

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002615-MR

THOMAS EDWIN JONES

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE SAM G. MCNAMARA, JUDGE
ACTION NO. 05-CI-00052

COMMONWEALTH OF KENTUCKY,
ADMINISTRATIVE OFFICE OF THE
COURTS

APPELLEE

OPINION AFFIRMING

** ** *

BEFORE: MOORE AND STUMBO, JUDGES; ROSENBLUM, SENIOR JUDGE.¹

ROSENBLUM, SENIOR JUDGE: Thomas Edwin Jones appeals from an order of the Franklin Circuit Court affirming his dismissal from his position as a pretrial hearing officer by the Administrative Office of the Courts (AOC). For the reasons stated below, we affirm.

¹ Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Jones was initially employed by AOC in September 1984 as a pretrial services officer in the Bell County office. The record discloses that in November 1987 Jones was placed on three months disciplinary probation for deficiencies in his job performance, including failing to complete pretrial interviews and criminal histories and to keep the court tracking file up to date. In September 1994 Jones received a written reprimand for deficiencies in his job performance, including failing to complete pretrial interviews and records checks and to keep records and logs up to date. In February 1998 Jones was suspended without pay for one day for deficiencies in his job performance, including failing to keep records and logs up to date. In January 1999 Jones was placed on three months disciplinary probation for deficiencies in his job performance, including failing to keep records and logs up to date. At this time he was warned that further violations would result in more severe disciplinary action. In November 2002 Jones was placed on six months disciplinary probation for failing to arrange pretrial coverage at the jail or for court proceedings on a day when he was ill.

Meanwhile, against the foregoing disciplinary background, in October 1998, D.J. Dalton was hired as a part-time pretrial services officer in the Bell County office and Jones became her supervisor. Eventually, there were rumors of an affair between Jones and Dalton, and a conflict developed between Jones' wife, Deborah,² and Dalton. Jones alleges that it was Dalton who started the rumors. Dalton eventually

² The marital status of Jones and Deborah is unclear from the record. In his brief Jones states that "Deborah divorced [Jones] when their daughters were minor children." However, at the May 7, 2004, hearing Deborah was referred to as Jones' wife, including by Jones and his counsel. Jones testified at that time that he and Deborah were "separated." In any event, the precise nature of their marital status is immaterial to our disposition of this appeal.

began to claim that she was receiving threatening telephone calls and was being stalked. She also began to allege that Jones was not doing enough to protect her safety and made reports to AOC managers in Frankfort. Jones was advised of Dalton's concerns and was directed to take corrective steps. Jones alleges, in substance, that the claims by Dalton were contrived by her as part of a scheme to have him discharged and to obtain his job.

The Dalton-related events culminated on November 4, 2003, when Dalton received what she claimed was a threatening call in Jones' presence. According to Dalton, Jones failed to react to the threatening call, and so she left the office and contacted law enforcement officials on her own. She also contacted the AOC Central office about the incident. Having been informed of the call, the AOC Assistant General Manager of Pretrial Services, Jim Rousch, contacted Jones about the incident, and Jones disclaimed knowledge of the call. At a later meeting, Jones admitted that he knew about the call. Rousch concluded from this that Jones had originally been deceptive in responding to questioning about the call, and this deception became a significant factor in the ultimate decision to discharge Jones.

Based upon Jones' past disciplinary record, the recent events surrounding the phone call, Jones' failure to take action concerning the call, and his subsequent deception in connection therewith, on November 17, 2003, the AOC's Division of Pretrial Services issued to Jones official notification of its intent to dismiss him from employment. Jones thereafter requested an informal meeting with the General Manager of the Division of Pretrial Services. On December 16, 2003, after this informal meeting,

Jones received a second official notification of intent to dismiss him. Jones appealed, and on May 7, 2004, the AOC conducted a hearing on the matter. After taking testimony from several witnesses and reviewing various letters, reports, and affidavits submitted by the parties, including one by Dalton, the hearing officer concluded that good cause existed for Jones' dismissal. On June 15, 2004, the Acting Director of the AOC adopted the hearing officer's recommendation to affirm Jones' dismissal. Jones appealed to the Court of Justice Employee Grievance and Appeal Committee, which, after a hearing in September 2004, found that the decision to terminate Jones' employment was reasonable.

Jones then filed an action in the Franklin Circuit Court, which he styled a "Petition for Appeal of Findings of Fact and Determination of Reasonableness of Director's Decision." On March 21, 2005, the Franklin Circuit Court ordered that Jones' action be transferred to the Supreme Court, reasoning that because the AOC is the administrative arm of the Supreme Court, requests for review of AOC actions can only be brought before the Supreme Court. On August 25, 2005, the Supreme Court rendered an opinion deciding that it was proper for the circuit court to conduct judicial review of personnel decisions of AOC. *See Jones v. Com., Administrative Office of the Courts*, 171 S.W.3d 53 (Ky. 2005).

On November 26, 2005, the circuit court entered an order affirming AOC's dismissal of Jones. This appeal followed.

FRAUD AND MISCONDUCT

Jones contends that his dismissal should be set aside and the cause remanded for a new hearing because AOC engaged in fraud and misconduct by failing to provide him with a copy of an affidavit prepared by Dalton prior to the May 2004 hearing. The affidavit was admitted into the record and referred to at the hearing.

Jones alleges that the “the AOC ambushed [him] and created unfair surprise by referring to the faxed letter and by presenting [the] affidavit at the hearing.” Jones asserts that AOC's concealment and failure to produce the affidavit prior to the hearing, and its subsequent use of the affidavit at the hearing, constitutes fraud on the part of AOC. Jones argues that his dismissal should be set aside and that he should be granted a hearing unprejudiced by the affidavit.

This argument is unpreserved for our review. First, Jones does not cite us to his preservation of this argument for review as required by CR³ 76.12(4)(c)(v). Further, our review of the May 2004 hearing discloses no objection to the admission and use of affidavits of nontestifying witnesses, including Dalton, and, indeed, Jones submitted such statements himself. Moreover, when specifically asked at the September 2004 Grievance Committee hearing to provide any objections concerning how the proceedings had been conducted up to that point, Jones did not cite the Dalton affidavit as a grounds for objection. And, finally, Jones did not raise the submission of the affidavit as an issue in his appeal to the Franklin Circuit Court.

³ Kentucky Rules of Civil Procedure.

“It is elementary that a reviewing court will not consider for the first time an issue not raised in the trial court.” *Caslin v. General Elec. Co.*, 608 S.W.2d 69, 70 (Ky.App. 1980). As Jones failed to previously raise this issue either in the administrative proceedings or in his appeal to circuit court, it is not properly preserved for our review.

Further, upon application of the palpable error rule contained in CR 61.02, we likewise find no error. No manifest injustice resulted from the withholding of the affidavit until the hearing or the introduction therein. Jones was well prepared at the hearing to address issues relating to Dalton. Under the relaxed evidentiary rules of the hearing he undertook a scathing impeachment of Dalton's character and credibility. Upon the record as a whole, we do not believe the affidavit had any impact upon the outcome of the proceedings.

MISCONDUCT AND DUE PROCESS

Jones also contends that his dismissal should be set aside and the cause remanded for a new hearing because he never had a chance to cross-examine Dalton. Jones alleges that he did not have any knowledge that AOC would not produce Dalton as a witness at the May hearing, and because it instead produced the affidavit, his due process rights were violated. We disagree.

Again, Jones fails to cite us to his preservation of the issue. Further, we are unable to locate any objection to Dalton's absence from the May 7, 2004, hearing in the transcript of the proceedings. Nor does Jones allege that he requested or otherwise sought Dalton's appearance at the hearing.

At the September 4, 2004, Grievance Committee hearing Jones did seek a continuance to procure the presence of Dalton. However, the record contains letters sent by AOC dated July 7 and August 5, 2004, to Jones' counsel, both of which contain the statement, "If you wish for subpoenas to be sent, please supply my office with names and addresses as soon as possible."

Thus well in advance of the hearing, Jones was made aware that he needed to timely act if he wanted to subpoena witnesses for the hearing, and he failed to undertake the proper diligence to do so. Thus, we discern no misconduct or violation of due process in connection with Dalton's failure to appear for cross-examination in either of the two hearings held during the administrative proceedings.

Interconnected with this argument is the Grievance Committee's denial of Jones' request for a continuance in order to secure the presence of Dalton. In *Cornwell v. Commonwealth*, 523 S.W.2d 224, 227 (Ky. 1975), the Supreme Court held that the refusal of a trial court to grant a continuance on account of an absent witness will not be disturbed unless there is a clear showing of an abuse of discretion in denying the continuance. We believe the same standard applies here. Based upon Jones' lack of diligence and the granting of a prior continuance, the Grievance Committee did not abuse its discretion in denying Jones' request for a second continuance to secure the testimony of Dalton. There was no misconduct or denial of due process in connection with this ruling.

In any event, we conclude that Jones' discharge was in full compliance with the applicable Policies and Procedures prescribed by AOC for such proceedings. AOC Personnel Policies Section 6.04, Dismissals and Notification of Dismissals (1999),⁴ provides, in relevant part, as follows:

(1) Whenever an appointing authority has reasonable evidence that any appointed official or employee is guilty of any substantial deviation from good behavior and/or satisfactory performance of duties, the appointing authority may, in the exercise of sound discretion, dismiss the offending appointed official or employee. Grounds for dismissal include, but are not limited to, the following:

....

(b) Refusal or inability to perform reasonable and legal duties required by the appointing authority.

....

(d) Refusal or inability to follow the prescribed procedures for handling money and maintaining records required by the Court of Justice.

....

(g) Noncompliance with internal written office policies.

The record as a whole discloses that the AOC had reasonable evidence that Jones had failed to adequately maintain records as required by AOC over a significant period of time and, more recently, had failed in his management duties in matters concerning D.J. Dalton. Even if Dalton's claims were contrived, nevertheless Jones had a

⁴ Effective May 2005 the AOC Personnel Policies were amended. Disciplinary and appeal procedures, formerly contained in Section 6, are now contained in Section 10. The procedures for dismissal are now contained in Section 8.08. Section 8.08(1) provides "Whenever the appointing authority has reasonable evidence that an appointed official or employee, under his/her management, is guilty of any substantial deviation from good behavior and/or satisfactory performance of duties, the appointing authority may, in the exercise of sound discretion, dismiss the offending appointed official or employee."

duty to comply with the directive from AOC management to take steps in response to her complaints concerning safety. There is reasonable evidence to support AOC's conclusion that Jones failed to properly respond to the November 4, 2003, threatening phone call, and then attempted to cover up his actions. Based upon the foregoing evidence, the AOC properly exercised its discretion in discharging Jones.

Further, the AOC Personnel Policy procedure requirements for effecting a termination were complied with. As previously noted, the only procedural deficiencies identified by Jones relate to the Dalton affidavit and her failure to appear at the hearing. Again, for the reasons previously stated, these factors did not infringe upon Jones' due process rights.

CONCLUSION

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Linda J. West
Barbourville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

James M. Herrick
Assistant Attorney General
Frankfort Kentucky