

IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

FILED
October 30, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

JONATHAN K. SHIPLEY)	ANDERSON COUNTY
)	03A01-9603-CV-00096
Plaintiff-Appellant)	
)	
v.)	HON. JOHN W. ROLLINS,
)	JUDGE
)	(Sitting by Designation)
THE PERSONNEL ADVISORY BOARD)	
FOR THE CITY OF OAK RIDGE,)	
TENNESSEE, et al.)	
)	
Defendants-Appellees)	AFFIRMED AND REMANDED

DAVID A. STUART OF CLINTON FOR APPELLANT

LEWIS R. HAGOOD and ROBERT N. TOWNSEND OF KNOXVILLE FOR JEFFREY J. BROUGHTON AND THE CITY OF OAK RIDGE

ROBERT W. WILKENS ON OF OAK RIDGE FOR THE PERSONNEL ADVISORY BOARD AND THE MEMBERS THEREOF

O P I N I O N

Goddard, P.J.

This is an appeal from a judgment entered by the Anderson County Circuit Court upholding an administrative decision of the Defendant Personnel Advisory Board¹ of the City of Oak Ridge. The PAB affirmed the decision of Jeffery J. Broughton, Oak Ridge City Manager, to terminate the employment of

¹ The Defendants will be collectively referred to as PAB.

Plaintiff Jonathan K. Shipley, a police officer for the City of Oak Ridge.

The Plaintiff sought a statutory writ of certiorari² to reverse the PAB decision. Upon motion of the PAB, the Trial Court converted the writ to one of common law certiorari.³ The Plaintiff does not appeal this decision. The Trial Court also prohibited discovery, finding that discovery is not allowed when reviewing an administrative decision under a common law writ of certiorari.

The Plaintiff insists the Trial Court was in error in finding that the PAB did not act illegally, arbitrarily, or fraudulently in terminating him. The Plaintiff further claims that his due process rights were violated by the PAB. Finally, the Plaintiff asserts that the Trial Court erred in not allowing him to engage in discovery.

This case originated from an event occurring on the evening of May 29, 1992. The Plaintiff, while on duty as an undercover police officer, was cited for indecent exposure after being found in the back of a van with another individual.⁴ That occurrence led to an extensive investigation by the Oak Ridge Police Department. Oak Ridge Chief of Police, Timothy A. Braaten, recommended to City Manager Broughton that the Plaintiff be terminated based upon the findings of the investigation, which uncovered numerous other transgressions by the Plaintiff.

² T.C.A. 27-8-102

³ T.C.A. 27-8-101

⁴ The criminal charges were eventually dismissed.

City Manager Broughton terminated the Plaintiff, who appealed his decision to the PAB pursuant to the City of Oak Ridge Personnel Ordinance. The PAB unanimously affirmed the decision of City Manager Broughton after conducting a three day hearing.

As already noted, the Plaintiff appeals, claiming that his due process rights were violated by the PAB in dismissing him from the Oak Ridge Police Department. Review under a common law writ of certiorari is limited to whether "the inferior board or tribunal (1) has exceeded its jurisdiction, or (2) has acted illegally, arbitrarily, or fraudulently." McCallen v. City of Memphis, 786 S.W.2d 633 (Tenn.1990), quoting Hoover Motor Exp. Co. v. Railroad and Public Utilities Commission, 261 S.W.2d 233 (Tenn.1953).⁵ The Plaintiff does not allege that the PAB exceeded its jurisdiction; thus, the only issue is whether the PAB acted illegally, arbitrarily, or fraudulently. The standard for review is stated in McCallen, at page 641:

[T]he court's primary resolve is to refrain from substituting its judgment for that of the local governmental body. An action will be invalidated only if it constitutes an abuse of discretion. If "any possible reason" exists justifying the action, it will be upheld. Both legislative and administrative decisions are presumed to be valid and a heavy burden of proof rests upon the shoulders of the party who challenges the action.

The Plaintiff did not provide the Trial Court one scintilla of evidence demonstrating that the PAB acted illegally, arbitrarily, or fraudulently, thus, failing to meet his "heavy

⁵ By contrast, review under the statutory writ set forth in T.C.A. 27-8-102 is by trial *de novo*. McCallen v. City of Memphis, 786 S.W.2d 633 (Tenn.1990).

burden of proof." The Trial Court had more than sufficient justification for upholding the decision to terminate the Plaintiff.

The Plaintiff's claim that his due process rights were violated by the PAB is also without merit. Under Phillips v. State Bd. of Regents, 863 S.W.2d 45, 50 (Tenn.1993), this Court must consider the following in determining whether the Plaintiff was afforded sufficient due process:

"[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). In determining what process is due in a particular situation, three factors must be considered: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of the interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). Moreover, the component parts of the process are designed to reach a substantively correct result. Elaborate procedures at one stage may compensate for deficiencies at other stages. Signall, 538 F.2d at 246.

Applying Phillips to the facts of this case, it is clear, as hereinafter set out, that the PAB provided sufficient due process for the Plaintiff.

Although termination from employment requires more due process than minor disciplines, further procedural safeguards by the PAB would not have significantly lessened the risk of an erroneous decision. A local government cannot be expected to

provide more due process procedural safeguards than the City of Oak Ridge provided. The Plaintiff had five meetings with his immediate supervisor, the Police Chief, with his attorney present. He thereafter participated in two additional meetings, while again represented by legal counsel, before City Manager Broughton. Finally, as already noted, the PAB, in a three day hearing, reviewed the actions of the Police Chief and the City Manager and found the termination to be justified.

The Plaintiff argues that the City of Oak Ridge Administrative Policy and Procedural Manual requires the City Manager to seek a recommendation from the Personnel Director.⁶ It is undisputed that the City Manager did not seek the recommendation of the Personnel Director. As a result, the Plaintiff argues that he was denied due process.⁷ However, one relatively minor procedural deviation in the context of the facts developed in this case does not rise to the level of constitutional due process deprivation.

The procedure used by the City of Oak Ridge provided safeguards to monitor such deviations. The component parts used by the PAB are designed to reach a substantively correct result. Review of the City Manager's decision compensates for deficiencies such as a failure to consult the Personnel Director.

⁶ Section 2.2 of the Manual provides:

Department Directors are granted authority to discipline employees up to and including Minor Suspensions, with the advice and counsel of the Personnel Director. Major Suspensions, Dismissals, denial of pay increments, or demotion in pay grade, rank, and salary shall be determined by the City Manager upon the recommendation of the Department Director and the Personnel Director.

⁷ Section 2.8 of the manual refers to the procedures as guidelines. We do not reach the question of whether the manual procedures are mandatory or mere guidelines.

Furthermore, the final decision rests with the City Manager. The City Manager cannot delegate the authority to terminate a police officer to others. The Personnel Director does not have to concur in the City Manager's decision to terminate a police officer. Ultimately, the City Manager makes the decision, subject to review by the PAB. In this case, the City Manager made the decision to terminate. Consultation with the Personnel Director would not have altered the result. Consequently, we find this issue to be without merit.

The final issue raised by the Plaintiff is whether the Trial Court erred in not allowing him to engage in discovery. As already noted, this case proceeded on the basis of common law certiorari.

Because the standard of review by the Trial Court is whether the inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally, it would be inappropriate to countenance additional testimony which might be uncovered by discovery and, as a result, reverse the administrative body based upon evidence not before it.

Moreover, the Plaintiff has not cited any authority for the proposition that he was entitled to engage in discovery when review is under a common law writ of certiorari. As the Plaintiff has failed to cite any legal authority in support of this proposition, this Court is of the opinion that he has waived our consideration of this issue. Rule 27(7) of the Tennessee Rules of Appellate Procedure; Rampy v. ICI Acrylics, Inc., 898

S.W.2d 196 (Tenn.App.1994); Michelsen v. Stanley, 893 S.W.2d 941 (Tenn.App.1993); Wilhite v. Brownsville Concrete Co., 798 S.W.2d 772 (Tenn.App.1990).

For the foregoing reasons, the judgment of the Trial Court is affirmed and the cause remanded for collection of costs below. Costs of appeal are adjudged against the Plaintiff and his surety.

Houston M. Goddard, P.J.

CONCUR:

Herschel P. Franks, J.

William H. Inman, Sr.J.