

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Ohio Department of Rehabilitation & Correction, Ross Correctional Institution,	:	
	:	
Appellant-Appellant,	:	No. 10AP-260
	:	(C.P.C. No. 09CVF-09-13914)
v.	:	
	:	(ACCELERATED CALENDAR)
Albert Price,	:	
	:	
Appellee-Appellee.	:	

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D E C I S I O N

Rendered on November 18, 2010

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*Richard Cordray*, Attorney General, and *Drew C. Piersall*, for appellant.

*Mann & Preston, LLP*, and *Mark A. Preston*, for appellee.

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APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Appellant, Ohio Department of Rehabilitation & Correction, Ross Correctional Institution ("DRC"), appeals from a judgment of the Franklin County Court of Common Pleas affirming a decision of the State Personnel Board of Review ("SPBR") that disaffirmed an order DRC issued to appellee, Albert Price, reducing him in rank from Corrections Lieutenant to Corrections Officer. DRC assigns a single error:

The common pleas court erred and abused its discretion in upholding the decision of the State Personnel Board of Review disaffirming Albert Price's reduction in position at the Ohio Department of Rehabilitation & Correction, Ross Correctional Institution.

Because the common pleas court did not abuse its discretion in determining reliable, probative, and substantial evidence supports the decision of the SPBR, we affirm.

### **I. Facts and Procedural History**

{¶2} As a result of an incident on April 30, 2008, DRC issued an order of reduction pursuant to R.C. 124.34, reducing Price in rank from Corrections Lieutenant to Corrections Officer. According to the order of reduction, Price "witnessed a subordinate officer under [his] supervision throw punches at an inmate," but "failed to require this officer to self report his actions." (Order of Reduction, DRC Exhibit 1.) Price also did not report the incident. DRC concluded Price's conduct violated DRC Work Rules 25, 27, and 49 and issued the order of reduction on August 26, 2008.

{¶3} At the heart of DRC's order of reduction was its Use of Force Report Policy, which provides that each DRC staff member "who is physically involved in or witnesses a use of force incident is required to complete an Incident Report \* \* \* before leaving the institution at the end of their shift or work day." (Use of Force Report Policy, DRC Exhibit 12.) The policy further states "[s]taff members should describe their own actions and those of other staff members if the writer witnessed them. Staff members should take care to report details as completely as possible. Opinions are inappropriate." (Use of Force Report Policy, DRC Exhibit 12.)

{¶4} On August 28, 2008, Price timely appealed his disciplinary reduction to the SPBR and requested a hearing. At the February 9, 2009 hearing, Price testified he began

his employment with DRC in 1981 and was promoted to the rank of Corrections Lieutenant in 2003. On the day of the incident, Price was working overtime on second shift and serving as shift supervisor at Ross Correctional Institution. Price ordered and participated in a cell extraction of two inmates who flooded their cell and covered the cell window with toilet paper so no one could see inside the cell. As corrections officers attempted to extricate the two uncooperative inmates from the cell, one of the two inmates "struck his head on the sink" and as a result required a medical evaluation. (Tr. 17.)

{¶5} During the attempt to transport the inmate to the medical unit, Price testified he saw "what appeared to be one swing by Officer [Scott] Leist" at the inmate. (Tr. 22.) Price stated that although he "viewed what [he] thought to be a punch," he "couldn't tell if [Leist] hit the man or not." (Tr. 22-23.) Price testified he advised Leist "he shouldn't be doing that," but Leist and the other two escorting officers "said he didn't do it." (Tr. 32.) According to Price, he did not report the swing because he was unsure of what he saw, he "didn't have no evidence to – to corroborate that," and he "had nothing to go on." (Tr. 32.) Price acknowledged he is familiar with DRC's Use of Force Policy, but "if you don't see – not sure what you see, you don't put that in there. You put only what you know to be fact." (Tr. 87.)

{¶6} The hearing also included the testimony of Warden Michael Sheets and Assistant Chief Inspector Paul Shoemaker, as well as a videotape of the incident. Sheets testified Leist's throwing two punches at an inmate qualified as both force and excessive force under DRC's policy. According to Shoemaker, Price stated during an investigative interview that he saw Leist swing twice, though neither punch connected. (Tr. 78.) The

videotape showed that while Price was nearby, Leist swung twice at the inmate. Price watched the tape at the hearing but said a doorjamb obstructed his view at the time of the incident. (Tr. 21.)

{¶7} Following the hearing, an administrative law judge ("ALJ") issued a report and recommendation on July 21, 2009 concluding Price's actions did not violate DRC Work Rules 25, 27 or 49. The ALJ recommended Price's reduction be disaffirmed and Price be restored to his former classification of Corrections Lieutenant. On August 13, 2009, DRC filed objections to the ALJ's report and recommendation; Price filed a response to DRC's objections.

{¶8} The SPBR adopted the ALJ's finding that DRC failed to demonstrate Leist actually struck the inmate. The SPBR, however, modified the ALJ's report and recommendation, concluding instead that Price violated DRC Rule 25 when he failed to report that the subordinate officer swung his fist at an inmate or, alternatively, failed to require the subordinate officer to so report. With that modification, the SPBR ordered Price's reduction be disaffirmed but that Price's reinstatement to the rank of Corrections Lieutenant be effective as of the date of the SPBR's order, September 10, 2009.

{¶9} DRC appealed the SPBR's order to the Franklin County Court of Common Pleas. Acknowledging, in a detailed recitation, the evidence presented at the administrative hearing, the court concluded reliable, probative, and substantial evidence supported the SPBR's order and the order was in accordance with law. The common pleas court thus affirmed the SPBR's order. DRC timely appealed.

## II. Standard of Review

{¶10} Under R.C. 119.12, a common pleas court, in reviewing an order of an administrative agency, must consider the entire record to determine whether reliable, probative, and substantial evidence supports the agency's order and the order is in accordance with law. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 110-11. The common pleas court's "review of the administrative record is neither a trial de novo nor an appeal on questions of law only, but a hybrid review in which the court 'must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence, and the weight thereof.'" *Lies v. Veterinary Med. Bd.* (1981), 2 Ohio App.3d 204, 207, quoting *Andrews v. Bd. of Liquor Control* (1955), 164 Ohio St. 275, 280. The common pleas court must give due deference to the administrative agency's resolution of evidentiary conflicts, but "the findings of the agency are by no means conclusive." *Conrad* at 111. The common pleas court conducts a de novo review of questions of law, exercising its independent judgment in determining whether the administrative order is "in accordance with law." *Ohio Historical Soc. v. State Emp. Relations Bd.* (1993), 66 Ohio St.3d 466, 471.

{¶11} An appellate court's review of an administrative decision is more limited than that of a common pleas court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. The appellate court is to determine only whether the common pleas court abused its discretion. *Id.*; *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219 (defining an abuse of discretion). Absent an abuse of discretion, a court of appeals may not substitute its judgment for that of an administrative agency or the common pleas court. *Pons* at 621. An appellate court, however, has plenary review of purely legal

questions. *Big Bob's, Inc. v. Ohio Liquor Control Comm.*, 151 Ohio App.3d 498, 2003-Ohio-418, ¶15.

### III. Assignment of Error

{¶12} DRC's sole assignment of error contends the common pleas court erred and abused its discretion in two aspects in affirming the SPBR's decision. DRC initially argues the common pleas court abused its discretion in concluding no underlying use of force occurred but at the same time concluding Price failed to report a use of force. DRC secondly asserts the common pleas court abused its discretion in giving Price's testimony more weight than the testimony of other witnesses.

#### A. Use of Force

{¶13} DRC's order, issued pursuant to R.C. 124.34, charged Price with violations of DRC Work Rules 25, 27, and 49. A violation of Rule 25 occurs in the "[f]ailure to immediately report a violation of any work rule, law, or regulation." (Order of Reduction, DRC Exhibit 1.) A violation of Rule 27 addresses the "[f]ailure of a supervisor to properly supervise or enforce work rules." (Order of Reduction, DRC Exhibit 1.) Finally, Rule 49 is violated when "[a]ny violation of ORC 124.34" occurs. (Order of Reduction, DRC Exhibit 1.) The ALJ concluded Price's "actions did not constitute a violation of [DRC] Work Rules 25, 27, or 49." (Report and Recommendation, 7.) The SPBR, however, concluded Price's failure to report the incident with Leist and the inmates violated Rule 25.

{¶14} DRC's Use of Force Policy defines "force" as "the exertion or application of a physical compulsion or constraint." (Use of Force Policy, DRC Exhibit 11.) "Excessive force" is "an application of force which, either by the type of force employed, or the extent to which such force is employed, exceeds that force which reasonably appears to be

necessary under all the circumstances surrounding the incident." (Use of Force Policy, DRC Exhibit 11.) DRC argues that in order for the SPBR to find a violation of Rule 25, as it did, it necessarily also must find an underlying use of force. DRC thus asserts the SPBR's finding of no use of force is irreconcilable with a finding that Price violated Rule 25. According to DRC, if the SPBR imposed a sanction on Price and concluded he violated Rule 25, it necessarily concluded Price failed to report a use of force. DRC accordingly asserts the SPBR's order is fatally flawed, and the common pleas court abused its discretion in affirming that order.

{¶15} The SPBR did not conclude that Leist did not use force in his dealings with the inmates. Rather, based on the evidence presented, it concluded no application of physical compulsion or constraint occurred. Because use of force can be either exertion or application of physical compulsion or constraint, the SPBR's determination that no application occurred does not preclude its unarticulated conclusion that Leist exerted compulsion but fell short of applying it, an exertion Price should have reported, but did not, and so violated Work Rule 25.

{¶16} Although an unspoken conclusion often leaves us uncertain about the agency's rationale, the record here is entirely consistent with such a finding. See *State ex rel. McAtee v. Indus. Comm.* (1996), 76 Ohio St.3d 648, 651 (finding the Industrial Commission implicitly disposed of the issue of abandonment where "the commission relied on all of the evidence in the file and adduced at the hearing, and that evidence can only lead to the conclusion" of abandonment). Price testified he saw Leist swing but did not see the swing connect with either inmate. Had Leist's swing connected with the inmate, a report would have been necessary to document Leist's application of force; the

failure to report arguably would have warranted the reduction DRC imposed. SPBR, however, in its discretion could deem a failure to report an exertion of force to be a less serious offense, though one nonetheless violating Work Rule 25 and deserving a sanction. Consistent with such a finding, a reduction for a period of time, as SPBR imposed here, would be within the realm of reason.

{¶17} Unlike the "exertion" analysis that renders the SPBR's decision internally consistent, DRC's argument would render it inconsistent: SPBR would have found no violation but nevertheless would have imposed a sanction. When we are presented with alternate interpretations of a tribunal's decision, only one of which delivers internal consistency, we are compelled to construe the decision in a manner that achieves consistency. *Macklin v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 01AP-293, 2002-Ohio-5069, ¶20 (stating " '[i]f the evidence is susceptible to more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment' "), quoting *Estate of Barbieri v. Evans* (1998), 127 Ohio App.3d 207, 211. Here that consistency is achieved in rejecting DRC's interpretation of the evidence and in deferring to the SPBR's evaluation of the credibility of the witnesses, its conclusions about what Price witnessed and the sanction it imposed that reasonably addresses the violation it found.

{¶18} As a result, the common pleas court thus did not abuse its discretion in concluding substantial, reliable, and probative evidence supports the SPBR's conclusion. Although Leist did not apply physical compulsion or constraint, Price should have reported Leist's exertion of compulsion and, because he did not, he violated Work Rule 25 and warranted the modified sanction. DRC's first argument is unpersuasive.

### B. Weight of Testimony

{¶19} DRC next contends the trial court abused its discretion in affirming the order of the SPBR because the SPBR relied too heavily on Price's self-serving testimony. DRC points to the testimony of Sheets and Shoemaker categorizing Leist's conduct as excessive force, the result of Shoemaker's investigation determining excessive force occurred, and the video showing Leist's conduct. DRC argues that because such evidence far outweighs Price's testimony, the trial court abused its discretion in affirming the SPBR's decision to give more weight to Price's testimony.

{¶20} The common pleas court did not abuse its discretion in giving deference to the SPBR's findings. The ALJ's report and recommendation included an extensive recitation of the testimony and exhibits from the hearing, stating it conducted "a thorough examination of the entirety of the record." (Order.) The weight to be given the testimony is primarily a matter for the finder of fact, and the common pleas court must give due deference to the SPBR's resolution of evidentiary conflicts. *Maurer v. Franklin Cty. Treasurer*, 10th Dist. No. 07AP-1027, 2008-Ohio-3468, ¶15, citing *Conrad* at 111; see also *Jones v. Franklin Cty. Sheriff* (1990), 52 Ohio St.3d 40, 43, quoting *Graziano v. Amherst Exempted Village Bd. of Edn.* (1987), 32 Ohio St.3d 289, 293 (stating " 'due deference must be accorded to the findings and recommendation of the [ALJ] \* \* \* because it is the [ALJ] who is best able to observe the demeanor of the witnesses and weigh their credibility' "). Because DRC alleged Price failed to report an event he witnessed, the ALJ and the SPBR did not act unreasonably in giving substantial weight to Price's testimony concerning what he actually saw during the incident.

{¶21} Given the evidence in the record, the common pleas court's decision and entry properly stated that, "[a]fter reviewing the evidence in the record, the Court finds that the record contains reliable, probative and substantial evidence supporting the [SPBR's] order." (Decision and Judgment Entry, 6.) DRC points to nothing to indicate the common pleas court abused its discretion in so doing, other than to disagree with the underlying credibility and weight determinations. To the extent DRC suggests we reweigh the credibility of the witnesses, such an exercise is not appropriate for this court's role in reviewing the common pleas court's decision. DRC's second argument is not well-taken.

#### **IV. Disposition**

{¶22} Because the common pleas court did not abuse its discretion in concluding substantial, reliable, and probative evidence supports the SPBR's order modifying Price's reduction, we overrule DRC's sole assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

KLATT and McGRATH, JJ., concur.

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