

COURT OF APPEALS  
MORROW COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

JOHN MILLINGTON	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellant	:	Hon. William B. Hoffman, J.
	:	
-vs-	:	
	:	Case No. 2009-CA-0007
MORROW COUNTY BOARD OF	:	
COUNTY COMMISSIONERS	:	
	:	<u>OPINION</u>
Defendant-Appellee	:	

CHARACTER OF PROCEEDING: Administrative appeal from the Morrow County Court of Common Pleas, Case No. 2008-CV-217

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: August 24, 2009

APPEARANCES:

For Plaintiff-Appellant

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330 South High Street  
Columbus, OH 43215

For Defendant-Appellee

MARK LANDES  
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Columbus, OH 43215

*Gwin, J.*

{¶1} Appellant John Millington appeals a judgment of the Court of Common Pleas of Morrow County, Ohio, which reversed the decision of the State Personnel Board of Review regarding the termination of his employment. Appellee is the Morrow Board of County Commissioners. Appellant assigns three errors to the trial court:

{¶2} “I. THE LOWER COURT COMMITTED REVERSIBLE ERROR IN FAILING TO APPLY THE PROPER STANDARD OF REVIEW UNDER O.R.C. SEC. 119.12 TO THE ORDER OF THE STATE PERSONNEL BOARD OF REVIEW, AND CONSIDER WHETHER THE ORDER DISAFFIRMING THE APPELLEE’S REMOVAL OF THE APPELLANT WAS SUPPORTED BY RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE AND WAS IN ACCORDANCE WITH LAW.

{¶3} “II. THE LOWER COURT COMMITTED REVERSIBLE ERROR IN OVERRULING THE ORDER OF THE STATE PERSONNEL BOARD OF REVIEW DISAFFIRMING THE REMOVAL OF A CLASSIFIED CIVIL SERVICE EMPLOYEE FROM HIS EMPLOYMENT PURSUANT TO O.R.C. SEC. 124.34 AND O.A.C. SEC. 124-3-01, BECAUSE SAID ORDER WAS SUPPORTED BY RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE AND WAS IN ACCORDANCE WITH THE LAW.

{¶4} “THE LOWER COURT COMMITTED REVERSIBLE ERROR IN APPLYING THE DOCTRINE OF LACHES AGAINST THE APPELLANT FOR NOT RAISING THE ISSUE OF JURISDICTION UNDER O.R.C. SEC. 124.34 AND O.A.C. 124-3-01.”

{¶5} The record indicates appellee Commissioners employed appellant as a Zoning Inspector. He was a classified civil servant and passed his probationary period.

{¶6} On November 15, 2006, in accord with the county Personnel Policy Manual, the Commissioners sent appellant a notice of a pre-disciplinary conference, regarding three Group III offenses that had been lodged against him. The hearing was held on November 20, 2006. After the pre-disciplinary hearing, which appellant attended, the commissioners voted to remove appellant from his position.

{¶7} The Commissioners prepared an Order of Removal which stated appellant's employment was terminated effective November 21, 2006. The sheriff unsuccessfully attempted to serve appellant at his home on November 21, 2006. The same day, the Commissioners mailed the order of removal by certified mail, for which appellant signed the return receipt on November 22, 2006. In addition, a copy of the order of removal was faxed to appellant's counsel on November 21, 2006, and counsel filed a notice of appeal that same date.

{¶8} The matter was heard before the State Personnel Board of Review on February 14, 2008. The administrative law judge took extensive evidence on the merits of appellant's removal, but then raised the question of whether appellant had been properly served in accord with O.A.C. Section 124-3-01. The administrative judge found the order of removal was ineffective because it had not been served on appellant on or before the effective date of the removal. This decision was sustained throughout the administrative procedure.

{¶9} The Commissioners appealed the matter to the Court of Common Pleas pursuant to R.C. 119.12. The Common Pleas Court found there was no doubt the Commissioners did not strictly comply with R.C. 124.34 in regard to the mandate for an order of removal, because appellant was served after the effective date. However, the

court found all the parties involved knew of the removal, and no due process rights were violated or compromised.

{¶10} The trial court noted appellant appeared at the February 2008 hearing before the Administrative Law judge, and never raised the issue of defective service. The hearing office sua sponte raised the matter after the hearing had commenced.

{¶11} The trial court found the Commissioners substantially complied with the statutory requirements and did not prejudice any of appellant's rights. The court found this especially relevant in light of the fact that appellant's attorney filed a notice of appeal from the removal on November 21, 2006. The court also discussed the Commissioners' defense of laches. The court noted appellant never raised the issue of defective service, and the result of the administrative decision is that the Commissioners must pay appellant back wages to November 2006. The court found this is simply contrary to the intention of the General Assembly.

{¶12} The trial court reversed the decision of the State Personnel Board of Review and remanded the matter for a hearing on the merits of the appeal of the removal order.

{¶13} Ohio Admin. Code § 124-3-01 states in pertinent part:

{¶14} "(A) "Section 124.34 orders" and orders of involuntary disability separation may be affirmed only if each of the following criteria are satisfied:

{¶15} "(1) The copy of the order served on the employee shall bear the original signature of the appointing authority and the date of signature. If an appointing authority is a public body, the order must contain the signatures of a majority of the

members, or in the alternative, a certified copy of the resolution adopting the order shall be attached to each copy of the order; and

{¶16} “(2) The employer shall serve the employee with a copy of the order on or before the effective date of the action; and

{¶17} “(3) The order shows, on its face, a list of particulars which form the basis for the order; and

{¶18} “(4) The appointing authority can, if challenged, demonstrate both the authority of the signer and the authenticity of the signature on a "section 124.34 order" or an order of involuntary disability separation.”

{¶19} OAC 124-3-02 states:

{¶20} “(A) A "section 124.34 order" or an order of involuntary disability separation is served on an employee when:

{¶21} “(1) It is personally served upon the employee; or

{¶22} “(2) It is received by the employee at the employee's last known address, by certified mail, return receipt requested; or

{¶23} “(3) It is left at the usual place of residence, or last known address of the affected employee, with an adult residing therein.”

I

{¶24} In his first assignment of error, appellant argues the trial court failed to apply its statutory standard of review, and should have deferred to the Board's decision. In *Pons v. State Medical Board* (1993), 66 Ohio St. 3d 619, 1993-Ohio-122, 614 N.E. 2d 748, the Supreme Court of Ohio found a common pleas court reviewing an agency's decision must determine if the agency's order is supported by a reliable, probative, and

of substantial evidence, and is in accord with Ohio law. The common pleas court must give due deference to the administrative agency's resolution of evidentiary conflicts, but the agency's findings are not conclusive. *University of Cincinnati v. Conrad* (1980), 63 Ohio St. 2d 108, 407 N.E. 2d 12.

{¶25} The Commissioners respond the Common Pleas Court accepted all the factual findings from the Board, but came to a different conclusion based on applicable law. We find the Common Pleas Court applied the proper standard of review.

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

## II

{¶27} In his second assignment of error, appellant argues the trial court committed reversible error when it determined the Commissioners were in substantial compliance with the Code in serving him with the order of removal.

{¶28} In *Hughes v. Ohio Department of Commerce* (2007), 114 Ohio State 3d 147, 2007-Ohio-2877, 868 N.E. 2d 246, the Ohio Supreme Court found an administrative agency must strictly comply with the procedural requirements of R. C. 119.09 in serving the final order of adjudication on the affected party before the appeal period begins to run, *Hughes*, syllabus by the court, citations deleted.

{¶29} We note Civ. R. 5 permits service of papers subsequent to the initial complaint to be served on the attorney of record representing the party. Admittedly, Civ. R. 5 does not apply here, but the fact appellant's attorney not only received the notice, but acted on it on behalf of appellant, must weigh in the analysis. We presume the attorney was acting on appellant's instructions.

{¶30} The Commissioners argue Ohio courts have routinely determined that substantial compliance with administrative regulations is all that is required. In *State ex rel. Lapp Roofing & Sheet Metal Co., Inc. v. Industrial Comm.* 117 Ohio St.3d 179, 882 N.E.2d 911, 2008 -Ohio- 850, the court found “[C]ertain mitigating factors are to be considered when examining the sufficiency of a notice of appeal. These factors include whether appellant has substantially complied with the statutory appeal provisions and whether the purpose of the unsatisfied provision is sufficiently important to require compliance for jurisdictional purposes. This flexibility comports with R.C. 4123.95” *Lapp* at paragraph 17, citation deleted.

{¶31} Other examples where courts have applied substantial compliance, rather than raise form over substance, are: *State v. Veney*, 120 Ohio St. 3d 176, 2008-Ohio-5200 897 N.E.2d 621, (Crim. R. 11 requires only substantial, not strict compliance); *In re: L.A.B.*, 121 Ohio St.3d 112, 2009 -Ohio- 354, 902 N.E.2d 471 (Juv. R. 29 requires only substantial compliance); *Hartzell Propeller, Inc. v. Ohio Bureau of Employment Services* (1989), 65 Ohio App.3d 575, 584 N.E.2d 1263 (reviewing O.A.C. 4141-17-01: an application two days late should not be dismissed); *Martin v. Franklin County Sheriff's Dept.* (June 25, 1991), 10<sup>th</sup> Dist. Nos. 90AP-1342 and 90A1343 (finding the two year mandatory time limit only in O.A.C. 124-3-04, and not statutorily imposed, allows for reasonable delay); *Merino v. Salem Hunting Club*, 7<sup>th</sup> Dist App. No. 07 CO 16, 2008-Ohio- 6366 (substantial compliance with O.A.C. 501:31-20-03's rules regarding noise levels is sufficient); and *State v. Isbell*, 3<sup>rd</sup> Dist. App. No. 17-08-08, 2008-Ohio- 6753 (ODH regulations that the breath machine's operator's manual be kept in the area

where breath tests are conducted and subject tests and calibration tests be maintained for three years require only substantial compliance).

{¶32} The trial cited *Adams v. Crawford County Board of Commissioners*, Third Dist. App. No. 3-07-19, 2007-Ohio-6966. In *Adams*, the court reviewed the case of an employee removed from her position for testing positive for drugs. The sheriff's office attempted to serve Adams with the removal notice at various times on September 14<sup>th</sup> and 15<sup>th</sup>, but was unable to serve Adams prior to the effective date of her removal.

{¶33} The *Adams* court found there was insufficient evidence Adams was responsible for, or contributed to, the failure of service prior to the effective date, and the record did not show she had actual notice of the termination via other means. The court found, however, the language of OAC 124-3-01 would not preclude substantial compliance in a case where an employee obstructs proper service of notice or has suffered no prejudice by an untimely service because actual timely notice can be demonstrated in the record via other means.

{¶34} The record here does not demonstrate appellant took any action to frustrate timely service. The record does show, however, actual timely notice. Under the unusual facts and circumstances of this case, we agree with the trial court the State Personnel Board of Review erred in finding the order removal was ineffective to terminate appellant's employment.

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



III

{¶36} In his third assignment of error, appellant argues the trial court was incorrect in applying the doctrine of laches against the appellant because he did not raise this issue prior to or during the administrative hearing.

{¶37} Because we find the trial court was correct in finding the order of removal is valid, this issue is moot.

{¶38} For the foregoing reasons, the judgment of the Court of Common Pleas of Morrow County, Ohio, is affirmed.

By Gwin, J., and

Farmer, P.J.,

Hoffman, J., concurs

separately

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

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HON. WILLIAM B. HOFFMAN

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*Hoffman, J., concurring*

{¶39} I concur in the majority's analysis and disposition of Appellant's Assignments of Error I and III.

{¶40} I further concur in the majority's analysis of Assignment of Error II and its application of the substantial compliance standard in the case sub judice. I write separately only to state I find Appellant's reliance on *Hughes* misplaced. *Hughes* requires strict compliance with R.C. 119.09 as it concerns invoking the appellate jurisdiction of the common pleas court. Ohio Admin. Code §124-3-01 does not involve the State Personnel Board of Review's jurisdiction to review, but rather whether an order of removal was properly served. Accordingly, I concur in the majority's analysis and disposition of Assignment of Error II.

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HON. WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS FOR MORROW COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

JOHN MILLINGTON	:	
	:	
Plaintiff-Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
MORROW COUNTY BOARD OF COUNTY COMMISSIONERS	:	
	:	
Defendant-Appellee	:	CASE NO. 2009-CA-0007

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Morrow County, Ohio, is affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

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HON. WILLIAM B. HOFFMAN