

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000867-MR

LARRY BUSH

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE EDWIN A. SCHROERING, JR, JUDGE
ACTION NO. 98-CI-007002

CITY OF PROSPECT, KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BUCKINGHAM, GUIDUGLI AND HUDDLESTON, JUDGES.

GUIDUGLI, JUDGE. Larry Bush ("Bush") appeals from a summary judgment of the Jefferson Circuit Court in his action against the City of Prospect, in which he alleged that the City violated KRS 15.520 by depriving him of an employment termination hearing. We find no error in the entry of summary judgment, and accordingly affirm.

Bush was employed as a police officer with the City of Prospect. On or about November 20, 1998, he received a letter from Mayor Lawrence C. Falk ("Falk") alleging that he failed to properly carry out his duties on November 17, 1998. Falk suspended Bush without pay effective November 20, 1998. The

letter advised Bush of a hearing on the matter to be conducted three days later.

On November 23, 1998, the hearing was conducted before Falk. Bush was present, as was his counsel. Some time shortly after the hearing, Bush's employment was terminated.

Bush then filed the instant action in Jefferson Circuit Court. He alleged therein that the November 23, 1998 hearing did not comply with KRS 15.520 and that due process requires that he have both pre-termination and post-termination hearings. The City of Prospect responded with a motion to dismiss, which was treated by the court as a motion for summary judgment. Upon considering the motion, the circuit court concluded that the City had complied with KRS 15.520. It rendered a memorandum and order on March 31, 1999 granting the motion, and a summary judgment was entered. This appeal followed.

Bush now argues that the Jefferson Circuit Court erred in granting the City's motion to dismiss. Specifically, he maintains that KRS 15.520 requires a post-dismissal hearing when a police officer is charged with misconduct or rule violations. Since no such hearing was conducted, he seeks to have the judgment reversed and remanded with instructions that he be reinstated.

We have closely studied the record, the law, and the arguments of counsel, and find no error. KRS 15.520(1)(h) states:

When a hearing is to be conducted by any appointing authority, legislative body, or other body as designated by the Kentucky Revised Statutes, the following administrative due process rights shall be

recognized and these shall be the minimum rights afforded any police officer charged:

1. The accused police officer shall have been given at least seventy-two (72) hours notice of any hearing;

2. Copies of any sworn statements or affidavits to be considered by the hearing authority and any exculpatory statements or affidavits shall be furnished to the police officer no less than seventy-two (72) hours prior to the time of any hearing;

3. If any hearing is based upon a complaint of an individual, the individual shall be notified to appear at the time and place of the hearing by certified mail, return receipt requested;

4. If the return receipt has been returned unsigned, or the individual does not appear, except where due to circumstances beyond his control he cannot appear, at the time and place of the hearing, any charge made by that individual shall not be considered by the hearing authority and shall be dismissed with prejudice;

5. The accused police officer shall have the right and opportunity to obtain and have counsel present, and to be represented by the counsel;

6. The appointing authority, legislative body, or other body as designated by the Kentucky Revised Statutes shall subpoena and require the attendance of witnesses and the production by them of books, papers, records, and other documentary evidence at the request of the accused police officer or the charging party. If any person fails or refuses to appear under the subpoena, or to testify, or to attend, or produce the books, papers, records, or other documentary evidence lawfully required, the appointing authority, legislative body, or other body as designated by the Kentucky Revised Statutes may report to the Circuit Court or any judge thereof the failure or refusal, and apply for a rule. The Circuit Court, or any judge thereof, may on the application compel obedience by proceedings for contempt as in the case of disobedience of the requirements of a subpoena issued from the court;

7. The accused police officer shall be allowed to have presented, witnesses and any documentary evidence the police officer wishes to provide to the hearing authority, and may cross-examine all witnesses called by the charging party;

8. Any police officer suspended with or without pay who is not given a hearing as provided by this section within sixty (60) days of any charge being filed, the charge then shall be dismissed with prejudice and not be considered by any hearing authority and the officer shall be reinstated with full back pay and benefits; and

9. The failure to provide any of the rights or to follow the provisions of this section may be raised by the officer with the hearing authority. The hearing authority shall not exclude proffered evidence based on failure to follow the requirements of this section but shall consider whether, because of the failure, the proffered evidence lacks weight or credibility and whether the officer has been materially prejudiced.

Our review of the record indicates that the City complied with all relevant provisions of KRS 15.520(1)(h). As the circuit court properly noted, Bush was given at least 72 hours notice of the hearing (KRS 15.520(1)(h)(1)); there was no exculpatory evidence offered (KRS 15.520(1)(h)(2)); the complainant, Falk, was present at the hearing (KRS 15.520(1)(h)(3) & (4)); Bush was represented by counsel (KRS 15.520(1)(h)(5)); Bush sought no subpoenas for witnesses or evidence (KRS 15.520(1)(h)(6)); and, Bush was availed of the opportunity to present witnesses and evidence, and cross-examine all witnesses of the charging party (KRS 15.520(1)(h)(7)). It is clear that Bush received each of the procedural safeguards set forth in KRS 15.520(1)(h).

Bush argues that the November 23, 1998 hearing is properly characterized as a pre-termination hearing, and that he was not given the post-termination hearing to which he was entitled. Bush, however, does not cite any language in KRS 15.520 requiring a post-termination hearing, and our research has not uncovered any such language.

Bush goes on to direct our attention to Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), in support of his assertion that he was entitled to a post-termination hearing. We are not persuaded by Bush's reliance on Loudermill in that Loudermill interpreted an Ohio statute requiring a post-termination hearing. KRS 15.520 requires no such hearing.

In sum, Bush received each of the procedural safeguards set forth in KRS 15.520, and was not entitled to a post-termination hearing. The Jefferson Circuit Court did not err in so finding. Summary judgment shall be granted if the record shows that there is no genuine issue of material fact and that the movant is entitled to a judgment as a matter of law. CR 56.03. It should be granted only where it appears that it would be impossible for the non-movant to produce evidence at trial warranting a judgment in his or her favor. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991). Even when viewing the record in a light most favorable to Bush and resolving all doubts in his favor, we cannot find that the trial court erred in determining that the City of Prospect complied

with the procedural safeguards set forth in KRS 15.520.
Accordingly, we find no error.

For the foregoing reasons, we affirm the summary
judgment of the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Mark L. Miller
Louisville, KY

BRIEF FOR APPELLEE:

Christopher Tyson Gorman
Grover C. Potts, Jr.
Louisville, KY