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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001464-MR
AND
NO. 2011-CA-001506-MR

CARA SAJKO — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CHARLES L. CUNNINGHAM JR., JUDGE
ACTION NO. 11-CI-000288 AND 11-CI-000625

JEFFERSON COUNTY BOARD
OF EDUCATION; AND
DONNA HARGENS, IN HER
OFFICIAL CAPACITY AS
SUPERINTENDENT — APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, COMBS, AND VANMETER, JUDGES.

VANMETER, JUDGE: Cara Sajko appeals from an order of the Jefferson Circuit Court which affirmed an order of a tribunal that upheld the school superintendent's termination of Sajko's employment as a teacher in the Jefferson County school

system. The school system[1] cross-appeals from a portion of the court's order, including the portion that affirmed the determination that the tribunal had jurisdiction to consider Sajko's defense to the charges. We conclude that the tribunal lacked jurisdiction because Sajko's notice of intent to challenge the dismissal was untimely. In addition, upon reviewing the merits of her claim, we further hold that her termination was supported by substantial evidence and affirm the tribunal's decision.

For a concise summary of the facts and procedural background, we turn to the prior Court of Appeals decision in this case:

> Sajko had been employed as a teacher in the Jefferson County school system for a number of years. During the time in question (2003-2004 and 2004-2005 school years), she was a teacher at Louisville Male Traditional High School. Sajko's actions involving her treatment of students led to the school principal taking action in the form of reprimands and directives to Sajko in an effort to stop her inappropriate behavior. Sajko was twice suspended without pay when she failed or refused to follow the principal's directives.
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> In January 2005, Sajko was advised that she must submit to an occupational evaluation to determine whether she had any health problems that could affect her performance as a teacher. When Sajko refused to submit to the evaluation, the superintendent, Dr. Donna Hargens, suspended her without pay pending recommendation that her employment be terminated.
>
> On March 28, 2005, the superintendent caused a seven-page letter from her to be hand-delivered to Sajko informing her that she was terminating her employment on the grounds of her insubordination and conduct unbecoming a teacher. *See* Kentucky Revised Statutes

[1] Jefferson County Board of Education and Donna Hargens, Superintendent.

(KRS) 161.790(1)(a) and (b). The superintendent cited specific instances in the letter and stated that Sajko was terminated due to "the seriousness of the violations" and Sajko's "previous disciplinary record that includes two suspensions and numerous reprimands and warnings."

The letter also advised Sajko that she could answer the charges and contest the termination by providing notice to him and to the commissioner of the Kentucky Department of Education within 10 days after receiving the letter. Additionally, the letter stated that the termination would be final if Sajko failed to provide the notice within that time. The applicable statute, KRS 161.790(3), was referenced.

The statute states:

Prior to notification of the board, the superintendent shall furnish the teacher with a written statement specifying in detail the charge against the teacher. The teacher may within ten (10) days after receiving the charge notify the commissioner of education and the superintendent of his intention to answer the charge, and upon failure of the teacher to give notice within ten (10) days, the dismissal shall be final.

Id.

On April 7, 2005, exactly ten days after receipt of the superintendent's letter, Sajko's attorney sent a facsimile letter (fax) to the office of the school board's general counsel indicating that Sajko intended to answer the charges against her and that copies of the notice would be sent to the appropriate parties.[2] The fax was not sent until after regular business hours. The superintendent and the commissioner received their copies the following day, 11 days after Sajko had received the termination letter.

As provided in KRS 161.790(4), a three-member tribunal was appointed to consider Sajko's termination. Prior to the tribunal hearing, a hearing officer considered

[2] Sajko's appellate counsel did not represent her at this stage of the proceedings.

the school system's motion to dismiss Sajko's appeal on the ground that her notice was not delivered in a timely manner and that the termination was therefore final. *See* KRS 161.790(3) and (5). That motion was denied after the hearing officer determined the statute was ambiguous.

The tribunal heard evidence for eight days and found that Sajko was guilty of insubordination in violation of KRS 161.790(1)(a). The tribunal concluded, however, that Sajko did not engage in conduct unbecoming a teacher. In the tribunal's final order, it found that "Sajko would consider any reduction in the sanction as vindication of her inappropriate teaching methods and her unacceptable responses to Male High School officials' directives." Thus, the tribunal affirmed the superintendent's decision to terminate Sajko's teaching contract.

Both sides sought review from the Jefferson Circuit Court. *See* KRS 161.790(8); KRS 13B.140(1); *James v. Sevre-Duszynska*, 173 S.W.3d 250, 256 (Ky. App. 2005). The court affirmed the tribunal's decision to terminate Sajko's teaching contract based on insubordination. The court also affirmed the tribunal's finding that Sajko was not guilty of conduct unbecoming a teacher. In addition, the court affirmed the decision that the tribunal had jurisdiction to hear Sajko's defense.

In its cross appeal the school system again contends that the tribunal was without jurisdiction to hear Sajko's defense. It argues that Sajko failed to give notice to the superintendent and the commissioner within ten days after she received notice of the charge from the superintendent. Thus, the school system maintains that the tribunal erred in hearing the case and that the circuit court erred in affirming the tribunal's jurisdiction.

Sajko states in her reply brief that she "denies actually receiving the Schools' termination letter on March 28, 2005."[3] She then contends that even if that

[3] In her briefs Sajko does not cite to the record or make further argument in this regard. The circuit court noted, however, that Sajko received the termination letter on March 28, 2005. That

date is accurate, the notice she provided was timely under the provisions of the statute.

First, Sajko argues that the facsimile transmission of her intent that was sent to the school board's attorney on the tenth day "should constitute constructive notice" to the superintendent. We disagree. Even if the letter constitutes constructive notice to the superintendent, it does not constitute such notice to the commissioner. Furthermore, notice to the school board's attorney does not strictly comply with the requirement of KRS 161.790(3) that the superintendent and commissioner be notified. *See Roberts v.Watts*, 258 S.W.2d 513 (Ky. 1953), wherein the court held:

> The right of appeal in administrative as well as other proceedings does not exist as a matter of right. When the right is conferred by statute, a strict compliance with its terms is required.

Id.

Sajko next maintains that "KRS 161.790(3) is satisfied when the notice is *placed in the mail*." In other words, she contends that by mailing certified letters to the superintendent and the commissioner on the tenth day after she received notice of the charge, she satisfied the statutory requirement even though those letters were not received until the following day. Sajko asserts that it would be a "very harsh result" to bar a teacher's right to challenge his or her termination "where the teacher certified and mailed the required notice within the statutory window, but the required notice was not actually received until one day after that period ended." She contends that the mailing of the letters, not their receipt, satisfies the notice requirement of the statute. We disagree.

In *Energy Regulatory Commission v. Kentucky Power Co*., 605 S.W.2d 46, 51 (Ky. App. 1980), this court stated that "[w]e believe that it is not the sending

Sajko received the letter on that date is supported by the affidavits of two school employees and by the testimony of Sajko's union representative.

> but the receipt of a letter that constitutes true notice." In *Baldwin v. Fidelity Phenix Fire Ins. Co. of New York*, 260 F.2d 951, 953-54 (6th Cir. 1958), the court stated that "[i]t is not, therefore the sending, but the receipt, of a letter that will constitute notice."
>
> As neither the superintendent nor the commissioner received Sajko's letter notifying them of her intent within ten days of her receipt of the superintendent's letter, Sajko failed to strictly comply with the notice requirements of the statute.[4] Sajko's failure to meet the timely notice requirement denied the tribunal jurisdiction to consider her defense to the charges.
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> The order of the Jefferson Circuit Court is reversed, and this case is remanded for the entry of an order upholding Sajko's termination, pursuant to KRS 161.790(3), based upon the tribunal's lack of jurisdiction to consider the matter.

Sajko v. Jefferson County Bd. of Educ., No. 2007-CA-000128 and No. 2007-CA-000130 (Sept. 19, 2008).

The Kentucky Supreme Court granted discretionary review of the Court of Appeal's opinion to address the issue of whether the notice provision in KRS 161.790(3) required receipt of the teacher's notice within the ten-day period, or whether the timing statute was satisfied by the mailing of the teacher's notice within the ten days. *Sajko v. Jefferson County Bd. of Educ.*, 314 S.W.3d 290 (Ky. 2010). KRS 161.790(3) provides:

> No contract shall be terminated except upon notification of the board by the superintendent. Prior to notification of the board, the superintendent shall furnish the teacher with a written statement specifying in detail the charge

[4] We do not imply that there must be personal service on the superintendent and the commissioner.

> against the teacher. The teacher may within ten (10) days after receiving the charge notify the commissioner of education and the superintendent of his intention to answer the charge, and upon failure of the teacher to give notice within ten (10) days, the dismissal shall be final.

The Supreme Court addressed the following language of that statute: "'The teacher may within ten (10) days after receiving the charge notify the commissioner of education and the superintendent of his intention to answer the charge, and upon failure of the teacher to give notice within ten (10) days, the dismissal shall be final.'" *Sajko*, 314 S.W.3d at 291 (quoting KRS 161.790(3)). The Supreme Court interpreted that language to require receipt of the teacher's notice within the ten-day period. *Id.* The Court declined to determine whether Sajko's letter to the commissioner of education (which the parties stipulated was received by the commissioner on April 8, 2005) was timely because a question of fact existed as to when the ten-day period began running. *Id.* at 299. The hearing officer never made a factual finding regarding when Sajko received her dismissal letter (March 28 or 29) and both the circuit court and the Court of Appeals improperly assumed that Sajko received her dismissal letter on March 28. *Id.* Since the date Sajko received her dismissal letter was a critical fact in determining whether she gave timely notice of her intent to challenge the dismissal, the Supreme Court remanded the case to the hearing officer to make the necessary findings of fact. *Id.* The Court noted:

> If, on remand, the hearing officer finds that Sajko received her dismissal letter one day later than March 28, 2005, then as a matter of law, receipt would be timely,

> leaving only the merits appeal which the Court of Appeals did not address. In that event, the action would return to the Court of Appeals for a ruling on the merits of her appeal.

Id.

On remand, the hearing officer found that Sajko received her dismissal letter on March 29, and therefore her notice of intent to challenge the dismissal was timely received within the ten-day period. This case now returns to the Court of Appeals for a ruling on the merits of Sajko's appeal. On appeal, the school system continues to maintain that the tribunal lacked jurisdiction to consider Sajko's defense to the charges. The school system argues that the evidence clearly shows that Sajko "received" her dismissal letter on March 28, for purposes of KRS 161.790(3), and that the hearing officer's finding to the contrary was not supported by substantial evidence and was arbitrary. In addition, the school system argues that Sajko failed to comply with the requirements of the statute that created her right to appeal and thus her dismissal is final. We agree.

Our standard for reviewing a determination of a tribunal is whether the decision was arbitrary, *i.e.*, "not supported by substantial evidence." *Fankhauser v. Cobb*, 163 S.W.3d 389, 400-01 (Ky. 2005). "'Substantial evidence' means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Id.* at 401 (citation omitted).

The following language of KRS 161.790(3) is at issue in this appeal:

> Prior to notification of the board, the superintendent shall **furnish** the teacher with a written statement specifying in

> detail the charge against the teacher. The teacher may within ten (10) days after **receiving** the charge notify the commissioner of education and the superintendent of his intention to answer the charge . . . .

(emphasis added). The parties stipulated that on March 28, an employee of the school system hand-delivered a manila envelope containing the dismissal letter to Sajko's address of record which she had provided to the school system. When no one answered the door, the employee left the manila envelope resting against Sajko's front door.

Unbeknownst to the school system, Sajko did not reside at this address. Instead, she lived across the street in her parents' house. Sajko testified that when she left her parents' house on March 29, she saw, from inside her car, the manila envelope resting against her front door across the street. At that point, Sajko retrieved the envelope containing the dismissal letter.

But Sajko also testified that she became aware of her dismissal on March 28, when she heard news of it on a local news report (she could not remember if the report was on the tv or radio). She testified that she telephoned her union representative on March 28 to discuss the matter, but was unable to reach the representative until March 29.

The school system argues that Sajko "constructively" received the dismissal letter on March 28 and that her failure to "actually" receive the letter the same day was attributable only to her willful refusal to collect and read her mail. By providing the school system with that address for its records, Sajko evinced her

agreement to accept delivery of documents there and she was charged with checking her mail at that address. Her failure to do so, particularly on the day she said she heard news of her dismissal on a local news report, was unreasonable and constitutes "purposeful avoidance" of delivery of the dismissal letter. In support, the school system cites to the affidavit of Sajko's union representative, who stated that she spoke with Sajko on March 28 and that Sajko told her she had received the dismissal letter.

The hearing officer found Sajko's testimony to be credible, and the recollection of the union representative to be "suggestive." The hearing officer further construed the term "receiving" in KRS 161.790(3) as requiring "actual" receipt and found that Sajko did not actually receive the dismissal letter until she discovered it on her doorstep on March 29. Thus, the ten-day period did not begin to run until that date. The hearing officer distinguished the terms "furnishing" and "receiving," as used in KRS 161.790(3), from the terms "notify" and "give notice," the latter of which the hearing officer found to be familiar legal concepts. The hearing officer consulted the dictionary for a definition of "furnish" and found that the words used to describe that term ("equip, provide, supply") implied actual receipt. As a result, the hearing officer refused to apply the concept of "constructive" receipt to KRS 161.790(3).

We find the hearing officer's construction of KRS 161.790(3) to be erroneous as a matter of law and its factual findings to be arbitrary. We agree with the school system that it satisfied its statutory duty to "furnish" Sajko with a

written statement specifying in detail the charge against her. In fact, the school system took the extra measure of hand-delivering the dismissal letter, rather than relying on postal mail service. We do not construe KRS 161.170(3) as requiring personal service on the teacher. In fact, the Supreme Court's opinion in this very case noted:

> Hand delivery is not the only constitutionally acceptable mode of serving notice; according to some authority, service of notice may be made by affixing a copy to the front door of the usual place of abode of the person who is to be served if no person to whom a copy may be delivered is found there.

Sajko, 314 S.W.3d at 295 (quoting 66 C.J.S. *Notice* § 22 (2009)).

Here, the school system delivered the dismissal letter to the address Sajko had provided, which we find to be her "usual place of abode" (barring some affirmative evidence that the party attempting to provide notice knew or should have known that the address of record was not accurate). The employee left the envelope in a location prominent enough that Sajko was able to view it from across the street. Sajko was responsible for maintaining a current address on file with her employer and taking reasonable steps to retrieve her mail. Sajko offers nothing to indicate that she could not have collected the dismissal letter on March 28, the date she admits she became aware of her termination. She simply chose not to do so. The hearing officer's finding to the contrary is not supported by substantial evidence and is arbitrary. The ten-day period began running on March 28 and the commissioner's receipt of Sajko's intent to challenge the dismissal eleven days

later was untimely. Since Sajko failed to provide notice within ten days, the dismissal became final and the tribunal lacked jurisdiction to consider her challenge.

However, even if we were to consider the merits of Sajko's termination, the record clearly supports the tribunal's decision to uphold the superintendent's termination of her employment. During the hearing before the tribunal, evidence was presented regarding Sajko's long history of insubordination: she regularly, repeatedly, and continually refused to comply with the directives from the school's administrators in their attempt to bring her teaching methods into compliance with the school's standards. Sajko's insubordinate conduct was well-documented and the evidence showed that she had received multiple school-level reprimands, warnings, and discipline, including two suspensions. The basis of the superintendent's decision to fire her was set forth in the dismissal letter, including the seriousness of the violations outlined in the letter, her disciplinary record, and numerous written reprimands and warnings. Based on the evidence presented, the tribunal upheld the superintendent's decision to terminate her employment. *See Fankhauser*, 163 S.W.3d at 400 ("the tribunal has the discretion to accept or reject the sanction proposed by the superintendent and the discretion to impose an alternative or less severe sanction."). Upon review, we conclude that the tribunal's decision was supported by substantial evidence and therefore affirm.

The Jefferson Circuit Court's order is affirmed.

CLAYTON, JUDGE, CONCURS.

COMBS, JUDGE, CONCURS IN RESULT ONLY.

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