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Commonwealth Of Kentucky

Court Of Appeals

NOS. 2000-CA-000882-MR & 2000-CA-001850-MR

DONALD HUMBLE — APPELLANT

v.

APPEAL FROM WAYNE CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 99-CI-00063

BOARD OF EDUCATION OF THE WAYNE COUNTY SCHOOLS; JOHN DALTON, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF THE WAYNE COUNTY SCHOOLS; AND THE COMMONWEALTH OF KENTUCKY, EDUCATION, ARTS, AND HUMANITIES CABINET — APPELLEES

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

BEFORE: HUDDLESTON, KNOPF, AND TACKETT, JUDGES.

KNOPF, JUDGE: Before us are two appeals by Donald Humble, *pro se*, from orders of the Wayne Circuit Court. In appeal no. 2000-CA-000882, Humble objects on both procedural and substantive grounds to the circuit court's March 15, 2000, order upholding a decision by the Department of Education to terminate Humble's employment contract with the Wayne County Board of Education. In appeal no. 2000-CA-001850, Humble challenges a July 12, 2000,

order denying his post-judgment motion to introduce newly discovered evidence. In both appeals, we affirm.

Humble began his career as an educator in Wayne County in 1973. For several years he worked as a middle and high-school science teacher. In about 1984 he became an assistant principal, in about 1990 an itinerant principal for three outlying schools, and in about 1995 principal of the Turner Intermediate School. In June 1998, John Dalton, the local superintendent, informed Humble that he was recommending to the state Board of Education that Humble's employment contract be terminated. Dalton alleged that Humble had engaged in an extra-marital affair with one of the intermediate school's teachers and that, when the teacher had wanted to end the affair, Humble had used his position to pressure her to continue it. According to Dalton, this and related conduct was unbecoming to Humble's position and evidenced immoral character, two of the grounds listed in KRS 161.790(1) that justify removal of a tenured educator from his or her position. Pursuant to section (3) of the same statute, Humble requested the Department of Education to appoint a three-member tribunal and a hearing officer to hear the charges.

The administrative hearing commenced in November 1999. It concluded, after six days of testimony and two continuances, in February 2000. Humble did not dispute that he and the teacher had engaged in an affair, but he denied that he had abused his position either during the affair's course or in its aftermath. On the contrary, he maintained that he had ended the relationship and that the teacher had complained against him for the sake of

revenge. The superintendent, Humble further asserted, was a political rival who had exploited the situation for purely political reasons. The tribunal, finding that Humble had engaged in wrongful conduct that had borne detrimentally on his job, upheld the superintendent's decision to dismiss him.

Pursuant to KRS 161.790(8) and KRS 13B.140 - 150, Humble appealed from the tribunal's decision to the Wayne Circuit Court. In addition to reiterating his defense and challenging the sufficiency of the superintendent's evidence, Humble raised objections to several aspects of the administrative proceedings. He complained, for example, that one of the tribunal's members had not been qualified to participate and that a transcription of the superintendent's case-in-chief, but not a transcription of his case-in-chief, had been provided to the tribunal. The circuit court rejected Humble's allegations of procedural error--primarily because the alleged errors had not been brought to the hearing officer's attention--and held that there was sufficient evidence of Humble's detrimental wrongdoing to support the tribunal's findings. Humble challenges these rulings in appeal no. 2000-CA-000882. In that appeal he also objects to the circuit court's refusal to conduct a trial *de novo*. We shall address first Humble's claims of procedural error and then his claim regarding the sufficiency of the evidence.

2000-CA-000882

The tribunal proceedings were rendered unfair, Humble contends, by the participation of an unqualified panel member; by the hearing officer's having ordered a transcription of the

superintendent's case-in-chief, but not one of Humble's case-in-chief; by the violation of the witness separation rule by two of the superintendent's witnesses; and by the presence of several uniformed police officers outside the room in which the tribunal deliberated. Only the alleged violation of the witness separation rule was raised before the hearing officer. Humble complained of the other alleged errors for the first time upon appeal to the circuit court. As that court correctly noted, the general rule "requires a party to raise issues before th[e] particular [administrative] entity . . . before those issues are available for appellate review."[1] The likeliest possible exception to this rule would be for palpable errors resulting in manifest injustice.[2] But none of Humble's allegations meet that standard.

For example, the tribunal was to be composed of one administrator, one teacher, and one layperson.[3] The layperson in this case was a woman who had served for many years as a school superintendent's secretary. Humble contends that her close association with an administrator disqualified her from sitting on the tribunal. Even if that contention be deemed plausible, however, it is far from obvious, far from palpable. If Humble wished to challenge the tribunal on this ground, therefore, he was obliged, under the general rule stated above, to raise the

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[1]Swatzell v. Commonwealth of Kentucky, Natural Resources and Environmental Protection Cabinet, Ky., 962 S.W.2d 866, 868 (1998).

[2]*Cf.* CR 61.02.

[3]KRS 161.790(4).

issue during the administrative proceeding. The circuit court did not err by so ruling.

For the same reason the circuit court did not err by overruling Humble's belated objections to the allegedly unfair transcription and to the presence of police officers in the building during the tribunal's deliberation. It is unlikely that these occurrences could be characterized as error, much less palpable error. And it is certain that they did not give rise to manifest injustice. Humble's failure to raise these issues before the hearing officer, therefore, precluded the circuit court's (and this court's) review.

Nor did the circuit court err by upholding the hearing officer's ruling on Humble's allegation of witness impropriety. Perhaps the most damaging witnesses against Humble were the teacher with whom he had had the affair and another teacher at the intermediate school who had served as the pair's confidante. The two teachers claimed that Humble had retaliated against them when the affair ended. After one of them testified, the two witnesses were together for a significant length of time before the other was called. Humble objected on the ground that they had had an opportunity to discuss their testimonies. When the hearing officer questioned them, however, both witnesses denied having discussed the case. The hearing officer accepted these statements, although he assured Humble that he would continue to entertain any substantial evidence to the contrary. Humble did not raise the matter again until he appealed.

In his brief to the circuit court, Humble observed that, during the testimony of the second of these two witnesses, she had referred to one of the exhibits by number. Humble contended that she could not have known the number unless she had been told it improperly. The superintendent responded by pointing out that at the commencement of the hearing all the witnesses had been instructed to refer to that particular exhibit by number, so that nothing improper was implied by this witness's having done so.

The circuit court correctly focused on the issue only to the extent that it had been raised before and addressed by the hearing officer. As the court noted, the officer's finding of no impropriety was supported by substantial evidence. Humble's challenge of that finding on appeal was both too late and too little.

In his last objection to a procedural matter, at least in his direct appeal, Humble contends that the circuit court unfairly denied him a *de novo* trial. Citing Osborne v. Bullitt County Board of Education,[4] he claims that the circuit court was authorized to supplement the record and that it should have done so in an attempt to get to the bottom of the two sides' sharply conflicting versions of events. The short answer to this contention is that Osborne and the other cases upon which Humble relies refer to a version of KRS 161.790 that has been superseded. At the time Humble appealed, KRS 13B.150 had become

[4]Ky., 415 S.W.2d 607 (1967).

the operative rule. That statute and KRS 161.790(8) prescribed the following form of judicial review:

> (1) Review of a final order shall be conducted by the court without a jury and shall be confined to the record, unless there is fraud or misconduct involving a party engaged in administration of this chapter. The court, upon request, may hear oral argument and receive written briefs.

This is the form of review that Humble received. The trial court did not err by refusing Humble's request for a *de novo* trial.

Finally, Humble contends that the tribunal's decision to dismiss him was not supported by substantial evidence and that the trial court erred by failing to so rule. As our Supreme Court explained in Board of Education of Hopkins County, Kentucky, v. Wood,[5]

> KRS 161.790 provides that the teaching contract shall remain in force during good behavior and efficient and competent service by the teacher.
> . . .
> The purpose of teacher tenure laws is to promote good order in the school system by preventing the arbitrary removal of capable and experienced teachers by political or personal whim. It is not to protect those who violate the criminal law. A teacher is held to a standard of personal conduct which does not permit the commission of immoral or criminal acts because of the harmful impression made on the students. The school teacher has traditionally been regarded as a moral example for the students. See Gover v. Stovall, 237 Ky. 172, 35 S.W.2d 24 (1931).
> . . .
> Great care must be taken to ensure that proof of conduct of an immoral nature or conduct unbecoming a teacher which is sufficient to merit discharge of a tenured teacher should be of the same quality as required by other subsections of the statute, that is, written

[5]Ky., 717 S.W.2d 837 (1986).

> documentation from impartial sources to substantiate the charges, as in the present case, or its substantial equivalent. In addition, the conduct, when it occurs in a context other than professional competency in the classroom should have some nexus to the teacher's occupation.
> . . .
> One standard for judging a teacher's conduct can be found in Morrison v. State Board of Education, 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969) which provides in part that the Board may consider such matters as the likelihood that the conduct may have adversely affected students or fellow teachers, and the proximity or remoteness in time of the conduct.
>
> It was not the intention of the legislature to subject every teacher to discipline or dismissal for private shortcomings that might come to the attention of the Board of Education but have no relation to the teacher's involvement or example to the school community. The power of the Board to discipline teachers is not based on personal moral judgments by Board members. It exists only because of the legitimate interests of the government in protecting the school community and the students from harm. Weissman v. Board of Education of Jefferson City School District, 190 Colo. 414, 547 P.2d 1267 (1976).[6]

Humble contends that his affair was, at worst, a private shortcoming that did not bear significantly on his or anyone else's job performance. It has been used as a pretext for dismissing him, he claims, by his political enemies. In his attempt to substantiate this interpretation of events, Humble presented evidence tending to show that other school district personnel had been involved in non- or extramarital relationships and yet had not been disciplined, much less dismissed. And he

[6]Board of Education of Hopkins County, Kentucky, v. Wood, *supra,* 717 S.W.2d at 839-40.

introduced evidence tending to show that his employment-discrimination suit against the Wayne County School Board in 1989 had put him on the wrong side of then superintendent Clarence Boyd. Humble's theory is that superintendent Dalton is carrying on the vendetta of his friend Boyd. Humble also presented evidence purporting to show that he rather than the teacher had ended the affair. This evidence refutes, he contends, the teacher's and the superintendent's allegations that he used his position to harass or to retaliate against the teacher.

The tribunal rejected Humble's version of events. In particular, the tribunal concluded that the affair had led Humble to abuse his position. It found that Humble had shown favoritism toward his friend during the affair, and that while it was ending he had harassed her, evaluated her critically, attempted to have her transferred, attempted to prevent her contract from being renewed, and, when she had filed a complaint against him, had threatened to make the proceedings as embarrassing as he could.

In reviewing the tribunal's decision, the circuit court's standard was to ask whether that decision was arbitrary.[7] One factor bearing upon that determination is the evidence upon which the tribunal relied. The well established rule is that the tribunal's decision must be supported by substantial evidence; that is, evidence fit "to induce conviction in the minds of reasonable persons."[8] It is also well established that the fact

[7]Reis v. Campbell County Board of Education, Ky., 938 S.W.2d 885 (1996).

[8]The Gallatin County Board of Education v. Mann, Ky. App., 971 S.W.2d 295, 300 (1998) (citing O'Nan v. Ecklar Moore Express, Inc., Ky., 339 S.W.2d 466 (1960)).

finder, here the administrative tribunal, "is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses,"[9] and that a reviewing court (here the circuit court as well as this court) may not "substitute its judgment for that of the agency as to the weight of the evidence on questions of fact."[10]

The reform of Kentucky's public education system, begun more than a decade ago, has as one of its principal aims the delivery of the system from political abuse. We are particularly sensitive, therefore, to Humble's allegations that his dismissal was politically motivated. Nevertheless, we agree with the circuit court that the tribunal's decision was supported by substantial evidence. Numerous witnesses with no apparent political interest described instances when Humble had misused his position to pursue purely personal goals. Numerous witnesses confirmed the allegation that he had misused his position to harass and punish his former friend. Humble denied the allegations of wrongdoing, or attempted to explain them away, but the tribunal was well within its discretion by giving the allegations the weight and credence it apparently did.

Against this conclusion Humble refers us to Harlan County Board of Education v. Stagnolia.[11] In that case the court upheld a circuit court decision reinstating an assistant

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[9]*Id.* (citing Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298 (1972)).

[10]Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth of Kentucky, Transportation Cabinet, Ky., 983 S.W.2d 488, 490 (1998) (citation and internal quotation marks omitted).

[11]Ky. App., 555 S.W.2d 828 (1977).

principle who had been dismissed, the circuit court concluded, for political reasons. The court held that circumstantial evidence of a politically motivated dismissal could be, and in that case was, sufficient to support an order of reinstatement. Humble reads this case as standing for the proposition that any circumstantial evidence of political motivation necessitates a finding that the dismissal was improper. Stagnolia does not hold that such a result is necessitated, however, but merely allowed--if indeed the circumstantial evidence is strong enough. The evidence of politics in this case, although certainly disheartening, was not that strong and was not such as to compel a finding in Humble's favor.

Humble also seeks relief on the ground that the school board had not promulgated a rule or regulation prohibiting sexual harassment. Citing Osborne v. Bullitt County Board of Education,[12] a case in which the court reversed a disciplinary order because of insufficient evidence, Humble contends that no action by an educator can be considered misconduct unless it violates a rule lawfully enacted by the board. Again, however, Humble has read the case too broadly. The Osborne court stated that one could not be found insubordinate under the then current version KRS 161.790, the charge involved in that case, unless one had violated a rule or regulation established by the board. It did not say that board rules and regulations similarly mark the boundary of immoral character or conduct unbecoming a teacher. As Board of Education of Hopkins County, Kentucky, v. Wood,

[12]Ky., 415 S.W.2d 607 (1967).

supra, makes clear, they do not. Even if the board had not established a rule against sexual harassment (the superintendent claims that it had), surely Humble realized that he was not to use his public authority to further his private relations. If he did not, he should have.

2000-CA-001850

About three months after the circuit court affirmed the tribunal's decision, in June 2000, Humble moved for relief pursuant to CR 60.02. Subpart (b) of that rule authorizes trial courts to grant relief from a final judgment on the ground of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02." Humble claimed to have recently discovered that the administrative hearing officer, Scott Majors, had formerly worked in a law firm with one of the attorneys who had represented the Board of Education. This was sufficient evidence of a biased proceeding, Humble argued, to require at least that the circuit court hear additional evidence on the question. By order entered July 12, 2000, the circuit court summarily denied Humble's motion. In appeal no. 2000-CA-001850, Humble contends that the denial was an abuse of the trial court's discretion. We disagree.

CR 60.02 creates an extraordinary remedy, one that is to be cautiously applied. Relief is only appropriate where, without it, there is a substantial likelihood of pronounced

injustice.[13] This court reviews CR 60.02 rulings deferentially according to an abuse of discretion standard.[14] We are not persuaded that Humble has met the high burden of proof for CR 60.02 relief. Even were the circumstances to show that the hearing officer should not have, for the sake of appearances, overseen a case involving his former partner,[15] there is simply no indication in the record that the hearing officer or the proceedings were in fact biased against Humble. On the contrary, the hearing officer made every effort to see to it that Humble had a full and fair opportunity to explain and to present evidence supporting his side of the matter.

It is true, as Humble notes, that the first three days of the proceedings, when the Board presented its case, were transcribed and made available to the tribunal. The transcription was necessitated, however, by the fact that there was nearly a two month continuance between those three days in November 1999 and the resumption of the hearing in January 2000. The transcription was a reasonable means of reminding the tribunal what had been said and what had happened at the outset of the proceedings. It did not prejudice Humble. In fact, it gave counsel who entered the case on Humble's behalf in early

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[13]Board of Trustees of Policemen's & Firemen's Retirement Fund of the City of Lexington v. Nuckolls, Ky., 507 S.W.2d 183 (1974).

[14]Bethlehem Minerals Company v. Church and Mullins Corporation, Ky., 887 S.W.2d 327 (1994).

[15]*Cf.* SCR 4.300(E)(1)(a).

January a better than could be expected means of preparing for the representation.

It is also true that the hearing officer excluded some of the evidence Humble wished to present concerning unpunished extramarital affairs by other school board employees. The evidence was properly excluded, however, as cumulative and unduly sensational.[16] The exclusion did not prejudice Humble's defense; he was given a more than adequate opportunity to make his point. The adverse rulings do not suggest that the hearing officer was biased, and they certainly do not entitle Humble to CR 60.02 relief.

In sum, although we regret this conclusion to Humble's long career as a Wayne County educator, we agree with the circuit court that the administrative proceeding leading to his dismissal was fundamentally fair and that the dismissal itself was based on substantial evidence. Accordingly in appeals no. 2000-CA-000882 and no. 2000-CA-001850, we affirm the orders of the Wayne Circuit Court, entered respectively on March 15, 2000, and June 19, 2000.

ALL CONCUR.

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[16] *Cf.* KRE 403.