

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002131-MR

LILLIAN BASSETT

APPELLANT

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 06-CI-00126

BOARD OF REGENTS, KENTUCKY COMMUNITY
AND TECHNICAL COLLEGE SYSTEM (KCTCS),
DR. MICHAEL B. MCCALL, PRESIDENT

APPELLEE

OPINION AFFIRMING

** ** *

BEFORE: COMBS, CHIEF JUDGE; ACREE AND TAYLOR, JUDGES.

COMBS, CHIEF JUDGE: Lillian Bassett appeals from orders of the Oldham Circuit Court dismissing her action against the Board of Regents of the Kentucky Community and Technical College System (KCTCS). Following a disciplinary action, Ms. Bassett was removed from her position as a full-time literacy instructor assigned by Jefferson Community and Technical College to the educational center at Luther Luckett Correctional Complex. Before the trial court, Bassett contended that she has been denied

substantive and procedural due process and that her removal violated Section 2 of the Kentucky Constitution. Having reviewed the applicable law and the arguments of counsel, we affirm.

As part of its administrative policies and procedures, KCTCS adopted a performance review process for its instructors. Bassett underwent several performance reviews. For the 2004-2005 academic year, Bassett received her third consecutive negative performance rating from her supervisor. Pursuant to the administrative policies of KCTCS, Bassett appealed the performance rating to a designated committee. According to Bassett, the appeals committee recommended that the evaluation process be repeated. Instead, on June 9, 2005, Dr. Anthony Newberry, President of Jefferson Community and Technical College, affirmed the 2004-2005 performance rating assigned to Bassett by her supervisor. Upon further review by the College's Chancellor, Bassett's negative performance rating was upheld once more.

By letter hand-delivered to her on June 28, 2005, Bassett was notified that KCTCS intended “to demote [her] from the position of Assistant Professor to the position of Adjunct Faculty with temporary, part-time, substitute status.” As reasons for her demotion, KCTCS outlined numerous violations of administrative policies and procedures and cited Bassett's poor job performance in its four-page letter. The bulk of administrative policies and procedures violations involved penitentiary safety and security issues that had led to Bassett's prior reprimand in March 2002 and to her suspension without pay in April 2003. KCTCS informed Bassett that she was entitled to

a pre-demotion hearing to review any issues concerning the adverse action and to show cause why the anticipated action should not be taken. Bassett was placed on administrative leave with pay until further notice.

Bassett attended an administrative hearing conducted by KCTCS on August 10, 2005. She was represented by counsel and was given the opportunity to present information as to why she ought not be removed from her position as literacy instructor at the correctional facility.

On August 15, 2005, Bassett contacted Anthony Newberry, President of Jefferson Community and Technical College. She requested that Newberry consider information that she had failed to present during the administrative hearing. Bassett was permitted to submit additional information that she considered favorable to her position on August 22, 2005.

By letter dated September 1, 2005, Bassett was informed by Newberry that she would be demoted and that the last day of her administrative leave with pay would be September 2, 2005. Newberry gave a detailed basis for his finding that Bassett had engaged in a pattern of inappropriate behavior; had failed to improve her poor job performance; and was subject to severe disciplinary action. Bassett was informed that pursuant to the KCTCS Policy Manual, she was entitled to appeal the adverse action taken against her. Newberry advised that Bassett was entitled to initiate the KCTCS Complaint Resolution Procedure within ten days and that she might also be entitled to

request the Independent Third-Party Appeal Process within thirty days. Bassett chose to initiate the KCTCS Complaint Resolution Procedure.

In a detailed letter dated January 17, 2006, Bassett was notified of the final decision of Michael McCall, KCTCS's President and designee of the Board of Regents for the complaint resolution proceeding. McCall advised Bassett that her request for relief was being denied. Bassett was again informed of the numerous grounds supporting her removal and of the various reasons why President McCall found that her contentions had been addressed in a “factual, thorough, and credible way.” In his letter, McCall advised Bassett that the decision was based on Bassett's “well-documented series of policy violations and performance failures,” including:

late monthly reports, job carelessness, poor conduct and poor behavior toward staff and students, incidents of placing blame on others, interfering with normal prison operations, by attempting to perform tasks outside your assigned duties and failure in following security procedures....

Finally, he indicated that her actions negatively impacted “staff, students, and other faculty.” McCall denied that Bassett had been terminated from her position; he indicated instead that she remained eligible for substitute teaching duties.

On February 16, 2006, Bassett filed an action in Oldham Circuit Court styled “petition on appeal from administrative action/petition for declaration of rights.” Bassett asserted that her demotion amounted to a *de facto* termination; that the action taken against her was arbitrary; and that she was denied both substantive and procedural due process. She contended that both jurisdiction and venue were properly vested in the

Oldham Circuit Court, and she sought both reinstatement to her prior position and monetary damages.

Before filing an answer, KCTCS filed a motion to dismiss pursuant to the provisions of CR 12.02. In its motion, KCTCS asserted that the court lacked subject matter jurisdiction; that it was an improper venue; and that the petition failed to state a claim upon which relief could be granted. By its order entered July 6, 2006, the trial court summarily dismissed Bassett's petition. And, by order entered September 11, 2006, the trial court denied Bassett's motion to alter, amend, or vacate. This appeal followed.

While the parties argue vigorously as to the trial court's jurisdiction and venue for this action, we shall assume for purposes of this opinion that the court properly exercised its jurisdiction and that venue in the Oldham Circuit Court was also proper. In reviewing the substantive issues raised on appeal, we conclude that the trial court did not err by summarily dismissing Bassett's claims since she was not deprived of due process of law.

Bassett alleges that she was improperly denied notice of the underlying bases for the charges against her; that she was not given an opportunity to present evidence concerning those charges; and that she did not receive an opportunity to confront and cross-examine the witnesses against her. Section 2 of the Commonwealth's Constitution guarantees that our citizens shall not be subject to arbitrary state action. With respect to adjudications, whether judicial or administrative, this guarantee is generally understood as a due process provision whereby Kentucky citizens may be

assured of fundamentally fair and unbiased procedures. *Smith v. O'Dea*, 939 S.W.2d 353 (Ky.App. 1997).

The concept of procedural due process is flexible and is judged by reference to federal constitutional standards. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed. 494 (1985). The United States Supreme Court has declared that the essential requirements of due process are notice and an opportunity to be heard. Bassett's own pleadings reveal and acknowledge that she was afforded adequate written notice of the charges against her, an explanation of KCTCS's evidence against her, and an opportunity to be heard and to present her side of the story. She received review by means of the four-step grievance process afforded to employees of KCTCS. Kentucky Revised Statute (KRS) 164.321, the statute that created the KCTCS, does not grant the right to a formal administrative hearing to an employee of KCTCS. KCTCS is not an “agency” as defined under KRS Chapter 13B so as to entitle its employees to the panoply of administrative remedies – including a due process hearing. Therefore, Ms. Bassett has received the full range of the due process to which she is entitled under the statute.

While Bassett also contends that she was deprived of substantive due process, it is well established that substantive due process protections extend only to matters relating to a fundamental right. *Albright v. Oliver*, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). State-created employment relationships or contract rights do not constitute a fundamental right that would warrant substantive due process protection.

We affirm the order of dismissal of the Oldham Circuit Court.

ALL CONCUR.

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