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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000366-MR

MATTHEW B. CORDER — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC COWAN, JUDGE
ACTION NO. 06-CI-007368

LOUISVILLE POLICE MERIT BOARD;
CHIEF ROBERT C. WHITE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, KELLER AND LAMBERT, JUDGES.

KELLER, JUDGE: Matthew B. Corder (Corder) appeals from an opinion and order of the Jefferson Circuit Court affirming the findings and order of the Louisville Metro Police Merit Board (Merit Board). The Merit Board affirmed Chief Robert White's (Chief White) decision to terminate Corder. For the reasons set forth below, we affirm.

FACTS

We adopt and incorporate herein the statement of facts set forth by the circuit court in its opinion and order:

> The primary conduct that led to Corder's eventual termination[1] involved the attempted repossession of his Lincoln Navigator during the late-night hours of October 2002, at his estranged wife's house. According to the three persons involved in the attempted repo, Corder exited the house and brandished his weapon, frisked all of them, then placed the wrecker driver under arrest for "disorderly conduct." Chief White found this conduct to be essentially reasonable, apparently because Corder had reason to believe that the workers may have been stealing his car. However, thereafter, according to the workers, Corder then struck a deal whereby he would release the wrecker driver in exchange for the workers' agreement to not repossess the Navigator. The repo workers also claimed that Corder threatened to have warrants issued for their arrest if they reported the "deal" to the department. While Corder disputed these allegations, he did not dispute the fact that he did not report to a superior that he had placed the driver under arrest and then released him. The alleged deal violated the Department Rules and Standards of Conduct 4.013 regarding Abuse of Authority in that he used his police powers for personal gain. It was also against department procedure to release a suspect from arrest without reporting the release to a commanding officer.
>
> The repossession workers filed a complaint with the Professional Standards Unit (PSU) of the Metro Police. The officer in charge of the PSU investigation, Lt. Tandeta Hettich, interviewed Corder to get his side of the story . . . and also interviewed the repo workers. She

[1] Corder was also terminated for lesser offenses which included failure to receive timely permission to work an off-duty job, which Corder eventually admitted to, and failure to remain at home while on accident leave. We find it unncessary, as did the circuit court, to recount the details of these offenses because "1) the repossession incident, standing alone, was sufficient to warrant his termination; and 2) it appears from the record that Chief White would not have terminated Corder had the repo incident not occurred."

provided the results of the investigation to Chief Robert White and recommended that the charges regarding the alleged "deal" Corder struck with the repo workers be sustained. She also concluded that Corder had been untruthful with her and his superiors regarding his role in the repo incident. Chief White reviewed the investigation and decided to terminate Corder because the deal he struck with the repo workers constituted an abuse of his authority as a police officer and because he lied about his role in the incident to Lt. Hettich and to his superiors.

On the evening of May 22, 2003, Corder received a memo from Major William Weedman ordering Corder to meet him to [sic] the next morning at 10:30 for a meeting with the Chief at 11:00. Corder immediately contacted his representative at the [Fraternal Order of Police], who arranged for an attorney to be present with him at the meeting. While the record is not perfectly clear, it appears that Corder knew roughly one-half hour before the meeting that Chief White intended to terminate him. (Findings & Order of Louisville Metro Police Merit Board at ¶10). Upon his arrival at the station, Corder's attorney provided him with a single-spaced, two and one-half page letter that listed all of the disciplinary charges filed against him, summarized the factual basis for each, and included the Chief's findings. Chief White "Exonerated" Corder on the Use of Force and Stop and Frisk violations, but "Sustained" the charges of Abuse of Authority and Truthfulness. Chief White concluded the letter by stating Corder was terminated.

Corder and his attorney then met with Chief White. The meeting was recorded, and the transcript reflects that the department's attorney announced that the Chief called the meeting "to give the officer an opportunity to be heard in regard to the Chief's intentions to serve him with a termination letter." Chief White then informed Corder that he believed the information contained in the letter warranted his termination, and that Corder could consider the letter notice of his termination unless he had something to say that would "mitigate my

> decision." Corder's attorney objected to what he termed the "termination hearing" because he and Corder had not had adequate time to prepare, and stated on the record that he had advised Corder to not respond. White then informed Corder that he was terminated.
>
> Five days later, counsel for the Department mailed Corder's counsel a letter. The letter expressed Chief White's "concern" that Corder felt he had insufficient time to prepare for the meeting and extended Corder an additional opportunity to meet and "offer reasons why the Chief should reconsider his decision." The letter assured counsel that the Chief "will seriously listen to what Mr. Corder has to say and, if appropriate, will reassess his decision." Corder declined this offer, and filed an appeal with the [M]erit [B]oard.
>
> Corder was subsequently indicted for his conduct in the repossession incident, and the Merit Board did not conduct a hearing until April 26, 2006, after a jury acquitted him on the criminal charges. Corder was present at the hearing and represented by counsel. The hearing lasted two days and [ten] witnesses testified, including Corder and the three repossession workers. Thereafter, the [Merit] Board sustained Chief White's actions and issued a 38 page "Findings & Order."

Corder appealed the Merit Board's decision to the Jefferson Circuit Court. On January 26, 2009, the circuit court entered an opinion and order affirming the Merit Board. This appeal followed.

STANDARD OF REVIEW

In *Crouch v. Jefferson County, Kentucky Police Merit Board*, 773 S.W.2d 461 (Ky. 1988), the Supreme Court of Kentucky held that the standard of review to be applied by the circuit court in this type of case is a modified *de novo.* As explained in *Brady v. Pettit,* 586 S.W.2d 29 (Ky. 1979), this standard allows the

reviewing court to invade the mental processes of the Merit Board to determine whether its action was arbitrary. To determine arbitrariness, the circuit court may review the record, the briefs, and any other evidence or testimony which would be relevant to that specific, limited issue. The appeal to circuit court is not the proper forum to retry the merits. It is limited only to the question of whether the Merit Board's action was clearly unreasonable. *Crouch*, 773 S.W.2d at 461.

On appeal from the circuit court, however, this Court is guided by the clearly erroneous standard set out in Kentucky Rule of Civil Procedure (CR) 52.01. We are not to disturb the determinations of the trial court unless they are not supported by substantial evidence. *Stallins v. City of Madisonville*, 707 S.W.2d 349, 350 (Ky. App. 1986). 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, 885-86 (Ky. 1996).

ANALYSIS

Corder makes the following two arguments: (1) that he was denied procedural due process; and (2) the Merit Board's decision to uphold the termination and the circuit court's subsequent affirmation thereof, was arbitrary, capricious and not supported by substantial evidence. For the reasons stated below, we disagree.

1. Procedural Due Process

Corder contends that he was denied his procedural due process right to a hearing prior to termination from the Louisville Metro Police Department. Corder argues that due to the short notice he received prior to the May 23, 2003, meeting, Chief White did not provide him adequate procedural due process before he was terminated. Corder also argues that he was denied procedural due process because he did not have an adequate opportunity to respond to the allegations being made against him. We disagree.

The United States Supreme Court has held that prior to termination, a public employee with a property interest in his public employment is entitled to a pre-termination hearing. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545, 105 S. Ct. 1487, 1495, 84 L. Ed. 2d 494 (1985). However, the hearing need not be elaborate. *Id*. In fact, the employee is only entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his or her side of the story to the employer. *Id.* at 546, 105 S. Ct. 1495. Where state law provides for a full administrative post-termination hearing and judicial review, the pre-termination hearing "need not definitively resolve the propriety of the discharge. It should be an initial check against a mistaken decision-essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Id*. at 545-46, 105 S. Ct. at 1495. The Supreme Court held that to require more than this "prior to termination would intrude to an unwarranted

extent on the government's interest in quickly removing an unsatisfactory employee." *Id*. at 546, 105 S. Ct. at 1495.

Corder contends that he did not receive any notice prior to being terminated. We disagree. As provided in *Loudermill*, Corder was only entitled to oral or written notice of the charges against him and an explanation of the evidence of the charges. *Id.* at 546, 105 S. Ct. 1495. In examining the facts of this case, it is clear that these requirements were satisfied. Upon arrival at the station on May 23, 2003, Corder's attorney provided him with the termination letter from Chief White that listed all of the disciplinary charges filed against him, summarized the factual basis for each, and included Chief White's findings. Corder and his attorney then met with Chief White and Corder was given the opportunity to present his side of the story, which he chose not to do. Although Chief White's letter was dated the same day as the meeting, Corder was not terminated until after he met with Chief White and had an opportunity to respond. Thus, Corder received adequate pre-termination notice.

Both the Merit Board and Chief White contend that in addition to giving Corder the opportunity to present his side of the story at the May 23, 2003, meeting, Corder again received an opportunity to respond after the meeting. Specifically, a letter was sent to Corder after the meeting offering him another opportunity to meet with Chief White to present his reasons why the decision to terminate him should be reconsidered. We note that the post-termination letter sent to Corder after the May 23, 2003, meeting, is not relevant to our conclusion that

Corder received adequate pre-termination notice because Corder was already terminated at that point.

Corder also contends that he was denied the opportunity to present a defense to the charges presented by Chief White due to a lack of notice prior to his termination. However, Corder presented his version of the incidents to Lt. Hettich during his PSU investigation, which was later conveyed to Chief White. Moreover, at the May 23, 2003, meeting, Corder was given the opportunity to provide evidence that might have dissuaded Chief White from terminating him, but chose not to do so. While Corder complains that he only received a half-hour to prepare whatever statement he might have made, Corder has failed to point to any authority for his proposition that Chief White was constitutionally required to give any preparation time at all. As stated in *Buckner v. City of Highland Park*, 901 F.2d 491, 495-96 (6th Cir. 1990):

> The employee, being confronted with the charges against him or her and being offered the chance to give a version of the incident, is responsible for the choice to not offer any competing evidence. When an employee is faced with charges that a reasonable person would recognize as jeopardizing an employment future, extra pretermination due process obligations are not placed on the employer. Affording an employee the opportunity to respond after being confronted with the charges is all that pretermination due process requires of the employer.

(internal citations omitted).

Here, Corder knew as well as anyone what role he played in the events that led to his termination and there is no reason to believe he would have

had difficulty in presenting his side of the story to Chief White. Furthermore, as correctly noted by the circuit court, "[w]hile there is no way to know for sure, it appears to the Court that Corder's refusal to provide any defense to his termination at the meeting with Chief White may have had more to do with tactical concerns than substantive ones."

Although it is unclear from his brief, it appears that Corder is also arguing that he was deprived of due process as required by Kentucky Revised Statute (KRS) 67C.325. KRS 67C.325 requires the Merit Board to afford due process to any police officer brought before it. Specifically, it requires the Merit Board to give the officer a prompt hearing, an opportunity to confront his or her accusers, and the privilege of presenting evidence to the Merit Board. However, an officer is entitled to a hearing with the Merit Board after he has been terminated. KRS 67C.323. Thus, the requirements set forth in KRS 67C.325 are not applicable to whether Corder was denied pre-deprivation procedural due process.

Further, there has been no allegation that the Board failed to provide Corder a due process hearing in compliance with KRS 67C.325. In fact, the Merit Board held a two-day hearing in which both parties presented multiple witnesses, cross-examined one another's witnesses, and offered various items of documentary evidence. Therefore, we conclude that the Merit Board complied with KRS 67C.325.

Corder also contends that he did not receive adequate due process under KRS 15.520. However, there is no authority to suggest that the procedures spelled out in KRS 15.520(1)(h) are required prior to the Merit Board hearing. Specifically, the administrative due process requirements of KRS 15.520(1)(h) only come into play "[w]hen a hearing is to be conducted by any appointing authority, legislative body, or other body as designated by the Kentucky Revised Statues." Thus, in the instant case, KRS 15.520(1)(h) only applied once the proceeding was to be held by the Merit Board. Therefore, it did not apply to Corder's meeting with Chief White.

2. Substantial Evidence

Corder also contends that there was not substantial evidence to support the Merit Board's decision to terminate him. In affirming the decision of the Merit Board, the circuit court found that the Merit Board's findings of fact were supported by substantial evidence of probative value and, thus, were not arbitrary and capricious.

Corder argues that there is conflicting testimony in the record to support his version of the facts as to what occurred during the repossession. However, as correctly noted by the circuit court, "[t]he case against Corder boils down to Corder's word against the repo workers'." Issues relating to weight and credibility of evidence are within the sole province of the fact-finder and generally will not constitute grounds for reversal on appeal. *See Caudill v. Commonwealth*, 240 S.W.3d 662 (Ky. App. 2007). After hearing the evidence and observing the

witness' demeanor, the Merit Board concluded that the repo workers' testimony was more credible than Corder's testimony. Thus, based upon the record, we conclude that there was substantial evidence to support the Merit Board's findings of fact and termination of Corder. Therefore, the circuit court properly affirmed the Merit Board's decision to terminate Corder.

3. Violation of Sick Leave Policy

Corder argues that the circuit court erred in affirming the Merit Board's determination that he violated the sick leave policy set forth in the Policies and Procedures Chapter 3, Section II, Article 22 (Sick Leave). Corder was involved in an on-duty vehicle accident on Wednesday, November 6, 2002, and Captain Richard L. Dotson (Captain Dotson) went to the hospital to see Corder that same day. Captain Dotson told Corder to take the rest of the week off and to call in on the following Monday. Instead, Corder went to the office of the (Crimes Against Children's Unit) CACU on November 7, 2002, looking for a radio for an off-duty job. Captain Dotson told Corder that department policy required him to be at home and ordered him to go home. However, Corder still went to the off-duty job. The following day, Captain Dotson received a page from Corder. Corder informed Captain Dotson that he was at the Logan Street garage and indicated that he was trying to get a new vehicle and that he could not obtain one without Captain Dotson's approval. Captain Dotson again ordered Corder to go home. Chief White found Corder to be in violation of the sick leave policy because he did not

remain in his home, as ordered by Captain Dotson, for recuperation purposes while he was off-duty due to the injuries he sustained in the vehicular accident.

Corder argues that he was not on sick leave during this period, but was instead "injured on duty." As correctly noted by the circuit court, it is not necessary to address Corder's failure to remain at home while on accident leave because the repossession incident, standing alone, was sufficient to warrant Corder's termination. It is clear from the record that Chief White would not have terminated Corder had the repossession incident not occurred. Thus, we will not further address this issue.

CONCLUSION

For the foregoing reasons, we affirm the opinion and order of the Jefferson Circuit Court.

ALL CONCUR.

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