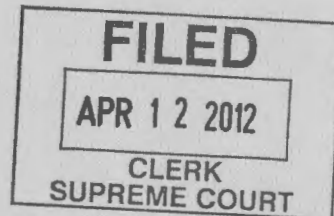


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2011-SC-000095-D
(2008-CA-001822)



COMMONWEALTH OF KENTUCKY,
FINANCE AND ADMINISTRATION CABINET,
DEPARTMENT OF REVENUE,
LORI H. FLANERY, APPOINTING AUTHORITY

APPELLANT

Vs.

Appeal from the Franklin Circuit Court
Action Nos. 2006-CI-0821, 2006-CI-0870 & 2007-CI-0024

WANDA FAYE WADE and
KENTUCKY PERSONNEL BOARD

APPELLEES

Brief for Appellee Kentucky Personnel Board

Submitted by:

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CERTIFICATE

This is to certify that a copy of the foregoing Brief for Respondent, Kentucky Personnel Board, was mailed, postage prepaid, this 12th day of April, 2012 to, Honorable Travis Powell, Finance and Administration Cabinet, Department of Revenue, 702 Capitol Avenue, 392 Capitol Annex, Frankfort, Kentucky 40601, Honorable E. Jeffrey Mosley, Finance and Administration Cabinet, Department of Revenue, 702 Capitol Avenue, 392 Capitol Annex, Frankfort, Kentucky 40601, Honorable Paul Fauri, 232 St. Clair Street, PO Box 1304, Frankfort, Kentucky 40602, Honorable George Geoghegan, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601-9229, Honorable Thomas Wingate, Judge, Franklin Circuit Court, Division II, 669 Chamberlin Avenue, P. O. Box 678, Frankfort, Kentucky 40601. The undersigned does certify that the record on appeal has not been withdrawn.


BOYCE ANDREW CROCKER

I. STATEMENT CONCERNING ORAL ARGUMENT

This appeal involving an administrative matter it is not difficult, and thus the Appellee, Kentucky Personnel Board, does not believe oral argument would be helpful.

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III. COUNTERSTATEMENT OF THE CASE

This is an appeal from a decision of the Kentucky Court of Appeals that affirmed a decision of the Franklin Circuit Court of two consolidated appeals which arose from Personnel Board decisions. Appellee Kentucky Personnel Board (hereinafter Board) believes its decisions, which have been upheld by the Franklin Circuit Court and the Kentucky Court of Appeals, were supported by substantial evidence of record.

The Appellant, Kentucky Finance and Administration Cabinet (Cabinet), in attempting to fire Appellee Wanda Faye Wade (Wade) triggered the events which led to this protracted litigation. In the midst of "negotiations" between the Cabinet and Wade, previous counsel for Wade had requested a delay, which was deemed by the Cabinet to be a waiver of Wade's pre-termination hearing thus, the Cabinet dismissed Wade from her employment. The Board held otherwise, sustaining Appellant's appeal that she had been fired in violation of the law that required a pre-termination hearing. The Cabinet did not make reasonable attempts to hold a pre-termination hearing, but instead unilaterally canceled it.

While the Board's ruling as to the first appeal by Wade (Kentucky Personnel Board Appeal No. 2005-120) was in progress, the Cabinet attempted unilaterally to bring Wade back to work, and when Wade did not report to work, then again "dismissed" her from her position. The Board ruled that the Cabinet did not follow the law in attempting unilaterally to reinstate Appellant to her position (at that time Appeal No. 2005-120 was in no way final), and when bringing her back had further attempted another dismissal, which also violated the law.

Ultimately these matters were consolidated and briefed to Franklin Circuit Court, which, in an Order dated August 12, 2008, sustained the actions of the Board, determining substantial evidence existed for the Personnel Board's decisions.

The Court of Appeals ruled substantial evidence supported the Board's findings as to both appeals and, in citing the case of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), held that "the opportunity to present reasons, either in person or in writing, why proposed actions should not be taken. . ." Thus the Court of Appeals ruled the Board was correct in holding that the Cabinet had no legal authority to deny Wade a chance to participate in the pre-termination hearing, and then fire her.

The Kentucky Court of Appeals also agreed with the Board that the Cabinet's attempt to unilaterally reinstate Appellant failed as a matter of law. The Court of Appeals cited KRS 18A.095(22) and stated: "That this is an accurate assessment of the law as evidenced by the fact that the Cabinet initially, though successfully, moved the Board to order Wade's reinstatement in December 2005. Indeed, the Cabinet has not cited any law granting it the authority to unilaterally reinstate a terminated employee during the appeal process." (Ct. App., at page 8).

IV. ARGUMENT

A. THE CABINET'S UNILATERAL EXTINGUISHMENT OF THE PRE-TERMINATION HEARING PROCESS DEPRIVED WADE OF A CLEARLY PROTECTED RIGHT.

It is understandable that the Cabinet was frustrated with Wade's previous counsel, the Hon. C. David Emerson, who, in the Cabinet's eyes appeared to be "playing games" for whatever advantage it may have gained his client. Regardless, there was no justification for the Cabinet, in a fit of pique, to determine Wade had "waived" her opportunity for a pre-termination hearing and canceled it. A remedy may have been for the Cabinet to have set a date, given Wade and her counsel sufficient notice, and held the hearing. However, this was not done and the hearing was never held.

This Court is no doubt mindful of the strong precedent expressed in *Loudermill*, supra, that deprivation of a property interest, such as the expectation of a career merit employee in Kentucky state government to continue that employment absent just cause, is not taken lightly. The Board did not set some "dangerous precedent" that will adversely affect the interests of state government agencies in being able to effectively manage and discipline its staff, but rather reaffirmed its understanding of the United States Supreme Court's holding in *Loudermill* that continued employment is a property interest, and that prior to deprivation of such, a state agency must not unilaterally decide that an employee has waived the right to a pre-termination hearing. The reasons advanced by the Cabinet over the years as to why it determined that Wade had waived a pre-termination hearing are not convincing. Firing an employee, especially a career state

government merit employee with over 35 years of service, as Wade had, should not be easy and should not be undertaken lightly.

By focusing on Wade and Emerson's conduct the Cabinet misses the point that the undisputed facts demonstrate it violated Wade's right to a pre-termination hearing.

These undisputed facts are as follows:

1. Wade received an intent to dismiss notice and requested a pre-termination hearing.
2. Wade requested a continuance of her pre-termination hearing, which was granted.
3. The parties agreed to confer and schedule a new pre-termination hearing date and time.
4. The parties conferred, however, a dispute arose as to a new date for the pre-termination hearing.
5. The Cabinet fired Wade without ever rescheduling her pre-termination hearing.

When the scheduling dispute arose, the Cabinet determined that Wade and Emerson's conduct constituted a waiver of her right to a pre-termination hearing. The Board contends the Cabinet violated Wade's constituted right to a pre-termination hearing by not scheduling the hearing. If the Cabinet believed Wade and Emerson were unreasonably delaying the pre-termination hearing, all the Cabinet had to do was schedule the hearing at a reasonable time.

Trial courts face the issue the Cabinet faced in this case all the time. What would be expected of a trial court judge faced with a criminal defendant who after having been granted one continuance, asked for what the court determined to be an unreasonable delay before scheduling a trial date. The court would deny the unreasonable request and schedule the trial at a reasonable time. The trial court would not determine that the unreasonable request constituted a waiver of a right to a trial.

In this case, the Cabinet transformed a scheduling dispute into a waiver of a fundamental right. All that was required was to reschedule a new pre-termination hearing at a reasonable time.

B. THE ATTEMPT TO UNILATERALLY REINSTATE WADE IN JANUARY 2006 HAD NO BASIS IN LAW, THUS RENDERING THE "RESIGNATION" OF WADE ON JANUARY 27, 2006, EQUALLY VOID.

During the course of the first appeal (Kentucky Personnel Board Appeal No. 2005-120), when it became apparent to the Cabinet that it would lose on the issue of whether Wade had "waived" her opportunity to attend a pre-termination hearing prior to the Cabinet firing her, the Cabinet attempted to unilaterally reinstate Wade. This, as was noted, was done while Wade's first appeal was not final. When Wade, unilaterally "reinstated," did not report to work, the Cabinet again fired her.

Wade filed an appeal of these two actions with the Personnel Board, which was decided as a matter of law, without an evidentiary hearing, in Wade's favor. This was noted by the Court of Appeals and not effectively refuted by the Cabinet in its brief.

The Cabinet contends that "the Personnel Board has advocated inconsistent positions on the reinstatement issue." Apparently counsel for the Cabinet mistakenly believes the "Findings of Fact, Conclusions of Law and Interim Order" made by Hearing Officer Stephen McMurtry, dated November 4, 2005, (Record On Appeal, 84 - 88) meant that the *Personnel Board* had ordered Wade reinstated to her position. In fact, in that Order, relief had not been determined and the Hearing Officer believed that a limited evidentiary hearing was necessary to determine the extent of the relief. At the time the Cabinet attempted to "reinstate" Wade, this limited evidentiary hearing had not taken

place. For the Cabinet to argue the Board advocated “inconsistent” positions makes no sense, as the Board had advocated no position; there was an Order from a Hearing Officer which was not final. The Cabinet states in its brief at page 17 that “the Personnel Board did not reinstate her, because by that time she had already been reinstated by the Cabinet, effective January 11, 2006.”

In any event, the Board has not taken inconsistent positions, nor have its Hearing Officers. Hearing Officer Stephen McMurtry, in his Recommended Order dated February 27, 2006, (ROA, 31 – 40) did, in fact, limit back pay until January 11, 2006, when Wade was “. . .given an opportunity to return to work.” The Hearing Officer was referring to the Cabinet’s attempt to reinstate Wade to her position. However, the question as to whether this unilateral reinstatement was valid was not before Hearing Officer McMurtry.

That matter came before the Personnel Board in a different appeal (Kentucky Personnel Board Appeal No. 2006-128), which was filed with the Personnel Board on March 23, 2006, after Hearing Officer McMurtry had issued his Recommended Order. In that appeal, a different Hearing Officer, the undersigned, Boyce A. Crocker, stated in Conclusion of Law 3 that “the Hearing Officer concludes that Appellee (the Cabinet) could have rescinded its dismissal of the Appellant (Wade), paid her back pay, and brought her back to work. The Appellee chose not to, and cannot unilaterally “reinstate” an employee while continuing to support her dismissal.” (ROA, 278 – 282).

Hearing Officer Crocker recommended the Board sustain the appeal, and reinstate Appellant Wade effective January 11, 2006, with back pay. The reason this may appear inconsistent, when only viewed on the surface, is that Wade had filed two different

actions with the Personnel Board in which different relief was requested, which was in fact, appropriate. Ultimately, the Personnel Board, in a Final Order, issued on December 19, 2006, did adopt the Hearing Officer's Recommended Order in Personnel Board Appeal No. 2006-128. (ROA, 268).

Taken together, the Personnel Board's actions as to both appeals was to order Appellant's reinstatement to her previous position with full back pay, minus some period of back pay that Hearing Officer McMurtry had determined Appellant Wade was not due because of her having claimed Family Medical Leave (FMLA).

C. THE PERSONNEL BOARD'S CONCLUSIONS REGARDING WADE'S MEDICAL CONDITIONS WERE SUPPORTED BY THE RECORD AND WERE LIMITED IN NATURE.

Hearing Officer Stephen McMurtry, in his February 27, 2006 Recommended Order found that the Cabinet had granted Wade FMLA benefits, which would have extended to June 9, 2005, upon initial approval on March 9, 2005, by the Cabinet.

As noted, the Cabinet withdrew approval for this FMLA on March 10, 2005, when, as found by Hearing Officer McMurtry, the Cabinet improperly terminated Wade, which led to this litigation. For a limited purpose, Hearing Officer McMurtry and the Board determine Wade disabled. This is supported by the record, and in fact, supported by actions taken by the Cabinet, when it initially determined Wade was entitled to FMLA leave. If anything, this determination was in the Cabinet's favor, as it limited the amount of back pay Appellant Wade could recover.

VI. CONCLUSION

The Court is presented with rather simple issues to decide, made to appear difficult by the amount of litigation that has flown from these events.

The Finance and Administration Cabinet wishes to dismiss Appellant Wanda Faye Wade from her classified (merit) employment, and in doing so in 2005, undertook to offer Wade the chance to participate in a pre-termination hearing, which of course is required by *Loudermill*, supra. After false starts, the Cabinet apparently grew frustrated with what it perceived to be Wade's, and then her attorney's attempts to delay the process, canceled the pre-termination hearing and dismissed Wade without the benefit of a pre-termination hearing.

As the Board has found, and as has been affirmed by the Franklin Circuit Court and the Kentucky Court of Appeals, Appellant did not waive her pre-termination hearing, and, absent such waiver, the subsequent dismissal of Wade by the Cabinet in March, 2005 was improper.

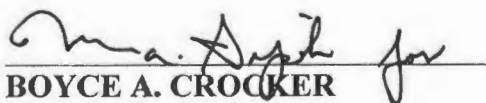
The next event which led to another appeal with the Personnel Board was when the Cabinet attempted to unilaterally reinstate Wade to her position in an apparent attempt to mitigate damages subsequent to the November 4, 2005 Order made by Hearing Officer McMurtry. Unfortunately, the Cabinet again misfired and attempted to reinstate Wade without rescinding its earlier dismissal of her, and in fact, while still very much challenging its earlier dismissal of her, and also without attempting to make Wade whole through payment of back pay. At the time the Cabinet attempted to reinstate Wade, it was still vigorously arguing that its March 2005 dismissal of Wade was proper. Again, the Hearing Officer and the Personnel Board found unilateral reinstatement without a

rescission of the earlier dismissal was void and of no effect. Franklin Circuit Court and the Kentucky Court of Appeals also upheld this decision of the Personnel Board, and the Cabinet has offered no compelling reason or any reason at all, why those findings and actions by the lower courts and the Personnel Board should be disturbed.

As to the Cabinet's claim that the Personnel Board erred when it made findings regarding Appellant Wade having been disabled for the period from March 9 through June 9, 2005, those findings were based entirely upon actions taken by the Cabinet when it placed Wade on Family Medical Leave under the FMLA, then attempted to rescind same when it improperly terminated Wade on March 10, 2005. Ultimately the Personnel Board, in deciding the first appeal (Personnel Board Appeal No. 2005-120), determined that Appellant Wade, having sought and been placed upon FMLA from March 9, 2005 and which would have extended through June 9, 2005, served to limit Wade's recovery of back pay from the dismissal.

The findings of the Personnel Board in the appeals referenced, and the determinations by Franklin Circuit Court and the Kentucky Court of Appeals in upholding every decision of the Personnel Board as to these appeals by Wade should not be disturbed. The rulings in these matters should be laid to rest.

Respectfully submitted,



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