

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001673-MR

MICHAEL SCOTT

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE WILLIAM J. WEHR, JUDGE
CIVIL ACTION NO. 97-CI-01407

CITY OF NEWPORT, KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: GUDGEL, Chief Judge; BUCKINGHAM and HUDDLESTON, Judges.
HUDDLESTON, Judge: Michael Scott appeals from a judgment affirming his dismissal from the City of Newport Police Department. Scott raises eight issues on appeal. He claims that (1) the alleged failure of the city to advise him within twenty-four hours of the reasons for his suspension violated Kentucky Revised Statute (KRS) 15.520; (2) that the charging document was so vague as to fail to adequately identify the nature of the offenses with which he was charged; (3) that the release by the City of the charging document violated KRS 15.520(1) and KRS 61.878(h) and therefore denied him due process; (4) that the circuit court used an improper standard

of review; (5) that his prior disciplinary actions were improperly considered by the Board of Commissioners; (6) that the Commissioners' findings of fact were without sufficient probative or factual support in the record and were inadequate to support dismissal; (7) that the City failed to exhaust the administrative remedies for which provision is made in its own administrative policies; and (8) that the circuit court erred in failing to make a declaration of his rights regarding pre-hearing publicity.

The circumstances surrounding Scott's dismissal are disputed. Brian Kren was arrested on the night of August 30, 1997, for driving under the influence by Newport Police Officer J.J. Bird. Riding with Bird the night of the arrest was Anita Fox, a civilian. Kren was transported to the Newport Police Station to be booked and to be given a breath alcohol test. Despite conflicting testimony regarding Kren's behavior on the night of the arrest, Bird reported that Kren was talkative, combative and cocky. According to Fox, Kren was agitated and yelling soon after being brought to the police station.

Apparently, Kren calmed down to a point where Bird felt it was safe to handcuff Kren in the front.¹ Bird administered a breath alcohol test, and the result exceeded the permissible level for legal intoxication. Kren disputed the result, complaining that the difference in the legal limit and the test result was a matter of "geometry." Scott had entered the room and overheard Kren's

¹ Kren complained that his wrist was hurting from the handcuffs due to recent surgery on his wrist.

statement. Scott then supposedly made a joke.² The testimony is disputed as to Kren's reaction to the joke. Scott claims Kren was offended by the joke and approached him in a belligerent manner. The City claims Kren only moved closer to Scott in order to better hear or make comment about the "joke." Regardless, Scott, who was facing a one-way mirror, pushed his right elbow against Kren's upper body to shove him away.³

The altercation did not end there. After booking Kren, Bird planned to transport him to a hospital pursuant to Kren's request for a blood alcohol test. Apparently, Scott followed Bird and Kren out of the station and the verbal exchange between Kren and Scott continued until Kren was finally put into Bird's police cruiser. Scott filed a terroristic threatening charge against Kren for comments made during the latter part of the altercation.⁴

Investigation of the incident by the Newport Police Department Internal Affairs Division resulted in a finding that Scott intentionally struck Kren, creating a hostile and explosive situation. Internal Affairs also found that Scott provoked Kren even further by following Bird and Kren out to the police cruiser and challenging and threatening Kren. Internal Affairs recommended that Scott be immediately suspended and administrative charges filed.

² Scott asked Kren what the tree said to the acorn. The "punch line" was "geometry" (gee, I'm a tree).

³ The force of the shove and where the Scott's elbow landed on Kren were also disputed.

⁴ The charge was subsequently dismissed.

Scott was notified of his suspension on September 24, 1997, via a letter written by the Chief of Police. The Chief stated that probable cause existed that Scott had "at least violated departmental policy regarding the mistreatment of prisoners." On September 26, 1997, the Disciplinary Charge and Affidavit (the charging document), which gave specific facts about the violations committed by Scott, was served upon Scott. The charging document was amended on September 30, 1997.

After the filing of the first charging document but before the City of Newport Board of Commissioners' hearing, the charging document and the notice of the date established for the public hearing were released to the press.

On November 3 and 4, 1997, an evidentiary hearing was conducted by the Commissioners. Among the Commissioners' findings were that: Scott had provoked Kren to elicit conduct which formed the basis of the terroristic threatening charge; Scott had struck Kren without justifiable provocation; Scott had used excessive force; Scott had interfered with Bird's arrest; Scott had engaged in conduct that deprived Kren of his civil rights; and Scott had engaged in conduct unbecoming a Newport police officer. Based upon the findings, the severity of the acts and Scott's prior disciplinary record, the Commissioners' terminated Scott's employment.

Scott appealed the Commissioners' decision to Campbell Circuit Court. In a judgment dated April 21, 1999, the court held that the record was replete with sufficient evidence upon which the Commissioners' could have based their decision, that the release of

the charging document did not prejudice the finders of fact, and that the punishment of Scott was not arbitrary or capricious. On June 10, 1999, the court denied a motion by Scott to alter, amend or vacate the judgment and for additional findings of fact.

KRS 15.520

On appeal, Scott raises two issues under KRS 15.520. The first is whether the alleged failure of the City to advise Scott within twenty-four hours of the reasons for his suspension violated KRS 15.520(1)(b). The second is whether the release of the charging document to the press was a violation of KRS 15.520(1)(f). KRS 15.520, "The Police Officers' Bill of Rights," was enacted "to deal fairly [with] and set administrative due process rights for police officers of the local unit of government and at the same time provid[e] a means of redress by citizens of the Commonwealth for wrongs allegedly done to them by police officers" ⁵ The provisions of KRS 15.520 apply to police officers employed by cities which receive funds from the Kentucky Law Enforcement Program Fund. ⁶

KRS 15.520(1)(b) states that "[p]rior to or within twenty-four (24) hours after suspending the officer pending investigation or disposition of a complaint, the officer shall be advised in writing of the reasons for the suspension." Scott claims that the reasons proffered in the Chief of Police's September 24, 1997, suspension letter were not specific enough.

⁵ Ky. Rev. Stat. (KRS) 15.520(1).

⁶ See KRS 15.520(4).

The letter stated that Scott had "at least violated department policy regarding the mistreatment of prisoners."

Although the statute does require reasons to be given for the suspension, it does not specify how detailed the reasons must be. Scott directs our attention to Hartman v. Board of Education of Jefferson County⁷ and Bregel v. City of Newport.⁸ In Hartman, this Court held that proper and adequate notice was not given by a Board of Education in the demotion of certain counselors.⁹ There, however, the issue was whether the board had complied with a different statute, KRS 161.765(2)(b)(1) and (2)¹⁰. No time limit was imposed on the board in which to notify the counselors of the reasons for their demotions, unlike here where notice had to be given within twenty-four hours.

Bregel, although more on point with the facts of the case under consideration, is also distinguishable. Kentucky's highest court held that the charges filed against Bregel¹¹ before the Board of City Commissioners did "not set out with clearness or

⁷ Ky. App., 562 S.W.2d 674 (1978).

⁸ 208 Ky. 581, 271 S.W. 665 (1925).

⁹ See Hartman, 562 S.W.2d at 677.

¹⁰ KRS 161.765(2)(b)(1) provides "that a written statement of grounds for demotion . . . shall be served upon the administrator. The statement shall contain: 1. A specific and complete statement of grounds upon which the proposed demotion is based, including, where appropriate, dates, times, names, places and circumstances." It was clear that the reasons the Board gave for the demotions, "the required reduction of expenditures in the 1977-78 budget . . .," did not comply. See Hartman, 562 S.W.2d at 676.

¹¹ Frank Bregel was a member of the Newport police department for twenty-five years.

distinctness any charge."¹² Bregel does not address the issue of the required specificity of reasons for suspension required within the twenty-four hour period because KRS 15.520 had not been enacted at the time of the dispute.¹³

Scott's challenge to the suspension letter because of lack of specificity is without merit. The deficiency in Bregel related more to the charging document than the suspension letter. Hartman is also more in line with notice provided in the charging document than the suspension letter. As the stated purpose of KRS 15.520 is to "set administrative due process rights for police officers of the local unit of government and at the same time provid[e] a means of redress by the citizens of the Commonwealth for wrongs allegedly done to them by police officers," and considering the level of specificity of the charges that were set out in the charging document that was served on Scott within forty-eight hours of his suspension, we believe that the suspension letter complied with KRS 15.520(b). Scott was put on notice of the suspension and was given reasons for the suspension, thereby affording him adequate due process.

Scott's next challenge under KRS 15.520 is his assertion that KRS 15.520(1)(f) was violated with the release of the charging

¹² Bregel, 271 S.W.2d at 665. Bregel was accused of "attempt[ing] to influence voters in the election of November 6, 1923, and in the primary of October 20, 1923" and with "inefficiency and neglect in the performance of his duty" Id.

¹³ KRS 15.520 was enacted in 1980.

document to the press.¹⁴ KRS 15.520(1)(f) states that "[w]hen a police officer has been charged with a violation of departmental rules or regulations, no public statements shall be made concerning the alleged violation by any person or persons of the local unit of government or the police officer so charged, until final disposition of the charges." The threshold question is whether release of the charging document contravened the statute's intent to guarantee police officers due process of law.

Because we have no precedential guidance on this issue, it becomes one of statutory construction. We reference two long-established rules of statutory construction: first, words and phrases shall be construed according to the common and approved usage of language, and two, statutes are to be construed to carry out the intent of the statute.¹⁵

The intent of KRS 15.520(f) is to protect any police officer charged with violation of departmental rules and to guarantee that the officer is afforded due process of law.¹⁶ An officer's due process rights could potentially be jeopardized if something was said concerning the charges that might lead the Commissioners to reach a premature judgment. The release of the charging document did not contravene this statutory purpose. The Commissioners, who conducted the hearing, would have known about

¹⁴ Scott also attempts to form an argument under KRS 61.870 et seq., the Kentucky Open Records Act. This argument is misplaced because the issue is the effect of the release of the charging document, not whether the charging document could have been obtained. Consequently, this argument will not be addressed.

¹⁵ See KRS 446.080(1) and (4).

¹⁶ See KRS 15.520(1).

the charges against Scott before the actual hearing took place, regardless of the release of the charging document. It was the potential for premature opinion forming by the Commissioners that could have most adversely affected Scott's due process rights. The release of the charging document could not have influenced the Commissioners any more than they could have been influenced upon seeing their agenda for the hearing. The Commissioners were necessarily aware that a full blown evidentiary hearing would have to be conducted to determine the validity of the charges. Considering that the charging document was only a formal charge against Scott, we do not believe any violation of his due process resulted from its release.

Adequacy of the Charging Document

Although Scott argues that the release of the charging document violated his due process rights, he also insists that the charging document was so vague as to fail to adequately identify the nature of the charges and the allegations against him. The charges against an officer must "be made with sufficient distinctness to enable the person charged to know the acts which are charged against him."¹⁷ "The charges must be definite and certain and of such character as to establish inefficiency, misconduct, insubordination, or violation of law on the part of the accused officer."¹⁸ There can be no doubt that the original charging document and the amended charging document exhibited the

¹⁷ Bregel, 271 S.W. at 665.

¹⁸ Armstrong v. Board of Civil Service Comm'rs, 48 S.W.2d 1055, 1055 (1932).

requisite specificity. In particular, the amended charging document identified each departmental policy that Scott had violated,¹⁹ and contained a detailed narrative of the specific allegations that led to the charge. The charging document clearly complied with the requisite level of specificity thus enabling Scott to know the acts charged against him and prepare for the Commissioner's hearing.

Standard of Review

Scott alleges that the circuit court used an improper standard of review. Scott cites several cases for the proposition that the court must review an employee termination on a de novo basis where the court reviews the transcript and hears additional witnesses. "It is clear . . . that 'de novo' is not, in this instance, a retrial of all the issues."²⁰ The standard of review to be applied in a public employee discharge was described by the Supreme Court of Kentucky in Brady v. Pettit.²¹

In summary, it appears that in public employee discharge cases where there is a trial de novo statute, the discharged employee is entitled to something less than a

¹⁹ The amended charging document charged Scott with violating Policy #01.02.95, Section R (Arrest and Treatment of a Prisoner); Policy #01.02.95, Section C (Conduct); Policy #06.03.95, Section F (Excessive Force); Policy #01.02.95, Section V (Ethics); and Policy #01.02.95, Section C (Unbecoming Conduct).

²⁰ Crouch v. Police Merit Bd., Ky., 773 S.W.2d 461, 463 (1988).

²¹ Ky., 586 S.W.2d 29 (1979).

classic trial de novo in circuit court. In this proceeding in circuit court the burden of proof shifts to the discharged employee. After review of the transcript of evidence or hearing the witnesses, the trial court is limited in its decision. The trial court may not substitute its judgment for that of the administrative body, that is, there may not be a substitute punishment. The trial court may find the discharged employee has failed to meet the burden of proof and affirm the action of the administrative board; or if it is found that the employee has sustained the burden of proof, the trial court may set aside the punishment. . . . We are of the opinion that trial de novo be further refined to the extent that the discharged employee has the obligation of producing the transcript of evidence of the proceeding before the administrative board. We are of the further opinion that review of the transcript of evidence in circuit court is a corollary to the burden of proof which has shifted to the discharged employee. In circuit court the transcript of evidence is reviewed but the proceeding is not limited to this review; the discharged employee is accorded the right to call such additional witnesses as he may desire. The trial court's review is limited to a determination of whether the administrative body acted arbitrarily.²²

²² Id. at 32-33 (original emphasis).

The circuit court obviously felt that the Commissioners' decision to terminate Scott was amply supported by the record. Scott does not allege, nor does the record indicate, that Scott attempted to call witnesses or introduce additional evidence in the circuit court to show that the Commissioners' acted arbitrarily. The circuit court used the proper standard in evaluating Scott's claim.

Use of Scott's Prior Disciplinary Record

Scott argues that his prior disciplinary record was used solely to prejudice him. Although several allegations are made by Scott, he provides no support for his argument that use of the record actually prejudiced him. It is clear that Scott's prior disciplinary record was only used in determining his punishment and not in determining his guilt. Scott's due process rights were not violated by the use of his disciplinary record.

Sufficiency of the Findings of Fact

_____Next, Scott contends that the Commissioners' findings of fact lack evidentiary support. The Commissioners conducted an evidentiary hearing where evidence was admitted and testimony was taken. While the evidence was conflicting on some points, there was evidence of substance to support each critical finding made by the Commissioners. That is all that is required.

Denial of Scott's Request for a Declaration of Rights

Scott appeals the circuit court's denial of his request for declaratory relief under KRS 418.045. In pertinent part, KRS 418.045 states that "[a]ny person . . . whose rights are affected by statute, municipal ordinance, or other government regulation . . . may apply for and secure a declaration of his right or duties .

. . .” Specifically, Scott sought a declaration of rights regarding the release of the charging document to the press. Scott contends that his right to a fair hearing was violated through the release of the charging document to the press. As this issue has previously been addressed, we need not discuss it further.

Exhaustion of Administrative Remedies

Scott’s final argument is that the City’s procedural policy number 01.12.98H3 was not followed and therefore the matter was not ripe for the Commissioners to review the issue. Although Scott alleges that the policy requires the Chief of Police to confer with an employee prior to pressing charges, a copy of the procedure is not in the record. As a result, we cannot review the policy to determine if it applies and whether it was or was not followed.

Conclusion

The judgment is affirmed.

ALL CONCUR.

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