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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000327-MR

JOHN COTTRELL — APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
ACTION NO. 03-CI-00251

CITY OF HILLVIEW AND
CIVIL SERVICE COMMISSION — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, JOHNSON, AND McANULTY, JUDGES.

GUIDUGLI, JUDGE: This is an appeal from the Bullitt Circuit Court's judgment entered January 13, 2004, which upheld the suspension of a police officer because of his inability to possess a firearm due to a Domestic Violence Order entered against him. We affirm.

John Cottrell was hired as a police officer at the Hillview Police Department on May 24, 1999. On February 26, 2001, a Domestic Violence Order (DVO) was entered against

Cottrell with a term of three years. The DVO provides in pertinent part that "pursuant to 18 U.S.C. 922(g), it is a federal violation to purchase, receive or possess a firearm while subject to this order."

The policies and procedures of the Hillview Police Department require that officers be armed at all times and have their badge and identification. The Mayor of Hillview at the time, Leemon Powell, initially suspended Cottrell from active duty on March 3, 2001, because he was unable to carry a firearm. Cottrell was then terminated on July 1, 2001, because there were no positions that would allow him to work without carrying his weapon. Mayor Powell later re-hired Cottrell for "administrative duties" only, which meant he did not have to be armed to perform his duties, on October 21, 2002.

In January 2003, Mayor Jim Eadens took office and on January 9, 2003, wrote a letter suspending Cottrell from duty. The letter provided Cottrell 5 days in which to return all City issued equipment and gave notice that a hearing would be scheduled. A hearing before the Commission was conducted on February 18, 2003. The Commission rendered its decision on February 25, 2003, upholding Mayor Eadens's decision to suspend Cottrell from his position in the Hillview Police Department. Cottrell then petitioned the Bullitt Circuit Court for review of

his suspension and hearing. The circuit court upheld the suspension. This appeal followed.

The standard of de novo review applies in all public employee discharge cases. Crouch v. Jefferson County, 773 S.W.2d 461, 462 (Ky. 1988). Judicial review of administrative action is concerned with the question of arbitrariness. Id. at 464. The reviewing court must review the record, briefs and any other evidence relevant to the narrow issue of arbitrariness in the discharge of the employee. Id. at 462. By "arbitrary," the court means clearly erroneous, and by "clearly erroneous," the court means unsupported by substantial evidence. Kentucky Bd. Of Nursing v. Ward, 890 S.W.2d 641, 642 (Ky.App. 1994).

We have reviewed the record and conclude that the Hillview Civil Service Commission had sufficient evidence to conclude that Mayor Eadens's suspension of Cottrell was not arbitrary.

Cottrell was prohibited from carrying a weapon under 18 U.S.C. 922(g)(8). This section specifically makes it unlawful for any person who is subject to a domestic violence court order to possess in or affecting commerce, any firearm or ammunition. However, 18 U.S.C. 925(a)(1) creates an exception for police officers by stating,

> the provisions of this chapter, except for sections 922(d)(9) and 922(g)(9) and provisions relating to firearms subject to

> the prohibitions of section 922(p), shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof.

Therefore, while 18 U.S.C. 922(g)(8) prohibits all individuals subject to a DVO from possessing a firearm, 18 U.S.C. 925(a)(1) creates an exception for firearms issued by the United States, or any state or agency thereof.

This statute has been challenged in federal court by police officers whose employment has been terminated for their inability to carry a firearm, and has been upheld. Gillespie v. City of Indianapolis, 185 F.3d 693 (7th Cir. 1999). In Gillespie, Jerald Gillespie could no longer carry a firearm because of his misdemeanor conviction of domestic violence and, as a result, lost his job as a police officer. The court in Gillespie specifically stated that there is a separate provision that,

> exempts the state and federal governments from most of the firearms disabilities specified in the statute, thereby allowing members of the armed services and law enforcement agencies who might otherwise be prohibited from carrying firearms to do so in connection with their public responsibilities. 18 U.S.C. § 925(a)(1). However, by its express terms, that provision of the statute does not apply to

> the firearms disability set forth in section 922(g)(9).

Therefore, the police officer, in Gillespie, was prohibited from possessing a firearm because he had been convicted of a domestic violence misdemeanor, which is specifically excluded from the exception that allows members of the armed services and law enforcement agencies to carry a firearm in connection with their public responsibilities.

However, Cottrell has not been convicted of a domestic violence misdemeanor, but rather is subject to a DVO. Unlike being convicted of a domestic violence misdemeanor, being subject to a DVO does not exclude Cottrell from the exemption created by 18 U.S.C. 925(a)(1). Therefore, since he is included in the exemption, as a police officer he may be able to carry a firearm issued by the City.

Even though 18 U.S.C. 925(a)(1) provides an exception to the statute, we agree with the circuit court that Cottrell has not followed the appropriate steps to have the exemption apply to him. The proper step Cottrell should have taken was to move the Warren Family Court that there was a specific exemption to the federal statute which would allow a police officer subject to a DVO to carry a firearm. Cottrell has made no attempt to move the Warren Family Court to amend his DVO and he is, therefore, still subject to a valid court order and the

prohibition contained therein. If Cottrell wants the exemption to apply to him, he must follow the appropriate steps to have his DVO amended based on this exemption.

Even if it is determined that the exception applies to Cottrell, he is permitted only to carry a firearm "issued for the use of" the police department and is not permitted to carry a personal firearm. Since Hillview does not "issue" their police officers firearms the plain language of the exemption may not apply to Cottrell.

The decision of the Hillview Civil Service Commission is not arbitrary because it was based on substantial evidence including the language of the DVO, the fact sheet provided by Bullitt District Court, and the state police department's procedures manual.

The express language of the DVO states that "pursuant to 18 U.S.C. 922(g), it is a federal violation to purchase, receive, or possess a firearm while subject to this order." Regardless of whether the exception should apply to Cottrell as a police officer, the DVO did not make such an exemption and was not amended pursuant to such an exemption. The Mayor, the Civil Service Commission, and the police department appropriately relied on the express language of the DVO since it was, and still is, a valid court order.

Mayor Eadens did not rely solely on the DVO but also had the city attorney, Mark Edison, research whether there was an exception to the statute for police officers. At Edison's request, a fact sheet was provided by the Bullitt District Court on January 3, 2003, explaining the federal law. The fact sheet specifically states that the statute "does not exempt military or law enforcement personnel."

Edison also contacted the state police department to determine how they deal with and interpret federal law. In response, he received an excerpt from its procedures manual, which provides the state police with specific authority to suspend employees for a DVO.

Cottrell also raises several issues regarding whether there being too many persons on the Hillview Civil Service Commission resulted in prejudice to him, whether he was effectively terminated because the suspension could last longer than one year, and whether the misstatement by the circuit court amounts to reversible error. The Court has reviewed each of these issues and finds that none of them has merit.

The number of persons on the Hillview Civil Service Commission did not result in prejudice to Cottrell. Since four of the five members voted to uphold Mayor Eadens's suspension of Cottrell, striking any two of the members would not change the result in Cottrell's favor. Therefore, the wrong number of

persons on the Commission is harmless error and did not result in prejudice to Cottrell.

Cottrell was not effectively terminated simply because it was possible that his suspension could last longer than one year. He was informed that his suspension would end as soon as he took care of the DVO.

The Bullitt Circuit Court's initial review of the Civil Service Commission's findings contained a misstatement regarding whether the exemption was presented during the Hillview Civil Service Commission's hearing. However, the Bullitt Circuit Court again reviewed the transcripts and record, corrected the misstatement, and found that the action of the Commission was not arbitrary.

Cottrell was afforded substantive and procedural due process. The minimum requirements of due process are notice, an opportunity for a hearing appropriate to the nature of the case, and the making of particularized findings of fact for the record. Pangallo v. Ky. Law Enforcement Council, 106 S.W.3d 474, 477 (Ky.App. 2003); citing Cape Publications, Inc. v. Braden, 39 S.W.3d 823, 827 (Ky. 2001). In Pangallo, the Court of Appeals reversed a judgment of the circuit court, which upheld a decision to revoke a police officer's certification without notice of the allegations or an opportunity to be heard. Unlike the police officer in Pangallo, Cottrell was given proper

notice of his suspension and was afforded an opportunity to be heard at a hearing before the Hillview Civil Service Commission.

Cottrell was given notice of his suspension in a letter written by Mayor Eadens dated January 9, 2003, which set forth the reason for his suspension. The letter specifically stated that Cottrell had a DVO issued against him that would limit his ability to perform his duties as a police officer by restricting his ability to possess a firearm. The letter specifically states that since there were no other positions available that would not require the possession of a firearm, he was suspended until the outstanding DVO expires or is overturned. The letter written by Mayor Eadens did everything possible to inform Officer Cottrell that he was suspended from duty, why he was suspended, and what was required to end the suspension.

In addition, the letter also gave notice that there would be a hearing scheduled. It specifically stated that this notice was being forwarded to the Clerk of Civil Service Commission, who would proceed to schedule a hearing. A hearing was scheduled before the Hillview Civil Service Commission and Cottrell was present and was represented by counsel. Finally, the hearing satisfied the final requirement of due process by making particularized findings of fact for the record.

Therefore, since the minimum requirements of due process were met, Cottrell was afforded substantive and procedural due process.

While 18 U.S.C. 922(g)(8) prohibits all individuals subject to a DVO from possessing a firearm, 18 U.S.C. 925(a)(1) creates an exemption for firearms issued to police officers. However, even though 18 U.S.C. 925(a)(1) provides an exception to the statute, Cottrell has not followed the appropriate steps to have the exemption apply to him. Cottrell must move the Warren Family Court to amend his DVO based on this exemption. However, since the Hillview Police Department does not "issue" firearms, the exemption may not benefit Cottrell.

The decision of the Hillview Civil Service Commission was not arbitrary because it was based on substantial evidence, including the express language of the DVO, the Fact Sheet provided by Bullitt District Court, and the state police department's procedures manual.

Finally, Cottrell was given proper notice of his suspension, was afforded an opportunity to be heard, and the hearing made particularized findings of fact for the record. Since the minimum requirements of due process were met, Cottrell was afforded substantive and procedural due process.

For the foregoing reasons the order of the Bullitt Circuit Court is affirmed.

McANULTY, JUDGE, CONCURS IN RESULT ONLY.

JOHNSON, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEES:
Garry Richard Adams, Jr. Thomas E. Clay Mark Richard Lafeir Louisville, KY	Kristie Babbitt Walker Gregory L. Smith Louisville, KY