

[Cite as *Mays v. Cincinnati*, 2009-Ohio-2885.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

GENE MAYS,	:	APPEAL NO. C-080827
	:	TRIAL NO. A-0709014
Plaintiff-Appellant,	:	
	:	<i>DECISION.</i>
vs.	:	
CITY OF CINCINNATI	:	
	:	
and	:	
CIVIL SERVICE COMMISSION OF	:	
THE CITY OF CINCINNATI,	:	
	:	
Defendants-Appellees.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: June 19, 2009

David A. Singleton and *Ohio Justice & Policy Center*, for Appellant,

John P. Curp, City Solicitor, and *Augustine Giglio*, Assistant City Solicitor, for Appellees.

Please note: This case has been removed from the accelerated calendar.

HILDEBRANDT, PRESIDING JUDGE.

{¶1} Plaintiff-appellant, Gene Mays, appeals the judgment of the Hamilton County Court of Common Pleas affirming the decision of the defendants-appellees, the city of Cincinnati and the Civil Service Commission of the City of Cincinnati (“the commission”), to remove him from a list of eligible employees.

{¶2} Mays is an electrician. In 2006, he took an examination to become an electric maintenance helper for the city. He passed the examination and was placed on an eligible list for all city departments. He then sought employment with the city’s Metropolitan Sewer District (“MSD”).

{¶3} After conducting a background check, MSD discovered that Mays had been convicted of felony drug offenses. MSD requested that Mays be removed from the eligible list based on Civil Service Commission Rule 05, Section 12, which provided that “[t]he Commission may refuse to appoint or examine an applicant, or, after an open competitive examination, refuse to certify the applicant as eligible, who * * * has been convicted of a felony.”

{¶4} A recommendation from a commission staff member stated that, because Mays had been convicted of felonies, he “could therefore not be hired for City employment (Rule 5, Section 12).” The commission granted MSD’s request to remove Mays from the eligible list.

{¶5} Mays then requested a hearing to challenge his removal from the eligible list. The commission conducted a hearing, during which counsel for Mays submitted evidence that he had been rehabilitated and that he was a suitable candidate for the MSD position. In a written decision, the commission stated that “[a]fter review and discussion, the Commission decision remains unchanged.”

{¶6} Mays appealed the commission’s decision to the common pleas court, contending that the commission had improperly applied a blanket rule denying him eligibility based on his felony convictions. Mays argued that Civil Service Commission Rule 05, Section 12, afforded the commission the discretion to remove him from the eligible list, but that the commission had failed to exercise that discretion in applying the per se rule.

{¶7} In certifying the record to the trial court, the city initially failed to transmit the evidence submitted by Mays at the commission hearing. But the city did not oppose Mays’s motion to supplement the record, and the evidence was ultimately included in the trial court’s record.

{¶8} After a hearing, the trial court rejected Mays’s arguments and upheld his removal from the eligible list.

{¶9} In two related assignments of error, Mays now contends that the commission erred in applying a per se rule denying him employment based on the felony convictions and that the trial court erred in upholding the commission’s decision. We address the assignments together.

{¶10} A decision of a municipal civil service commission is appealable under R.C. Chapter 2506.¹ Under R.C. 2506.04, the common pleas courts and the courts of appeals apply different standards of review for administrative appeals.

{¶11} The common pleas court must determine if the order or decision of the administrative board or agency is “unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record.”² An appellate court cannot substitute its judgment for that of the common pleas court, except within its limited statutory scope of

¹ *Williams v. Cincinnati*, 1st Dist. No. C-080546, 2009-Ohio-1972, ¶5.

² R.C. 2506.04.

review, and is to determine only if the common pleas court abused its discretion.³ The term “abuse of discretion” means more than an error of law or judgment; it means that the trial court’s decision was unreasonable, arbitrary, or unconscionable.⁴

{¶12} In the case at bar, the trial court did not abuse its discretion. We accept, for purposes of argument, that Civil Service Commission Rule 05, Section 12, required the commission to consider mitigating evidence for an applicant who had been convicted of a felony.

{¶13} In this case, the record indicates that the commission did in fact consider Mays’s evidence. Upon Mays’s request, the commission afforded him a hearing at which he was represented by counsel. Mays was permitted to submit evidence of his rehabilitation, and the commission’s written decision explicitly stated that it had reviewed and discussed the matter before upholding Mays’s removal from the eligible list.

{¶14} Mays places special emphasis on the commission staff’s recommendation indicating that his removal from the eligible list was mandated by his felony record. But the proceedings before the commission itself, in which Mays was permitted to challenge the removal, demonstrated that the commission did not apply a per se rule. Under these circumstances, the trial court’s judgment upholding the commission’s decision was not unreasonable, arbitrary, or unconscionable. Accordingly, we overrule the assignments of error and affirm the judgment of the trial court.

Judgment affirmed.

SUNDERMANN, J., concurs.

PAINTER, J., dissents.

³ *Saeed v. Cincinnati*, 1st Dist. No. C-030854, 2004-Ohio-3747, ¶21, citing *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 148, 2000-Ohio-493, 735 N.E.2d 433.

⁴ *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

PAINTER, J., dissenting.

A False Assumption and a Perfunctory Hearing

{¶15} As the majority points out, “A recommendation from a commission staff member stated that, because Mays had been convicted of felonies, he ‘could therefore not be hired for City employment (Rule 5, Section 12).’ ”

{¶16} Then “the commission granted MSD’s request to remove Mays from the eligible list.” Those two sentences show that the commission was operating under the assumption that anyone who had a felony conviction was forever barred from city employment. The rest of the case is eyewash.

{¶17} The commission allowed a perfunctory hearing. And then “[a]fter review and discussion, the Commission [sic] decision remains unchanged.” Somehow, the majority interprets this to mean that discretion was exercised. Baloney. It’s the same as the boilerplate a court uses about “being fully advised in the premises.” [Premises? A house maybe?]. Interestingly, that very language was used in the trial court’s entry here.

“May” Equals Discretion

{¶18} The trial court approved the magistrate’s report, which held that “the conditions listed [in the rule] give the Commission the *absolute right* to refuse applicants” if one of the conditions applies. Commissions do not have rights; people do. And the statement is incorrect—the rule requires the use of discretion. The rule says “may.” The first definition of “may” is “has discretion to.”⁵ Even the city accepts this proposition in its brief, but the majority accepts it only “for purposes of

⁵ Garner, *Dictionary of Modern Legal Usage* (1985), 552

argument,” thus even refusing at least to make this case precedent, so that others will not suffer from the commission’s error in the future.

Error of Law and Abuse of Discretion

{¶19} I also question the majority’s statement that our standard of review is the old “abuse of discretion,” which is too often used as a tool to rubber-stamp trial-court errors. Our review is on questions of law. The trial court’s decision “may be appealed by any party on questions of law.”⁶ And “[w]ithin the ambit of ‘questions of law’ includes whether the common pleas court abused its discretion.”⁷ That is, abuse of discretion is one of the ways a trial court can commit an error of law. Here, the issue is one of law—must the commission exercise discretion? The trial court found that discretion was not necessary—which was an error of law, not an abuse of discretion.

{¶20} But I would go further. We should hold that the commission’s refusal to allow Mays to be hired, and the trial court’s failure to reverse, were each an abuse of discretion, as being both unreasonable and arbitrary. That is in addition to the error of law that discretion need not be applied, when it must be.

One Mistake

{¶21} Mays got into some drug trouble. He paid whatever debt he owed, and has had no contact with the criminal justice system since 1994—at the time of the commission’s decision, at least 13 years. From everything in the record, Mays has been a model of how to come back from misfortune. He has been steadily employed. He worked four years with Aramark Uniform Service, where he was rated highly, and then entered an educational training program run by IBEW Local 212. As part of the program, he apprenticed at two electric companies. He was rated “excellent” in all

⁶ R.C. 2506.04

⁷ *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 2000-Ohio-493, 735 N.E.2d 433.

ten review categories by both companies. In the classroom portion of the training, he ranked number one in his class of more than 50 *all five years*.

{¶22} Mays then had the audacity to apply to the city for the position of “electrical maintenance helper.” He took the required civil service test, and was one of only 15 of 68 to pass.

{¶23} All was going well in Mays’s quest for the job until the city decided that the 13-year-old convictions disqualified Mays from city employment. The majority blithely ignores what is plain—*that there was no other possible reason*.

{¶24} Many people who get in trouble early in life never get out. They get caught up in the criminal system and bounce between probation (now “community control,” whatever that is supposed to mean), the courts, and prison. Surely, most of their troubles are self imposed. But when people do turn their life around, we should applaud and help them help themselves—not ban them from employment by imposing arbitrary rules.

Arbitrary and Unreasonable

{¶25} The commission’s decision turning down a highly qualified candidate for no other reason than a long ago drug conviction is, under the facts of this case, an abuse of discretion. It is arbitrary and unreasonable—as is the approval of it by the magistrate, the trial court, and the majority of this court. I would reverse on both (1) an error of law—failure to use discretion; and (2) and abuse of discretion—failing to hire an otherwise highly qualified candidate.

Please Note:

The court has recorded its own entry on the date of the release of this decision.