

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000333-MR

KEITH B. HUNTER

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NO. 01-CI-000019

KENTUCKY LOTTERY CORPORATION

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; BARBER AND COMBS, JUDGES.

EMBERTON, CHIEF JUDGE. The appellant, Keith B. Hunter, is an attorney who represents various former Kentucky Lottery Corporation employees in their employment action claims. On December 18, 2000, Mr. Hunter filed two open records requests with the Lottery that were denied. Mr. Hunter subsequently filed an action against the Lottery pursuant to KRS¹ 61.870, et seq., the Open Records Act. The issue presented is whether the trial court abused its discretion when it failed to find the

¹ Kentucky Revised Statutes.

Lottery's denial of the open records request was willful and further when it denied attorney's fees to Mr. Hunter.

In response to the action filed by Mr. Hunter, the Lottery claimed that he had already requested the same documents in discovery in the employment cases and that it had either produced the documents or objected to their discovery. Arguing that Mr. Hunter could not circumvent the rules of discovery by use of the Open Records Act, it filed for summary judgment. Relying on Kentucky Lottery Corporation v. Stewart,² rendered after the denial of Mr. Hunter's request, the trial court found that the Lottery's denial was wrongful and ordered inspection. After the Lottery produced the documents requested, Mr. Hunter asked the court to award damages, attorney's fees, and costs alleging that the Lottery's denial was willful and intentional. Following a hearing, the trial court denied Mr. Hunter's motion.

In Stewart, supra, we interpreted KRS 61.878(1) stating:

We disagree with the Lottery's interpretation of the statute. That statute does not exempt or exclude all records from the open records disclosure, in favor of discovery in litigation or anticipated litigation cases, but limits the release of records specifically listed in KRS 61.878(1) to those records which parties can obtain through a court order. The gist of this wording is not to terminate a person's right to use an open records request during

² Ky. App., 41 S.W.3d 860 (2001).

litigation, but to limit a court on an open records request on excluded records, to those records that could be authorized through a court order on a request for discovery under the Rules of Civil Procedure governing pretrial discovery. Any other interpretation would allow a nonparty (like the press, which also made a request in this case) to obtain records not exempted, while a party before an administrative agency could not obtain these same nonexempted records because administrative agencies are generally not subject to pretrial discovery. This would bring about an absurd or unreasonable result which cannot be fostered by the courts. "[T]he Legislature clearly intended to grant any member of the public as much right to access to information as the next."³ (Emphasis original) (Footnotes omitted).

There is no allegation made that any of Mr. Hunter's requests included records exempted by KRS 61.878 whereby under Stewart, the Lottery's denial was unlawful. The Lottery does not contend otherwise.

Under the Open Records Act a successful party against any agency alleging a violation of the Act "may, upon a finding that the records were willfully withheld," be awarded costs, including reasonable attorney's fees.⁴ Mere wrongful conduct by the agency is not sufficient to award costs and attorney's fees.

³ Id. at 863.

⁴ KRS 61.882(5).

"Willful" requires some knowledge of the wrongfulness of the denial.⁵

As the trial court noted until Stewart, supra, there had been no judicial authority regarding the rights of litigants to a civil action seeking inspection under the Open Records Act. Mr. Hunter points out, however, that as early as 1982, attorney general's opinions expressed the view eventually adopted in Stewart. In Stewart, we also recognized the existence of the attorney general's opinions; however, attorney general's opinions, while persuasive, are not binding authority on the courts. As stated in York v. Commonwealth:⁶

Attorney general opinions are usually sought by state officials concerning their official duties, since the attorney general is the legal advisor of all the "state officers, departments, commissions, and agencies" of the Commonwealth. The government officials are expected to abide by the opinion until a court decrees otherwise or the legislature changes the law. An attorney general's opinion is highly persuasive, but not binding on the recipient. (Citations omitted).

Mr. Hunter contends that despite this general rule, attorney general's opinions in Open Records Act cases have the force of law, and therefore, the Lottery was bound to follow those decisions. KRS 61.880(5)(b) provides:

⁵ See Huddleston v. Hughes, Ky. App., 843 S.W.2d 901 (1992).

⁶ Ky. App., 815 S.W.2d 415, 417 (1991).

If an appeal is not filed within the thirty (30) day time limit, the Attorney General's decision shall have the force and effect of law and shall be enforceable in the Circuit Court of the county where the public agency has its principal place of business or the Circuit Court of the county where the public record is maintained.

We agree with Mr. Hunter that attorney general's opinions in such cases are binding on the parties and enforceable in court. In other words, unless appealed, the opinion is the same as a lower court decision. The statute, however, does not make such opinions binding on the courts. Although clearly the opinion, if not appealed, binds the agency to the particular case addressed, the opinion is not binding judicial precedent.

With due regard to KRS 61.880 and the persuasive authority of attorney general's opinions, we are not willing to hold, as a matter of law, that the Lottery's denial of Mr. Hunter's request was willful. Moreover, contrary to Mr. Hunter's assertion, prior to Stewart, the attorney general had not conclusively resolved the issue now presented. In Stewart, the attorney general "sided with the agency" and we noted that it was "a case of first impression, thus it [the Lottery] had a legitimate argument for withholding records, and even the Attorney General thought the Lottery's actions were justified."⁷

⁷ Stewart, supra, at 865.

The award of costs and attorney's fees in Open Records Act cases is controlled by statute and where judgment is rendered against the Commonwealth, can be imposed only to the extent permitted by law.⁸ Even if the trial court finds that agency actions are willful it may, in its discretion, deny attorney's fees and costs. Under the statute, the trial court's discretion is broad. We find no abuse of that discretion.

The judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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⁸ Lang v. Sapp, Ky. App., 71 S.W.3d 133 (2002)(overruling Blair v. Hendricks, 30 S.W.3d 802 (2000)).