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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000138-MR

GLENN E. BONE — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 96-CI-001981

CITY OF LOUISVILLE; CITY OF LOUISVILLE CIVIL SERVICE BOARD; CITY OF LOUISVILLE DIVISION OF POLICE — APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: KNOPF, TACKETT, AND VANMETER, JUDGES.

VANMETER, JUDGE: This is an appeal from a summary judgment entered by the Jefferson Circuit Court dismissing appellant's claim pertaining to appellees' failure to hire him. For the reasons stated hereafter, we affirm.

The circuit court aptly described the pertinent facts as follows:

> Plaintiff applied for a position as a City of Louisville police officer recruit in 1995 and

1997. On his 1995 competitive examination he received the third-highest score of all the applicants. On his 1997 competitive examination his score was significantly lower. The Defendant has the duty of promulgating rules and regulations for the appointment of all employees of the city pursuant to KRS 90.160(1), including police officers. The Defendant has adopted a "banding" concept to help rank police recruit applicants. Stated simply, the banding procedure is similar to the "A," "B," "C," etc. grades students are given in schools. Those applicants with top scores are placed in Band A, those with the next highest scores are in Band B, and so on. Plaintiff's score on the 1995 exam qualified him for Band A; his 1997 score qualified him for Band B.

The Board also uses the "Rule of Three" in supplying a certified list of applicants to the Louisville Police Division, whereby for each open position, three applicants are provided for hiring consideration. Thus, were the number of open positions 30, the Board would present 90 candidates for consideration. In that each band's applicant's scores are considered unbreakably tied, the Board is obligated to submit all the applicants in that band should the need present itself. Just such a situation occurred in 1995 when 30 open positions were offered for appointment. The Board was obligated to certify 90 applicants. Band A had 58 persons, including the Plaintiff. The Board then looked to Band B to provide the last 32 applicants. However, because Band B's applicants were considered to have tied scores, all of them –- 219 total – were certified as applicants. Thus, the Board certified a list of 277 candidates for 30 open positions.

Plaintiff was not hired in 1995, nor in 1997. Apparently, his resignation from the Division of Police some years before, and the behavior leading to that resignation, were factors in the Division of Police's decision not to rehire Plaintiff. Plaintiff then brought suit against the Defendants. Plaintiff contends his

> score, as one of the top three in 1995, should have taken precedence over all those lower than his pursuant to KRS 90.160(1)(c) and that the practice of banding is in direct contravention to that statute.

Appellant's two consolidated claims against appellees were removed to the United States District Court for the Western District of Kentucky, which granted summary judgment to appellees. On appeal, after determining that the matter had been improperly removed to the federal court, the Sixth Circuit Court of Appeals remanded it to the Jefferson Circuit Court, which in turn granted appellees' motion for summary judgment. This appeal followed.

First, appellant contends that the trial court erred by failing to find that appellees' banding practices violated KRS 90.160 and related statutes. We disagree.

KRS 90.160(1) provides in pertinent part:

> The board shall . . . make, promulgate, and if and when necessary, amend, rules and regulations for the appointment . . . of all employees of the city in the classified service . . . . Such rules shall, among other things, provide:
>
> . . . .
>
> (c) For the creation of eligible lists upon which shall be entered the names of successful candidates in the order of their standing through examination; and for the filling of places in the classified service by the appointing authorities who shall select from not more than three (3) candidates graded highest on the appropriate eligible list.

A city is authorized to "make and promulgate such other reasonable rules and regulations as are necessary or desirable to the enforcement of and not inconsistent with KRS 90.110 to 90.230." KRS 90.160(2). Pursuant to that authority, the Louisville Civil Service Board promulgated rules including Rule 7.7(c), which provides that civil service examinations shall be ranked as follows:

> On every competitive promotional and original appointment list, the eligibles shall be ranked in the order of their ratings earned in the examination given for the purpose of establishing the list. The Chief Examiner may determine that ratings earned in the examination process shall be divided into bands. Bands shall be established based on the psychometric properties of the test score distribution. All scores falling within a given band shall be considered unbreakably tied notwithstanding any other provisions of these rules to the contrary.

"Band" in turn is defined by the civil service rules as meaning

> a series of test scores, defined by a high score and a low score, which, based upon the psychometric properties of the total distribution of scores, may be interpreted as indicative of a given level of knowledge, skill or ability for a job class. (Assigning someone to a band is similar to assigning someone a letter grade [A, B, C, D, or F] in school. Everyone within a certain range of scores gets the same grade.)

We are not persuaded by appellant's contention that Rule 7.7(c) and related rules violate KRS 90.110 to 90.230. Although KRS 90.160(1)(c) requires civil service boards to determine candidates' grades and standing, and it states that

employment eligibility lists shall provide "not more than" the three candidates with the highest test scores, it does not specifically address how raw scores should be used or how lists should be compiled when appointing authorities seek to simultaneously hire multiple candidates. Therefore, pursuant to KRS 90.160(2), appellees were authorized to adopt additional rules and regulations as needed for the enforcement of KRS 90.110 to 90.230.

Kentucky courts generally must give great deference to agencies' interpretations of their enabling statutes. Delta Air Lines, Inc. v. Commonwealth, Revenue Cabinet, 689 S.W.2d 14, 20 (1985). Moreover, "a regulation is valid unless it exceeds statutory authority or, in some way, is repugnant to the statutory scheme." Revenue Cabinet v. Joy Technologies, Inc., Ky. App., 838 S.W.2d 406, 409 (1992).

Here, evidence was adduced to show that slight differences among raw test scores are statistically unimportant for employment purposes, and that candidates for available positions may reasonably be ranked by treating all candidates in a particular score range or "band" as having the same score for ranking purposes. However, a certain band may contain an insufficient number of qualified candidates to satisfy the "rule of three," especially where multiple openings justify the creation of a sizeable list in order to provide the appointing

authority with three candidates per position. Because all persons ranked within a single band are considered to be tied in rank, it may be necessary to submit the names of all candidates in one or more additional bands if the number of candidates in the highest band does not amount to three times the number of available positions. Even though the submitted names may then exceed the number strictly envisioned by the rule of three, we cannot say that appellees' decision to utilize banding resulted in an unreasonable interpretation of KRS 90.160 and related statutes. This is especially true since even a strict interpretation requires the rule of three to be broken whenever there are tied third-place candidates, as tied third-place test results necessarily would require the submission of either more or less than three candidates' names.

Further, we are not persuaded by appellant's contention that the use of banding resulted in reverse discrimination in violation of his civil rights. Indeed, the use of banding in selecting police officers for promotion was recently addressed by the Kentucky Supreme Court in Jefferson County v. Zaring, Ky., 91 S.W.3d 583, 589 (2002), which noted that "[t]he United States Supreme Court has held on numerous occasions that reverse employment discrimination against members of a majority group is permissible where necessary to address the results of previous or current discrimination in their

favor." Although appellant relies on Meyers v. Chapman Printing Co., Inc., Ky., 840 S.W.2d 814 (1992), that case is distinguishable from the one before us as it addressed a claim of discrimination against a protected class, rather than a claim of reverse discrimination. In Zaring, 91 S.W.3d at 591, the court held that a plaintiff who claims reverse discrimination relating to a remedial affirmative action plan must establish a prima facie case of discrimination by proving that but for the plaintiff's race, he or she would have been promoted. Id. at 591. Noting that the plaintiffs had not claimed that banding was illegal or unconstitutional, the court opined that their failure to make such a claim was "presumably because 'banding' has been consistently upheld in the face of every challenge to date," and that its use "neither required [the plaintiffs'] discharge and replacement by minority employees nor created an absolute bar to their advancement. It simply afforded equally qualified female and minority employees the same opportunity for advancement as Caucasian male employees." Id. at 593. Absent any evidence to show that the regulation was "an invalid affirmative action plan," the plaintiffs were not entitled to relief. Id. at 593.

In the matter now before us, there is nothing to indicate that appellant could adduce evidence at a trial to establish a prima facie case of reverse discrimination by

proving that he would have been hired but for his race. Zaring, 91 S.W.3d at 591. As test scores constituted only one of the factors considered in the hiring process, there is no basis for concluding that appellant's 1995 rank, as the candidate with the third highest test score, would have guaranteed his hiring if some method other than banding had been used to certify multiple candidates to the appointing authority. This is especially true given the circumstances surrounding appellant's resignation from a previous police department position.

Next, appellant contends that the court erred by failing to find that appellees acted arbitrarily by allegedly finding him ineligible for employment for failing to "meet the standards of the job." Since the record shows that appellant was certified and placed on the list of eligible candidates, he clearly was considered fit for employment insofar as the testing qualification process was concerned. Any subsequent determination that he "did not meet the standards of the job" obviously was based on other factors, such as the conduct which previously led to his resignation as a police recruit. Because it cannot reasonably be argued that matters regarding prior employment and misconduct were not pertinent to the issue of reemployment, there is simply no merit to appellant's assertion that appellees acted arbitrarily by considering such matters when he reapplied for employment.

Next, appellant contends that the trial court erred by failing to find that appellees violated his civil rights and denied him due process by failing to permit him an opportunity to challenge his disqualification from further consideration for employment. However, as nothing in the record suggests that appellant was disqualified from employment, rather than simply rejected on the ground that other candidates were better qualified, he is not entitled to relief on this ground.

Having carefully reviewed the record, we conclude that there are no genuine issues of material fact remaining open for resolution. See Steelvest, Inc. v. Scansteel Service Center, Ky., 807 S.W.2d 476 (1991). Hence, the trial court did not err by entering summary judgment for appellees.

The court's summary judgment is affirmed.

TACKETT, JUDGE, CONCURS.

KNOPF, JUDGE, CONCURS IN RESULT.

KNOPF, JUDGE, CONCURRING IN RESULT: While I agree with the result reached by the majority, I write separately because I do not believe that the banding process adopted by the city complies with the "rule of three" standard set forth in KRS 90.160(1)(c). In Jefferson County v. Zaring, Ky., 91 S.W.3d 583 (2002), Jefferson County specifically amended its ordinance to eliminate the "rule of three" and replaced it with a banding

procedure. The only question in Zaring was whether the county's use of the banding procedure constituted reverse discrimination. In this case, the City of Louisville attempted to administratively institute a banding procedure despite the express requirement of KRS 90.160(1)(c) that "not more than three (3) candidates" be considered for each available position.[1] Although I agree with the goals of the banding procedure, I cannot agree that the statute authorized the City to submit 277 applications for 30 positions.

Nevertheless, I agree with the majority that Bone failed to establish that he would have been hired but for the City's use of the banding procedure. Bone scored well in the "B" range on the 1997 examination, and he would not have been

[1] In the enabling legislation authorizing the City of Louisville and Jefferson County to form the merged metro government, the General Assembly set forth a policy to ensure fair representation and employment for minority citizens. In particular, KRS 67C.117(2) provides that "[t]he percentage of minority citizens who shall be employed by the consolidated local government . . . shall be no less than the percentage of minority citizens in the community, or the percentage of minority representatives on the consolidated local government's legislative body, whichever is greater." KRS 67C.117(3) and 67C.119 authorize the metro government to adopt ordinances to achieve this mandate. Furthermore, KRS 67C.303 allows the merged metro government to establish a consolidated local government police force merit board, and, like the former county merit board, to promulgate rules relating to the appointment of officers. Consequently, it appears that the merged government is no longer strictly bound by the "rule of three" set out in KRS 90.160(1)(c), but may, by ordinance, adopt the banding procedure.

considered but for the fact that the City considered all of the "B" applicants. Bone did receive the third-highest score of all those taking the 1995 examination, and the City properly considered him with all of the "A" applicants. However, the City was not required to hire applicants based solely on test-score rank order. Bone's problemsome prior history with the police department makes it unlikely that the City would have hired him under any circumstances. Consequently, I agree with the majority that the trial court properly dismissed his claim.

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