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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001710-MR

GARRY MURPHY — APPELLANT

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM G. CLOUSE JR., JUDGE
ACTION NO. 10-CI-01197

CITY OF RICHMOND GOVERNMENT, BY AND THROUGH THE RICHMOND CITY COMMISSION; LARRY BROCK, CHIEF OF THE RICHMOND POLICE DEPARTMENT — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; KELLER AND THOMPSON, JUDGES.

KELLER, JUDGE: Following a hearing, the Richmond City Commission[1] (the Commission) found that Garry Murphy's (Murphy) off-duty conduct had violated the Richmond Police Department's (the Police Department) policies and

[1] One Commissioner did not participate because he did not believe he could be impartial.

procedures, and the Commission terminated him from his position as a police officer. The circuit court affirmed the Commission and Murphy appeals from that court's order. On appeal to this Court, Murphy argues the Commission did not make findings of fact sufficient for either the circuit court or this Court to determine whether the Commission's actions were arbitrary. Furthermore, Murphy argues that any negative impact his conduct had on the Police Department was the result of an unjustified prosecution by the Commonwealth's Attorney and resultant negative publicity in the Richmond and Lexington, Kentucky newspapers. The Appellees agree that the Commission did not make specific findings of fact; however, they note that Murphy did not request any. Furthermore, the Appellees argue that the Commission's on-the-record statement that it based its determination to discharge Murphy on the evidence presented at the hearing was sufficient to satisfy due process requirements. For the reasons set forth below, we affirm.

FACTS

The underlying facts are salacious, and we will not set them forth in detail herein. However, a brief recitation of the facts is necessary to understand what transpired below.

Several weeks before October 26, 2009, Sgt. James Rogers (Rogers), a supervisor with the Police Department, responded to a domestic violence call at the home of April McQueen (McQueen). Following that incident, Rogers and McQueen began a sexual relationship. During the course of the relationship, McQueen told Rogers that she enjoyed "rough sex," "being dominated," and sex

with multiple partners. On October 26, 2009, at McQueen's invitation, Rogers, Murphy, and another officer (collectively the officers) from the Department went to McQueen's home to have group sex. During the course of the night, McQueen suffered a split lip and bruises on her neck and other parts of her body.

After the officers left her home, McQueen went to a neighbor's house to get ice for her split lip. The neighbor encouraged McQueen to report the incident to the sheriff's department, but McQueen refused. The next morning, the neighbor, with the assistance of others, reported the incident to the Madison County Sheriff's Department (the Sheriff's Department). According to McQueen, neighbors, acquaintances, and officers from the Sheriff's Department coerced her into going to the hospital. At the hospital, McQueen underwent treatment for her split lip and bruises but refused to submit to a rape kit because she did not believe she had been raped.

McQueen then underwent a recorded interview with a detective from the Sheriff's Department. During the interview, McQueen made some statements that led the detective and the Commonwealth's Attorney to believe that crimes had been committed. Soon after receiving notice of the Sheriff Department's investigation, the chief of the Police Department suspended the officers and advised them that they were being charged with violating the Police Department's policies and provisions regarding conduct. Thereafter, a Madison County Grand Jury indicted the officers on a number of criminal charges, and the Police Department and the officers agreed to put the administrative proceedings in

abeyance pending resolution of the criminal charges. Those charges were dismissed following a not guilty jury verdict.

The Police Department then proceeded with an administrative hearing before the Commission on the violation of the policies and procedures charges. At the hearing, Rogers and McQueen testified about their relationship, the events of October 26, 2009, and the prosecution of the criminal charges.

The detective who conducted an internal affairs investigation for the Police Department testified at the hearing about his investigation and his belief that no criminal charges should have been filed. The chief of the Police Department testified that, once the media began to publicize the events of October 26, other officers in the Police Department expressed concerns about working with Rogers and Murphy and about the public's perception of the Police Department. He also testified that morale within the Police Department had been damaged by the publicity. However, the chief admitted that there likely would not have been any administrative charges filed if there had been no criminal prosecution and the attendant publicity.

A criminal justice professor called as an expert witness by the Police Department testified that the officers' conduct: showed poor judgment; could have a negative impact on morale; and would diminish the view the public had of the Police Department. Finally, a human sexuality expert testified on behalf of the officers that the behavior they engaged in was legal; although he admitted it might raise some concerns among the general public.

Following the hearing, the Commission deliberated and found that Murphy and Rogers[2] had violated two provisions of the Police Department's Policies and Procedures Manual - "Conduct Impairing the Police Department" and "Conduct Unbecoming" - and discharged them. The Commission did not make any written findings but, after deliberation, the members unanimously approved and adopted the following motion regarding Murphy and a similar motion regarding Rogers:

> [B]ased on the evidence in the record presented in the hearing, I move that we find Officer Murphy is guilty of the charges of violating Chapter 5.07, Section 6, C-7, conduct impairing the police department and Chapter 5.07, Section 6, C-8, entitled conduct unbecoming of the rules and regulations of the Richmond Police Department and that we affix the punishment as dismissal from service and immediate termination of employment.

Following this vote, Murphy and Rogers timely filed an action in circuit court arguing that the Commission's decision did not contain adequate findings of fact, was arbitrary, and was not supported by the evidence.

The circuit court made specific findings of fact regarding the events of October 26 and what followed. The court then affirmed the Commission, finding that it afforded Murphy an adequate due process hearing; it was not required to make specific findings of fact; its actions were not arbitrary; and its determination was supported by evidence of substance. It is from the circuit court's order that Murphy now appeals. We set forth additional facts as necessary below.

[2] It appears from the record that the third officer voluntarily resigned from the Police Department and was not involved in the hearing before the Commission.

STANDARD OF REVIEW

In reviewing a circuit court's determination we are guided by the clearly erroneous rule as set forth in Kentucky Rule of Civil Procedure (CR) 52.01. Pursuant to that rule, "[w]e cannot disturb the trial court's determination unless it acted clearly erroneously in the sense that its determinations were not supported by substantial evidence." *Stallins v. City of Madisonville*, 707 S.W.2d 349, 351 (Ky. App. 1986). With that standard in mind, we address the issues raised by Murphy on appeal.

ANALYSIS

As noted above, Murphy argues that the Commission did not make findings of fact sufficient to permit appellate review and that any negative impact on the Police Department was not the result of his actions. We address the sufficiency of the Commission's findings first.

According to Murphy, absent specific findings of fact, the Commission's action was *per se* arbitrary. We disagree for the following reasons.

Initially, we note that

> The function of the hearing body in instances of charges against police officers is to make two determinations: first, whether the officer has violated the rules and regulations of the department and if so, second, it must exercise its discretion in imposing a penalty. The first is subject to judicial review; the second is not.

Stallins, 707 S.W.2d at 350. The Commission herein fulfilled its obligations under *Stallins*. It determined that Murphy had violated the Police Department's policies

and procedures regarding conduct unbecoming and conduct impairing the Police Department, and it imposed a penalty. *Stallins* requires nothing more.

Next, we note that, Murphy's argument to the contrary notwithstanding, the Commission did make findings of fact - that Murphy violated the policies and procedures regarding conduct unbecoming a police officer and conduct impairing the Police Department. What the Commission did not do is cite to the evidence it relied on in making those findings of fact. Just as a jury is not required to set forth the evidence it relied on in making its factual determinations, the Commission was not required to do so either.

Finally, we note that Murphy relies on *Pearl v. Marshall,* 491 S.W.2d 837 (Ky. 1973) to support his argument that the Commission was required to make specific findings of fact. However, that reliance is misplaced. In *Pearl,* a vendor applied for a liquor license. The pertinent statute required the applicant to show that, absent issuance of the license, "[s]ubstantial aggregations of population would otherwise not have reasonable access to a licensed vendor." *Id.* at 838. Based on its finding that the applicant met "all of the requirements of the laws and regulations," the Alcoholic Beverage Control Board issued the license. On appeal, the former Court of Appeals determined that the license was improperly issued because the Board was required to find that a substantial number of people would not have access to a licensed vendor before issuing the license. In other words, where an agency's order "rests upon a factual determination" the agency is required to make findings of fact. *Id.* at 839.

Pearl is distinguishable for three reasons. First, in *Pearl* there was a factual dispute concerning the number of people who would not have access to a licensed vendor if the Board denied the application. Here, there is no dispute regarding the underlying facts. Murphy has admitted that the events of October 26, 2009, took place, and he did not dispute the evidence that the publicity surrounding those events had a negative impact on the Police Department.

Second, the statute in question in *Pearl* required the Board to make specific determinations before issuing a license. As the Court noted, the Board's determination did "not give any clue that it even considered the real issues;" thus, it was fatally deficient. *Id.* at 840. Here, there is no statutory requirement for the Commission to make any specific findings. Furthermore, it is clear from the Commission's findings that it considered the real issues - whether Murphy's conduct violated provisions of the Police Department's policies and procedures.

Third, appeals from a decision by the Alcoholic Beverage Control Board are governed by KRS Chapter 13B. Pursuant to KRS 13B.150, the circuit court is limited to reviewing the record from the agency. Furthermore, on review, the court may not *de novo* make findings of fact. However, an appeal from a hearing authority in a police discipline case is pursued under KRS 15.520(2), as an original action in circuit court. As such, the proceeding is "quasi *de novo*" wherein the court reviews the record from the hearing authority and any additional evidence the parties choose to file. Because of this structural difference in how appeals are

pursued, as well as for the preceding other two reasons, *Pearl* has no application herein.

For the foregoing reasons, we hold that the circuit court correctly determined that the Commission's findings of fact were sufficient. Furthermore, we agree with the circuit court that the Commission's findings of fact were amply supported by evidence of substance in the record.

Next, we address Murphy's argument that his discipline was based, not on his conduct, but on the negative impact of publicity over which he had no control. As noted above, the Commission found Murphy guilty of violating the Police Department's policies and procedures Chapter 5.07, Section VI, C, 7: Conduct (Impairing the Police Department), which states that "No member shall take any action which will impair the efficiency or reputation of the department, its members or employees;" and Chapter 5.07, Section VI, C, 8: Conduct (Unbecoming), which states that

> Members shall conduct themselves at all times, both on and off duty, in such a manner as to reflect favorably on the department. Unbecoming conduct shall include that which brings the department into disrepute or reflects discredit upon the individual as a member of the department, or which impairs the operation or efficiency of the department or member.

As we understand it, Murphy contends that his conduct - engaging in consensual group sex that involved aspects of domination, submission, sadism, and masochism - did not, in and of itself, have any "prohibited effect on the [Police

Department] or its employees." Rather it was the publicity regarding that conduct that had the prohibited effect. We agree. Behavior that is completely private, i.e. known only to the participants, cannot reflect either negatively or positively on other officers or the Police Department and would likely not be the proper subject of discipline.

However, Murphy's argument misses the point because Murphy's behavior, no matter his intent or the intent of the other participants, became public. The point of the two policies and procedures is to ensure that an officer's behavior, if it becomes public, does not have an adverse impact on his fellow officers or the Police Department. Murphy chose to engage in conduct, which was likely to be viewed as aberrant by the community at large, with three other people. When he did so, he took the risk that his conduct would become public. He cannot now escape responsibility for his choice by claiming that he did nothing to publicize that conduct. To hold otherwise would render the Conduct Unbecoming and Conduct Impairing the Police Department policies and procedures meaningless.

CONCLUSION

Because the Commission made sufficient findings of fact and those findings were supported by evidence of substance, we affirm.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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