[Cite as *Kingsley v. Ohio State Personnel Bd. of Review*, 2011-Ohio-2227.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Kay A. Kingsley,	:	
Appellant-Appellant,	:	
v.	:	No. 10AP-875 (C.P.C. No. 2010 CV 03 4906)
Ohio State Personnel Board of Review,	:	(REGULAR CALENDAR)
Appellee-Appellee.	:	

D E C I S I O N

Rendered on May 10, 2011

Kingsley Law Office, James R. Kingsley and *Nickolas D. Owen*, for appellant.

Michael DeWine, Attorney General, and *Michael D. Allen*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶1} Appellant, Kay A. Kingsley ("Kingsley"), appeals the Franklin County Court of Common Pleas' judgment granting a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim. For the reasons that follow, we affirm the judgment of the trial court.

{¶2} This is an administrative appeal from the State Employment Relations Board ("SERB"). Kingsley worked for the SERB as an administrative law judge from January 1999 to October 2009. Effective July 17, 2009, the General Assembly enacted

H.B. No. 1, Ohio's biennial budget bill. This bill revised portions of R.C. Chapter 4117, including a revision to R.C. 4117.02(H) that changed Kingsley's position from the classified service to the unclassified service. On October 26, 2009, SERB notified Kingsley that her employment as an unclassified administrative law judge was being terminated, effective October 30, 2009.

{¶3} Kingsley appealed to the State Personnel Board of Review ("SPBR") claiming that her reclassification was unconstitutional and that SPBR was required to hear her appeal. On March 19, 2010, SPBR dismissed the case for lack of subject-matter jurisdiction stating that Kingsley was an unclassified employee.

{¶4} Pursuant to R.C. 119.12, Kingsley then filed a Notice of Administrative Appeal with SPBR and the Franklin County Court of Common Pleas on March 29, 2010. The appellee named in the notice was the SPBR. On May 7, 2010, the named appellee, SPBR, filed a Civ.R. 12(B)(6) motion to dismiss Kingsley's administrative appeal for failure to state a claim against SPBR upon which relief could be granted. In Kingsley's May 11, 2010 memorandum contra she asked that, pursuant to Civ.R. 21, SERB be substituted for SPBR or added as a party. Kingsley states that the failure to name SERB was a ministerial error, and she states that SPBR was named as a party to compel them to create a record that Kingsley would use to challenge the constitutionality of her reclassification. The common pleas court denied the substitution or addition of SERB and granted the Civ.R. 12(B)(6) motion to dismiss. Kingsley now appeals to this court.

{¶5} On appeal, Kingsley assigns three errors for our consideration:

> **Assignment of Error #1:** Did the trial court commit prejudicial error in granting Appellee's Ohio Civ. R. 12(B)(6) motion to dismiss for failure to state a claim by considering

> matters outside of the pleadings and ruling on the merits of the appeal?
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> **Assignment of Error #2:** Did the trial court commit prejudicial error in granting Appellee's Ohio Civ. R. 12(B)(6) motion to dismiss for failure to state a claim after relying upon O.A.C. 124-15-06, because an administrative rule may not add to, or subtract from, the requirements of the controlling statute?
>
> **Assignment of Error #3:** Did the trial court commit prejudicial error in granting Appellee's Ohio Civ. R. 12(B)(6) motion to dismiss for failure to state a claim based on a misnomer of Appellee in the caption who received actual service of the notice of appeal?

Before addressing the individual assignments of error, we must examine the requirements of the statutory scheme.

{¶6} R.C. 124.03(A)(1) and 124.34(B) grant to the SPBR the authority to approve or disapprove the termination of only classified state employees. SPBR determined that Kingsley was no longer a classified employee pursuant to the July 17, 2009 amendment to R.C. 4117.02(H). Thus, SPBR dismissed the case based on a lack of subject-matter jurisdiction.

{¶7} Final decisions of the SPBR are appealable to the common pleas court under R.C. 119.12 which provides, in pertinent part:

> Any party adversely affected by any order of an agency issued pursuant to any [adjudication not otherwise identified in R.C. 119.12] may appeal to the court of common pleas of Franklin county * * *.
>
> * * *
>
> Any party desiring to appeal shall file a notice of appeal with the agency setting forth the order appealed from and stating that the agency's order is not supported by reliable, probative, and substantial evidence and is not in accordance

> with law. * * * Unless otherwise provided by law relating to a particular agency, notices of appeal shall be filed within fifteen days after the mailing of the notice of the agency's order as provided in this section. * * *

{¶8} Where a statute confers the right of appeal, an appeal may be perfected only in the manner prescribed by statute. *CHS-Windsor, Inc. v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 05AP-909, 2006-Ohio-2446, ¶6. Ohio courts have consistently held that "a party adversely affected by an agency decision must * * * strictly comply with R.C. 119.12 in order to perfect an appeal." *Hughes v. Ohio Dept. of Commerce*, 114 Ohio St.3d 47, 52, 2007-Ohio-2877, ¶17.

{¶9} Under the plain terms of R.C. 119.12, proper filing includes a requirement that the appeal be filed within 15 days after the mailing of the notice of the agency's order. Within those 15 days, Kingsley did file a notice of appeal but only named SPBR as the appellee. It was not until May 11, 2010 when Kingsley filed a memorandum contra to appellee's motions to dismiss that the trial court was asked to substitute SERB for SPBR or add SERB.

{¶10} The third assignment of error asserts that it was improper for the common pleas court to grant a Civ.R. 12(B)(6) motion after denying Kingsley's request to substitute SERB for SPBR as the proper appellee.

{¶11} The Ohio Supreme Court has held that appellate review of a trial court's decision on a motion seeking leave to add or drop new parties, whether filed pursuant to Civ.R. 15 or 21, is subject to an abuse of discretion standard of review. *Darby v. A-Best Products Co.*, 102 Ohio St.3d 410, 413-14, 2004-Ohio-3720. An "abuse of discretion" connotes more than a mere error of law of judgment, instead requiring a finding that the

trial court's decision was unreasonable, arbitrary, or unconscionable. *In re Consol. Mtge. Satisfaction Cases*, 97 Ohio St.3d 465, 2002-Ohio-6720.

{¶12} The issue then becomes whether the notice of appeal could have been amended to substitute SERB for SPBR or add SERB and whether the trial court abused its discretion in denying the substitution. R.C. 119.12 contains no provision allowing a party to amend a notice of appeal once it has been filed with the court of common pleas. However, this court has previously held that, under the plain language of R.C. 119.12, amendments to a notice of appeal filed pursuant to that section can be made during the 15-day period following the mailing of the adjudication order by the agency. *CHS-Windsor, Inc.* The amendment though, must occur within that 15-day period. Amendments made beyond this time period will fail. *Hills & Dales v. Ohio Dept. of Edn.*, 10th Dist. No. 06AP-1249, 2007-Ohio-5156 (an R.C. 119.12 notice of appeal was dismissed for lack of subject-matter jurisdiction in which the improper party filed the appeal and failed to file an amendment to the notice within the 15-day period required by statute).

{¶13} Kingsley claims that the notice of appeal can be amended. She claims that misnomer is never jurisdictional as long as the other statutory requirements of the appeal are met. Secondly, Kingsley claims that a correction of a misnomer should be permitted when there is no confusion to the identity of the party. Thirdly, Civ.R. 21 is intended to fix misnomers and that the common pleas court does not require a good or sufficient reason to grant an amendment.

{¶14} The common pleas court did not abuse its discretion in denying Kingsley's request to amend the notice of appeal. The common pleas court gave its reasons for its decision.

{¶15} First, Civ.R. 21 and Ohio Adm.Code 124-15-06 require that an appeal be filed within 15 days of the mailing of the final order of the board.

{¶16} Second, the Ohio Supreme Court held that when the "prescribed time has passed [to file an appeal conferred by statute], the court lacks jurisdiction to hear the claim and the Civil Rules may not be applied to extend or reactivate jurisdiction." *Ramsdell v. Ohio Civil Rights Comm.* (1990), 56 Ohio St.3d 24, 28.

{¶17} Finally, the common pleas court stated "[f]urther, the Court does not find a good or sufficient reason to allow the Plaintiff to apply Civ. R. 21." (Decision and Entry Granting Defendant's Motion to Dismiss filed May 7, 2010, at 3.)

{¶18} Under this court's interpretation of R.C. 119.12, a notice of appeal cannot be amended outside the statutory proscribed 15-day period.

{¶19} The third assignment of error is overruled.

{¶20} The first assignment of error asserts that granting a Civ.R. 12(B)(6) motion is improper if considering matters outside the pleadings and ruling on the merits of the appeal.

{¶21} Appellate court review of a trial court's decision to dismiss a case pursuant to Civ.R. 12(B)(6) is de novo. *Springfield Fireworks, Inc. v. Ohio Dept. of Commerce, Div. of State Fire Marshall* (Dec. 18, 2003), 10th Dist. No. 03AP-330.

{¶22} In *Springfield Fireworks*, the appellant alleged that the trial court erred in considering material outside of the "pleadings" in ruling on a Civ.R. 12(B)(6) motion. The

pleading is the notice of administrative appeal which incorporates the administrative decision that is being appealed. This court held that it was proper for the trial court to consider the administrative decision being appealed as it is incorporated in the notice of appeal. Id. at 13. Therefore, it is proper for both the trial court and this court to consider SPBR's administrative decision when evaluating a Civ.R. 12(B)(6) motion.

{¶23} The Supreme Court of Ohio has indicated that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *O'Brien v. Univ. Community Tenants Union, Inc*. (1975), 42 Ohio St.2d 242, 245. Further, "all the factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party." *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 60). However, "Unsupported conclusions of a complaint are not considered admitted, and are not sufficient to withstand a [12(B)(6)] motion to dismiss." *Hickman v. Capots* (1989), 45 Ohio St.3d 324. (Citations omitted.)

{¶24} SPBR is clearly without jurisdiction to hear appeals from unclassified state employees. Here, SPBR is the only named appellee and any relief must come from SPBR. R.C. 124.03, states in pertinent part, SPBR's powers, as follows:

> (A) The state personnel board of review shall exercise the following powers and perform the following duties:
>
> (1) Hear appeals, as provided by law, of employees in the classified state service * * *.

{¶25} SPBR hears appeals of employees when those employees are in classified state service. SPBR does not have jurisdiction to hear appeals of employees who are unclassified. R.C. 124.03.

{¶26} When SERB hired Kingsley as an administrative law judge, she was brought in as a classified employee. On July 17, 2009, the Ohio General Assembly changed Kingsley's position and that of all of SERB's administrative law judges from classified to unclassified service. SERB then terminated Kingsley effective October 30, 2009 after she was an unclassified employee.

{¶27} SPBR performs a quasi-judicial function that is limited to the appeals of classified employees. At the time of Kingsley's termination and appeal, she was an unclassified employee, and therefore SPBR did not have subject-matter jurisdiction to hear Kingsley's appeal. Subject-matter jurisdiction is a question of law, which we review de novo. *Derakhshan v. State Med. Bd. of Ohio*, 10th Dist. No. 07AP-261, 2007-Ohio-5802, ¶11.

{¶28} Although Kingsley has raised the issue of the constitutionality of H.B. No. 1, we decline to consider this argument because the question of which body may determine constitutionality has already been addressed by this court in a mandamus action. *State ex rel. Kingsley v. State Emp. Relations Bd.*, 10th Dist. No. 09AP-1085, 2011-Ohio-428. Common pleas court is the proper venue to bring a facial constitutional challenge and "it is not clear from the record before this court whether [Kingsley] actually raised her as-applied challenge to H.B. 1 in her SPBR appeal[.]" Id. at ¶19. This case is being appealed to Supreme Court of Ohio who ordered that the case shall be processed as an appeal of right pursuant to S.Ct.Prac.R. 2.1(A)(1). (Apr. 15, 2011 *Case Announcement*, 2011-Ohio-1815.)

{¶29} Further, SPBR is not the entity that terminated Kingsley; it was SERB and thus, SPBR is an improper party to this appeal. SERB is the party charged with the

responsibility for hiring and firing Kingsley and it is from this decision that appellant seeks relief. This failure to name SERB as an appellee destroys subject-matter jurisdiction.

{¶30} It is also clear from the administrative rules that SPBR is not to be a party to an appeal. Ohio Adm.Code 124-15-06(B) states that SPBR is not the proper party when appealing to the court of common pleas. "The [SPBR] is not to be named as party in any appeal to the court of common pleas filed under the authority of Chapter 119. of the Revised Code."

{¶31} Having an improper party named in an R.C. 119.12 appeal has been addressed by this court before. In *All Children Matter v. Ohio Sec. of State*, 10th Dist. No. 09AP-322, 2010-Ohio-371, this court observed that "R.C. 119.12 provides that any party adversely affected by an agency decision may appeal to the court of common pleas. *Implicit in this right is the proposition that the proper appellee must be the party charged with responsibility for making and enforcing the decision from which the aggrieved party appeals*." (Emphasis sic.)

{¶32} *All Children Matter* adheres to the holding in *Haig v. Ohio State Bd. of Edn.* (1992), 62 Ohio St.3d 507.

{¶33} In *Haig*, the named party was the State Board of Education, the administrative body that affirmed the decision being appealed. The Supreme Court of Ohio, however, affirmed that the proper party was the one that originally made the decision being appealed. That entity was the Kelleys Island Local School District Board of Education. The state board performed a quasi-judicial function by adjudicating a dispute between two adverse parties. "As an adjudicator, the state board's interest is to

render a fair decision in the dispute between the parties. It has no independent interest adverse to those of the local board or the [appellant]." Id. at 510.

{¶34} *Haig* is analogous to this case. SPBR does not have an adverse interest to Kingsley in its quasi-judicial function of hearing appeals from the classified civil service. It is not the entity from which relief could be granted. SERB issued the decision that is being appealed. Thus, pursuant to *Haig*, the lack of the proper party being named is fatal and warrants dismissal.

{¶35} Consequently, because there is no relief that SPBR can grant Kingsley under its enumerated statutory powers and also because SPBR is not the proper party to the appeal, there is no subject-matter jurisdiction.

{¶36} Assuming all the factual allegations in the notice of appeal are true, there was no possible relief that SPBR could grant Kingsley.

{¶37} If the common pleas court considered other material, any error is harmless as this court conducts a de novo review of the Civ.R. 12(B)(6) motion.

{¶38} The first assignment of error is overruled.

{¶39} The second assignment or error asserts that it was improper for the trial court to rely upon Ohio Adm.Code 124-15-06 when granting a Civ.R. 12(B)(6) motion to dismiss. Kingsley claims that the trial court appears to allege that Kingsley failed to serve all appropriate parties under Ohio Adm.Code 124-15-06. Kingsley states that "this can only mean that the trial court believes Appellant, in order to fully comply with its service requirements, needed to serve the 'opposing party,' in this case the SERB." (Brief of Appellant, at 16.) Kingsley bases this assumption from the court of common pleas decision. "The Court also declines to add SERB as a defendant pursuant to Civ. R. 21.

O.A.C. 124-15-06 which requires that the appeal is filed within 15 days of the mailing of the final order of the Board. Although notice of appeal was filed with the court within the 15 days, it was not filed with the proper parties." (Trial court decision granting motion to dismiss, at 3.)

{¶40} Kingsley's claim is wrong for two reasons. First, the common pleas court reference to the proper parties is not in reference to the proper parties being served with the notice of appeal. The reference was to the notice of appeal not being filed with the proper parties named as the appellee in the appeal. Second consideration of a Civ.R. 12(B)(6) motion is a question of law. The SPBR is charged by the legislature with conducting administrative appeals and must create rules, which have been codified in the Ohio Administrative Code governing these appeals. It is proper for a court to consider these rules when ruling on a Civ.R. 12(B)(6) motion.

{¶41} The second assignment of error is overruled.

{¶42} Having overruled all the assignments of error, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

CONNOR, J., concurs.
FRENCH, J., concurs separately.

FRENCH, J., concurring separately.

{¶43} I agree with the majority that the trial court did not err by dismissing appellant's complaint, but I reach that conclusion by way of different reasoning.

{¶44} I have previously expressed my view that a clerical mistake within a notice of appeal does not preclude jurisdiction under R.C. 119.12; therefore, clerical corrections

may be made outside the 15-day timeframe. See *Hills & Dales v. Ohio Dept. of Edn.*, 10th Dist. No. 06AP-1249, 2007-Ohio-5156 (French, J., dissenting). But even if appellant's notice were enough to invoke jurisdiction and allow a correction, I would conclude that the trial court did not abuse its discretion by denying appellant's request to substitute SERB as the appellee.

{¶45} Appellant's initial March 29, 2010 notice of appeal named the Ohio State Board of Education as the appellee, an entity obviously without any connection to the appeal. Appellant's March 30, 2010 first amended notice of appeal substituted SPBR as the appellee, and the clerk served SPBR on April 1, 2010. Appellant did not ask to add or substitute SERB as the appellee until its May 11, 2010 memorandum contra to SPBR's motion to dismiss. In that memorandum, appellant contended that SPBR was a proper appellee. By naming SPBR, appellant sought to preclude SPBR from refusing "to proceed with a hearing upon which it has no authority to act. That is, the remand must be artfully crafted, and directed to the SPBR, to keep this case on track. Therefore, retaining the SPBR as a party is proper." Appellant conceded that SERB "should have been included as an Appellee," but she argued that the oversight was not fatal because the trial court could drop and add parties pursuant to Civ.R. 21.

{¶46} Before this court, SPBR contends that the trial court did not abuse its discretion by denying appellant's request to add SERB as an appellee because SPBR's order—dismissing appellant's appeal for lack of jurisdiction because she was unclassified—was correct. In my view, any consideration of appellant's status is premature at this point. As SPBR properly conceded at oral argument, this court held recently that the common pleas court is a proper forum for considering appellant's

constitutional challenge to the law that changed her status from classified to unclassified. See *State ex rel. Kingsley v. State Emp. Relations Bd.*, 10th Dist. No. 09AP-1085, 2011-Ohio-428, ¶19. The propriety of that forum assumes, of course, that jurisdiction has been invoked. If appellant had filed the appeal properly and the trial court had then determined that the law was unconstitutional, the court could have remanded the matter to SPBR for further proceedings. See *Kingsley* at ¶21. Those proceedings could have included an evidentiary hearing to determine whether appellant's duties alone made her unclassified. Without a proper appeal before the trial court, however, these issues were not relevant.

{¶47} Nevertheless, because appellant had already filed an amended notice of appeal to name a new party as appellee, waited six weeks to ask for a change in parties, and then argued in the first instance that it sought to add SERB as an appellee, not simply correct a clerical mistake, I would conclude that the trial court did not abuse its discretion by denying appellant's request. Therefore, I concur in the majority's judgment to affirm the judgment of the Franklin County Court of Common Pleas.