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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002064-MR

JIMMY ROSS APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 03-CI-00675

COMMONWEALTH OF KENTUCKY,
JUSTICE AND PUBLIC SAFETY CABINET,[1]
DEPARTMENT OF JUVENILE JUSTICE; AND
KENTUCKY PERSONNEL BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MINTON, SCHRODER AND TAYLOR, JUDGES.

SCHRODER, JUDGE: A state merit employee with status appeals a circuit court judgment affirming the Kentucky Personnel Board's dismissal for cause. The severity of disciplinary action is a Board matter that was not excessive in light of its finding of inappropriate behavior.

[1] Formerly the Justice Cabinet.

Jimmy Ross was hired by the Department of Juvenile Justice (D.J.J.) at the Adair Youth Development Center in Columbia, Kentucky, on October 27, 2000, as a Youth Worker I.[2] After training and successful completion of probation, he was promoted to Youth Worker II. K.H. was a 17-year-old female resident of the Adair Youth Development Center from October 5, 2001, to December 27, 2001 (while Ross was on staff). After K.H. was transferred from the facility to the Mayfield Group Home, Ross admittedly sent her a photograph of himself with the accompanying letter:

> K[3],
>
> What's up baby girl? I just got off work and thought that I would drop a few lines. So, hows work?? I hope you are still in school. Like I always say, keep doing good so that you can get out own your own. Because, when you do get out of D.J.J.'s control, we can see each other. So, that should be enough to keep you own task and do whats right.
>
> So, what the hell; was you wrighting about in your last letter about me and other girls? You are asking questions that you shouldn't. Do I ask you shit like that? I'm not mad or anything like that, but please don't do it again. I know that life has started over for you again their but I keep you in my mind and spirit here. Just rember that!! Whats up with some surgery

[2] Ross has a degree in elementary education and social services and has taught from 1996 through 1998.

[3] K.H.'s actual name was given in the letter. Also, grammar and spelling are original.

> you was having last Wed? Whats wrong with ya? Here is a kiss to make it better.
>
> I'm not one to put things on paper, because you never know what could happen to it so I'll keep most of the good things to myself for now. I just wanted to let you know that I miss you and wish you the best of luck in life. So, when people put their hands on you, you, tell the right people about it.
>
> Just in case that you forgot what I looked like here is a couple of pictures of me. Keep in touch.
>
> Much Love
> "Big Jim"
>
> I'm sorry, but I could only send one picture becaus the other one was too big, so I will draw the second one! ha ha!

When the D.J.J. discovered the letter and picture, it conducted an investigation and decided to terminate Ross's employment. The D.J.J. notified Ross on May 7, 2002, that he had a right to a pre-termination hearing, which was conducted on May 21, 2002. On May 24, 2002, the D.J.J. notified Ross in a letter that his employment was terminated based upon probable cause that during a period from October 5, 2001, through December 27, 2001, he had an inappropriate and unprofessional relationship with a female resident at the Adair Youth Development Center based on the letter and picture, and for other reasons that were eventually dropped. The termination

letter also stated the conduct violated the following D.J.J. policies:

> 102, Professional Practices;
> 104, Employee Code of Conduct; and
> 106.11, Sexual Harassment.

Ross filed an appeal with the Kentucky Personnel Board. A hearing was conducted on October 22, 2002, and on December 18, 2002. The Hearing Officer upheld the D.J.J.'s termination and Ross appealed to the Personnel Board. The Board made these findings of fact and conclusions of law in upholding Ross's termination:

FINDINGS OF FACT

> 1. Jimmy Ross was a Youth Worker II at Adair Youth Development Center during 2001.
>
> 2. Youth (KH) was a female resident of the Adair Youth Development Center while Ross was a staff person there.
>
> 3. After she was moved from the facility, Ross admittedly wrote the letter introduced as Appellee's Exhibit 1 to KH, which letter was accompanied by a photograph of himself.
>
> 4. Based upon the language in Ross' letter to KH (Appellee's Exhibit 1), Ross clearly had an inappropriate relationship with a resident of the facility in which he was a youth worker. He violated DJJ Policy 104 by engaging in a relationship which was not professional and violated Adair SOP 104 by contacting a former resident.
>
> 5. The Hearing Officer has carefully reviewed all the evidence and testimony in the record in this case, attempting to give the Appellant the benefit of every doubt.

Nevertheless, it is impossible to ignore the language and clear implications of an emotional relationship contained in Ross' letter to KH (Appellee's Exhibit 1).

6. Notwithstanding Ross' predicted explanations for the contents of Appellee's Exhibit 1, the language contained therein and the tone of the letter is not that which would be expected of a professional dealing at arm's length with a troubled resident of a youth facility.

7. Clearly there existed an inappropriate relationship between Ross and KH. The fact that the letter (Appellee's Exhibit 1) was sent is enough evidence to establish a relationship which was not professional and is clearly an inappropriate relationship between a youth worker and a resident or former resident of the facility. This finding is supported by Ross' admission that he learned KH was planning to run away from her foster home but did not tell DJJ staff.

CONCLUSIONS OF LAW

1. The Appellant was in violation of DJJ Policy No. 102, "Professional Practices," DJJ Policy No. 104, "Employee Code of Conduct," and DJJ Policy No. 106.11, "Sexual Harassment."

2. The Appellant was guilty of poor behavior and unsatisfactory work performance in violation of 101 KAR 1:345, Section 1.

> Appointing authorities may discipline employees for lack of good behavior or the unsatisfactory performance of duties.

3. Under all of the surrounding circumstances, the Appellant's violation of policy was egregious enough to sustain a dismissal.

> 4. The evidence does not support the conclusion that the actions of the Appellee were arbitrary and capricious or that there was any violation of KRS 18A.165 or KRS 18A.145.

The circuit court affirmed the Personnel Board's decision and Ross filed an appeal to this Court.

Ross presents three arguments for this Court to consider. First, Ross contends the dismissal was excessive and erroneous. He presented a former supervisor's opinion that a three-day suspension would have been appropriate. KRS 18A.095(2) authorizes penalizations, up to and including dismissal, for cause, which includes a lack of good behavior. KRS 18A.095(23)(c) allows the State Personnel Board to review the penalization and "[i]f the board finds that the action taken by the appointing authority was excessive or erroneous in view of all the surrounding circumstances, the board shall direct the appointing authority to alter, modify, or rescind the disciplinary action[.]"

The circuit court weighed the policies with the disciplinary action taken. The court summarized D.J.J. Policy No. 104:[4]

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[4] Section II "O" of policy 104 provided: "Staff contact with current and former clients and their families shall be limited to their prescribed work hours and duties or shall have the advance approval of the Superintendent." After Ross sent the letter, Section II was amended to add "Q" which states: "Staff members shall not engage in any type of communication with youth i.e. written, or telephonically outside the scope of their duties." Section "O" was retained as Section "R".

> "Employees shall conduct themselves in a professional manner. Staff shall be aware that their personal conduct reflects upon the integrity of the agency and its ability to provide services to youth. . .Employees shall be expected to maintain a professional relationship with youth at all times. . .An Employee shall not Enter into a dating or sexual relationship with a youth or formerly committed youth under the age of eighteen."

The court then reviewed the letter in question and concluded:

> This note is patently inappropriate. Any reasonable person recognizes its sexual references, flirtations, and romantic overtones. The Personnel Board properly determined such conduct offensive, and this Court is in no position to overrule this finding of fact. *See* Mill Street Church of Christ v. Hogan, Ky.App. 785 S.W.2d 263 (1990). Further, D.J.J. Policy No. 104 unequivocally prohibits this behavior, both before and after it explicitly prohibited all communications with youth outside professional duties. Therefore, the letter alone substantially proves Petitioner's flagrant misconduct.

We agree with the circuit court. The letter was inappropriate and the punishment was not too severe. Termination is an extreme sanction but was appropriate considering the D.J.J. obligation to the youth (and their parents) of the Commonwealth. The penalty cannot be changed by this Court unless the Board (the administrative agency conducting the review) was arbitrary and capricious, or clearly abused its discretion. See City of Louisville v. Milligan, 798 S.W.2d 454, 458 (Ky. 1990).

Ross's second argument contends the Board's decision was not supported by substantial evidence and was contrary to law. Ross does not deny writing the letter, only that the inappropriate relationship has neither evidentiary support nor legal support, in that D.J.J. Policy 104 in effect at the time the letter was written did not contain "the communication prohibition". The language of the letter speaks for itself. As far as what D.J.J. Policy 104 prohibits, it is clear that Section II "O" (now "R") of the policy prohibited "Staff contact with current and former clients and their families shall be limited to their prescribed work hours and duties or shall have the advance approval of the Superintendent." This policy was in effect when the letter was written by Ross. What was added to the policy afterwards was "Q" which specifically prohibited letters and phone calls to former residents. The letter was a communication to K.H. and even if a supervisor approved sending a letter, Ross went beyond the directions given and clearly went beyond the professional relationship.

As to the evidentiary support, although the Board has the burden of proof, we believe the Board's findings are supported by substantial evidence. Substantial evidence is that which has sufficient probative value to induce conviction in the minds of reasonable men. Wade v. Commonwealth, Dept. of Treasury, 840 S.W.2d 215, 218 (Ky.App. 1992).

Ross's final contention is that the notice of dismissal from the D.J.J. failed to comply with KRS 18A.095(8) in that Ross was not given a specific statutory or regulatory violation, nor specific action or activity and the names of the parties involved, and the letter in question was sent after the period of time mentioned in his written notification. Goss v. Personnel Board, 456 S.W.2d 819 (Ky. 1970) made it clear that when an agency terminates or penalizes a status employee, the notice required "shall be in sufficient detail to enable the employee to 'reply thereto in writing', or to appear before and 'reply' to the head of the department or his agent." *Id.* at 821. Also, "mere allegations of 'incompetency' or 'inefficiency' are not enough and that 'the facts of the incompetency must be alleged.'" *Id*. (citation omitted). Under the Goss test, we must ask if the notice of termination was sufficient in detail to enable Ross to reply to the charges. In reviewing the notice, with the surrounding circumstances, we believe the notice was sufficient. The notice told Ross he was being terminated. The specific reason or activity was for an inappropriate and unprofessional relationship with a female resident between October 5, 2001, through December 27, 2001, which was the same time that K.H. was a resident. The "letter" was addressed to K.H. Ross wrote the letter so he knew who K.H. was. He was told the relationship was based on probable

cause based on his letter and his picture that he sent K.H. Although the letter was mailed after K.H. was transferred, the letter implicates a relationship that existed when K.H. was a resident at the Adair Youth Development Center, October 5, 2001, through December 27, 2001. The notice also gives D.J.J. Policy 104, Employee Code of Conduct, as being the violation. After reviewing the first argument above, we conclude the notice of violation or regulation was sufficient.

For the foregoing reasons, the judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Donald Duff
Frankfort, Kentucky

Paul F. Fauri
Frankfort, Kentucky

BRIEF FOR APPELLEE
COMMONWEALTH OF KENTUCKY,
JUSTICE AND PUBLIC SAFETY
CABINET, DEPARTMENT OF
JUVENILE JUSTICE:

Angela E. Cordery
Frankfort, Kentucky