COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

JAMES SMITH	**:**	
Plaintiff	**:**	**CASE NO. 2011 CVH 01952**
vs.	**:**	**Judge McBride**
PIERCE TOWNSHIP	**:**	**DECISION/ENTRY**
Defendant	**:**	

W. Kenneth Zuk, attorney for the plaintiff James Smith, 3487 St. Annes Turn, Cincinnati, Ohio 45245.

Schroeder, Maundrell, Barbiere & Powers, Lawrence E. Barbiere and J. Michael Morgalis, attorneys for the defendant Pierce Township, 5300 Socialville-Foster Road, Suite 200, Mason, Ohio 45040.

This cause is before the court for consideration of a motion for summary judgment and a motion to strike plaintiff's amended complaint filed by the defendant Pierce Township and a motion for summary judgment and motion for leave to file amended complaint file by the plaintiff James Smith.

The court scheduled and held a hearing on the motions on January 28, 2013. At the conclusion of that hearing, the court took the issues raised by the motions under advisement.

Upon consideration of the motions, the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE

The plaintiff James Smith served as the Chief of Police for Pierce Township beginning in 2001.[1] On May 30, 2011, Smith became aware of accusations made against him by several police officers.[2] Smith met with David Elmer, Pierce Township Administrator, twice on that day and, at the second meeting, Elmer requested that Smith extend his vacation (which was scheduled to end the following day) and Smith did so.[3]

On June 2, 2011, the Pierce Township Board of Trustees announced a special meeting to be held on June 3rd to announce the retirement of Smith and to enter into executive session to discuss personnel matters.[4] Smith states in his affidavit that he had no intention of retiring at that time and that, after the executive session on June 3rd, he was asked by Trustees Batchler and Knoop to go on sick leave and asked by Trustee Knoop to resign.[5] Smith notes in his affidavit that this occurred after Trustees Batchler and Knoop interviewed several Pierce Township police officers in the executive session.[6] In late June 2011, Smith also obtained copies of statements made by several

[1] Amended Affidavit of Plaintiff James Smith, filed January 16, 2013, at ¶ 1.
[2] Id. at ¶ 9.
[3] Id. at ¶¶ 10-12.
[4] Affidavit of Plaintiff James Smith, filed January 7, 2013, Exhibit 2A.
[5] Id. at ¶¶ 13-14.
[6] Id. at ¶ 14.

police officers, which had been provided to the board of trustees, which contained allegations of sexual activity on the part of Smith.[7]

The Pierce Township Board of Trustees announced and held the following special meetings: (1) Friday June 24, 2011, to enter into executive session to discuss personnel matters, discipline/dismissal, and legal matters; (2) July 6, 2011, to conduct a name-clearing hearing as requested by Smith and to enter into executive session to discuss personnel matters, discipline/dismissal, legal matters, and pending or imminent court action; (3) August 19, 2011, to enter into executive session to discuss personnel matters, discipline/dismissal, legal matters, and pending or imminent court action; and (4) August 25, 2011, to conduct a name-clearing hearing for Smith, to conduct a pre-disciplinary hearing for Smith, and to enter into executive session to discuss personnel matters, discipline/dismissal, legal matters, and pending or imminent court action.[8]

In an email sent on June 27th to David Elmer, Smith wrote "I anticipate I will need the public records for the name clearing hearing if that is the manner the township desires to proceed in lieu of discussion with my attorney."[9] In response to Smith's request for a "name-clearing hearing," the township scheduled such a hearing.[10] In a letter from Elmer to Smith written on August 19th, Elmer also notified Smith that a "pre-disciplinary" hearing would be conducted on August 25th which would provide Smith with "an opportunity * * * to be heard with respect to your removal from office as the Board has lost confidence in your ability to effectively manage and lead the police

[7] Id. at ¶ 17.
[8] Id., Exhibits 2B through 2E.
[9] Id., Exhibit 4A.
[10] Id., Exhibit 4B.

department."[11] That letter further states that "the Board of Trustees believes that, by law, you serve at the pleasure of the Board and are not legally entitled to a hearing."[12]

Smith ultimately chose to not attend the August 25th hearing.[13] After an executive session on that date, a motion was made by Trustee Knoop, seconded by Trustee Batchler, to terminate the employment of Smith as the Pierce Township Chief of Police effectively immediately, and that motion was passed.[14] Consequently, a letter was sent by Elmer to Smith on that same date informing Smith of his termination.[15]

I. MOTIONS FOR SUMMARY JUDGMENT

WHAT IS THE STANDARD FOR REVIEW ON A MOTION FOR SUMMARY JUDGMENT?

The court must grant summary judgment, as requested by a moving party, if "(1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence demonstrates that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party opposing the motion."[16]

[11] Id., Exhibit 4D.
[12] Id.
[13] Id., Exhibit 4H; and, Affidavit of David Elmer at ¶ 8.
[14] Elmer Aff. at ¶ 9 and Exhibit D.
[15] Id., Exhibit E.
[16] Civ. R. 56(C); *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267; *Davis v. Loopco Indus., Inc.* (1993), 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144.

The court must view all of the evidence, and the reasonable inferences to be drawn therefrom, in a light most favorable to the non-moving party.[17] Furthermore, the court must not lose sight of the fact that all evidence must be construed in favor of the nonmoving party, including all inferences which can be drawn from the underlying facts contained in affidavits, depositions, etc.[18]

Determination of the materiality of facts is discussed in *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211:

> "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."[19]

Whether a genuine issue exists meanwhile is answered by the following inquiry: Does the evidence present "a sufficient disagreement to require submission to a jury" or is it "so one-sided that the party must prevail as a matter of law[?]"[20] "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial–whether, in other words, there are any genuine factual issues that can properly be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[21]

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[17] *Engel v. Corrigan* (1983), 12 Ohio App.3d 34, 35, 465 N.E.2d 932; *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12-13, 467 N.E.2d 1378; *Welco Indus. Inc. v. Applied Cas.* (1993), 67 Ohio St.3d 344, 356, 617 N.E.2d 1129; *Willis v. Frank Hoover Supply* (1986), 26 Ohio St.3d 186, 188, 497 N.E.2d 1118; *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150, 152, 309 N.E.2d 924.
[18] *Hannah v. Dayton Power & Light Co.* (1998), 82 Ohio St.3d 482, 485, 696 N.E.2d 1044, citing *Turner v. Turner* (1993), 67 Ohio St.3d 337, 341, 617 N.E.2d 1123.
[19] *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211.
[20] Id. at 251-52, 106, S.Ct. at 2512, 91 L.Ed.2d at 214.
[21] Id. at 250, 106 S.Ct. at 2511, 91 L.Ed.2d at 213.

The burden is on the moving party to show that no genuine issue exists as to any material fact, and that the moving party is entitled to judgment as a matter of law.[22] This burden requires the moving party to "specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond."[23]

A party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims.[24] The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case.[25] Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims.[26]

If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied.[27] However, if the moving party satisfies this burden, then the nonmoving party has a "reciprocal burden" to set forth specific facts, beyond the allegations and denials in his pleadings, demonstrating that a "triable issue of fact" remains in the case.[28] The duty of a party resisting a motion for summary judgment is

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[22] *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3fd 157, 161, 553 N.E.2d 597; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46.
[23] *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 526 N.E.2d 798, syllabus.
[24] *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264; *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 674 N.E.2d 1164.
[25] Id.
[26] Id.
[27] Id.
[28] Id.

more than that of resisting the allegations in the motion.[29] Instead, this burden requires the nonmoving party to "produce evidence on any issue for which that (the nonmoving) party bears the burden of production at trial."[30]

The nonmovant must present documentary evidence of specific facts showing that there is a genuine issue for trial and may not rely on the pleadings or unsupported allegations.[31] Opposing affidavits, as well as supporting affidavits, must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must show affirmatively that the affiant is competent to testify on the matters stated therein.[32]

"Personal knowledge" is defined as "knowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay."[33]

Accordingly, affidavits which merely set forth legal conclusions or opinions without stating supporting facts are insufficient to meet the requirements of Civ.R.56(E), which sets forth the types of evidence which may be considered in support of or in opposition to a summary judgment motion.[34]

Under Civ.R.56(C), the only evidence which may be considered when ruling on a motion for summary judgment are "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if

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[29] *Baughn v. Reynoldsburg* (1992), 78 Ohio App.3d 561, 563, 605 N.E.2d 478.
[30] *Wing v. Anchor Media Ltd. Of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095, paragraph three of the syllabus; *Welco Indus., Inc. v. Applied Companies* (1993), 67 Ohio St.3d 344, 346, 617 N.E.2d 1129; *Gockel v. Ebel* (1994), 98 Ohio App.3d 281, 292, 648 N.E.2d 539.
[31] *Shaw v. J. Pollock & Co.* (1992), 82 Ohio App.3d 656, 659, 612 N.E.2d 1295.
[32] Civ.R.56(E); *Carlton v. Davisson* (1995), 104 Ohio App.3d 636, 646, 662 N.E.2d 1112; *Smith v. A-Best Products Co.* (Feb. 20, 1996), 4th Dist. No 94 CA 2309, unreported.
[33] *Carlton v. Davisson*, 104 Ohio App.3d at 646, 662 N.E.2d at 1119; *Brannon v. Rinzler* (1991), 77 Ohio App.3d 749, 756, 603 N.E.2d 1049.
[34] *Stamper v. Middletown Hosp. Assn.* (1989), 65 Ohio App.3d 65, 69, 582 N.E.2d 1040.

any, timely filed in the action." These evidentiary restrictions exist with respect to materials which are submitted both in support of and in opposition to a motion for summary judgment.

Where the copy of a document falls outside the rule, the correct method for introducing such items is to incorporate them by reference into a properly framed affidavit.[35] Thus, Civil Rule 56(E) also states that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

Because summary judgment is a procedural device designed to terminate litigation where there is nothing to try, it must be awarded with caution, and doubts must be resolved in favor of the nonmoving party.[36] Summary judgment is not appropriate where the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.[37]

However, the summary judgment procedure is appropriate where a nonmoving party fails to respond with evidence supporting his claim(s). While a summary judgment must be awarded with caution, and while a court in reviewing a summary judgment motion may not substitute its own judgment for the trier of fact in weighing the value of evidence, a claim to survive a summary judgment motion must be more than merely colorable.[38]

In deciding a summary judgment motion, the court may, even if summary judgment is not appropriate upon the whole case, or for all the relief demanded, and a

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[35] *Martin v. Central Ohio Transit Auth.* (1990), 70 Ohio App.3d 83, 89, 590 N.E.2d 411; *Biskupich v. Westbay Manor Nursing Home* (1986), 33 Ohio App.3d 220, 222, 515 N.E.2d 632.
[36] *Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.
[37] *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150.
[38] *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d at 111, 570 N.E.2d at 1099.

trial is necessary, grant a partial summary judgment, such that a trial will remain necessary as to the remaining controverted facts.[39]

LEGAL ANALYSIS

R.C. 505.49(B)(2) provides that the township trustees shall appoint a chief of police for the district and "[t]he chief of police of the district shall serve at the pleasure of the township trustees."

Pursuant to R.C. 505.491:

> "Except as provided in division (D) of section 505.49 or in division (C) of section 509.01 of the Revised Code for a board of township trustees, and except as provided in division (D) of section 505.49 of the Revised Code for a joint police district board, if the board has reason to believe that a chief of police, patrol officer, or other township or joint police district employee appointed under division (B) of section 505.49 of the Revised Code or a police constable appointed under division (B) of section 509.01 of the Revised Code has been guilty, in the performance of the official duty of that chief of police, patrol officer, other township or joint police district employee, or police constable, of bribery, misfeasance, malfeasance, nonfeasance, misconduct in office, neglect of duty, gross immorality, habitual drunkenness, incompetence, or failure to obey orders given that person by the proper authority, the board immediately shall file written charges against that person. The written charges shall set forth in detail a statement of the alleged guilt and, at the same time, or as soon thereafter as possible, serve a true copy of those charges upon the person against whom they are made. The service may be made on the person or by leaving a copy of the charges at the office or residence of that person. Return of the service shall be made to the board in the same manner that is provided for the return of the service of summons in a civil action."

[39] Civ.R.56(D); *Holeski v. Lawrence* (1993), 85 Ohio App.3d 824, 834, 621 N.E.2d 802.

The Ohio Supreme Court has held that "[a]bsent a reason to believe that a township police chief is guilty of one or more of the named offenses in R.C. 505.491, he may be removed from office 'at the pleasure of the township trustees,' pursuant to R.C. 505.49(A)."[40]

In *Smith v. Fryfogle* (1982), 70 Ohio St.2d 58, 434 N.E.2d 1346, the court noted that "[t]he General Assembly has established dual tracks for the tenure and removal of township chief of police[,]" and the court explained the two tracks as follows:

> "R.C. 505.49(A) provides that " * * * [t]he chief of police of the district shall serve at the pleasure of the township trustees * * *." This first path is clear and unequivocal. It gives the appointing body unilateral authority to terminate the chief of police without considerations of cause or reason. The function thus exercised is executive, not judicial or quasijudicial. * * *
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> The second track for removal of a township police chief is found in R.C. 505.491 through 505.495 * * * .
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> The second track, R.C. 505.491 et seq., is also clear and unequivocal. In those limited circumstances where the trustees believe the chief of police, patrolman, or other police district employee has been guilty of one of the named offenses the trustees must act in a quasi-judicial manner, conducting a due process hearing.
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> R.C. 505.49 applies all the time and only to the police chief. R.C. 505.491 applies to the chief, among others, but only when the trustees have reason to believe the officer is guilty of neglect of duty or other named offense."[41]

The court opined that the two tracks are "supported by logic" as follows:

> "In those instances where the trustees have reason to believe that the chief of police, or other officer, has been guilty of a named offense, the best interests of the government, the employee, and the public are served by a quasi-judicial proceeding where notice, hearing, compulsory

[40] *Smith v. Fryfogle* (1982), 70 Ohio St.2d 58, 434 N.E.2d 1346, syllabus.
[41] Id. at 59-60.

> attendance of witnesses, and advocacy are brought to bear upon the truth of the charges. For valid reasons of public policy, patrolmen, other township police district employees, and police constables, excluding the chief of police, are always granted the protection of this due process procedure upon removal. Conversely, the chief of police of the district is accountable directly to the appointing authority, the board of trustees. Absent a reason to believe that he is guilty of one of the named offenses, he may be removed 'at the pleasure of the township trustees.'"[42]

The *Fryfogle* court noted in that case that the board of trustees proceeded according to the first path under R.C. 505.49, there was no evidence that the trustees had reason to believe the chief was guilty of any of the conduct described in R.C. 505.491, and there was no evidence that they received or heard any such complaints.[43]

The Ohio Supreme Court recently discussed its holding in *Fryfogle* and stated that "[b]ecause only a police chief dismissed for improper conduct, as defined by R.C. 505.491, was entitled to a hearing, we concluded that the General Assembly had not intended to provide due-process protections to a police chief dismissed for any other reason."[44]

In *Hiett v. Goshen Twp. Bd. of Trustees* (July 30, 1984), 12th Dist. No. CA83-04-033, the board of trustees notified Hiett, the Goshen Township police chief, in writing of charges they had filed against him for misfeasance, nonfeasance, misconduct in office, neglect of duty, and failure to obey orders.[45] After a hearing, the board demoted Hiett to a patrol officer and discharged him from that position.[46] The appellate court noted that, in the *Fryfogle* case, there was no evidence that the trustees believed the chief was

[42] Id. at 60.
[43] Id. at 61.
[44] *Blair v. Sugarcreek Twp. Bd. of Trustees* (2012), 132 Ohio St.3d 151, 970 N.E.2d 884, 2012-Ohio-2165, ¶ 10.
[45] *Hiett* at *1.
[46] Id.

guilty of misconduct and they did not receive or hear any complaints.[47] However, in *Hiett*, there was evidence that the board believed the chief was guilty of misconduct and the board did hear complaints.[48] The appellate court then held as follows:

> "The board could simply have removed Hiett as chief of police without any cause or reason given therefor. However, once the board chose to file charges and remove Hiett for cause, he became entitled to a due process hearing and the panoply of protections guaranteed thereby, including proof of the charges against him."[49]

In *Miller v. Union Twp.* (Nov. 30, 1998), 12th Dist. No. CA98-06-044, 1998 WL 820927, Miller's employment as the Union Township Chief of Police was terminated by the board of trustees.[50] While Miller argued that he was wrongfully discharged, the appellate court noted that he served at the pleasure of the board of trustees pursuant to R.C. 505.49(A) and "[w]here a chief of police is discharged pursuant to this statutory provision, a board of trustees has 'unilateral authority to terminate the chief of police without considerations of cause or reason.' "[51] As such, the court found that "the General Assembly has expressed a 'clear public policy' in R.C. 505.49(A) that a chief of police is an at-will employee."[52]

In the case at bar, Pierce Township chose not to pursue the second track; in other words, the board chose to not file charges against James Smith and to not dismiss him for cause. Instead, after several executive sessions, the board of trustees, via the Township Administrator, notified Smith that it had lost confidence in his ability to

[47] Id. at *3.
[48] Id.
[49] Id.
[50] *Miller* at *1.
[51] Id. at *3, quoting, *Fryfogle* at 59.
[52] Id.

effectively manage and lead the police department, and ultimately chose to dismiss him on August 25th.

The statutory and case law is clear that the chief of police serves at the pleasure of the board. The Pierce Township Board of Trustees chose to dismiss Smith without any cause or reason given therefor, which is its right under R.C. 505.49. As noted in the *Hiett* case, had the board chosen to file written charges against Smith and seek his dismissal on the basis of malfeasance or other cause, his right to the due process protections under R.C. 505.491 through 505.495 would be triggered. The board chose not to do so in the present case and instead simply chose to terminate Smith's employment without cause.

The court acknowledges that this case presents a unique set of facts. However, based on the statutes and case law discussed herein, the court finds that the plaintiff was not wrongfully discharged and was not entitled to any of the hearings or protections set forth by R.C. 505.491 through 505.495, as the plaintiff served at the pleasure of the board and the board of trustees has the "unilateral authority to terminate the chief of police without considerations of cause or reason."

As such, the defendant's motion for summary judgment shall be granted and the plaintiff's motion for summary judgment shall be denied.

II. MOTION TO STRIKE AND MOTION TO AMEND

Pierce Township file a motion to strike the plaintiff's amended complaint which was filed on January 7, 2013. The amended complaint contains new allegations that

the plaintiff was denied a hearing as required by the Pierce Township Personnel Policy Manual and adds a demand for relief for back pay.

The defendant is correct that the plaintiff did not originally seek leave to file its amended complaint as required by Civ.R. 15(A). However, in its response to the motion to strike, the plaintiff requested retroactive leave to file the amended complaint. In the memorandum opposing the motion to strike, the plaintiff argues that he did not learn of the viability of a claim regarding the personnel policy until after the depositions of Trustee Batchler and Township Administrator Elmer were taken in December 2012.

The defendant argues that it is prejudiced by this delay and notes that the amended complaint was filed after the motion for summary judgment and after the discovery deadline set by the court.

Pursuant to Civ.R. 15(A):

> "A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty-eight days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within fourteen days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders."

As noted above, "Civ.R. 15(A) provides that a party may seek leave of court to amend its pleading and that leave 'shall be freely given when justice so requires.' "[53] "While Civ.R. 15(A) encourages liberal amendment, 'motions to amend pleadings pursuant to Civ.R.15(A) should be refused if there is a showing of bad faith, undue

[53] *Westbrook v. Swiatek* (Feb. 14, 2011), 5th Dist. No. 09CAE09-0083, 2011-Ohio-781, ¶ 78.

delay, or undue prejudice to the opposing party.' " The defendant argues that the plaintiff engaged in undue delay in not filing the amended complaint until January 2013 and that it is prejudiced as a result.

The present case was filed in October 2011 and discovery was not complete until December 2012. Discovery issues remained pending after the original discovery deadline and a motion for protective order was heard by the court in September 2012. The court does not find the filing of the amended complaint in January 2013, shortly after the depositions were held in December 2012, to be undue delay and does not find that the defendant has been unduly prejudiced by the filing of the amended complaint. The court notes that, as of this date, discovery is now closed and, as discussed at the hearing on this matter, summary judgment can be filed and briefed on the personnel policy manual issue in fairly short order.

The defendant also argues that the amended complaint is futile and leave should be denied on that basis. The defendant argues that Smith will be unable to make the showing required to support a claim that his at-will employment relationship was altered by the terms of the personnel policy manual. Generally, Ohio case law holds that "[t]he provisions of an employee handbook will alter the terms of an at-will employment relationship only if the employer and the employee have agreed to create a contract from the writing."[54]

The plaintiff attached a portion of the personnel policy manual to his affidavit in support of his motion for summary judgment.[55] Article III of that manual addresses disciplinary procedures for township employees. Article 3.4 sets forth an appeal

[54] See, e.g., *Curry v. Blanchester* (July 19, 2010), 12th Dist. Nos. CA2009-08-010 and CA2009-08-012, 2010-Ohio-3368, ¶ 73, citing *McIntosh v. Roadway Express, Inc.* (1994), 94 Ohio App.3d 195, 210, 640 N.E.2d 570.
[55] Smith Aff., Exhibit 1.

procedure, although the court notes that said section begins "[e]xcept department heads, certified police officers and fire personnel, an employee * * * may appeal * * *."[56] The defendant also argued at the hearing on this matter that the first page of the manual states that it is not a contract; however, a copy of that portion of the manual was not supplied to the court.

The court finds at this juncture, based on the documentation and claims before it, that the plaintiff has set forth a sufficient claim to allow leave to file the amended complaint. The court will address the merits of the claim, the specific language of the manual, and the applicable case law fully when issuing a decision on a motion for summary judgment.

CONCLUSION

The plaintiff's motion for summary judgment is not well-taken and is hereby denied.

The defendant's motion for summary judgment regarding the issues set forth above is well-taken and is hereby granted.

The plaintiff's motion for leave to file the amended complaint is well-taken and is hereby granted. As such, the defendant's motion to strike the amended complaint is not well-taken and is hereby denied.

IT IS SO ORDERED.

[56] Id.

DATED:_____ _____
Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 21st day of March 2013 to all counsel of record and unrepresented parties.

_____
Administrative Assistant to Judge McBride