

[Cite as *Ponser v. Newark*, 2010-Ohio-6073.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MARILYN PONSER

Plaintiff-Appellant

-vs-

CITY OF NEWARK

Defendant-Appellee

JUDGES:

Hon. Julie A. Edwards, P. J.

Hon. William B. Hoffman, J.

Hon. John W. Wise, J.

Case No. 10 CA 42

O P I N I O N

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common
Pleas, Case No. 09 CV 2092

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

December 10, 2010

APPEARANCES:

For Plaintiff-Appellant

For Defendant-Appellee

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Wise, J.

{¶1} This is an appeal from a March 29, 2010, judgment of the Licking County Common Pleas Court upholding the decision of the Newark Civil Service Commission to terminate Appellant Marilyn Ponser’s employment with the City of Newark.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant Marilyn Ponser began working for the City of Newark in 1991 as a financial intake officer. (T. at 104). In late 1999, Appellant changed jobs and took the grant-funded position of Building Inspector. *Id.* As Building Inspector, Appellant had numerous duties and responsibilities as set forth in the written “Position Description” for “Building Inspector, Community Development”:

{¶3} “Administers the distribution of federal housing dollars.

{¶4} “Maintains accounts for federal housing dollars, once distributed.

{¶5} “Informs and assists clients and contractors in all aspects of housing related issues.

{¶6} “Assists in housing inspections, bid specs, and grant writing.

{¶7} “Inputs data on Integrated Disbursement and Data Systems, i.e. HUD computer reporting system.

{¶8} “Performing other duties as required.”

{¶9} As Building Inspector, Appellant’s duties also included, among others, completing applications for Homestead Exemptions and Home Energy Assistance Programs; working with families under the Down Payment Assistance Program, and the Licking County Economic Action Development Study, as well as transportation services. The bulk of her duties, however, dealt with the City’s housing rehabilitation program and

the various funding sources and programs the City used to provide such housing rehabilitation.

{¶10} The City of Newark receives money from a Community Development Block Grant (CDBG). (T. at 37). Through this Program, the City of Newark makes emergency home repairs such as replacing a roof or furnace. The City also receives money through the State's CHIP Grant. Id. This grant money is supplied by the Ohio Department of Development and is used to complete major home rehabilitation projects. (T. at 37, 42). The City usually completes twenty to twenty-five emergency repairs and starts about five to six home rehabs per year. (T. at 38-39).

{¶11} The Program is supposed to operate as follows: When a homeowner contacts the Community Development Department requesting assistance through the Owner-Occupied Rehabilitation Program, his or her address is verified to make certain they live within the City of Newark. Assuming they do, the income of everyone in the home is verified by paystubs, social security award letters, etc. (T. at 39-40). Once income has been verified, the City sends an inspector to the home to assess the work that needs done. Id. After the scope of work has been agreed upon, a mortgage is prepared to cover the cost of the repair, the loan is closed, and the mortgage is recorded. (T. at 41). No work, including emergency repairs, is to begin until the mortgage has been filed. (T. at 99). Once the mortgage is filed, the City uses its grant money to pay the subcontractors who make the repairs. If a change order creates a situation where the original mortgage no longer fully secures the cost of the project, a new or amended mortgage is to be signed and filed. (T. at 58).

{¶12} Unlike other cities, the City of Newark operates its Owner-Occupied Rehabilitation Program as an interest-free loan. However, all of the Program's money must be reimbursed. (T. at 43). If the homeowner decides to move or the property is otherwise transferred, the City's mortgage is repaid, plus a one-time fee of five percent (5%). (T. at 43). Once the City's mortgage is repaid, it puts the money into a revolving loan account, which is an account that is used to pay future emergency repairs or full rehab projects. Id.

{¶13} In 2003, concerns arose over the Department's practices and efficiency. The Ohio Department of Development issued a monitoring report, and the Director of the City's Department of Community Development, Bill Slocum, commissioned an evaluation of this department. In early 2004, the City began a criminal investigation. In February 2004, upon advice from the police department, the mayor placed Appellant on administrative leave so that they could conduct their investigation. The mayor then hired Attorney Priscilla Hapner to conduct an internal investigation. At the conclusion of such hearing, the attorney recommended to the mayor that Appellant be terminated.

{¶14} On January 21, 2005, the City of Newark terminated Appellant's employment for "gross inefficiency, incompetency [sic] and neglect of duty in [Appellant's] administration of the housing rehabilitation/emergency repair wait list and [Appellant's] failure to obtain and file mortgages to secure the full amount of housing assistance provided to beneficiaries of the City's housing rehabilitation and emergency repair programs in accordance with federal, state and/or City policies and rules."

{¶15} Appellant appealed her termination to the Newark Civil Service Commission. A record hearing was held before a hearing officer on April 15, 17 and 20, 2009.¹

{¶16} On October 7, 2009, the hearing officer issued his Report and Recommendation, finding that Appellant had been properly terminated for cause.

{¶17} At its meeting on November 19, 2009, the Civil Service Commission affirmed the Report and Recommendation.

{¶18} On December 4, 2009, Appellant appealed such decision to the Licking County Common Pleas Court pursuant to R.C. §2506.01.

{¶19} Briefs were filed by the parties, and on March 29, 2010, the trial court upheld the decision of the Civil Service Commission to terminate Appellant's employment.

{¶20} Appellant now appeals, assigning the following error for review:

ASSIGNMENT OF ERROR

{¶21} "I. THE TRIAL COURT ABUSED ITS DISCRETION IN ITS DECISION BY AFFIRMING THE DECISION OF THE NEWARK CIVIL SERVICE COMMISSION UPHOLDING THE TERMINATION OF APPELLANT FROM HER EMPLOYMENT BECAUSE THE COMMISSION'S DECISION WAS ARBITRARY, CAPRICIOUS, UNREASONABLE AND NOT SUPPORTED BY THE PREPONDERANCE OF SUBSTANTIAL, RELIABLE AND PROBATIVE EVIDENCE."

¹ The Hearing in this matter was delayed due to an open police investigation.

I.

{¶22} Appellant claims the trial court erred in upholding the decision of the Civil Service Commission. We disagree.

{¶23} R.C. §2506.04 sets forth the applicable standard of review for a court of common pleas to review an administrative appeal:

{¶24} “The court may find that the order, adjudication, or decision is unconstitutional, illegal, 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 with instructions to enter an order, adjudication, or decision consistent with the findings or opinion of the court. The judgment of the court may be appealed by any party on questions of law as provided in the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505 of the Revised Code.”

{¶25} In *Henley v. Bd. of Zoning Appeals* (2000), 90 Ohio St.3d 142, 147, 735 N.E.2d 433, the Ohio Supreme Court stated:

{¶26} “[W]e have distinguished the standard of review to be applied by common pleas courts and courts of appeals in R.C. Chapter 2506 administrative appeals. The common pleas court considers the ‘whole record,’ including any new or additional evidence admitted under R.C. 2506.03, and determines whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence. (Citation omitted).”

Pataskala Banking Co. v. Etna Tp. Bd. of Zoning Appeals, Licking App. Nos. 07-CA-116, 07-CA-117, 07-CA-118, 2008-Ohio-2770, ¶ 13.

{¶27} This Court's standard of review of a R.C. §2506.04 appeal is “more limited in scope.” *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34, 465 N.E.2d 848. “This statute grants a more limited power to the court of appeals to review the judgment of the common pleas court only on ‘questions of law,’ which does not include the same extensive power to weigh ‘the preponderance of substantial, reliable and probative evidence,’ as is granted to the common pleas court. Within the ambit of ‘questions of law’ for appellate court review would be abuse of discretion by the common pleas court.” *Id.* at fn. 4. “It is incumbent on the trial court to examine the evidence. Such is not the charge of the appellate court. * * * The fact that the court of appeals * * * might have arrived at a different conclusion than the administrative agency is immaterial. Appellate courts must not substitute their judgment for those of an administrative agency or a trial court absent the approved criteria for doing so.” *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 261, 533 N.E.2d 264. This standard of review is tantamount to an abuse of discretion standard; therefore, an appellate court should reverse the trial court's judgment in such a case only upon a finding that the decision is unreasonable, arbitrary, or unconscionable. *In re American Outdoor Advertising*, supra at ¶ 5; see, also, *Kisil*, supra 12 Ohio St.3d at fn. 4.

{¶28} In upholding the decision of the Civil Service Commission, the trial court found that the testimony of Attorney Hapner and Anne Spray, the Office Manager/Account Clerk for the Newark City Community Development Office, presented ample evidence that Appellant failed to secure mortgages or the appropriate amount of

indebtedness in the mortgages she did record on numerous occasions and that such failures jeopardized the City's ability to fulfill its mission.

{¶29} During Hapner's testimony she stated that as part of her investigation she reviewed the Sherman Report², the Diaz Report, the Department of Development Handbook, and the City of Newark's policy and procedures manual. She interviewed Appellant's co-workers and supervisors, in addition to a Lana Vacha, a HUD employee. (T. at 160-176). She also reviewed rehabilitation files and kept detailed notes of her findings. During her testimony, Atty. Hapner specifically reviewed a number of cases where the amount of the mortgages filed by Appellant did not match the actual rehabilitation loans provided to the mortgagees. (T. at 177-185).

{¶30} The trial court likewise found that Appellant's own admissions that she did not perform her duties in accordance with city policies presented substantial evidence of gross misconduct. The trial court found that there was undisputed testimony that Appellant repeatedly failed to properly secure debt, failed to secure debt in a timely fashion, failed to maintain useful wait lists for applicants and failed to collect proof of hazard insurance from beneficiaries of the programs.

{¶31} Applying our limited review, we find, as a matter of law, the decision of the common pleas court is supported by a preponderance of reliable, probative, and substantial evidence, and that the court did not abuse its discretion in upholding the decision to terminate Appellant's employment.

² Tom Sherman was the Housing Specialist assigned to the City of Newark for approximately ten (10) years until his retirement in 2005. His duties included making a technical assistance visit to grantee at the beginning of a grant and a monitoring visit toward the of the grant period, followed by the preparation of a monitoring report. (T. at 333, 377, 341).

{¶32} Assignment of Error I is denied.

{¶33} For the foregoing reasons, the judgment of the Court of Common Pleas of Licking County, Ohio is hereby affirmed.

By: Wise, J.

Edwards, P. J., and

Hoffman, J., concur.

JUDGES

JWW/d 1103

