

IN THE COMMON PLEAS COURT OF DARKE COUNTY, OHIO

LEROY MURPHY	:	CASE NO. 09-CV-00254
	:	
Appellant,	:	
	:	
vs.	:	JONATHAN P. HEIN, Judge
	:	
GREENVILLE TOWNSHIP	:	
BOARD OF TRUSTEES	:	
	:	
Appellee.	:	<u>JUDGMENT ENTRY</u>

This matter came before the Court for adjudication on the merits of the appeal herein, with the parties having filed their briefs and arguments of law. The Appellant was represented by Laura L. Wilson, Esq. The Appellee was represented by Eric H. Brand, Esq.

Nature of the Case

Appellant was the Assistant Fire Chief for Greenville Township in Darke County. On May 1, 2009, George Luce, Jr., as Chairman of the Board of Trustees, signed a Notice that a disciplinary hearing would be held on May 7, 2009 to consider allegations made against Mr. Murphy. A hearing was conducted and various witnesses testified, subject to cross-examination. Documents were also considered by the Trustees. As a result of the hearing, Mr. Murphy's duties as Assistant Fire Chief were terminated. It is from this decision that this appeal was filed.

Legal Standards

Pursuant to R.C. 505.38(A), an appointee of a township fire department "shall continue in office until removed from office as provided by sections 733.35 to 733.38 of the Revised Code." Sections 733.35 to 733.38, which otherwise pertain to methods for cities and villages, set forth various procedures that must be followed in the removal process, including written notice of the allegations, timeliness of hearings, and hearing procedures.

As with most administrative appeals, the governmental entity bears the burden of providing a transcript and record of the underlying administrative action. [citations omitted.] From the transcript and record, the trial court must determine whether the decision of the governmental entity was based upon a "preponderance of substantial, reliable and probative evidence." See R.C. 2506.04; *Sell v. Adams Twp. Board of Zoning Appeals* (December 22, 2000), Darke App. No. 1518. When a transcript had been filed, the Court must presume that the decision was reasonable and valid and would have given deference to the governmental entity's decision. *Amser Corp. v. Village of Brooklyn Heights* (May 6, 1993), Cuyahoga. App. No. 62140; *In Re: Application of Watkins* (February 18, 2000), Montgomery App. No. 17723. [Where there is no transcript, the Court must consider the matter *de novo* and the decision of the governmental entity is of no consequence in the Court's review. *Woerner v. Mentor Exempted Village School Dist. Bd. of Edn.* (1993), 84 Ohio App. 3d 844.]

Decision

Sufficiency of the Charges

Appellant claims that there are various deficiencies in complying with R.C. 733.35 regarding the charges filed against the him. In its pertinent parts, R.C. 733.25 provides that the written charge must set forth:

“a detailed statement of such alleged guilt, and at the same time, or as soon thereafter as possible, serve a true copy of such charges upon the person against whom they are made. Such service may be made on the person or by leaving a copy of the charges at the office of such person. Return thereof shall be made to the legislative authority, as is provided for the return of service of summons in a civil action.”

Here, the Notice of Pre-dispositional Hearing (i.e. the charge) was signed on May 1, 2009. However, it was not served on Appellant until May 7, 2009 and then only by facsimile transmission to the Appellant’s counsel. Such service was only two days in advance of the hearing.

Return of service was not filed with the record.

The Court determines that service on counsel meets the intentions of the statute, especially when considering that merely leaving the notice at the office of the person would be permitted. However, no explanation exists as to the delay in service or the failure to otherwise document the manner of delivery.

Regarding sufficiency of the charge, the Court finds that the charging notice is sufficiently detailed as to all of the numerous incidents involved. While every incident did not contain a particular calendar date or precise location, the charges are not “vague” as Appellant alleges. Since he was personally involved with each incident, sufficient overall information was contained in the attachments to the charge in order to advise Appellant of the aggrieved conduct. Further, when several allegations were dismissed and the Township chose to move forward on only

conduct involving purchase and payment of fire equipment, the other allegations became moot – and so did arguments about any deficiency. The Court specifically finds that the charge involving the unauthorized purchase of fire equipment was not vague.

Attendance of Witnesses

Appellant complains that he was prejudiced by the failure of the Trustees to compel the attendance of seven witnesses. Instead, only two of the Appellant's witnesses appeared. The record does not include copies of any subpoenas, so it is uncertain whether any subpoenas were even issued. While the burden is placed on the Trustees to issue subpoenas and to compel the appearance of witness, the lack of a timely request by Appellant is the problem.

Appellant claims that a continuance could not be accepted because the Appellant's hearing must be held within 30 days after this suspension. However, the 30 day timing requirement for the hearing under R.C. 733.37 commences on the day that the charges were filed, i.e. May 1, 2009 – not the date of suspension. See *State ex. rel. Patrick v. Baldine* (1951), 91 Ohio App. 284. The hearing needed to be concluded by May 30, 2009, which provided adequate time for issuance of subpoenas had Appellant not refused the offer of a continuance. Appellant's argument that the suspension can only last 30 days is inaccurate; instead, the hearing must be concluded within 30 days after the charge is lodged. The failure of Appellant to accept a continuance in order to garner the attendance of witnesses was a tactical decision for which no error can be laid on the Appellee. Any error alleged regarding subpoenas is denied since the error was caused by Appellant.

Propriety of the Hearing

In this case, the Notice of Pre-disciplinary Hearing was signed on May 1, 2009 by the Chairman of the Board of Trustees. The first page of the Notice appears to be procedural in nature

by setting a hearing date and advising of procedural rights. However, attached thereto are five pages of facts and allegations involving the Appellant's conduct. Standing alone, the five additional pages

are not sufficient to be a charge since statutory reasons for discipline, and the types of discipline are not included. Therefore, taken as a whole, the six page document must be considered the charge.

However, the propriety of one Trustee signing the charge has been raised, since it is undisputed that all three Trustees were involved in the adjudicatory process, including the decision to terminate the Appellant as Assistant Fire Chief. On this issue, the holding in *Kiger v. Albon* (1991), 67 Ohio App.3d 301 at 307 is clear:

“*** in *American Cyanamid Co. v. Federal Trade Comm.* (C.A. 6, 1966), 363 F.2d 757, 767-768, the court held as follows: "The result of the participation of Chairman Dixon in the decision of the Commission is not altered by the fact that his vote was not necessary for a majority. 'Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we may know of whereby the influence of one upon the others can be quantitatively measured.' *Berkshire Employees Association of Berkshire Knitting Mills v. N.L.R.B.*, 121 F.2d 235, 239 (C.A. 3, [1941])."

In this case, the correct process would have been for the Fire Chief – or other administrative supervisor of the Fire Department, if any – to file the charges against the Appellant, and to include in the charge the basis for discipline, possible disciplines, and specific facts involved. Thereafter, the Chairman or other Trustee could have advised of procedural rights. The correct process would not place the Chairman of the Board of the Trustees in the position of being both the charging officer and an adjudicatory officer. [The fact that the decision to remove Appellant was unanimous does not remove the violation of procedural due process. See *Kiger, supra.*]

Several other concerns are noted. First, the record provides references by the Chairman of the Board of Trustees to other conduct outside the allegations in the charge. The meaning of those references cannot be discerned from the record; findings of fact in support of its decision would have solved the question of the evidence used to make the decision. In the absence of such findings, regularity of the proceedings cannot be presumed. Second, another Trustee apparently misunderstands the adjudicatory process. When discussing the Chief's testimony and conclusions drawn therefrom, appellant's counsel challenged the Chief's testimony. The telling and erroneous response was that "credibility's got nothing to do with it." Clearly, credibility of witnesses has everything to do with determining whether the Appellant should be discharged as Assistant Fire Chief. When an adjudicator ignores the importance of weighing credibility of witnesses, the integrity of the entire hearing is questioned. Finally, careful attention should be paid to the recording process since part of the transcript was not provided when the hearing commenced before the recorder was activated.

Decision

The Court finds that careful attention to statutory detail was lacking in the service upon Appellant and the proof of service but that such defects were not prejudicial to Appellant. Further, the alleged defects regarding the attendance of witnesses was the result of Appellant's counsel's tactical decisions and, therefore, are not an error. However, the participation of the Trustee in the decision making process after signing the charges is prejudicial *per se*. Since the Trustee involved is no longer a member of the Board of Trustees, his future participation will not be problematic.

IT IS THEREFORE ORDERED AND DECREED that this matter is remanded to the Greenville Township Board of Trustees for *de novo* adjudicatory hearing on the allegations contained in the charge. Whether the Trustees chose to proceed on all three charges or only the one involving procurement of fire equipment remains their decision. Costs taxed to the Appellee.

FINAL APPEALABLE ORDER.

Jonathan P. Hein, Judge

cc: Laura Wilson, Attorney for Appellant (via fax)
Eric Brand, Attorney for Appellee (via fax)

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