

FILED
COURT OF APPEALS

DEC 7 1987

COURT OF APPEALS
ELEVENTH DISTRICT
TRUMBULL COUNTY

TRUMBULL COUNTY, OHIO
VIOLET CAMPANA WHITMAN, Clerk

J U D G E S

HON. DONALD R. FORD, P.J.
HON. ROBERT E. COOK, J.
HON. JUDITH A. CHRISTLEY, J.

MARIE MONICO, EXECUTRIX,

Relator

- VS -

GIRARD BOARD OF
EDUCATION,

Respondent

CASE NO. 3716

OPINION AND JUDGMENT ENTRY

CHARACTER OF PROCEEDINGS: Original Action in Mandamus

JUDGMENT: Relator is entitled to a Writ of Mandamus.

ATTY. RICHARD A. ABRAMS
GREEN, SCHIAVONI, MURPHY, HAINES
SGAMBATI CO., L.P.A.
4th Floor, Dollar Bank Building
P.O. Box 849
Youngstown, Ohio 44501-0849
(For Relator)

ATTY. ROBERT S. McGEOUGH
ATTY. NED GOLD
500 Second National Tower
Warren, Ohio 44481
(For Respondent)

FORD, J.,

Relator Anthony Monico took a Civil Service examination and was appointed to the position of bus mechanic's helper with the respondent Girard Board of Education ("board") in

November of 1978. In December of 1980 or 1981, the transportation director had a heart attack and relator was asked by the board to perform the duties of the transportation director in addition to the duties he performed as bus mechanic's helper. Without resigning as bus mechanic's helper, relator complied with the board's request. Although relator performed the duties of the transportation director, he was not offered nor was he ever formally appointed to that position. His most recent salary notice listed him as bus mechanic's helper.

On August 24, 1985, relator submitted to the superintendent of the Girard City Schools a letter of resignation. Following the receipt of the letter, respondent terminated relator in his capacity as acting transportation director and bus mechanic's helper on or about September 5, 1985, and immediately hired a replacement bus mechanic's helper.

On approximately October 28, 1985, relator sought to revoke his earlier letter of resignation, submitting a letter to that effect to respondent. Relator appealed his termination to the Girard Civil Service Commission, claiming that his resignation as expressed in his letter of August 24, 1985, was a qualified one, and was only as the acting director of transportation, not bus mechanic's helper. On December 23, 1985, the commission agreed with relator, disaffirmed his

termination and ordered the board to reinstate relator as bus maintenance helper with all back pay and privileges due him. (The inadvertent use of the word "maintenance" rather than "mechanic's" is of no consequence here.) Respondent's refusal to reinstate relator prompted this writ of mandamus.

Respondent appealed the decision of the commission on January 2, 1986, and maintains that since the appeal will provide relator with an adequate remedy at law, the writ of mandamus is improper. Relator argues that respondent has no right to appeal the decision of the commission and that any appeal made was not properly perfected. Although relator died on December 27, 1986, a Suggestion of Death was filed on January 7, 1987, and Marie Monico, executrix, was substituted as relator.

The primary issue posited here is whether relator resigned as bus mechanic's helper, or as acting director of transportation, or whether his resignation applied to both of these classifications. If relator resigned in his capacity as acting director of transportation only, the Girard Board of Education improperly terminated his employment and he is entitled to compensation for back pay, vacation, holiday and sick days as well as interest and retirement contributions. Relator's letter of resignation stated: "It is with deep regret that I inform you of my decision to withdraw as acting director of transportation *** I feel I would be of much more

use as the mechanic in the transportation department." Therefore, we share the view of the Girard Civil Service Commission that relator did not resign as bus mechanic's helper despite the belief by the board that he had resigned both positions. We are of the opinion that the foregoing language is clear and unequivocal, and that its diction is such that the language is most susceptible of applying plain meaning to it. Lawler v. Burt (1857), 7 Ohio St. 340 and its progeny. We conclude that this syntax was tantamount to a qualified resignation applying only to his status as acting director of transportation. Respondent's argument regarding estoppel fails for the same reason.

The request for a writ of mandamus here is proper. In State, ex rel. Kabatek v. Stackhouse (1981), 66 Ohio St. 2d 64, the appellant claimed he was improperly laid off from work with the county engineer. The court of common pleas disaffirmed the layoff and ordered reinstatement. After returning to work, appellant in Stackhouse, supra, was not placed in the same job, so he appealed to the State Personnel Board, but unsuccessfully. He filed an appeal in the court of common pleas and, during its pendency, filed a mandamus action with the court of appeals. After the court of appeals dismissed the action on the grounds that the pending action in the court of common pleas afforded appellant Kabatek an adequate remedy at law, he appealed that decision to the

Supreme Court which held that "the only issue before this court is whether appellant utilized the proper remedy to obtain back pay, benefits and reinstatement allegedly due him from the layoff of October 21, 1977. Mandamus is the proper remedy under these facts." (citations omitted.) The fact pattern in the instant action is quite similar to that of Kabatek, supra. Additionally, the court in State, ex rel. Martin v. Columbus (1979), 58 Ohio St. 2d 261, found that a mandamus action by a reinstated public employee was permitted to recover compensation due him for a period of time during which he was wrongfully terminated from his employment.

Respondent has no right to appeal because R.C. 124.34 does not confer upon respondent this right. The respondent admits that pursuant to R.C. 124.34, no right of appeal exists from an adverse ruling of a civil service commission involving the issue of termination of a classified employee. Respondent also acknowledges that R.C. 2506.01 does not grant a civil service employee any additional substantive rights. As relator points out, the substantive right to appeal a civil service commission ruling is limited by R.C. 124.36 which respondent admits provides no right to appeal here. The appeal to the court of common pleas is collateral to the dispute between the parties, and does not negate the merit of relator's contention. Based on the facts before us, relator

was improperly terminated as bus mechanic's helper and is entitled to full compensation.

Respondent's contention that relator was not a civil service employee is meritless and ignores the evidence and findings of the commission. He took and passed a civil service examination and was appointed to the position of bus mechanic's helper, a position that he never vacated, resigned from, or left. Relator agreed to perform the duties of acting transportation director after the director had a heart attack, as an accommodation, but this did not negate his status as a civil service employee as a bus mechanic's helper. Consequently, his role was a hybrid one. He never achieved the singular status of transportation director, which would have resulted in his being viewed as a supervisory employee not entitled to civil service protection. If this in fact had occurred, respondent's argument that it would have the right to pursue an administrative appeal under R.C. 2506 et seq. would be greatly enhanced. See R.C. 124.11(B). Further, respondent acknowledges at page six of its brief that with reference to a ruling by a civil service commission as to a classified employee that an employer in effect has no right to appeal such a ruling when it states "that there exists no right of appeal pursuant to Revised Code §124.34."

The Respondent also argues that the Civil Service Commission was without subject matter jurisdiction to review

relator's appeal of his termination on the basis of R.C. 4117.01 et seq. R.C. 4117.10 provides in part:

*** the state personnel board of review or civil service commissions have no jurisdiction to receive and determine any appeals relating to matters that were the subject of a final and binding grievance procedure."

It appears that the foregoing statute precludes jurisdiction to a civil service commission over matters that "were the subject of a final and binding grievance procedure." It is discerned that the legislature through the foregoing language sought to prevent dual litigation through both an arbitration exercise and a separate appeal to a civil service commission. Here, however, Relator's appeal was never the subject of grievance procedure or final and binding arbitration pursuant to a collective bargaining agreement. Therefore, we conclude that R.C. 4117.10(A) does not interdict the Civil Service Commission's assertion of jurisdiction here.

Parenthetically, it is our general understanding that the right to proceed to arbitration is controlled by the employee organization, and not the employee. The collective bargaining representative may refuse to arbitrate a particular dispute. Respondent's approach would thus deprive a classified employee of his rights under the civil service law. A careful analysis is triggered when one claims that the public sector collective bargaining bill extinguishes other

DEC 7 1987

TRUMBULL COUNTY, OHIO
VIOLET CAMPANA WHITMAN, Clerk

statutory rights. See, State ex rel. Dispatch Printing Company v. Wells (1985), 18 Ohio St. 3d 382.

It is well established that in order to obtain a writ of mandamus, a relator must demonstrate a clear legal right to the relief requested, a clear legal duty on the part of respondent to perform the requested act and the absence of an adequate remedy at law. State ex rel. Cartmell v. Dorrian (1984), 11 Ohio St. 3d 177. State ex rel. Westchester v. Bacon (1980), 61 Ohio St. 2d 42. R.C. 2731.05 A writ of mandamus is used to coerce the performance of a pre-existing duty and the writ cannot be resorted to in place of an appeal. Since the respondent did not have the right to appeal the decision of the Girard Civil Service Commission and refused to comply with its order, relator had no adequate remedy at law.

Upon consideration of the pleadings, evidence adduced, arguments of counsel and memoranda of law, and for the foregoing reasons stated in this opinion, this court finds that relator is entitled to a writ of mandamus. It is therefore ordered that a writ of mandamus issue against respondent, directing it to compensate relator's estate for full compensation from the date of termination until the date of Mr. Monico's death, with accrued vacation, holiday and sick days, retirement contributions and lawful interest, together with the costs of these proceedings.

Donald R. Ford

DONALD R. FORD
PRESIDING JUDGE