

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Chris Barley, :
Appellant-Appellant, :
v. : No. 09AP-386
Ohio Department of Job & Family Services, : (C.P.C. No. 08CVF05-7601)
Appellee-Appellee. : (ACCELERATED CALENDAR)

D E C I S I O N

Rendered on September 24, 2009

Walter J. Gerhardstein, for appellant.

Richard Cordray, Attorney General, *Nicole S. Moss*, and *Megan H. Boiarsky*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Appellant, Chris Barley, appeals from a judgment of the Franklin County Court of Common Pleas affirming an order of the State Personnel Board of Review ("SPBR" or "the board"), which dismissed appellant's administrative appeal of a disciplinary suspension imposed by his employer, the Ohio Department of Job and

Family Services ("ODJFS"). At the heart of this case is the question of whether appellant was a classified employee of the agency and therefore entitled to civil service protection in connection with disciplinary action or discharge. A subsidiary question, which has now grown to comprise the sole remaining issue on appeal, concerns appellant's right to have the SPBR examine the circumstances under which he lost his classified status and concomitant civil service protection.

{¶2} Appellant began work for ODJFS in 1989, received regular promotions, and assumed the duties of bureau chief of state hearings for ODJFS in 1998. In the interim, appellant completed his law degree and was admitted to the Ohio bar in 1993. During the course of his employment, appellant was formally and informally recognized as a classified employee, even after promoted to his highest and final position. ODJFS does not dispute that it did not formally adopt the position that appellant was an unclassified employee until it opposed his SPBR appeal on that basis.

{¶3} The director of ODJFS suspended appellant in December 2005 for violations of workplace rules. His then-supervisor, Robert Mullinax, Chief Legal Counsel for ODJFS, would later testify before the SPBR that he did not consider at that time whether appellant was a classified or an unclassified employee. (Tr. 292-96.) Shortly thereafter, appellant faced new charges of violation of workplace rules and was offered a "last chance agreement," under which he would waive civil service protection and withdraw his pending appeal to SPBR of his prior suspension, in exchange for continued employment. Upon appellant's refusal to execute the agreement, ODJFS then terminated appellant. In subsequent proceedings, ODJFS asserted that appellant was in fact an unclassified employee, despite ODJFS's prior indications that appellant

was classified and the explicit terms of the "last chance agreement" that seemed to indicate a right to civil service protection. Appellant both maintained his prior appeal to SPBR regarding his initial suspension and initiated a new appeal to SPBR contesting his termination. The present appeal to this court addresses only the first SPBR appeal.

{¶4} An administrative law judge heard the matter on the initial appeal from suspension and considered only the threshold issue of whether appellant was a classified employee and, therefore, could undertake an appeal to SPBR. After hearing testimony regarding the scope of appellant's duties with ODJFS, the evolution of those duties over the term of his employment under his final job title, and the extent of his independent authority, the hearing officer rendered a report and recommendation concluding that appellant, as bureau chief of state hearings, held a fiduciary or administrative relation to his employing agency as defined by R.C. 124.11(A)(9) and Ohio Adm.Code 124-1-02 and was therefore not a classified employee. Because SPBR has jurisdiction only over appeals by classified employees, the hearing officer recommended that the board dismiss appellant's appeal. The board then overruled appellant's objections to the hearing officer's report and recommendation and dismissed the appeal.

{¶5} Appellant appealed the board's decision to the Franklin County Court of Common Pleas under R.C. 119.12. The common pleas court affirmed SPBR's decision, finding it supported by reliable, probative, and substantial evidence and in accordance with law. The present appeal ensued, and appellant brings the following sole assignment of error:

The Franklin County Court of Common Pleas erred when it ruled that Barley was not entitled to due process when he was deprived of his protected property interest in continued employment.

{¶6} When addressing an administrative appeal brought pursuant to R.C. 119.12, the standard of review for the common pleas court is that it will affirm an agency's order if it finds "upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law." R.C. 119.12.

The evidence required by R.C. 119.12 can be defined as follows: (1) "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) "Substantial" evidence is evidence with some weight; it must have importance and value.

Our Place, Inc. v. Ohio Liquor Control Comm. (1992), 63 Ohio St.3d 570, 571, footnotes omitted.

{¶7} An agency's findings of fact will be presumed to be correct and deferred to by the reviewing court unless the court determines that "the agency's findings are internally inconsistent, impeached by evidence of a prior inconsistent statement, rest upon improper inferences, or are otherwise unsupportable." *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 471, 1993-Ohio-182. Upon further appeal from the common pleas court to this court, our review is limited to a determination of whether the common pleas court abused its discretion in determining whether the agency's order was supported by reliable, probative, and substantial evidence and was in accordance with law. *Hartzog v. Ohio State Univ.* (1985), 27 Ohio App.3d 214. The

term "abuse of discretion" connotes more than a mere error of judgment or law, it implies an attitude that is arbitrary, unconscionable or unreasonable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157. However, on the question of whether the agency's order was in accordance with law, this court's review is plenary and without deference to the conclusions of law reached either by the administrative adjudication or the court of common pleas on initial appeal. *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, 343.

{¶8} Appellant's argument on further appeal to this court does not revisit the extensive factual disputes and subsequent conclusions by the SPBR and the court of common pleas that support their respective determinations that appellant was, at the time of his initial suspension, an unclassified employee and thus without civil service protection or right of appeal to the SPBR. Appellant instead argues that he was denied due process rights when, at some undetermined time and without notification to him, his conditions of employment must have changed from classified to unclassified during his tenure as bureau chief. This is a purely legal question and we exercise our plenary review under *Univ. of Cincinnati College of Medicine*.

{¶9} Ohio's civil service scheme is embedded in the Ohio Constitution and is enacted in R.C. Chapter 124. Civil service employees are divided into classified and unclassified positions. R.C. 124.11. A classified employee can be removed only for good cause and only after the procedures set forth in R.C. 124.34 have been followed. *Yarosh v. Becane* (1980), 63 Ohio St.2d 5, 9. By contrast, an unclassified public employee generally can be terminated for any reason. *Eudela v. Ohio Dept. of Mental Health & Mental Retardation* (1986), 30 Ohio App.3d 113. The unclassified service

includes, inter alia, "[t]he deputies and assistants of state agencies authorized to act for and on behalf of the agency, or holding a fiduciary or administrative relation to that agency." R.C. 124.11(A)(9). This is the class in which the SPBR determined appellant fell.

{¶10} SPBR has jurisdiction to hear appeals brought by classified employees only. R.C. 124.03. The nominal attribution of classified or unclassified status to an employee by an employer is not determinative: "The State Personnel Board of Review has jurisdiction over appeals from removals of public employees if it determines that such employees are in the classified service, regardless of how they have been designated by their appointing authorities." *Yarosh*, paragraph two of the syllabus.

{¶11} Having found that appellant falls in the unclassified service, ordinarily SPBR would not have jurisdiction to examine the circumstances and conditions of appellant's prior removal from a classified to unclassified position. "SPBR does not have jurisdiction to hear appeals arising solely out of a change from classified to unclassified service." *Kittrells v. Ohio Lottery Comm.* (Mar. 22, 1994), 10th Dist. No. 93APE08-1176, citing *State ex rel. Weiss v. Indus. Comm.* (1992), 65 Ohio St.3d 470, and *Rarick v. Geauga Cty. Bd. of Commrs.* (1980), 63 Ohio St.2d 34. When, however, a change from classified to unclassified status is coupled with an adverse job action, SPBR may have jurisdiction over claims of constitutional violations arising from the change in status. *Kittrells; Weiss* at 475. We must therefore find that our review of SPBR's dismissal for lack of jurisdiction does not end with an affirmance of the now-uncontested conclusion that appellant was an unclassified employee, but must continue with an examination of his constitutional claims.

{¶12} Specifically, appellant alleges a due process deprivation in the change in status of his position from classified to unclassified. He asserts that he suffered a deprivation of a constitutionally protected property interest by the loss of his classified status, and that this occurred without substantive due process protections, including a hearing pursuant to *Cleveland Bd. of Edn. v. Loudermill* (1985), 470 U.S. 532, 105 S.Ct. 1487. Appellant points out that any right to a pre-deprivation hearing is not satisfied by the board's post-deprivation jurisdictional hearing that gave rise to this appeal.

{¶13} Courts have for the most part held that there is no attached property right of an employee to a job classification. *Esselburne v. Ohio Dept. of Agriculture* (1985), 29 Ohio App.3d 152; *Shearer v. Cuyahoga Cty. Hosp.* (1986), 34 Ohio App.3d 59; *Treckiak v. State of Ohio* (July 10, 1997), C.A.6 No. 96-3303. This conclusion is not unanimous, however. See, e.g., *Reddick v. Coshocton Cty. Regional Airport*, 5th Dist. No. 04CA017, 2005-Ohio-2169.

{¶14} We need not resolve that conflict in precedent. Both SPBR and the court of common pleas have determined that appellant was correctly placed in the unclassified service due to the nature and scope of his authority and job duties. That conclusion is no longer challenged in this appeal. If appellant is correctly placed in the unclassified service, appellant has not been deprived of a protected property interest that, under the due process analysis set forth in *Loudermill*, would trigger the right to a pre-deprivation hearing. He can claim no deprivation from loss of his previous designation as classified, which did not reflect his actual status and could not control SPBR's review of his right to appeal. *Yarosh*. SPBR correctly found that it lacked jurisdiction and dismissed this appeal by an unclassified employee.

{¶15} In accordance with the foregoing, appellant's sole assignment of error is overruled and the judgment of the Franklin County Court of Common Pleas affirming the SPBR's dismissal of appellant's appeal for lack of jurisdiction is affirmed.

Judgment affirmed.

FRENCH, P.J., and BROWN, J., concur.
