RENDERED: OCTOBER 6, 2000; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002084-MR

GEORGE A. ELLIS, JR. APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 97-CI-03838

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT
CIVIL SERVICE COMMISSION APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: CHIEF JUDGE GUDGEL, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from a judgment upholding a decision of the Lexington-Fayette Urban County Government Civil Service Commission terminating the employment of appellant. Appellant argues that he was not given sufficient notice of the basis for his termination. From our review of the record, appellant was given sufficient notice of enough of the charges against him to support his termination and, thus, the lack of notice as to certain of the charges constitutes harmless error. Appellant's remaining assignments of error were not preserved for review. Accordingly, we affirm.

On July 21, 1997, the Director of the Division of Building Maintenance and Construction of the Lexington-Fayette Urban County Government ("LFUCG") filed charges against appellant, George Ellis, seeking his dismissal for events which occurred on July 15 and 16, 1997. At that time, Ellis was working with the asbestos crew within the Division of Building Maintenance and Construction. There was evidence presented at his dismissal hearing that on July 15, 1997, Ellis made the statement that if he was sent to a certain job site with certain individuals, "I don't know how long it will be before I seriously hurt one of them." After that statement was made, four of Ellis's fellow employees and his direct supervisor, James Waddy, filed grievances against Ellis for making said threat. The next morning, July 16, 1997, a confrontation arose when Ellis arrived at work and was informed of the grievances, that he was being reassigned, and that he should report to the heating and air conditioning supervisor. A loud argument then ensued between Ellis and the operations manager, Mike Walford. According to Ellis, Walford called him a "damned nigger" during this argument. Walford denied calling Ellis a "nigger". Walford claimed that when he ordered Ellis to report to his new work assignment, he refused and demanded to talk with the human resources manager, Wally Skiba. According to Walford and Carolyn Smith, in whose office Ellis went after arguing with Walford, they felt threatened by Ellis's tone of voice and his demeanor during this time. Eventually, the police were called and escorted Ellis off the premises.

A hearing on Ellis's proposed dismissal was held before the LFUCG Civil Service Commission ("the Commission") on September 24, 1997. Following the hearing, the Commission voted in favor of Ellis's dismissal. Ellis then appealed to the Fayette Circuit Court which affirmed the dismissal. This appeal by Ellis followed.

Ellis first argues that he was given insufficient notice of the basis for his dismissal. The written notice sent to Ellis by the LFUCG Civil Service Commission provided as follows:

> CHARGES
>
> Comes now the Lexington-Fayette Urban County Government, Division of Building Maintenance and Construction and charges George A. Ellis with misconduct and inefficiency within the meaning of KRS 67A.280 and Section 21-44 of the Code of Ordinances, to wit:
>
> COUNT I
>
> That said George A. Ellis committed the offense of insubordination in that he failed or refused to follow a direct order of a supervisor on July 15, 1997.
>
> COUNT II
>
> That said George A. Ellis committed the offense of deliberate malicious conduct in that he threatened to harm several employees in the Division of Building Maintenance and Construction on July 15, 1997.
>
> COUNT III
>
> That said George A. Ellis' repeated acts of misconduct, insubordination, and malicious behavior interfere with the efficient operation of the Division of Building Maintenance and Construction.
>
> COUNT IV
>
> That said George A. Ellis has received previous discipline in that on July 6, 1993 he was given a written reprimand for leaving his work station without authorization; on August 16, 1993 he was given a written reprimand for leaving his work station without authorization and insubordination; on June 15, 1994 he was given a five (5) day

> suspension for insubordination; and, on May 7, 1996 he was given a written reprimand for misconduct.
>
> WHEREFORE, the Lexington-Fayette Urban County Government requests that the Civil Service Commission dismiss George A. Ellis, pursuant to the provisions of KRS 67A.280 and Section 21-44 of the Code of Ordinances.

The opinion and order entered by the Commission pursuant to the hearing made the following findings:

> 1. That on July 16, 1997 Mr. Ellis disrupted the office and refused to go to the job site as directed.
> 2. That Mr. Ellis failed or refused to follow a direct order of a supervisor on July 15, 1997.
> 3. That Mr. Ellis threatened to harm several employees in the Division of Building Maintenance and Construction on July 15 and 16, 1997.
> 4. That Mr. Ellis' repeated acts of misconduct, insubordination, and malicious behavior have interfered with the efficient operation of the Division of Building Maintenance.
> 5. That the forgoing constitutes misconduct, insubordination, and inefficiency, justifying his dismissal.

Ellis argues that his due process rights were violated because the notice sent to him did not mention charges stemming from the events of July 16, 1997, of which evidence was presented at the hearing and which, from the above findings of the Commission, clearly served as at least part of the basis of the Commission's decision.[1] In support of his position, Ellis cites Wade v. Commonwealth, Dept. of Treasury, Ky. App., 840 S.W.2d 215 (1992), in which the specific notice requirements for dismissal

[1]Contrary to LFUCG's assertion that this issue was not preserved for review, we note that Ellis argued that the notice was insufficient in his motion to dismiss before the Commission and in his reply memorandum in support of his position before the circuit court.

of executive branch state employees pursuant to KRS 18A.095 are set out. However, Ellis is not an executive branch state employee; he is an urban-county government employee. Dismissals of urban-county government employees are governed by KRS 67A.280. KRS 67A.280(2) provides in pertinent part:

> Any person may prefer charges in writing against any employee by filing them with the appointing authority who shall communicate the charges without delay to the head of the executive unit in charge of personnel matters, and to the civil service commission. The charges must be signed by the person making them and must set out clearly each charge. The appointing authority shall, whenever probable cause appears, prefer charges against any employee whom he believes guilty of conduct justifying his removal or disciplinary action. Upon the filing of charges, the secretary of the civil service commission shall notify its members and serve a copy of the charges upon the accused employee . . .

KRS 67A.280(3) goes on to provide:

> Upon the hearing, the charges shall be considered traversed and put in issue, and the trial shall be limited to the issues presented by the written charges, provided, however, that the charges may be amended prior to trial, in which event the notice procedures hereinabove described shall be again complied with, and reasonable opportunity given for the preparation for trial on the amended charges.

Although the entire record of the Commission was not placed in the record before us, we do not see that the Commission ever amended the charges against Ellis. The question then becomes, did the notice sent to Ellis "set out clearly each charge"?

Implicit in a party's due process right to an opportunity to be heard is that the party receive sufficient

notice to direct his attention to the occurrences at issue. Somsen v. Sanitation Dist. No. 1, 303 Ky. 284, 197 S.W.2d 410 (1946). In Goss v. Personnel Board, Ky., 456 S.W.2d 819 (1970), the statute (KRS 18.270(17) — the precursor to KRS 18A.095(8)) contained a general notice requirement, as in the instant case, mandating that the notice give "the reasons for the discharge" and allow the party to reply in writing or in person. The Court held that the notice must be such that it allows the party to adequately reply to the charges, which requires dates, places, and names. Id. at 821. Similarly, in Kupper v. Kentucky Board of Pharmacy, Ky., 666 S.W.2d 729 (1983), it was adjudged that the notice of administrative charges was not sufficiently specific where it did not state the nature, time or place of the accusations, although said error was not properly preserved for review. In Estreicher v. Board of Education of Kenton County, Ky., 950 S.W.2d 839 (1997), the statute mandated that the notice of demotion contain "[a] specific and complete statement of grounds upon which the proposed demotion is based, including, where appropriate, dates, times, names, places, and circumstances." KRS 161.765(2)(b)(1). The Court held that, although the notice contained only general statements of the charges against appellant, notice was sufficient when it alluded to past correspondence between appellant and appellee which set forth in detail the grounds for the demotion. Id. at 842. The Court once again recognized that notice is sufficient if it allows the party to "know the specific nature of the charges

against them, in order to evaluate intelligently the accusations and prepare fully for a hearing on the matter." Id.

The notice at issue in the present case stated that Ellis was insubordinate when he refused to follow a direct order of a supervisor on July 15, 1997 and that he committed an act of malicious conduct on July 15, 1997 when he threatened to harm several employees. The remainder of the notice cited four specific instances of previous discipline, stating the date, the punishment, and the nature of each offense. In reviewing the record of the hearing on this matter, we see that much evidence was elicited regarding Ellis's confrontation with Mike Walford and his subsequent encounter with Carolyn Smith, which occurred on July 16, 1997. In fact, the Commission clearly stated in its findings that Ellis refused to go to the job site and threatened to harm several employees on July 16, 1997. However, there was no reference to any incident occurring on July 16, 1997 in the notice received by Ellis. Ellis argues this rendered the notice to him inadequate, as he was not prepared to defend against charges stemming from the events of July 16, 1997. Ellis also argues that the notice regarding the events of July 15, 1997 was not sufficiently specific because there was no reference to the time or place of his purported conduct and there were no names mentioned.

From our review of the record, we believe that the notice was sufficiently specific as to Ellis's conduct on July 15, 1997. Although the notice did not contain the names of the individuals threatened, there was evidence that Ellis was aware

of the grievances filed by the fellow employees in which they alleged that Ellis had threatened them on July 15, 1997 at 3:20 p.m. at Connie Griffith Manor. The grievance forms also refer to Ellis's refusal to perform a work assignment with certain individuals on July 15, 1997.

As to the allegations regarding Ellis's conduct on July 16, 1997, we believe the notice was inadequate. The alleged events of July 15 and July 16, although related, were separate and distinct. Ellis's confrontation on July 16 was with a different supervisor, and the purported threats of July 16 were presumably against different individuals. Yet the notice made no mention of any conduct occurring on July 16. We believe Ellis did not receive sufficient notice to intelligently respond to or prepare for a hearing on the charges related to the events of July 16. The question then becomes, was said error harmless or reversible error? CR 61.01.

Upon review of the record, we believe that Ellis's conduct on July 15 and the evidence regarding the past discipline of Ellis were sufficient basis to dismiss Ellis, even without the evidence regarding his conduct on July 16. KRS 67A.280(1) provides that "No employee in the classified service of urban-county government, . . . shall be dismissed . . . for any reason except inefficiency, misconduct, insubordination, or violation of law involving moral turpitude." In actions involving the dismissal of an urban-county government employee, "[t]he trial court's review is limited to a determination of whether the administrative body acted arbitrarily." Brady v. Pettit, Ky.,

586 S.W.2d 29, 33 (1979). LFUCG presented evidence that Ellis refused to follow a direct order of his supervisor on July 15 and that he made a threat against certain of his fellow employees on July 15. Further, there was evidence of the four past instances of insubordination and misconduct for which Ellis had been disciplined. From that evidence, we cannot say the Commission acted arbitrarily in terminating Ellis's employment.

Ellis next argues that the Commission failed to enforce equal time limits on both parties during the hearing. Ellis maintains that LFUCG was allowed to exceed its two-hour time limit by 30 minutes, while Ellis stayed within the two-hour limit. In reviewing the transcript of the hearing, we do not see that this issue was preserved, and Ellis has not pointed us to where in the record the issue was preserved as required by CR 76.12(4)(c)(iv). At no time did Ellis object to the fact that LFUCG was exceeding its time limit. Moreover, we do not see that Ellis ever asked for more time to present his case. Accordingly, this issue is precluded from our review. See Kaplon v. Chase, Ky. App., 690 S.W.2d 761 (1985).

Ellis's next assignment of error is that the Commission improperly excluded the testimony of Julius Berry, LFUCG's EEO Compliance Director. During the hearing, Ellis sought to question Berry as a witness, but LFUCG objected on grounds that Berry had nothing to do with the dismissal of Ellis. When the Commission then ordered Berry's testimony excluded, Ellis's counsel assented to the exclusion — "Like I said, I have no problem in eliminating Julius Berry. We'll let him go home."

Subsequently, because of certain information which came to light during the hearing, Ellis renewed his request to call Berry as a witness. After LFUCG agreed to Berry being called, the Chairperson of the Commission ruled that Ellis was entitled to call Berry and offered Ellis a continuance of a month for that purpose. Ellis's counsel declined the offer, responding "we really can't afford to do that at this time." The Chairperson then suggested that Ellis pursue his questioning of other witnesses. Ellis's counsel agreed that he would and then stated, "If we need to discuss it, we can discuss it after that." Thereafter, we do not see that Ellis's counsel ever raised the issue again, despite his contention that the Commission denied Ellis's request to discuss Berry's testimony at a later time. From our review of what transpired during the hearing, Ellis waived the claim of error when he rejected the offer of a continuance. See Riebesehl v. Commonwealth, Ky., 434 S.W.2d 41 (1968).

Ellis's final argument is that the Commission erred when it excluded the testimony of two witnesses who signed the grievances against Ellis, Dennis McHatton and Todd Hedges. Ellis claims that McHatton and Hedges would have testified that they did not actually write the grievances themselves and that they had signed other such grievances against Ellis in the past. Ellis maintains that this would have tended to show that they were part of a longstanding conspiracy against him. Ellis did not attempt to elicit their testimony by avowal. Thus, the nature of their testimony is pure speculation. See Kentucky

Stone Co. v. Gaddie, Ky., 396 S.W.2d 337 (1965). In any event, even if McHatton and Hedges would have testified as Ellis suggests, we do not believe that would have compelled a ruling in Ellis's favor.

For the reasons stated above, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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