

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000105-MR

LOUISVILLE AND JEFFERSON COUNTY
METRO GOVERNMENT BY AND THROUGH
CHIEF ROBERT WHITE ON BEHALF OF THE
LOUISVILLE METRO POLICE DEPARTMENT

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 04-CI-009352

LOUISVILLE METRO POLICE MERIT BOARD
AND OFFICER MICHAEL JOE THOMPSON

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, KELLER AND MOORE, JUDGES.

MOORE, JUDGE: The Louisville and Jefferson County Metro Government (Metro Government), by and through Chief Robert White, on behalf of the Louisville Metro Police Department, appeals from an opinion and order of the Jefferson Circuit Court dismissing the Metro Government's appeal from the findings and order of the Louisville Metro Police Merit Board. The Merit Board affirmed Chief White's determination that

Officer Michael Joe Thompson violated several of the Police Department's standard operating procedures but set aside Officer Thompson's termination. On appeal, Metro Government argues that Chief White has the sole authority to issue rules and regulations governing the conduct of the Department's police officers and that the Merit Board illegally usurped this authority. We disagree and affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

It is undisputed that on May 2, 2004, Officer Thompson smoked marijuana. On May 6, 2004, Thompson received a notice, from the police department, ordering him to submit to a random drug screen. Upon receiving this notice, Thompson panicked, having smoked marijuana a few days earlier. Therefore, he went to the headquarters of the Police Department's Professional Standards Unit, seeking advice. While speaking with one of the Professional Standards Unit's sergeants, Thompson admitted that he had smoked marijuana. Ultimately, the sergeant advised Thompson to submit to the drug test, which Thompson did.

After Thompson underwent the drug test, Chief White ordered the Professional Standards Unit to investigate Thompson's drug use. Officers of the Professional Standards Unit interviewed Thompson and, during the interview, Thompson admitted to them that he had smoked marijuana on May 2. During the interview, Thompson was initially very reluctant to give the address and the last name of the man who supplied the marijuana to him; however, he did reveal this information to the investigating officers. Additionally, when the investigating officers asked Thompson whether he had smoked marijuana on other occasions within the last year, he initially

denied doing so but, when pressed, confessed that he had also smoked marijuana two weeks prior to May 2.

As a result of the Professional Standards Unit's investigation, Chief White terminated Thompson. Chief White set forth the bases of his decision in a letter addressed to Thompson. In the letter, he explained that, by smoking marijuana, Thompson violated the Police Department's Standard Operating Procedure 5.1.2 regarding obedience to the Department's rules and regulations and violated Standard Operating Procedure 5.1.32 regarding Thompson's requirement to abide by the collective bargaining agreement between the River City Fraternal Order of Police (FOP) and the Department which prohibited members of the FOP from ingesting illegal drugs.¹ In addition to violating those two procedures, Chief White explained that Thompson also violated Standard Operating Procedure 4.1.4., which requires officers to be truthful. According to Chief White, because Thompson initially refused to reveal the name and address of the man who gave the marijuana to him, Chief White deemed him to be untruthful. And because Thompson initially denied prior marijuana use, Chief White likewise deemed this as untruthful. *Id.*

After receiving the termination letter, Thompson sought a review of Chief White's decision from the Merit Board, pursuant to Kentucky Revised Statute (KRS) 67C.323(1). A hearing was held, and the Merit Board heard testimony from numerous witnesses including Thompson and Chief White. Before the Merit Board, Thompson stipulated that he used marijuana.

Chief White testified before the Merit Board that he had a "zero tolerance" policy regarding officers using drugs. According to Chief White, his "zero tolerance"

¹ Thompson is a member of the River City Fraternal Order of Police.

policy meant that a police officer could never use an illegal drug, not even once, because such drug use caused credibility problems for the police department. Chief White attested that an officer's good employment history would not mitigate illegal drug use, and the punishment for any illegal drug use was termination under all circumstances.

After hearing the evidence, the Merit Board affirmed that Thompson violated Standard Operating Procedure 5.1.2 and Standard Operating Procedure 5.1.32 due to possessing and ingesting marijuana. Regarding Thompson's violation of Standard Operating Procedure 4.1.4 concerning truthfulness, the Merit Board determined that Thompson had not lied about the name and address of the man who supplied the marijuana to him. As to Thompson's prior drug use, the Merit Board found that while Thompson had initially lied about this, he quickly corrected himself and told the truth.

Pursuant to KRS 67C.323(1), the Merit Board set aside Chief White's decision to terminate Thompson, finding that it was unjustified given Thompson's virtually unblemished record, his good employment history and his efforts to correct his problem.² The Merit Board modified Thompson's punishment from termination to a twenty-seven-day suspension, requiring Thompson to submit to drug testing³ and to continue counseling for as long as Chief White determined.

After the Merit Board modified Thompson's punishment, Metro Government filed, pursuant to KRS 67C.323(3)(a), an appeal with the Jefferson Circuit Court, naming the Merit Board and Thompson as appellees. Shortly after Metro

² In addition, the Merit Board found that several other mitigating factors existed: that Thompson did not smoke marijuana on a regular basis; that Thompson had quickly admitted to using marijuana; that Thompson had quickly enrolled in drug counseling; that he had continued with the counseling; that his counselor believed that he was unlikely to use illegal drugs again; and that Thompson's admissions to using marijuana and his enrollment in counseling indicated "future success as an officer."

³ Thompson was required to personally pay for the drug testing.

Government filed its appeal, the Merit Board and Thompson filed motions for summary judgment. The circuit court held a hearing regarding the motions and, thereafter, issued an opinion and order resolving the appeal.

In the circuit court's opinion, it held that three issues were before it: 1) whether the Merit Board's decision was unreasonable and arbitrary; 2) whether the Board had exceeded its authority as granted by KRS 67C.323 by modifying Thompson's punishment; and 3) whether the Board's decision to modify Thompson's punishment was subject to judicial review. The circuit court held that, given the mitigating proof before the Board, substantial evidence supported the Board's decision to modify Thompson's punishment. The circuit court determined that KRS 67C.323 gave the Merit Board the authority to set aside Chief White's decision and impose its own punishment. Finally, citing *City of Louisville by Kuster v. Milligan*, 798 S.W.2d 454 (Ky. 1990), the circuit court ruled that the function of a hearing body, such as the Merit Board, is to first decide whether a police officer before it had violated department rules; this determination is subject to judicial review. Additionally, the court determined that a hearing body may also impose a penalty; however, the punishment meted out by the body is not subject to judicial review according to *Milligan*. Based on this reasoning, the circuit court dismissed Metro Government's appeal with prejudice and affirmed the Merit Board's findings and order.

II. STANDARD OF REVIEW

When reviewing an administrative decision regarding a disciplinary action against a police officer, the reviewing court must apply the clearly erroneous standard set forth in Kentucky Civil Rule of Procedure (CR) 52.01. *Kuster*, 798 S.W.2d at 458.

Thus, we will not disturb the circuit court's decision unless it was not supported by substantial evidence. *Stallins v. City of Madisonville*, 707 S.W.2d 349, 351 (Ky. App. 1986).

III. ANALYSIS

On appeal, Metro Government argues that *Kuster*, 798 S.W.2d 454, does not apply because there is only one penalty for illegal drug use by a police officer: termination. After quickly distinguishing *Milligan*, Metro Government avers that its primary argument is “a kind of ‘separation of powers’ argument.” Citing no authority to support its contention, Metro Government insists that Chief White has *sole* authority to promulgate and enforce rules and regulations governing the conduct of the Department's police officers. According to Metro Government, the Merit Board cannot subsume or encroach upon Chief White's authority. In addition, Metro Government explains that a violation of the Department's “zero tolerance” policy by the use of illegal drugs is antithetical to the Department's fundamental nature and is contrary to a police officer's oath to uphold the law. Therefore, Metro Government reasons that for violations of a “zero tolerance” policy, there can be but one penalty: termination. With this in mind, Metro Government explains that when the Merit Board modified Thompson's penalty from termination to suspension, it, as a matter of law, illegally modified the Chief's “zero tolerance” policy, rendering the policy ineffective.

To summarize, on appeal, Metro Government argues that Chief White has sole authority to promulgate the Department's rules and regulations governing the behavior of its police officers, and the Merit Board illegally encroached upon this authority. However, according to KRS 67C.303(1), the Merit Board,

except when prohibited, shall promulgate rules and regulations not inconsistent with KRS 67C.301 to 67C.327 governing the classification, qualification, examination, appointment, probation, promotion, demotion, suspension, and other disciplinary action within the consolidated local government police force of all officers affected and covered by the provisions of KRS 67C.301 to 67C.327, and shall hold hearings and impose, if necessary, penalties upon the personnel affected by KRS 67C.301 to 67C.327.

Pursuant to this statute, Metro Government's argument is not well taken.

Finding Metro Government's appellate argument to be unsupported and unpersuasive, we briefly turn to the Merit Board's decision. The Board found the punishment imposed by Chief White to be unjustified given the mitigating evidence offered by Thompson. According to KRS 67C.323(1),

[e]very action in the nature of a dismissal, suspension, or demotion of a nonprobationary officer made by the chief shall be subject to review by the board at the request of any officer affected by KRS 67C.301 to 67C.327. An appeal to the board of a dismissal, demotion, or forty (40) hour or more suspension of a nonprobationary officer shall be heard by the full board. The board shall give notice and hold a public hearing. After the hearing, the board shall retire in executive session to discuss the evidence introduced at the hearing and to make its determination and conclusion. While in executive session, the board shall not receive any further evidence or communication from any source prior to reaching its determination and conclusion. The board, while in executive session, may request and receive legal advice from board counsel on specific legal issues which may arise during deliberations. **If a majority of the members of the board are of the opinion that the action of the chief is unjustified or unsupported by proper evidence, the order of the chief may be set aside and revoked by the board, and the board may impose the penalty or punishment it deems necessary and appropriate, if any; provided however, the board shall not impose a penalty or punishment in excess of the action of the chief. No officer shall be removed or dismissed except as provided for in this section.**

(Emphasis added).

According to this statute, not only did the Merit Board have the authority to review Chief White's decision, it also had the authority to set aside the punishment imposed by him and substitute its own penalty, which is precisely what the Merit Board did. *See e.g., Milligan*, 798 S.W.2d at 456. Furthermore, according to the record, Thompson had been an officer for thirteen years, had virtually an unblemished record, had a good employment history, only used marijuana on a sporadic basis, sought drug counseling on his own initiative and benefited from that counseling. This proof constituted substantial evidence to support the Board's decision to set aside the punishment of termination and impose the lesser penalty of suspension. Given the law and the evidence, the Jefferson Circuit Court did not err when it ruled that the Merit Board did not act arbitrarily and had the authority to modify Thompson's punishment from termination to suspension. Accordingly, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT LOUISVILLE
AND JEFFERSON COUNTY METRO
GOVERNMENT:

William T. Warner
Assistant Jefferson County Attorney
Louisville, Kentucky

BRIEF FOR APPELLEE LOUISVILLE
METRO POLICE MERIT BOARD:

Mark W. Dobbins
Louisville, Kentucky

BRIEF FOR APPELLEE OFFICER
MICHAEL JOE THOMPSON:

Mary W. Sharp
Louisville, Kentucky