

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000584-MR

KENTUCKY COURT OF JUSTICE
DISMISSAL APPEAL BOARD;
ADMINISTRATIVE OFFICE OF
THE COURTS; DEPARTMENT
OF JUVENILE SERVICES

APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 11-CI-00049

MARY STORY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: LAMBERT, MAZE AND MOORE, JUDGES.

LAMBERT, JUDGE: The Kentucky Court of Justice Dismissal Appeal Board,
Administrative Office of the Courts, and the Department of Juvenile Services
(hereinafter collectively the Administrative Office of the Courts) appeal from the

Franklin Circuit Court's order reversing the termination of Mary Story's employment as a Court-Designated Worker (CDW) by her employer, the Administrative Office of the Courts (AOC). After careful review, we reverse the order of the Franklin Circuit Court reversing Ms. Story's termination.

Mary Story worked as a CDW in Christian County, Kentucky. AOC terminated her employment on August 20, 2010, alleging that Ms. Story had committed insubordination and exceeded her authority as a CDW. At the time Ms. Story was terminated, she was already on probation for a prior incident discussed below. Just prior to her termination in August 2010, Ms. Story received an email from her direct supervisor at AOC, Bridget Thompson, advising her of a change in CDW policy regarding the use of pre-stamped court orders. The email instructed Ms. Story and the other CDWs not to discuss the change in policy with anyone until she (Ms. Thompson) first had an opportunity to inform Christian District Court Judge Adams about the change and to discuss the reasons underlying it. Instead of complying with the directive, however, Ms. Story notified Judge Adams of the proposed change in policy before Ms. Thompson could meet with the judge to discuss the change.

AOC also alleged that Ms. Story stepped outside the scope of her authority as a CDW when she offered to contact a witness in a case to assist in securing that witness's testimony in court, although the record ultimately revealed that this was not the action that resulted in her termination. The CDW with responsibility for that particular case notified her supervisor, and Ms. Story was

advised of the complaint and directed not to say anything in order to protect the integrity of the investigative process. Ms. Story allegedly violated the supervisor's directive and openly discussed the matter in and around the courthouse.

In reaching its termination decision, AOC considered the two alleged instances of insubordination by Ms. Story, but also took into account prior progressive disciplinary actions, including Ms. Story's November 2009 written reprimand, July 2010 paid administrative leave, and current July 2010 six-month probation. Ms. Story did not appeal any of these prior disciplinary actions, and in August 2010, during the first month of her six-month probation, Ms. Story committed the acts that resulted in her termination.

Ms. Story appealed the termination decision to AOC's Dismissal Appeal Board (hereinafter Board). After conducting an evidentiary hearing on October 29 through 30, 2010, the Board issued a Recommended Decision upholding the termination. The hearing included testimony from eleven witnesses, including Ms. Story herself, with direct examination, cross-examination, redirect examination, as well as consideration of objections. Based on its review of the hearing testimony and record evidence, the Board recommended upholding the termination. In particular, the Board concluded that Ms. Story's insubordination in August 2010 constituted a substantial deviation from good behavior and satisfactory performance of her duties and reflected an inability or refusal to perform reasonable and legal duties required of CDWs.

A Senior Executive Officer for AOC reviewed and evaluated the Board's Recommended Decision and issued a final decision. As a part of this process, the Executive Officer reviewed the full administrative record, including the complete hearing transcript with all of the witness testimony. After completing her review, the Executive Officer notified Ms. Story by letter dated December 9, 2010, that the termination decision would be upheld. This letter constitutes AOC's final agency order.

Ms. Story filed a Petition for Review of AOC's termination of her employment in Franklin Circuit Court. In this petition, Ms. Story asked the circuit court to reverse AOC's final order and to reinstate her to her former position with back pay and all attendant benefits. Ms. Story contended that the decision to terminate her employment was in excess of AOC's statutory authority, not supported by substantial evidence, arbitrary and capricious, and/or abuse of discretion, supported by false testimony, and an infringement on her First Amendment rights to free speech and association in connection with her communications with Judge Adams.

On October 24, 2012, the circuit court issued an Opinion and Order reversing AOC's decision to terminate Ms. Story's employment and remanding the matter with specific direction that Ms. Story be reinstated to the CDW position, with back pay and benefits. The court held that AOC's reasoning for Ms. Story's termination was unsupported by substantial evidence, the decision to terminate her employment was arbitrary and capricious in light of Ms. Story's record as a CDW,

and Ms. Story had not been provided with sufficient notice of her right to appeal the prior disciplinary actions or the Board's recommended decision.

AOC contends that in its opinion, the circuit court determined that AOC had concluded that it did not have supervisory responsibility and control over CDWs, a determination that AOC alleges was outside the court's review, contrary to statutory law, and never questioned by Ms. Story in the first place. AOC argues that the circuit court looked well outside of the record, presumably to support its determination that Ms. Story had received insufficient notice of her appeal rights relating to the prior disciplinary actions, to find that certain of the appeal procedures in Section 8 of the Kentucky Court of Justice Personnel Policies violated Kentucky Revised Statutes (KRS) 13B.110 and, further, that those procedures were unconstitutional under Sections 2 and 3 of the Kentucky Constitution.

On November 5, 2012, AOC moved the circuit court for post-judgment relief. AOC argued that the circuit court failed to confine its review to the administrative record as explicitly required by KRS 13B.150. In addition, it argued that the circuit court impermissibly substituted its judgment for AOC's on the issue of whether Ms. Story's conduct warranted termination. Finally, AOC sought to demonstrate that the circuit court's rulings in connection with the constitutionality of certain personnel policies fell squarely outside the scope of a circuit court's jurisdiction and authority pursuant to *Ex Parte Farley*, 570 S.W.2d 617 (Ky. 1978), and Kentucky Supreme Court Rule (SCR) 1.010.

After oral argument on AOC's Kentucky Rules of Civil Procedure (CR) 59 motion, the circuit court issued an order on post-judgment motions granting AOC's motion in part by vacating the portions of the opinion that held certain sections of the Kentucky Court of Justice Personnel Policies to be in violation of KRS 13B.110 and Sections 2 and 3 of the Kentucky Constitution. However, the court denied the remainder of AOC's motion and added an instruction that Ms. Story's reinstatement must occur within thirty days. This appeal now follows.

On appeal, AOC argues that this Court should reverse the circuit court's opinion and reinstate Ms. Story's termination. AOC contends that the circuit court acted wholly outside the scope of its limited appellate jurisdiction by failing to confine its review to the administrative record, by improperly substituting its judgment for AOC's as to the termination of Ms. Story's employment, and by ordering Ms. Story to be reinstated with back pay and benefits within thirty days. As to all of these issues, the appellants seek reversal of the circuit court's October 24, 2012, opinion, as partially upheld by its February 28, 2013, order.

“As an appellate court, we stand in the shoes of the circuit court and review the Board's decision for arbitrariness.” *Martin County Home Health Care v. Cabinet for Health and Family Services*, 214 S.W.3d 324, 326 (Ky. App. 2007) (internal citation omitted). KRS 13B.150 provides that “[r]eview of a final order shall be conducted by the court without a jury and shall be confined to the

record...” and that the reviewing court “shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.” Notably, “[t]he position of the [reviewing] court in administrative matters is one of review, not of reinterpretation.” *Commonwealth, Dept. of Education v. Commonwealth, Kentucky Unemployment Ins. Comm’n*, 798 S.W.2d 464, 467 (Ky. App. 1990).

“The findings of fact of an administrative agency which are supported by substantial evidence of probative value must be accepted as binding by the reviewing court.” *Kosmos Cement Co. v. Haney*, 698 S.W.2d 819, 829 (Ky. 1985).

The term “substantial evidence” means “evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men.” *Smyzer v. B.F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971).

AOC argues that the circuit court improperly extended its review and analysis far beyond the scope of its limited appellate jurisdiction by failing to accept AOC’s factual findings that were grounded in substantial evidence. AOC’s final agency order adopted the finding of the Board that “Ms. Story did not follow the directive of her supervisor, Ms. Thompson, to keep confidential an email from her about using pre-stamped forms and related materials. Ms. Story shared the content of the email with Judge Adams.” AOC argues that instead, the circuit court re-cast the facts and found that Ms. Story merely offered a “truthful and forthcoming answer to the direct questioning of a District Judge.”

A careful review of the transcript of the hearing and the record in this case reveals that the Board’s decision was supported by substantial evidence. Ms.

Story confirmed that she received an email that instructed her specifically not to discuss the information with anyone. Ms. Story directly testified that the email bothered her and that she felt like she needed to share the information with Judge Adams. There was no testimony whatsoever that Judge Adams asked her about the email, or that her disclosures to him were in response to his questions. Further, Rebecca Haddix and Marissa Gray, the two other CDWs, testified that they received the email and kept the information confidential. Ms. Haddix testified that, after the email arrived, Ms. Story nonetheless said she was going to see Judge Adams to discuss the information. Judge Adams himself testified that it was Ms. Story who came to him and said she wanted to discuss something with him, so they went into his private conference room where Ms. Story told him about the email's contents. Ms. Haddix testified that she later observed Story print out a copy of the email, hand it to Judge Adams, and discuss the email with him.

Given this testimony, we simply cannot hold that AOC's determination that Ms. Story discussed the email with Judge Adams after specific instruction not to, was against the weight of the evidence. Furthermore, the circuit court's conclusion that Story merely offered a "truthful and forthcoming answer to the questioning of a District Judge" is not supported by the record. Nothing in the testimony of any of the witnesses indicates that Judge Adams questioned Ms. Story about the contents of the email; instead, all of the testimony indicates that Ms. Story went to Judge Adams and confided in him.

Next, AOC argues that the circuit court's conclusion that "ultimate responsibility for the 'court-designated worker' policies, by law, must reside in the duly elected member of the judiciary who is responsible to the public for the discharge of those public duties in the exercise of jurisdiction over juvenile matters" was in error. AOC adopted the Board's factual finding that "CDWs are AOC employees and must follow the directives of their supervisors, Court of Justice Personnel Policies and CDW policies and procedures."

A review of the record and the testimony at the administrative hearing does not provide any support for the circuit court's finding. Mr. Yewell, Ms. Thompson's supervisor, testified specifically that "the Court Designated Worker Program works for the Administrative Office of the Courts in regards to business, there are certain business things that are necessary to remain in the office." Ms. Thompson testified that, at all times, Ms. Story was under her supervision and further confirmed that Judge Adams never completed any performance reviews of Ms. Story or supervised her in any way.

In its order, the circuit court found that the directive from Ms. Thompson to keep the email confidential was inappropriate and contrary to KRS 605.030, to the extent that it is construed as a directive to keep this information confidential from the Judge. Our review of KRS 605.030 indicates that CDWs work as part of AOC at the discretion of the judge. In particular, KRS 605.030(2) states, "Upon the filing of a petition which initiates a formal court action in the interest of the child, the court-designated worker's involvement, with the exception

of the activities defined in subsection (1)(i) of this section, shall cease.” This Court does not note anything in KRS 605.030 that indicates that a CDW is authorized to converse with a judge about a policy her supervisor intends to discuss with the judge in direct violation of her supervisor’s instructions regarding such a policy. Instead, the statutory scheme and the record in this case indicates that AOC seeks to work positively and respectfully with the judiciary, but the judges have never, and did not during Story’s tenure, supervise CDWs. Based upon the record, AOC’s factual finding in this regard was binding and should have been upheld by the circuit court.

Finally, AOC argues that the circuit court refused to accept its finding that Ms. Story was formally disciplined three times in less than a year starting in November 2009. The record indicates that prior to Story’s termination, she had been placed on administrative leave and received a written reprimand for her failure to properly interview a victim and the victim’s parents prior to determining how to proceed in a sexual abuse case. The circuit court stated, “prior disciplinary actions all involve administrative matters that appear to be minor, that reflect an on-going personal friction between Ms. Story and her immediate supervisor.”

To the contrary, the testimony and evidence presented at the administrative hearing demonstrate AOC’s finding to be thoroughly supported, and establish that the disciplinary actions related to infractions by Ms. Story were anything but merely administrative. Both Ms. Thompson and Mr. Yewell testified in detail about Ms. Story’s prior discipline. Ms. Story was disciplined for

falsifying documents, for not following proper custody procedures, for failing to monitor diversion cases, for failing to obtain consent for diversion recommendations, and for giving a media interview without permission. A review of the record indicates that Ms. Story's infractions were more than mere administrative errors. As AOC's finding regarding Ms. Story's prior disciplinary actions was supported by substantial evidence of record, it was binding on the circuit court.

Given the substantial evidence of probative value supporting AOC's termination of Ms. Story, we agree with AOC that the circuit court improperly substituted its judgment for AOC's. Absent evidence that the Board or the Executive Officer's findings were arbitrary, this is impermissible under KRS 13B.150 and Kentucky case law. Accordingly, we reverse the February 28, 2013, order of the Franklin Circuit Court and remand this matter for proceedings consistent with this opinion.

MOORE, JUDGE, CONCURS.

MAZE, JUDGE, DISSENTS WITH SEPARATE OPINION

MAZE, JUDGE, DISSENTING: The majority makes a strong argument that the circuit court overstepped the proper scope of judicial review by making its own findings concerning the circumstances surrounding Mary Story's termination as a Court Designated Worker (CDW). In most cases, I would agree that the decisions of administrative agencies are entitled to considerable deference. However, I find the circumstances surrounding Story's termination to be so

troubling that the circuit court properly declined to afford such deference to the Board's decision in this case.

On August 10, 2010, Story's supervisor, Bridgett Thompson, sent out an e-mail directing that Christian County CDWs no longer use forms pre-stamped with a judge's signature or sign forms or orders at a judge's direction. Apparently, Thompson initiated this change in policy without first discussing it with Christian County District Judge Jim Adams. The e-mail further advised CDWs not to share this information with anyone. Nevertheless, Story went to Judge Adams and told him about the e-mail.

I fully agree with the circuit court that Thompson's email placed CDW's in an untenable dilemma; either disregarding the directives of a presiding judge or complying with the directives of their supervisor. Furthermore, as the circuit court pointed out, Thompson admitted that she had ongoing disagreements with Judge Adams about his policies in juvenile court and his use of CDWs. Notwithstanding the merits of that dispute, I have no tolerance for Thompson's insistence that this action be kept secret from the presiding judge, even if only for a brief period of time. Any change in policy concerning the use of pre-stamped forms should have been presented to Judge Adams before being implemented. Furthermore, like the circuit court, I am inclined to believe that the complaints against Story were primarily motivated by Thompson's perception that Story was more loyal to Judge Adams than to her.

Finally, I recognize that Story failed to appeal from the determinations made in her prior disciplinary actions. Nevertheless, the circuit court makes a valid observation that those prior infractions were comparatively minor. Moreover, most of that previous conduct reflected the ongoing disagreements between Thompson and Judge Adams concerning the proper use of CDWs in court. And while AOC seeks to disparage Story's performance of her duties, the Board recognized that Story was an excellent employee who frequently went beyond the call of duty. I find it regrettable that AOC has chosen to lose the services of an employee such as Story, particularly in circumstances which seem so petty and vindictive. In my opinion, this personnel action should have been avoided at all costs.

Accordingly, I dissent.

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