

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001496-MR

SHAUN KLASERNER

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE ANTHONY W. FROHLICH, JUDGE
ACTION NO. 12-CI-02195

BURLINGTON FIRE PROTECTION
DISTRICT

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: JONES, KRAMER, AND D. LAMBERT, JUDGES.

KRAMER, JUDGE: Shaun Klaserner filed an action in Boone Circuit Court pursuant to Kentucky Revised Statute (KRS) 75.140 to contest the termination of his employment with the Burlington Fire Protection District (“the District”). The circuit court affirmed his termination and Klaserner now appeals to this Court.

Upon review, we likewise affirm.

By way of background, Klaserner began working for the District in 1990 and ultimately achieved the position of Assistant Fire Chief. In his position as Assistant Fire Chief, Klaserner mentored younger firefighters. Travis Hinkle began working for the District in 2009. Klaserner mentored Hinkle and they began a professional relationship. As their relationship evolved from professional to personal, however, Klaserner began to turn the topics of their conversations to sexual subjects. Ultimately, Klaserner was placed on what the Chief of the District characterized as “administrative detail” on June 11, 2012, shortly after Hinkle alleged in a formal complaint that, after he had rejected two sexual offers from Klaserner, Klaserner had subjected him to a hostile work environment. On October 8, 2012, the District eventually terminated Klaserner’s employment based upon the conduct alleged in Hinkle’s complaint and the results of the District’s investigation.

Klaserner does not contest that substantial evidence supports the Board’s decision to terminate his employment. Instead, Klaserner asserts a procedural argument based upon KRS 75.130(5), which provides:

When the board of trustees or the chief of the fire protection district has probable cause to believe a member or employee of a fire protection district has been guilty of conduct justifying dismissal or punishment, the board or the chief may suspend the member or employee from duty or from both pay and duty, pending trial, and the member or employee shall not be placed on duty, or allowed pay, until the charges are heard. If the member is suspended, there shall be no continuances granted without the consent of the member or employee accused. If the member suspended is a paid firefighter or an

employee, the hearing on the charges shall be conducted within fourteen (14) days after the charges have been preferred by the chairman of the board of trustees.

Boiled down, Klaserner asserts that he was suspended on June 11, 2012; that he was consequently entitled to a hearing before the Board regarding his charges within 14 days of that date pursuant to KRS 75.130(5); and, that because he was not given such a hearing within fourteen days, his termination was invalid.

The primary flaw in Klaserner's argument, however, is a misunderstanding of what qualifies as a "suspension" under KRS 75.130. "Suspension" has been statutorily defined in KRS 75.100(9) to mean "the separation of an employee from the service for a temporary or fixed period of time, by his appointing authority, *as a disciplinary measure.*" (Emphasis added.) In turn, KRS 75.130 does not allow for any "disciplinary measure" to precede either (1) the preferment of charges and a hearing;¹ or (2) a determination of probable cause, by either the chief of the fire protection district or the Board, "to believe a member or employee of a fire protection district has been guilty of conduct justifying dismissal or punishment[.]"²

KRS 75.130 does, however, contemplate that an "inquiry or investigation" may precede a determination of whether probable cause exists and,

¹ See KRS 75.130(1), which provides:

Except as provided in subsection (5) of this section no member or employee of a fire protection district shall be reprimanded, dismissed, suspended, or reduced in grade or pay for any reason except inefficiency, misconduct, insubordination, or violation of law or of the rules adopted by the board of trustees of the fire protection district, and only after charges are preferred and a hearing conducted as provided in this section.

² See KRS 75.130(5), *supra*.

thus, whether disciplinary measures are warranted. *See* KRS 75.130(2).³ And, the Chief testified that an ongoing investigation, rather than a disciplinary objective, was the purpose of Klaserner's June 11, 2012 separation from employment:

CHIEF: The action that I took with Assistant Chief Klaserner was based on the allegations that were raised, it was obvious that with this information, there were lots of people involved in our department that he deals with regularly. And the action that I took was the following Monday—the complaint originally came in verbally on a Friday. The following Monday mid-day the decision was made that I assigned Assistant Chief Klaserner to basically administrative detail. I said, “you’ll receive full pay but you do not need to be at the firehouse, you do not need to be making responses and you’re not to have any contact with any personnel of this District so that we can protect the integrity of the investigation to find out where fact and fiction is on.”

COUNSEL: Yes, sir. Was this a punishment?

CHIEF: No.

COUNSEL: Was this a suspension?

CHIEF: No.

³ In full, KRS 75.130(2) provides:

Any person may file charges against a member or employee of a fire protection district by filing them with the secretary of the board of trustees and by delivering or mailing the charges to the principal fire house in the fire protection district. The secretary shall immediately communicate the charges to the board of trustees by mailing or delivering a copy of the charges to each member of the board of trustees within seven (7) days of receipt of the charges at the principal fire house. The chairman of the board of trustees shall, after conducting or having conducted any inquiry or investigation which may be necessary, determine if probable cause appears. The chairman shall prefer charges to the board of trustees against any member or employee against whom probable cause exists, of conduct justifying the dismissal or punishment of the member or employee. If probable cause does not exist, the chairman shall dismiss the charges. All charges shall be written and shall set out clearly the charges made. The person filing the charges may withdraw them at any time prior to the conclusion of the hearing. The charges may then be dismissed.

COUNSEL: And did he continue to receive full pay?

CHIEF: Yes.

COUNSEL: Did you instruct him to keep himself available?

CHIEF: Yes.

COUNSEL: What did you instruct him with regards to his department issued phone?

CHIEF: The statement that I made was he is not under house arrest or anything along those lines, to keep his District issued phone with him so that if for any reason I needed to reach him, that I or yourself, Mike McKinney, would be able to reach him. If you had any questions as the investigation proceeded, that we would have access to him, but that he is not to be here at the fire station or interacting with any fire personnel.

COUNSEL: Well, importantly, did you leave the door open for him in the event you needed him to come back here in some sort of service while he was on his paid administrative detail?

CHIEF: The only option for that was he was to have access to either yourself as you've conducted the initial phase of the investigation or myself as his immediate supervisor. Those were the only two personnel that he was to talk with.

COUNSEL: Did you place anything in his personnel file with regards to this paid administrative leave?

CHIEF: No.

COUNSEL: So would it be accurate to state that if anybody were to review or see his personnel file with regards to the paid administrative leave, as far as the file is concerned, nothing exists?

CHIEF: That is correct.

COUNSEL: So would it be further accurate to state that his status as an employee hadn't changed?

CHIEF: That is correct.

Taken objectively, what occurred on June 11, 2012, was not a "suspension" within the meaning of KRS 75.100(9). Rather, in the words of the Kentucky Attorney General,

The suspension addressed here is one imposed upon an employee by the governmental unit *prior to a determination of an employee's culpability* in connection with some matter or matters for which an employee might be penalized. Indeed, such culpability might not be present. Such a suspension is understood to be levied for a limited period of time, with the employee remaining subject to immediate reinstatement or recall to active service during the period. Such suspension may be viewed as necessary to assure public confidence in governmental oversight of the actions of governmental employees, when an event or events raise questions, or, as necessary to assure that the presence of an employee will not interfere with the conduct of an inquiry.

Kentucky Attorney General Opinion (Ky. OAG) 96-3.⁴

Here, the written policy of the Burlington Fire Protection District dealing with matters of sexual harassment required an immediate investigation of Hinkle's complaint. KRS 75.180(2), which broadly empowered the Chief to "direct and control the operation of the fire department and the control of the members in the discharge of their duties," certainly authorized the Chief to separate Klaserner from the service to assure that his presence would not interfere

⁴ While we are not bound by opinions of the Attorney General, this Court can afford them great weight. *Louisville Metro Dept. of Corrections v. King*, 258 S.W.3d 419, 421–22 (Ky. App. 2007) (citation omitted).

with the conduct of that investigation. Moreover, there is nothing of record demonstrating that, prior to July 27, 2012 (*i.e.*, when the Chief ultimately filed disciplinary charges against Klaserner), the Chief or the Board determined there was probable cause to believe Klaserner was guilty of conduct justifying dismissal or punishment. As such, at least until July 27, 2012, there is no support for Klaserner's contention that his "administrative detail" qualified as a disciplinary measure and, thus, satisfied the statutory definition of a "suspension."

As an aside, we disagree with the District's contention that Klaserner was not *at all* suspended within the meaning of KRS 75.100(9). Any investigation that had been conducted—and thus any non-disciplinary suspension based upon it—effectively ended when the Chief made a probable cause determination by filing disciplinary charges against Klaserner on July 27, 2012. Afterward, Klaserner remained separated from the service and, in every objective sense, was then subject to the disciplinary suspension described in KRS 75.130(5). Because the chairman of the board of trustees preferred his charges on August 1, 2012, there is also little doubt that the 14-day period for conducting a hearing on Klaserner's charges started as of that date. *See* KRS 75.130(5).

Nevertheless, the fact that Klaserner's hearing took place on September 10, 2012, rather than August 15, 2012, does not warrant invalidating Klaserner's dismissal from the fire protection district. Regardless of whether the statutory 14-day period is considered mandatory, KRS 75.130(5) provides that it may be continued with "the consent of the member or employee accused." Here,

the administrative record does not demonstrate Klaserner voiced any objection to having his hearing on September 10, 2012. To the contrary, the record supports that Klaserner desired a hearing date even *later* than September 10, 2012. By way of illustration, his counsel stated at the beginning of the September 10, 2012 hearing: “I do need to say for the record that we had put on—we had made a request for a continuance of this hearing and that request was not granted. We wanted to go at least two weeks and it was not granted.” When the September 10, 2012 hearing did not provide enough time for Klaserner to introduce all of his proof, Klaserner agreed to continue it until September 23, 2012. And, when the September 23, 2012 hearing still did not provide enough time, Klaserner then agreed to continue the hearing until October 8, 2012.

In light of the foregoing, the Boone Circuit Court is AFFIRMED.

D. LAMBERT, JUDGE, CONCURS.

JONES, JUDGE, DISSENTS.

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