

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001700-MR

CURTIS GORDON, JR.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 04-CI-008609

CITY OF SHIVELY, KENTUCKY; AND
SHIVELY CIVIL SERVICE COMMISSION

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: JOHNSON AND TAYLOR, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

JOHNSON, JUDGE: Curtis Gordon, Jr. has appealed from an opinion and order of the Jefferson Circuit Court entered on July 15, 2005, denying his appeal from a September 14, 2004, findings and order entered by the appellee, Shively Civil Service Commission (the Commission), suspending Gordon from his duties as a Shively police officer for a period of five months. Having concluded

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

that the circuit court did not err in denying Gordon's appeal, we affirm.

On March 19, 2004, Gordon was involved in an automobile accident while on duty. This was his second accident in a matter of months. Following the accident, Gordon was directed by his supervisor to go to Concentra, a medical care facility, and a first report of accident was prepared by the chain of command. Gordon was examined at Concentra and released that same day to return to duty, but was given the remainder of the day off as administrative leave.

From March 19, 2004, through April 5, 2004, Gordon appeared regularly for work. On April 5, 2004, Gordon called in sick and on April 6 and 7 he was given emergency vacation leave at his request. April 8 and 9 were Gordon's regular days off work. On April 9, he called his supervisor, Sergeant Terry Laun, and advised her that he was experiencing some soreness as a result of his auto accident. Sergeant Laun directed Gordon to report to Concentra on April 10 to be evaluated and to provide a doctor's note upon his return to work. April 10, 2004, was a Saturday and Concentra was closed, so Gordon was directed by his supervisors to go to the emergency room instead. The emergency room physicians prescribed medications and released Gordon. Gordon was on workers' compensation leave on April 11 and 12.

On April 11, 2004, Gordon was instructed by his supervisors to report back to Concentra on April 12 for a follow-up examination. He was seen by Dr. Sherrell Nunnelley who prescribed additional medications, referred him to physical therapy and placed restrictions on lifting, standing, bending, pushing, and pulling. He was also restricted from driving a city vehicle. Concentra referred Gordon to Dr. William Moss, an orthopedic surgeon. Dr. Moss did not renew the physical therapy prescription, but prescribed medications in addition to those received from the emergency room and Dr. Nunnelley. A follow-up appointment was scheduled for April 13. On April 13, Sergeant Laun advised Gordon to report for light-duty work at 2:00 p.m., but Gordon called and told her he was placed off work until April 14 and he was shown as being on workers' compensation for April 13.

On April 14, Gordon contacted dispatch and advised them that he was quite ill from taking all of his prescriptions. He requested a sick day, but was given a vacation day instead. He was told to return to Dr. Moss, but indicated that he would be seeing his own doctor as well because he did not have any confidence in Dr. Moss due to all the prescriptions he had been given. Gordon saw Dr. Moss on April 14 and was released to return to light-duty work on April 15. On April 15, 2004, Gordon was seen by his own doctor, Dr. Chary, who found he was

overmedicated and took him off work for April 15 and 16 and told him he could return to work on April 17. Dr. Chary also discontinued all of Gordon's medications. April 17, 18, 19, and 20 were regularly scheduled days off work for Gordon.

Major Marty Kleier visited Gordon at home on April 15, 2004, and was shown the doctor's note covering the April 15 and 16 absences and requested that Gordon fax the note to the department, or get a copy of it. Gordon advised Major Kleier that Dr. Chary's instructions were to schedule a follow-up appointment if he did not feel better, and Major Kleier confirmed the instructions with the doctor's office. Gordon also informed Major Kleier that the appointment was scheduled for April 20, his last scheduled day off work. Gordon was scheduled to return to work on April 21.

On April 21, 2004, Gordon called dispatch and advised them he had missed his follow-up appointment the previous day, as he had been confused regarding the date of the appointment. He stated that the appointment had been rescheduled for the following day, April 22. Major Kleier informed Gordon that Dr. Chary's office had not faxed to the department a work excuse for his absences of April 15 and 16..

Gordon called Major Kleier again on April 22, 2004, and reported that Dr. Chary's office had cancelled all appointments due to a death in the doctor's family. Gordon

stated that he thought another doctor was to come in to see him in place of Dr. Chary. Major Kleier told Gordon that the department still had not received the doctor's note covering his absences on April 15 and 16. Gordon faxed a note to Major Kleier during their phone conversation and it showed Gordon was excused from work on April 15 and 16 and was to return to work on April 17. Gordon advised Major Kleier that he thought Dr. Chary's office was making arrangements for another doctor to cover Dr. Chary's appointments on April 22, and that he would notify the department as soon as the appointment was scheduled. Gordon stated that the doctor's office had told him they would excuse his additional absences, and Major Kleier requested that he obtain a note covering his absences of April 21 and 22.

After speaking to Gordon, Major Kleier called Dr. Chary's office and confirmed that the doctor's appointments had been cancelled due to a family emergency, and that Dr. Chary would not be returning until May 6. The office advised Major Kleier that Gordon would be seen on May 6 when the doctor returned. Major Kleier called Dr. Chary's office again on April 22 regarding the notes for April 15 and 16. Major Kleier asked whether there was another note regarding Gordon returning to light-duty work because the note for April 15 and 16 released Gordon to return to work on April 17. Dr. Chary's office indicated that Gordon's file did not say anything about light-

duty work and noted that Dr. Chary apparently felt Gordon could return to regular duty.

On April 23, 2004, Acting Chief Alan Eisenback sent Gordon a letter suspending him without pay from duty as a Shively police officer and giving Gordon notice that Eisenback would recommend that Gordon be terminated for failure to report to work for three consecutive days without just cause in violation of the collective bargaining agreement. Acting Chief Eisenback also advised Gordon that he was in violation of the Standard Operating Procedures (SOP) under Section 500.20, Rules of Conduct, conformance to rules and regulations, inefficiency, and conduct unbecoming. Gordon was notified of his suspension through a phone call from Major Kleier on April 26.

On April 27, 2004, Gordon obtained a second note from Dr. Chary's office. This note related back to April 15 and stated that Gordon was to be off work until May 11, 2004. Gordon provided a copy of this note to the department when he returned his city-owned property on April 27.

The Commission conducted a hearing pursuant to KRS 90.360 on July 1 and July 26, 2004. On September 14, 2004, the Commission issued its unanimous findings and order. The Commission found that Gordon was absent without leave from his duties for three consecutive days, April 21, 22, and 23, 2004, without just cause in violation of the collective bargaining

agreement. It found Gordon was in violation of the SOP for the Shively Police Department Section 500.20, Rules of Conduct (2) conformance to rules and regulations due to his untimeliness in providing a doctor's note covering his absences on April 15 and 16. Lastly, the Commission found Gordon's failure to appear for work on April 21, 22, and 23, 2004, along with his failure to provide a doctor's note until after he was suspended, qualified as conduct unbecoming in violation of the SOP, Rules of Conduct (45) conduct unbecoming in that his conduct impaired the operation and/or efficiency of the department because they were unable to depend upon his presence for duty.

The Commission ordered that Gordon not be terminated from his employment as a Shively police officer. It further ordered that Gordon's suspension without pay be lifted as of September 23, 2004, and that he be returned to duty as soon thereafter as possible. Finally, the Commission ordered that Gordon have three vacation days restored for his future use. Gordon appealed the Commission's decision to the Jefferson Circuit Court. The circuit court found that the Commission's decision was not arbitrary and that it had not applied an incorrect rule of law. The circuit court further found that the decision was supported by substantial evidence and denied Gordon's appeal. This appeal followed.

The circuit court correctly noted that on appeal of a decision by an administrative agency the function of the circuit court is to determine if the agency acted arbitrarily or outside the scope of its authority, if the agency applied an incorrect rule of law, or if the decision itself is not supported by substantial evidence.² "Substantial evidence is defined as evidence that 'when taken alone or in light of all the evidence it has sufficient probative value to induce conviction in the minds of reasonable [people].'"³ If the record compels a result contrary to the decision of the administrative agency in light of substantial evidence, the action of the agency is arbitrary and unreasonable.⁴ "By 'arbitrary' we mean clearly erroneous, and by 'clearly erroneous' we mean unsupported by substantial evidence. By 'unreasonable' is meant that under the evidence presented there is no room for difference of opinion among reasonable minds."⁵

Gordon argues that the Commission's decision was clearly erroneous because it did not assign any weight to the

² Lindall v. Kentucky Retirement Systems, 112 S.W.3d 391, 394 (Ky.App. 2003).

³ Kentucky Retirement Systems v. Heavrin, 172 S.W.3d 808, 814 (Ky.App. 2005) (quoting Kentucky State Racing Commission v. Fuller, 481 S.W.2d 298, 308 (Ky. 1972)).

⁴ Id. (citing Bourbon County Bd. of Adj. v. Currans, 873 S.W.2d 836, 838 (Ky.App. 1994)).

⁵ Crouch v. Jefferson County, Kentucky Police Merit Board, 773 S.W.2d 461, 464 (Ky. 1988) (quoting Thurman v. Meridian Mutual Insurance Co., 345 S.W.2d 635, 639 (Ky. 1961)).

doctor's note of April 27 which Gordon provided to the department excusing him from work from April 15 through May 11. We disagree. "In reviewing whether an agency's decision is supported by substantial evidence, the reviewing court must adhere to the principle that the agency, as fact finder, is afforded great latitude in its evaluation of the evidence heard and the credibility of the witnesses appearing before it."⁶ It is not the province of this Court to substitute its judgment for that of the Commission regarding the weight of the evidence on questions of fact. In this case, the Commission considered all of the evidence presented to it as shown by its detailed order in support of its decision to suspend Gordon. As it is permitted to do, the Commission did not find the final note provided by Gordon four days after his suspension to be credible. Such a decision, however, does not make the action of the Commission in suspending Gordon arbitrary under the facts of this case.

Gordon essentially argues that the Commission's decision is not supported by substantial evidence based on the fact that he was in constant contact with the department during the time in question and relied upon his superiors' assurances that everything was fine under the circumstances and that there is no evidence that he was absent for three days without just

⁶ Hughes v. Kentucky Horse Racing Authority, 179 S.W.3d 865, 871 (Ky.App. 2004).

cause. Again, we disagree. The Commission had transcripts of all telephone conversations between Gordon and the department as well as between the department and Gordon's physician's office and found that there was little mention of Gordon's health problems between April 21 and April 26. Additionally, the Commission had evidence in the April 15 note from Gordon's physician that Gordon had been released to return to work and determined from this evidence that Gordon should have reported to work on April 21 as scheduled. This Court agrees with the circuit court that such evidence was substantial and properly supported the Commission's decision to suspend Gordon on the basis that he had been absent for three consecutive days without just cause for such absences.

Based upon the foregoing, the opinion and order of the Jefferson Circuit Court denying Gordon's appeal of the Commission's decision is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Don Meade
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLANT:

Mark L. Miller
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT FOR
APPELLEE, CITY OF SHIVELY,
KENTUCKY:

Walter L. Cato, Jr.
Louisville, Kentucky