104861055

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

JEREMY SHADD
Plaintiff

CLEVELAND CIVIL SERVICE COMMISSION, ET AL.
Defendant

Case No: CV-17-889571

Judge: JOHN P O'DONNELL

JOURNAL ENTRY

96 DISP.OTHER - FINAL

JUDGMENT ENTRY AFFIRMING THE NOVEMBER 10, 2017, DECISION OF THE CLEVELAND CIVIL SERVICE COMMISSION.

O.S.J.

COURT COST ASSESSED TO THE PLAINTIFF(S).
PURSUANT TO CIV.R. 58(B), THE CLERK OF COURTS IS DIRECTED TO SERVE THIS JUDGMENT IN A MANNER PRESCRIBED BY CIV.R. 5(B). THE CLERK MUST INDICATE ON THE DOCKET THE NAMES AND ADDRESSES OF ALL PARTIES, THE METHOD OF SERVICE, AND THE COSTS ASSOCIATED WITH THIS SERVICE.

Judge Signature   Date 8/2/2018

FILED
2018 AUG -2 P 12:58
CLERK OF COURTS
CUYAHOGA COUNTY

- 96
08/02/2018

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

JEREMY SHADD	)	**CASE NO. CV 17 889571**
	)	
Appellant/Plaintiff,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	**JUDGMENT ENTRY AFFIRMING A DECISION OF THE CLEVELAND CIVIL SERVICE COMMISSION**
	)	
CLEVELAND CIVIL SERVICE COMMISSION, ***et al***	)	
	)	
	)	
Appellees/Defendants.	)	

John P. O'Donnell, J.:

Jeremy Shadd was a heavy equipment operator for the City of Cleveland when he was fired in early 2015. Cleveland's civil service commission upheld his termination and this case is his appeal of that decision. The record of administrative proceedings was filed on January 5, 2018. Briefing by the parties includes Shadd's merit brief[1], a supplement to the merit brief,[2] the commission's brief in opposition,[3] Shadd's reply brief,[4] the commission's sur-reply,[5] and Shadd's reply to the sur-reply.[6] Upon consideration of the entire evidentiary record and all of the briefing

---

[1] Filed February 7, 2018.
[2] Filed February 28.
[3] Filed April 2.
[4] Filed April 6.
[5] Filed April 13.
[6] Filed April 16.

I find that the commission's decision is supported by reliable, probative and substantial evidence and is in accordance with law and I therefore affirm it.

The evidence

Shadd was employed as a construction equipment operator in Cleveland's department of public utilities, division of water pollution control. He was responsible for using machines such as cranes, forklifts, excavators and front-end loaders. On January 14, 2015, he was accused of commandeering a front-end loader used by Ernest L. Gardner, Jr. by jumping on the machine while it was running and forcing Gardner off.

Cleveland's heavy equipment operators are classified as civil service employees. After an investigation, the interim director of the utilities department, Sharon Dumas, informed Shadd by a letter dated February 6, 2015, that he was fired, effective a month later, because he violated the city's workplace policies and Rule 9.10 of the Rules of Civil Service. In particular, Dumas cited to Rule 9.10's provisions concerning neglect of duty, incompetence or inefficient performance of duties, conduct unbecoming an employee in the public service, insubordination and offensive conduct or language toward a fellow employee. Additionally, she relied on the rule's catch-all of "other failure of good behavior which is detrimental to the service, or for any other act of misfeasance, malfeasance or nonfeasance in office."

Shadd sought a review of his termination by a neutral referee appointed by the civil service commission. A hearing before the referee took place on November 30, 2015, and included testimony from Shadd and Gardner as well as their direct supervisor Edwin Rivera and Daniel Tomko, a water pollution control superintendent who is Rivera's supervisor. The transcript of that hearing comprises the bulk of the evidentiary record on appeal.

On the day of the incident Gardner – whose usual job is sewer serviceman – was working a temporary assignment as a construction equipment operator. He testified that he was using a front-end loader to do work in the yard on the orders of his supervisor. He had just backed up to let another vehicle pass when Shadd "jumped on the truck" while it was still in gear, causing Gardner to slam on the brakes to avoid a crew of workers just behind him. Shadd told him to get off the loader so Shadd could use it and then Shadd "reached over to grab the key" and also took hold of the gear shifter and put the machine into neutral. After a few minutes of arguing Gardner ceded control of the front-end loader to Shadd.

Rivera testified that by trying to take over Gardner's assignment that day Shadd committed insubordination. When Rivera was told by Gardner what happened he ordered Shadd to park the front-end loader in the rear of the building and go to his own job site, but Shadd instead kept using the front-end loader to fill another truck, forcing Rivera to repeat his instruction. According to Rivera the failure to follow his order was a second instance of insubordination.

Tomko's testimony focused on the grave risk to safety that Shadd's conduct created. Tomko said:

> The front-end loader is articulated steering. It steers on hydraulics. It has in between the two tires, right in the center of the tractor, is a hinge and it steers by actually articulating the whole machine. So in other words, it doesn't steer like a car where your tires turn, but the machine pivots. Also, you have the large wheel right there by the ladder. I have personally seen somebody get smashed in between that when it was turning, by doing the almost identical climbing up on the machine trying to yell at the operator, telling him what they were doing or weren't doing wrong. That is the biggest no-no with that machine and one of the most hazardous safety conditions you can even create. . .

> Heavy equipment's the most dangerous job we do in construction, whether it's cranes, forklifts, front-end loaders or excavators. There's a certain amount of safety that you have to have or somebody will die, not just get hurt, they will die. That machine running, it could accidentally be bumped into gear or anything. Do not approach a machine and stand within its working radius, while that machine is running. That is the number one safety no-no in operating heavy equipment.

Before the incident with Gardner, Shadd had earned numerous disciplinary sanctions, including a three-day suspension for conduct unbecoming and insubordination, a five-day suspension for neglect of duty and conduct unbecoming, a ten-day suspension for neglect of duty and conduct unbecoming, and a 15-day suspension for neglect of duty, insubordination and conduct unbecoming. Tomko acknowledged being aware of that history when he recommended Shadd's termination, but he insists that termination was justified based on this incident alone because "[i]t is one of the most hazardous type of conditions you can create on the job." Gardner and Rivera also testified to the effect that Shadd's actions were dangerous.

The previous discipline is mentioned in the February 6 letter of termination, but is not relied upon as justification for Shadd's firing. Instead, Dumas told Shadd:

> The manner in which you continue to challenge authority is not acceptable, nor will it be tolerated. Further, your behavior clearly substantiates the charges of neglect of duty and insubordination. Your negligence in performing your duties as required caused the division wasted performance hours, and created a safety hazard.
>
> Be advised that you put your safety as well as your co-workers (*sic*) safety at risk, which is unacceptable. Employees are here to perform their assignments, not to challenge and/or question any supervisor when jobs are assigned. Management explained that your

continued failure to address these areas of deficiency is unacceptable and will not be tolerated by any employee. Because you could not legitimately substantiate the reason for your actions, I must take this action.

In Shadd's testimony at the hearing he essentially denied Gardner's version of events and said that nothing of consequence happened between the two men that day.

The referee issued a report and recommendation on February 23, 2016. Finding the facts to be consistent with the version of events offered by Gardner, Rivera and Tomko, the referee denied Shadd's appeal, concluding that in "view of the serious safety issue and [Shadd's] approach to the operating loader, the usurpation of authority and the failure to park when ordered, there were sufficient reasons to issue the discipline chosen by the Appellant's supervisor."

On March 1, 2016, Robert L. Davis, the director of the department of public utilities, sustained Shadd's termination.

In the meantime, Shadd was negotiating with the city to amend his disciplinary record, and on September 25, 2017, he and Cleveland reached a settlement agreement that expunged three of the prior suspensions from his disciplinary record, leaving only a single five-day suspension. Thereafter, Shadd appealed the March 1 affirmance of his termination to the civil service commission and a hearing was held on October 27, 2017. At the hearing, the parties stipulated to the settlement erasing most of the past discipline from Shadd's employment record, but Cleveland emphasized that Shadd's termination was not based on the city's progressive discipline policy because it constituted a major safety violation.

The commission denied Shadd's appeal and upheld the appointing authority's decision to terminate Shadd. The minutes from the October 27 meeting were adopted on November 10 and the commission approved the following pertinent findings of fact and conclusions of law:

Jeremy Shadd was terminated from his employment effective on March 6, 2015, for violation of the civil service rules, and the policies and procedures of the City. . . Upon review of the entire record and the report and recommendation of Referee Skulina, the commission finds that the seriousness of the offense warrants the discipline imposed. The commission affirms the decision of the appointing authority and sustains the termination of Jeremy Shadd.

Shadd appealed the November 10 decision to the common pleas court on November 28, 2017.

Standard of review in the common pleas court

Shadd's notice of appeal states that it is "pursuant to R.C. § 119.12 and R.C. § 124.34 and, alternatively, R.C. § 2506.01." The parties disagree on which of those sections should govern this appeal. Shadd asserts that R.C. Chapter 119 governs and the city claims that R.C. Chapter 2506 applies.

The Eighth District Court of Appeals has said that "[a]ppeals of municipal civil service commission decisions are governed by R.C. Chapters 2505 and 2506. . . [T]he commission is not an 'agency' for purposes of R.C. Chapter 119, and therefore the only applicable statutory provisions for appeal are found in R.C. Chapters 2505 and 2506." *Krickler v. Brooklyn*, 149 Ohio App.3d 97, 2002-Ohio-4278 (8th Dist.), ¶24.

However, *Krickler* is distinguishable from this case because it involved the appeal of an employee categorized as unclassified under R.C. 124.11(A), while Shadd is a classified employee under R.C. 124.11(B). Thus, Krickler did not fall within the ambit of R.C. 124.34(B), which is strictly for classified employees.

Instead, this case is more analogous to *Knight v. Cleveland Civ. Serv. Comm'n*, Cuyahoga County App. No. 103104, 2016-Ohio-5133. Like Shadd, Knight was a Cleveland construction equipment operator who appealed the civil service commission's decision upholding his termination. In holding that R.C. Chapter 119 governed the proceedings on appeal, the appellate court decided that a classified employee may elect whether to proceed under that chapter or under R.C. Chapter 2506, saying:

> Where a municipality removes a *classified employee* from his employment for disciplinary reasons, a decision by the municipality's civil service commission may be appealed to the court of common pleas pursuant to R.C. 124.34, in accordance with the procedure set forth in R.C. 119.12, or pursuant to R.C. 2506.01 through 2506.04. In this case, Knight opted to appeal the [commission's] decision to the common pleas court pursuant to R.C. 124.34 and 119.12. *Id.*, ¶¶ 5-6 (Citations omitted and emphasis added).

Here, Shadd cited to both chapters at the time he filed his appeal but has since elected to proceed under R.C. Chapter 119 by virtue of R.C. 124.34(B), and his election governs.

Accordingly, I will decide the appeal using the standards applicable under Chapter 119 through R.C. 124.34(B), which provides:

> In cases of removal . . . for disciplinary reasons, [a classified] employee may appeal from the decision of the [civil service] commission, and any such appeal shall be to the court of common pleas of the county in which the appointing authority is located, or to the court of common pleas of Franklin County, as provided by section 119.12 of the Revised Code.

In turn, R.C. 119.12(B) provides that appeals pursuant to R.C. 124.34(B) must go to the court of common pleas and, furthermore, the common pleas court, under R.C. 119.12(M), "may affirm the

order of the agency complained of in the appeal 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. In the absence of this finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law." A trial court must give due deference to the administrative resolution of evidentiary conflicts and must not substitute its judgment for that of the administrative board or agency. *Id.*, ¶22.

Having persuasively shown that he is entitled to an appeal as provided by R.C. Chapter 119, Shadd proceeds to argue that he is entitled to have the appeal decided by the trial court *de novo* and not under the more deferential standard of review. In support of his argument he notes that R.C. 124.34(C) provides an appeal *de novo* to police officers and fire fighters. Since, according to Shadd, there is no reason why safety forces should be treated differently from other classified employees, then applying the more deferential standard of review to his appeal denies him his constitutional rights to due process and the equal protection of the laws.

The equal protection clauses contained in the Fourteenth Amendment to the United States Constitution and Article I, Section 2, of Ohio's constitution require that individuals be treated in a manner similar to others in like circumstances. *McCrone v. Bank One Corp.*, 107 Ohio St. 3d 272, 2005-Ohio-6505, ¶6. The equal protection clauses keep governmental decision makers from treating differently persons who are in all relevant respects alike. *Pickaway County Skilled Gaming, L.L.C. v. Cordray*, 127 Ohio St. 3d 104, 2010-Ohio-4908, ¶16.

A statute's constitutionality can be challenged on its face or on the particular set of facts to which the statute has been applied. *Knight*, supra, ¶26. When a statute is challenged on its face, the challenger must demonstrate that no set of circumstances exists under which the statute would

be valid. *Id.* This facial challenge is properly raised in a declaratory judgment action and is improper in an administrative appeal. *Id.* Since this is not a declaratory judgment action I will not address Shadd's facial challenge to the constitutionality of the differing standards of review on appeal afforded by statute to police officers and fire fighters, on one hand, and to classified employees except police and fire on the other.

Still, the constitutionality of a statute as applied to a particular defendant may be raised in an appeal of an administrative decision in a court of common pleas. *Id.*, ¶27. Yet here Shadd has not raised an "as applied" challenge to the differing standards of review afforded to different classified employees. Instead his challenge is to the constitutionality on its face of the differing standards. Shadd raised the constitutional challenge for the first time in his *reply* brief, and even then only in the most cursory fashion. At page 8 of his reply brief he devotes all of four sentences to his constitutional argument:

> Appellant Shadd should be entitled to the same standard of review as police and firemen. To find otherwise would be contrary to equal protection and due process rights contained in Ohio's and the U.S. Constitution. (*Citation omitted.*) There is no rational basis for using a different standard of review for classified civil servants who are police and firemen and those classified civil servants who are not police and firemen. Appellant Shadd accordingly asks this Court to allow his appeal to proceed on both the facts and law relevant to his case on a *de novo* basis.

This is, in short, merely a facial challenge to the constitutionality of R.C. 124.34 and, as discussed above, should have been brought as a declaratory judgment action. There is no "as applied" constitutional challenge to decide.

First assignment of error

Shadd argues that it was error for the referee and the commission to affirm his termination without explicit conclusions of law as required by R.C. 119.09. That statute provides, in pertinent part, that "[t]he referee . . . shall submit to the agency a written report setting forth the referee's . . . findings of fact and conclusions of law and a recommendation of the action to be taken by the agency."

The record evidence shows that the referee did make conclusions of law, even if they were not designated as such. In the section of his report labeled "Discussion and Recommendation," the referee makes several factual findings – that Shadd had no authority to order Gardner out of the front-end loader; that Shadd's conduct was extremely unsafe; that his actions presented a risk of injury to the nearby workers; and that he committed insubordination – and then concludes that "[i]n view of the serious safety issue and his approach to the operating loader, the usurpation of authority and the failure to park when ordered, there were sufficient reasons to issue the discipline chosen by the Appellant's supervisor." The commission then adopted the referee's findings and affirmed that "the seriousness of the offense warrants the discipline imposed."

Implicit in the language used by the referee and the commission is a conclusion that the facts of the incident, as found by the referee, fit the work rules justifying discipline. I don't read R.C. 119.09 to obligate the referee to say that the facts show that Shadd created a safety hazard, thus he violated the rule against creating a safety hazard. It is enough to find that his conduct created a safety hazard because the factual finding dictates the conclusion of law, which is apparent without additional verbiage.

Shadd's first assignment of error is overruled.

Second and fourth assignments of error

Shadd's second and fourth assignments of error will be considered together because they both essentially assert that the commission erred when it failed to consider that his termination was materially based on previous disciplinary events which were later modified by the settlement agreement, and under the city's progressive disciplinary policy his maximum punishment – considering his revised discipline history – would have been a ten-day suspension.

Cleveland's progressive discipline program, found in section C-24 of the Human Resources Policies and Procedures Workplace Policies, provides the city with "a structured corrective action process to improve and prevent a recurrence of undesirable behavior and/or performance issues." It outlines recommended steps for the city to take, including written reprimands, suspensions, reduction, demotion and termination of employment. The program describes "termination of employment" as follows:

> The last and most serious step in the progressive discipline procedure is a termination of employment. The Appointing Authority/designee is encouraged to utilize the progressive nature of this policy by first providing warnings, and/or suspension from the workplace before proceeding to a recommendation to terminate employment. *However, the City reserves the right to combine and skip steps depending upon the circumstances of each situation and the nature of the offense. Furthermore, employees may be terminated without prior disciplinary action.* (Emphasis added).

Additionally, the progressive discipline program includes as a major infraction insubordination for "failing to perform a directive from a supervisor or management representative," and it includes "[d]isregard for safety or security regulations that results or would likely result in serious physical harm or major property loss or damage" as a removable infraction.

Each person who testified at the hearing agreed that the set of facts the referee found to exist presented a serious safety hazard. Moreover, the evidence is that the termination was ultimately based only on the January 14, 2015, incident, even though Shadd's bosses were admittedly well aware of his prior disciplinary record. Dumas's February 6 letter cites the unacceptable safety risk that Shadd created. Tomko testified that termination based only on the incident in question was warranted, irrespective of past discipline, because "[i]t is one of the most hazardous type of conditions you can create on the job." And the referee's report makes no mention of Shadd's previous disciplinary history and focuses on the "serious safety issue" he created and "the usurpation of authority and failure to park when ordered." Given the facts found at the administrative level, Shadd committed a removable infraction and the city acted within its authority to skip progressive discipline when it terminated Shadd.

Thus, the decision of the commission to uphold Shadd's termination notwithstanding Cleveland's progressive discipline policy and the settlement agreement is supported by reliable, probative and substantial evidence and is in accordance with law.

Shadd's second and fourth assignments of error are overruled.

Third assignment of error

Shadd's third assignment of error contends that the commission erred when it failed to consider whether Cleveland proved the occurrence of any event which warranted his termination.

As already discussed, "[d]isregard for safety or security regulations that results or would likely result in serious physical harm or major property loss or damage"[7] is considered a removable infraction. Tomko testified as to the seriousness of Shadd's actions, describing his conduct as "the

---

[7] Section C-24 of the Human Resources Policies and Procedures Workplace Policies.

biggest no-no with that machine and one of the most hazardous safety conditions you can even create." He also testified that even if Shadd's version of events was believed it would have still presented a serious safety issue because "[t]he machine can still articulate and [Shadd's] still standing in the zone where he can be potentially crushed by the machine." Thus, the city was able to prove the occurrence of a serious safety violation warranting termination through Tomko's testimony and the testimony of Gardner and Rivera.

In addition, the city's progressive discipline program lists insubordination for "failing to perform a directive from a supervisor or management representative" as a major infraction. Rivera testified that Shadd was insubordinate twice on the day in question, first when he took it upon himself to commandeer the front-end loader Gardner was instructed to operate and second when he started loading another truck after Rivera told him to park the machine.

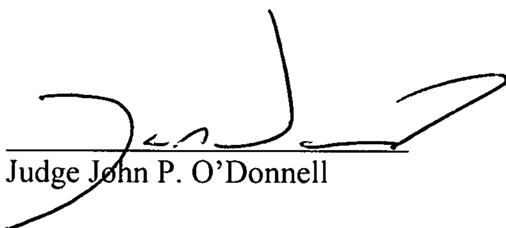
The decision of the commission to uphold Shadd's termination based on insubordination, a major infraction, and the creation of a grave safety hazard, a removable infraction, is supported by reliable, probative, and substantial evidence and is in accordance with law.

Shadd's third assignment of error is overruled.

Conclusion

The November 10, 2017, decision of Cleveland's civil service commission to uphold the termination of Jeremy Shadd is supported by reliable, probative and substantial evidence and is in accordance with law. It is hereby affirmed.

IT IS SO ORDERED:



Judge John P. O'Donnell

August 2, 2018
Date

SERVICE

SERVICE

A copy of this judgment entry was sent by email on August 2, 2018, to the following:

Stewart D. Roll
sdroll@climacolaw.com
Attorney for the appellant

Mark V. Webber
mwebber@city.cleveland.oh.us
Amanda Boutton
aboutton@city.cleveland.oh.us
Attorneys for the appellees

Judge John P. O'Donnell