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IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO

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| JEREMY SHADD,               | ) | CASE NO. CV 15 847677                  |
|                             | ) |  |
| Appellant,                  | ) | JUDGE JOHN P. O'DONNELL                |
|                             | ) |  |
| vs.                         | ) | <u>JUDGMENT ENTRY REVERSING</u>        |
|                             | ) | <u>THE CLEVELAND CIVIL SERVICE</u>     |
| CLEVELAND CIVIL SERVICE     | ) | <u>COMMISSION'S JUNE 26, 2015</u>      |
| COMMISSION, <i>et al.</i> , | ) | <u>DECISION AFFIRMING THE</u>          |
|                             | ) | <u>PLAINTIFF'S FIVE-DAY SUSPENSION</u> |
| Appellees.                  | ) |  |

*John P. O'Donnell, J.:*

This is an appeal by Jeremy Shadd from the City of Cleveland Civil Service Commission's<sup>1</sup> decision upholding his five-day job suspension for failing to report an accident. Shadd has filed a merit brief, the Commission and the City of Cleveland have filed a brief in support of their position, and Shadd has filed a reply brief. This judgment entry is based on those briefs and the transcript of proceedings.

STATEMENT OF FACTS

During the relevant time period, Jeremy Shadd was employed as a construction equipment operator for the City of Cleveland's Department of Public Utilities, Division of Water Pollution Control. On October 31, 2014 Shadd was driving a backhoe through an entranceway in Cleveland's Water Pollution Control garage when there was a loud bang. The City contends that the loud noise was the bucket of the backhoe hitting the top of the entranceway, causing damage to the backhoe and the door frame. Shadd asserts that the bucket did not hit the door

<sup>1</sup> The Cleveland Civil Service Commission will be referred to throughout this entry as "the Commission" or "CCSC."

frame and that there was no damage to either the backhoe or the frame; instead, his position is that the noise can be attributed to the backhoe passing over a bump in the ground.

Terry Taylor is the manager of general maintenance in Shadd's division. From his observations, he believes that an accident occurred that Shadd was required to report under the City's workplace rules. He told Shadd that it must be reported even though Shadd's opinion was that there was nothing to report. Taylor informed superintendent Daniel Tomko of the circumstances, and Tomko submitted a report to the human resources department recommending that Shadd be disciplined.

A pre-disciplinary conference was held on November 13 and on November 20, Rachid Zoghaib, Commissioner of Water Pollution Control, notified Shadd by letter that he was suspended for five days without pay because he "blatantly disregarded policies and procedures" when he failed to "immediately report all accidents/incidents to [his] superiors in addition to completing the proper forms."<sup>2</sup>

Shadd exercised his right to a hearing before a neutral referee appointed by the Commission. The hearing went forward on February 12, 2015 before referee Thomas Skulina. Taylor, Tomko, Edwin Rivera<sup>3</sup> and Shadd testified at the hearing.

Taylor testified that he saw the backhoe operated by Shadd approach the entranceway of the garage, but then he turned away to continue with what he had been doing.<sup>4</sup> He heard a loud bang, and when he turned his attention back to the backhoe he saw it continuing on without stopping.<sup>5</sup> When he examined the entranceway, he saw "gash marks with yellow paint or

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<sup>2</sup> November 20, 2014 letter from Commissioner Zoghaib.

<sup>3</sup> Rivera is a supervisor over maintenance.

<sup>4</sup> Transcript from February 12, 2015, hearing, page 10.

<sup>5</sup> *Id.*

something on it” on the aluminum siding above the door frame<sup>6</sup> and shards of rusted metal from the backhoe on the ground.<sup>7</sup>

Taylor opined that the bucket of the backhoe was up too high, causing contact.<sup>8</sup> It is his belief that the metal shards came from the backhoe; however, the backhoe was missing pieces of metal all over it, so any shards that did come from the backhoe could not be matched up to a specific location.<sup>9</sup> Taylor testified that he had taken photographs of the backhoe and that they did not depict any damage.<sup>10</sup> He also observed that a photograph of the aluminum siding indicates that it has been struck numerous times.<sup>11</sup>

Taylor testified that Shadd told him “[w]hen I hit it, I didn’t think it was nothing,” but that he told Shadd that the incident must still be reported.<sup>12</sup> He acknowledged that the area had been hit several times before,<sup>13</sup> and that it is known procedure to make a report any time a city vehicle hits a structure.<sup>14</sup> He stated, “I know . . . there are numerous vehicles inside our division whom have hit the actual door, tore the door down, showed physical damage, there was an accident. Those people were called to an incident hearing. That is my understanding of an accident.”<sup>15</sup>

Tomko testified that after he had been notified that there was an accident, he approached Shadd, who said that he hit the door and did not report it because “he didn’t think it was a big deal.”<sup>16</sup> Tomko also testified that any time a vehicle is involved in any type of accident,

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 28.

<sup>8</sup> *Id.* at 11.

<sup>9</sup> *Id.* at 43.

<sup>10</sup> *Id.* at 22.

<sup>11</sup> *Id.* at 38.

<sup>12</sup> *Id.* at 16-17.

<sup>13</sup> *Id.* at 11.

<sup>14</sup> *Id.* at 40.

<sup>15</sup> *Id.* at 36-37.

<sup>16</sup> *Id.* at 50.

regardless of whether any damage is sustained to either the vehicle or the structure, a report has to be made.<sup>17</sup>

Edwin Rivera testified that, at the pre-disciplinary hearing, Shadd “admitted the backhoe boom hit the top of the door” but that “he didn’t know he had to report it” and “[h]e didn’t believe it was an accident.”<sup>18</sup> He also reiterated that it is policy to report incidents where vehicles hit structures.<sup>19</sup>

Shadd testified that there was “no damage done whatsoever” to the backhoe.<sup>20</sup> When asked if the backhoe made any contact, he responded: “I don’t believe it did. After observing the overhead door, I noticed the scuff marks that were there, there was no difference from the left to right. After observing my backhoe and observing the door, I made a judgment call saying that I did not in fact make contact with the door; therefore, there was no reason to report. What I originally thought was the machine making contact with the door, there is a two-inch bump going through the door. As you pass over it, it makes the machine jump and makes the bucket rattle sometimes. That is what I believe the noise was, what the feeling was.”<sup>21</sup>

In explaining a prior statement, Shadd said that what looked like white paint on top of the vehicle was actually lithium grease used to lubricate the machine, which he realized when he was able to wipe it off with his hand.<sup>22</sup>

Shadd also testified that he does not remember acknowledging to anyone that he hit the top of the door, only that he may have hit it.<sup>23</sup> He stated that “[a]t that point in time I wasn’t sure

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<sup>17</sup> *Id.* at 51.

<sup>18</sup> *Id.* at 59.

<sup>19</sup> *Id.* at 60.

<sup>20</sup> *Id.* at 72.

<sup>21</sup> *Id.* at 72-73.

<sup>22</sup> *Id.* at 73.

<sup>23</sup> *Id.* at 79.

if I did or not. I examined the door and machine, there was no contact made. There was no damage done to either of them.”<sup>24</sup>

On April 16, 2015 the referee issued a report recommending that the five-day suspension be deleted from Shadd’s record. The referee reasoned that:

The occurrence was not witnessed. There were some shards of material found at the scene, but no proof these were there because of the grievant and not by other equipment that utilized the same access to the building.

In a discipline situation, the burden is on the appointing authority to prove its case.

The grievant restated the contested issue. He felt he did not have to report the occurrence since there was no sign of damage and it is not dispositive without more proof that contact was made with the building.

The backhoe was not damaged. There was no proof that there was damage to the top of the entranceway that was attributed to the grievant.

In conclusion, there is a lack of evidence and does not bear the weight necessary to impose discipline.

Hence, there is an unwitnessed occurrence, no damage to the backhoe, disputed testimony from the grievant and also some evidence that other vehicles may have passed through this entrance. They could have made contact with same.

Interim Director of Public Utilities Sharon Dumas sent Shadd a letter dated April 28, 2015 sustaining the decision of Commissioner Zoghaid to suspend him for five days without pay

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<sup>24</sup> *Id.*

for failing to report an accident. Dumas said "I disagree with the Referee's finding that there was insufficient evidence of the accident involving the backhoe you operated that day."<sup>25</sup>

Shadd appealed Dumas's decision to the Commission. A hearing was held May 22, 2015 where the Commission received argument from the attorneys for both sides. No evidence was presented at the hearing. At the conclusion of the hearing, the Commission affirmed the Interim Director's decision sustaining the Commissioner's suspension of Shadd for five days without pay.

On June 26, 2015 the Commission issued its findings of fact and conclusions of law. It found, in pertinent part:

At the hearing, Mr. Shadd testified that the accident did not occur. Three witnesses, Mr. Taylor, Mr. Tomko, and Mr. Edwin Rivera, a Maintenance Operations Supervisor who attended Mr. Shadd's pre-disciplinary conference, all testified that prior to his Civil Service Hearing, Mr. Shadd had acknowledged and admitted the occurrence of the accident. Mr. Taylor testified that he heard the accident; that upon approaching the entranceway to the garage he observed fresh damage to the entranceway and to the backhoe; and that he had just prior to hearing the loud bang which drew his attention to the entranceway, observed the backhoe operated by Mr. Shadd enter the maintenance garage with its bucket in the up position.

The Commission concluded that "the City met its burden of establishing by a preponderance of the evidence just cause for Mr. Shadd's five (5) day suspension issued on November 20, 2014 for his failure to report an accident which occurred on October 31, 2014."

Shadd appealed the Commission's decision to this court on June 30, 2015.

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<sup>25</sup> April 28, 2015, letter from Interim Director of Public Utilities Sharon Dumas.

## LAW AND ANALYSIS

Shadd brings the appeal pursuant to Chapter 2506 of the Ohio Revised Code.<sup>26</sup> Section 2506.04 states, in pertinent part, that:

If an appeal is taken in relation to a final order, adjudication, or decision covered by division (A) of section 2506.01 of the Revised Code, 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, 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.

Shadd is not claiming that the Commission's decision is unconstitutional, illegal, arbitrary, capricious, or unreasonable, so the relevant inquiry is whether the Commission's decision was unsupported by the preponderance of substantial, reliable and probative evidence.

Shadd submits the following four assignments of error:

Assignment of Error No. 1:

The City failed to prove that Mr. Shadd caused or was involved in or failed to report a motor vehicle accident or violated any City Motor Vehicle Accident Procedures.

Assignment of Error No. 2:

The City of Cleveland Civil Service Commission failed to give proper and due deference to the factual findings of the Referee who issued a Report and Recommendation that Mr. Shadd's suspension be overturned on the basis that the City had not sustained its burden to prove a motor vehicle accident had taken place. Pursuant to *Badertscher v. Liberty-Benton School Dist.*, 2015-Ohio-1422 (Ohio App. 3<sup>rd</sup> Dist. 2015), the referee's primary

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<sup>26</sup> Shadd's notice of appeal to this court states that the appeal is taken pursuant to R.C. §§ 119.12 and 124.34 and alternatively pursuant to R.C. § 2506.01. However, his merit brief only references R.C. Chapter 2506.

duty is to ascertain facts, and the commission's primary duty is to interpret the significance of the facts. The commission must accept the referee's findings of fact, unless they are against the greater weight of the evidence, or preponderance of the evidence.

Assignment of Error No. 3:

The referee's report should have been approved and accepted by Cleveland's Civil Service Commission since it was and is supported by reliable, probative and substantial evidence. *Boddy v. Cleveland Civil Service Commission*, 8th Dist. Cuyahoga No. 49302, 1985 Ohio App. LEXIS 8163 (June 20, 1985).

Assignment of Error No. 4:

The Interim Director's decision sustaining the Commissioner's five (5) day suspension was untimely and not in conformance with Cleveland Civil Service Rule 9.40.

The first three assignments of error may be decided together because they all essentially assert that the Commission's decision was unsupported by the preponderance of substantial, reliable and probative evidence. In support of his position, Shadd cites to two cases: *Badertscher v. Liberty-Benton School Dist.*, supra and *Boddy v. Cleveland Civil Service Commission*, supra.

In *Badertscher*, the court held that a board must accept the referee's findings of fact unless they are against the preponderance of the evidence. ¶ 33. However, *Badertscher* is inapposite here because that rule was made in the context of teacher disputes arising under R.C. 3319.16. Here, Civil Service Rule 9.40 states that upon review of the record "including, where applicable, the facts, conclusions of law, and recommendations of the Referee, the Director may sustain, modify, or overrule the action of the appointing authority in the City service in discharging, suspending, or reducing the officer or employee concerned." Neither Civil Service Rule 9.40 nor the case law interpreting it require adherence to the rule articulated in *Badertscher*.

*Boddy* held that the referee's findings should be affirmed if supported by reliable, probative and substantive evidence. ¶ 9. However, in contrast to Shadd's situation, in *Boddy* the CCSC agreed with the referee's factual finding and the court of appeals eventually affirmed those same findings. In addition, Shadd is arguing his appeal under R.C. Chapter 2506 while *Boddy* was decided in the context of R.C. 119.12 and 124.34.

But just because Shadd cannot find support from *Badertscher* or *Boddy* does not mean his claims fail. In determining whether the Commission's decision was supported by the preponderance of substantial, reliable and probative evidence, the evidence considered by the Commission must be examined to see whether it supports a conclusion that Shadd caused an accident that required reporting.

Pursuant to the Motor Vehicle Accident Procedure as outlined in Section C-16-1 of the City of Cleveland Human Resources Policies and Procedures Manual, an accident is defined as "any intended or unintended event from which vehicle damage results" and must be reported to the employee's supervisor within 24 hours. Thus the factual question to be resolved by the Commission was whether "vehicle damage result[ed]."

On that issue, the evidence – all of which is testimony – is legally insufficient to demonstrate by a preponderance that vehicle damage was caused.

Three people did testify that Shadd acknowledged hitting the top of the entranceway with the backhoe, so the Commission may reasonably have found that an "event" occurred, but an event must be reported only when vehicle damage results. On that subject, only one witness – Taylor – testified to observing circumstantial evidence of damage in the form of shards of rusted metal on the garage floor. Yet Taylor also agreed that photographs of the backhoe did not reveal any damage to the vehicle. At the same time, Shadd testified that he personally inspected the

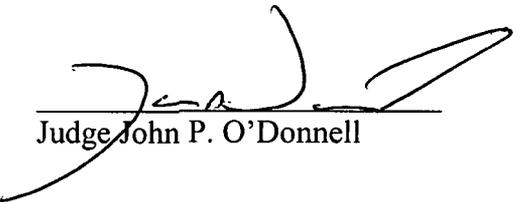
backhoe and it was not damaged. On the record available to him, the referee made the only conclusion he could have: that vehicle damage was not proved by a preponderance of the evidence. The Commission, which received no evidence, was thus without an evidentiary basis to overturn the referee's factual finding. In short, the Commission's decision is unsupported by the preponderance of substantial, reliable and probative evidence.

Shadd's fourth assignment of error argues that because the Interim Director's decision was not timely, the referee's report and recommendation should be sustained. While it is noted that Shadd has not pointed to any authority for that conclusion, a determination of this issue is unnecessary given the disposition of his first three assignments of error.

#### CONCLUSION

The Commission disregarded the preponderance of the evidence when it found that an accident causing vehicle damage occurred and triggered Shadd's duty to report under the City's Motor Vehicle Accident Procedure and its June 26, 2015 decision affirming Shadd's suspension is reversed. Shadd's five-day suspension shall be vacated and deleted from his record, and the City is ordered to reimburse Shadd for the loss of pay for those five days.

**IT IS SO ORDERED:**

  
Judge John P. O'Donnell

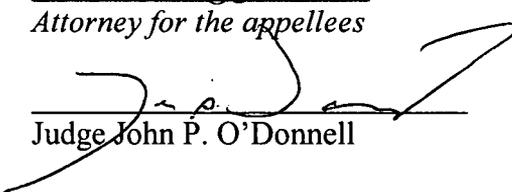
March 8, 2017  
Date

**SERVICE**

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Judge John P. O'Donnell