

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000798-MR

J.P. HAMM, IN HIS OFFICIAL
CAPACITY AS THE APPOINTING
AUTHORITY FOR THE CABINET FOR
HEALTH AND FAMILY SERVICES

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 07-CI-00110

LOWELL WORKMAN; AND THE
KENTUCKY PERSONNEL BOARD

APPELLEES

OPINION AND ORDER
DISMISSING

** ** * ** * ** *

BEFORE: KELLER AND THOMPSON, JUDGES; GRAVES,¹ SENIOR JUDGE.

KELLER, JUDGE: J.P. Hamm, in his official capacity as the Appointing Authority for the Cabinet for Health and Family Services (“the Cabinet”), has appealed from the order of the Franklin Circuit Court awarding attorney fees to

¹ Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky constitution and KRS 21.580.

Lowell Workman's counsel, Paul F. Fauri. Having determined that the Cabinet failed to name an indispensable party (the attorney) in the notice of appeal, we must dismiss the appeal.

The facts and procedure leading to the circuit court's award of attorney fees is relatively straightforward. Lowell Workman was an Environmental Health Inspector Program Evaluator employed by the Cabinet. He was denied a promotion to the position of Environmental Health Supervisor in the Cabinet's Milk Safety Branch and filed an appeal with the Kentucky Personnel Board ("the Board"). In that appeal, Workman claimed that he was wrongfully denied a promotion to a supervisory position because a selection panelist was biased against him. Furthermore, Workman claimed that he was more qualified for the promotion than the successful candidate. A Hearing Officer found that the selection panelists properly considered the criteria of 101 KAR 1:400 in selecting a candidate other than Workman. However, the Board ordered the Cabinet to redo the process in accordance with 101 KAR 1:400 and KRS 18A.0751(4)(f).

On January 18, 2007, the Cabinet appealed the Board's order to the Franklin Circuit Court and moved the court to stay enforcement of that order, pending the outcome of judicial review. The circuit court denied the motion to stay the order on January 31, 2007. Subsequently, the Cabinet voluntarily dismissed the petition for judicial review.

Workman then moved the circuit court to award attorney fees to his attorney. The Cabinet argued that awarding attorney fees was inappropriate

because a final adjudication on the merits of this case, as required by KRS 453.260, did not occur. On March 19, 2007, the circuit court found that the Cabinet's dismissal of the case was the equivalent of an adjudication on the merits, which satisfied KRS 453.260, and that the Cabinet acted without substantial justification. Therefore, the circuit court awarded the requested attorney fees. The crux of the Cabinet's appeal is whether the circuit court correctly awarded these fees.

Before we may reach the merits of the Cabinet's appeal, we must address the issue raised in Workman's motion to dismiss the appeal, which was passed to the merits panel in an order entered August 9, 2007. In his motion, Workman points out that the Cabinet's notice of appeal only names Workman and the Board as appellees. Workman asserts that the appeal should be dismissed because the Cabinet failed to also name as an appellee the attorney who was awarded the fees. The Cabinet argues that because KRS 18A.095(24) states that attorney fees are to be awarded to the employee instead of the attorney, the employee is the real party in interest. However, in this case, we agree with Workman that the attorney was an indispensable party who had to be named in the notice of appeal.

Pursuant to CR 73.03(1), "[t]he notice of appeal shall specify by name all appellants and all appellees. . . ." The Supreme Court of Kentucky has instructed that "[f]ailure to specify any party whose absence prevents the appellate court from granting complete relief among those already parties would be fatal to

the appeal.” *Braden v. Republic-Vanguard Life Ins. Co.*, 657 S.W.2d 241, 243 (Ky. 1983). Dismissing an appeal for failure to name an attorney as a party is made on a case-by-case basis with a proper examination of whom the fees were awarded to and the authority for the award. *Knott v. Crown Colony Farm, Inc.*, 865 S.W.2d 326 (Ky. 1993). Although, based on the language of KRS 18A.095(24), the circuit court erroneously awarded attorney fees directly to the attorney, instead of to Workman, the Cabinet failed to seek a correction of that order at the circuit court level. The Cabinet should have, for example, moved to amend the final order pursuant to CR 59.05. The Cabinet cannot rely on its error in failing to raise this issue at the circuit court level in order to defend its mistake in failing to name the attorney as an appellee. A proper examination of the circumstances of this case, particularly the person to whom fees were awarded, reveals that Workman’s attorney was directly awarded the attorney fees. Therefore, the Cabinet’s error in failing to name Workman’s attorney as a party is fatal.

For the foregoing reasons, Workman’s passed motion to dismiss is GRANTED and the above-styled appeal is ORDERED DISMISSED. The Cabinet’s passed motion to strike Workman’s brief is DENIED as moot.

ALL CONCUR.

ENTERED: June 20, 2008

/s/ Michelle M. Keller
JUDGE, COURT OF APPEALS

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