

IN THE SUPREME COURT OF OHIO

ORIGINAL

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.	:	

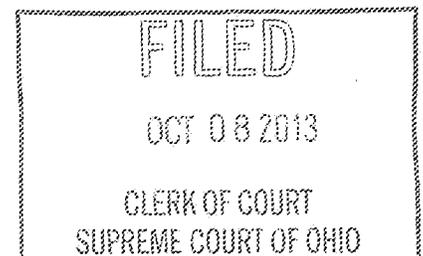
REPLY BRIEF OF APPELLANTS WESTLAKE CIVIL SERVICE COMMISSION
AND CITY OF WESTLAKE

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)
Diemert & 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
tmhanculak@aol.com
dapowell@diemertlaw.com

COUNSEL FOR APPELLEE, RICHARD O. PIETRICK



Philip Hartmann, Esq. (#0059413) (COUNSEL OF RECORD)
Stephen J. Smith, Esq. (#0001344)
Yazan S. Ashrawi, Esq. (#0089565)
Frost Brown Todd LLC
10 West Broad Street, Suite 2300
Columbus, Ohio 43215
Telephone (614) 464-1211
Fax No. (614) 464-1737
phartmann@fbtlaw.com
ssmith@fbtlaw.com
yashrawi@fbtlaw.com

John Gotherman, Esq. (#0000504)
Ohio Municipal League
175 South Third Street, #510
Columbus, Ohio 43215-7100
Telephone (614) 221-4349
Fax No. (614) 221-4390
jgotherman@columbus.rr.com

COUNSEL FOR AMICUS CURIAE, THE OHIO MUNICIPAL LEAGUE

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW	1
Appellee’s Merit Brief contains several misstatements of the testimony and facts, takes testimony out of context and makes factual assertions not supported by the record	1
The Applicable Standard of Review.....	10
Appellants’ Proposition of Law No. 1: Criminal or unethical conduct is not a pre-requisite to a finding that a public employee has engaged in neglect of duty or failure of good behavior pursuant to R.C. §124.34.....	13
Appellants’ Proposition of Law No. 2: Regardless of the term of art used to describe the conduct subject to discipline, the Court of Common Pleas upheld the Appellants’ determination that Appellee engaged in neglect of duty and/or failure of good behavior.	13
CONCLUSION.....	15
PROOF OF SERVICE.....	16
	<u>Appx. Page</u>
APPENDIX.....	1
<u>UNREPORTED CASES: STATUTES & REGULATIONS:</u>	
J – <i>Sandusky v. Neusse</i> , 6 th Dist. No. E-10-039, 2001-Ohio-6497	2
K – <i>Baron v. Civil Service Board of the City of Dayton, et al.</i> , 2 nd Dist. No. 25273, 2012-Ohio-6179.....	17

TABLE OF AUTHORITIES

Page

CASES

Baron v. Civil Service Board of the City of Dayton, et al., 2nd Dist. No. 25273, 2012-Ohio- 6179 12

Bartchy v. State Bd. of Edn., 120 Ohio St.3d 205, 2008-Ohio-4826, 897 N.E.2d 1096..... 11

Sandusky v. Neusse, 6th Dist. No. E-10-039, 2001-Ohio-6497 2

STATUTES

R.C. §119.12 11, 12

R.C. §124.34(A)..... 11

R.C. §124.34(C)..... 11, 12, 13

ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

Appellee's Merit Brief contains several misstatements of the testimony and facts, takes testimony out of context and makes factual assertions not supported by the record.

A careful reading of Appellee's Merit Brief is necessary as Appellee has several important misstatements of the facts, asserts facts which are wholly unsupported by the record and takes testimony offered out of context. In addition, Appellee either intentionally or accidentally wholly ignores many findings of the trial court as to the testimony and evidence in the record. Appellant shall address several of the more prominent inaccurate statements and assertions made by Appellee. Throughout Appellee's brief, he interjects commentary without proper factual support from the record in an effort to paint a more sympathetic picture of a Chief who, charged with the supervision and orderly and efficient functioning of his subordinates, regularly called upon them to provide him with personal automotive repair services on City time. While as City taxpayers we are required to obtain private auto mechanics to repair our vehicles, often at great personal expense, he was utilizing the City of Westlake's Fire Department as his personal automobile repair shop. Appellee's motivation for this misleading briefing strategy is his concern that this Court will recognize his conduct for what it is: egregious misconduct which demonstrates that he is entirely unsuitable for a leadership position, and that the City was justified in its determination. A review of Appellee's mischaracterization and misstatements are instructive, as set forth infra.

On Page 3 of the Appellee's Merit Brief, he states that the City fails to provide any evidence of prior discipline. Though proof of prior discipline is unnecessary in the instant matter (see Appellants' argument on Pages 23 and 24 of its Merit Brief), Appellants did not need to provide additional evidence of prior discipline when Appellee readily admits in his testimony

before the Commission that he received letters of reprimand and disciplinary warnings. (Supp. 142, 143, Tr. 142, 143.)

On Page 4 of his Merit Brief and prominent elsewhere throughout his Merit Brief, Appellee attempts to mislead the Court into thinking that Appellee was somehow deprived of his due process rights by the introduction of evidence at the Civil Service Commission hearing regarding the two Audit Reports. Appellee attempts, by citing *Sandusky v. Neusse*, 6th Dist. No. E-10-039, 2001-Ohio-6497 (Appendix J), to mislead the Court into thinking that his discipline was upheld on grounds other than those set forth in the Mayor's Notice of Discipline. This is simply not the case and *Sandusky, supra.* is not relevant to this matter. Though evidence regarding the two audits of the Fire Department was introduced at the Civil Service Commission hearing before Hearing Officer Pincus, it was Pincus' responsibility when considering the evidence before him to determine if the same was credible and/or even relevant. This is not a case of discipline confined to the Greenberg report or the Audit Reports. Notably absent from Pincus' holding is any reference to or reliance upon the Audit Reports. (Supp. 428-433, Tr. 428-433.) Clearly, the Hearing Officer, who was privy to the actual testimony of the parties, disagreed with Appellee regarding his unfounded claims that the City and/or Mayor had an ulterior motive for disciplining Pietrick. Along with Pincus, both the trial court and court of appeals found some form of discipline to be appropriate.

Appellee received all due process required. A pre-deprivation hearing was held before Gary Ebert, Esq. and a full Civil Service Commission hearing was conducted in accordance with law before respected Arbitrator and Hearing Officer, David Pincus. Appellee was provided full due process and neither the trial court nor the court of appeals reversed the Commission's

determination based on Appellee's due process claims. Appellee's allegations regarding an alleged ulterior motive by the City or the Mayor are not supported by the record.

Appellee alleges on Pages 26 and 27 of his Merit Brief that the lack of progressive discipline established that the discipline imposed was driven by an improper and ulterior motive. Appellee's claim is unfounded and quite to the contrary as at no step of this process was it determined that the discipline was imposed for an improper or ulterior motive. The Court should not fall prey to Appellee's continued attempts to gain sympathy for his inappropriate actions. The Mayor disciplined Pietrick for using fire department mechanics on City time to repair his own personal vehicles. Pincus and the Civil Service Commission upheld the Mayor's discipline for the same inappropriate behavior. The trial court and the court of appeals further found that Pietrick's behavior was a violation of the required conduct of a civil service employee. The trial court Opinion clearly states, "the record is clear that Appellant's (Pietrick) promotion was not based on the McGrath audit and follow up assessment. Standing alone, the circumstances surrounding the repair of Appellant's (Pietrick) automobiles and those of his family members merited discipline." (See Appendix D, Page 43.)

Appellee, on Pages 5 and 6 of his Merit Brief, attempts to downplay Pietrick's "extremely poor judgment" by highlighting that he apologized for his inappropriate actions and promised to cease his use of City employees on City time to repair his personal vehicles. In addition, Appellee finds there to be some merit in the fact that the letter from the Union to Pietrick received by the Mayor was a carbon copy. The method in which the Mayor was made privy to the situation, be it by direct letter or carbon copy, is irrelevant. The Mayor, once on notice that inappropriate conduct has occurred cannot ignore the same merely because the information presented to him was by way of carbon copy. That Pietrick admitted his

wrongdoing and apologized, promising to never again use the City as his personal repair shop, though an appropriate response when one is actually guilty of the same, does not negate the need for discipline.

On Page 10 of his Merit Brief, Appellee states that Spriesterbach did not repair brakes on his black Chrysler. Pietrick claims he had proof of receipt that the brakes were repaired by an outside mechanic, but he never introduced the same into evidence. Hearing Officer Pincus found Spriesterbach's testimony regarding the Chrysler repairs to be the more credible testimony. (Supp. 162, Tr. 162.)

On Page 10 of his Merit Brief, Appellee states that Spriesterbach did not file a complaint or report the situation "until pressured to do so by the Union". Appellee cites no transcript support for this statement as none exists. At no time during the hearing did anyone testify that Spriesterbach felt pressure from the Union to complain about the improper behavior. Pietrick misstates his own testimony on Page 12 of the Merit Brief by stating Spriesterbach was "pressured" by the Union to "complain". What actually occurred was stated during Pietrick's testimony on Page 152 of the transcript: Spriesterbach told him, "they don't want me to help you with anything." (Emphasis supplied.) (Supp. 152, Tr. 152.) Spriesterbach, per Pietrick's testimony, never stated that he felt "pressure to complain" about Pietrick, but that the Union had asked Spriesterbach to stop helping Pietrick repair his personal vehicles on City time. Spriesterbach testified that he "verbally complained frequently to his shift members" regarding Pietrick's requests (Supp. 129, Tr. 129) and that some Union members were objecting long before tensions rose between Pietrick and the Union. (Supp. 126, Tr. 126.) Quite to the contrary, as supported by the testimony, the "pressure" Spriesterbach felt was not from the Union demanding he complain, but from Pietrick himself as Spriesterbach made it clear in his

testimony that he felt “pressured” by Pietrick on different occasions based on the repetition of the requests. (Supp. 121, Tr. 121.) It is only natural that Spriesterbach and the other similarly situated department members would be tentative regarding formally complaining about an inappropriate use of City resources by the very individual who yearly holds authority to deny them the mechanic appointment and corresponding pay increase. The trial court found that the evidence supported the claim that the subordinates, including Spriesterbach, obliged to Pietrick’s requests for so long because they felt “powerless” or “vulnerable” to protest due to his superior position. (See Appendix D to Merit Brief, Page 42.)

Appellee misstates Spriesterbach’s testimony on Page 11 of his brief regarding pricing for parts as requested by Pietrick. Spriesterbach did not state as alleged by Appellee that “someone might ask him to call around”. (Emphasis supplied, Appellee’s Merit Brief, Page 11, Line 8.) What Spriesterbach actually stated as set forth on Pages 117 and 118 of his testimony was as follows:

- Q. Okay. Aside from doing these mechanic jobs, were there occasions when the chief would come to you and want you to buy things for him or order things through the fire department or however you phrase it?**
- A. Yes, sir. Bid out, shall we say. Get him prices on one thing or the other. Try to call around to get the best possible prices for him.**
- Q. Why would he have you do that?**
- A. Well, I think there were a couple reasons involved. One reason was because I knew the people in most of the stores. Another reason was – he’s like anybody else – he’s looking for the best price available and trying to get a discount from like a fire --**
- Q. Like the fire department?**
- A. A commercial discount that they do offer.**
- Q. What types of parts would he have you chasing?**
- A. Just about anything. Rotors for his car, prices, that sort of thing. Struts for the white Cadillac.**
- Q. Struts?**
- A. Front struts, sir.**
- Q. Okay.**
- A. Different sets of tires, that sort of thing.**

(Supp. 117-118, Tr. 117-118.) The testimony is clear that only Pietrick asked him to call around for discounted pricing, not “someone”. Pietrick testified that he did not receive discounts that others did not also receive, but he failed to put into evidence any proof that others received similar discounts.

Contrary to the Appellee’s unsupported assertions on Page 13 of his Brief, there was competent, credible testimony that Pietrick coerced the mechanics into doing work on his private vehicles while on City time. Hearing Officer Pincus had the unique opportunity to hear and see the testimony of the various witnesses and while the Greenberg report was considered by Pincus, Pincus made it very clear that the Greenberg Report was not the conclusive finding in the matter as Appellee would like the Court to believe. The entire record reviewed by Pincus was “far more extensive and contextually different” than Greenberg. (Supp. 429, Tr. 429.) Likewise, Pincus pointed out that his method of determining if Pietrick committed punishable misconduct was far different than Greenberg’s mere interviewing of witnesses. Pincus aptly found that the evidence clearly showed that Pietrick “took advantage of his status and position for his own personal gain at significant cost to the City” and that Pietrick “did intimidate and coerce mechanics in engaging in these repair related activities.” Pincus further stated: “coercion and intimidation can take various implicit and explicit forms” and “implicit intimidation, however, is less obvious, but equally as sinister.” He later found that, “The geometry of the 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.” (Supp. 431, Tr. 431.) After the Union brought his coercive practice to light, Pietrick then followed up the lengthy practice of using City mechanics as his own personal repair shop by becoming agitated, retaliating and threatening to dispose of

his long term acceptable peer to peer common sense rule. Pincus found that he implicitly intimidated Spriesterbach in his position as a mechanic and explicitly intimidated the entire Union by threatening to dispose of their peer to peer common sense practice. (Supp. 433, Tr. 433.) Likewise, the trial court agreed with Pincus and found the mechanics felt powerless or vulnerable to complain and as a result, there was implicit coercion. (See Appendix D, Page 42.)

Appellee misleads the Court on Page 29 of his Merit Brief by stating that the record established that Pietrick's use of City employees to repair his personal vehicles on City time never interfered with the orderly, efficient and safe operation of the department. This statement is wholly unsupported. Appellee cites Pages 103 and 126 of the Civil Service Commission transcript for support, but there is no testimony to this effect on these pages. Quite the opposite, the testimony heard by Pincus shows that the repairs requested did in fact interfere on at least one occasion with the ability of a fire truck to exit the station in an emergency. (Supp. 116-117, Tr. 116-117.) In addition, it is clear that Pietrick's actions affected the morale of the department and how the members viewed a Chief who they felt had been using the mechanics and the station as a personal repair shop. Spriesterbach testified that the Union members complained of the practice and that he also complained to other members regarding the personal favors asked. (Supp. 126 & 129, Tr. 126 & 129.)

Appellee misquotes the Mayor's testimony on Page 66 of the Civil Service Commission transcript by saying on Page 32 of his Merit Brief that "the Mayor sought a vote of no confidence from the Union and attempted other forms of improper influence on the rank and file members of the department to undermine the Chief's standing and authority." The Mayor actually testified, as set forth on Pages 66-70 of the Civil Service Commission transcript, that he became tired of the Union constantly coming to him complaining about Pietrick and that he told them he was not

going to go to Council regarding their constant complaints unless they held a vote of “no confidence”. (Supp. 66-70, Tr. 66-70.) There is no evidence in the record that the Mayor was the one “seeking” a “vote of no confidence” or “secretly soliciting support.” The Appellee further appears to know the very thoughts of the Mayor in stating on Page 32 of his Brief that “in the Mayor’s opinion” the Union’s letter complaining about the misuse of the mechanics on City time by Pietrick was the “vehicle” the Mayor was waiting for “to get rid of Pietrick”. Such an attempt to describe the Mayor’s thoughts is wholly unsupported by the record. There is absolutely no testimony or evidence in the record which supports this unfounded statement that the Mayor was plotting against him and such statements are quite contrary to the holdings throughout this matter.

In an effort to support the modification of the disciplinary penalty, the lower courts and Appellee attach significance to the fact that Pietrick did not have a formal written policy in the department which prohibited his utilizing City employees and the fire station as his personal repair shop. Why would he institute such a policy? Doing so would be counterproductive to his own self-serving actions and motivations. The trial court stated that the Chief’s discipline should be reduced as Pietrick, as Chief, did not have a written policy in place which prohibited the acts which led to his personal gain. Regardless, the testimony showed and the hearing officer agreed that there was clearly an unwritten “common sense rule” (Supp. 430, Tr. 430) that members of the department were permitted to work on their OWN vehicles and certainly other members could offer up advice, but that the work would be done during downtime by the member on his own vehicle. Acting Chief Janicek testified that over the last ten years there had been a practice of allowing employees to repair their own vehicles. He stated as follows when describing the “peer to peer” practice Pietrick permitted while Chief:

- Q.** Would you explain to the Arbitrator because there seems to be a little confusion on this issue, what you perceive to be the practice and policy regarding the type of work employees may do.
- A.** It's my understanding since the early '90s, the policy of the department for employees working on their own vehicles or hobbies or things are: If it's your vehicle, you can wash it, you can wax it, you can clean it, vacuum it and anything minor that wouldn't take the vehicle out of being able to be started and moved out of the station in case they had to leave on an emergency run and then other people would come in to fill the station and not be able to move that car. So just minor types of mechanic work.
- Q.** When you say "minor," something like maybe changing a headlight?
- A.** Yes.
- Q.** Maybe putting in some spark plugs?
- A.** Yes.
- Q.** Or putting in like a new air filter or the air filter on the carburetor or something along those lines?
- A.** Yes.
- Q.** Would it include possibly changing oil or no?
- A.** It's usually left up to the officer in charge whether they want to allow that vehicle to not be able to be moved for five or ten minutes.
- Q.** So it wouldn't be a total negative "No way" but "Be careful"?
- A.** Correct.
- Q.** Would it entail overhauling a car engine?
- A.** No.
- Q.** Would it entail taking all the wheels off and doing a complete and thorough brake job, et cetera?
- A.** No. That's not my understanding.
- Q.** Would it entail taking axles out, drive axles and the like on a car?
- A.** No.
- Q.** Would it entail changing oil pumps and water pumps or power steering pumps on a car?
- A.** No.
- Q.** Okay. Was there ever any policy or practice of the mechanics being required or authorized to do mechanical work on their own for higher ranking officers?
- A.** It's usually been allowed that they could help. Mechanics are allowed to help people do work on their vehicles to assist them or show them what needs to be done, but not to do it all themselves.
- Q.** Right. So you were in a meeting where I talked to a couple mechanics and one of the comments was "We do a lot of pointing."
- A.** Correct.
- Q.** In essence, the mechanics could maybe give them some guidance but the mechanics weren't supposed to be doing the work?
- A.** Correct.

(Supp. 73-75, Tr. 73-75.)

Hearing Officer Pincus found this testimony to be credible when reviewing the evidence and determining that an unwritten policy had been created in the department under Pietrick's reign and that Pietrick himself had "violated his own common sense rule." (Supp. 430, Tr. 430.)

Appellee states on Page 13 of his Merit Brief that no other members of the department have been disciplined for having the mechanics work on their vehicles. That is because the testimony (other than Pietrick's testimony) does not support that this practice ever took place. The testimony supports that the other members of the department performed their own minor repair work and asked for advice or assistance, unlike the Chief. (Supp. 73-75, Tr. 73-75.) (See also, testimony of Spriesterbach supporting Assistant Chief Janicek's testimony. Supp. 106-108, Tr. 106-108.) The trial court clearly found that the testimony supported the fact that Pietrick's use of the mechanics was far different than the policy in the department of "peer to peer" assistance. (See Appendix D, Pages 39 and 41.)

Only Pietrick was permitted to ask department members to do private repair work while the remaining department members were held to Pietrick's common sense peer to peer practice. It was clearly an abuse of discretion to modify the disciplinary penalty for Pietrick's failure to put into writing the very practice he enforced only on his department members, but regularly personally violated.

The Applicable Standard of Review

In his "Introductory Discussion of Law", the Appellee ignores both the opinion of the Eighth District Court of Appeals as well as the Appellants' well-reasoned argument concerning that opinion. Appellee concludes that the decision of the Eighth District rests upon R.C.

§124.34(C) which it emphatically does not, as stated by the Eighth District and set forth at Page 17 of Westlake's Merit Brief. In its opinion the Eighth District held:

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. (Emphasis added.)

(Opinion of Eighth District Court of Appeals, at Paragraph 30, Appendix B.)

The Eighth District then stated:

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.

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. (Emphasis added.)

(Appendix B at Paragraphs 31-32.)

The flaw in this reasoning is that the substitution of "grossly poor judgment" for the City's finding of "misfeasance, malfeasance, nonfeasance, neglect of duty, and failure of good behavior" removes the proscribed conduct from the parameters of R.C. §124.34(A) and therefore does not trigger the standard of review provided in R.C. §124.34(C). By electing in its appeal to the court of common pleas the alternative standard set forth in R.C. §119.12, the Appellee afforded review of the Civil Service Commission's action pursuant to that standard and the applicable standard of review under R.C. §119.12 is the hybrid inquiry explained by the Supreme Court in *Bartchy v. State Bd. of Edn.*, 120 Ohio St.3d 205, 2008-Ohio-4826, 897 N.E.2d 1096. That standard of review presumes that the agency's findings are presumed to be correct and must be deferred to by a reviewing court. So, if the misconduct of Appellee found to merit discipline

by the trial court, which misconduct and discipline is later confirmed by the Eighth District, is legally appropriate, as Appellee apparently concedes by his failure to file a cross-appeal to the Eighth District's decision, it must be subject to R.C. §119.12 review, as the Eighth District held that the misconduct found by the trial court was "substituted" for the Civil Service Commission's finding pursuant to the parameters of R.C. §124.34(C). Appellee's citation of R.C. §124.34(C) and *Baron v. Civil Service Board of the City of Dayton, et al.*, 2nd Dist. No. 25273, 2012-Ohio-6179 (Appendix K) is wholly inapplicable to this proceeding, given the Eighth's District's opinion.

Perhaps this Court can appreciate the awkward position the Eighth District has placed municipalities and civil service employees. On the one hand, it holds that the trial court did not agree with the finding of the Civil Service Commission that Appellee's conduct amounted to "misfeasance, malfeasance, nonfeasance, neglect of duty and failure of good behavior" pursuant to R.C. §124.34(C), but merely "extremely poor judgment" and permits the trial court to substitute its judgment in imposing a lesser discipline; on the other hand, the Eighth District applies the de novo review standard. Given the Eighth's District's holding, only a R.C. §119.12 standard could have been applied, and hence the trial court as well as the appellate court erred.

Appellee cannot now argue that the appellate court erred in finding that Appellee's conduct was punishable, despite being outside the parameters of R.C. §124.34(C) as Appellee failed to file a notice of cross-appeal of the Eighth District's decision. What this Court can require is the correct application of the standard chosen by Appellee in his appeal of the Civil Service Commission's determination; i.e., the standard set forth in R.C. §119.12 requiring a hybrid standard of review and deference to an agency's finding and decision.

Appellants' Proposition of Law No. 1: Criminal or unethical conduct is not a pre-requisite to a finding that a public employee has engaged in neglect of duty or failure of good behavior pursuant to R.C. §124.34.

Regardless of how the Appellee attempts to soften the impact of the appellate court holding regarding the necessity of criminal or unethical behavior, the appellate court made it clear in Paragraph 38 of its Opinion that the trial court found Pietrick demonstrated “extremely poor judgment as opposed to committing acts of misfeasance, malfeasance, nonfeasance, neglect of duty and failure of good behavior.” (Emphasis supplied.) (Appendix B, Paragraph 38.) The court follows by saying he did not engage in any criminal or unethical behavior and as a result, the trial court acted within its discretion when modifying the penalty. The court of appeals is thereby saying, without criminal or unethical finding in regard to the inappropriate behavior, the neglect of duty and failure of good behavior become merely “extremely poor judgment” which then justifies the trial court reduction in the disciplinary penalty. Therefore, the court has held a criminal or unethical violation is required for discipline imposed under R.C. §124.34(C) when the employee has engaged in neglect of duty or failure of good behavior as opposed “extremely poor judgment” which somehow becomes a lesser transgression carrying a lesser unknown penalty. The trial court and court of appeals erred when creating a new label for the misbehavior and declaring it outside the parameters of R.C. §124.34(C) in an effort to justify modifying the disciplinary penalty imposed.

Appellants' Proposition of Law No. 2: Regardless of the term of art used to describe the conduct subject to discipline, the Court of Common Pleas upheld the Appellants' determination that Appellee engaged in neglect of duty and/or failure of good behavior.

For the reasons explained in Appellants' response to Appellee's “Introductory Discussion of Law”, Appellee has misinterpreted or misread the Eighth District's opinion and relies on an inappropriate standard of review, despite Appellee's election of another.

Moreover, further evidence of the trial court's error, disregarded erroneously by the court of appeals, is the contrary findings used to first support the determination of improper behavior and then using the same finding to modify the discipline imposed. The trial court concludes that the established peer to peer practice that was ongoing in the department was far different than the practice characterized as use of "extremely poor judgment" which Pietrick regularly engaged in. In essence, as Pincus aptly put, Pietrick was violating his own "common sense" policy. On this the trial court agreed. (Appendix D, Page 41.) The trial court then turned around and modified the disciplinary penalty imposed by the Commission and used as its justification the lack of a written department policy or guideline violated. Pietrick's discipline was erroneously modified by the trial court for not putting in writing the very fire department policy and long term practice he had been willingly violating for years.

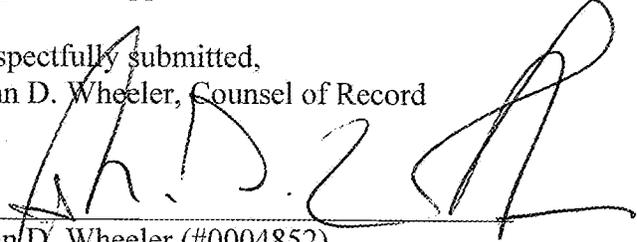
Further, the trial court stated that it was of no matter that the mechanics had not lodged complaints and "that complaints were withheld for years may tempt an argument that this be regarded as a minor matter. The evidentiary record supports the contrary argument that Appellant's (Pietrick) subordinates obliged in acceding to his requests for so long because as they testified, they felt powerless or vulnerable to protect due to Appellant's superior position. In this context, the implicit coercion experienced by the mechanics should not be discounted or minimized." Quizzically, following this holding the court, quite to the contrary, modified the disciplinary penalty and used as its justification that no prior complaints had been lodged. (Appendix D, Page 42.)

Lastly, a review of the factual record clearly indicates that the trial court abused its discretion in modifying the discipline for Appellee's misconduct, and therefore reversal is required.

CONCLUSION

For the reasons set forth in the Appellants' Merit Brief and Reply Brief, it is requested that this Court reverse the decision of the trial court and the affirmance by the Eighth District Court of Appeals and reinstate Appellants' discipline of Appellee.

Respectfully submitted,
John D. Wheeler, Counsel of Record



John D. Wheeler (#0004852)
COUNSEL FOR APPELLANTS, WESTLAKE
CIVIL SERVICE COMMISSION AND CITY
OF WESTLAKE

PROOF OF SERVICE

I certify that a copy of Appellants' Reply Brief was sent by ordinary U.S. mail on this 8th day of October, 2013, to the following:

Joseph W. Diemert, Jr., Esq.
Thomas M. Hanculak, Esq.
Daniel A. Powell, Esq.
Diemert & Associates Co., L.P.A.
1360 S.O.M. Center Road
Cleveland, Ohio 44124

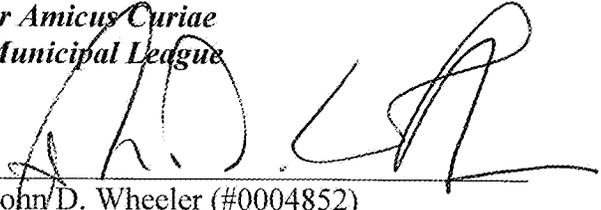
***Counsel for Appellee
Richard O. Pietrick***

Philip Hartmann, Esq.
Yazan S. Ashrawi, Esq.
Stephen J. Smith, Esq.
Frost Brown Todd LLC
10 West Broad Street, Suite 2300
Columbus, Ohio 43215

-and-

John Gotherman, Esq.
Ohio Municipal League
175 South Third Street, #510
Columbus, Ohio 43215-7100

***Counsel for Amicus Curiae
The Ohio Municipal League***



John D. Wheeler (#0004852)

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

APPENDIX

J – *Sandusky v. Neusse*, 6th Dist. No. E-10-039, 2001-Ohio-6497

K – *Baron v. Civil Service Board of the City of Dayton, et al.*, 2nd Dist. No. 25273,
2012-Ohio-6179

Slip Copy, 2011 WL 6322977 (Ohio App. 6 Dist.), 2011 -Ohio- 6497
(Cite as: 2011 WL 6322977 (Ohio App. 6 Dist.))

H
CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio,
Sixth District, Erie County.
City of SANDUSKY, Appellee/Cross-Appellant
v.
Kimberly NUESSE, et al., Appellant/
Cross-Appellee.

No. E-10-039.
Decided Dec. 16, 2011.

Background: Former police chief sought review of decision of city civil service commission upholding her termination. The Court of Common Pleas, Erie County, affirmed. Former police chief appealed.

Holdings: The Court of Appeals, Yarbrough, J., held that

(1) former police chief was sufficiently apprised of specific incident of alleged dishonesty that would be at issue in her termination proceeding, and
(2) evidence was sufficient to support her termination from employment.

Affirmed.

West Headnotes

[1] Constitutional Law 92 ↪ 4172(6)

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)7 Labor, Employment, and Public Officials
92k4163 Public Employment Relationships
92k4172 Notice and Hearing; Pro-

ceedings and Review

92k4172(6) k. Termination or Discharge. Most Cited Cases

Municipal Corporations 268 ↪ 182

268 Municipal Corporations
268V Officers, Agents, and Employees
268V(B) Municipal Departments and Officers Thereof
268k179 Police
268k182 k. Chief or Superintendent or Other Executive. Most Cited Cases

Stipulations 363 ↪ 14(4)

363 Stipulations
363k14 Construction and Operation in General
363k14(4) k. Stipulations as to Issues and Evidence Thereunder. Most Cited Cases

Former police chief was sufficiently apprised of specific incident of alleged dishonesty that would be at issue in her termination proceeding, and thus the incident fell within the scope of the stipulated issue of "failure of [police chief] to display absolute honesty" which was the reason for termination given in notification letter, and therefore, use of such incident as basis for termination did not violate former police chief's right to due process; letter of notification included reference to conducted outlined in report, and report contained a description of the incident and statements from several witnesses regarding alleged statement by former police chief. U.S.C.A. Const.Amend. 14.

[2] Municipal Corporations 268 ↪ 182

268 Municipal Corporations
268V Officers, Agents, and Employees
268V(B) Municipal Departments and Officers Thereof
268k179 Police
268k182 k. Chief or Superintendent or Other Executive. Most Cited Cases
Evidence, including statements by three wit-

Slip Copy, 2011 WL 6322977 (Ohio App. 6 Dist.), 2011 -Ohio- 6497
(Cite as: 2011 WL 6322977 (Ohio App. 6 Dist.))

nesses, that police chief was visibly upset after a commission meeting, and gave dispatchers false information that they would be “county employees within two weeks” was sufficient to support finding that police chief committed a falsehood when she denied that she made such statement, and that such conduct constituted dishonest or “immoral conduct that undermined the effectiveness of the agency’s activities,” and such conduct was, therefore, was sufficient to support her termination from employment.

Margaret Anne Cannon and Susan Porter, for appellee.

K. Ronald Bailey, for appellant.

YARBROUGH, J.

*1 {¶ 1} This is an appeal from the judgment of the Erie County Court of Common Pleas overturning the decision of the Sandusky Civil Service Commission and upholding the termination of former Sandusky Police Chief Kimberly Nuesse. For the reasons that follow, we affirm.

{¶ 2} In August 2006, the city of Sandusky (“the City”) hired Nuesse to be its chief of police. Less than two years later, on March 10, 2008, the city manager, Matthew Kline, suspended Nuesse with pay pending the outcome of an external investigation conducted by Michael Murman. The investigation resulted in the “Murman Report,” an eight-page document with an over 200–page supplement, featuring signed statements and interview summaries from many of the people who interacted with Nuesse. A copy of this report and supplement were provided to Nuesse’s attorney. Relying on the Murman Report, on June 3, 2008, Kline notified Nuesse of a pre-disciplinary meeting to provide her an opportunity to respond to alleged violations of “the laws of the State of Ohio and the City Police Department” including, *inter alia*: failure to uphold standards of honesty and failure to display absolute honesty, falsification of reports, using public office for private gain, and failure to cooperate and co-

ordinate with other law enforcement organizations and government agencies. The notice also stated,

{¶ 3} “[T]he City plans to use any information contained in the Murman report to support its position. In particular, the City believes that the report confirms that while you were the Chief of Police for the City you were dishonest, falsified Federal government funding documents, allowed a parking ticket issued against you to be dismissed, and created an uncomfortable work environment for employees of the Police Department, the City and Erie County, all of which violate one or more of the above laws, rules and regulations. Examples of your dishonesty include informing your superior and members of City Commission that the City’s dispatch system was on the verge of collapse which would impact public safety, submitting false information to the Federal government regarding grants, creating a situation allowing an employee to receive paid administrative leave for attending a court ordered Driving Under the Influence class, giving your assistant inaccurate information regarding City job assignments, and manipulating Police Department expenses so that City officials would not be aware of money spent on such items as coffee and water.”

{¶ 4} Nuesse chose to forego the pre-disciplinary meeting and instead sent a written response (“Nuesse Response”) to the allegations on June 10, 2008. Subsequently, on June 17, 2008, Kline issued a disciplinary decision notifying Nuesse that she was being terminated as Chief of the Sandusky Police Department. In the disciplinary decision, Kline stated,

{¶ 5} “Based on the initial investigation and the Nuesse Response, I have focused my decision on violations of the Sandusky Police Department’s Rules and Regulations involving falsification of reports, honesty, cooperation with other organizations and agencies, and use of official position for personal gain. However, it is my further decision that other disciplinary violations also occurred as set forth in the original Notice.”

Slip Copy, 2011 WL 6322977 (Ohio App. 6 Dist.), 2011 -Ohio- 6497
(Cite as: 2011 WL 6322977 (Ohio App. 6 Dist.))

*2 {¶ 6} The disciplinary decision continued by identifying examples of Nuesse's dishonesty relating to grant documents and the capabilities and need to replace the current dispatch system, Nuesse's failure to cooperate with the Erie County Sheriff and Prosecutor, and Nuesse's use of her office for personal gain by allowing a parking ticket she received to be voided. The disciplinary decision concluded,

{¶ 7} "There are additional disciplinary violations set forth in the Notice. However, in reviewing the Sandusky Police Department's Rules and Regulations 1-7, Employee Discipline, I find your actions and violations as set forth above to fall under Category III offenses. Being such offenses, I have decided the appropriate cause of action to be dismissal."

{¶ 8} Nuesse appealed the termination order to Sandusky's Municipal Civil Service Commission ("the Commission"). The Commission scheduled a hearing on the matter and hired former judge, Joseph E. Cirigliano, to serve as the fact finder. The parties stipulated that the hearing would be limited to resolving four issues:

{¶ 9} "1. The giving of false statements by Ms. Nuesse regarding certain grant applications,

{¶ 10} "2. Failure of Ms. Nuesse to display absolute honesty, including using the influence of her position to mislead city officials regarding the dispatch system, in addition to the falsification of the grant application,

{¶ 11} "3. Failure of Ms. Nuesse to cooperate and coordinate efforts with other employees and law enforcement organizations and agencies, such as the County Sheriff and County Prosecutor, and

{¶ 12} "4. Use of Ms. Nuesse's public office for private gain, specifically regarding a parking ticket."

{¶ 13} The hearing commenced on October 13, 2008, and spanned 22 days over a period of six

months, included over 60 witnesses and 280 exhibits, and generated over 3,600 pages of transcript. Afterwards, Hearing Officer Cirigliano issued his report recommending to the Civil Service Commission that Kline's decision to discharge Nuesse be sustained.

{¶ 14} In his report, the hearing officer initially identified the state and local laws that authorized the city to discharge Nuesse. Specifically, R.C. 124.34(A) provides that a classified civil service employee may be discharged from his or her position for, inter alia, dishonesty or violating any "policy or work rule of the officer's or employee's appointing authority." Notably, the Sandusky Police Department's Rules and Regulations governing "Employee Discipline" divide unacceptable conduct into three categories according to the severity of misbehavior. Category III offenses, which include, but are not limited to, "[e]ngaging in dishonest or immoral conduct that undermines the effectiveness of the agency's activities or employee performance, whether on or off the job," are the most severe. The rules deem the commission of a Category III offense so serious as to warrant suspension or dismissal upon a single occurrence.

*3 {¶ 15} The hearing officer then found that the City proved the allegations in the disciplinary decision by a preponderance of the evidence. First, he found that Nuesse committed a Category III offense by using her office for personal gain regarding an incident where she did not pay a \$15 parking ticket, and an incident where she asked for and accepted tickets for her family to Soak City—the water park attached to the Cedar Point amusement park. Second, the hearing officer found that Nuesse committed a Category III offense by failing to work cooperatively with other law enforcement agencies, a finding that stemmed from her personal conflicts with the Erie County Sheriff and Prosecutor. This included a failure to notify them of a fugitive roundup she was coordinating with the U.S. Marshall's office, even though the sheriff's office would be required to house those arrested and the prosec-

Slip Copy, 2011 WL 6322977 (Ohio App. 6 Dist.), 2011 -Ohio- 6497
(Cite as: 2011 WL 6322977 (Ohio App. 6 Dist.))

utor's office would be required to process them. Third, the hearing officer found that Nuesse committed Category III offenses when she engaged in dishonest and fraudulent conduct on three separate occasions by: (1) providing false information with regard to the federal Edward Byrne Justice Assistance Grants Program, (2) knowingly giving false information to other city representatives regarding the capabilities of the dispatch system that were to be included in a Weed and Seed grant application, and (3) misleading Kline and the city commissioners into believing that the City's emergency dispatch system was on the verge of collapse when it was not, and that the City's only viable option was to immediately merge its system with Perkins Township. Finally, the hearing officer commented on several instances where Nuesse testified untruthfully at the hearing. Although these instances were "wholly unrelated to the issues that led to her termination," he found they nonetheless reinforced the conclusion that the decision to remove Nuesse as the chief of police was correct. The incidents consisted of "Nuesse's assertion that laptop computers were never removed from the patrol vehicles during her tenure, that Assistant Chief Sams left work early on February 28, 2008, [that] she spoke personally with Judge O'Brien about her unpaid parking ticket * * * [and] that Chief Majoy offered her tickets to Soak City—she never asked for them." (Emphasis sic.)

{¶ 16} On October 7, 2009, the Commission was scheduled to meet to review the hearing officer's report. Two days prior to that, the City filed a motion to have Chairperson Janice Warner recuse herself because her brother testified on behalf of Nuesse at the hearing. Chairperson Warner denied the motion, stating that she would be impartial. At the October 7, 2009 meeting, Commissioner Rhodes made a motion to "modify the ruling of [Hearing Officer] Cirigliano and reinstate Kim Nuesse to her job as chief of police with no back pay effective Wednesday, October 7, 2009." Chairperson Warner seconded the motion. Roll was taken and Chairperson Warner and Commissioner Rhodes

affirmed and Commissioner May dissented.

*4 {¶ 17} Immediately thereafter, pursuant to R.C. 124.34(C), the City appealed the Commission's decision to the Erie County Court of Common Pleas, and simultaneously filed a motion to stay the reinstatement of Nuesse, which the trial court ultimately granted. On October 14, 2009, Nuesse filed a cross-appeal in the trial court, contesting the Commission's denial of back pay, and seeking to have the hearing officer's report vacated. Subsequently, the parties agreed that the trial court would conduct a trial de novo on the same four issues submitted to Hearing Officer Cirigliano, with the trial to consist of the court reading the transcript, examining the exhibits, and allowing the parties to submit additional evidence. See *Cupps v. City of Toledo* (1961), 172 Ohio St. 536, 179 N.E.2d 70, paragraph two of the syllabus (trial de novo is the appropriate procedure for an appeal from the decision of a civil service commission on questions of law and fact taken pursuant to R.C. 124.34).

{¶ 18} On August 10, 2010, the trial court issued its judgment entry upholding the June 17, 2008 termination of Nuesse, and overturning the October 7, 2009 decision of the Commission.

{¶ 19} Although it reached the same ultimate result as the hearing officer, the trial court's conclusions on most of the issues differed. First, the court found that the City failed to prove by a preponderance of the evidence that Nuesse used her public office for private gain regarding both the parking ticket and Soak City incidents. Next, the court found that the City failed to prove the allegation that Nuesse did not work cooperatively with other law enforcement agencies, characterizing most of the incidents as "legitimate disagreements among elected officials." Third, the court found that the City failed to meet its burden regarding the allegations of false statements pertaining to the "Edward Byrne" and "Weed and Seed" grants. However, the court did find that the City successfully established by a preponderance of the evidence that Nuesse

Slip Copy, 2011 WL 6322977 (Ohio App. 6 Dist.), 2011 -Ohio- 6497
 (Cite as: 2011 WL 6322977 (Ohio App. 6 Dist.))

failed to “display absolute honesty, including using the influence of her position to mislead city officials regarding the dispatch system,” and thus upheld the termination.

{¶ 20} In reaching its conclusion on this issue, the trial court, unlike the hearing officer, found that the City did not prove that Nuesse misled city officials into believing that the dispatch system was near collapse. Similarly, the court found that the City did not prove that Nuesse *intentionally* misled city officials regarding the capabilities of the existing dispatch system; instead, any lack of understanding was attributed to Nuesse's ignorance of the system. Nevertheless, the court identified three other specific incidents of dishonesty, each of which it deemed sufficient to justify Nuesse's termination. In order to put these incidents into context, a brief summary of the background facts is necessary.

{¶ 21} During Nuesse's tenure, the City was contemplating an agreement with Perkins Township that would result in a single facility to house their respective police departments and the court systems. Eventually, those discussions became limited to simply joining the two entities' dispatch systems. Simultaneously, the City was also discussing the merger of its dispatch system with Erie County. The impetus of these discussions was the Sandusky Commissioners' understanding that the City's dispatch system was inadequate and needed to be replaced. This understanding was based on the commissioners' belief from conversations with Nuesse that the dispatch system could fail at any point, and statements from Nuesse that the current dispatch system could not generate the necessary reports to secure grant funding. As to the former point, there is conflicting testimony regarding whether Nuesse actually told the commissioners that the situation regarding the dispatch system was dire and that collapse was imminent. Regardless of the basis for their understanding, the commissioners were faced with three options: (1) upgrade the City's current dispatch system at a significant cost, (2) merge the City's dispatch system with the system in Perkins

Township, or (3) merge the City's dispatch system with Erie County's system. Nuesse was in favor of the merger with Perkins Township, and strongly against the merger with Erie County. However, on February 26, 2008, it became clear that Perkins Township would not approve combining its dispatch system with the City.

*5 {¶ 22} On that day, a meeting was held at 2:00 p.m. between Sandusky officials Mayor Murray, Commissioners Stahl and Crandall, Law Director Don Icsman, and Fire Chief Meinzer so that Meinzer could inform the commissioners of what he thought were false statements made by Nuesse the night before, regarding the viability of the current dispatch system. Kline participated in the meeting via telephone. Nuesse was also summoned to this meeting, but was told that it began at 3:00 p.m. Believing that the meeting was to work on the merger proposal with Perkins Township, Nuesse asked Assistant Chief Sams to accompany her. When the two arrived a few minutes early to the meeting, they were told to wait outside, an order that they perceived to be ominous. Upon being allowed into the meeting, Commissioner Stahl and Mayor Murray informed Nuesse that she had misled them regarding the dispatch system. In addition, Mayor Murray revealed to Nuesse that Perkins Township would not approve the merger, and thus the commissioners were exploring a merger with Erie County.

{¶ 23} As it relates to the first incident of dishonesty relied on by the trial court, several witnesses testified that Nuesse's behavior following the February 26, 2008 meeting was emotional, erratic, unraveled, and hostile in nature. The trial court found that sometime shortly after the meeting, Nuesse told the city dispatchers they were going to be county employees within the next two weeks, even though no timetable for implementing a merger was given at the meeting, and it was clearly agreed that the merger would be of equipment and facilities only; the dispatchers would remain city employees. When Kline had to assure the union

Slip Copy, 2011 WL 6322977 (Ohio App. 6 Dist.), 2011 -Ohio- 6497
(Cite as: 2011 WL 6322977 (Ohio App. 6 Dist.))

leader that city employees would remain so, he confronted Nuesse about what she said. Nuesse claimed that the dispatchers simply misunderstood her. However, the trial court found that the evidence was otherwise, and concluded that this incident of dishonesty, by itself, was sufficient to support the termination.

{¶ 24} The second incident related to an occurrence on February 28, 2008 when Kline called a meeting to discuss the dispatch system and the potential merger with Erie County. Kline ordered Nuesse to attend, but Nuesse refused, saying that she had talked to a lawyer and was too concerned about losing her job. Nuesse also refused to send Assistant Chief Sams, claiming that he was unavailable and also was concerned about losing his job. However, the testimony revealed that Sams was in fact not concerned. In addition, the trial court found that Nuesse later claimed at the hearing that Sams had gone home that day and would not have been able to attend the meeting, but this was refuted by Sams' time card and the testimony of other officers. The trial court found that this incident of dishonesty, by itself, was sufficient to support the termination.

{¶ 25} As to the third incident, on February 29, 2008, Kline arrived at work to see newspaper headlines that Nuesse was in jeopardy of losing her job, despite Kline making statements to the contrary to a reporter the night before. When Kline confronted Nuesse about the headlines and to see if she had spoken to the reporter, he found her already visibly upset. Kline sent her home that day, which was a Friday, with Nuesse scheduled to be on vacation the following week. While Nuesse was on vacation, she contacted Sams, and told him that Kline could not be trusted and that Sams should secretly tape record any conversation with Kline. This order was in contravention of her previous directive prohibiting secret tape recordings. Sams reminded her of this directive, but Nuesse replied that it only applied to the officers, not to her and Sams. When Nuesse returned from vacation, Kline informed her that she

was suspended with pay pending the outcome of an external investigation. At the hearing, Nuesse testified that she did not order any secret tape recordings. The trial court found this denial to be a falsehood as it was contradicted by both Sams and Lt. Chris Hofacker. The court then found that this incident of dishonesty, by itself, was sufficient to support the termination.

*6 {¶ 26} In addition to identifying these three incidents, the trial court also engaged in a discussion in its judgment entry under the heading "A pattern of dishonest conduct permeating the entire case." In reviewing the entire record, the court concluded that,

{¶ 27} "Chief's Nuesse [sic] management style was, in large part, simply based upon the telling of partial truths and outright lies to suit her own purposes. * * * The Court specifically concludes that Chief Nuesse's failure to display honesty undermined the effectiveness of the Sandusky Police Department and her own performance as Chief by repeatedly violating Category III prohibitions."

{¶ 28} The trial court then listed eight falsehoods that it found proven by a preponderance of the evidence, giving the caveat that "some of these untruths were related to certain allegations in this case, which this Court concluded were not proven by a preponderance of the evidence. Nevertheless, these incidences of not being truthful certainly are relevant to issue [sic] of Ms. Nuesse's 'failure to display absolute honesty.' Some of these matters are relatively minor in nature, while others are serious."

{¶ 29} The court itemized the falsehoods as:

{¶ 30} "1) Chief Nuesse insisted, under oath, that the Cedar Point and Sandusky Police Departments were co-equals (Cedar Point is a private police force, deriving its power from the City of Sandusky).

{¶ 31} "2) There were serious problems with

Slip Copy, 2011 WL 6322977 (Ohio App. 6 Dist.), 2011 -Ohio- 6497
(Cite as: 2011 WL 6322977 (Ohio App. 6 Dist.))

search warrants coming out of the police department. Nuesse claimed she corrected the problem by placing Assistant Chief Sams in charge of reviewing all warrants and making him available 24/7. (Sams under oath called this a lie, as he was not in charge of reviewing warrants.)

{¶ 32} “3) Chief Nuesse insisted that lap top computers were not removed from the patrol vehicles while she was chief. (Evidence was overwhelming that she knew they were out of the vehicles and were removed while she was chief.)

{¶ 33} “4) Chief Nuesse insisted she did not ask Cedar Point Chief Majoy about Soak City Tickets. (Chief Majoy said she did and is very credible on this issue, as he had no authority to offer her those tickets in the first place and had to call to obtain them.)

{¶ 34} “5) Chief Nuesse insisted she talked to Judge O'Brien about the parking ticket matter. (Judge O'Brien testified that he talked to Captain Frankowski about the matter, but has no recollection of talking to Ms. Nuesse.)

{¶ 35} “6) Chief Nuesse claimed she toured the County's dispatch system when it was fully functional. (Credible evidence showed that it was not fully functional when she toured the center following a meeting.)

{¶ 36} “7) Chief Nuesse denied any knowledge of a new police website that was being prepared by Assistant Chief Sams. (Nuesse later admitted to the City Manager that she knew Sams was preparing the site and had actually seen it.)

*7 {¶ 37} “Finally, and perhaps most illustrative of how dishonesty can undermine the effectiveness of a police department was the testimony of Lt. Chris Hofacker, who was full of praise for Chief Nuesse and her family for helping him out of a very tough personal situation. Nevertheless, upon questioning, Officer Hofacker related an incident when Chief Nuesse asked that patrol officers no longer

park in the circle in front of the police station, but rather in the back. Officer Hofacker sent out a directive to other officers, informing them of the change. Officer Hofacker also testified that he forwarded a copy of the directive to Chief Nuesse.

{¶ 38} “Officer Hofacker further testified that he never heard anything back from Chief Nuesse on the order he copied her, but he did hear some complaining from officers. One day, he was standing with one of the loudest complainers when Chief Nuesse approached. Chief Nuesse told the complaining officer that the parking order was a misunderstanding; it only related to certain times that they could not park there. Hofacker then testified that the other officer ‘looked at me like, boy, how do you know—you're telling us this stuff and how much of it is really a fact and how much of it are you just making up kind of thing, and I lost some credibility with him a little bit.’ “

{¶ 39} Upon resolving the four stipulated issues by finding that the City proved by a preponderance of the evidence that Nuesse failed to display absolute honesty, the trial court then addressed the City's other legal arguments. The court found that the City was not denied due process when Chairperson Janice Warner refused to disqualify herself from reviewing the hearing officer's report because of a potential conflict of interest. The court also declined to examine how much time individual commission members spent on their decision to modify the hearing officer's recommendation.

{¶ 40} Nuesse now appeals from the judgment of the trial court, setting forth the following two assignments of error:

{¶ 41} “I. THE REVIEWING COURT ERRED BY ABUSING ITS DISCRETION IN DENYING APPELLANT HER RIGHT TO DUE PROCESS SECURED TO HER UNDER THE OHIO AND UNITED STATES CONSTITUTION.

{¶ 42} “II. THE REVIEWING COURT ERRED IN FAILING TO AWARD APPELLANT

Slip Copy, 2011 WL 6322977 (Ohio App. 6 Dist.), 2011 -Ohio- 6497
(Cite as: 2011 WL 6322977 (Ohio App. 6 Dist.))

FULL BACK PAY AND CONDUCTING A HEARING ON THE CORRECT AMOUNT.”

{¶ 43} In addition, the City cross-appeals, raising the following three assignments of error:

{¶ 44} “1. Did the Erie County Court of Common Pleas commit reversible error by rejecting the City's argument that it was denied due process after Chairperson Janice Warner refused to disqualify herself from voting on whether to adopt, modify or reject Hearing Officer Cirigliano's August 13, 2009 Report and Recommendation where the uncontroverted evidence showed that she could not be a fair and impartial decision-maker because her brother was one of Ms. Nuesse's material witnesses; she was a participant in the Perkins Township and City of Sandusky Police Participation Committee that backed Appellant Nuesse's unsuccessful proposal to merge the City's emergency dispatch system with Perkins Township; and her former sister-in-law—a Sandusky Police Department Dispatcher—was laid off just prior to the October 7, 2009 Commission meeting?”

*8 {¶ 45} “2. Did the Erie County Court of Common Pleas commit reversible error by failing to consider any of the evidence supporting the City's argument that it was denied due process after Chairperson Janice Warner and Commissioner Vincent Rhodes voted to modify Hearing Officer Cirigliano's Report and Recommendation and to order Nuesse's immediate reinstatement without meaningfully reviewing the 3,647 transcript [sic] and 281 exhibits from the 22-day hearing?”

{¶ 46} “3. Did the Erie County Court of Common Pleas commit reversible error when it found that Appellant [sic] The City of Sandusky (“the City”) failed to establish by a preponderance of the evidence that Nuesse was properly terminated under Ohio Law and the Sandusky Police Department's Rules and Regulations for engaging in misconduct, including using her public office for private gain by failing to pay a parking ticket and accepting Cedar Point and Soak City tickets; failing

to cooperate and coordinate efforts with other employees and law enforcement organizations and agencies, such as the Erie County Sheriff and Prosecutor; and falsifying grant reports?”

{¶ 47} 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. *Raizk v. Brewer*, 12th Dist. Nos. CA2002-05-021, CA2002-05-023, 2003-Ohio-1266, ¶ 10; *Ward v. City of Cleveland*, 8th Dist. No. 79946, 2002-Ohio-482. The term abuse of discretion implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. When applying this standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621, 614 N.E.2d 748.

{¶ 48} Under her first assignment of error, Nuesse argues that the trial court abused its discretion in that it violated her right to due process by considering incidents of dishonesty that were outside the scope of the stipulated issues. Specifically, Nuesse argues that the court abused its discretion by upholding the termination based on incidents of dishonesty that were not related to the grant applications or the dispatch system, and by upholding the termination based on incidents of dishonesty that occurred at the hearing, after she was already terminated. The City, on the other hand, argues that one of the stipulated issues was failure “to display absolute honesty,” and that this issue encompasses all incidents of dishonesty, not just those relating to the grants or the dispatch system. Moreover, the City argues that the trial court was entitled to consider incidents of dishonesty that occurred at the hearing, because not allowing the court to do so could lead to a “bizarre and nonsensical result” in that “the City would have to re-hire [Nuesse], and then re-fire her, on the clearly legitimate grounds that she lied under oath at the [civil service] hear-

Slip Copy, 2011 WL 6322977 (Ohio App. 6 Dist.), 2011 -Ohio- 6497
(Cite as: 2011 WL 6322977 (Ohio App. 6 Dist.))

ing.”

*9 [1] {¶ 49} This case presents the unusual situation in which the trial court found that the City did not prove by a preponderance of the evidence its main reasons for terminating Nuesse's employment. Instead, the court found alternative reasons to justify upholding Nuesse's termination that, while beyond those specifically stated by the City, were within what it interpreted to be the scope of the larger stipulated issue of “failure to display absolute honesty.” Because we conclude that one of these incidents of dishonesty was sufficiently identified in the disciplinary decision and the Murman Report such that it is appropriately included in the stipulated issue, and because that incident constitutes a Category III offense for which termination is warranted upon a single occurrence, we affirm the trial court's decision.

{¶ 50} Contrary to the City's argument, we think it is axiomatic that a court cannot base its finding that a termination was justified on acts that occurred *after* the employee was terminated. It is the duty of the court to determine whether the City's proffered reasons for termination were proven, not to seek “ad hoc” reasons to support terminating the employee. The City cites to several cases that it argues support its position that a court can consider post-termination events. However, we find the City's reliance on those cases to be misplaced.

{¶ 51} The first is *Athens Cty. Commrs. v. Ohio Patrolmen's Benevolent Assn.*, 4th Dist. No. 06CA49, 2007–Ohio–6895. In that case, an arbitrator determined the county had just cause to terminate an employee. Notwithstanding that, the arbitrator used evidence of the employee's medical condition, discovered post-termination, to mitigate the punishment of the employee from discharge to reinstatement with a requirement that every six months he prove his ability to perform his job. The City argues that the same logic applies here, such that the trial court is permitted to rely upon evidence which was not available to the City at the time of its ter-

mination decision—Nuesse's falsehoods at the hearing—to determine whether the City had just cause for termination. We disagree.

{¶ 52} *Athens* cited to *Bd. of Trustees of Miami Twp. v. Fraternal Order of Police, Ohio Labor Council, Inc.* (1998), 81 Ohio St.3d 269, 271–272, 690 N.E.2d 1262, in which the Ohio Supreme Court framed the issues that an arbitrator must consider in determining whether “just cause” exists to discharge an employee as: “(1) whether a cause for discipline exists and (2) whether the amount of discipline was proper under the circumstances.” Although not controlling because the present situation does not involve arbitration, we think this framework is helpful in illustrating the flaw in the City's argument. In *Athens Cty. Commrs.*, the employee did not dispute that a cause for discipline existed. Thus, the issue before the arbitrator was whether the amount of discipline was appropriate. In deciding that issue, the arbitrator was empowered by the collective bargaining agreement to modify the amount of discipline based on the circumstances, and was not limited by the collective bargaining agreement to considering only facts known at the time of the decision to discipline. *Athens Cty. Commrs.* at ¶ 40. It is in that context that the Fourth District discussed whether consideration of post-termination evidence was appropriate; reaching the conclusion that such consideration was in the discretion of the arbitrator. *Id.* at ¶ 41, 690 N.E.2d 1262. Here, in contrast, the issue before the trial court was whether a cause for discipline existed in the first instance, not whether the amount of discipline was appropriate. Therefore, the holding in *Athens Cty. Commrs.* is inapposite.

*10 {¶ 53} For the same reasons, the City's argument that the present situation is analogous to the “after-acquired evidence doctrine” as articulated by the United States Supreme Court in *McKennon v. Nashville Banner Publishing Co.* (1995), 513 U.S. 352, 115 S.Ct. 879, 130 L.Ed.2d 852, is untenable. In *McKennon*, the employee was allegedly discharged as part of a work force reduction plan.

Slip Copy, 2011 WL 6322977 (Ohio App. 6 Dist.), 2011 -Ohio- 6497
(Cite as: 2011 WL 6322977 (Ohio App. 6 Dist.))

However, the employee filed suit in federal court, contending that age was the motivating factor in the decision to discharge her, and thus her employer violated the Age Discrimination in Employment Act of 1967 (“ADEA”). During discovery, the employee admitted to having copied several confidential documents relating to the company’s financial situation while still employed. Upon learning this, the employer sent a letter informing the employee that this conduct was a separate and sufficient ground for termination. The employer argued that this after-acquired evidence barred any recovery by the employee for any violation of the ADEA. In its reasoning, the Supreme Court stated,

{¶ 54} “[T]he case comes to us on the express assumption that an unlawful motive was the sole basis for the firing. [The employee’s] misconduct was not discovered until after she had been fired. *The employer could not have been motivated by knowledge it did not have and it cannot now claim that the employee was fired for the nondiscriminatory reason.* Mixed motive cases are inapposite here, except to the important extent they underscore the necessity of determining the employer’s motives in ordering the discharge, an essential element in determining whether the employer violated the federal antidiscrimination law.” (Emphasis added.) *McKennon* at 360.

{¶ 55} The Supreme Court then went on to “consider how the after-acquired evidence of the employee’s wrongdoing bears on the specific remedy to be ordered.” *Id.* Under that analysis, the Supreme Court held that in the case before it, and as a general rule in cases involving after-acquired evidence sufficient to support termination, “neither reinstatement nor front pay is an appropriate remedy. It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds.” *Id.* at 361–362. However, the court concluded that an absolute rule barring any recovery would undermine the ADEA’s objectives of forcing employers to examine their

motivations, and penalizing employers for decisions that spring from age discrimination. Instead, the beginning point in formulating a remedy “should be calculation of backpay from the date of the unlawful discharge to the date the new information was discovered * * * [and] taking into further account extraordinary equitable circumstances that affect the legitimate interests of either party.” *Id.* at 362.

{¶ 56} Similar to *Athens* and *Bd. of Trustees of Miami Twp.*, the Supreme Court separated the issues of the motivation behind the termination decision from the proper remedy for the unlawful discharge. Moreover, the court allowed after-acquired evidence when considering the latter, but not the former. Here, the issue before the trial court was whether the City proved its grounds for termination by a preponderance of the evidence, which is akin to finding whether cause existed to discipline Nuesse, as in *Athens* or *Bd. of Trustees of Miami Twp.*, or determining the City’s motivation to terminate Nuesse, as in *McKennon*. As such, we find instructive the Supreme Court’s statement that “[t]he employer could not have been motivated by knowledge it did not have and it cannot now claim that the employee was fired for the [after-acquired] reason.” *McKennon* at 360. Therefore, we reject the City’s argument that the trial court was entitled to consider evidence of Nuesse’s post-termination dishonesty when determining whether the City proved its grounds for termination.

*11 {¶ 57} Applying this conclusion to the three separate incidents the trial court relied upon to support its judgment that Nuesse failed to display absolute honesty, we find that the third incident and part of the second incident—Nuesse’s denial that she ordered secret recordings of conversations with Kline, and her statement that Sams was unavailable on February 28, 2008, respectively—are falsehoods that occurred at the hearing, and thus could not be considered by the trial court in determining whether cause existed to terminate Nuesse at the time the decision was made. Likewise, the first six of the

Slip Copy, 2011 WL 6322977 (Ohio App. 6 Dist.), 2011 -Ohio- 6497
(Cite as: 2011 WL 6322977 (Ohio App. 6 Dist.))

eight additional falsehoods mentioned by the trial court should not have been considered as they also relate to statements Nuesse made at the hearing.

{¶ 58} In fact, of the incidents of dishonesty referenced by the trial court, only four occurred prior to Nuesse's termination, and, therefore, were available to support the court's decision to uphold the termination. They are: (1) Nuesse's denial to Kline that she made statements to the dispatchers that they would be county employees within two weeks ("dispatcher incident"), (2) Nuesse's statement to Kline that Sams could not attend the February 28, 2008 meeting because he was unavailable and/or afraid of losing his job ("Sams incident"), (3) Nuesse's denial to then City Manager Miers that she had any knowledge of a new police website being created by Sams ("website incident"), and (4) Nuesse's claim that the parking directive issued by Hofacker was a misunderstanding ("parking incident").^{FN1}

FN1. The first two are the first and second separate incidents of dishonesty found by the trial court, while the last two are the seventh and eighth additional falsehoods mentioned by the court.

{¶ 59} We must now decide whether these four remaining incidents are sufficiently within the scope of the issues presented to the trial court as grounds for Nuesse's termination. Specifically, the stipulated issue of "Failure of Ms. Nuesse to display absolute honesty, including using the influence of her position to mislead city officials regarding the dispatch system, in addition to the falsification of the grant application." Nuesse argues that this issue is limited to incidents of dishonesty relating only to the dispatch system or the grant applications. The City, on the other hand, argues that the plain language of this issue is broad enough to encompass any incident of dishonesty. We reject both arguments.

{¶ 60} Initially, we find Nuesse's argument meritless because a simple reading of the stipulated

issue reveals that "failure of Ms. Nuesse to display absolute honesty" is modified by the next phrase "including using the influence of her position * * *." (Emphasis added.) The word "including" does not in any way limit the incidents of dishonesty to be considered, but rather emphasizes the importance of the two incidents that are specifically mentioned. Therefore, we disagree with Nuesse's narrow interpretation that only incidents of dishonesty relating to the dispatch system or to the grant applications should be considered.

{¶ 61} However, we also cannot adopt the City's broad construction. By adopting the City's view, we would be sanctioning a scenario in which a city police chief could be notified of the grounds for her termination, contest the termination on those grounds, and then have the termination upheld on entirely different grounds of which she was unaware and had no opportunity to contest. This result contravenes the concept of procedural due process, which requires, at a minimum, an opportunity to be heard at a meaningful time and in a meaningful manner "when the state seeks to infringe a protected liberty or property right."^{FN2} *State v. Cowan*, 103 Ohio St.3d 144, 814 N.E.2d 846, 2004-Ohio-4777, ¶ 8 (citing *Boddie v. Connecticut* (1971), 401 U.S. 371, 377, 91 S.Ct. 780, 28 L.Ed.2d 113 and *Mathews v. Eldridge* (1976), 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18).

FN2. The parties do not dispute that Nuesse has a protected property right in continued employment as the City of Sandusky Chief of Police. See *Cleveland Bd. of Educ. v. Loudermill* (1985), 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494.

*12 {¶ 62} In employment termination cases, procedural due process claims typically arise in the context of the sufficiency of the pre-termination notice. In that context, "[t]he tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Cleveland Bd. of Educ. v. Loudermill*

Slip Copy, 2011 WL 6322977 (Ohio App. 6 Dist.), 2011 -Ohio- 6497
(Cite as: 2011 WL 6322977 (Ohio App. 6 Dist.))

(1985), 470 U.S. 523, 546, 105 S.Ct. 1487, 84 L.Ed.2d 494. We think these same due process considerations also apply post-termination to prevent a trial court from upholding the termination order where the employee had no notification that the relied upon incidents were at issue. Therefore, in order to define the scope of the incidents included in “failure * * * to display absolute honesty,” we look to the disciplinary decision, which notified Nuesse of the reasons for her termination.

{¶ 63} We note initially that while the disciplinary decision sets forth the allegations of dishonesty relating to the dispatch system and the grant applications, it does not specifically mention any of the four remaining incidents relied upon by the trial court. However, in the disciplinary decision, Kline incorporates the pre-termination notice and the Murman Report by stating, “it is my further decision that other disciplinary violations also occurred as set forth in the original Notice,” “[t]he Murman Report gives examples of your lack of honesty,” and “[t]here are additional disciplinary violations set forth in the Notice.” In addition, we note that the pre-termination notice also does not specifically address any of the four remaining incidents, but does advise Nuesse that “the City plans to use any information contained in the Murman [R]eport to support its position.” Thus, we turn to the Murman Report to determine if the four remaining incidents were included in it.

{¶ 64} Of those four incidents, the main body of the Murman Report does not notify Nuesse, in any way, about three of them—the Sams incident, the website incident, and the parking incident. In fact, the Sams incident is not even mentioned in the 200–page supplement to the Murman Report, the website incident only appears once in the supplement, in the signed statement of Mark Volz, and the parking incident only appears in the supplement in two places, the signed statements of Sams and Hoffer. Therefore, because Nuesse was not notified of these three incidents of dishonesty, they cannot be used to uphold the decision to terminate her.^{FN3}

See *Clippis v. City of Cleveland*, 8th Dist. No. 86887, 2006–Ohio–3154, ¶ 18 (employee's due process rights were violated where the city did not inform the employee that other sexual harassment incidents were being considered against her); *Arnett v. Franklin Monroe Local Bd. of Educ.*, 2d Dist. No. 1567, 2002–Ohio–3559 (school bus driver's due process rights were violated where he was not told that an alleged conversation regarding a complaint that he almost struck a student with his bus, and during which he stated that he was not trying to hit the student, but merely was trying to scare him, would be used to evaluate whether he should be terminated).

FN3. This is not to say, however, that the City is required to ignore the excluded incidents of dishonesty. See *Brown v. Ohio Bur. of Emp. Servs.* (1996), 114 Ohio App.3d 85, 92, 682 N.E.2d 1033 (“[*McKennon*] held that the court cannot force an employer to ignore improper behavior that it learns about during the proceeding.”) Indeed, had we reversed the judgment of the trial court, these incidents would be relevant in constructing an appropriate remedy for the wrongful discharge under the reasoning in *McKennon*, supra, at 360–362.

*13 {¶ 65} In contrast, the dispatcher incident is included in the main body of the Murman Report. The report states:

{¶ 66} “Deceit to advance her personal agenda has been policy for chief Nuesse* * * In an apparent fit of spitefulness, after her recommendation to merge with Perkins Township's dispatch was rebuffed, she announced to the Sandusky dispatchers that they would all be working at the county in two weeks.”

{¶ 67} In addition, mention of this incident was also found in the supplement to the report in the signed statement of Meinzer, and in the summary of the interviews of union representative Tony Vaccaro, Mayor Murray, Commissioner Crandall, and

Slip Copy, 2011 WL 6322977 (Ohio App. 6 Dist.), 2011 -Ohio- 6497
(Cite as: 2011 WL 6322977 (Ohio App. 6 Dist.))

dispatcher Amy Theriault. Moreover, the supplement contained the signed statement of dispatcher Felicia Jones who claimed that Nuesse told her they would be at the county in two weeks. Finally, the supplement included the interview summary of Chief Nuesse, in which she discussed what she said to the dispatchers.

{¶ 68} Therefore, because the dispatcher incident was specifically mentioned in the main body of the Murman Report, and was referenced by seven different people in the supplement to the report, including Nuesse herself, and because the Murman report was incorporated into both the pre-termination notice and the disciplinary decision, we hold that Nuesse was sufficiently apprised that this incident of dishonesty would be at issue, and thus it fell within the scope of the stipulated issue of “failure of Ms. Nuesse to display absolute honesty.” See *Washington v. Cleveland Civ. Serv. Comm.*, 8th Dist. No. 94596, 2010-Ohio-5608, ¶ 31 (letters sufficient to notify employee of charges against him where they adequately explained the evidence against him, employee had opportunity to respond, and he was given a full post-termination hearing). Furthermore, because this incident of dishonesty fell within the scope of the stipulated issue, the trial court was entitled to rely upon it to uphold the termination.

{¶ 69} Having held that the incident regarding Nuesse's statements to the dispatchers fell within the scope of the stipulated issue of failing to display absolute honesty, we now turn to whether the trial court abused its discretion in finding that the City proved this allegation by a preponderance of the evidence, and in finding that this incident alone was sufficient to uphold Nuesse's termination.

[2] {¶ 70} Nuesse contends that there is no support for the idea that she told the dispatchers they were going to be county employees. Further, Nuesse contends that the trial court violated due process by “alleging” that she was dishonest where her testimony was supported by the testimony of others. However, “[o]n the trial of a case, either

civil or criminal, the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts.” *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. The trier of fact may believe all, some, or none of what a witness says. *State v. Antill* (1964), 176 Ohio St. 61, 67, 197 N.E.2d 548.

*14 {¶ 71} At the hearing, Murman, Kline, Hofacker, and Nuesse all testified regarding this incident.

{¶ 72} Murman stated, “She walked into the dispatch area after a Council meeting, or Commission meeting, in which things had not gone her way, and began speaking directly to the—to the dispatchers. And whatever she actually said we'll probably never know for sure, but certainly some of the dispatchers came away with the impression that she told them that their jobs were—with the city were toast, that they'd be over at the—they'd be working over at the county, and for the county, within a couple of weeks.”

{¶ 73} Kline testified, “[I got] a call that our dispatch employees are all upset, in arms because the night before after the meeting, after the meeting that afternoon, Kim had gone back and went straight to the dispatchers that were working and said * * * ‘You're going to become County employees in the next two weeks.’ “ Kline learned this from Warrenette Parthemore who told him that Troy Vaccaro was inquiring why they were taking away the union's employees. Kline stated that from his meeting with Vaccaro, “[t]he clear impression [was] that the dispatchers were told that they were going to become county employees in the next two weeks, or within two weeks.” Kline further testified that Nuesse said, “Well, that's not what I said. They misunderstood me.” Kline also recalled that at the February 26, 2008 meeting, Mayor Murray clearly said that the merger would be of facilities only; dispatchers would not become county employees.

{¶ 74} Hofacker testified that dispatcher Feli-

Slip Copy, 2011 WL 6322977 (Ohio App. 6 Dist.), 2011 -Ohio- 6497
(Cite as: 2011 WL 6322977 (Ohio App. 6 Dist.))

cia Jones “yelled out one of the questions to the Chief and the Chief looked in the office and told [Jones] that, and, again, I’m not going to speculate or tell you something I can’t remember exactly. I don’t remember what time frame she said, but the Chief made some comment to her about the dispatch was going to be moved in X number of days and I don’t remember how many days. And if she had a problem with that, she had to take it up with her Union.”

{¶ 75} Nuesse, for her part, testified that “one of the dispatchers became upset and asked me if their job was in jeopardy, and I reassured her that, no, it was not. She kept asking me questions I couldn’t answer. And I explained to her that I didn’t have any answers for her at the time, that everything was very preliminary, I had just learned about it an hour or so before. * * * And that as more details became available, I would make them aware of it. And then she asked if she could contact her union. And I said, ‘Well, that’s up to you. But, you know, but I’m sure that they are going to be kept in the loop same as when we were working on the joint Sandusky/Perkins effort.’ “

{¶ 76} In addition, the Murman Report, which was entered into evidence, contained the signed statement of dispatcher Felicia Jones, and the interview summary of dispatcher Amy Theriault.^{FN4} In her signed statement, Jones stated,

FN4. Neither Jones nor Theriault testified at the hearing.

*15 {¶ 77} “The very next day around 4:30 PM, the Chief with [Assistant Chief] Sams accompanying her once again came to the dispatch area after she had been to a meeting with the City Commissioners. It was the day the Commissioners had been to a meeting in Perkins Township. While in the Dispatch room Chief Nuesse said ‘They had a meeting and it is out of my hands, in two weeks they want you at the County.’

{¶ 78} “I asked the Chief questions about how

would the work with the courts, warrants, and other matters be handled, if the Dispatch Center was moved to the County. The Chief gave no answers and said, ‘It is out of my hands.’ The Chief then told me ‘Contact your union representatives.’ It was obvious to me that the Chief was visibly upset.

{¶ 79} “Subsequent to this discussion with Chief Nuesse, that night, I called Union President Todd Gibson, but he was ill so I talked to Union Vice President Troy Vaccaro, who told me he would check into it, the possible move in two weeks, but advised me no jobs would be lost.”

{¶ 80} The summary of the interview with Amy Theriault recounted that, “[Theriault] stated that after the article appeared in the local newspaper, regarding the Department’s dispatch system, Chief Nuesse did come in and tell the unit that no one would lose their job and it was just in the planning stage. However, on another occasion, after the County Commissioners had indicated that the Sandusky Police Department Dispatch might move to the Erie County Dispatch Center, Chief Nuesse came into the unit and said it was out of her hands at that point. Tim Mead may have been present when she made the announcement. According to Theriault, Chief Nuesse appeared to be visibly upset and indicated our questions about the move would be answered eventually and she did not have the answers at that time.

{¶ 81} “Ms. Theriault stated that very night she got a call from another police dispatcher, Felicia Jones, who told her that Chief Nuesse told Jones, ‘we were moving to the County in two weeks.’ Ms. Theriault stated the next morning both she and Tim Mead were on duty and Chief Nuesse did not mention to them they were moving in two weeks. She stated if she had, we definitely would have discussed it. Ms. Theriault stated it is hard to keep it all straight, with so many people talking about these matters for the last several weeks.”

{¶ 82} Based on the above evidence, specifically the statements of Kline, Hofacker, and Felicia

Slip Copy, 2011 WL 6322977 (Ohio App. 6 Dist.), 2011 -Ohio- 6497
 (Cite as: 2011 WL 6322977 (Ohio App. 6 Dist.))

Jones, we cannot conclude that the trial court abused its discretion in finding that Nuesse committed a falsehood when she denied to Kline that she had told the dispatchers they would be county employees within two weeks, claiming that they misunderstood what she had said.

{¶ 83} Nor can we conclude that the trial court abused its discretion in finding that “this incident of dishonesty, by itself, is sufficient in the Court’s view to terminate Chief Nuesse.” The Sandusky Police Department’s Rules and Regulations governing “Employee Discipline” define Category III offenses as including, “[e]ngaging in dishonest or immoral conduct that undermines the effectiveness of the agency’s activities or employee performance, whether on or off the job.” In addition, the rules deem the commission of a Category III offense so serious as to warrant suspension or dismissal upon a single occurrence. Here, Nuesse engaged in dishonesty that caused city dispatchers to become needlessly concerned for their jobs. Because the rules provide that the commission of a single Category III offense can lead to termination, we hold that the trial court did not abuse its discretion in upholding Nuesse’s termination on this incident alone.

*16 {¶ 84} Accordingly, Nuesse’s argument that the trial court violated her due process rights is without merit, and her first assignment of error is not well-taken. Further, our resolution of Nuesse’s first assignment of error renders her second assignment of error moot. See App.R. 12(A)(1)(c). Similarly, because we have upheld Nuesse’s termination, the City’s cross-appeal is also moot, and will not be considered. See *id.*

{¶ 85} Based on the foregoing, the judgment of the Erie County Court of Common Pleas is affirmed. Nuesse is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th

Dist.Loc.App.R. 4.

MARK L. PIETRYKOWSKI, J., THOMAS J. OSOWIK, P.J., and STEPHEN A. YARBROUGH, J.,
 Concur.

Ohio App. 6 Dist., 2011.
 Sandusky v. Nuesse
 Slip Copy, 2011 WL 6322977 (Ohio App. 6 Dist.),
 2011 -Ohio- 6497

END OF DOCUMENT

Slip Copy, 2012 WL 6737833 (Ohio App. 2 Dist.), 2012 -Ohio- 6179
(Cite as: 2012 WL 6737833 (Ohio App. 2 Dist.))

CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio,
Second District, Montgomery County.
Robert J. BARON, Plaintiff-Appellant
v.

CIVIL SERVICE BOARD of the City OF
DAYTON, et al., Defendants-Appellees.

No. 25273.
Decided Dec. 28, 2012.

Civil appeal from Common Pleas Court.
Richard T. Bush, Youngstown, OH, for plaintiff-
appellant.

Thomas M. Green, Dayton, OH, for defendants-ap-
pellees.

FROELICH, J.

*1 ¶ 1} Robert J. Baron appeals from a judgment of the Montgomery County Court of Common Pleas, which overruled his appeal from a decision of the Civil Service Board of Dayton. The Civil Service Board had approved the City Manager's determination that Baron should be discharged from his employment as a firefighter for violating the city's prohibition on dual employment.

¶ 2} For the reasons discussed below, the judgment of the common pleas court will be reversed, and the case will be remanded for further consideration.

I

¶ 3} In February 2006, Baron was working as a part-time police officer in Hubbard, Ohio, when he learned that he had been accepted into the City of Dayton's Fire Academy. Class began on February 27, and Baron secured a residence in Dayton

before that date, as required by the City. Between February 27 and May 5, 2006, he was paid as a full-time employee to attend the academy. During his first few weeks at the academy, Baron commuted to Hubbard to work seven weekend shifts. His employment with Hubbard terminated in April 2006. After Baron graduated from the academy in May 2006, he worked for the City as a firefighter until August 2010.

¶ 4} The City has a policy that prohibits its employees from holding employment with the State or any county, township, or other municipal government. City of Dayton Charter § 6.1(C); City of Dayton Personnel Policies and Procedures 2.06.II.A. In August 2010, the City learned that Baron had worked for the City of Hubbard after he had started at the academy, a fact that Baron did not dispute. The parties do dispute, however, the precise time and manner by which Baron learned of the City's dual employment policy. Baron contends that he was unaware of this policy until after his employment with Hubbard had ended; the City contends that Baron was informed of this policy during his interview and during his training. In any event, in 2010, the Fire Chief terminated Baron's employment when he learned of Baron's dual employment during his time in the academy. In March 2011, the Civil Service Board affirmed the termination of Baron's employment.

¶ 5} Baron appealed the Civil Service Board's ruling to the common pleas court. In reviewing the appeal, the common pleas court applied a deferential standard of review and affirmed the decision of the Civil Service Board.

¶ 6} Baron filed a Motion for New Trial and to Vacate Judgment, which asserted that the common pleas court "erred in treating this matter as a typical administrative appeal" and in deferring to the factual determinations and decision of the Civil Service Board. Baron filed his notice of appeal before the court ruled on this motion, and the court

Slip Copy, 2012 WL 6737833 (Ohio App. 2 Dist.), 2012 -Ohio- 6179
(Cite as: 2012 WL 6737833 (Ohio App. 2 Dist.))

did not thereafter address it.

{¶ 7} Baron appeals, raising three assignments of error.

II

{¶ 8} In his first assignment, Baron contends that the common pleas court erred when it failed to conduct a de novo review of the decision of the Civil Service Board.

*2 {¶ 9} The notice of appeal that Baron filed in the common pleas court stated that his appeal was “filed pursuant to O.R.C. § 124.34, O.R.C. Chapter 119, and O.R.C. Chapter 2506.” While the common pleas court’s decision focused primarily on R.C. 119.12 and cases interpreting it, the parties’ arguments in this court focus primarily on R.C. 124.34 and R.C. Chapter 2506.

{¶ 10} We begin by addressing the trial court’s reliance on R.C. 119.12 and its progeny.

{¶ 11} The common pleas court applied the standard of review set forth in R.C. 119.12, which sets forth the general parameters for administrative appeals, and the discussion of R.C. 119.12 in *Bartchy v. State Bd. of Edn.*, 120 Ohio St.3d 205, 2008–Ohio–4826, 897 N.E.2d 1096. *Bartchy* involved an attempt by a group of residents to transfer their property from one school district to another. In reviewing the Board of Education’s denial of the property owners’ request, *Bartchy* relied on R.C. 119.12 and held that, in an administrative appeal to the common pleas court, the court “may affirm” the agency’s decision if it is supported by “reliable, probative and substantial evidence and is in accordance with law.” *Id.* at ¶ 36, 897 N.E.2d 1096, citing R.C. 119.12. Otherwise, it may “reverse, vacate, or modify the order or make such other ruling as is supported” by the evidence. *Id.*

{¶ 12} In *Bartchy*, the supreme court referred to the two inquiries a common pleas court must conduct in such an appeal as “a hybrid factual/legal inquiry and a purely legal inquiry.” It noted that, in

the “hybrid factual/legal inquiry,” the common pleas court must give deference to the agency’s resolution of evidentiary conflicts, although the agency’s conclusions need not be treated as conclusive if “legally significant reasons for discrediting certain evidence relied upon by the administrative body and necessary to its determination” were found. *Id.* at ¶ 37, 897 N.E.2d 1096. The common pleas court applied the deferential “hybrid factual/legal” standard discussed in *Bartchy* in overruling Baron’s appeal.

{¶ 13} The trial court erred in applying the deferential standard set forth in R.C. 119.12 and discussed in *Bartchy* in Baron’s case. Although R.C. 119.12 generally applies to administrative appeals, R.C. 124.34 sets forth the appeal procedure from an administrative action involving the suspension, fine, demotion or removal of “any member of the police or fire department of a city or civil service township, who is in the classified civil service.” R.C. 124.34(C). When such an appeal is heard, the appointing authority or trial board “may affirm, disaffirm, or modify the judgment of the appointing authority. An appeal on question of law and fact may be had from the decision of the commission to the court of common pleas * * *.” *Id.*

{¶ 14} It is well settled that, when a conflict exists between a specific provision of law and a general provision, the specific provision prevails. See R.C. 1.51; *Meerland Dairy L.L.C. v. Ross Twp.*, 2d Dist. Greene No. 07CA0083, 2008–Ohio–2243, ¶ 18; *Palco Invest., Inc. v. Springfield*, 2d Dist. Clark No.2004 CA 80, 2005–Ohio–6838, ¶ 11, citing *Love v. Port Clinton*, 37 Ohio St.3d 98, 99, 524 N.E.2d 166 (1988). Thus, while some of the general provisions of R.C. 119.12 may apply to a firefighter’s appeal from the decision of the Civil Service Board, the common pleas court is required to apply the standard of review set forth in the more specific statute, R.C. 124.34, which permits de novo review of questions of law and fact. In Baron’s case, the standard of review discussed in *Bartchy*, which was a general administrative appeal unrelated to the re-

Slip Copy, 2012 WL 6737833 (Ohio App. 2 Dist.), 2012 -Ohio- 6179
(Cite as: 2012 WL 6737833 (Ohio App. 2 Dist.))

removal of a police officer or firefighter in the classified civil service, was not controlling.

*3 {¶ 15} We now turn to the parties' argument related to the applicability of R.C. 124.34 and R.C. Chapter 2506.

{¶ 16} We have previously observed that, in Ohio, a classified civil servant who is removed from his or her position "is accorded two avenues of appeal, namely those provided in R.C. 124.34 and R.C. 2506.04. These avenues are separate and distinct." *Barnhardt v. Versailles*, 2d Dist. Darke No. 1311, 1993 WL 39613, *2 (Feb. 18, 1993), citing *Resek v. Seven Hills*, 9 Ohio App.3d 224, 459 N.E.2d 566 (8th Dist.1983). We have distinguished these types of appeal as follows:

R.C. 124.34 allows an appeal on questions of law and fact from the decision of the municipal or civil service commission to the court of common pleas after an intermediate appeal to the municipal or civil service township civil service commission, and grants the court of common pleas the authority to affirm, disaffirm, or modify the judgment of the appointing authority. [*Resek*]. An appeal under this section involves a rehearing and retrial of a cause upon the law and the facts; i.e. a trial *de novo*. See R.C. 2505.01(A)(3).

Thus, under R.C. 124.34 a court may substitute its judgment for that of the administrative tribunal.

Barnhardt at *2.

{¶ 17} On the other hand, under R.C. 2506.04, the trial court may find that the administrative "order, adjudication, or decision is arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. Consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication, or decision, or remand the cause to the officer or body appealed from * * *."

"[I]n an appeal under Chapter 2506, the Court of Common Pleas must weigh the evidence before it * * *. Its review is a hybrid form of review; it involves a consideration of the evidence. To a limited extent, a substitution of judgment by a reviewing common pleas court is permissible. * * *"

Id., citing *In Re Petition for Annexation of 550.626 Acres, More or Less, From Butler Township, Montgomery County and Union Township, Miami County to the City of Union, Ohio*, 2d Dist. Montgomery No. 13398, 1992 WL 361909 (Dec. 9, 1992). See also *Washington v. Civil Service Comm. of Akron*, 9th Dist. Summit No. 20620, 2002 WL 185184, *2 (Feb. 2, 2002).

{¶ 18} Although a classified civil servant has two avenues of appeal available to him, he is required to elect one, because the procedures and standards of review invoked by each are different. *Barnhardt* at *2; *Brittain v. Youngstown Civil Serv. Comm.*, 7th Dist. Mahoning No. 82 CA 54, 1983 WL 4555, *2 (Oct. 19, 1983), citing *State ex rel. Crockett v. Robinson*, 67 Ohio St.2d 363, 423 N.E.2d 1099 (1981). "Without this election, neither the common pleas court nor [the appellate] court can determine which is the proper standard of review." *Barnhardt* at *2. "Although the differences may not all be readily discernable, one distinction crucial to the [election] is that in a *de novo* proceeding the burden of proof is upon the appointing authority, here the city, to show by a preponderance of the evidence, the sufficiency of the cause for removal. * * * In a proceeding pursuant to R.C. 2506, the burden is on the party prosecuting the appeal * * * to demonstrate the error committed by the commission." *Maple Heights v. Karley*, 8th Dist. Cuyahoga No. 36564, 1977 WL 201604, *4 (Nov. 23, 1977).

*4 {¶ 19} Moreover, in an appeal pursuant to R.C. 2506, a court of appeals has a limited function in determining whether the standard of review was correctly applied by the common pleas court, which does not involve a determination as to the weight of

Slip Copy, 2012 WL 6737833 (Ohio App. 2 Dist.), 2012 -Ohio- 6179
(Cite as: 2012 WL 6737833 (Ohio App. 2 Dist.))

the evidence, *Barnhardt* at *2, and our inquiry is limited to a determination of whether we can say, as a matter of law, that there did exist a preponderance of reliable, probative and substantial evidence to support the finding by the trial court. *Id.* See also *University of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111, 407 N.E.2d 1265 (1980). On the other hand, we review a common pleas court's judgment on an R.C. 124.34 appeal from the decision of the civil service commission under an abuse of discretion standard. *Sandusky v. Nuesse*, 11th Dist. Erie No. E-10-039, 2011-Ohio-6497, ¶ 47, citing *Raizk v. Brewer*, 12th Dist. Clinton Nos. CA2002-05-021, CA2002-05-023, 2003-Ohio-1266, ¶ 10 and *Ward v. Cleveland*, 8th Dist. Cuyahoga No. 79946, 2002 WL 192092 (Feb. 7, 2002).

{¶ 20} Where the appellant has not expressly elected between the statutes under which his claim may be reviewed, such an election may, in some circumstances, be inferred. For example, in *Royse v. Dayton*, 195 Ohio App.3d 81, 2011-Ohio-3509, 958 N.E.2d 994 (2d Dist.), the appellant "did not identify in his notice of appeal from the board's decision which statutory avenue of appeal he invoked," but in various filings with the common pleas court, he relied on provisions of R.C. Chapter 2506, without any mention of R.C. 124.34 or a desire for a trial de novo. On appeal, we concluded that Royse had "induced the court to apply the R.C. Chapter 2506.04 standard of review," and could not argue on appeal that the trial court had erred in not applying the R.C. 124.34 standard instead. *Royse* at ¶ 10-12, 958 N.E.2d 994. Similarly, the Eighth Appellate District has held that, where a notice of appeal did not specifically cite R.C. 124.34, but the appellant requested an appeal on questions of law and fact and referred to R.C. 124.34 in his filings in the common pleas court, he had "sufficiently alerted" the common pleas court that he "sought a de novo review of the civil service commission proceedings." *Giannini v. Fairview Park*, 107 Ohio App.3d 620, 699 N.E.2d 283 (8th Dist.1995).

{¶ 21} In Baron's brief in the common pleas court, he repeatedly stated that he sought a de novo review of the civil service board's decision to affirm the fire chief's finding that he had known or should have known of the dual employment policy and that he should be terminated. His argument stated that "[t]he case is before the court for a *de novo* determination of all issues, including the circumstances of the alleged violation and the propriety of the imposed sanction of discharge." Baron urged the court to consider "all the facts and circumstances," and, in his conclusion, he stated that the court "must make a *de novo* determination of all issues, including whether a violation occurred, whether it was intentional, and whether it was so serious as to warrant the ultimate sanction of discharge from employment."

*5 {¶ 22} Although Baron cited both R.C. 124.34 and R.C. Chapter 2506 in his Notice of Administrative Appeal, on this record, there is little doubt that he elected the de novo review afforded by R.C. 124.34. The City's argument that Baron's reference to R.C. Chapter 2506 in his notice of appeal "invoked the trial court's jurisdiction to apply a deferential standard of review" and "gave the trial court the choice of which standard of review to apply" is unsupported by any case law and is, in our view, without merit.

{¶ 23} Because Baron requested a de novo review of the civil service board's decision and was entitled to such a review under R.C. 124.34, the common pleas court erred in deferring to the board's findings when it considered Baron's appeal.

{¶ 24} The first assignment of error is sustained.

III

{¶ 25} In his second assignment of error, Baron contends that the common pleas court erred in failing to grant his motion for a new trial and to vacate judgment, for the reasons cited in support of the first assignment of error. Although Baron's argument implies that the common pleas court denied

Slip Copy, 2012 WL 6737833 (Ohio App. 2 Dist.), 2012 -Ohio- 6179
(Cite as: 2012 WL 6737833 (Ohio App. 2 Dist.))

the motion, in fact, the trial court did not rule on the motion.

{¶ 26} “When a case has been appealed, the trial court retains all jurisdiction not inconsistent with the court of appeals’ jurisdiction to reverse, modify or affirm the judgment.” *Roberts v. Frasier*, 2d Dist. Montgomery No. 21891, 2007-Ohio-2428, ¶ 15, citing *Yee v. Erie Cty. Sheriff’s Dept.*, 51 Ohio St.3d 43, 44, 553 N.E.2d 1354 (1990). In this case, once Baron filed his notice of appeal, this attempt to have the common pleas court modify or vacate its judgment was inconsistent with our authority to “affirm, modify, or reverse” the judgment. App.R. 12(A). Accordingly, the common pleas court did not err in failing to grant Baron’s motion for a new trial or to vacate judgment. Moreover, this argument is moot in light of our disposition of the first assignment of error.

{¶ 27} The second assignment of error is overruled.

IV

{¶ 28} In his third assignment of error, Baron advances an alternate argument that, if the common pleas court’s application of a deferential standard of review were proper, the court nonetheless erred in concluding that the civil service board’s determination was supported by reliable, probative, and substantial evidence. This assignment of error is also rendered moot in light of our disposition of the first assignment of error, and we will not address it. App.R. 12(A)(1)(c).

V

{¶ 29} The judgment of the common pleas court will be reversed, and the matter will be remanded to the court for it to conduct a de novo review of the civil service board’s decision.

GRADY, P.J. concurs.

HALL, J., concurring.

{¶ 30} I agree that the trial court applied an incorrect statutory standard of review. I write separately to note that an argument could be made that

Baron’s notice of appeal of the Dayton Civil Service Board’s administrative decision, filed with the common pleas court, was ineffective to institute a review on questions of law and fact. R.C. 2505.05 provides that a notice of appeal of an administrative decision “shall designate * * * whether the appeal is on questions of law or questions of law and fact.”^{FN1} Although Baron’s notice of appeal refers to R.C. 124.34, which provides for law-and-fact appeals, the notice fails to specifically state that the appeal is on questions of law and fact. Nevertheless, as pointed out by the majority, before the trial court Baron argued for de novo review. Moreover, in its August 4, 2011 answer brief, the City acknowledged that this was a law-and-fact appeal: “This Court reviews the decision of the Civil Service Board under Rev.Code § 124.34(C) and Rev.Code § 2506.01 et seq. The appeal is de novo, on questions of law and fact.” (Answer Brief, 1-2). The City has thus waived any argument that Baron’s notice of appeal was ineffective.

FN1. In Ohio, law-and-fact appeals at the appellate-court level were abolished in 1971 by App.R. 2.

Ohio App. 2 Dist., 2012.
Baron v. Civ. Serv. Bd. of Dayton
Slip Copy, 2012 WL 6737833 (Ohio App. 2 Dist.),
2012 -Ohio- 6179

END OF DOCUMENT