



LEXSEE 106 OHIO APP. 3D 761

**RALPH PRETE, Appellee v. THE AKRON CITY SCHOOL DISTRICT BD. OF
EDN., Appellant**

C.A. NO. 17131

**COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, SUMMIT
COUNTY**

106 Ohio App. 3d 761; 667 N.E.2d 73; 1995 Ohio App. LEXIS 4619

October 13, 1995, Decided

SUBSEQUENT HISTORY: [***1] As Amended. *Per curiam.*

PRIOR HISTORY: APPEAL FROM JUDGMENT ENTERED IN THE COMMON PLEAS COURT. COUNTY OF SUMMIT, OHIO. CASE NO. 94 7 2435.

DISPOSITION: Judgement reversed.

COUNSEL: RONALD MACALA and SHAWN GROFF, GREEN, HAINES, SGAMBATI, MURPHY & MACALA CO., L.P.A., Akron, OH, for Appellee.

DENNIS WHALEN, R. BRENT MINNEY, and CRAIG A. ROBINSON, WHALEN & COMPTON CO., L.P.A., Akron, OH, for Appellant.

JUDGES: JOHN W. REECE. REECE, P. J., SLABY, J., CONCUR. DICKINSON, J., DISSENTS SAYING:

OPINION BY: JOHN W. REECE

OPINION

[*762] [*74] *DECISION AND JOURNAL ENTRY*

Dated: October 13, 1995

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

The Akron City School District Board of Education ("Board") has appealed from an order of the Summit County Court of Common Pleas that reversed the decision of the City of Akron Civil Service Commission and ordered reinstatement of appellee Ralph Prete as an elementary school custodian. The Board has argued that the common pleas court incorrectly determined that Mr. Prete was not responsible for the care, custody, or control of a child within the meaning of Section [***2] 3319.39 of the Ohio Revised Code. This Court reverses the common pleas court's judgment because, as a matter of law, a preponderance of reliable, probative, and substantial evidence supported the Commission's decision to uphold the discharge of Mr. Prete.

I.

The Board hired Mr. Prete as a five hour custodian at one of its elementary schools on January 12, 1994. At the time he was hired, the board informed him that his [*763] employment was conditioned upon satisfactory completion of a criminal records check by the Ohio Bureau of Criminal Identification and Investigation. As a result of the criminal records check, the Board learned that Mr. Prete had been convicted of or pleaded guilty to a violation of Section 2907.09 of the Ohio Revised Code, public indecency, on August 18, 1975.

Section 3319.39(B)(1) of the Ohio Revised Code provides:

Except as provided in rules adopted by the department of education in accordance with division (E) of this section and as provided in division (B)(3) of this section, no board of education of a school district and no governing authority of a chartered nonpublic school shall employ a person as a person responsible for the care, custody, [***3] or control of a child if the person previously has been convicted of or pleaded guilty to any of the following:

(a) A violation of section
* * * 2907.09 * * * of the
Revised Code.

The Board discharged Mr. Prete on April 28, 1994, effective April 26, 1994, on two grounds: (1) he had failed to list his conviction on his employment application; and (2) he was disqualified from employment by his public indecency conviction.

Mr. Prete appealed his discharge to the City of Akron Civil Service Commission, which held a hearing on June 30, 1994. The Commission rejected the Board's claim that it was justified in discharging Mr. Prete because he had failed to list his conviction on his employment application. It determined, however, that employment of Mr. Prete by the Board would be a violation of Section 3319.39 of the Ohio Revised Code and upheld his discharge.

Mr. Prete appealed the Commission's decision to the Summit County Court of Common Pleas. On January 6, 1995, the common pleas court entered a judgment that reversed the Commission's decision and ordered Mr. Prete reinstated to his former position. According to the common pleas court, Mr. Prete "clearly was not in [***4] a position 'as a person responsible for the care, custody, or control of a child.'" The Board timely appealed to this Court.

II.

The Board's sole assignment of error is that the common pleas court incorrectly determined that Mr. Prete was not responsible for the care, custody, or control of a child within the meaning of Section 3319.39. Section

2506.04 of the Ohio Revised Code governs the standard of review for appeals from an administrative board to a common pleas court:

[**75] 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, [*764] 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 [***5] rules, Chapter 2505 of the Revised Code.

In *Dudukovich v. Lorain Metro. Housing Auth.* (1979), 58 Ohio St. 2d 202, 207, 389 N.E.2d 1113, the Ohio Supreme Court addressed the trial court's standard of review in a Revised Code Chapter 2506 appeal:

Thus, it is quite evident that the Court of Common Pleas must weigh the evidence in the record, and whatever additional evidence may be admitted pursuant to R.C. 2506.03, to determine whether there exists a preponderance of reliable, probative and substantial evidence to support the agency decision. We caution, however, to add that this does not mean that the court may blatantly substitute its judgment for that of the agency, especially in areas of administrative expertise. The key term is "preponderance." If a preponderance of reliable, probative and substantial evidence exists, the Court of Common Pleas must affirm the agency decision; if it does not exist, the court may reverse, vacate, modify or remand.

A court of appeals must affirm the common pleas court, unless it finds, as a matter of law, that the common pleas court's decision is not supported by a preponderance of

reliable, probative, and substantial evidence. [***6] *Kisil v. Sandusky* (1984), 12 Ohio St. 3d 30, 34, 465 N.E.2d 848; *Dudukovich*, 58 Ohio St. 2d at 208.

Mr. Prete's shift as a five hour custodian began at 2:30 p.m. He reported to work as students were being dismissed. His regular duties consisted of cleaning and maintaining the school building. Mr. Prete had contact with students as they were leaving school and with students who were in the school after regular school hours because they returned to retrieve books or because they were involved in after-school activities.

The Board has argued that "all adult school district employees possess the inherent authority to direct, control, and deal with students as the need arises." Brief of Appellant at 7. The Coordinator of Classified Staff of the Akron Public Schools testified at the Commission hearing about whether Mr. Prete, as a custodian, was responsible for the care, custody, or control of children:

Q: As far as your understanding of the statute, who is subject to a criminal records check under that statute?

A: All employees of the Board of Education are subject.

[*765] Q: In your opinion, would custodial workers be individuals who have the custody or [***7] control of students?

A: Yes. Any individual that is employed by the Board of Education would have that contact, and some control.

It has further argued, in regard to Mr. Prete specifically, that "it would be expected that [he] would intervene if he observed a student engaging in conduct that is dangerous or in violation of school rules and control, direct, or deal with the student accordingly." *Id.* at 6-7. Mr. Prete at the Commission hearing admitted that, during an emergency, he could be entrusted with the care of children: "Yes. I might end up in a situation where I had to help children in case * * * of an emergency or something."

This Court finds that, as a matter of law, a preponderance of reliable, probative and substantial evidence supported the Commission's decision that Mr. Prete was subject to discharge pursuant to Section 3319.39 of the Ohio Revised Code. The testimony

supports a finding that Mr. Prete had responsibility for the care, custody, or control of children in that he regularly had contact with children and could have been entrusted with their care during an emergency. The common pleas court, therefore, [**76] should have affirmed the decision [***8] of the commission. The Board's assignment of error is sustained.

III.

The Board's assignment of error is sustained. The judgment of the Summit County Court of Common Pleas is reversed.

Judgment reversed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Summit Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E).

Costs taxed to appellee.

Exceptions.

JOHN W. REECE

FOR THE COURT

REECE, P.J.

SLABY, J.

CONCUR

DISSENT BY: DICKINSON

DISSENT

DICKINSON, J.

DISSENTS SAYING:

In its judgment entry, the common pleas court reasoned that adoption of the Board's argument would not be consistent with the legislature's apparent intent:

"There is no evidence that § 3319.39 was enacted with the intent of requiring that *all* applicants [***9] for employment with a school district or school be subject to a criminal records check. Rather, the statute expressly states that only those persons responsible for the '*care, custody, or control* of a child' are required to undergo such a check. If the legislature had intended that the criminal records check requirement apply to *all* applicants for employment with a school district or school, it could have specifically stated so." (Emphasis sic.)

[*766] I cannot disagree with the common pleas

court's conclusion that the words chosen by the legislature indicate that it did not intend to bar people convicted of the crimes listed in Section 3319.39(B)(1) from all employment with a school district. The statute does not say that such people are barred from any employment, or even that they are barred from employment in buildings where students may be present. It says that they are barred from employment in positions in which they would be "responsible for the care, custody, or control of a child." Nor can I disagree with the trial court's conclusion that, as a five hour custodian, Mr. Prete was not employed in a position in which he was "responsible for the care, custody, or [***10] control of a child." I would overrule the Board's assignment of error and affirm the common pleas court.