

IN THE SUPREME COURT OF OHIO

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| Westlake Civil Service Commission, et al. | : | Case No. 13-0052 |
| | : | |
| Appellants, | : | On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District |
| | : | |
| v. | : | |
| | : | |
| Richard O. Pietrick, | : | Court of Appeals Case No. 98258 |
| | : | |
| Appellee. | : | |

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS, WESTLAKE CIVIL SERVICE COMMISSION AND CITY OF WESTLAKE

John D. Wheeler, Esq. (0004852) (COUNSEL OF RECORD)
 Director of Law, City of Westlake
 Robin R. Leasure, Esq. (0061951)
 Assistant Director of Law, City of Westlake
 27700 Hilliard Boulevard
 Westlake, Ohio 44145
 Telephone (440) 617-4230
 Fax No. (440) 617-4249
jwheeler@cityofwestlake.org
rleasure@cityofwestlake.org

COUNSEL FOR APPELLANTS, WESTLAKE CIVIL SERVICE COMMISSION AND CITY OF WESTLAKE

Joseph W. Diemert, Jr., Esq. (0011573) (COUNSEL OF RECORD)
 Thomas M. Hanculak, Esq. (0006985)
 Daniel A. Powell, Esq. (0080241)
 Joseph W. Diemert, Jr. & Associates Co., L.P.A.
 1360 S.O.M. Center Road
 Cleveland, Ohio 44124
 Telephone (440) 442-6800
 Fax No. (440) 442-0825
receptionist@diemertlaw.com

COUNSEL FOR APPELLEE, RICHARD O. PIETRICK

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This case presents a critical issue for the future of employee discipline and discharge throughout the State of Ohio; that is, whether a public employee must have engaged in criminal or unethical behavior to be disciplined for neglect of duty or failure of good behavior pursuant to O.R.C. §124.34.

In this case, the Court of Appeals found that criminal or unethical behavior is required in order for a public employee to be disciplined pursuant to O.R.C. §124.34 for neglect of duty or failure of good behavior. In sum, the Court of Appeals held that, as there was no finding that Westlake Fire Chief Pietrick engaged in criminal or unethical behavior, he could not be disciplined for neglect of duty or failure of good behavior. The Court of Appeals created a new category, “grossly poor judgment”, which the Court of Appeals considered conduct of a less offensive nature and which finding the Court of Appeals further stated allowed the Trial Court to modify the discipline and penalty. There is no justification, statutorily or by case law, for this holding.

This opinion offends the plain language of O.R.C. §124.34 and the forty plus years of case law established in the State of Ohio. This matter needs urgent correction by this Court.

This decision threatens the ability of the State, counties, civil service townships, cities, city health districts, general health districts and school districts throughout Ohio to discipline employees for failure of good behavior and neglect of duty where no criminal or unethical conduct exists.

Such a rule, allowed to stand, will sabotage the ability of all public entities in the State of Ohio previously mentioned from disciplining employees for issues such as excessive

absenteeism or sleeping or loafing on the job. Such behavior, traditionally understood to be neglect of duty, would not constitute criminal or unethical behavior.

The Court of Appeals should not be permitted to judicially alter the intent of the General Assembly to provide a specific list of categories of improper conduct, only a few of which, and not all, encompass or require criminal behavior.

Courts across the state since the early 1960's have decided cases regarding public employee discipline without the added pre-requisite of a criminal or ethical violation. The case law is quite to the contrary, specifically finding that many of the specific listed categories of misbehavior set forth in O.R.C. §124.34 do not require criminal behavior.

This case is of great public and general interest as it undermines the ability to effectively discipline problem employees for neglect of duty or failure of good behavior without the employee having engaged in criminal or unethical behavior. The Court of Appeals created a new second tier classification it terms "grossly poor judgment", which is not listed in the statute and certainly was never intended to be added to the statute by the opinion of the Trial Court. The Court of Appeals states that this lesser second tier classification brings with it a lesser punishment than failure of good behavior and neglect of duty. This opinion is contrary to the method of discipline by public employers which has existed under O.R.C. §124.34 and its predecessors for decades. This decision has severely compromised O.R.C. §124.34. It is critical that this Court grant jurisdiction to hear this case and reverse the erroneous and dangerous decision of the Court of Appeals so that the purpose and integrity of O.R.C. §124.34 will be preserved to promote consistent and orderly discipline of public employees across Ohio.

STATEMENT OF THE CASE AND FACTS

This case arises as the result of the suspension and demotion by Westlake Mayor, Dennis Clough, of Westlake Fire Chief, Richard Pietrick, to the position of First Class Fire Fighter for committing acts of misfeasance, malfeasance, non-feasance, neglect of duty and failure of good behavior as provided in O.R.C. §124.34 and the Rules and Regulations of the Westlake Civil Service Commission. The acts of Pietrick which resulted in such discipline were Pietrick's use of city employees (Fire Department mechanics) to repair his personal vehicles while on duty. Such behavior was a violation of Pietrick's own policy regarding engaging in personal activities while on duty. The sworn testimony indicated that the Mayor became aware of these inappropriate actions by Pietrick by way of correspondence to Pietrick from the Fire Fighter's Union advising Pietrick that the fire department mechanics would no longer work on his personal vehicles. The Union advised it was a conflict of interest as a result of Pietrick's annual appointment of the department mechanics. Mayor Clough proceeded to hire Attorney Jonathan Greenberg of Walter & Haverfield to conduct an investigation.

Mr. Greenberg reviewed pertinent Westlake Ordinances and Civil Service Rules, as well as the City's Collective Bargaining Agreement with Local 1814. He interviewed Todd Spriesterbach, Chris Gut and Doug Vasi, all of whom are Westlake Fire Fighters and department mechanics, as well as Pietrick. Pietrick admitted during the course of the investigation that he had work performed on his personal vehicles by mechanics while they were working for the City. Mr. Greenberg found that Pietrick engaged in misconduct that required punishment by the City to prevent future occurrences.

Greenberg specifically noted that the mechanics position paid an additional 5% of base wage. At one time the appointment to mechanic was more or less permanent, but Pietrick

unilaterally changed it to an annual appointment. There were no written job requirements, no tests for the job, and no interview. Greenberg found that Pietrick had unfettered discretion in making mechanic appointments according to whatever standards he deemed fit.

A pre-deprivation hearing was conducted by Mr. Gary Ebert, attorney-at-law. Evidence was presented by all parties and Mr. Ebert found that the repairs to Pietrick's vehicles in fact occurred and were performed by City employees on City time. He found the Mayor's discipline to be warranted.

At the Westlake Civil Service Commission hearing before respected arbitrator, Dr. David Pincus, the department employees presented the same testimony as they did before Mr. Greenberg.

The testimony showed that it was department policy to allow fire fighters during "slow" periods to do various activities unrelated to the department, i.e. the fire fighters were allowed to play cards, work on hobbies, wash cars or do light mechanical work to their own vehicles. It was emphasized that the employees were not permitted to render their vehicle incapable of being started and moved if necessary due to an emergency 911 call.

The witnesses testified that Pietrick asked one mechanic to make repairs to his automobiles five or six times over a period of six years and that the previous appointment process for the mechanic's position, which allowed a mechanic to remain in his position until retirement or separation from employment, was changed by Pietrick at about the same time as when Pietrick began asking this mechanic to do repairs. Once changed, the mechanics had to re-apply each year for the position.

Testimony further showed that Pietrick asked this mechanic to obtain tire bids from vendors for his personal use and that Pietrick expected him to get discounts which the general public could not get by using the influence of his office as Fire Chief.

Hearing Officer Pincus considered the testimony and evidence and upheld the Mayor's Notice of Discipline, thereby denying Pietrick's appeal. Hearing Officer Pincus found Pietrick's behavior to be "egregious", "substantive" and reflected "certain leadership failures." (See Opinion attached as Appendix "B".) Hearing Officer Pincus further found Pietrick violated O.R.C. §124.34 for neglect of duty and failure of good behavior as well as related city rules and regulations. Hearing Officer Pincus stated that Pietrick intimidated and coerced mechanics and clearly took advantage of his status with the City for his own personal gain. Hearing Officer Pincus believed the situation was ripe for abuse and intimidation as Pietrick held unfettered discretion in making the appointments to mechanic with its obvious economic ramifications. Pietrick then appealed the decision to the Cuyahoga County Court of Common Pleas pursuant to O.R.C. §124.34 and O.R.C. Ch. 119.

The Court of Common Pleas upheld the Civil Service Commission's determination (in adopting opinion of Dr. David Pincus) that Pietrick engaged in neglect of duty and failure of good behavior, but in violation of the mandates of O.R.C. §119.12, the Common Pleas Court modified the disciplinary penalty and demoted Pietrick to Captain. The Westlake Civil Service Commission appealed the Common Pleas Court decision to the Eighth District Court of Appeals. In its decision affirming the Common Pleas Court's decision, the Court of Appeals erred in finding that criminal or unethical behavior is required before a public employee may be demoted for failure of good behavior or neglect of duty. Furthermore, the Court erred in adding a new

second tier category of behavior for which a public employee may be disciplined to the list of specific categories set forth in O.R.C. §124.34.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: Criminal behavior or ethical violations are not a pre-requisite to a finding that a public employee has engaged in neglect of duty or failure of good behavior pursuant to O.R.C. §124.34.

O.R.C. §124.34 established the authority and procedure by which a public employee in Ohio may be demoted, suspended or removed. O.R.C. §124.34(A) lists the specific reasons for which demotion, removal or suspension are appropriate. Specifically, the statute provides for: incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of Chapter 124, violation of rules of director of administrative services or the commission, any other failure of good behavior, any acts of misfeasance, malfeasance, non-feasance, or conviction of a felony.

The statute does not require criminal or unethical behavior as a pre-requisite to a finding of neglect of duty or failure of good behavior. *Watson v. Schwenker*, 8 Ohio App.3d 294, 456 N.E.2d 1243 (10th Dist. 1982). (Court found dishonesty for which removal was justified did not require criminal punishment.) *In Re Fortune*, 65 Ohio Law Abs. 564, 101 N.E.2d 174, (Cuyahoga C.P., 1951). (Court found public employee not required to have committed violation of criminal laws to be removed.)

The Court of Appeals, in upholding the Trial Court's modification of the disciplinary penalty, states in Paragraph 38 of its opinion that Pietrick's use of "extremely poor judgment", as

cited by the Trial Court, did not rise to the level of neglect of duty or failure of good behavior as a result of the lack of criminal or unethical behavior by Pietrick.¹

This holding by the Court of Appeals ignores the purpose and meaning of O.R.C. §124.34. Such an expansion by the Court of Appeals to a clear and carefully drafted statute violates the rules of statutory construction. *State ex. Rel Keller v. Forney*, 108 Ohio St. 463, 1 N.E. 16 (1923).

The Legislature did not intend that demotion, suspension or removal for neglect of duty or failure of good behavior require commission of a crime or unethical behavior.

Proposition of Law No. 2: Regardless of the term of art used to describe the improper behavior, the Court of Common Pleas upheld the determination that Pietrick engaged in neglect of duty and/or failure of good behavior. The exercise of grossly poor judgment by a public employee results in neglect of duty and/or failure of good behavior.

The General Assembly has chosen not to specifically define what misbehavior constitutes neglect of duty or failure of good behavior as those terms are used in O.R.C. §124.34. It is logical to conclude that exercising grossly poor judgment and utilizing city employees on city time to repair one's personal vehicles constitutes misbehavior which would be included in O.R.C. §124.34's failure of good behavior. *Jackson v. Coffey*, 52 Ohio St.2d 43, 368 N.E.2d 1259 (1977).

The Trial Court did not specifically or expressly reverse the hearing officer by using the phrase "grossly poor judgment" in reference to the misbehavior as opposed to the terms "failure of good behavior" or "neglect of duty". It is certainly not feasible or necessary for the Legislature to spell out each and every possible label for public employee misconduct. As a result, catch-all phrases, such as "failure of good behavior," are used. *Meehan v. Macy*, 392 F.2d

¹ In actuality, the Trial Court stated, Pietrick demonstrated "grossly poor judgment". (Tr. Ct. Opinion, pg. 9, Appendix "C".)

822, (D.C. Cir. 1968). The Trial Court's use of the term, "grossly poor judgment," is not in conflict with the terms, "neglect of duty" and "failure of good behavior". It is the very act of using grossly poor judgment that resulted in Pietrick's failure of good behavior and neglect of duty. The exercise of grossly poor judgment in thinking it is appropriate to request that Pietrick's subordinate mechanics perform repairs on city time to his personal vehicles resulted in Pietrick's failure of good behavior. Exercising grossly poor judgment when requesting that his personal vehicles be repaired on city property, rendering the vehicles inoperative and potentially restricting the ability of fire safety vehicles to exit the premises without delay in an emergency, is an example of Pietrick's neglect of duty as the Fire Chief to ensure the safety of the community.

The Court of Appeals erred in holding that "grossly poor judgment" is somehow a lesser offense included within O.R.C. §124.34. O.R.C. §124.34 lists the specific causes which allow for demotion, suspension or removal. The Court of Appeals cannot judicially create a lesser tier offense of "grossly poor judgment" and add it to O.R.C. §124.34's list of prohibited conduct. *Jackson v. Kurtz*, 65 Ohio App.2d 152, 416 N.E.2d 1064 (1st Dist. 1979). (Court held only specific causes listed in O.R.C. §124.34 can be used to suspend, demote or remove.)

The Trial Court's finding that Pietrick engaged in "grossly poor judgment" was a sufficient determination in respect to O.R.C. §124.34 that Pietrick engaged in "neglect of duty" and "failure of good behavior". While the Trial Court did not use the precise statutory language of O.R.C. §124.34, the conduct described by the Trial Court clearly is conduct proscribed by the statute. However, the Court of Appeals erred in holding that Pietrick's conduct of exercising "grossly poor judgment" was a lesser offense than "neglect of duty" and "failure of good behavior" and thereby allowed the Trial Court to modify the disciplinary penalty. The Trial

Court erred in modifying the disciplinary penalty pursuant to O.R.C. §119.12 once the Trial Court had upheld the finding of neglect of duty and failure of good behavior. *Maurer v. Franklin City Treasurer*, 10th Dist. No. 07AP-1027, 2008 WL 2699433. *Franklin County Sheriff v. Frazier*, 174 Ohio App.3d 202, 881 N.E.2d 345 (10th Dist. 2007).

Such a holding has disastrous consequences for public employers. A public employee could be chronically absent, found sleeping or loafing on the job, or be delinquent in performing their duties and could not be disciplined effectively under the operative statute for neglect of duty or failure of good behavior because, according to the Eighth District Court of Appeals, an employee can only be disciplined for neglect of duty or failure of good behavior where criminal or unethical conduct exists.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. The Appellants hereby request that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,
John D. Wheeler, Counsel of Record



Robin R. Leasure
COUNSEL FOR APPELLANTS, WESTLAKE
CIVIL SERVICE COMMISSION AND CITY
OF WESTLAKE

Certificate of Service

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to counsel for Appellee, Joseph W. Diemert, Jr., Esq., Thomas M. Hanculak, Esq. and Daniel A. Powell, Esq. at Joseph W. Diemert, Jr. & Associates Co., L.P.A., 1360 S.O.M. Center Road, Cleveland, Ohio 44124 on January 31, 2013.



Robin R. Leasure

COUNSEL FOR APPELLANTS, WESTLAKE
CIVIL SERVICE COMMISSION AND CITY
OF WESTLAKE

APPENDIX

A – Journal Entry and Opinion of the Cuyahoga County Eighth Appellate District Court of Appeals (December 20, 2012)

B – Report and Recommendation of Hearing Officer David M. Pincus

C – Cuyahoga County Court of Common Pleas, Case No. CV-08-660103; Opinion and Order

Court of Appeals of Ohio

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EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

LAW DEPT.
CITY OF WESTLAKE

JOURNAL ENTRY AND OPINION
No. 98258

RICHARD O. PIETRICK

APPELLEE/CROSS-APPELLANT

vs.

**CITY OF WESTLAKE, CIVIL SERVICE
COMMISSION, ET AL.**

APPELLANTS/CROSS-APPELLEES

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-660103

BEFORE: Blackmon, A.J., Stewart, J., and Keough, J.

RELEASED AND JOURNALIZED: December 20, 2012

PATRICIA ANN BLACKMON, A.J.:

{¶1} Appellants/cross-appellees, the city of Westlake and its Civil Service Commission (collectively “the City”) appeal the trial court’s decision placing appellee/cross-appellant, Richard O. Pietrick (“Pietrick”), in the position of captain in the Westlake Fire Department following Pietrick’s demotion from Fire Chief to 1st Class Fire Fighter. The City assigns the following error for our review:

I. The trial court erred when it modified the penalty of the commission and reinstated appellee to the rank of captain with full seniority, back pay and benefits contrary to the court’s opinion and the mandates of ORC §119.12.

Pietrick also cross-appeals and assigns the following error for our review:

I. The trial court erred when it failed to reinstate Pietrick to his position as Fire Chief after conclusively finding that the adverse employment action was not supported by the requisite degree of proof.

{¶2} Having reviewed the record and pertinent law, we affirm the trial court’s decision. The apposite facts follow.

{¶3} On July 28, 1980, the City hired Pietrick as a firefighter paramedic. In March 1989, Pietrick was promoted to lieutenant and in April 1993, he was promoted to captain. In November 1994, after Pietrick had passed a civil service examination, Dennis Clough, the mayor of Westlake (“Mayor Clough”), appointed him to the rank of fire chief.

{¶4} Sometime in 2005, the International Association of Fire Fighters (“IAFF”), Local 1814, the union representing the city’s fire department rank and file, asked Westlake to conduct an audit or risk assessment of their fire department. Westlake’s city council approved funding and engaged McGrath and Associates (“McGrath”), a consulting firm, to conduct the audit.

{¶5} McGrath concluded, after reviewing the responses of 32 firefighters to a questionnaire, that the Westlake fire department was dysfunctional. McGrath also concluded that Pietrick was not to blame for all the dysfunction, but as the fire chief, bore the ultimate responsibility. In addition, McGrath found that Pietrick was a “visionary,” but had a “huge” communication problem. Finally, McGrath recommended that Pietrick take certain steps to improve the department.

{¶6} Mayor Clough and Pietrick discussed McGrath’s report, and a decision was made that Pietrick would address the issues raised by the audit. Throughout 2006, Pietrick informed Mayor Clough that he had accomplished some of the recommendations. Believing that the situation had worsened, Mayor Clough commissioned McGrath to issue a follow-up report.

{¶7} In the follow-up report, McGrath indicated that Pietrick had made progress, but noted that issues still remained and that morale was low. The report also indicated that Mayor Clough had openly expressed his lack of

confidence in the administration of the fire department. Mayor Clough asked Pietrick to resign, but Pietrick refused.

{¶8} On June 6, 2007, Patrick M. Grealis ("Grealis"), president of the IAFF, Local 1814, sent Pietrick a letter demanding that he discontinue the practice of having subordinate firefighters perform maintenance on vehicles owned and operated by Pietrick and members of his family. The letter also warned Pietrick that if he retaliated against the firefighters, the union would file an unfair labor practice action against Pietrick. Grealis copied Mayor Clough on the letter sent to Pietrick.

{¶9} On June 13, 2007, Pietrick issued a response to Grealis indicating that he was not aware of any concerns with or any objections to the practice. Pietrick then assured Grealis that he would no longer request assistance in any personal matter or project from firefighters lower in rank. Pietrick also assured Grealis that no adverse action would be taken against the firefighters who brought this issue to light.

{¶10} Thereafter, in a letter dated November 2, 2007, Mayor Clough informed Pietrick that "* * * you have committed acts of misfeasance, malfeasance, nonfeasance, neglect of duty, and failure of good behavior, as provided in R.C. 124.34, and Westlake Civil Service Commission Rule XI." The letter also notified Pietrick that he had been demoted to the position of firefighter and suspended for 30 days without pay.

{¶11} Pietrick was entitled to request an informal hearing before Mayor Clough, however, he skipped that step and appealed the decision directly to the Commission. On November 19, 2007, prior to the Commission taking any action, Mayor Clough convened a pre-deprivation hearing before Gary A. Ebert, the municipal attorney. Ebert found that the repairs to Pietrick's car did in fact occur and that the repairs were performed on the City's time. Ebert also concluded that the evidence and facts were sufficient to warrant the disciplinary action Mayor Clough had taken against Pietrick.

{¶12} On November 30, 2007, a civil service commission hearing was conducted before Dr. David Pincus. On April 30, 2008, Dr. Pincus issued an opinion denying Pietrick's appeal. Subsequently, pursuant R.C. 124.34, Pietrick appealed the Commission's decision to the common pleas court.

{¶13} On March 26, 2012, after briefing and oral argument, the trial court issued a decision affirming in part and reversing in part the Commission's decision. The trial court ordered the City to give Pietrick the rank of captain. The City appeals, and Pietrick cross-appeals, from the trial court's decision.

Modification of Penalty

{¶14} In the sole assigned error, the City argues the trial court abused its discretion when it modified Pietrick's demotion and placed him in the position of captain of the fire department.

{¶15} 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 & Zoning Comm. of the City of Dublin, Ohio*, 10th Dist. No. 08AP-742, 2009-Ohio-2230, ¶ 15.

{¶16} 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 R.C. Chapter 2505. *Harr v. Jackson Twp.*, 10th Dist. No. 10AP-1060, 2012-Ohio-2030, 970 N.E.2d 1128.

{¶17} When a firefighter appeals his dismissal, R.C. 124.34 controls. *Hall v. Johnson*, 90 Ohio App.3d 451, 629 N.E.2d 1066 (1st Dist.1993). *See also Chupka v. Saunders*, 28 Ohio St.3d 325, 327, 504 N.E.2d 9 (1986). The common pleas court considers the “whole record,” including any new or additional evidence admitted under R.C. 2506.03, and determines whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence. *Ponser v. Newark*, 5th Dist. No. 10 CA 42, 2010-Ohio-6073, *Pataskala Banking Co. v. Etna Twp. Bd. of Zoning Appeals*, 5th Dist. Nos. 07-CA-116, 07-CA-117, 07-CA-118, 2008-Ohio-2770, ¶ 13.

{¶18} We begin our analysis by noting that we review the trial court's judgment on the R.C. 124.34(C) appeal from the decision of the civil service commission under an abuse of discretion standard. *Sandusky v. Nuesse*, 6th Dist. No. E-10-039, 2011-Ohio-6497, citing *Raizk v. Brewer*, 12th Dist. Nos. CA2002-05-021, CA2002-05-023, 2003-Ohio-1266, ¶ 10.

{¶19} The term abuse of discretion implies that the trial court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). When applying this standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 1993-Ohio-122, 614 N.E.2d 748.

{¶20} In the instant case, the facts that triggered the disciplinary action the City took against Pietrick are largely undisputed. After receiving a copy of the letter from the union president relative to work being done on Pietrick's personal vehicles by firehouse mechanics, Mayor Clough retained the law firm of Walter & Haverfield to investigate the matter. Attorney Jonathan Greenberg conducted an investigation and issued a report that revealed, among other things, that two fire department mechanics indicated that they had done repairs on Pietrick's personal vehicles, while on the firehouse property.

{¶21} One of the mechanics, Todd Spriesterbach, indicated to Greenberg and later testified at an hearing that he had done approximately six personal repair jobs for Pietrick over a five-year period. Spriesterbach indicated that

although Pietrick never ordered him to do the repairs, he felt obligated to complete the repairs. Spriesterbach stated that because Pietrick was responsible for the annual reappointments of mechanics, he did not want to jeopardize being reappointed by refusing to do the repairs. Finally, Spriesterbach indicated that Pietrick did not retaliate when he stopped doing the repair work.

{¶22} A second mechanic, Chris Gut, indicated that Pietrick asked him to do repairs on a lawn tractor that Pietrick brought to the fire station. Gut stated that after his initial examination, he told Pietrick that the lawn tractor had a broken rod, but Pietrick insisted that he tear it apart to confirm his diagnosis. Gut also stated that he believed Pietrick wanted him to purchase the part to do the repair, but he told Pietrick he did not have the time to do either. Gut stated that after some time, Pietrick removed the disassembled lawn tractor from the fire station.

{¶23} The record reveals that Greenberg concluded that Pietrick's conduct was not criminal and was not likely an ethical violation under the laws of Ohio. However, Greenberg found it was inappropriate for Pietrick, given his superior position, to have asked the fire station's mechanics to work on his personal vehicles. Thus, Greenberg recommended that the City take internal measures to punish Pietrick.

{¶24} The City demoted Pietrick to the rank of firefighter. The trial court found at best his conduct was “grossly poor judgment” and merited a demotion to the rank of captain.

{¶25} In this appeal and cross-appeal, the City argues the judge after finding Pietrick’s conduct punishable, could not alter the penalty imposed by the city. Pietrick argues that the court should have reinstated him to chief.

{¶26} This court concludes that the following language of the trial court in its de novo authority amounts to a well-reasoned decision and is not unreasonable:

***** Yet against this instance of grossly poor judgment, other facts suggest that the discipline meted out was excessive. Firstly, there was no written work rules or policies in place that were violated. No prior complaints had been lodged. No specific directives or guidelines discouraging such practices were ever issued. Department Mechanics were not expressly told by appellant they were required to perform the repairs in question. No negative work action was ever taken against any one of them for not fulfilling appellant’s requests. Finally, when a complaint was formally lodged by the union, appellant readily promised to cease the practice and offered to meet with the union to discuss the matter in greater detail. (Trial Court’s Opinion and Order, Page 9.)**

{¶27} Additionally, the trial court gave careful consideration to Pietrick’s career spanning more than 25 years, being promoted from firefighter to lieutenant, to captain, and then to fire chief, where he served 12 years before being demoted to the position he held when he first started in 1980. The trial

court noted that Pietrick had received no prior reprimands nor other disciplinary actions before being demoted. Given Pietrick's otherwise unblemished service, the trial court concluded a demotion to the lowest rank was unwarranted.

{¶28} The trial court further noted that at the time Pietrick's repair requests came to light, tensions were already running high between Mayor Clough and Pietrick. As previously stated, the McGrath report revealed that Mayor Clough had openly expressed his dissatisfaction with Pietrick's administration, had requested Pietrick's resignation, and Pietrick had refused.

{¶29} At the time of Pietrick's demotion from fire chief to the lowest rank, he had spent 27 years with the Westlake fire department, and as the trial court duly noted, other than the issue forming the basis of the instant appeal, Pietrick's service record was unblemished.

{¶30} We conclude that the trial court's reasoning for its "grossly poor judgment" finding is supported by the record; consequently, the City's interpretation of the trial court's judgment or finding is incorrect. Our review of the trial court's opinion reveals that it failed to adopt the City's finding of misfeasance, malfeasance, nonfeasance, neglect of duty, and failure of good behavior, but instead substituted that finding to one of "grossly poor judgment." This, the trial court could do under its de novo review.

{¶31} Accordingly, the City's use of *Maurer v. Franklin Cty. Treasurer*, 10th Dist. No.07AP-1027, 2008-Ohio-368, is misplaced. *Maurer* holds "[w]here

the evidence supports the board's decision, the common pleas court must affirm the board's decision and has no authority to modify the penalty." *Maurer* concludes that where the evidence supports the City's decision, the trial court must affirm. Here, the trial court held that the evidence did not support the City's findings and substituted its judgment when it held that at best Pietrick's conduct was "grossly poor judgment" that required a different penalty.

{¶32} The law supports this finding by the trial court. It is well established that administrative appeals brought pursuant to R.C. 124.34 and 119.12 are subject to trial de novo. *Wolf v. Cleveland*, 8th Dist. No. 82135, 2003-Ohio-3261. The court of common pleas may substitute its own judgment on the facts for that of the civil service commission, based upon the court's independent examination and determination of conflicting issues of fact. *Id.*, citing *Newsome v. Columbus Civ. Serv. Comm.*, 20 Ohio App.3d 327, 486 N.E.2d 174 (10th Dist.1984). A trial court must not simply determine if the ruling of the Civil Service Commission was arbitrary or capricious, the standard for appeals brought pursuant to R.C. Chapter 2506, but must evaluate the evidence anew. *Id.*

{¶33} With respect to the trial court's charge of independent review, the *Maurer* court stated: "If the common pleas court finds after its appraisal of all the evidence that reliable, probative, and substantial evidence does not support the board's decision, or the decision is not in accordance with law, the court may

reverse, vacate, or modify the board's decision." *Id.*, citing *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 407 N.E.2d 1265 (1980).

{¶34} During oral argument, the city argued that like *Maurer, Franklin Cty. Sheriff v. Frazier*, 174 Ohio App.3d 202, 2007-Ohio-7001, 881 N.E.2d 345 (10th Dist.), supports the proposition that the trial court may not modify the penalty, when it finds some fault in the employee's conduct regardless of the label. The City suggests there is no difference between "grossly poor judgment" and misfeasance, malfeasance, nonfeasance, neglect of duty, and failure of good behavior. We disagree. As previously stated, the record reveals that the Greenberg report concluded that Pietrick's conduct was not criminal and was not likely an ethical violation under the laws of Ohio. Like *Maurer, Frazier* is not supportive of the city's position.

{¶35} In *Frazier*, following an investigation of the sheriff department's internal affairs relating to alleged offenses by Frazier, a deputy sheriff, the sheriff ordered his removal from employment. Frazier appealed and an administrative law judge (ALJ) for the board determined that he had committed six of eight infractions alleged in connection with an excessive force incident. The board adopted the ALJ's findings of fact and recommended sanction of suspension instead of removal. When the sheriff department appealed the board's decision to the common pleas court, the trial court reversed the order of the board and reinstated the sheriff's removal order.

{¶36} When Frazier appealed the trial court's decision to reinstate the sheriff's removal order, the court of appeals reversed the trial court's decision and stated:

Contrary to the conclusion the common pleas court reached, the noted record evidence amply supports the ALJ's determination that "the primary reason for the severity of Appellant's discipline was [the sheriff's] perception that Appellant lied about the time and manner in which he injured his hand." Specifically, Garrity's testimony indicates the sixth and seventh grounds for appellant's removal were based on a belief that appellant lied to IAD about his hand injury. The board, through the ALJ, concluded the sheriff did not prove those grounds, and the common pleas court did not conclude otherwise. Although the evidence was clear that the unproven grounds would have resulted automatically in a penalty of removal had they been proven, no evidence indicates the other proven grounds carry such a harsh penalty. Similarly, no evidence suggests the sheriff would have removed appellant from employment based on the proven grounds alone. To the contrary, the evidence suggests the sheriff would have agreed to a 30-day suspension of appellant but for the additional allegations that appellant lied to IAD.

{¶37} In *Frazier*, unlike the instant case, evidence in the record supported the board's decision to reduce Frazier's punishment from removal to suspension because the sheriff department had not proven that Frazier was guilty of the sixth and seventh count alleged. Notably, the trial court did not conclude that the sheriff had proven counts six and seven. Given that the sixth and seventh counts were not proven, and they were the only grounds that would have justified removal, the trial court abused its discretion when it reinstated the sheriff's removal order.

{¶38} Here, as previously noted, the trial court found that Pietrick demonstrated extremely poor judgment, as opposed to committing acts of misfeasance, malfeasance, nonfeasance, neglect of duty, and failure of good behavior. The trial court's finding was consistent with the determination of the outside law firm, which concluded that Pietrick had not done anything criminal and had not done anything that was likely an ethical violation. Accordingly, the trial court acted within its discretion.

{¶39} Turning our attention to Pietrick's cross-appeal, wherein he argues that the trial court should have reinstated him to the position of fire chief, we find no abuse of discretion in the trial court's decision to place him in the position of captain. As previously discussed, the trial court did find that Pietrick demonstrated extremely poor judgment given his superior position and that the mechanics felt some sense of coercion, given their subordinate position.

{¶40} Thus, the trial court's decision is supported by a preponderance of reliable, probative, and substantial evidence. Accordingly, we overrule the City's assigned error. We also overrule Pietrick's cross-assigned error.

{¶41} Judgment affirmed.

It is ordered that appellee and appellants share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



PATRICIA ANN BLACKMON, ADMINISTRATIVE JUDGE

MELODY J. STEWART, J., and
KATHLEEN ANN KEOUGH, J., CONCUR

UNDER THE AUSPICES OF THE CIVIL SERVICE COMMISSION
WESTLAKE, OHIO

RICHARD O. PIETRICK

V.

CITY OF WESTLAKE

REPORT AND RECOMMENDATION
TRIAL HEARING OFFICER: DAVID M. PINCUS
APRIL 30, 2008

APPEARANCES

For the City

Dennis M. Clough

Rick Humiston

Robin Leasure

Ronald Janicek

Christopher Gut

Todd Priesterbach

Gary C. Johnson

Mayor

Law Clerk

Assistant Law Director

Provisional Chief

Mechanic

Mechanic

Advocate

For the Union

Richard Pietrick

Thomas M. Hanculak

Appellant

Advocate

CASE HISTORY

Richard O. Pietrick, the appellant and former Chief of the Fire Department, was hired by the City of Westlake, hereinafter referred to as the city or the Employer, on July 28, 1980 as a firefighter paramedic. He was promoted to Lieutenant in March of 1989, and was promoted to Captain in April of 1993. As a consequence of a civil service examination, the appellant was appointed by Mayor Dennis Clough to Fire Chief on November 23, 1994. He held this position until his subsequent demotion.

It should be noted that the Westlake Fire Department ordinance and the agreement between the City and the Westlake Fire Fighter Association, hereinafter referred to as the Union, provide for the appointment of one Mechanic per shift. Standards regarding retention of positions by incumbents or replacement of incumbents by new applicants do not appear in place. As such, the Fire Chief appears to have the unrestricted authority to make these appointments and reappointments without any specified qualifying standards.

These mechanic appointments, moreover, have a certain economic benefit. Mechanics receive a pay supplement of five percent (5%) above the pay received by those holding Fireman First Grade positions.

On June 6, 2007, Patrick M. Grealis, President of Local 1814, sent a letter to Pietrick. It contained the following relevant particulars:

XXX

Dear Sir,

This letter is to inform you that the current practice of having Union Members work on your personal vehicles can no longer be tolerated. It puts our Union membership in an uncomfortable position as you make the final decision on who maintains the Department's "Mechanics" title every year. The Union believes that this is a conflict of interest and not good for the morale of Fire Department.

Please note that any retaliation from this decision on the Union or its membership will be followed with an unfair labor practice and further discussion will be taken up with the safety director.

If you have any questions with regards to this request, please feel free to contact me or our Union Attorney.

XXX
(Joint Exhibit 4)

On June 13, 2007, Pietrick authored a response (Joint Exhibit 5) to Grealis' complaint. He addressed Grealis' concern by stating he would not ask a fire fighter "...to assist or advise me on any personal matter or project of this nature."

It appears that the Mayor and Safety Director, Dennis M. Clough, was also advised of Grealis' complaint. Clough contacted the law department who in turn retained the law firm of Walter and Haverfield to conduct an investigation.

After conducting an extensive investigation, Walter and Haverfield investigators authored a Client Memorandum (Joint Exhibit 6). Pietrick admitted during the course of the investigation that he did have Fire Department mechanics perform repairs on his personal vehicles over a period of time. He recalled five repair incidents conducted by Mechanic Todd Spriesterbach. These included

the following repairs: a radiator, a front end, brakes, power steering system and an alternator. Mechanic Chris Gut, moreover, examined Pietrick's lawn tractor.

The incident which served as the triggering event for the present dispute took place in May of 2007. Mechanic Spriesterbach recalled, and Pietrick confirmed, that Pietrick asked Spriesterbach to call a number of stores and compare tire prices for his vehicle. Mechanic Spriesterbach eventually advised Pietrick that he could no longer work on his vehicles.

The investigators concluded the matter should not be referred to the County Prosecutor or the Ohio Ethics Commission. Yet it was determined:

XXX

Chief Pietrick's actions in having his subordinates perform repairs on his personal vehicles under circumstances suggesting that he may having (sic) been taking advantage of his status as their superior officer represents extremely poor judgment particularly from a Department Head, and the City should considering (sic) pursuing internal remedies to punish this misconduct and to prevent future occurrences.

XXX

(Joint Exhibit 6, Pgs. 15-16)

On November 2, 2007, a Notice of Disciplinary Action and Order of Suspension, Reduction (Demotion) (Joint Exhibit 7) was issued by the Mayor. He charged Pietrick with the following misconduct:

XXX

Requesting the mechanic to perform work on your personal vehicle constitutes a violation of Rule IX, Section 1, of the Rules of the Westlake Civil Service Commission and Section 124.34 of the State of Ohio Civil Service Laws...it has been determined that you have committed acts of misfeasance, non-feasance, neglect of duty and failure of good behavior, as provided in O.R.C. 124.34 and Westlake Civil Service Commission Rule XI.

XXX

(Joint Exhibit 7, Pg. 1-2)

Pietrick was reduced (demoted) to the position of Fire Fighter and suspended without pay for thirty (30) days. On November 6, 2007, Pietrick filed a Notice of Appeal (Joint Exhibit 9) challenging the administrative decision to impose discipline.

On November 28, 2007, a pre-deprivation hearing was held by Gary A. Ebert, and independent hearing officer. He concluded that the evidence and facts were sufficient to warrant the disciplinary action (Joint Exhibit 12).

Neither party raised any substantive nor procedural issues. As such, the disputed matter is properly before the Trial Board in accordance with Westlake Civil Service Rule XI, Section 2.

THE MERITS OF THE CASE

The City's Position

The record establishes beyond any doubt that the offenses specified in the Notice of Disciplinary Action (Joint Exhibit 7) were engaged in by Pietrick. He admitted during the course of the investigation that he had work performed on his personal vehicles by mechanics while they were working for the City. Mechanics Gut and Spriesterbach detailed these repairs without any rebuttal underscoring their credibility and veracity.

Actions engaged in by Pietrick were quite egregious. The repairs in question were not minor. They involved replacing radiators, front end axles, brakes, motors, discs, new power steering systems and an alternator. Although necessary parts for these various repairs were paid for by Pietrick, he had the mechanics call vendors used by the Fire Department to shop for the lowest possible prices. Pietrick, moreover, was then able to procure these parts at the Westlake Fire Department's discounted rates.

It is the City's position that Pietrick intimidated the mechanics into doing the repair work and chasing parts for lower prices. Pietrick's position as Chief made the mechanics subservient and responsive to his repair requirements. Further implicit intimidation was engendered by a policy change implemented by Pietrick on or about the time Spriesterbach started responding to Pietrick's repair

requests. Prior to this time frame, mechanic appointments were permanent and held until the appointee decided to vacate or someone retired and a replacement was appointed. This practice as testified to by Spriesterbach, changed to a yearly appointment.

Pietrick retaliated when advised by Spriesterbach that he no longer wanted to do mechanical work on Pietrick's personal vehicles. Spriesterbach said Pietrick became highly agitated. Pietrick told Spriesterbach to advise his bargaining unit members that "there was no mechanical work to be done on any private vehicles, and that is may go as far as washing cars."

The City urged the Trial Hearing Officer not to modify the imposed penalty. It urged him to defer to the City's decision on discipline. Here, without an abuse of discretion, the Trial Hearing Officer should not set aside the penalty imposed by the City.

The Appellant's Position

O.R.C. 124.34 provides classified civil servants with tenure, and as a consequence a property interest, which provides Chief Pietrick with due process protections. As such, the City must prove by a preponderance of the evidence that it had just cause to discipline Chief Pietrick. Here, the City failed to prove the offenses in question or the propriety of the imposed penalty.

Chief Pietrick was disciplined because of an on-going struggle with the Mayor. The deteriorating relationship between Chief Pietrick and the Mayor surfaced after an audit or assessment was conducted of the Westlake Fire Department. The initial McGrath Report (City Exhibit 1) concluded Chief Pietrick had to alter his management style. A second audit (City Exhibit 2) was initiated by the same organization. The McGrath report highlighted the poor relationship between the two protagonists. It noted the Mayor lacked confidence in the Fire Chief, and that the Fire Chief had to manage the Fire Department more effectively. The Fire Chief, moreover, expressed no intention of retiring, accepting reassignment or resigning.

At some point in time, the Mayor, in fact, did ask the Fire Chief to resign. The Fire Chief refused this option. The Mayor subsequently responded by soliciting a vote of no confidence against the Chief. He went to fire stations to solicit their support.

Chief Pietrick never intentionally violated any known rule, policy or regulation dealing with repair to personal vehicles, with or without the assistance of mechanics, while not responding to emergency runs. This practice in question has been condoned for a considerable period of time without any formal complaint or grievance. In fact, no individual employed by the Fire Department had ever been cautioned or disciplined for engaging in similar acts of misconduct.

The offenses, themselves, are a bit ambiguous. The exact nature of the repairs and associated duties were never articulated. Chief Pietrick, moreover, contended the discounts he received could be obtained by any City employee.

For a number of reasons, the degree of discipline administered was not related to the seriousness of the proven offense. The repairs were not coerced but were done as favors. Spriesterbach told investigators that performance of these repairs never limited performance of his normal duties. He also maintained that the Fire Chief never used his power of appointment or reappointment to the mechanic position to influence commission of these repairs.

THE TRIAL HEARING OFFICER'S OPINION AND AWARD

From the evidence and testimony adduced at the hearing and an impartial review of the record including the parties' briefs, it is this Trial Hearing Officer's opinion that the City had just cause to demote and suspend Chief Pietrick. The actions engaged in by Chief Pietrick were egregious, substantive and reflect certain leadership failures. Notwithstanding sufficient proofs for criminal or ethical culpability under Title 29 of the Ohio Revised Code and Ohio Revised Code Sections 102.03 (D) and (F), the Fire Chief did violate Ohio Revised Code Section 124.34 for neglect of duty and failure of good behavior (Joint Exhibit 3) and related City of Westlake rules and regulations (Joint Exhibit 13).

The appellant relied heavily on the investigation and related conclusions contained in the Client Memorandum (Joint Exhibit 6) authored by the Walter and Haverfield group. The related analysis and conclusions, however, do not bind this Trial Hearing Officer, but are merely viewed as part of the record to be reviewed, rather than "the conclusive finding." The entire record reviewed by the Trial Hearing Officer is far more extensive and contextually different. Also, the just cause standard utilized by the Trial Hearing Officer requires a standard of proof which differs from those conducting an investigation.

The record clearly supports, by a preponderance of the evidence, that Chief Pietrick is guilty as charged. He freely admitted during the course of the investigation that he had Fire Department mechanics perform repairs on his personal vehicles over the course of several years. These admissions were further supported in a letter of apology and remorse (Joint Exhibit 5) sent to Grealis, and at the hearing during direct and cross-examination.

The appellant wishes to equate the actions and repairs engaged in by mechanics on his behalf with those offered other bargaining unit members. This attempt to equivocate the two situations is beyond belief. Granted, the Westlake Fire Department, like other municipal departments, has a practice properly identified by Chief Pietrick in his June 13, 2007 letter. He states in pertinent part:

XXX

As you and every fire fighter knows, it has been the practice in this department, and most all others, that fire fighters on shift can, and do, work on projects of their own choosing. Washing cars, repairing cars, reading books, minor assembly and construction projects, puzzles, games, workouts, etc. are all permissible activities outside the routine of the work day, providing there are no other work-related assignments still pending for that day. As long as individuals are on the station house property, and ready to respond as needed, the department does not restrict the activities other than by common sense.

XXX

(Joint Exhibit 5)

The record clearly discloses that Chief Pietrick violated his own "common sense" rule.

Per the mechanics' testimony at the hearing, their activities cannot be viewed by any reasonable person as mere assistance and advice. They performed major repairs and purchased parts when necessary while on the City's payroll. Even if Chief Pietrick eventually paid for these parts, he realized a major discount because the mechanics purchased parts at monthly vendors who normally engaged in business with the City of Westlake. Nothing in the record supports the appellant's view that other City employees have or did receive similar discounts. Also, no other Fire Department employee had mechanics, or any other employee, search the surrounding area for the lowest possible price for vehicle parts and set-up a pick-up location at a discounted rate.

These various activities far exceed the practice referred to by the Fire Chief in his letter of remorse (Joint Exhibit 5) and while testifying at the hearing. He clearly took advantage of his status and position for his own personal gain at a significant cost to the City.

Chief Pietrick did intimidate and coerce mechanics in engaging in these repair related activities. Coercion and intimidation can take various implicit and explicit forms. Explicit intimidation involves direct orders and negative consequences for noncompliance. Implicit intimidation, however, is less obvious but equally sinister. Oftentimes, situational contingencies are orchestrated in a manner requiring a certain course of action to avoid potential negative consequences.

Spriesterbach testified he began to perform repairs on the Fire Chief's vehicles approximately five to six years ago. On or about the same time frame, the Fire Chief changed the appointment process for mechanics. Currently, the mechanic position is a yearly appointment without any standards for appointment or retention. Prior to the change, the Chief appointed the mechanics who held the position until mechanics decided to leave or retired.

The geometry of this situation made it ripe for abuse and implicit intimidation potential. Fire Chief Pietrick held unfettered discretion in making these appointments with consequent economic ramifications. As such, mechanics were implicitly intimidated or faced negative consequences.

Spriesterbach testified these repair requirements caused him discomfort, which the Trial Hearing Officer equates as intimidation. Under direct examination the following question and response support this finding:

XXX

Question: Did you feel a type of pressure, or I don't know how better to say it, to do the mechanical work during this time frame?

Answer: Yes, sir. I felt uncomfortable.

XXX

The finding was further reinforced under cross-examination by the appellant's advocate:

XXX

Question: Todd, you felt pressured, correct?

Answer: Yes, sir.

Question: When did you feel the pressure?

Answer: On different occasions.

Question: So, it was the repetition of the request that led to the pressure?

Answer: Yes.

(Transcript page 121)

Shortly after performing repairs on the Fire Chief's Cadillac and soliciting tire prices for the Fire Chief, Spriesterbach had a meeting with the Fire chief which resulted in an explicit intimidation attempt. Spriesterbach advised Fire

Chief Pietrick "...that I did not have the time and was not willing to do any more repairs." Fire Chief Pietrick became agitated and told him to advise other bargaining unit members "...that there was no mechanical work to be done on any private vehicles and ...it may go as far as washing the cars."

This incident underscores the unfettered authority and the implicit and explicit intimidation wielded by the Fire Chief. He implicitly intimidated Spriesterbach's position as a mechanic, and explicitly intimidated the entire bargaining unit by threatening to unilaterally dispose of a long term practice.

His response to Spriesterbach's refusal to repair his vehicles also discloses the import he placed on these repair assignments. He felt he could lose the potential discounts he had received through the years, and the use of his own personal garage and mechanic.

AWARD

The appeal is denied. The City had just cause to demote and suspend Fire Chief Pietrick.

4/30/08

Chagrin Falls, Ohio



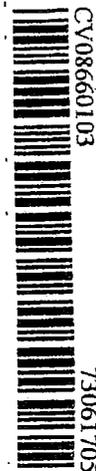
Dr. David M. Pincus
Trial Hearing Officer

IN THE COURT OF COMMON PLEAS
COUNTY OF CUYAHOGA, OHIO

RICHARD O. PIETRICK,)
)
Plaintiff-Appellant)
)
vs.)
)
CITY OF WESTLAKE CIVIL)
SERVICE COMMISSION,)
)
Defendant-Appellee)

CASE NO. CV-08-660.103

OPINION AND ORDER



José A. Villanueva, J.:

This case comes before the court on an appeal filed pursuant to Ohio Revised Code 124.34 and 119.12. The parties have briefed the issues and the court has considered all arguments. For the reasons noted below, the court affirms in part and reverses in part the decision of the City of Westlake Civil Service Commission.

PROCEDURAL POSTURE

Plaintiff-Appellant Richard Pietrick (hereinafter, "Appellant") challenges Defendant-Appellee City of Westlake Civil Service Commission (hereinafter, "Appellee") denial of his appeal after his demotion from Fire Chief of Westlake's Fire Department to firefighter and a 30-day suspension without pay.¹ In a letter dated November 2, 2007, Westlake Mayor Dennis Clough informed appellant that "you have committed acts of misfeasance, malfeasance, non-feasance, neglect of duty and failure of good behavior, as provided in R.C. 124.34 and Westlake Civil Service Commission Rule XI." The letter notified appellant that "you will be reduced (demoted) to the position of Fire Fighter and suspended without pay for 30 days."

Pursuant to procedure, appellant was entitled to request an informal hearing before the Mayor. In a letter dated November 6, 2007 sent to the Mayor by appellant's attorney, appellant

¹ During his suspension period health care benefits were not provided.

advised he would be skipping this step and appealing the decision directly to the Westlake Civil Service Commission. A pre-deprivation hearing was held on November 19, 2007. The Neutral Hearing Officer concluded that the evidence and facts presented were sufficient to warrant the disciplinary action taken by the City of Westlake.²

On November 30, 2007, an arbitration hearing was had before Arbitrator David Pincus at which time sworn testimony was presented. The arbitrator denied appellant's appeal in an opinion dated April 30, 2008. This appeal to the court of common pleas was thereafter instituted.

FACTUAL BACKGROUND

Both sides agree the dispute leading to the disciplinary action against appellant was prompted by a June 6, 2007 letter from International Association of Fire Fighters (IAFF), Local 1814, President Patrick Grealis. Grealis demanded that appellant cease the practice of having subordinate firefighters (all of whom were union members) perform maintenance on the Fire Chief's personal vehicles and those of his family members. The letter also warned appellant not to retaliate against the complaining firefighters.³

Appellant responded in a letter dated June 13, 2007. Appellant stated he had been unaware of any difficulties with the practice in question and offered an explanation. He promised the practice of requesting assistance from firefighters would cease and assured

² The pre-deprivation hearing did not involve the taking of testimony, apparently consisting of argument by counsel.

³ See Joint Exhibit 4.

President Grealis there would be no retaliation. Appellant also suggested convening a formal meeting to address the matter in more detail.⁴

Although the letter from Patrick Grealis to appellant was the immediately precipitating event leading to appellant's demotion, in truth, relations between the Mayor and appellant had already severely deteriorated prior to receipt of the letter. In fact, the Mayor and appellant had clashed on several occasions in the wake of a 2005 risk assessment of the Fire Department.⁵

This risk assessment was commissioned by the City of Westlake and conducted by an entity by the name of McGrath Consulting Group. The consultants found that the Fire Department was approaching a state of "mutual distrust" between leadership, management, and the rank and file firefighters.⁶ The risk assessment found that with few exceptions, almost everyone interviewed by the consultants recognized there was "organizational dysfunction" in the Fire Department.⁷

The consultants did not place the blame solely upon the appellant,⁸ but noted that he bore ultimate responsibility as leader of the Fire Department. The report found that the Fire Chief was a "visionary" but who also had a "huge" communications problem.⁹ The risk assessment

⁴ See Joint Exhibit 5. It appears that no such meeting between appellant and the union took place as the Mayor of Westlake initiated other steps to address the complaints.

⁵ The assessment had been requested by Appellant and the IAFF.

⁶ City Exhibit 1, p. 50.

⁷ Id. at p. 51.

⁸ "The Fire Chief has many strengths and attributes that can be beneficial to the fire department. No single individual is the cause of this ongoing problem but ultimately the responsibility of change falls clearly on the Fire Chief's ability and leadership style." Id. at p. 52. "The Fire Chief is clearly a caring individual who is passionate about fire service. The question is not about his character, but about his leadership style." Id. at p. 53. "The Fire Chief is extremely talented in creating and developing partnerships within the fire service and with other community organizations or businesses." As an example of this, the report cited the "recent consolidation of the dispatch efforts with neighboring communities" ... commenting that he "should be applauded for these efforts." Id. at p. 54.

⁹ "The fire Chief is a visionary who sees the greater picture and entrusts those below him to achieve that image." ... "There are a number of issues that the Fire Chief must address. Communication is a huge problem and not one of the Fire Chief's best attributes." Id. at p. 52.

stated that the Fire Chief ultimately had the responsibility for making necessary changes.¹⁰ The report recommended appellant address a number of issues to improve the Department.¹¹

The Mayor and appellant spoke about a number of the issues presented in the risk assessment. The Mayor suggested appellant move forward on the recommendations made by the consultants. Throughout 2006, appellant told the Mayor he had been working on the recommendations and had accomplished some of them. However, based on what the Mayor had purportedly heard through rank and file members of the Department, the situation was actually worsening. As a result, the Mayor requested McGrath do a follow-up report.

In 2006, McGrath submitted a one-year follow up progress assessment. It identified that appellant had made some advancements on issues brought up in the 2005 risk assessment. It also noted significant issues remained, including a decline in morale.¹² The progress assessment also found that the Mayor openly expressed a lack of confidence in the administration of the Department.¹³ The Mayor asked appellant to resign. Appellant refused.

Thus, it was into this atmosphere of tension and acrimony that the letter from the IAFF President Grealis was received. On advice of the City's law department, the Mayor engaged outside counsel to investigate the matter. Attorney Jonathan Greenberg was hired to conduct the investigation and subsequently issued a detailed written report. (Hereinafter, the "Greenberg Report").¹⁴

¹⁰ The report noted that, "Regardless of who is at fault, the Fire Chief must lead the organization out of dysfunction and create a cohesive team." *Id.* at p. 52.

¹¹ *Id.* at 53.

¹² City Exhibit 2, p. 42

¹³ *Id.*

¹⁴ Joint Exhibit 6.

In interviews of Department Mechanics undertaken by Greenberg investigators, Todd Spriesterbach stated he was first asked to repair appellant's personal vehicles several years prior. The vehicles were brought onto firehouse property for the repairs. Over a period of five to six years, Spriesterbach performed approximately six repair jobs for appellant. Although he agreed to do the repairs, Spriesterbach complained to others in the department about the requests. He stated that the requests made him feel uncomfortable.

Spriesterbach acknowledged appellant never used orders or intimidation to have the repairs done. However, since the annual appointment process for selecting a mechanic was vested in appellant, he did sense a need to keep the Fire Chief happy in order to retain his position.¹⁵ It was not until years after the first request to perform repair work for appellant that Spriesterbach formally objected.¹⁶

Another Department Mechanic, Chris Gut, stated he was asked to perform repairs on appellant's lawn tractor.¹⁷ Once again, the machine was brought onto firehouse property. Appellant "insisted" that Gut tear down the engine to confirm the lawn tractor had a broken rod, even though Gut informed appellant this was obvious from external examination.¹⁸ Gut stated he felt appellant wanted him to purchase the parts needed to fix the broken rod. Gut informed appellant that he did not have time to make the purchase or complete the repairs. The disassembled lawn tractor remained on the premises for some period of time but was eventually removed without the repairs being completed.¹⁹

¹⁵ Joint Exhibit 6, p. 6; City Exhibit 3, p. 6.

¹⁶ See Joint Exhibit 6, p. 5.

¹⁷ Id. at p. 8.

¹⁸ Id.

¹⁹ The third Department Mechanic was never asked by appellant to perform any repair work.

Despite the testimony of the mechanics that they were uncomfortable with the Fire Chief's requests for repairs, the investigation revealed it was common at the Westlake Fire Department for firefighters to ask Department Mechanics for assistance.²⁰ However, the testimony provided to Greenberg and at the subsequent evidentiary hearing established that this typically consisted of providing advice regarding how to conduct a repair or minor assistance trouble shooting a problem. The person seeking the advice would then complete repairs himself. The practice did not involve firefighters or other employees simply dropping off automobiles and other mechanical devices for mechanics to repair, as appellant had apparently expected.²¹

The Greenberg investigation concluded that appellant's conduct was neither criminal nor likely an ethical violation under Ohio law. Nevertheless, it did find "wrongdoing" by appellant because his superior position in the chain of command made it inappropriate to ask the Department Mechanics to work on his personal vehicles.²² The report recommended that the City consider punishing appellant through internal remedies.²³

Based on Greenberg's investigation, in November 2007 the Mayor issued a Notice of Disciplinary Action²⁴ leading to appellant's suspension and demotion. Administrative proceedings before the Westlake Civil Service Commission and the arbitrator's hearing followed. The instant appeal ensued.

²⁰ Joint Exhibit 6, p. 12

²¹ Although at the arbitrator's hearing, Chief Pietrick testified somewhat differently than the mechanics, the evidence on the whole fairly establishes the substance of the assertions made by the Department Mechanics.

²² Joint Exhibit 6, pp. 14-16.

²³ Id. at pp. 15-16.

²⁴ See Joint Exhibit 7.

DISCUSSION

An appeal to a common pleas court on questions of law and fact from a municipal civil service commission's decision, taken pursuant to R.C. 124.34(C), is a trial de novo. *Raizk v. Brewer*, 12th Dist. Nos. CA2002-05-021, CA2002-05-023, 2003-Ohio-1266, ¶ 25; citing *Cupps v. Toledo*, 172 Ohio St. 536, 179 N.E.2d 70 (1961), paragraph two of the syllabus (referring to R.C. 124.34's predecessor statute, R.C. 143.27).

In a trial de novo, the common pleas court may "substitute its own judgment on the facts for that of the commission, based upon the court's independent examination and determination of conflicting issues of fact." *Chupka v. Saunders*, 28 Ohio St.3d 325, 327, 504 N.E.2d 9 (1986), quoting *Newsome v. Columbus Civ. Serv. Comm.*, 20 Ohio App.3d 327, 329, 486 N.E.2d 174 (1984). "The 'trial,' in a trial de novo, is the 'independent judicial examination and determination of conflicting issues of fact and law, notwithstanding the evidence before the appellate court consists of the record of the proceedings in the lower tribunal.'" *Chupka, supra*, at 327, 504 N.E.2d 9, quoting *Lincoln Properties v. Goldslager*, 18 Ohio St.2d 154, 248 N.E.2d 57 (1969), paragraph one of the syllabus.²⁵

Chapter 124 of the Ohio Revised Code provides for the manner in which firefighters may be disciplined. It states that:

"No officer or employee shall be reduced in pay or position, fined, suspended, or removed, or have the officer's or employee's longevity reduced or eliminated, except as provided in section 124.32 [transfer to similar positions] of the Revised Code, and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of any policy or work rule of the officer's or employee's appointing authority, violation of this chapter or the

²⁵ It should be noted that a trial de novo does not require the court to hold a new evidentiary hearing on the matter. The R.C. 119.12 hearing may be limited to a review of the record, or, at the judge's discretion, the hearing may involve the acceptance of briefs, oral argument and/or newly discovered evidence. *Ruck v. City of Cleveland*, 8th Dist. No. 89564, 2008-Ohio-1075, at ¶ 23. In the instant case, the parties filed legal briefs and a record of proceedings conducted prior to appeal. They also presented oral arguments to the court.

rules of the director of administrative services or the commission, any other failure of good behavior, any other acts of misfeasance, malfeasance, or nonfeasance in office, or conviction of a felony." R.C. 124.34(A).

Revised Code 124.34(C) sets forth the procedure for reduction, suspension, removal and demotion of public employees by administrative agencies and the public employee's right to appeal to the civil service commission and common pleas court.

As a preliminary matter, the burden is on appellee, as the appointing authority, to demonstrate that the allegations made against appellant warranted the disciplinary action taken by the Mayor.²⁶ Appellee must prove by a preponderance of the evidence that the charges against appellant were true and the discipline taken warranted. *Cupps, supra*, at 539, 179 N.E.2d 70 ("he who alleges must prove"); *Ruck, supra*, at ¶ 85; *Giannini, supra*, at *11.²⁷

The court has carefully reviewed the record in this case. It has given due consideration to the briefs filed by the parties, the applicable case law and their oral arguments.

The evidence supports a finding that appellant's conduct in having Department Mechanics make repairs on his personal vehicles and machinery was improper. The record shows that appellant utilized the department mechanics in a manner different from how other peer-to-peer services were typically (and willingly) provided. There is no support in the record that other firefighters or employees brought their personal vehicles onto firehouse property with the expectation mechanics would simply make repairs as if they were the neighborhood garage. The record established more of a practice of mutual aid and support, during which advice and troubleshooting may have been provided.

²⁶ Appellant argues that appellee must also demonstrate "just cause" for his demotion and suspension. However, the term "just cause" does not appear in the cases cited by appellant nor any of those reviewed by the court regarding appeals under R.C. 124.34 and 119.12. Appellant is incorrect that just cause is the standard.

²⁷ For *Ruck*, a residency case, the burden was initially on the public employee to prove he lived in Cleveland. This was as set forth in Cleveland's Civil Service Rules and does not change the fact that the burden lies with appellee in this case.

Although the Department Mechanics testified they acquiesced in performing repairs for appellant over a period of several years without lodging complaints, they also testified to feeling some coercion because of their subordinate position. No matter, on these facts appellant demonstrated extremely poor judgment, reasonably drawing his leadership of the Fire Department into question. That complaints were withheld for years may tempt an argument that this be regarded as a minor matter. The evidentiary record supports the contrary argument: that appellant's subordinates obliged in acceding to his requests for so long because, as they testified, they felt powerless or vulnerable to protest due to appellant's superior position. In this context, the implicit "coercion" experienced by the mechanics should not be discounted or minimized.

Yet, against this instance of grossly poor judgment, other facts suggest that the discipline meted out was excessive. Firstly, there were no written work rules or policies in place that were violated. No prior complaints had been lodged.²⁸ No specific directives or guidelines discouraging such practices were ever issued.²⁹ Department Mechanics were not expressly told by appellant they were required to perform the repairs in question. No negative work action was ever taken against any one of them for not fulfilling appellant's requests.³⁰ Finally, when a complaint was formally lodged by the union, appellant readily promised to cease the practice and offered to meet with the union to discuss the matter in greater detail.

It is apparent that at the time appellant's longstanding repair requests came to light, tensions were running high between the Fire Department and the Mayor's office. The record is

²⁸ The record does allude to some peer-to-peer grumblings over the years but these did not seem to have percolated their way up the chain of command. See Joint Exhibit 6, p. 5; City Exhibit 3, p. 5; Arbitration Hearing Transcript, p. 129.

²⁹ The Mayor's reference to at one time having read in newspapers about perhaps similar difficulties the City of Lakewood was having with its employees and expressing his hope that Westlake employees were not similarly engaged did not become a directive or published admonition.

³⁰ This was the case although Spriesterbach testified that appellant "became agitated" during a discussion in which Spriesterbach told appellant he did not have the time and was not willing to do any more repairs. Arbitration Hearing Transcript, pp. 119-120.

replete with references to the Mayor's displeasure with Chief Pietrick; something the Mayor readily acknowledged. As already noted, he had asked for appellant's resignation in the aftermath of the McGrath follow up assessment and had been pointedly rebuffed. Nevertheless, the Mayor apparently chose not to discipline appellant on that basis.

Appellant's tenure with the Westlake Fire Department must also be considered. Appellant had worked his way up through the ranks during a 25-year career being promoted to lieutenant, then to captain and finally, to the top position of Fire Chief. He served twelve years in that position before his demotion. Chief Pietrick had received no prior reprimands or other disciplinary action prior to his demotion. In this respect, he had an otherwise unblemished record. And he testified at hearing regarding his efforts (albeit, uneven) to fulfill the recommendations of the McGrath Report.³¹

The record is clear that appellant's demotion was not based on the McGrath audit and follow up assessment.³² Standing alone, the circumstances surrounding the repair of appellant's automobiles and those of his family members merited discipline. However, demotion to the lowest rank in the Department was unwarranted.³³ While the City of Westlake may have been justified in stripping appellant of his position as Fire Chief, reducing his rank below that of Captain was not.³⁴ Under the totality of circumstances, the demotion to firefighter was unreasonable and excessive.

³¹ It should be noted that appellant disagreed with some of the recommendations contained in the McGrath Report but the one year assessment showed he had, in fact, made progress in addressing some of the tasks enumerated therein.

³² To emphasize this point further, at no point during the disciplinary or appeals process is the McGrath Report or assessment asserted as the basis for the disciplinary action taken against appellant.

³³ The ranking system at the Westlake Fire Department goes from firefighter to lieutenant to captain to assistant chief and finally to chief. Arbitration Hearing Transcript, p. 136.

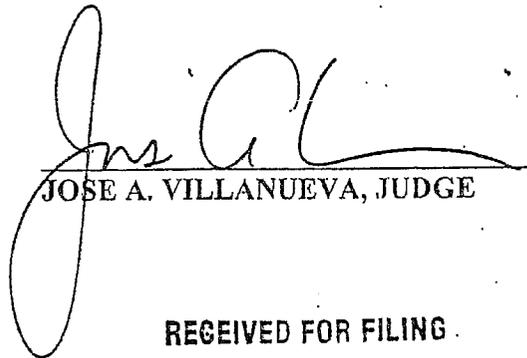
³⁴ Obviously, a reduction to Assistant Fire Chief arguably would leave appellant in line to assume the Fire Chief position in crisis and thus, would be inappropriate. However, the next rank Captain presents no such dilemma.

CONCLUSION

For the foregoing reasons, the decision of the City of Westlake's Civil Service Commission is affirmed in part and reversed in part.³⁵ The court finds that appellant's suspension without pay for 30 days and his demotion from the position of Fire Chief are supported by the record. However, his demotion to the position of basic firefighter is reversed and the City of Westlake is ordered to reinstate appellant to the rank of Captain with full seniority, back pay and commensurate benefits.

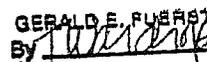
IT IS SO ORDERED.

3/26/12
DATE


JOSE A. VILLANUEVA, JUDGE

RECEIVED FOR FILING

MAR 26 2012

GERALD E. FUERST, CLERK
By  Deputy

| | |
|--|---|
| THE STATE OF OHIO Cuyahoga County | } SS. GERALD E. FUERST, CLERK OF THE COURT OF COMMON PLEAS WITHIN AND FOR SAID COUNTY. |
| HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND COPIED FROM THE ORIGINAL <u>660103</u> | |
| NOW ON FILE IN MY OFFICE | |
| WITNESS MY HAND AND SEAL OF SAID COURT THIS <u>19</u> <u>12</u> | |
| DAY OF <u>April</u> | A.D. 20 <u>12</u> |
| GERALD E. FUERST, Clerk | |
| By  | Deputy |

³⁵ As noted previously, in an appeal de novo the court may "substitute its own judgment on the facts for that of the commission, based upon the court's independent examination and determination of conflicting issues of fact" and either affirm, disaffirm, or modify the action taken by the commission. See *Chupka, supra*, 504 N.E.2d 9; see also *Raizk, supra* (trial court vacated a portion of the commission's order restricting demoted fire chief from seeking promotion to the his former position for 180 days in a case finding mitigating factors); *Hostiuck v. Gertz*, 1st Dist. No. C-840521, 1985 WL (July 10, 1985) (trial court disagreed with disciplinary actions of demoting a police chief to the rank of lieutenant and suspending him for ninety days without pay imposed by the civil service commission and restored appellant to the position of chief and reduced his suspension to five days).

CERTIFICATE OF SERVICE

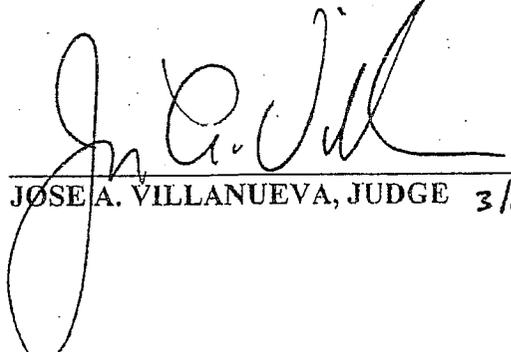
A copy of this **Opinion and Order** was sent by ordinary U.S. mail on this 26th day of

March 2012 to:

Joseph W. Diemert, Jr.
Counsel for Appellant
Joseph W. Diemert, Jr. & Associates Co., L.P.A.
1360 S.O.M. Center Road
Cleveland, OH 44124

And

Gary C. Johnson
Counsel for Appellees
Johnson, Miller & Schmitz, L.L.P.
1001 Lakeside Avenue, Ste. 1700
Cleveland, OH 44114



JOSE A. VILLANUEVA, JUDGE 3/26/12