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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002108-MR

DAVID B. COLE — APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE KEVIN M. HORNE, JUDGE
ACTION NO. 02-CI-01390

CITY COUNCIL OF THE CITY OF FLORENCE, KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND STUMBO, JUDGES; ROSENBLUM,[1] SENIOR JUDGE.

ROSENBLUM, SENIOR JUDGE: David B. Cole appeals from an order of the Boone Circuit Court upholding his dismissal from his position as a police officer with the City of Florence, Kentucky, for sending inappropriate e-mail messages over the police department's computer messaging system. We affirm.

[1] Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

FACTUAL AND PROCEDURAL BACKGROUND

Cole was initially employed as a police officer for the City of Florence in October 1997. At some point the police department issued laptop computers to its officers for use in their cruisers. The laptops included a Mobile data terminal system (MDT), an e-mail system for intradepartmental communications.

In 2002 the department undertook a random screening of MDT messages aimed at determining whether improper messages were being sent over the system. As a result of the review, Cole and four other officers were identified as having used the system to send inappropriate communications. As to Cole, the department charged that "during the period 4/5/02 through 4/14/02, [Cole] used the Mobile Data Terminal System to send embarrassing, indecent, profane and obscene communications." Among the messages which resulted in the charges were[2] "K-Mart sucks"; "I'm just covering 3 while 60 jacks off on post"; "No . . . but we're adding all these new parks right? Probably need more cops to lock up all the new S-H-dot-dot-T-E-R-S"; "C.O.P.S. Citizens out preserving S-Blank-Blank-Blank-T-E-R-S."; "Probably got tired of feeding deputies for free"; and "What is this B-C-S-O substation?"[3]

As an initial step, the five police officers were asked to write a letter explaining their inappropriate messages. According to testimony presented at the

[2] The record on appeal does not contain a printout of the actual messages as sent by Cole. The messages as set forth are as they appear in the transcript of the September 9, 2002, City Council hearing.

[3] B-C-S-O was understood by Florence police officers to mean Boone County Sheriff's Office. The latter two messages were considered inappropriate because they disparaged other police departments.

September 9, 2002, City Council hearing, all of the officers except Cole wrote letters acknowledging their wrongdoing and expressing contrition. Cole, however, defended his messages as within the scope of legitimate police business, and did not express contrition. At the hearing, Cole acknowledged that his letter could be construed as "sarcastic."

As an informal resolution to the controversy, Police Chief Thomas Kathman offered the other four officers reprimands and counseling. Cole, however, was offered a one day suspension. Believing he was being singled out for more severe punishment in relation to the other officers, Cole exercised his right to have the charges of misuse of the MDT system reviewed by the Florence City Council.

A hearing was held before the City Council on September 9, 2002. At the hearing Chief Kathman recommended discharge for Cole's improper use of the MDT system. Kathman testified that he believed Cole's messages were worse than the other four officers', and that the other officers had demonstrated contrition, whereas Cole had not. Cole defended on the basis that, in effect, the messages he sent did not rise to a level of misuse which should result in a punishment greater than that imposed upon the other officers. Cole further testified that he did not believe that the messages he sent were embarrassing, indecent, profane or obscene.

At the conclusion of the hearing the City Council voted that Cole was guilty of misconduct and imposed as punishment dismissal from service with the Florence Police Department.

Cole subsequently appealed his dismissal to the Boone Circuit Court. On August 30, 2006, the circuit court entered an order affirming, by way of summary judgment, Cole's dismissal. Cole subsequently filed a motion to alter, amend, or vacate pursuant to CR[4] 59.05, which was denied by order entered September 29, 2006. This appeal followed.

ARBITRARINESS OF CITY COUNCIL'S DETERMINATION

In his first argument Cole contends that the circuit court erred by granting the City Council summary judgment, thereby affirming his termination. Based upon the applicable standards at issue, we construe this argument to be that the City Council acted arbitrarily in determining that Cole violated the rules and regulations of the police department. As discussed below, we conclude that the City Council did not act arbitrarily in reaching this determination.

We first note that the circuit court's awarding of summary judgment to the appellee was, in effect, a ruling upon the case as fully submitted by the parties. The record is complete, there are no genuine issues of material fact, and the issue presented is whether the City of Florence was entitled to judgment as a matter of law. CR 56.03; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). Thus we move directly to the relevant authorities applicable to these proceedings.

"The function of the hearing body in instances of charges against police officers is to make two determinations: first, whether the officer has violated the rules and regulations of the department and if so, second, it must exercise its discretion in

[4] Kentucky Rules of Civil Procedure.

imposing a penalty. The first is subject to judicial review; the second is not. Sound public policy requires that the matter of punishment and discipline of a police officer be left to the city." *City of Columbia v. Pendleton*, 595 S.W.2d 718 (Ky.App. 1980); *Stallins v. City of Madisonville*, 707 S.W.2d 349, 350 (Ky.App. 1986).

The trial court's review upon appeal is limited to a determination, by way of a limited trial de novo, of whether the administrative body acted arbitrarily in deciding whether the employee violated the rules and regulations of the police department. *Stallins* at 350 (citing *City of Henderson Civil Service Commission v. Zubi*, 631 S.W.2d 632 (Ky. 1982)). "[T]he test for arbitrariness as in all reviews of actions by administrative bodies is based on the absence of substantial evidence to support the action in question, or is based on the presence of proof so overwhelming that relief must be granted to the claimant." *Id.* (citing *City of Owensboro v. Noffsinger*, 280 S.W.2d 517 (Ky. 1955); *Williams v. Cumberland Valley National Bank*, 569 S.W.2d 711 (Ky.App. 1978); *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985)).

The standard guiding this Court on the appeal from the circuit court is the "clearly erroneous" rule as promulgated in CR 52.01. We cannot disturb the trial court's determination unless it acted clearly erroneously in the sense that its determinations were not supported by substantial evidence. *Id.*; CR 52.01; *Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1979). Of course, as with any appeal from a decision of an administrative agency, we review the trial court's application of the law to the facts de novo. *See Reis v.*

Campbell County Board of Education, 938 S.W.2d 880, 885-886 (Ky. 1996); *Howard v. City of Independence,* 199 S.W.3d 741, 743 (Ky.App. 2005).

We begin by noting that the circuit court used the "preponderation" standard as set forth in *City of Owensboro v. Noffsinger*, 280 S.W.2d 517 (Ky. 1955) and *Kilburn v. Colwell* 396 S.W.2d 803 (Ky. 1965) in its review. While we conclude that this was the incorrect standard, *see Stallins*, *supra,* nevertheless, we believe the circuit court's "determination upholding the city council's action was well within the guides recited above to determine whether the council's action was arbitrary." *See Stallins* at 351 (affirming circuit court's determination even though it erroneously used the preponderation standard).

The circuit court found that Cole "admits that he sent the messages in question." That Cole sent the MDT messages is, in fact, not in dispute. Cole admits sending the messages. Moreover, it is not in dispute that the Florence Police Department had in place a policy prohibiting the sending of embarrassing, indecent, profane or obscene messages over the system. Upon our review of the text of the messages sent by Cole, it is apparent that the City Council did not act arbitrarily in determining that Cole violated the MDT messaging policy. The messages were laced with profanity and certain of the messages disparaged fellow police agencies. The City Council's determination that the messages were embarrassing, indecent, profane or obscene messages was a reasonable determination and was not arbitrary. It follows that the Council did not act arbitrarily in concluding that Cole engaged in a policy violation by sending the messages.

Our review must end there. As previously noted, the punishment meted out by the Council is not subject to our consideration. *Stallins* at 350.

Notwithstanding the foregoing, Cole argues that the City Council's determination was arbitrary because the other four officers who sent inappropriate messages were only given reprimands and counseling as punishment, whereas he was singled out for suspension and, ultimately, terminated for his misconduct.

First, as previously noted, the punishment meted out is not subject to our review. This argument, in effect, asks us to do just that - review Cole's punishment relative to the punishment given to the other four officers. Hence, we believe that this argument asks us to act outside of the permissible scope of our review.

However, in any event, Cole's argument is unpersuasive. The record discloses that the other officers, in contrast to Cole, recognized their misconduct, were contrite for their misconduct, demonstrated an inclination not to engage in the misconduct again, and accepted their punishment through the informal disciplinary system.

Rather than recognize his misconduct, however, Cole sarcastically challenged the suggestion that the messages were inappropriate (Transcript of Hearing, pg. 108-109), and persisted before the Council in denying that the messages were even in violation of departmental policy (Transcript of Hearing, pg. 120-121).[5] As such, Cole's

[5] We note that at one point in his testimony when asked if he believed he had violated MDT operating procedures Cole responded, "In light of everything that's developed since then, yes, probably, but at the time, you know, I guess I didn't understand what was appropriate, inappropriate, embarrassing, obscene." Transcript of Hearing, pg. 110. Cole later unequivocally testified, however, that he did not believe that his messages were embarrassing, indecent, profane

unwillingness to recognize his misconduct separates him from the other four officers involved in the messaging investigation, and the Council could have reasonably determined that his lack of contrition foreshadowed an inclination to transgress again, and, accordingly, that discharge was the proper punishment. Hence, this argument is unpersuasive.

DISCHARGE FOR EXERCISING STATUTORY RIGHT

KRS 95.450 provides a police officer with a right to a hearing in connection with an allegation of misconduct. Cole alleges that he was discharged because he exercised his right to a hearing before the City Council. In support of this argument Cole cites to Chief Kathman's deposition testimony in the circuit court proceedings to the effect that "if there wasn't a hearing on September 9th, 2002, Mr. Cole would have been working September 10th, 2002[.]"

A review of Kathman's testimony as a whole discloses that what he meant by this statement was that if Cole had acquiesced to the informal proceedings under which he was offered a one day suspension in full resolution of the matter, the subsequent City Council proceedings which led to his discharge would, of course, not have been held and, obviously, the City Council votes which resulted in his discharge would not have occurred. However, Kathman did not mean to suggest that Cole was impermissibly fired for exercising his right to a hearing, rather he meant that the informal settlement would have forestalled the otherwise proper disciplinary hearing which resulted in his discharge.

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or obscene. Transcript of Hearing, pg. 120-121.

The record contains no evidence that the Florence City Council undertook to punish Cole for exercising his right to a hearing in this disciplinary matter. Moreover, as previously discussed, the evidence discloses that the Council did not act arbitrarily in determining that Cole engaged in a policy violation by sending the messages at issue. Cole's allegation that the Council's decision was driven by a motive to punish him for exercising a statutory right is without evidentiary support. Nor does Cole suggest why the Council would be motivated to punish him for exercising his right to a hearing. In summary, this argument is without merit.

UNEMPLOYMENT BENEFIT PROCEEDINGS AND RES JUDICATA

Cole's last argument is that the City Council is precluded from arguing that he was not terminated for exercising his statutory right to a hearing because in his application for unemployment benefits the Kentucky Unemployment Insurance Commission determined that Cole was discharged for reasons other than misconduct connected with work, and that determination was upheld by the Boone Circuit Court. However, "we do not believe that the procedures utilized in the unemployment system either grant any party a full, true opportunity to litigate issues, or even encourage any meaningful participation in the process. . . . [T]he unemployment system is set up to quickly determine benefit eligibility status. Hearings are generally informal and expeditious. The rules of evidence are relaxed." *Board of Educ. of Covington v. Gray*, 806 S.W.2d 400, 403 (Ky.App. 1991). Consequently,

> [a]n unemployment compensation hearing is designed to adjudicate promptly a narrow issue of law, and to grant a

> limited remedy to an unemployed worker. The use of an unemployment compensation decision to bind the parties in a subsequent . . . action . . . would be wholly inappropriate, and would frustrate the underlying purpose of . . . collateral estoppel. If findings entered at an unemployment compensation hearing may be used to establish the employer's liability . . . in a subsequent lawsuit, the employer would have a strong incentive to use its superior resources consistently to oppose a discharged employee's claim for unemployment benefits. Issues presented . . . will be contested strongly, and the hearings will become lengthy and more detailed, and will no longer be suited to the prompt resolution of unemployment compensation claims. Judicial economy would be frustrated, rather than improved, as many unemployment compensation hearings become forums in which claims for unlawful or unconstitutional discharge are tried.

Id. (quoting *Salida School District R-32-J v. Morrison*, 732 P.2d 1160, 1165 (Colo. 1987)).

As such, the principles of res judicata do not apply in relation to an unemployment benefits proceeding. *Berrier v. Bizer*, 57 S.W.3d 271, 281 (Ky. 2001). It follows that this argument, which relies upon principles of res judicata in relation to an unemployment benefits proceeding, is without merit.

CONCLUSION

For the foregoing reasons the judgment of the Boone Circuit Court is affirmed.

ALL CONCUR.

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