

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Scott Harr,	:	
	:	
Appellant-Appellee,	:	
	:	
v.	:	No. 10AP-1060
	:	(C.P.C. No. 10CVF-04-6263)
Jackson Township	:	
Jackson Township Board of Trustees,	:	(REGULAR CALENDAR)
	:	
Appellees-Appellants.	:	
	:	

D E C I S I O N

Rendered on May 8, 2012

Thompson Hine LLP, and William C. Moul, for appellee.

Reminger Co., LPA, and D. Patrick Kasson, for appellants.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Appellees-appellants, Jackson Township and Jackson Township Board of Trustees ("Jackson Township Board"), appeal from a judgment entered by the Franklin County Court of Common Pleas reversing a decision by the Jackson Township Board finding appellant-appellee, Scott Harr ("Harr"), guilty of violating several provisions of the Jackson Township code of conduct and the Jackson Township disciplinary policy and consequently terminating his employment as a firefighter. Because the court failed to apply the proper R.C. 2506.04 standard of review, we reverse the judgment of the Franklin County Court of Common Pleas and remand this matter for the court to properly weigh all of the evidence in the record.

{¶ 2} On April 13, 2010, the Jackson Township Board conducted a disciplinary hearing with respect to the actions of Harr and firefighter Sean Garvey ("Garvey"). Harr

was subject to two disciplinary charges involving violations of the code of conduct and the disciplinary policy. First, he was charged with engaging in a pattern of conduct by which he made false and/or misleading statements concerning the fire department and its personnel. It was also alleged he was not honest in the investigation of that matter. The second charge alleged Harr had in his possession a document concerning an EMS run for a township citizen who was also the wife of the chief of the fire department. The charge alleged Harr was dishonest in his explanation of when he obtained the document and how he used it, and that he improperly shared the document with other members of the fire department without any legitimate business reason for doing so. Garvey, on the other hand, was charged with violating the code of conduct and the disciplinary policy for improperly accessing a report detailing the EMS run involving the fire chief's wife and having no legitimate business reason for accessing the document. The charge also alleged Garvey printed the document and that copies of the document were subsequently found to be circulating within the fire department. In addition, it alleged Garvey was dishonest in answering questions about the document.

{¶ 3} Deputy Fire Chief of Jackson Township Paul Richard Dawson ("Deputy Chief Dawson"), as well as firefighters Harr and Garvey, testified at the disciplinary hearing. The majority of the testimony at the hearing centered around Harr's and Garvey's actions with respect to accessing and/or distributing the electronic report completed by other firefighters, which documented the run made on February 13, 2010, by the Jackson Township Fire Department EMS to the home of Jackson Township Fire Chief Lloyd Sheets ("Chief Sheets"). Both firefighters also testified as to their union activities and involvement.

{¶ 4} On February 13, 2010, the Jackson Township Fire Department EMS was dispatched by Grove City police to the residence of Chief Sheets following a 911 call placed by the brother-in-law of Chief Sheets, in which he alleged Chief Sheets may have assaulted his wife, Patty Sheets. The caller further alleged Mrs. Sheets ingested numerous pills.

{¶ 5} Deputy Chief Dawson testified that, as a result of the EMS run, and pursuant to standard protocol, the incident was electronically recorded by the Jackson and Pleasant Township fire departments and by the Grove City police. Access to the report generated by the run, called a Civil Detail Report or "CAD," could be obtained via department computer using a password. A paper printout of the information could be

obtained as well. The report could also be accessed via a computer outside the department if the URL was copied off of the computer from the CAD system to dispatch. Additionally, a copy of the report could be obtained via a public records request, but it could not be obtained by the public by simply visiting the Grove City website.

{¶ 6} According to Deputy Chief Dawson, within a couple of weeks of the February 13, 2010 incident, it was discovered the CAD for this run had been accessed and printed and copies had been made. An investigation was conducted to determine who had accessed the CAD, printed it, made copies, and circulated it. The investigation revealed firefighter Garvey had accessed and printed the report. Although he initially denied it, upon being confronted with physical evidence demonstrating he had in fact accessed and printed the CAD, Garvey admitted to doing so. He also told investigators that, although he printed the CAD out of curiosity after receiving an anonymous note suggesting he should check it out, he shredded the report after reading it and he did not make copies of it or circulate it.

{¶ 7} During the course of the investigation, it was determined other firefighters and departments had received a copy of the CAD. A copy was also sent to The Columbus Dispatch. Deputy Chief Dawson learned from Trustee Daphne Hawk ("Trustee Hawk") she too had received a copy of the CAD, as well as a phone call from Harr indicating he had a copy of the CAD. This prompted Deputy Chief Dawson to interview Harr and ask if he had ever seen a copy of the CAD. Harr initially advised he had received a copy of it in the mail on February 26, 2010. Upon further questioning, he stated he saw a copy lying on a credenza at the fire station on February 25, 2010. Harr told Deputy Chief Dawson he did not discuss the report with anyone other than Trustee Hawk and his family. Harr further admitted the document concerning Mrs. Sheets was "none of his business." (Tr. 133.)

{¶ 8} Deputy Chief Dawson testified he went with Harr to Harr's residence after the interview to pick up the CAD Harr had admitted was in his possession. Deputy Chief Dawson believed that CAD was the only copy that Harr had in his possession. However, during the course of the disciplinary hearing, it was revealed Harr in fact had another copy of the report.

{¶ 9} Deputy Chief Dawson testified he interviewed approximately 20 other firefighters, none of whom confirmed Harr's claim that the CAD was just "floating

around" the fire station. Those interviews revealed Harr read or showed the CAD to other firefighters or talked about the CAD with other firefighters at the station. One firefighter even reported Harr said he advised a Columbus Dispatch reporter that he would obtain a CAD report from the dispatcher center.

{¶ 10} Deputy Chief Dawson also acknowledged that an investigation regarding Harr had been initiated prior to the CAD incident involving the February 13, 2010 EMS run. The investigation was prompted by the belief that Harr was attempting to discredit Chief Sheets through statements he made to the public, which Chief Sheets believed contained untrue or unsupported facts. As a result, Chief Sheets had started compiling notebooks of Harr's statements, which he then supplemented with his own comments. These allegations formed the basis for count one of the disciplinary charge.

{¶ 11} At the hearing, Garvey testified he began his career as a firefighter with Jackson Township in 1991 and served as a union steward for approximately five terms, with the most recent term ending in 2009. Garvey testified he accessed the CAD report after receiving an inter-department mail envelope personally addressed to him with instructions to take a look at the run. The instructions provided the address, date, and time of the run. Garvey testified he printed and read the report and then shredded it before he left the office. He further testified he had no discussions with anyone, internally or externally, about the report until he was questioned about it by Deputy Chief Dawson. Garvey denied ever providing a copy of the report to anyone. Garvey acknowledged he initially lied during the investigation, but when he was confronted with evidence demonstrating he had accessed and printed the report, he admitted it.

{¶ 12} Harr testified at the disciplinary hearing and admitted he had lied to his superiors during the course of the investigation. Harr admitted he anonymously sent a copy of the CAD report to another firefighter, specifically Jon Kirkpatrick, the vice president of the union, as well as to Trustee Hawk. Harr testified he sent the CAD to Trustee Hawk because he "figured she needed to know about it," but acknowledged that he did not send copies of the CAD to the two other trustees, since they did not want to talk to the union anymore. (Tr. 247.) Harr denied mailing a copy of the CAD to The Columbus Dispatch, to other fire stations, or to other individuals in central Ohio. He also admitted to briefly discussing the run to Chief Sheets' residence with a few people in the department. Harr testified he lied about discussing the CAD with others because he

"didn't want to draw everybody else in to this big mess and get them into trouble." (Tr. 231.)

{¶ 13} Harr also testified he has been a member of the Jackson Township Fire Department since 1989 and has served as a union steward for two terms. At the time of the incident involving the EMS run to Chief Sheets' residence, he was serving his third term as union president. He described his relationship with Chief Sheets as "strained" and stated Chief Sheets' relationship with the union was also strained. Harr testified he had clashed with Chief Sheets over a series of safety concerns and various union-related issues, including the union's endorsement of Trustee Hawk. Harr acknowledged he offered testimony before the General Assembly in November 2009 in an effort to amend the public employees' collective bargaining law. The amendment would allow townships such as Jackson with a total general population (rather than just the unincorporated areas) of 5,000 or more to be treated as "public employers," thereby re-establishing collective bargaining for the Jackson Township Fire Department. Chief Sheets did not approve of Harr's actions. As a result of his participation in various union-related activities, Harr testified Chief Sheets retaliated against him through various means, including the initiation of the present disciplinary charges.

{¶ 14} Following the presentation of testimony and evidence, the Jackson Township Board found Garvey guilty of all charges, but modified the disciplinary recommendation for termination and instead suspended Garvey for 20 days. As to Harr, the Jackson Township Board found Harr guilty of the charges alleged in count two and accepted the recommendation to terminate him. Based upon that finding, charge one was withdrawn.

{¶ 15} On April 23, 2010, Harr appealed his discharge to the Franklin County Court of Common Pleas, asserting that the Jackson Township Board did not have sufficient cause for his removal, arguing his discharge was in retaliation for his union activities, rather than for any alleged violations of work policies or codes of conduct. Harr further argued the order of termination was unconstitutional, arbitrary, illegal, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record.

{¶ 16} On October 12, 2010, the Franklin County Common Pleas Court issued a decision reversing the Jackson Township Board's decision to terminate Harr. The court

held the decision to terminate Harr's employment was not supported by established facts and was not supported by substantial, reliable, and probative evidence. More specifically, the common pleas court acknowledged that the factual scenario at issue gave rise to the opportunity to compare the discipline imposed upon Garvey and Harr, and that the court did not recognize a basis for imposing a more severe punishment upon Harr than was imposed upon Garvey. Referencing the concept of disparate treatment, the common pleas court held there was nothing within the record to distinguish why the Jackson Township Board imposed two very different punishments or to indicate that the discipline imposed upon Harr was typical, compared to other disciplinary violations. Therefore, the court of common pleas found the termination of Harr was improper and ordered the matter to be reversed and remanded for the imposition of an appropriate discipline.

{¶ 17} Jackson Township Board filed a timely appeal and now presents a single assignment of error for our review:

THE LOWER COURT ERRED WHEN IT SUBSTITUTED ITS
JUDGMENT FOR THAT OF THE JACKSON TOWNSHIP
BOARD OF TRUSTEES AND REVERSED THEIR DECISION
TO TERMINATE MR. HARR.

{¶ 18} R.C. 505.38 provides for the appointment and removal of fire chiefs and firefighters in townships and fire districts with a fire department. R.C. 2506.04 sets the standard of review for appeals taken pursuant to R.C. 2506.01. *Athenry Shoppers Ltd. v. Planning and Zoning Comm. of the City of Dublin, Ohio*, 10th Dist. No. 08AP-742, 2009-Ohio-2230, ¶ 15. Under R.C. 2506.01(A), every final order, adjudication, or decision of any officer, authority, board, bureau, commission, department, or other division of any political subdivision of the state may be reviewed by the court of common pleas in the county where the principal office of the political subdivision is located as provided for in Chapter 2505. If an appeal is pursued pursuant to a final order, adjudication, or decision covered under R.C. 2506.01(A), the court may find it to be "unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record." R.C. 2506.04. This provides the court with authority to "affirm, reverse, vacate, or modify the order, adjudication, or decision, or remand the cause to the officer or body appealed from with instructions to

enter an order, adjudication, or decision consistent with the findings or opinion of the court." R.C. 2506.04.

{¶ 19} "Although a review under R.C. 2506.04 is not de novo, it often resembles a de novo proceeding because the reviewing court weighs the evidence in the 'whole record' in determining whether the administrative decision is supported by the preponderance of substantial, reliable, and probative evidence." *Athenry Shoppers Ltd.* at ¶ 16, citing *Dudukovich v. Lorain Metro. Housing Auth.*, 58 Ohio St.2d 202, 206-07 (1979). In *Dudukovich*, the court analogized the R.C. 2506.04 standard of review to the standard of review set forth in R.C. 119.12 appeals, stating, " * * * the Court of Common Pleas * * * must give consideration to the entire record * * * and must [a]ppraise all such evidence as to the credibility of (the) witnesses, the probative character of the evidence and the [w]eight to be given it * * *." (Emphasis sic.) *Id.* at 207, quoting *Andrews v. Bd. of Liquor Control*, 164 Ohio St. 275 (1955), paragraph one of the syllabus.

{¶ 20} We have previously characterized the R.C. 2506.04 standard of review as a hybrid form of review, due to the balance that must be maintained. *See Elbert v. Bexley Planning Comm.*, 108 Ohio App.3d 59, 66 (10th Dist.1995); *Athenry Shoppers Ltd.* at ¶ 17. The common pleas court must weigh the evidence to determine if the decision is supported by the preponderance of substantial, reliable, and probative evidence, yet still give due deference to the board's resolution of evidentiary conflicts and not blatantly substitute its own judgment for that of the board, particularly in areas involving administrative expertise. *Id.*, citing *Elbert*. "Preponderance" is the key word. *Id.* at ¶ 16, quoting *Dudukovich* at 207. If a preponderance of substantial, reliable, and probative evidence exists, the court of common pleas must affirm. *Id.* If it does not exist, the court of common pleas may reverse, vacate, remand, or modify. *Id.*

{¶ 21} Courts of appeal apply a more limited standard of review in an appeal pursuant to R.C. 2506.04. *Athenry Shoppers Ltd.* at ¶ 18, citing *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147 (2000). "R.C. 2506.04 gives the common pleas court the authority to weigh the evidence, but the statute grants a more limited power to an appellate court to review the judgment of the common pleas court only on questions of law. This does not give an appellate court the same power to weigh the preponderance of substantial, reliable, and probative evidence which the common pleas

court has." *Stovall v. Streetsboro*, 11th Dist. No. 2006-P-0077, 2007-Ohio-3381, ¶ 50, citing *Kisil v. Sandusky*, 12 Ohio St.3d 30, 34 (1984).

{¶ 22} We find the trial court abused its discretion in reversing the decision of the Jackson Township Board by substituting its judgment for that of the board and by failing to apply the proper R.C. 2506.04 standard of review. Specifically, we find the common pleas court did not consider and weigh all of the evidence in the record in determining that the preponderance of substantial, reliable, and probative evidence did not support the decision of the Jackson Township Board.

{¶ 23} Pursuant to its review under R.C. 2506.04, the common pleas court is required to weigh the evidence in the entire record and to assess the worth of all such evidence, to assess the credibility of the witnesses as well as the probative character of the evidence, and to determine the weight to be given to that evidence. *See Dudukovich at 207*. Here, rather than weighing all of the evidence in the record to determine whether the board's decision was supported by a preponderance of substantial, reliable, and probative evidence, the trial court only focused on evidence it found persuasive, and therefore it effectively substituted its judgment for that of the Jackson Township Board. *See generally, Athenry Shoppers Ltd. at ¶ 24*.

{¶ 24} The common pleas court did not consider the whole record in weighing the preponderance of the evidence. For example, the common pleas court made essentially no attempt to weigh the testimony submitted from several firefighters who asserted Harr had either discussed the run to Chief Sheets' residence with them or showed them a copy of the CAD report (while grinning), against the testimony submitted by Harr, in which he denied even talking to some of those same firefighters. While the trial court acknowledged that several firefighter interview transcripts were introduced into evidence, the trial court conducted virtually no analysis of that testimony and provided no discussion as to the credibility or weight to be given to that evidence, other than to state Harr did not make any effort to cast the run in a negative manner.¹

¹ During the disciplinary hearing, Harr objected to the admission of the interview transcripts. However, as a general rule, the strict rules of evidence which are applicable in a court proceeding do not apply in administrative proceedings. *See Holzhauser v. State Med. Bd. of Ohio*, 10th Dist. No. 06AP-1031, 2007-Ohio-5003, ¶ 19. Statements or evidence that would be excluded as hearsay elsewhere are admissible in an administrative proceeding where they are not inherently unreliable and are sufficient to constitute substantial, reliable, and probative evidence. *Felice's Main Street, Inc. v. Ohio Liquor Control Comm.*, 10th Dist. No. 01AP-1405, 2002-Ohio-5962, ¶ 18.

{¶ 25} Additionally, the trial court ignored other evidence presented against Harr by concluding there had been "no evidence presented that [Harr] was the source of any of the news articles." October 12, 2010 Decision, at 7. Yet Deputy Chief Dawson testified one of the firefighters he interviewed (firefighter Gierman) stated he had a conversation with Harr during which Harr informed that firefighter he had advised The Columbus Dispatch he did not know anything about the run, but that he would go to the dispatcher center and get a CAD report. In stating that the accusation against Harr involving the dissemination of information to The Columbus Dispatch was not factually supported, it suggests that the common pleas court largely ignored this testimony. However, this *could* constitute circumstantial evidence that Harr disseminated the CAD report to the print media or at a minimum, provided additional information about the contents of the CAD report, but the trial court failed to discuss or mention it, or to even assess the value (or lack thereof) of this evidence.

{¶ 26} The trial court also did not address or weigh the evidence presented against Harr demonstrating that Harr disseminated the CAD report to Trustee Hawk specifically because he wanted Trustee Hawk, his "union voice," to know what was going on in Chief Sheets' personal life, presumably for Harr's own political reasons. Yet, on cross-examination, Harr also confirmed his motives were "completely pure of heart." (Tr. 248-49.) However, the motivation behind this dissemination was not considered, analyzed or discussed by the common pleas court.

{¶ 27} Furthermore, the common pleas court did not indicate which testimony it found to be credible or not credible with respect to the retaliation allegations asserted by Harr and it did not indicate whether it assigned any weight to any of the testimony on that issue. It is possible there is testimony or evidence that would support Harr on that matter, but the trial court failed to recognize, analyze or weigh any of it.

{¶ 28} These are but a few examples of the evidence and testimony presented that was not weighed by the common pleas court in reaching its determination. While it would be proper for the common pleas court to reject the board's determination if the preponderance of substantial, reliable, and probative evidence did not support the termination, the court was first required to actually weigh all of the individual pieces of evidence in the record in making that determination. Because it did not, we must reverse

and remand this matter for the common pleas court to conduct a proper weighing of the evidence.

{¶ 29} Furthermore, we note that the primary basis cited by the common pleas court in support of its decision to reverse the board's determination is its conclusion that a due process violation occurred when Harr was terminated because of the disparate treatment between Harr and Garvey, since Garvey was only suspended for 20 days, rather than terminated. Specifically, the common pleas court stated:

There are few instances in administrative appeals which have a factual scenario that gives the Court the opportunity to compare discipline imposed between two separate employees. The instant appeal does provide such circumstance. In view of the established breaches of duty, the Court cannot discern any basis to impose greater discipline against [Harr] than was imposed against firefighter Garvey.

October 12, 2010 Decision, at 10.

{¶ 30} "Disparate treatment is only relevant when comparing the disciplinary actions taken with respect to similarly situated employees." *Blansett v. Grafton Correctional Inst.*, 9th Dist. No. 99CA007344, 2000 WL 354197, *2, 2000 Ohio App. LEXIS 1482, *6 (Apr. 5, 2000), citing *Turner v. Madison Correctional Inst.*, 2nd Dist. No. 2863 (Aug. 19, 1992). "In order to compare the parties, the employees must be similarly situated in both the actions that led to the disciplinary action and in their respective employment positions." *Id.*

{¶ 31} Aside from the fact that the trial court did not explain how it reached the conclusion that Harr and Garvey are "similarly situated," we believe it is significant to point out that no due process/disparate treatment argument was ever raised by Harr in the common pleas court. Admittedly, Harr did compare and contrast Garvey's situation with his own, arguing that his own consequences were much more severe. However, that argument was clearly made for the purpose of supporting Harr's contention that his firing for the violations alleged was actually a pretext for the "real" reason he was fired—retaliation for his exercise of his First Amendment rights and his participation in various union activities.

{¶ 32} Nowhere in the instant case did Harr ever use the phrase "disparate treatment" in his argument. "A party generally waives the right to appeal an issue that

could have been raised, but was not raised, in earlier proceedings." *Trish's Cafe & Catering, Inc. v. Ohio Dept. of Health*, 195 Ohio App.3d 612, 2011-Ohio-3304, ¶ 19 (10th Dist.), citing *MacConnell v. Ohio Dept. of Commerce*, 10th Dist. No. 04AP-433, 2005-Ohio-1960, ¶ 21. Generally, a reviewing court does not consider questions not presented to the court whose judgment is sought to be reversed. *McBroom v. Dickerson*, 10th Dist. No. 11AP-601, 2012-Ohio-377, ¶ 11, citing *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 81 (1997). Furthermore, a party who fails to raise an argument below waives his right to raise it on appeal. *McBroom* at ¶ 11, citing *Zollner v. Indus. Comm.*, 66 Ohio St.3d 276, 278 (1993).

{¶ 33} Here, Harr concedes he did not raise the issue of the need for a due process analysis and, therefore, we find the argument was waived and cannot be considered. However, Harr does not concede that the trial court's due process analysis is improper. We disagree.

{¶ 34} As previously stated, the common pleas court provided no analysis as to how it reached the determination that the two firefighters were similarly situated in order to pursue a disparate treatment analysis, and because we are not in a position to weigh the evidence, we struggle to find support for this determination as an issue of law. Under these circumstances, we believe it was improper for the common pleas court to make this finding. *See State ex rel. Luckey v. Etheridge*, 62 Ohio St.3d 404 (1992) (Wright, J., dissenting) (the court should not supply a party with an argument he has been unable to raise on his own); *State ex rel. Shelly Materials, Inc. v. Clark Cty. Bd. of Commrs.*, 115 Ohio St.3d 337, 2007-Ohio-5022, ¶ 55 (Pfeifer, J., dissenting) (while a reviewing court has the power to raise issues sua sponte, it should not decide cases on such issues without giving the parties an opportunity to be heard through supplemental briefing and argument because such failure is inconsistent with due process).

{¶ 35} Rather than weighing all of the evidence in the record to determine whether the board's decision was supported by a preponderance of substantial, reliable, and probative evidence, the trial court only focused on evidence it found persuasive and, therefore, it effectively substituted its judgment for that of the board. *See Athenry Shoppers Ltd.* at ¶ 24. Although the common pleas court could have rejected the reasons cited by the board if the preponderance of substantial, reliable, and probative evidence

did not support the termination, it was required to weigh all the evidence in the record in making that determination.

{¶ 36} Based upon the foregoing, we sustain the Jackson Township Board's single assignment of error. We reverse and remand this matter for the common pleas court to properly weigh the evidence in the whole record and determine whether there is a preponderance of substantial, reliable, and probative evidence to support the decision of the Jackson Township Board.

*Judgment reversed;
cause remanded with instructions.*

SADLER and DORRIAN, JJ., concur.
