

ORIGINAL

IN THE SUPREME COURT OF OHIO

RICHARD O. PIETRICK,

Appellee

v.

CITY OF WESTLAKE,  
CIVIL SERVICE COMMISSION, et al.

Case No. 2013-0052

On Appeal from the Eighth District  
Court of Appeals, Cuyahoga County,  
Ohio

Court of Appeals Case No. 98258

APPELLEE RICHARD PIETRICK'S MEMORANDUM IN RESPONSE TO  
MEMORANDA IN SUPPORT OF JURISDICTION

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# 1. STATEMENT OF APPELLEE'S POSITION AS TO WHETHER THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

Appellants City of Westlake and its civil service commission (collectively "the City") premise their argument that this case is of public or great general interest on the confounding misconception that the court of appeals decision somehow requires that 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." Amicus Curiae the Ohio Municipal League ("OML") apparently holds the same misconception and also incorrectly suggests that this case is of public or great general interest due to OML's inference that "the trial court was clearly concerned that the disciplinary penalty rank issued by the City did not adhere to a progressive discipline structure." None of these concerns apply to the decision on appeal and there has, thus, not been an adequate showing that this case is of the kind of public or great general interest to warrant this Court's consideration of the merits.

The court of appeals decision is much more simplistic and specific to the facts presented than the City and OML allege in their jurisdictional memoranda. The decision was limited to a determination that the trial court did not abuse its discretion by finding, following a *de novo* review of the administrative record on appeal, that the evidence did not sufficiently support the discipline imposed by the City on Appellee Richard Pietrick ("Pietrick"). Only under a grossly over-expansive reading of the released decision, accompanied by inferences and innuendoes not capable of being drawn from said decision, might the propositions of law suggested by the City and OML arguably be cause for concern.

This case is no different than countless administrative appeals processed through the courts of this state every year. The trial court reviewed the record and utilized its discretion in determining whether to affirm, reverse, vacate or modify the judgment of the civil service commission. The City and OML might strongly disagree with the ultimate decision reached, but such disagreement does not cause this case to rise to the level of public or great general interest necessary to invoke this Honorable Court's jurisdiction.

**2. ARGUMENT IN SUPPORT OF THE APPELLEE'S POSITION REGARDING EACH PROPOSITION OF LAW RAISED IN THE MEMORANDA IN SUPPORT OF JURISDICTION**

**a. The City's Proposition of Law No. 1 and OML's Proposition of Law No. 2:**

Civil service employees in Ohio appealing an adverse decision of a municipal civil service commission have the option of filing their administrative appeals pursuant to either Chapter 119 (and Chapter 124 when applicable) or Chapter 2506 of the Ohio Revised Code. Cf. Crocket v. Robinson (1981), 67 Ohio St.2d 363, 365. Pietrick filed his appeal pursuant to Ohio Revised Code Chapters 119 and 124. Subsection C of R.C. 124.34 applies only to police officers and firefighters in the classified civil service and provides added discretion and latitude in the judicial review applicable to administrative appeals for adverse employment actions taken against such employees.

In R.C. 124.34(C) appeals, "[a] court of common pleas is required to conduct a trial *de novo* of the proceedings held before a civil service commission." See *Ward v. City of Cleveland* (Ohio App. 8 Dist. 2002), Cuyahoga App. No. 79946, 2002-Ohio-482, citing *Cupps v. Toledo* (1961), 172 Ohio St. 536, at ¶ 2 of the syllabus. "The evidence must be considered anew as if there had been no proceeding before the commission." *Id.*,

citing *Lincoln Properties, Inc. v. Goldslager* (1969), 18 Ohio St.2d 154. Accordingly, **the common pleas court owes no deference to the findings and judgment of the civil service commission and may substitute its own judgment based upon its own independent examination and determination of the evidence in the record.** *Id.*, citing *Newsome v. Columbus Civ. Serv. Comm.* (Ohio App. 10 Dist. 1984), 20 Ohio App.3d 327.

In this case, the trial court conducted a trial *de novo* and, based upon its independent examination of the evidence in the record, decided to substitute its own judgment for that of the civil service commission. Given the evidentiary record, the court of appeals found no abuse of discretion in the trial court doing so. *One* of the *various* considerations was the absence of any criminal act or ethical violation, as confirmed by the City's own investigator. This was hardly the only or determinative consideration, as the City and OML would have this Court believe. Other considerations included:

- Pietrick did not violate any written rule or policy;
- No specific directives or guidelines discouraging the long-standing repair practices were ever issued;
- The mechanics were never ordered or otherwise instructed to perform the repairs at issue;
- In the instances when the mechanics, for whatever reason, communicated that they could not or would not comply with the request, Pietrick took no adverse employment action against them;

- When the Union did finally make an objection to the practice, Pietrick immediately ceased making any such requests and offered to meet with the Union to address any concerns.

The trial court also rightfully took into account that the Union's objection was made at a time when tensions were running high and that these tensions were particularly apparent between the Mayor and Pietrick. As acknowledged by the trial court, the Mayor obviously had other motivations for removing Pietrick from his position as fire chief, although the only basis for the demotion which he chose to pursue was the issue relative to the mechanics raised by the Union. The trial court further considered Pietrick's tenure with the fire department and dedicated service to the people of the City of Westlake, and correctly noted the absence of *any* prior discipline in Pietrick's unblemished record of service.

In addition to the reasons explicitly cited by the trial court, the record on appeal clearly establishes why the life-altering and career debilitating demotion imposed by the City was not warranted under the circumstances. Pietrick had absolutely no knowledge that requesting a mechanic to assist in the repair of his personal vehicle would result in him losing everything he has worked so hard for over the past 25 years and cause him such monumental economic harm.

The record also establishes that the actions alleged to be the basis for discipline in no way interfered with the orderly, efficient, and safe operation of the Fire Department. Notably, the only time an objection to the practice was ever raised was during a period of high tension between the Union and Pietrick which boiled over into the Union's letter which, in turn, triggered the Mayor's involvement. While Pietrick subsequently admitted

that he might have made an error in judgment, it was all in the family atmosphere of the fire house where firefighters help other firefighters with various personal issues.

The trial court's findings closely mirror the findings of the City's own investigator, Attorney Jonathan Greenberg. The investigative report confirmed that the mechanics were never ordered to perform any of the repairs, and that the repairs were done as a favor. The mechanics also admitted that making the repairs did not interfere with their normal routine duties for the fire department. The mechanics further acknowledged that Pietrick never suggested or intimated that, if the repairs were not performed, their mechanic designation would not be renewed. Moreover, when the Union objected to the practice, Pietrick apologized for any perceived impropriety and honored the Union's wishes without protest or delay.

The City's investigative report further found, and the courts below merely considered, that there were no criminal or ethical violations under Ohio law uncovered by the investigation, noting the lack of sufficient evidence suggesting the use of authority to force the mechanics to make the repairs. As indicated in the report, the evidence as to such alleged intent is, at best, highly circumstantial. The investigator concluded it is virtually impossible to make any informed judgment about the repairs being of such value as to manifest a "substantial and improper influence."

Admittedly, the investigator did suggest some level of poor judgment on Pietrick's part. However, the question for the reviewing courts then became whether or not a tentative finding of "poor judgment" in the face of such an exemplary career in the civil service warrants a demotion from the highest to the lowest grade position in the fire department, along with a 30-day suspension. The trial court, exercising its discretion,

obviously found that it did not and the court of appeals determined that the trial court acted within its discretion in making that decision. The trial court *did*, however, conclude that some discipline was warranted and modified the penalty to uphold the 30 day suspension. The trial court also declined to reinstate Pietrick to his position as fire chief, as he had requested in his appeal. Instead, the trial court ordered Pietrick demoted to the rank of Captain, which is still a significant punishment.

In the end, Pietrick still lost his position as fire chief and was still suspended without pay for 30 days despite no finding of a criminal or ethical violation. The City and OML conveniently forget or ignore that the court of appeals also affirmed those decisions in response to Pietrick's cross-appeal. Therefore, no logical argument can be made that the court of appeals decision requires that 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." Pietrick did not engage in any criminal or unethical behavior, as now confirmed by the City's own investigator, the trial court, and the court of appeals, but was disciplined nonetheless.

**b. The City's Proposition of Law No. 2:**

In its second proposition of law, the City again misrepresents the scope of the decisions under review. The City continues to ignore the simple fact that discipline against Pietrick was *upheld*. While the trial court *modified* the decision of the civil service commission, it did *not* reverse or vacate the decision as would be authorized under R.C. 119.12. Accordingly, the trial court's finding, as affirmed by the court of appeals, is that discipline was indeed warranted under R.C. 124.34.

Revised Code section 119.12 authorizes a court of common pleas to use its discretion to “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.” The trial court carefully examined the evidence and decided to modify the order to a degree of discipline it found to be supported by reliable, probative, and substantial evidence. The fact that the trial court owed no deference to the findings of the civil service commission, and was free to substitute its own judgment for that of the civil service commission, only lends credence to the court of appeals decision finding no abuse of discretion.

Regardless of how the City attempts to twist the decisions on appeal to brand them as something they are not, there was more than adequate cause to determine that the civil service commission’s decision (to uphold the discipline imposed by the Mayor) was not supported by the requisite degree of evidence. The administrative action under review was not simply limited to whether Pietrick’s conduct merited some degree of discipline. The trial court was also within its discretion to examine whether the degree of discipline imposed was warranted by the conduct meriting discipline. In the end, the trial court held that the discipline issued was not warranted by the evidence and modified the adverse employment action to reflect that finding in accordance with the statutory authority granted to reviewing courts under such circumstances.

**c. OML’s Proposition of Law No. 1:**

In OML’s first proposition of law, it is suggested (yet hardly established) that the trial court’s decision somehow rested solely on a lack of progressive discipline leading up to the discipline at issue. Certainly, the trial court did consider the fact that Pietrick had

no disciplinary history through the various ranks he held in his decades with the fire department, but the trial court's decision is much more comprehensive and detailed than that. Indeed, the trial court considered several factors and the lack of disciplinary history was simply one factor it took into account while reviewing and weighing the evidentiary record.

Would OML actually have this Court believe that a disciplinary history replete with reprimands and suspensions would not be relevant to the very same inquiry? Just as a long history of discipline demonstrates a lack of fitness for duty, a civil service file spanning over several decades yet lacking even the hint of any conduct worthy of discipline suggests quite the opposite.

Moreover, this case is somewhat unusual as the people of the City of Westlake, through their charter, have elected to make their fire chief a member of the classified civil service. The fire chief, thus, does not serve at the pleasure of the appointing authority (the mayor). The mayor, therefore, cannot remove the fire chief without cause. Many courts and arbitrators have issued varying tests to determine whether 'cause' was established for a given adverse employment action. Each and every generally accepted and respected test for determining whether 'cause' has been established by the employer takes into consideration the past disciplinary history of the employee. Again, it is simply a consideration and not the determining factor, as it may or may not be under certain collective bargaining agreements. The relevance and weight to be given to any finding of past disciplinary history or lack thereof generally depends on the circumstances. Here, the lack of disciplinary history only further established that the discipline imposed was propelled by the improper and ulterior motives of the Mayor.

Respectfully submitted,



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### **CERTIFICATE OF SERVICE**

A copy of the foregoing Memorandum in Response has been sent by regular U.S.

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