

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

FRANK M. TEMPESTA,	:	O P I N I O N
Plaintiff-Appellant,	:	
- vs -	:	CASE NO. 2010-T-0054
CITY OF WARREN, OHIO,	:	
Defendant-Appellee.	:	

Administrative Appeal from the Court of Common Pleas, Case No. 2009 CV 01876.

Judgment: Affirmed.

Michael D. Rossi, Guarnieri & Secrest, P.L.L., 151 East Market Street, P.O. Box 4270, Warren, OH 44482 (For Plaintiff-Appellant).

Gregory V. Hicks, Warren City Law Director, and *James R. Ries*, Warren City Deputy Law Director, 391 Mahoning Avenue, N.W., Warren, OH 44483 (For Defendant-Appellee).

MARY JANE TRAPP, P.J.

{¶1} Frank M. Tempesta appeals from a judgment of the Trumbull County Court of Common Pleas which ruled in favor of the Warren Municipal Service Commission (“the Commission”). Mr. Tempesta was laid off from his position with the city of Warren as the Director of Operations as a result of having the lowest retention points among the employees considered for layoffs. The Commission verified his

retention points, and he filed an administrative appeal in the trial court to appeal the Commission's action. For the following reasons, we affirm the trial court's decision.

{¶2} Substantive Facts and Procedural History

{¶3} Due to a lack of funds, the city of Warren, a non-charter municipality, decided to lay off a number of employees in June 2009. It decided to lay off one of three employees in its "Director of Service Operations" classification series. The three employees in the series were Mr. Tempesta, the Director of Operations, David Mazzochi, the Operations Superintendent, and Leann O'Brien, the Parks and Streets Supervisor. Mr. Tempesta began his employment with the city in 2000, while Mr. Mazzochi and Mrs. O'Brien began in 1981 and 1986, respectively. The city calculated Mr. Tempesta's retention points to be 323, the lowest among the three employees, and therefore he was selected for lay off.

{¶4} On June 25, 2009, the city's Director of Public and Safety notified the city's Municipal Service Commission of his intent to lay off Mr. Tempesta, based on the retention points of the three employees within that classification. The director asked the Commission to verify the retention points of these employees.

{¶5} On July 7, 2009, the Commission verified the retention points, and, the day after the verification was completed, the city's Director of Public Service and Safety notified Mr. Tempesta that he would be laid off, effective July 26, 2009, because he had the lowest retention points.

{¶6} On July 16, 2009, Mr. Tempesta filed the instant administrative appeal in the trial court regarding the Commission's action verifying his retention points.¹ The trial court affirmed the Commission's decision and this appeal follows. Mr. Tempesta raises

1. We note Mr. Tempesta did not appeal his layoff to the Commission although he had the right to do so. However, at the proceedings below, the city did not raise the defense of exhaustion of administrative remedies and therefore waived it. See *Jones v. Chagrin Falls* (1997), 77 Ohio St.3d 456, syllabus.

one assignment of error:

{¶7} “The trial court erred in affirming Appellee’s Municipal Service Commission’s verification of the ‘retention points’ of certain city employees subject to layoff.”

{¶8} Law and Analysis

{¶9} Mr. Tempesta’s sole claim relates to the manner in which the retention points for layoff purposes are determined. Because it requires an interpretation of statutory authority, which is a question of law, our review is de novo. *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, ¶8.

{¶10} Several sections of Chapter 124 of the Ohio Revised Code, Ohio’s civil service law, relate to retention points for layoff purposes. R.C. 124.322 (“Layoffs by classification; order of layoff and recall”) states:

{¶11} “Whenever a reduction in the work force is necessary, the appointing authority of an agency shall decide in which classification or classifications the layoff or layoffs will occur and the number of employees to be laid off within each affected classification. The director of administrative services shall adopt rules, under Chapter 119. of the Revised Code, establishing a method for determining layoff procedures and an order of layoff of, and the displacement and recall of, laid-off state and county employees.

{¶12} “The order of layoff in those rules *shall be based in part on length of service and may include efficiency in service*, appointment type, or similar other factors the director considers appropriate. *If* the director establishes relative efficiency as a criterion to be used in determining order of layoff for state and county employees, credit

for efficiency may be other than ten per cent of total retention points.” (Emphasis added.)

{¶13} R.C. 124.325, at the time of the instant matter,² stated in relevant part:

{¶14} “(A) Retention points to reflect the length of continuous service and efficiency in service for all employees affected by a layoff shall be verified by the director of administrative services.

{¶15} “***

{¶16} “(E) The director of administrative services shall adopt rules in accordance with Chapter 119. of the Revised Code to establish a system for the assignment of retention points for each employee in a classification affected by a layoff ***.”

{¶17} As a preliminary matter, we point out that “[t]he authority of a municipal civil service commission to effect personnel decisions with respect to persons under its territorial jurisdiction is coextensive with that possessed by the director of administrative services for the state of Ohio.” *Vincent v. Civil Service Comm.* (1990), 54 Ohio St.3d 30, 31. As this court noted in *City of Warren v. Warren Mun. Civ. Serv. Comm.*, 11th Dist. No. 2001-T-0068, 2002-Ohio-6929, R.C. 124.40(A)³ authorizes a municipal civil

2. R.C. 124.325 was recently amended. The current statute, effective October 16, 2009, states, in pertinent part:

“(A) Retention points to reflect the length of continuous service and efficiency in service for all employees affected by a layoff shall be verified by the director of administrative services for positions *in the service of the state*.

“(E) The director of administrative services shall adopt rules in accordance with Chapter 119. of the Revised Code to establish a system for the assignment of retention points for each employee *in the service of the state* in a classification affected by a layoff and for determining, in those instances where employees *in the service of the state* have identical retention points, which employee shall be laid off first.” (Emphasis added.)

A comparison of the two versions of the statute indicates that the current version adds the phrase “in the service of the state” to qualify the terms “positions” and “employees.”

3. R.C. 124.40(A) states, in pertinent part:

service commission to prescribe, amend, and enforce rules not inconsistent with Chapter 124 for the classification of positions in the city’s civil service for appointments and layoffs. *Id.* at ¶12, citing *Vincent*. This court noted specifically that the civil service commission of a *non-charter* municipality “may exercise all authority granted to the director of administrative services relative to state employment, except that it may not prescribe, amend, and enforce rules which are inconsistent with Chapter 124 of the Ohio Revised Code.” *Id.*, citing *Vincent*.

{¶18} With the recognition that the provisions in Chapter 124 regarding appointments, promotions, removals, and layoffs are made applicable to the municipal civil service commission by R.C. 124.40, we now turn to the statutes at issue: R.C. 124.322 and R.C. 124.325.

{¶19} Regarding the calculation of retention points, R.C. 124.322 states unequivocally that “[t]he order of layoff in those rules shall be based in part on length of service and *may* include efficiency in service, appointment type, or similar other factors the director considers appropriate.” (Emphasis added.) When construing statutes, we

“The municipal civil service commission shall prescribe, amend, and enforce rules not inconsistent with this chapter for the classification of positions in the civil service of the city *** for examinations for and resignations from those positions; for appointments, promotions, removals, transfers, layoffs, suspensions, reductions, and reinstatements with respect to those positions; and for standardizing those positions and maintaining efficiency in them. The commission’s rules shall authorize each appointing authority of a city, city school district, or city health district to develop and administer in a manner it devises an evaluation system for the employees it appoints. The commission shall exercise all other powers and perform all other duties with respect to the civil service of the city *** as prescribed in this chapter and conferred upon the director of administrative services and the state personnel board of review with respect to the civil service of the state; and all authority granted to the director and the board with respect to the service under their jurisdiction shall, except as otherwise provided by this chapter, be held to be granted to the commission with respect to the service under its jurisdiction. The procedure applicable to reductions, suspensions, and removals, as provided for in section 124.34 of the Revised Code, shall govern the civil service of cities.”

construe the word “may” as “optional, permissive, or discretionary.” *In re Davis*, 5th Dist. No. 06CA163, 2007-Ohio-6994, ¶33. Therefore, under the statute, the Ohio Director of Administrative Services has the discretion to include efficiency in service in a calculation of retention points for layoff purposes. In this regard, we note the Ohio Director of Administrative Services adopted two rules regarding the calculation of retention points. O.A.C. 123:1-41-09 and 123:1-41-08 govern the verification and computation of retention points, respectively. Neither rule mentions efficiency in service as a component in the calculation of retention points. And, we further note that these rules have been adopted by the Warren Municipal Service Commission, through its rules and regulations, for calculating the city’s employees’ retention points for layoff purposes.

{¶20} Relying exclusively on R.C. 124.325(A), which states “[r]etention points to reflect the length of continuous service and efficiency in service for all employees affected by a layoff shall be verified by the director of administrative services,” Mr. Tempesta argues efficiency in service is a mandatory component in the calculation of retention points, claiming R.C. 124.325(A) “defines” retention points as “the length of continuous service and efficiency in service.” He argues that, because the city failed to include efficiency in service as a part of the retention points, “there were simply no retention points to be computed by the city, let alone ‘verified’ by the Commission to dictate the order of layoff in the Operations Dept.”

{¶21} “Our paramount concern in construing statutes is legislative intent.’ ‘To discern this intent, we must “read words and phrases in context according to the rules of grammar and common usage.”” *State ex rel. Lucas Cty. Republican Party Exec.*

Commt. v. Brunner, 125 Ohio St.3d 427, 2010-Ohio-1873, ¶16 (internal citations omitted). Also, “[u]nder the standard for construing statutes in pari materia, statutes relating to the same subject matter must be construed together to give full effect to the provisions.” *Id.* (citation omitted).

{¶22} Reading words and phrases in context according to the rules of grammar and common usage and reading R.C. 124.325 in harmony with R.C. 124.322, we cannot interpret the statute as Mr. Tempesta proposes. R.C. 124.325 in no way “defines” retention points, as he suggests. R.C. 124.322 unequivocally states the inclusion of efficiency in service is optional and permissive; therefore, R.C. 124.325(A) must be read as requiring the Director of Administrative Services to verify the retention points, which should reflect the length of continuous service pursuant to R.C. 124.322, and efficiency in service, *if required* by the Director of Administrative Services.

{¶23} Mr. Tempesta draws our attention to the fact that the amendment of R.C. 124.325, effective October 16, 2009, added the phrase “in the service of the state” to quantify positions subject to the statute. He argues the statute was amended for the purpose of limiting the “definition” of the retention points as “length of continuous service and efficiency in service” to the state employees, and, since the former statute was in effect at the time of the calculation of his retention points, that “definition” applied to him. This argument lacks merit. The quantifying phrase “in the service of the state” in the amended statute limits the employees whose retention points *must be verified by the Director of Administrative Services* to the state employees only. *Neither* version of the

statute mandates the inclusion of efficiency in service as a component of the retention points calculation.⁴ Thus, Mr. Tempesta's argument is without merit.

{¶24} Mr. Tempesta also maintains that, without the inclusion of efficiency in service, there could be *no* retention points at all, and therefore, the Commission must layoff the employees without regard to retention points. He therefore claims the city must layoff Mr. Mazzochi first, pursuant to R.C. 124.324, which governs "displacement" of an employee in the "successively lower classification." He argues that because Mr. Mazzochi is in the "superintendent" classification, which is the "successively lower classification" than his "director" classification, he should have displaced Mr. Mazzochi.

{¶25} Because we have determined the Commission properly verified the city's calculation of the retention points regarding the employees, we reject Mr. Tempesta's claim based on the non-existence of retention points. In any event, his citation to the displacement statute in support of his right to displace Mr. Mazzochi is puzzling because that statute *also* utilizes retention points as a basis for determining an employee's right to displace another in a lower classification.⁵

4. Our determination that efficiency in service is not a mandatory component of retention points is further supported by a comparison of R.C. 124.35 with a prior version. HB187, effective July 1, 2007, deleted a provision regarding efficiency in service from a prior version of the statute. Prior to July 1, 2007, R.C. 124.325 included the following provision:

"(C) Retention points for efficiency in service shall be determined by averaging the employee's latest two annual performance evaluations. An employee with less than two years of service will have the latest performance evaluation used. Any employees with less than one year of service will have their final probationary evaluation used."

5. R.C. 124.324 ("Displacement rights of laid-off employees") states, in pertinent part:

"(B) Following the order of layoff, an employee laid off in the classified civil service shall displace another employee within the same appointing authority or independent institution and layoff jurisdiction in the following manner:

"(1) Each laid-off employee possessing more retention points shall displace the employee *with the fewest retention points* in the next lower classification or successively lower classification in the same classification series.

"(2) Any employee displaced by an employee possessing *more retention points* shall displace the employee with the fewest retention points in the next lower classification or successively lower classification in the same classification series. This process shall continue, if necessary, until the employee with the fewest retention points in the lowest classification of the classification series of the

{¶26} For the foregoing reasons, the judgment of the Trumbull County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J.,

TIMOTHY P. CANNON, J.,

concur.

same appointing authority or independent institution has been reached and, if necessary, laid off.”
(Emphasis added.)