

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002753-MR

LANCE HAWKINS

APPELLANT

V. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 97-CI-2840

JEFFERSON COUNTY POLICE MERIT
BOARD; JEFFERSON COUNTY, KENTUCKY;
and SPECIAL JEFFERSON COUNTY
POLICE MERIT BOARD

APPELLEES

OPINION AFFIRMING IN PART, AND VACATING AND REMANDING IN PART

* * * * *

BEFORE: GUDGEL, Chief Judge; GUIDUGLI and TACKETT, Judges.

GUDGEL, CHIEF JUDGE: This is an appeal from an opinion and judgment entered by the Jefferson Circuit Court in a police disciplinary proceeding. The court adjudged that appellant Lance Hawkins should be terminated from his employment as a Jefferson County policeman, thereby reversing the findings and order of a special Jefferson County Police Merit Board (special board) which limited his discipline to suspension periods of thirty-nine days and twenty days. For the reasons stated hereafter, we affirm in part, and vacate and remand in part.

On January 19, 1995, Police Chief Leon Jones ordered Hawkins to be suspended without pay for a period of twenty consecutive days beginning January 20. The suspension stemmed from two separate incidents, as well as the failure to be truthful during the ensuing investigation. During one of the incidents, Hawkins provided a twenty-year-old female with alcohol and allowed her to remain on the premises where the alcohol was served. The other incident involved Hawkins' failure to take action or to leave the premises when marijuana was smoked at a social gathering. Hawkins chose not to exercise his KRS 78.455(1) option to appeal his twenty-day suspension to the Jefferson Police Merit Board (regular board). Thus, Hawkins' suspension period was completed by mid-February.

Next, in March 1995, Hawkins was interviewed by officers of the department's internal affairs unit regarding a complaint that he had shared a bed and had sexual contact with a fifteen-year-old female. Hawkins denied the charge, but after an investigation the officers determined that he had been untruthful with them regarding the incident. As a result, the Acting Chief of Police, Charles Loeser, Jr., advised Hawkins in writing on April 21, 1995, that pursuant to the authority vested in him by KRS 78.445(1), Hawkins' employment was immediately terminated. In accordance with KRS 78.455(1), Hawkins timely requested the regular board to review Acting Chief Loeser's disciplinary action.

Meanwhile, being dissatisfied with the limited discipline imposed upon Hawkins on January 19, the Jefferson County Judge/Executive ordered the regular board to investigate that disciplinary action and other matters relating to Hawkins' conduct as a policeman. On April 19, 1995, after completing its investigation, the board on its own initiative filed charges against Hawkins pursuant to KRS 78.450. These charges in part duplicated those set out in the disciplinary letters of January 19 and April 21. Further, the board filed a new charge of dereliction of duty, relating to Hawkins' alleged failure to appear as a witness in court on numerous occasions. Subsequently, for reasons which are unclear to us, it was apparently agreed that the regular board members would disqualify from hearing either Hawkins' appeal from the April 21 termination letter, or the charges filed on the board's own initiative. Instead, the county judge/executive appointed special board members to conduct both hearings. By agreement, the requisite hearings were deferred until December 11 and 12, 1996, pending the outcome of a felony charge on which Hawkins was acquitted.

First, a hearing was conducted on December 11 regarding Acting Chief Loeser's termination of Hawkins' employment stemming from the incident involving the fifteen-year-old female. After a recess at the conclusion of the hearing, the special board orally announced on the record that although it was upholding the acting chief's finding of guilt in regard to Hawkins' untruthfulness, it would impose only a sixty-day suspension rather than upholding

the acting chief's decision to terminate Hawkins' employment. After being informed the next day that, pursuant to the regular board's regulations, a sixty-day suspension would result in Hawkins' termination, the special board reduced the suspension period to thirty-nine days.

The special board then conducted a hearing on December 12 on the regular board's new charge regarding the alleged dereliction of duty. At the conclusion of that hearing, the special board orally announced that it was finding Hawkins guilty of that charge, but that it would impose no additional discipline beyond a twenty-day suspension. The special board concluded that the remaining charges raised by the regular board had been resolved either on the previous day or by the January suspension.

On May 12, 1997, the special board rendered written findings and an order suspending Hawkins for thirty-nine days without pay, effective December 11, 1996, based upon the charge involving the fifteen-year-old female. He was also suspended for twenty days without pay, effective December 12, 1996, based upon the dereliction of duty charge. Moreover, the special board reaffirmed the discipline meted out by Chief Jones on January 19, and it essentially declined to impose any additional discipline.

Once again, apparently satisfied with the discipline meted out to him, Hawkins did not appeal to the circuit court from the special board's findings and order. However, deeming themselves aggrieved by the special board's order, both the regular board and Jefferson County, by and through its current

police chief, appealed to the circuit court, naming Hawkins and the special board as respondents. On October 28, 1998, the court entered an opinion and judgment reversing the special board's decision, and ordering the reinstatement of Hawkins' earlier termination. This appeal followed.

At the outset, we note that the parties have raised no issues regarding the special board's twenty-day suspension of Hawkins on the dereliction of duty charge. Hence, we must affirm so much of the court's judgment as upholds that disciplinary action.

We also note that the regular board clearly was not entitled on April 19, 1995, to charge Hawkins on its own initiative regarding the same incidents for which Chief Jones disciplined him on January 19, 1995. KRS 78.455(2) expressly provides that disciplinary action taken by a police chief pursuant to that statute shall be final, except to the extent that a suspended officer or employee requests the board to review the suspension. Since Hawkins did not seek such a board review, it is clear that the twenty-day suspension imposed by Chief Jones became final and that the board could not revisit the same incident some three months later by filing charges on its own initiative. Indeed, to conclude otherwise not only would violate the express provisions of KRS 78.455, but it would also offend all of our notions of fairness and due process, and it would amount to arbitrary action in violation of Section 2 of Kentucky's constitution.

Given these conclusions, it follows that we need only address the merits of the issues raised regarding the special board's thirty-nine-day suspension of Hawkins relating to the incident involving the fifteen-year-old female, and the circuit court's decision to set aside that suspension and to reinstate Acting Chief Loeser's penalty of termination.

First, Hawkins contends that neither the regular board, nor the county and its present police chief, had standing to appeal from the special board's final order. We disagree.

The regular board was a party to the proceedings below, as it filed charges against Hawkins and thus was aggrieved by the special board's decision. Further, since Hawkins' employment was terminated on April 21 by Acting Chief Loeser, his successor in office, Chief Ricucci, was entitled to appeal on behalf of the county and the former acting chief from the special board's decision to reduce the penalty of termination to a thirty-nine-day suspension. In short, both the regular board and Chief Ricucci, on behalf of the county, clearly had standing to appeal from the special board's adverse decision. See Duvall v. Helm, Ky. App., 623 S.W.2d 234 (1981).

Next, Hawkins contends that the circuit court erred by finding that the board acted arbitrarily both by making the initial sixty-day suspension effective on December 11, 1996, rather than on the April 1995 date when the termination letter was served, and by then reducing the sixty-day suspension to thirty-nine days. The penalty's effective date is important

because a board regulation provides for the automatic termination of the employment of any officer who is suspended for a total of sixty or more days during a twelve-month period, and Hawkins already had been suspended for twenty days beginning January 20, 1995.

Arguing in reverse, appellees assert that the board had no authority on December 12, 1996, to reduce the period of the suspension which it announced one day earlier. Further, they assert that the sixty-day suspension must stand as of April 21, 1995, with the result that Hawkins runs afoul of the board's sixty-day regulation, and the termination of his employment is mandated. We conclude, however, that this argument is unsound and that the court erred by adopting it.

An administrative agency such as the special board speaks only through its written records. Oral statements made at the conclusion of a hearing and transcribed by a court reporter do not amount to such written records. Instead, the board must make written findings and issue an order from which an appeal may be taken. See Pearl v. Marshall, Ky., 491 S.W.2d 837 (1973). Until such findings and a final order are entered, the board may reconsider and change its decision. See Union Light, Heat & Power Co. v. Public Service Commission, Ky., 271 S.W.2d 361 (1954). Thus, the special board clearly was authorized on December 12 to reconsider and reduce the suspension decision which it verbalized one day earlier, as it had not yet rendered written findings and an order. We hold, therefore, that the

court erred by finding that the special board in any way acted arbitrarily by finally fixing Hawkins' suspension at thirty-nine days.

It thus follows that it is irrelevant whether the thirty-nine-day suspension period commenced in April 1995 or in December 1996, as the automatic termination regulation is simply inapplicable since the total suspension period in any event amounts to less than sixty days. Further, we note in passing that the relied-upon regulation's validity may be subject to challenge on the ground that nothing in Chapter 78 expressly authorizes the termination of a merit employee simply because he or she is suspended for sixty or more days during a twelve-month period. See Brown v. Jefferson County Police Merit Board, Ky., 751 S.W.2d 23 (1988).

Finally, Hawkins contends that the court erred by finding that the special board utilized the wrong standard in reducing his penalty from termination to a thirty-nine-day suspension, and by finding that the special board's decision to reduce the penalty was arbitrary. For the reasons stated hereafter, we vacate and remand for further proceedings as to this issue.

KRS 78.455(1) provides that if the board determines that the police chief's action was "unjustified or unsupported by proper evidence," it may set aside the order and impose a different penalty. In reaching such a conclusion, the board obviously must support its decision with adequate findings which

are based upon the cases's particular facts and circumstances. See City of Louisville by Kuster v. Milligan, Ky., 798 S.W.2d 454 (1990).

Here, the special board found that a thirty-nine-day suspension was appropriate in regard to the incident involving the fifteen-year-old female, but it made no findings whatsoever as to whether the acting chief's decision to terminate Hawkins was "unjustified" in light of the facts and circumstances presented by the proof. Such findings were statutorily required before the board could set aside the acting chief's penalty and impose a lesser penalty. Moreover, in the absence of such findings, neither the circuit court nor this court may provide meaningful appellate review of the board's decision. Thus, the issue as to the appropriate penalty must be vacated and remanded to the circuit court. The circuit court in turn should remand the issue to the special board, with directions to reconsider the penalty issue in a manner consistent with the views stated herein.

In summary, we affirm the twenty-day suspension meted out by Chief Jones on January 19, 1995, as well as the twenty-day suspension regarding the dereliction of duty as ordered by the special board on May 12, 1997. Further, we affirm the special board's finding that Hawkins was untruthful in regard to the incident involving the fifteen-year-old female. However, we vacate the circuit court's judgment reinstating the penalty of termination set forth in Acting Chief Loeser's letter of April

21, 1995, and we remand the penalty issue to the circuit court with directions that the matter be remanded to the special board for adequate findings in that vein and the entry of an appropriate order based upon those findings. We further direct the circuit court on remand to enter an amended judgment herein, dismissing all of the charges filed by the regular board on April 19, 1995, except the charge relating to the dereliction of duty.

For the reasons stated, we affirm in part, and vacate and remand in part for further proceedings consistent with our views.

TACKETT, J., CONCURS.

GUIDUGLI, J., CONCURS IN RESULT ONLY.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

Mark L. Miller
Louisville, KY

BRIEF AND ORAL ARGUMENT FOR
JEFFERSON COUNTY POLICE MERIT
BOARD:

Larry C. Ethridge
Louisville, Ky

BRIEF AND ORAL ARGUMENT FOR
JEFFERSON COUNTY, KENTUCKY:

David Leightty
Louisville, KY