

[Cite as *State ex rel. Cummings v. Ambroz*, 2010-Ohio-6028.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94735

**STATE OF OHIO, EX REL.
ALAN CUMMINGS**

RELATOR

vs.

LUCY AMBROZ, SEC'Y, ETC., ET AL.

RESPONDENTS

**JUDGMENT:
WRIT GRANTED IN PART,
DENIED IN PART**

Writ of Mandamus
Motion Nos. 434336 and 434413
Order No. 439328

RELEASE DATE: December 6, 2010

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KENNETH A. ROCCO, J.:

{¶ 1} Relator, Alan Cummings, was employed by the City of Cleveland (“the City”) as a security officer in the Division of Water until he was terminated on October 26, 2007. Cummings timely filed an appeal of his discharge to the city’s Civil Service Commission (“the Commission). The Commission referred his appeal to a referee. Counsel for Cummings, Kevin P. Prendergast, was not available to attend the March 7, 2008 hearing before the referee, but attorney Drue Marie Skaryd did appear and indicated that she was “covering” for Prendergast. The referee issued an opinion and served it on Prendergast but not on Skaryd.

{¶ 2} Section 9.40 of the Rules of the Cleveland Civil Service Commission (“Civil Service Rules”) provides, in part: “*Within seven (7) calendar days* from the date he/she receives the facts, conclusions and recommendations from the Referee, *the Director shall forward his/her written decision* to the Commission and *to the officer or employee and to the employee’s legal counsel*, if counsel has appeared for the employee.” (Emphasis added.) The record in this action includes the affidavits of Cummings, Skaryd and Prendergast. Cummings and Skaryd aver that each of them never received the director’s decision. Prendergast avers that he did not receive the director’s April 14, 2008 decision letter “until sometime around March 4, 2009,” after Prendergast received records in response to a public records request.

{¶ 3} As a consequence, Cummings requests that this court issue a writ of mandamus ordering:

1. Respondent, Lucille Ambroz, Secretary of the Commission to schedule a hearing on the merits of his termination;
2. Respondent, J. Christopher Nielson, commissioner, Division of Water, to reinstate Cummings as a security officer; and
3. Respondent, Barry Withers, Interim Director of the Department of Public Utilities, to serve on Cummings and his counsel the director’s decision upholding the decision of the referee sustaining relator’s

discharge and that “the matter be allowed to be appealed to the [Commission].” Complaint, Ad Damnum Clause.

For the reasons stated below, we grant relator’s motion for summary judgment in part and order Withers to forward to Cummings and Prendergast the director’s decision upholding the decision of the referee sustaining relator’s discharge.

{¶ 4} The fundamental criteria for issuing a writ of mandamus are well-established. “In order to be entitled to a writ of mandamus, relator must show (1) that he has a clear legal right to the relief prayed for, (2) that respondents are under a clear legal duty to perform the acts, and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State, ex rel. National City Bank v. Bd. of Education* (1977), 52 Ohio St. 2d 81, 369 N.E.2d 1200.” *State ex rel. Harris v. Rhodes* (1978), 54 Ohio St. 2d 41, 42, 374 N.E.2d 641. Of course, all three of these requirements must be met in order for mandamus to lie.

{¶ 5} Section 9.60 of the Civil Service Rules provides, in part: “Appeal to the Commission from the decision of the Director in all cases provided for by the Charter, shall be deemed perfected when the officer or employee concerned files notice thereof in writing with the Commission within ten (10) working days from the date of the letter of such decision * * * .” Cummings had a clear legal right to appeal the director’s decision and could only prosecute that appeal after the director issued a letter containing his decision.

{¶ 6} Respondents attached to their motion for summary judgment copies of:

1. a two-year discipline summary for Cummings; and
2. a letter dated April 14, 2008 from Withers to Cummings with a copy to Skaryd and stating, in part: “Referee Linton has recommended your termination be sustained. It is my decision to adhere to this recommendation. Therefore, you are hereby terminated effective the date of this correspondence.”

These attachments were not authenticated despite the fact that Cummings challenged the propriety of respondents’ reliance on these unauthenticated documents. In light of relator’s objection, we may not consider either the discipline summary or the letter from Withers as part of the record in this case. See, e.g., *Wolk v. Piano*, Cuyahoga App. No. 93095, 2010-Ohio-1755, ¶¶27-29.

{¶ 7} Cummings had a clear legal right to sufficient notice of the director’s decision to effect due process and permit him to perfect a timely appeal to the Commission. Cf. *Cleveland Bd. of Edn. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494. Section 9.40 of the Civil Service Rules placed a clear legal duty on Withers to “forward” his written decision to Cummings and his counsel. The record does not, however, demonstrate that Withers discharged his duty to “forward” the letter to Cummings and his counsel. Rather, the record in this action demonstrates that Cummings and Skaryd did not receive the

director's letter and that Prendergast first saw the director's letter circa March 4, 2009, after Prendergast received records in response to his public records request.

{¶ 8} Respondents argue that Cummings had an adequate remedy through an appeal under Section 9.60 of the Civil Service Rules. Of course, that is the remedy which Cummings is attempting to secure. Indeed, after Prendergast first saw the director's letter circa March 4, 2009, Prendergast wrote respondent Ambroz a letter on March 11, 2009 and requested a hearing before the Commission. He included affidavits from Cummings and Skaryd averring that neither of them received the director's letter. He also included his own affidavit stating that he first received the director's letter "sometime around March 4, 2009." Prendergast concluded by asserting relator's right to a hearing and requesting that the matter be set for hearing before the Commission. He also sent Ambroz a letter on April 24, 2009 inquiring regarding the status of his request for a hearing. The Commission has not held a hearing.

{¶ 9} In the absence of evidence demonstrating that Withers discharged his duty to forward his written decision to Cummings and his counsel, we must grant in part relator's motion for summary judgment. That is, we grant relief in mandamus and order Withers to forward to Cummings and Prendergast the director's decision upholding the decision of the referee sustaining relator's

discharge. We deny relator's request for relief against Ambroz and Nielson. We also deny respondents' motion for summary judgment.

{¶ 10} We enter judgment in this action based on the facts in the limited record in this case. This court's judgment does not restrict the evidence or arguments which the parties may present to the Commission.

{¶ 11} Accordingly, relator's motion for summary judgment is granted in part against respondent Withers and denied with respect to Ambroz and Nielson. Respondents' motion for summary judgment is denied. Respondents to pay costs. The clerk is directed to serve upon the parties notice of this judgment and its date of entry upon the journal. Civ.R. 58(B).

{¶ 12} Writ granted in part and denied in part.

KENNETH A. ROCCO, PRESIDING JUDGE

PATRICIA A. BLACKMON, J., and
LARRY A. JONES, J.,