

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-000541-MR

TERRY FARMER

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 13-CI-01015

KENTUCKY EXECUTIVE BRANCH
ETHICS COMMISSION, JOHN STEFFEN,
EXECUTIVE DIRECTOR

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KRAMER, CHIEF JUDGE; JONES AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Terry Farmer brings this appeal from a February 13, 2015, Opinion and Order of the Franklin Circuit Court affirming a Final Order of the Executive Branch Ethics Commission finding that Farmer violated KRS 11A.020(1) and KRS 11A.040(1). We affirm.

Farmer was employed as a Transportation Engineer II in District 11 of the Department of Highways in the Kentucky Transportation Cabinet. Farmer resided with his mother, Ruth Wells, and stepfather on the family farm located on State Route 2009 in Leslie County. Leslie County is a county within District 11.

On May 14, 2010, the Commonwealth of Kentucky, Executive Branch Ethics Commission (Commission) issued an Initiating Order alleging that Farmer violated Kentucky Revised Statutes (KRS) 11A.020(1) by using his official position “in an attempt to improperly influence the maintenance, repair, or replacement of a culvert which provides drainage to property in which he and his mother have a personal and financial interest.” Initiating Order at 4. It is also alleged that Farmer violated KRS 11A.040(1) by providing “confidential agency documents, either directly or through his mother, to a law firm to be used in litigation against the state.” Initiating Order at 5.

An administrative hearing was held upon the allegations contained in the Initiating Order. By Findings of Fact, Conclusions of Law and Recommended Order dated May 13, 2013, the hearing officer determined that Farmer knowingly violated both KRS 11A.020(1) and KRS 11A.040(1). Also, the hearing officer rendered the following findings of fact:

2. Roundhole Branch flows through the farm within sight of [Beth Wells'] house. As it falls from the surface-mined area on the higher land above the farm and reaches the flatter land, it slows down thus causing the water to drop the debris it accumulates before it flows under Route 2009 through a culvert. This case concerns Farmer's attempt to have the Roundhole Branch culvert

improved to prevent Wells' and his interests from flooding.

3. The culvert is a 2-barrel 6' x 4' metal pipe arch double culvert. Ex. 1 tab 1. *See* Ex. 11. A culvert is defined in the *Recording and Cooling Guide for the Structure Inventory and Appraisal of the Nation's Bridges* as:

A structure designed hydraulically to take advantage of submergence to increase hydraulic capacity. Culverts, as distinguished from bridges, are usually covered with embankment and are composed of structural material around the entire perimeter, although some are supported on spread footings with the streambed serving as the bottom of the culvert. Culverts may qualify to be considered "bridge" length.

Ex. 10 at viii. Culverts are measured along the center line of the roadway. The measurement should be made between the inside faces of the exterior walls. Ex. 10 at 28-29. So the length of a two-pipe culvert would be measured from the inner side of the outside wall of one pipe to the Roadway/Culvert/Roadway inner side of the outside wall of the other pipe, *i.e.*, (←)--(→). West Tr. at XX. According to West DVD Oct23 2:23; Michael Calebs, Branch Manager, Project Delivery and Preservation, District 11, DVD Oct23 at 4:01; and David Steele, Transportation Engineering Branch Manager, Bridge Preservation, DVD Oct24 3:29; the state keeps no inventory of culverts that are less than bridge length. According to Calebs, culvert replacement is done locally through Maintenance or sometimes the job is bid out. Culverts are generally low priority.

4. A bridge is defined as:

A structure including supports erected over a depression or an obstruction, such as water, highway, or railway, and having a track or passageway for carrying traffic or other

moving loads, and having an opening measured along the center of the roadway of more than 20 feet between undercopings of abutments or spring lines of arches, or extreme ends of openings for multiple boxes; it may also include multiple pipes, where the clear distance between openings is less than half of the smaller contiguous opening.

Ex. 10 at viii. It is to be noted that a culvert can be classified as a bridge if it is longer than 20'.

5. According to West, it takes five years of training to be certified as a bridge inspector. DVD Oct23 2:16. State Transportation Bridge Inspectors do not usually inspect culverts. DVD Oct23 2:33. If they are inspected they are to be labeled "non-inventory." DVD West Oct23 2:22; DVD Sams Oct24 9:16. Bridges are carefully and routinely inspected and placed on the National Bridge Inventory (NBI) and are catalogued in the PONTIS system. *See* Ex. 1 tab 6. The structure type and material, age and service, geometric data, inspection frequency, length, condition, load rating, etc. are entered on a Structure Inventory and Appraisal Sheet. That inspection data is put into PONTIS which electronically determines the sufficiency rating of the bridge and whether and how urgently a bridge needs to be replaced according to Cass Thomas Napier, Executive Advisor, State Highway Engineer's Office, formerly Chief District Engineer, District 11. DVD Oct24 12:10.

6. NBI provides a rational means of using federal funds for bridge repair and replacement. DVD Napier Oct24 12:10. Steele testified that the process begins at the District level. Every two years, Planning, Bridges, the Chief District Engineer, and the Project Development Coordinator meet and prioritize the needs for the District. DVD Oct24 3:33; *see also* DVD West Oct23 3:04. Then that priority list in regard to bridges goes to Steele to prioritize for the state. In Kentucky, the prioritization ultimately goes into the Six-Year Plan, or Highway Plan, for the use of state and federal funds as

determined at the state central office level. DVD Steele Oct24 3:33-3:35; DVD Calebs Oct23 3:38, 3:43. If a state is not in compliance with the national bridge inspection standards, federal funds for the state can be jeopardized according to Jeffrey Sams, Chief Bridge Inspector, Division of Maintenance. DVD Oct24 10:07. According to Steele, state as well as federal maintenance funds for bridges are also carefully prioritized. DVD Oct24 3:36.

7. Ruth Wells testified that she began worrying about Roundhole Branch flooding her property seven or eight years ago. In 2005, Terry Farmer, who was a Transportation Engineering Supervisor at the time, began a two-pronged approach to try to solve the flooding problem on his and his mother's property.

8. First apparently, Farmer used his position as a Bridge Inspector to fill out a Structure Inventory and Appraisal Sheet for the culvert at Roundhole Branch where it flows under KY 2009 on the family property. Ex. 1 tab 6; DVD West Oct23 2:58. He indicated that the culvert was 26' which made it long enough to be placed on the NBI. He also entered data to indicate that the "bridge" was in sufficiently poor condition so that it would qualify for replacement. His evaluation resulted in a sufficiency rating of 37 and anything below 50 means that rehabilitation or replacement is necessary. DVD Steele Oct24 3:56. He placed it on a 12 month or annual inspection schedule. On March 13, 2008, and on January 28, 2009, Farmer inspected the "bridge" as Substandard. Ex. 1 at tab 6; DVD West Oct23 3:15; DVD Sams Oct24 9:55.

9. In September 2009, after Farmer and his mother created a legal issue with Transportation Cabinet over the culvert, Michael West, Bridge Section Supervisor for District 11, visited the culvert near Farmer's home. He measured it to be 16' or less. DVD Oct23 2:25. On November 23, 2009, John Witt, the Investigator for Transportation, who had some surveying and engineering background, measured the Roundhole Branch culvert at Greasy Creek Road, KY 2009, and

determined that it was 14'. Ex. 1 at 6. On February 22, 2010, Jeffrey Sams, Chief Bridge Inspector for the Commonwealth, at the request of David Steele, Branch Manager for Bridge Preservation, performed a Quality Control Quality Assurance inspection. Sams determined that the culvert was a 12.2 feet long non-inventory structure. He assessed the condition of the culvert as Fair, "all primary structural elements are sound, but may have minor section loss, cracking, spalling or scour." He assessed the Headwall and Channel as Satisfactory, "structural elements show some minor deterioration." Ex. 11. *See* Ex. 10 at 38 for definitions. He thought that the culvert should be assessed every other year rather than annually. Sams' evaluation calculated to a sufficiency rating of 51 which meant; that the "bridge" did not qualify for replacement. Farmer's evaluation calculated to a sufficiency rating of 37 which made the "bridge" eligible for replacement. DVD Sams Oct24 10:09-10; DVD Steele Oct24 3:55-56. *See* Ex. 15. Napier, who was the Chief District Engineer in District 11 from April 2008-September 2011, agreed that the culvert should be replaced in the future but it was not of a high priority. DVD Oct24 12:23.

10. All of those who testified stated that the Roundhole Branch culvert was less than 20', and thus should not have been on the NBI.

11. Also in 2005, Farmer approached the culvert problem more directly by having Jeff Kelly do a drainage analysis. Farmer then sent an intradistrict memorandum to Lee Barrett, the Acting Area Engineer in Clay and Leslie Counties, about the poor condition of the culvert:

This structure was recently placed on our inventory due to the length qualifying for inventory purposes and due to the pipes being rusted thru at the outlet and due to contraction scour at the inlet and outlet ends of the structure.

An analysis completed by the Design section discovered that the existing structure could

not carry the runoff for the required 25-year storm. A recommendation was made by the Design section to install a 15' wide x 5' high concrete box culvert. The cost of installing this by contract would be approximately \$150,000. In case that special funds cannot be procured for this, we could perhaps request that this be replaced with Federal funds.

.....

12. Calebs testified that the suggested box culvert was extravagant for the drainage area. DVD Oct23 4:05.

13. Farmer's 2005 letter to Lee Barrett did not result in the action he requested. So, after a heavy rainfall on August 12, 2009, Farmer again tried to urge the state to replace the culvert on Roundhole Branch. On August 17, 2009, Farmer sent a memo to Adam Knuckles, Design Section Supervisor, District 11. Farmer attached his correspondence with Jeff Kelly in 2005 and provided some of his own calculations concerning discharge and headwater depth. Farmer's excited closing paragraph stated:

Could you apply your expertise to cross check everything? Please reply back in writing? I'll need documentation in the bridge file! My thanks in advance for your response! I'm requesting that you have everything ready, by Thursday (8/20), but if you can't anytime in the near future is fine!

.....

14. Knuckles testified that Farmer's memo was the first time he had had a request from the Bridge Office. DVD Oct23 11:47. Knuckles stated that it was neither his nor Jeff Kelly's usual job to do such calculations. DVD Oct23 12:18. He viewed it with such suspicion that he asked his supervisor if he should do it.

DVD Oct23 11:51. The requested turn-around time was unusually quick. DVD Oct23 11:48. Knuckles testified that it took him 1½ days to do the requested cross-checking. DVD Oct23 11:48. He concluded that Kelly's calculations were accurate and that Farmer's calculations were somewhat inflated. He agreed that the current culvert configuration was inadequate. Knuckles' responsive memo to Farmer was dated August 19, 2009. . . .

15. Farmer's requested quick turnaround time was driven by the fact that he, his mother, and his step-father had a meeting on August 21, 2009, with attorneys at Kinkead & Stiltz PLLC, in Lexington. At that meeting Farmer's June 9, 2005, memo to Barrett, his August 17, 2009, memo to Knuckles, and Knuckles' August 19, 2009, response to Farmer were given to the law firm. Those memos were the basis of a September 9, 2009, demand letter from Wayne F. Collier of Kinkead & Stiltz, to Tom Napier, Executive Director, Chief District Engineer, District 11. The demand letter said in part: "The damages to Ms. Wells' property are directly attributable to the inadequate design of the bridge and double culvert. The Highway Department has acknowledged that the current configuration of the double culvert is inadequate." Ex. 1 tab 1.

16. After a second demanding letter from Collier, Napier responded that the Department realized that there was a problem with water overtopping the road. He concluded:

The department has many commitments and many similar projects, which currently are unfunded, and thus, cannot be accomplished. Prioritization and procurement of an appropriate fund source will be required before a firm commitment to replacing this structure can be made.

Ex. 1 tab 1. On October 2 and on October 5, 2009, Collier wrote two more letters demanding remediation of the property. He set a deadline of October 9, 2009, for

the Department to give a positive response. Ex. 1 tab 1. Ultimately in the fall of 2009, the Wells, represented by Kinkead & Stiltz, filed an inverse condemnation action against the Transportation Cabinet in Leslie Circuit Court. Ex. 19

Based upon these findings of fact, the hearing officer determined that clear and convincing evidence demonstrated that Farmer knowingly “used his position as an Engineer . . . to further his and his mother’s economic interests.” The hearing officer also determined that Farmer knowingly disclosed confidential information to further his own and his mother’s economic interests. The hearing officer recommended a civil penalty of \$10,000 for the above violations. Farmer then filed exceptions to the hearing officer’s Findings of Fact, Conclusions of Law and Recommended Order. By Final Order dated July 30, 2013, the Commission adopted the Findings of Fact, Conclusions of Law, and Recommended Order of the hearing officer and ordered Farmer to pay a \$10,000 civil penalty.

Farmer then filed an action in the Franklin Circuit Court seeking judicial review of the Commission’s Final Order. KRS 13B.140. By a February 13, 2015, Opinion and Order, the circuit court affirmed the Final Order of the Commission. Farmer’s Kentucky Rules of Civil Procedure (CR) 59 motion to vacate, alter or amend was overruled by order entered March 16, 2015. This appeal follows.¹

¹ Terry Farmer was terminated from his position with the Kentucky Transportation Cabinet on May 23, 2010. He appealed the termination to the Kentucky Personnel Board, and the Board affirmed the Transportation Cabinet’s dismissal. Farmer then appealed that decision to this Court in Appeal No. 2012-CA-001505-MR, wherein we affirmed.

Farmer contends that the circuit court failed to utilize the proper standard to review the Commission's Final Order. Specifically, Farmer asserts:

The reviewing court in an Ethics Commission case must address the evidence to determine whether or not the legal standard [clear and convincing evidence] had been met by the Commission. It is not simply a substantial evidence review because the clear and convincing standard is a higher standard than simply choosing between the evidence presented. . . .

. . . .

There is no question that the Ethics Commission did not have clear and convincing proof under these standards and the fact of the matter is the Court's review must determine whether or not and how this legal standard was met. The Court simply failed to review this legal issue and the Court's affirming of the Ethics Commission's decision is therefore erroneous.

Farmer's Brief at 10-12.

As an appellate court, we step into the shoes of the circuit court and review the Commission's final order. *See Martin Co. Home Health Care v. Cabinet for Health and Family Servs.*, 214 S.W.3d 324 (Ky. App. 2007). KRS 11A.100(1) provides that the "provisions of KRS Chapter 13B shall apply to all commission administrative hearings." Under KRS 13B.150, judicial review of the Commission's final order is limited:

(2) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the final order or it may reverse the final order, in whole or in part, and remand the case for further proceedings if it finds the agency's final order is:

- (a) In violation of constitutional or statutory provisions;
- (b) In excess of the statutory authority of the agency;
- (c) Without support of substantial evidence on the whole record;
- (d) Arbitrary, capricious, or characterized by abuse of discretion;
- (e) Based on an ex parte communication which substantially prejudiced the rights of any party and likely affected the outcome of the hearing;
- (f) Prejudiced by a failure of the person conducting a proceeding to be disqualified pursuant to KRS 13B.040(2); or
- (g) Deficient as otherwise provided by law.

KRS 13B.150(2). In this case, the relevant standard of review is whether there is substantial evidence to support the Commission's findings as to violations of KRS 11A.020(1) and KRS 11A.040(1) by clear and convincing evidence. And, issues of law are reviewed *de novo*, such as interpretation of relevant statutory provisions.

In its Opinion and Order, the circuit court was cognizant of the proper standard of review and utilized same when addressing Farmer's allegations of error. The circuit court properly framed the issues as whether "substantial evidence in the record exists to support the [Commission's] conclusion that Farmer violated KRS 11A.020(1) and KRS 11A.040(1), which the Commission proved by clear and convincing evidence." Opinion and Order at p. 4-5. The circuit court also outlined the evidence supporting the Commission's findings that Farmer

violated KRS 11A.020(a) and KRS 11A.040(1). We, thus, attach no merit to Farmer's argument that the circuit court failed to utilize the proper standard of review.

Farmer next maintains that the Commission committed reversible error by finding that he violated KRS 11A.040(1). Farmer argues that the Commission erroneously concluded that a June 9, 2005, memorandum from Farmer to Lee Barrett constituted "confidential information" within the meaning of KRS 11A.040(1). Additionally, Farmer points out that the Commission failed to specifically find clear and convincing evidence of a violation of KRS 11A.040(1).

The interpretation and construction of a statute presents an issue of law for the court. *See Commonwealth, Cabinet for Health Servs. v. Family Home Health Care, Inc.*, 98 S.W.3d 524 (Ky. App. 2003).

KRS 11A.040(1) provides:

(1) A public servant, in order to further his own economic interests, or those of any other person, shall not knowingly disclose or use confidential information acquired in the course of his official duties.

Under KRS 11A.040(1), a public servant is prohibited from knowingly disclosing confidential information to advance any person's economic interests. Although the term "confidential" is not statutorily defined in KRS Chapter 11A, we believe this term is properly understood as meaning information obtained by reason of the public servant's employment that is intended to be secret.² This definition is

² Confidential information is defined as information "meant to be kept secret." *Black's Law Dictionary*, 294 (7th ed. 1999).

consistent with the Commission's definition of confidential information that was taken from the Transportation Cabinet's General Administration and Personnel (GAP) Policies § 809 . GAP § 809 defines confidential information as:

[I]nformation protected from disclosure by law, regulation, policy or which an individual is generally accepted by society to have a reasonable expectation of privacy in, whether such information is obtained from or embodied in or by any media, document, writing or written data, material, or compilation.

In the case at hand, the Commission concluded that the 2005 memorandum constituted confidential information because it would not have been subject to disclosure under the Open Records Act. In support thereof, the Commission relied upon the testimony of Ann Stansel, the record custodian of the Transportation Cabinet. Stansel testified that the 2005 memorandum was considered confidential because it contained preliminary recommendations and estimates for replacing the Roundhole Branch Culvert. Moreover, there was evidence that Farmer intended to use the 2005 memorandum to his and/or his mother's economic interests. The 2005 memorandum was given to his family's attorney to assist in litigation against the state concerning Roundhole Branch Culvert. Upon the whole, we conclude that substantial evidence supported the Commission's finding that Farmer violated KRS 11A.040(1) by clear and convincing evidence.³

³ Farmer also believes that the Commission erred by failing to specifically state that clear and convincing evidence was present. However, we conclude that the violation of KRS 11A.040(1) was demonstrated by clear and convincing evidence; consequently, any alleged error by the

Farmer also argues that the Commission committed reversible error by finding that he violated KRS 11A.020(1). Farmer asserts that the Commission failed to specify which subsection of KRS 11A.020(1) was violated. Farmer further maintains that clear and convincing evidence did not support the Commission's finding of a violation of KRS 11A.020(1).

KRS 11A.020(1) reads:

(1) No public servant, by himself or through others, shall knowingly:

(a) Use or attempt to use his influence in any matter which involves a substantial conflict between his personal or private interest and his duties in the public interest;

(b) Use or attempt to use any means to influence a public agency in derogation of the state at large;

(c) Use his official position or office to obtain financial gain for himself or any members of the public servant's family; or

(d) Use or attempt to use his official position to secure or create privileges, exemptions, advantages, or treatment for himself or others in derogation of the public interest at large.

In this case, there was evidence that Farmer, in his official capacity, had the Roundhole Branch Culvert placed on the NBI which made it eligible for replacement as a bridge even though the culvert did not meet the criteria for being a bridge. By so doing, it was Farmer's intent that Roundhole Branch Culvert would qualify more quickly for repair or replacement. There was also evidence

Commission is merely harmless, and not subject to reversal. *See Thomas v. Judicial Conduct Comm'n*, 77 S.W.3d 578 (Ky. 2002).

that Farmer used his official position to obtain a drainage analysis by utilizing employees of the Transportation Cabinet. And, evidence was introduced that Farmer attempted to influence other employees in the District to replace the culvert. The Commission specifically found that Farmer attempted to have Roundhole Branch Culvert replaced or repaired so as “to prevent the risk of the loss of valuable topsoil, livestock and improvements – the same risk faced by many other Kentucky landowners with property adjacent to non-inventory culverts.” Considering the evidence, we conclude that substantial evidence existed to support the Commission’s finding that clear and convincing evidence demonstrated that Farmer knowingly violated KRS 11A.020(1), (a), (b), (c), and (d).⁴

We view any remaining contentions of error as moot or without merit.

In sum, we hold that the Commission’s Final Order is not subject to reversal per KRS 11A.100 and KRS 13B.150.

For the foregoing reasons, the Opinion and Order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

⁴ Farmer additionally argued that the Commission committed error by failing to specify which subsection of Kentucky Revised Statutes (KRS) 11A.020(1) Farmer violated. As clear and convincing evidence demonstrated that Farmer violated KRS 11A.020(1), (a), (b), (c), and (d), we believe any error was harmless. *See Thomas*, 77 S.W.3d 578.

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BRIEF AND ORAL ARGUMENT
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