

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000766-MR

LISA ADKINS

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 00-CI-00952

JUSTICE CABINET,
DEPARTMENT OF CORRECTIONS; AND
KENTUCKY PERSONNEL BOARD

APPELLEES

OPINION

REVERSING AND REMANDING

** ** *

BEFORE: BARBER, DYCHE AND TACKETT, JUDGES.

BARBER, JUDGE: The Appellant, Lisa Adkins ("Adkins"), seeks review of an order of dismissal of the Franklin Circuit Court. The Appellees are the Justice Cabinet/Department of Corrections and the Kentucky Personnel Board. Adkins appealed to the circuit court from a final order of the Personnel Board. The circuit court dismissed on ground that the Personnel Board, an indispensable party, was never served with summons. We reverse.

On August 30, 1999, Adkins filed an appeal with the Personnel Board, alleging that she "was terminated as a correctional officer during her probationary period because of her gender and without cause." On July 18, 2000, the Personnel Board issued a final order adopting the recommended order of the hearing officer, denying her appeal. The final order states that it may be appealed to the Franklin Circuit Court in accordance with KRS 18A.100 and 13B.140

On August 17, 2000, Adkins filed a "NOTICE OF APPEAL FROM FINAL ORDER OF KENTUCKY PERSONNEL BOARD," in the Franklin Circuit Court. The notice states: "The Personnel Board is added as an indispensable party to this Appeal. The Board is requested to transmit and certify the official record to the Circuit Court pursuant to KRS 1313.140(3)[sic]." The certificate of service reflects that copies of the notice were served by U.S. mail on August 17, 2000, upon Hon. Mark A. Sipek, attorney for Corrections,¹ and upon Mr. Hansen Williams, Kentucky Personnel Board.

The circuit court's docket sheet reflects that summonses were issued on August 17, 2000, to the Justice Cabinet, Department of Corrections, and to the Kentucky Personnel Board; however, those summonses were never served. On

¹ Mr. Sipek is now the attorney for the Appellee, Kentucky Personnel Board.

August 22, 2000, the record from the Personnel Board was transferred and filed, accompanied by a cover letter addressed to the circuit clerk.

On September 8, 2000, the Justice Cabinet filed an answer. On April 3, 2001, Adkins filed a motion requesting that the court review and reverse the Personnel Board's final order. On May 29, 2001, the Personnel Board filed a motion to dismiss, on ground that it was an indispensable party "or at least a party necessary to be named to perfect an appeal of an administrative action." The Personnel Board maintained that it had never been served with summons and that the 30-day time period for filing the action, under KRS 13B.140 had long since expired. Adkins filed a response, contending that KRS 13B.140(1) does not require service of summons, and that the Board had effectively entered an appearance, by certifying the record on appeal.

On January 29, 2002, the Franklin Circuit Court entered an order of dismissal. The order provides, in relevant part:

Adkins argues that there exists a conflict between the Kentucky Civil Rules of Procedure and KRS 13B.140. CR 1(2) states that when the procedural requirements of a statute are inconsistent with the Civil Rules the statutory procedures will prevail. Adkins argues that KRS 13B.140 requires only a petition to be served upon the appropriate parties while CR 3.01 requires service of summons in order to initiate

an action. Therefore, she argues they are inconsistent.

Adkins' argument on this point is imprecise logic. There is no inconsistency between the two provisions. KRS 13B.140 states in part, "copies of the petition shall be served by the petitioner on the agency and all parties of record." There is nothing in KRS 13B.140 that is inconsistent or would override the Civil Rules as they apply with regards to service of summons. KRS 13B.140 is silent as to service of summons. KRS 13B.140 is also silent as to the payment of filing fees and signing of pleadings; however these clearly apply. Silence does not create an inconsistency.

Furthermore, this type of appeal is an original action filed in the Franklin County Circuit Court. *Commonwealth Transportation Cabinet v. City of Campbellsville*, Ky. App., 740 S.W.2d 162 (1987). The Board is by statute an indispensable party to such action. *Hammond v. Department for Human Resources*, Ky. App., 652 S.W.2d 91 (1983). Since the Board is an indispensable party, it is also necessary that the Board be served with summons to initiate an action against them. CR 3.01. Strict compliance is required where the legislature has statutorily granted the right of appeal from an action of an administrative agency. See *Board of Adjustments of City of Richmond v. Flood*, Ky., 531 S.W.2d 1 (1978). No inconsistency exists between the statute and the civil rules in this case. The statute has been interpreted by the Courts to include the Civil Rules through such decisions as *Hammond*. 652 S.W.2d 91. Adkins did not properly commence the action against the Board. Accordingly, they must be dismissed as a party.

The circuit court held that the Personnel Board did not waive service of summons by certifying the record on appeal; further, that Adkins could not amend service of summons under CR

4.16, where summons was never served. Accordingly, the circuit court granted the motion to dismiss the Personnel Board.

On February 21, 2002, the Justice Cabinet/Department of Corrections filed a renewed motion to dismiss, on ground that the Personnel Board was an indispensable party to the appeal. On May 20, 2002, the circuit court granted the motion and dismissed the appeal.

On April 11, 2002, Adkins filed a notice of appeal to this Court. On appeal, Adkins asserts that:

(A) THE CIRCUIT COURT ERRED BY FINDING THE KENTUCKY PERSONNEL BOARD AS AN INDISPENSABLE PARTY TO THE APPEAL UNDER KRS 18A.100 AND 13B.140. THE BOARD'S ONLY DUTY IS TO CERTIFY THE RECORD, A STATUTORY REQUIREMENT.

(B) THE CIRCUIT COURT ERRED BY APPLYING THE CR TO PERFECTING AN APPEAL UNDER KRS 13B.140 AND KRS 18A.100.

(C) THE SUPREME COURT HAS ADOPTED A SUBSTANTIVE [sic] COMPLIANCE STANDARD TOWARDS PERFECTION OF APPEALS THAT PERMITS APPELLANT TO HAVE HER APPEAL HEARD ON THE MERITS.

First, we address the argument that the circuit court erred in applying the Kentucky Rules of Civil Procedure. CR 1 is entitled "Title and scope of rules." Subsection (2) provides:

These Rules govern procedure and practice in all actions of a civil nature in the Court of Justice except for special statutory proceedings, in which the procedural requirements of the statute shall prevail over any inconsistent procedures set forth in the Rules. Regulations and manuals published by the Administrative Office of the

Courts upon authorization of the Supreme Court relating to internal policy and administration within the Court of Justice shall have the same effect as if incorporated in the Rules. (Emphasis added).

KRS 18A.100 provides:

(1) Any final order of the board either upholding or invalidating the dismissal, demotion, suspension, or other penalization of a classified or an unclassified employee may be appealed either by the employee or by the appointing authority.

(2) The party aggrieved may appeal a final order by filing a petition with the clerk of the Franklin Circuit Court in accordance with KRS Chapter 13B. (Emphasis added).

KRS 13B.140 is entitled "Judicial review of final order" and provides:

(1) All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.

Adkins argues that the civil rules do not apply to an appeal from an administrative order to the circuit court. We

disagree. KRS 23A.010(4) provides that "[t]he Circuit Court may be authorized by law to review the actions or decisions of administrative agencies, special districts or boards. Such review shall not constitute an appeal but an original action." CR 3.01 provides "A civil action is commenced by the filing of a complaint with the court and the issuance of summons in good faith."

We agree with the circuit court that there is no inconsistency between the provisions of KRS 13B.140, which requires filing of a petition in circuit court, and CR 3.01 which provides that "[a] civil action is commenced by the filing of a complaint with the court and the issuance of summons in good faith." ²

The trial court did not believe the Personnel Board had waived the defense of insufficiency of service of process, because CR 12.08(1) "does not state that any other participation in the case, such as certifying the record, will waive the defense." However, CR 12.08(1) does not enumerate the ways in

² See for example KRS 243.560, dealing with alcoholic beverage licenses, which contemplates service by summons although KRS 13B.140 is silent on the issue. Subsection (2) provides that "The person aggrieved by a final order may file a petition in . . . the Franklin Circuit Court **in accordance with KRS Chapter 13B.**" Subsection (3) provides that "The board and the licensee or applicant shall be necessary parties to any appeals. . . . [T]he board, **when served with the summons,** . . . shall appear and defend the action of the board in refusing, revoking, or suspending the license in question. (Emphasis added).

which a defendant, by its conduct, may be estopped from objecting to a defect in service; rather, the rule specifies the defenses that are waived if not properly presented.

As the circuit court noted, this is a case where the legislature has "statutorily granted" the right of appeal. KRS 13B.140(b) mandates that "[w]ithin twenty (20) days **after** service of the petition, . . . the agency shall transmit to the reviewing court the original or certified copy of the official record of the proceeding under review." Here, the Personnel Board complied with the statutory mandate and transmitted the certified record to the Clerk of the Franklin Circuit Court by letter dated August 21, 2000. The letter references both the caption of the circuit court case and the civil action number, "Lisa Adkins vs. Justice Cabinet Department of Corrections and Personnel Board Civil Action No. 00-CI-00952." The letter states "Pursuant to KRS 13B.140(3), please find attached the information required to be submitted by this office as it relates to the above-referenced case number." The letter is signed by R. Hanson Williams, Executive Director of the Kentucky Personnel Board, and is copied to Hon. Andrew J. Ruzicho [Adkins' counsel] and Hon. Mark A. Sipek [then counsel for Justice Cabinet/Corrections].

The Personnel Board's position that the appeal should be dismissed for failure of service of summons is inconsistent

with its conduct. By transmitting the record, the Personnel Board recognized that the appeal was pending in the circuit court. The Personnel Board acted like it was subject to the court's jurisdiction -- it had no duty to do anything unless it had been served. Service *by summons* is implicit in KRS 13B.140, because appeals to the circuit court are treated as original actions to which the civil rules apply, where not in conflict.

It is fundamental that one should not be permitted to take two inconsistent positions in a proceeding, to the prejudice of another.³ Under the circumstances, we hold that the Personnel Board waived the right to object to personal jurisdiction. We reverse the order of dismissal of the Franklin Circuit Court and remand for further proceedings as necessary to a determination on the merits.

TACKETT, JUDGE, CONCURS.

DYCHE, JUDGE, DISSENTS.

BRIEFS FOR APPELLANT:

Andrew J. Ruzicho
Lexington, Kentucky

BRIEF FOR APPELLEE, KENTUCKY
PERSONNEL BOARD:

Mark A. Sipek
Frankfort, Kentucky

BRIEF FOR APPELLEE, JUSTICE
CABINET, DEPARTMENT OF
CORRECTIONS:

John T. Damron
Frankfort, Kentucky

³ See *Rowe v. Shepherd*, Ky. 283 S.W.2d 188 (1955).