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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000266-MR
AND
NO. 2007-CA-000744-MR

MYERS ARNETT — APPELLANT

v.

APPEALS FROM POWELL CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NOS. 04-CI-00209 & 04-CI-00227

CITY OF STANTON, A KENTUCKY MUNICIPAL CORPORATION; VIRGINIA WILLS, MARIAM SMALLWOOD, JESSICA WELLS, MIKE LOCKHART, JAMES MARTIN, AND FRANK "JUNIE" HUTCHINSON, INDIVIDUALLY AND AS COUNCILMEN OF THE CITY OF STANTON; VICKIE SLEMP, CITY CLERK OF THE CITY OF STANTON; AND DAVID POOLE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND TAYLOR, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

[1] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

KELLER, JUDGE: In September of 2004, the Stanton City Council (the Council) voted to remove Mayor Myers Arnett (Arnett) from office. Arnett appealed the Council's decision. The Powell Circuit Court affirmed. It is from the court's order affirming the Council that Arnett appeals. In his appeal, Arnett argues that he was denied due process of law, that the Council did not follow the statutory procedures necessary to investigate his conduct and to remove him from office, and that the Council violated the Open Meetings Act. The Council argues to the contrary and that Arnett did not timely perfect his appeal to the circuit court. For the reasons set forth below, we affirm.

FACTS

1. Procedural Background

On August 10, 2004, members of the Council sent letters to Arnett outlining various allegations of misconduct and asking Arnett to resign. Based on those letters and other information, the attorney for the Council forwarded a letter to Arnett dated August 13, 2004, formally advising him that the Council was charging him with "misconduct, incapacity, and willful neglect in performance of [his] duties as mayor." The letter stated that a special meeting of the Council had been scheduled for August 17, 2004, to "begin the removal process and schedule a hearing date." At the August 17, 2004, special meeting, the Council scheduled the hearing for September 1, 2004.

In an apparent attempt to delay or stop the hearing, Arnett filed a complaint on August 31, 2004, seeking a declaratory judgment and injunctive

relief. That complaint was assigned case number 04-CI-00209 (the complaint). The Council went forward with the hearing on September 1, 2004, and voted to remove Arnett from office. Arnett appealed the Council's actions to circuit court. The appeal was assigned case number 04-CI-00227 (the appeal).

Both cases moved through the circuit court until February 25, 2006, when the court, in a handwritten note on the docket sheet, appears to have dismissed the complaint for lack of prosecution. We note that no other action appears to have been taken in the complaint action until December 28, 2006, when the court entered a six-page order again dismissing it. In that order, the court stated that Arnett's request for injunctive relief was moot as the hearing had been held. The court also noted that the issues raised by Arnett with regard to the adequacy of the hearing and whether he received due process would be better addressed within the appeal.

In the meantime, Arnett filed a petition for injunctive relief in the appeal on June 18, 2005. On July 27, 2005, the Council moved to dismiss the appeal on the grounds that Arnett had not perfected it. Following several procedural motions and the filing of the transcript of the September 1, 2004, hearing, the circuit court entered an order and judgment on March 21, 2007. In that order and judgment, the court adopted the December 28, 2006, order dismissing the complaint and found that said order was final and appealable with an effective date for appeal purposes of March 21, 2007. The court also affirmed

the findings of the Council and its dismissal of Arnett. It is from this order and judgment that Arnett appeals.

2. The Hearing Before the Council

Because Arnett argues, in part, that he was not given due process, we will briefly summarize the evidence presented at the hearing before the Council. There were essentially three charges brought against Arnett: (1) that he was often "under the influence of alcohol" or intoxicated while acting as mayor; (2) that he did not comply with various policies and/or regulations with regard to the awarding of and payment under at least two contracts; and (3) that he engaged in sexual harassment and other inappropriate conduct with employees of the City of Stanton (the City).

As to Arnett's intoxication, several employees of the water department testified that Arnett was intoxicated when he visited a job site where a water line was being repaired. We note that it is unclear from the record when this incident occurred. Other city employees testified that, in early 2003, when Arnett arrived for a Council meeting, he was too intoxicated to function. Therefore, the meeting was cancelled, and one of the employees drove Arnett home. The mayor of a neighboring city testified that she and Arnett attended a meeting with representatives of FEMA that had been called to advise officials in Powell County how to obtain federal funding for flood relief. Arnett appeared to be intoxicated at that meeting. Vickie Slemp (Slemp), the city clerk, Teresa Koontz (Koontz), the assistant city clerk, and Wendy Floyd (Floyd), an employee who worked part-time

for the City and part-time for the police department, testified that for six to eight months prior to the hearing, Arnett was under the influence of alcohol every time he came to the City's offices. Finally, several citizens testified that Arnett appeared to be intoxicated on several occasions while in public and while conducting the duties of his office.

With regard to financial irregularities, witnesses testified that Arnett approved payments to contractors that had not been authorized by the Council. Furthermore, testimony indicated that Arnett had made payment to a contractor to build sidewalks when that contractor had not been awarded a contract by the Council. However, a former Council member testified that the issue regarding that contract was discussed with the Council at the time it occurred and no one on Council objected.

As to Arnett's behavior toward employees, Slemp testified that Arnett made several comments regarding his desire to "sleep with" her. Although she did not consider these comments to amount to sexual harassment, she did report them to three Council members in July 2004. Slemp discussed Arnett's behavior with the other three Council members by telephone and/or e-mail. Floyd testified that Arnett made a comment about her appearance and stared "lustfully" at her on at least one occasion. Floyd reported Arnett's actions to her supervisor, Slemp, and prepared a written complaint in July 2004. Furthermore, Floyd testified that the female employees in the City office agreed that none of them would be alone with Arnett.

At the conclusion of the hearing, counsel for Arnett asked the Council to retire to deliberate. However, while a discussion regarding whether to do this was taking place, Arnett said, "I say vote and get it over with." His counsel reiterated Arnett's statement and the Council voted unanimously to remove Arnett as mayor. As noted above, Arnett timely appealed the Council's decision to the circuit court, and the circuit court affirmed the Council's removal of Arnett as mayor.

With this background in mind, we will address the issues raised by Arnett on appeal: (1) that he was denied due process of law; (2) that the Council did not follow the proper statutory procedures in investigating the allegations against him and in removing him from office; and (3) that the Council violated the Open Meetings Act.

STANDARD OF REVIEW

Arnett raises issues of law, which are subject to *de novo* review. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001); *see also A & A Mechanical, Inc. v. Thermal Equipment Sales, Inc.*, 998 S.W.2d 505, 509 (Ky. App. 1999); *Aubrey v. Office of Attorney General*, 994 S.W.2d 516, 518-19 (Ky. App. 1998); and *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998).

ANALYSIS

1. Due Process

We will first address the due process issue raised by Arnett. Arnett's primary argument is that the members of the Council "had previously reached an

agreement and were committed to" removing Arnett from office prior to the hearing. According to Arnett, this bias by the members of Council "should have disqualified them from sitting as hearing officer(s) and/or judges[.]" In support of this argument, Arnett cites to the letters written by members of Council prior to the removal hearing.

Additionally, Arnett argues that the Council voted to remove him because of improper political motives.[2] In support of this argument, Arnett states that "the conduct at issue in the charges arose during the prior administration of Arnett as Mayor of the City of Stanton." We will address each argument in the order set forth above.

At the outset, we note that the former Court of Appeals, in *Arbogast v. Weber,* 249 Ky. 20, 60 S.W.2d 144, 147 (1933), held that bias or prejudice on the part of city commissioners is not sufficient to enjoin them from acting on charges against another commissioner. *See also, Reed v. City of Richmond,* 582 S.W.2d 651, 655 (Ky. App. 1979). One who claims such bias or prejudice bears the burden of proof; however, in judging whether bias or prejudice had an impact on the Council's decision, "the court will give full consideration to the fact that the same body acted as accuser, judge and jury." *Reed,* at 655.

As noted above, Arnett relies on the letters written from the members of Council prior to the removal hearing to show undue bias and prejudice. Therefore, we must examine the language of those letters. Frank Hutchinson

[2] While we are not certain that this is a due process argument, we will address it in this section of the Opinion since Arnett included it in the due process section of his brief.

stated in his letter that he had received "some very serious allegations" of sexual harassment by Arnett. He asked Arnett to "step aside" so that the matter could "remain private and not be dealt with publicly." In her letter, Virginia Wills stated that "[s]exual harassment is unacceptable within the Stanton City office or outside the office." She asked Arnett to "refrain from any behavior that would appear to be of this nature" when he was acting as mayor and noted that "[t]he city has encountered many problems in the last months." Therefore, she asked Arnett to resign and noted that she hoped the matter could be dealt with privately. Jessica Wells (Wells), in her letter, asked Arnett to "refrain from any behavior that would constitute sexual harassment of any nature." As did the others, Wells asked Arnett to resign, in part, to keep the matter private. Although it appears to be missing a word or two, the letter from Mike Lockhart (Lockhart) also asked Arnett to refrain from engaging in any activity that might constitute sexual harassment. As did Wills, Lockhart noted that the city had "experienced numerous problems over the past several months," and Lockhart asked Arnett to resign. James Martin (Martin), in his letter, asked Arnett to refrain from any behavior that might "constitute sexual harassment." As did Wills and Lockhart, Martin noted the problems the city had experienced in the preceding several months, and he asked Arnett to resign. Finally, Mariam Smallwood asked Arnett to behave in a manner so as to "be free of sexual harassment" and to resign. She also noted the "many problems with which the city has been confronted during the past several months" as a reason supporting her request for Arnett's resignation.

Taken singly or as a group, these letters do three things: they advise Arnett that someone has complained about his behavior; they ask him to refrain from engaging in behavior that could constitute sexual harassment; and they ask him to resign in order to avoid a public hearing. They do not indicate that any of the members of Council had determined to remove Arnett or that any of the Council members had accepted the reports of Arnett's behavior as being true. To paraphrase the Court in *Arbogast,* "[t]he act of the [Council] in offering to permit [Arnett] to resign does not show any prejudice on the part of the [Council], but was rather a friendly act inasmuch as in the absence of such resignation the [Council] could scarcely escape its duty of hearing these charges." *Arbogast v. Weber*, 249 Ky. 20, 60 S.W.2d 144, 146 (1933).

As to improper political motives, Arnett argues that the charges relate to his prior administration and that "[t]hese disputes were settled by the electorate with Arnett's reelection[.]" As previously noted, the charges against Arnett centered on his apparent intoxication while performing his duties as mayor; his handling of various contracts; and his alleged sexual harassment of employees. Based on the record, it appears that the contract issues did arise during Arnett's prior administration. However, the sexual harassment appears to have been an ongoing problem, with both Slemp and Floyd making written complaints in July 2004. Furthermore, two of the witnesses testified that Arnett appeared to be intoxicated on a daily basis in the six months prior to the removal hearing. Therefore, Arnett's argument that the charges were stale is not supported by the

record. Finally, on this issue, we note that, after a thorough review of the record, we can find no testimony from anyone indicating that any of the Council members voted to remove Arnett for political reasons.

Arnett relies on *Jones v. Hillview Civil Service Com'n,* 760 S.W.2d 91 (Ky. App. 1988), to support his argument regarding improper political motivation. However, that reliance is misplaced. Jones, an officer in the Hillview police department, supported Leeman Powell (Powell) in a mayoral election. During the campaign, Powell announced that, if elected, he would name Jones as chief of police. The city council told Powell that they disapproved of Jones, and one of the council members, Richard Terry (Terry), embarked on a write-in campaign for mayor against Powell. Furthermore, council members advised Powell that, if he attempted to appoint Jones as police chief, they would "tie his hands with the civil service laws." *Id.* at 92. Prior to the election, the council adopted an ordinance establishing a civil service commission. Terry won the election and, two days later, the council began proceedings to place police officers under the purview of the newly created civil service commission. The council also appointed three commission members, two of whom had worked on Terry's campaign. Within two weeks after police officers were classified as civil service employees, Jones was called before the commission and fired.

Jones appealed and the Court of Appeals reversed the findings of the commission. In doing so, the Court noted that the charges against Jones were related to activity that occurred before the civil service commission had been

created. Furthermore, Jones had not been advised of several of the charges, many of which applied to all officers in the department, not just Jones. Finally, the Court noted that, when Jones asked to review his personnel file, he was told that no such file existed; however, during the hearing before the commission, "the file was produced and its contents were used as evidence against him." *Id.* at 94.

Clearly, *Jones* is distinguishable from the case before us. There is no evidence that any of the Council members opposed Arnett in his election for Mayor. The Council existed at all times when the actions in question took place, and there is no evidence that Arnett was denied access to any of the evidence that was used against him. Therefore, *Jones* is not dispositive.

Based on the above reasons, we hold that Arnett received sufficient substantive and procedural due process. Furthermore, we hold that the evidence does not support Arnett's claim that his removal was politically motivated.

2. Improper Investigation by the Council

Arnett's second argument is that the Council violated KRS 83A.130(13), which provides that

> [t]he council shall have the right to investigate all activities of city government. The council may require any city officer or employee to prepare and submit to it sworn statements regarding his performance of his official duties. Any statement required by the council to be submitted or any investigation undertaken by the council, if any office, department or agency under the

> jurisdiction of the mayor is involved, shall not be submitted or undertaken unless and until written notice of the council's action is given to the mayor. The mayor shall have the right to review any statement before submission to the council and to appear personally or through his designee on behalf of any department, office or agency in the course of any investigation.

Arnett argues that, because the Council did not provide him with written notification before undertaking an investigation of his behavior, the charges against him and subsequent actions by the Council were void. We disagree for two reasons. First and foremost, the statute cited by Arnett simply does not apply. KRS 83A.130(13) states that the Council must advise the mayor of any investigation into "any office, department or agency under the jurisdiction of the mayor." Notice is not required if an investigation is undertaken of the mayor. Second, there is no evidence that *the Council* undertook any investigation. The evidence indicates that individual Council members were advised of the sexual harassment charges. The charges arising from Arnett's intoxication were public knowledge as evidenced by numerous newspaper articles in the record, and it appears that any investigation regarding City contracts was undertaken by Slemp, not by the Council or any member of the Council. Therefore, we hold that KRS 83A.130(13) has no application to this case. Furthermore, even if KRS 83A.130(13) does apply, there is no evidence that the Council violated its provisions.

3. Violation of the Open Meetings Act

Finally, Arnett argues that the Council met in violation of the Open Meetings Act, KRS 61.800 *et seq.* In support of his argument, Arnett points to testimony by Slemp that she advised three members of Council about Arnett's behavior when the four of them met at Dairy Queen. She advised the remaining three members individually, either by e-mail or by telephone. These contacts between Slemp and the members of Council dealt with only the issue of Arnett's alleged sexual harassment. In response to questions by Arnett's counsel, Slemp states on several occasions that she advised "Council" and that she spoke with "Council." However, she also states on several occasions that no meetings were held without notice to the public. Faced with this evidence, the circuit court found that, "[a]though a quorum of commissioners [sic] may have discussed the issue among themselves at a gathering other than a regular meeting, there were no secret meetings." Based on the evidence as a whole, "we do not believe this finding is clearly erroneous, [and] we will not disturb it on appeal. *Avritt v. O'Daniel,* 689 S.W.2d 36 (Ky. App 1985); CR 52.01." *Beckham v. City of Bowling Green*, 743 S.W.2d 858, 861 (Ky. App. 1987).

Furthermore, we agree with the circuit court that any meetings that may have taken place fall within an exception to the Open Records Act. KRS 61.810(1)(f) provides for closed door meetings when discussing matters that might lead to discipline of "an individual, employee, member or student." Any discussions Council members may have had among themselves involved discipline of Arnett thus falling within the preceding exception to the Open Meetings Act.

Therefore, we find that the actions of the Council did not violate the Open Meetings Act.

4. Failure to Timely Perfect Appeal

Because we have affirmed the circuit court on substantive grounds, we need not address this procedural issue raised by the Council.

CONCLUSION

For the foregoing reasons we hold that the Council of the City of Stanton acted appropriately when it removed Arnett from his position as mayor. The Council did not violate the Open Meetings Act, it did not deny Arnett due process, and it did not violate KRS 83A.130(13). Therefore, the Powell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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ORAL ARGUMENT FOR APPELLANT:

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