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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001497-MR

DEPARTMENT OF CORRECTIONS,
WESTERN KY CORRECTIONAL COMPLEX — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
CIVIL ACTION NO. 03-CI-00706

BOBBY CHESTNUT — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DYCHE AND GUIDUGLI, JUDGES; PAISLEY, SENIOR JUDGE.[1]

PAISLEY, SENIOR JUDGE: The Kentucky Department of Corrections appeals from an opinion and order of the Franklin Circuit Court, affirming a decision of the Attorney General of Kentucky. The question on appeal concerns the level of specificity with which an inmate must describe the documents he or she is requesting

[1] Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

under KRS 61.872(2), a provision of the Open Records Act. It states in part that

> [a]ny person shall have the right to inspect public records. The official custodian may require written application, signed by the applicant and with his name printed legibly on the application, describing the records to be inspected.

On April 9, 2003, Bobby Chestnut, who was at that time an inmate at the Western Kentucky Correctional Complex (WKCC), filed an open records request. He asked for

> [a]n entire copy of [his] inmate file excluding any documents that would be considered confidential. Specifically beginning with date of [his] entrance into the Department of Corrections in October of 1996 until the current date.

On the next day, the open records coordinator at the WKCC responded:

> Your request is too broad and overly vague. KRS 61.872(2) states in part, "The official custodian may require written application describing the records requested." This means you must describe the records (forms) with reasonable particularity, so that the records can be identified.

Chestnut submitted a new request in which he described with greater specificity some of the documents he wanted, but he also asked for "any and every document contained within my file from the front cover to the back." The records coordinator responded to Chestnut's second request by providing him with copies of 138 documents that were directly responsive to those

he had described. He was not, however, provided with a copy of his entire file.

Chestnut also simultaneously appealed the first response he had received to the Attorney General (AG), explaining that he felt that his initial description had been clear enough for a layman to understand. He also added, "There are provisions set forth in the statute if the request creates a burden on the record holder. However it is my belief if time is required to compile the documentation, then that should have been the reason for delay rather than a denial of a record that I am statutorily entitled to."

In its letter to the AG responding to Chestnut's appeal, the Department of Corrections explained its position as follows:

> KRS 61.872(2) provides as follows: "(a)ny person shall have the right to inspect public records. The official custodian may require written application, signed by the applicant and with his name printed legibly on the application, *describing* the records to be inspected. (emphasis added). In OAG 92-56, this Office held that a custodian of records properly advises an inmate that he must request specific documents in his institutional file. A request for all "nonconfidential parts" of the file is a blanket request which need not be honored. Id. See also OAG 85-88. Even though KRS 61.871 permits the "free and open examination of public records," as a precondition to inspection, a requesting party must identify documents he or she

> wishes to review with "reasonable particularity." 03-ORD-040; 94-ORD-12.

In a decision issued on May 19, 2003, the AG acknowledged that the WKCC had responded properly to Chestnut's request based on prior decisions of the AG. The AG further stated, however, that in light of a decision made in a recent case involving a request for the personnel records of two school district employees, 03-ORD-012, Chestnut's request had been sufficiently specific to meet the requirements of KRS 61.872(2). The AG acknowledged that in 03-ORD-012, "this office departed from a long line of Attorney General decisions that held that public agencies are not obligated to honor a nonspecific request for a personnel record or inmate files, or to determine which documents within the record are exempt and which are nonexempt."

The Department of Corrections (DOC) appealed the AG's decision to the Franklin Circuit Court. In an opinion and order entered on June 28, 2004, the Circuit Court affirmed the decision on the grounds that "[t]he purpose and the plain language of the Open Records Act supports the AG's new interpretation [of KRS 61.872(2)]." The court agreed with the AG that

> [a]s long as the custodian can identify what documents the applicants wish to see, the statute is satisfied. Here, the Defendant desired to examine the documents in his inmate file. That description adequately described what documents he desired to

> inspect because the Plaintiffs could tell exactly what documents he wanted. The Plaintiffs are not authorized to require a more specific description under KRS 61.872(2).

The court also rejected an argument raised by the DOC invoking KRS 61.872(6), which provides that a public records custodian may refuse to produce public records if the request imposes an unreasonable burden or is intended to disrupt the essential functions of the public agency. The Circuit Court found that the DOC had failed to prove by clear and convincing evidence that responding to these inmate applications would create an unreasonable burden.

On appeal, the DOC challenges both the Circuit Court's interpretation of the relevant statutes, and its assessment of the evidence under KRS 61.872(6). Accordingly, we must apply two different standards of review to the circuit court's opinion. First, "the circuit court's review of an Attorney General's opinion is *de novo*. As such, we review the circuit court's opinion as we would the decision of a trial court." Medley v. Board of Educ., Shelby County, 168 S.W.3d 398, 402 (Ky.App. 2004) citing Moore v. Asente, 110 S.W.3d 336, 354 (Ky. 2003). Therefore, we apply a de novo standard of review to the Circuit Court's analysis of the relevant statutes. See Aubrey v. Office of the Attorney General, 994 S.W.2d 516, 519 (Ky. App. 1998). "In matters of statutory construction, the courts have

the ultimate responsibility[.]" Delta Air Lines, Inc. v. Commonwealth, Revenue Cabinet, 689 S.W.2d 14, 20 (Ky. 1985).

As to the circuit court's determination that the DOC had failed to prove by clear and convincing evidence that the AG's decision would impose an undue burden, "CR 52.01 requires that, in appeals of administrative agency decisions, appellate courts review the determinations of the circuit courts for clear error." Fayette County Bd. of Educ. v. M.R.D. ex rel K.D., 158 S.W.3d 195 (Ky. 2005). The situation here is complicated by the fact that the DOC bore the burden of proof in this action, ("The burden is on the public agency opposing disclosure to establish that a record is exempt from release." Medley, 168 S.W.3d at 402) and Chestnut provided no evidence. Under these circumstances, "[w]hen the trial court makes a finding of fact adverse to the party having the burden of proof and his is the only evidence presented, the test of whether its finding is clearly erroneous is not one of support by 'substantial evidence,' but rather, one of whether the evidence adduced is so conclusive as to compel a finding in his favor as a matter of law." Morrison v. Trailmobile Trailers, Inc., 526 S.W.2d 822, 824 (Ky. 1975). "An administrative decision granting relief to one having the burden of proof must be supported by findings based upon substantial evidence. . . . On the other hand, the failure to grant administrative relief to one carrying the

burden is arbitrary if the record compels a contrary decision in light of substantial evidence therein." Bourbon County Bd. of Adjustment v. Curran, 873 S.W.2d 836, 838 (Ky.App. 1994).

The appellants' first argument is that the circuit court erred by failing to apply KRS 197.025 to the facts of the case. KRS 197.025 permits certain restrictions to be placed on access to inmate records. It provides that

> (1) KRS 61.884 and 61.878 to the contrary notwithstanding, no person shall have access to any records if the disclosure is deemed by the commissioner of the department or his designee to constitute a threat to the security of the inmate, any other inmate, correctional staff, the institution, or any other person.
>
> (2) KRS 61.872 to the contrary notwithstanding, the department shall not be required to comply with a request for any record from any inmate confined in a jail or any facility or any individual on active supervision under the jurisdiction of the department, unless the request is for a record which contains a specific reference to that individual.

Under this statute, the DOC is authorized to impose limitations on prisoner's right to inspect its public records for security reasons. The DOC argues that requiring an inmate to identify precisely the form or category of records being sought is a necessary and reasonable limitation rationally related to the DOC's obligation to maintain institutional safety

and security pursuant to KRS 197.25(1) and KRS 61.878(1)(l).[2] The DOC urges that we defer to the expert judgment of prison officials in this matter, as we do in many matters regarding prison security.

Nothing in KRS 197.025, however, authorizes the DOC to require an inmate to offer a more detailed description of the records he or she wishes to see. The statute specifically authorizes the DOC to withhold documents from an inmate if those documents are deemed to present a security risk, or if they do not contain a reference to the inmate. It does not give the DOC the authority to insist that an inmate request documents with specificity. Although we are aware that the DOC is statutorily obligated to maintain institutional safety and security, the DOC does not convincingly explain how requiring an inmate to make a more specific open records request furthers this goal. Clearly, it will take longer for prison employees to go through an inmate's entire file to remove any documents that are potentially detrimental to security, but the Department fails to explain how this process would threaten institutional security.

[2] KRS 61.878 (1)(l) states in relevant part as follows:

(1) The following public records are excluded from the application of KRS 61.870 to 61.884 and shall be subject to inspection only upon order of a court of competent jurisdiction . . . :

(l) Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly[.]

The DOC next argues that KRS 61.872(2) and (3) authorized the appellants to require Chestnut to describe more precisely the records he wanted copied. The provisions state as follows:

> The official custodian may require written application, signed by the applicant and with his name printed legibly on the application, describing the records to be inspected.

KRS 61.872(2).

> A person may inspect the public records:
>
> . . . .
>
> By receiving copies of the public records from the public agency through the mail. The public agency shall mail copies of the public records to a person whose residence or principal place of business is outside the county in which the public records are located after he precisely describes the public records which are readily available within the public agency.

KRS 61.872(3)(b).

The DOC argues that simply asking for an entire inmate file is inadequate to meet the requirements of the statute. It points out that the definition of "public record" in KRS 61.870(2) does not even include the term "file." The DOC has further explained that there is no single "inmate file" because several files are created for each inmate. DOC argues that the AG's interpretation of the statute is overly broad and ignores the express intention of the legislature.

We find the AG's reasoning, and that of the circuit court, more persuasive. We agree with the circuit court that the purpose and plain language of the Open Records Act supports the AG's new interpretation. As the circuit court aptly stated in its opinion and order, "as long as the custodian can identify what documents the applicants wish to see, the statute is satisfied."

The DOC's next and more persuasive argument is that the circuit court erred in finding that the appellants had failed to prove an unreasonable burden pursuant to KRS 61.872(6), which states:

> If the application places an unreasonable burden in producing public records or if the custodian has reason to believe that repeated requests are intended to disrupt other essential functions of the public agency, the official custodian may refuse to permit inspection of the public records or mail copies thereof. However, refusal under this section shall be sustained by clear and convincing evidence.

KRS 61.872(6).

As evidence of this burden, the DOC provided, among other things, the affidavits of offender information supervisors at various correctional institutions in Kentucky, describing how much time was spent responding to open records requests from inmates and detailing how many requests had been received in the six-month period from January 1, 2003 through July 31, 2003.

The record also contains a photograph of Chestnut's inmate "file" which contains many hundreds of pages, which when stacked are about four inches thick. The circuit court determined, however, that the DOC had failed to prove by clear and convincing evidence that the AG's decision imposed an undue burden. It explained as follows:

> The Plaintiffs provide the Court with evidence showing that inmate records are often hundreds of pages long and that different parts of the files are located in different facilities. The Plaintiffs allege that they receive many requests by inmates to view their files and that many employees are needed to deal with these requests. The Plaintiffs also note that many statutes and laws prevent inmates from seeing parts of their files. Sorting through the files to pull out the documents that the prisoners cannot view and explaining why the documents cannot be viewed is undoubtedly tedious.
>
> The problem with the Plaintiffs' proof is that they do not attempt to show how the new burden will actually affect them. The Plaintiffs, for instance, do not estimate how many new employees they will have to hire to deal with the new requirement. The Plaintiffs argue that the current scheme is onerous and will become unbearable because many inmates will now request to review all of their non-confidential documents. The Plaintiffs, however, do not indicate the likelihood of this scenario, and they do not forecast what its actual burden would be. In short, the Plaintiffs fail to satisfy the "clear and convincing" standard under KRS 61.872(6) that the AG decision imposes an unreasonable burden on them.

On the basis of our review of the evidence in the record, we might not have arrived at the same conclusion as the circuit court. Nonetheless, we cannot say that the evidence is so conclusive as to compel a finding in favor of the DOC. See Morrison, 526 S.W.2d at 824. The circuit court did not therefore abuse its discretion in making this determination.

The DOC's final argument is that this entire appeal is moot. After Chestnut amended his request, he received those documents that he had specifically described. The DOC claims that this disclosure rendered Chestnut's appeal moot; and that the circuit court's subsequent opinion was therefore improperly advisory in nature. We disagree with this interpretation. Chestnut was never supplied with his "entire file" as he had requested. Had the DOC produced the "entire file," the substance of the controversy would have disappeared and only then would the case have become moot, because the disclosure sought by Chestnut's complaint would have been made. See e.g. Constangy, Brooks & Smith v. National Labor Relations Board, 851 F.2d 839, 841-42 (6th Cir. 1988).

For the foregoing reasons, the opinion and order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

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