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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001549-MR

RUBEN VAUGHN; AND THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 1586, AND ITS MEMBERS — APPELLANTS

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 07-CI-01048

CITY OF PADUCAH — APPELLEE

OPINION
REVERSING AND REMANDING

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** ** ** ** **

BEFORE: MOORE AND THOMPSON, JUDGES; HARRIS, SENIOR JUDGE.[1]

MOORE, JUDGE: Ruben Vaughn appeals from the entry of judgment against him by the McCracken Circuit Court. Upon review, we reverse and remand because

[1] Senior Judge William R. Harris sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

the Civil Service Board of the City of Paducah is a necessary party which was not before the circuit court.

This case originated in September of 2007, when Keith Wilkey,[2] Ray Joseph[3] and Appellant Ruben Vaughn, as representatives of a class consisting of the American Federation of State, County and Municipal Employees, Local 1586 and it members,[4] filed a complaint against the City of Paducah. The named plaintiffs were current or former employees of the City and were members of the Union. The present appeal only involves Vaughn.[5]

Beyond employment protections Vaughn enjoyed as a member of the Union, he was also protected as a merit employee under the Civil Service Ordinance passed by the City of Paducah pursuant to Kentucky Revised Statute[s] (KRS) 90.310. The City and the Union entered into a collective bargaining agreement, the terms of which are at the heart of the underlying matter, including the following provisions:

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[2]Wilkey was the president of the Union but is not a party to the appeal.

[3] Joseph was the secretary treasurer of the Union but is not a party to the appeal.

[4] Initially, the complaint included a vague reference to a class action. After the complaint, the issue of the class was not litigated. The plaintiffs did not move for class certification and the trial court did not make any findings of fact with regard to the class. Accordingly, the class was never certified; nor was certification denied by the trial court. Pursuant to *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989), and under these facts, a class action never existed.

[5] The circuit court granted the City's partial motion for summary judgment against Vaughn. Plaintiffs thereafter dismissed all other allegations in their complaint and moved the circuit court to enter an order of summary judgment in this matter. The circuit court granted the motion and entered a final judgment.

> B. It is agreed that disciplinary action shall not be imposed upon an employee except for just cause.
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> C. Any proposed disciplinary action involving discharge, suspension, or reduction in grade or pay will be imposed by bringing charges against the employee before the Civil Service Board, where applicable, unless the proposed disciplinary action is voluntarily accepted by the employee. Issues involving disciplinary actions referred to the Civil Service Board or the Disciplinary Review Board are not subject to the grievance procedure.
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> D. Although harsh disciplinary action may be imposed for severe infractions, in most cases the City shall adhere to the principle of progressive discipline. This disciplinary action shall include:
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> a. Verbal Warning
> b. Written Reprimand
> c. Suspension
> d. Termination

Vaughn worked for the City for nearly twenty-three and a half years and was approximately three years from drawing his pension. At the time at issue, he was a floodwall operator. In this position, he was responsible for mowing steep embankments using the City's tractors. While Vaughn was using a tractor to mow, it was damaged. Another City employee, Greg Taylor, had been using the tractor to mow for an hour and a half just prior to Vaughn's use of the equipment. Vaughn was blamed for the damage to the equipment.

Prior to the 2007 incident, Vaughn had been found to have misused the City's equipment, causing damage, on three prior occasions during the previous two-year period. These actions, combined with the July 2007 incident, cumulated

in the City's bringing charges against Vaughn to the Civil Service Board for his termination. After a hearing, the Board terminated Vaughn, finding:

> That the defendant, Ruben T. Vaughn, was in violation of KRS 90.360, and Paducah Ordinance §78-102 of the Paducah Code of Ordinances and guilty of charges as filed including operation of a Ford tractor on July 5, 2007, in such a manner [as] to destroy the tractor's clutch assembly. This was the third incident of this type.
>
> In reaching this decision, the Board must assume the validity of the aforementioned Statute and Ordinance, and be bound by their provision, terms and requirements.

On appeal from the Board, the circuit court did not find error in the Board's alleged failure to evaluate Vaughn's claim under the collective bargaining agreement. In so holding, the circuit court stated that "[T]he Civil Service Board had 'just cause' to terminate Vaughn, as that term is defined by the law. As a result, the City did not violate the collective bargaining agreement with the American Federation of State, County and Municipal Employees, (AFSCME) of which Vaughn is a member."

Vaughn contends on appeal that the standards used by the Civil Service Board in his termination were contrary to the collective bargaining agreement. In his prehearing statement to this Court, he stated that the issues on appeal are "[w]hether the Circuit Court erred by assuming the Civil Service Board had considered the collective bargaining agreement when [its] order neither mentions the contract or explains why the City/Appellee had 'just cause' to ignore the progressive discipline set forth therein."

Unfortunately the Civil Service Board was not named as a party to the action before the circuit court. This Court has previously spoken on this subject in an unpublished opinion, *Timmons v. City of Louisville*, No. 2003-CA-001631, 2004 WL 1857363 (Ky. App. Aug. 2004), *disc. review denied* (2005).[6] We find the reasoning in *Timmons* persuasive and agree that the Civil Service Board is an indispensable party.

In determining whether the Civil Service Board in the *Timmons* case was an indispensable party, the Court noted that "an administrative body is generally a representative of the public interest." *Id*. at 2 (citing *Boyd & Usher Transp. v. Southern Tank Lines, Inc*., 320 S.W.2d 120 (Ky. 1959); *City of Louisville v. Milligan*, 798 S.W.2d 454 (Ky. 1990)). The Court in *Timmons* wrote:

> The Civil Service Board is a legislatively created administrative body and was given the sole authority to administer classified service. KRS 990.110-KRS 990.230. It has been observed that:
>
> [T]he legislature intended to establish an independent civilian civil service board which could review actions taken by the department heads of the City of Louisville and determine the justification for such actions.
>
> . . . .
>
> [T]hat civil service systems were established to control the unfettered discretion of elected and appointed officials in public employment.
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> *Milligan*, 798 S.W.2d at 456-457. The Board is, thus, not merely a nominal party. Rather, the Board is vested with the authority to carry out specific legislative duties and

[6] The *Timmons* opinion fulfills the requirements of Kentucky Rules of Civil Procedure (CR) 76.23(c) for citation.

> with the responsibility of administering a fair civil service system. It is axiomatic that any judgment rendered in the Board's absence would be prejudicial to the Board's ability to carry out those legislative duties and to properly represent the public's interest in a fair civil service system. Additionally, we harbor grave doubt as to whether a judgment could be "shaped" so as to lessen the prejudicial effect.
>
> Most importantly, we are unable to fathom how any judgment rendered in the Board's absence could be "adequate." We observe the Board is required by KRS 90.190(3) to transmit a record of its proceedings to the circuit court. It is a well established principle of jurisprudence that the judiciary generally reviews an administrative agency's decision for arbitrariness. *See American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Comm'n*, Ky., 379 S.W.2d 450 (1964). As judicial review is primarily focused upon the arbitrariness of an administrative agency's decision, it is reasonable that the administrative agency must be made a party to the action. *Boyd & Usher Transp. v. S. Tanks Lines*, Ky., 320 S.W.2d 120 (1959); *Scott Bros. Logging and Lumber Co. v. Cobb*, Ky., 465 S.W.2d 241 (1971). We do not believe the Board could be required to take any action in the event of reversal or remand without the Board having been made a party to the action. *See Milligan v. Schenley Distillers, Inc*., Ky., 584 S.W.2d 751 (1979).

Timmons, 2004 WL 1857363, at 2-3.

In *Smith v. Com., Dept. of Justice*, 686 S.W.2d 831 (Ky. App. 1985), the Court analyzed whether the Board of Claims was an indispensable party. Like the Civil Service Board under review in the present appeal, the statutes governing the Board of Claims did not set forth whether it must be named a party to an action. In reviewing this question, the Court ruled that

> [u]nlike the statutory procedure for judicial reviews [of other agencies], there is no [statutory] requirement . . . to make the Boards of Claims execute the appellate court's order. The Board of Claims must be a party to an appeal to this Court for it to have a duty to conform to this Court's directive. *J.T. Nelson Co., Inc., v. Comstock*, [636 S.W.2d 896 (Ky. App. 1982)].

Smith, 686 S.W.2d at 832.

In Vaughn's appeal on the merits, he contends that the Civil Service Board failed to use the standards for discipline as set forth in the collective bargaining agreement and the City. Vaughn argues that "[t]he [Board] ignored the Agreement and the argument that the applicable standard to be considered was 'just cause.' The [Board] made no findings according to the contractually agreed 'just cause' standard." Consequently, to grant the relief sought by Vaughn (assuming for the sake of argument that he is correct), this matter would have to be remanded back to the Board, as only the Board has the authority to review the charges of termination the City brought against him. The City's only role in the termination process was to prefer written charges against Vaughn to the Board. KRS 90.360(2); s*ee, e.g., City of Paducah v. Moore*, 662 S.W.2d 491, 495 (Ky. App. 1984). The provisions of KRS 90.360(6) govern this by providing that

> [t]he civil service commission shall punish any employee found guilty by reprimand or a suspension for any length of time not to extend six (6) months, or by reducing the grade, if the employee's classification warrants, or by combining any two (2) or more of these punishments, or dismissed. *No employee shall be reprimanded, removed, suspended or dismissed except as provided in this section.*

(Emphasis added).

In supplemental briefing on the *Timmons* case, Vaughn argues that it is distinguishable because *Timmons* involved a first class city, whereas the City of Paducah is a city of the second class. While there are some statutory differences, these differences have no relevance or impact regarding the issue of whether a Civil Service Board is an indispensable party. The provisions of the statutes regarding dismissal and appeals do not differ in any relevant manner regardless of whether it is a city of the first class or the second class.

We note that Vaughn argues in his supplemental brief that even if the Board should have been joined, the City has waived this because it did not raise this in a proper and timely fashion. Vaughn quotes *Cabinet for Human Resources v. Kentucky State Personnel Bd.*, 846 S.W.2d 711, 714 (Ky. App. 1992), in support of his argument. However, other caselaw holds that failure to name an indispensable party is not waived and may be brought up by the Court *sua sponte*. *See Republic of Philippines v. Pimentel*, ___ U.S. ___. 128 S.Ct. 2180, 2188, 177 L.Ed.2d 131 (2008); *RAM Engineering & Construction, Inc. v. University of Louisville*, 127 S.W.3d 579, 582-83, 89 (Ky. 2003) ("Therefore, the indispensable party issue is limited to the question of whether the trial court should have *sua sponte* joined RAM . . . ."); *Kentucky High School Athletic Ass'n v. Hopkins County Bd. of Educ.*, 552 S.W.2d 685, 689 (Ky. App. 1977), *overruled on other grounds*; *Treadway v. Russell*, 299 S.W.2d 245, 246 (Ky. 1957). The reasoning behind the holdings in these cases can be explained as that

> [u]pon a motion by defendant to dismiss because of nonjoinder, or upon its own motion, the court will first undertake to determine whether the absentee is a person needed for a just adjudication of the action under the standard set out in Rule 19(a). If that proves to be the case, the court then will ascertain whether the person is subject to service of process and whether joinder of the person will deprive the court of subject-matter jurisdiction. Just as the nonjoinder of someone deemed only "necessary" under the prior rule was not fatal, the nonjoinder of someone described in Rule 19(a) does not result in a dismissal if that person can be made a party to the action. *If joinder is feasible, the court must order it; the court has no discretion at this point because of the mandatory language of the rule*.

7 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE §1611 (3d ed. Supp. 2009) (notes omitted) (emphasis added); *see also Askew v. Sheriff of Cook County, Ill*., 568 F.3d 632 (7th Cir. 2009) (upon determining that a required party was absent from the suit, the district court was required to order that the entity be made a party, rather than dismissing the suit).

Notwithstanding that we disagree with Vaughn's waiver argument, we agree with the logic in the authority we cited in the preceding paragraph.

> [I]t was the duty of the appellate court, even where the point had not been raised in the court below, to reverse and remand the case where an indispensable party was not joined. *See Faulkner v. Terrell*, Ky., 287 S.W.2d 409 [(Ky. 1956)].

Treadway, 299 S.W.2d at 246 (quoting *Flynn v. Brooks*, 105 F.2d 766 (D.C. Cir. 1939)); *see also Kentucky High School Athletic Ass'n*, 552 S.W.2d at 689 ("It was error to grant the temporary injunction without making the Association a party."); *RAM Engineering*, 127 S.W.3d at 582-83.

We believe it was error for the trial court to rule on the merits of the motion for partial summary judgment without making the Board a party. CR

19.01. ("A person who is subject to service of process, either personal or constructive, *shall* be joined as a party in the action if (a) in his absence complete relief cannot be accorded among those already parties . . . . *If he has not been so joined, the court shall order that he be made a party*. . . .") (emphasis added). Failing to do so, all indispensable parties are not before the Court. And, without the Board under the jurisdiction of this Court, assuming *arguendo* that we agreed with Vaughn's arguments on the merits, he would be without an avenue for relief. For the reasons stated, the judgment of the McCracken Circuit Court is reversed and remanded with directions to permit the joinder of the Board and for further proceedings not inconsistent with this opinion.[7]

ALL CONCUR.

BRIEF FOR APPELLANTS:

David O'Brien Suetholz
Dennis Franklin Janes
Louisville, Kentucky

BRIEF FOR APPELLEE:

Stacey A. Blankenship
Douglas R. Moore
Paducah, Kentucky

[7] We pause to note that we are aware that the Board likely will agree with the City on the issues before the circuit court. Nonetheless, it is the failure of the Board as a party that impedes our review of the merits of Vaughn's appeal. Consequently, without the Board as party, Vaughn will not in effect have an appeal as a matter of right under Section 115 of Kentucky's Constitution. A statutory appeal to the circuit court from any agency or tribunal other than the district court is an original action and not an appeal. *Sarver v. Allen County*, 582 S.W.2d 40, 43 (Ky. 1979); *see also* KRS 90.370.