

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Kelle Brush,	:	
	:	
Appellant-Appellant,	:	
	:	
v.	:	No. 11AP-101
	:	(C.P.C. No. 10CVF-04-6089)
Licking County Child Support	:	
Enforcement Agency,	:	(REGULAR CALENDAR)
	:	
Appellee-Appellee.	:	
	:	

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D E C I S I O N

Rendered on August 11, 2011

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*Daniel H. Klos*, for appellant.

*Kenneth W. Oswald*, Licking County Prosecuting Attorney, and *James D. Miller*, for appellee.

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APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶1} Appellant, Kelle Brush, appeals the Franklin County Court of Common Pleas decision granting appellee's motion to dismiss and affirming the State Personal Board of Review's ("SPBR") order. For the following reasons, we affirm the decision.

{¶2} Brush assigns the following errors for our consideration:

[I.] The Court erred when it did not find that the agency failed to consider an important aspect of the problem[.]

[II.] The Court erred when it did not find that the agency's interpretation of the statute was inconsistent with the statutory purpose.

[III.] The Court erred when it failed to apply *Treciak v. Ohio Dept. of Commerce* (Mar. 24, 1995), Licking App. No. 94-CA-00085, unreported, 1995 WL 347999; cert denied (1995), 73 Ohio St.3d 1453 to the Appellant's case that a change in Civil Service status for an employee shall be treated as if Appellant's position were abolished (10 days under OAC 124-1-03(B)) but that the triggering action was the post dated hiring on 1/7/10 effective 12/31/09, of another employee on whose job had been abolished at the same time as Appellant's.

[IV.] The Court erred when it failed to recite any evidence, law, or fact about what was different about the circumstances the Appellant cited that the SPBR Order was in error as dissimilar or unpersuasive to the Court.

[V.] The Court erred when it inferred that unnecessary appeals would have already occurred if the Appellant's position was correct when equally inferential facts under the law would not support that inference. It is arbitrary and capricious for the Court to infer that employees would have previously unnecessarily appealed an abolishment when the current state of the law requires a substantive right to relief (Reinstatement or back pay) created by any fact in existence during the 10-day appeal window.

{¶3} The facts in this case are not in dispute.

{¶4} Kelle Brush worked as an employee of appellee, Licking County Child Support Enforcement Agency. On December 17, 2009, Brush received a letter giving her notice of layoff and abolishment of her position, effective December 31, 2009.

{¶5} On December 28, 2009, a new position was created within the agency. One of Brush's co-workers, whose position had also been abolished on December 17, was appointed to this new position on January 7, 2010, retroactively effective December 31, 2009.

{¶6} Brush attempted to file an appeal of the abolishment of her own position with SPBR on January 6, 2010, but sent it to the wrong address. Brush filed her appeal in writing with SPBR on January 22, 2010.

{¶7} In addressing the appeal, the Administrative Law Judge ("ALJ") noted the issue of timing and held that Brush was untimely with her filing, falling outside the ten-day time limit prescribed by Ohio Adm.Code 124-1-03(B). The ALJ dismissed the appeal on jurisdictional grounds. The trial court agreed and dismissed Brush's appeal from the SPBR's order. Brush then timely appealed to this court.

{¶8} Where a statute confers the right of appeal, an appeal may be perfected only in the manner prescribed by statute. *CHS-Windsor, Inc. v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 05AP-909, 2006-Ohio-2446, ¶6.

{¶9} Considerable deference should be accorded to an agency's interpretation of rules the agency is required to administer. Further, an administrative rule that is issued pursuant to statutory authority has the force of law unless it is unreasonable or conflicts with a statute covering the same subject matter. *State ex rel. Celebrezze v. Natl. Lime & Stone Co.*, 68 Ohio St.3d 377, 1994-Ohio-486.

{¶10} Pursuant to R.C. 119.12, a reviewing trial court must affirm the order of the SPBR if it is supported by reliable, probative, and substantial evidence and is in accordance with law. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 111. "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. "Substantial" evidence is evidence with some weight; it must have importance and value. *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570, 571.

{¶11} In reviewing an order of an administrative agency, an appellate court's role is more limited than that of a trial court reviewing the same order. It is incumbent on the trial court to examine the evidence. Such is not the role of the appellate court. The appellate court is to determine only if the trial court has abused its discretion. *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 261.

{¶12} An abuse of discretion connotes more than an error of judgment; it implies a decision that is arbitrary or capricious, one that is without a reasonable basis or clearly wrong. *Pembaur v. Leis* (1982), 1 Ohio St.3d 89.

{¶13} We must establish the existence of jurisdiction before we can address Brush's assignments of error. To do so, we examine the statutes and codes controlling the appeal.

{¶14} Ohio Adm.Code 124-1-03(B) states "Appeals from layoffs, abolishments, and displacements shall be in writing and shall be filed with the

board, or postmarked, not more than ten calendar days after receipt of the notice of the action." This ten-day deadline must be met in order to vest SPBR with jurisdiction. *Sekerak v. Fairhill Mental Health Ctr.* (Apr. 16, 1985), 10th Dist. No. 84AP-1171.

{¶15} Brush received notice of the abolishment of her position on December 17, 2009. Assuming that Brush had properly addressed her first letter to SPBR on January 6, 2010, the appeal would still fall outside the ten-day calendar requirement of Ohio Adm.Code 124-1-03(B), having been filed 20 days after the abolishment.

{¶16} The court of common pleas found that there was reliable, probative and substantive evidence to support the SPBR's decision to dismiss the appeal for lack of jurisdiction due to Brush's late filing of an appeal.

{¶17} We find that the common pleas court did not abuse its discretion when affirming SPBR's order. This court's decision in *Sekerak* affirms that the ten-day period required to file an appeal is controlling in order to establish jurisdiction after a layoff. Brush failed to file within the ten-day period starting December 17, 2009, when she was given notice of her position's abolishment.

{¶18} Brush argues that the ten-day time limit should not have started on December 17, 2009. She alleges, at the time she was laid-off, there was no basis for an appeal. Rather, her grounds for an appeal occurred when her co-worker at the Licking County Child Support Enforcement Agency was rehired after having her position abolished the same day as Brush. Her argument is not well-taken. Brush's appeal to SPBR could only be an appeal of the abolishment

of her job or the termination of her employment. She could not contest the hiring of someone else to a new or different job. She had only ten days to contest the abolishment of her own job and the attendant loss of her employment.

{¶19} Having found that SBPR lacked jurisdiction to address her appeal, all of Brush's assignments of error are overruled.

{¶20} The judgment of the Franklin County Court of Common Pleas is affirmed.

*Judgment affirmed.*

BRYANT, P.J., and FRENCH, J., concur.

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