

Commonwealth Of Kentucky
Court Of Appeals

NO. 1998-CA-002039-MR

ROBERT RELFORD,
JAMES M. MORRIS, ESQ., AND
MORRIS & MORRIS, P.S.C.

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES KELLER, JUDGE
ACTION NO. 97-CI-03837

LEXINGTON-FAYETTE URBAN COUNTY
GOVERNMENT CIVIL SERVICE COMMISSION

APPELLEE

AND: CROSS-APPEAL NO. 1998-CA-002301-MR

LEXINGTON-FAYETTE URBAN COUNTY
GOVERNMENT CIVIL SERVICE COMMISSION

CROSS-APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES KELLER, JUDGE
ACTION NO. 97-CI-3837

ROBERT RELFORD

CROSS-APPELLEE

OPINION
AFFIRMING
** **

BEFORE: BUCKINGHAM, KNOPF, AND MILLER, JUDGES.

MILLER, JUDGE: Robert Relford, James M. Morris, Esq., and Morris
& Morris, P.S.C. bring Appeal No. 1998-CA-002039-MR from an
August 13, 1998 order of the Fayette Circuit Court, and
Lexington-Fayette Urban County Government Civil Service

Commission (Civil Service Commission) brings Cross-Appeal No. 1998-CA-002301-MR from a July 15, 1998 opinion and order of the Fayette Circuit Court. We affirm.

Robert Relford is a civil service employee of Lexington-Fayette Urban County Government. On June 20, 1997, he was served by Robert Ramsey, then Director of the Division of Building Maintenance and Construction, with a "Notification of Reasonable Cause Testing." It ordered him to undergo drug testing. The notification was predicated upon the belief that Relford had recently been charged with possession of controlled substance and drug paraphernalia. Relford refused to undergo testing. He maintained that the notification was defective because he had not been, in fact, charged with a controlled substance violation. Through counsel, he sought to have the reasonable cause notification so amended. However, his request was denied. Consequently, the Civil Service Commission entered an October 15, 1997 opinion and order acknowledging that the notification to Relford was inadequate, but nevertheless suspending Relford, without pay, for thirty days.

Relford appealed to the Fayette Circuit Court pursuant to Ky. Rev. Stat. 67A.290. On July 15, 1998, the circuit court reversed the Civil Service Commission's opinion and order suspending Relford. The court concluded that the Civil Service Commission acted arbitrarily by not following its own drug testing procedures. Through counsel, Relford then filed a motion requesting an award of attorney fees. On August 13, 1998, the

circuit court entered an order denying the motion. These appeals follow.

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The sole issue in this appeal is whether Relford, who successfully appealed an adverse decision of the Civil Service Commission, is entitled to an award of attorney fees. Relford claims he comes within the purview of the Civil Rights Attorney's Fee Award Act of 1976 codified in 42 U.S.C. §1988 (Civil Rights Fee Act). That act provides in relevant part as follows:

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318..., the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.
[Emphasis added.]

We are, however, unable to agree with Relford. He claimed that the Civil Service Commission acted arbitrarily, and by so doing, violated his Fourth Amendment Constitution rights. We do not view Relford's Fourth Amendment claim as within the compass of the Civil Rights Fee Act. In sum, we do not believe that Relford asserted a "civil rights" claim cognizable under Civil Rights Fee Act. See Dawson v. Birenbaum, Ky., 968 S.W.2d 663 (1998). As such, we are of the opinion that Relford is not entitled to an attorney fees award.

CROSS-APPEAL NO. 1998-CA-002301-MR

On cross-appeal, the Civil Service Commission contends that the circuit court improperly reversed its order suspending Relford without pay for thirty days. Specifically, it asserts that there existed substantial evidence to support the notification of drug testing and imposition of a thirty-day suspension. We disagree.

We believe it incumbent upon a governmental agency to follow its own rules and regulations. We are compelled to agree with the circuit court that the Civil Service Commission failed to follow its own drug testing procedures as established in the "Lexington-Fayette Urban County Government Alcohol and Drug Free Workplace Guidelines and Procedure Handbook" (Handbook). In this regard, we shall defer to the circuit court's ratiocination:

There were several types of testing programs set out in the Handbook, but the petitioner was specifically given notice that he was to be tested under "Reasonable Cause Testing." The policy for this type of testing was delineated, as follows:

Reasonable Cause Testing (RCT)-Employees will be tested for drugs or alcohol when reasonable suspicion exists to support a belief that the employee is under the influence of drugs or alcohol or that the employee's [sic] behavior or work performance has been affected by drugs or alcohol. The basis for the decision shall be documented, in writing, by at least two (2) trained supervisors or by professional law enforcement or medical personnel. A determination will be based upon observation and documentation of:

- 1.) Detection of an alcoholic substance emitting from the employee's breath. This shall include a detection of a "hang-over" odor.
- 2.) Observation(s) of the employee's speech being unusually slurred, or noticeably

different without a proper medical reason being given.

3.) Observation(s) of the employee's action or conduct as being noticeably different or impaired and not consistent with normal conduct and without proper explanation.

4.) Observation(s) that the employee's appearance, in conjunction with the above, indicates that the employee is impaired.

Lexington-Fayette Urban County Government Alcohol and Drug Free Workplace Guidelines and Procedure Handbook, 13 (1996).

The Handbook also defines reasonable suspicion, as follows:

Reasonable Suspicion-Whether a reasonable, prudent individual, trained in the symptoms of drug or alcohol abuse would believe, based on observation, that someone was under the influence of drugs or alcohol; or that based on observation that drugs and/or alcohol is being used or stored on LFUCG property.

Lexington-Fayette Urban County Government Alcohol and Drug Free Workplace Guidelines and Procedure Handbook, 5 (1996).

Based on these provisions, there are several reasons that the testing of the petitioner should not have been ordered. The first is that the reason given for the testing was an arrest of the petitioner for possession of a controlled substance and paraphernalia. This is not one of the criteria for ordering a drug test under Reasonable Cause Testing in the Handbook, regardless of the fact the petitioner was not arrested for possession of a controlled substance.

A second reason is that the basis for the decision to test was not properly documented. Under the policy, two supervisors must document, in writing, the reasons for testing. In this case, only one, Robert Ramsey, provided any type of basis. There is no indication in the record that this was documented by writing or that there were any additional supervisor observations. There is also no indication of any actual observances of the petitioner other than his arrest, which has already been disgarded [sic] as a valid basis for the testing. There was a written statement (the police incident

report) in the record from a law enforcement officer, E. A. Hart, that he observed the petitioner in possession of drug paraphernalia, but this still is not one of the criteria for Reasonable Cause Testing.

Finally, reasonable suspicion, as defined in the Handbook, was not satisfied. There is no indication in the record that the petitioner was observed under the influence of drugs or alcohol. There is also no indication that the petitioner was using, had used or was storing drugs or alcohol "on LFUCG property."

Upon the whole, we conclude that the "Notification of Reasonable Cause Testing" was not issued in compliance with the Handbook's procedures. Thus, we are of the opinion that failure of the Civil Service Commission to follow its own drug testing procedures rendered the notification and subsequent suspension of Relford arbitrary. See American Beauty Homes Corporation v. Louisville and Jefferson County Planning and Zoning Commission, Ky., 379 S.W.2d 450 (1964).

For the foregoing reasons, Appeal No. 1998-CA-002039-MR is affirmed. Cross-Appeal No. 1998-CA-002301-MR is affirmed.

ALL CONCUR.

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