

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

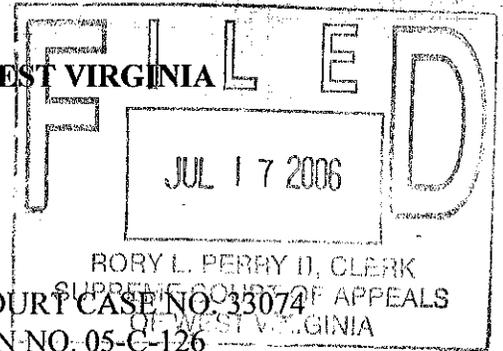
MICHAEL GIANNINI,

Plaintiff-Appellee,

v.

THE FIREMEN'S CIVIL SERVICE
COMMISSION OF THE CITY OF
HUNTINGTON, and DAVID A.
FELINTON, Mayor of the City of
Huntington,

Defendants-Appellants.



SUPREME COURT CASE NO. 33074
CIVIL ACTION NO. 05-C-126
The Honorable John L. Cummings, Judge
Circuit Court of Cabell County

APPELLEE'S BRIEF

Prepared by Counsel for Appellee:

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I. STATEMENT OF THE CASE

On or about April 14, 2004, the Appellee, Pvt. Michael Giannini, was suspended from duty, without pay, from the City of Huntington Fire Department pending termination. The Appellee was charged with violating the City of Huntington Fire Department General Rules and Regulations, Paragraph 2, which states that “. . . personnel shall be governed by the ordinary rules of good behavior observed by self respecting, law abiding citizens and shall conduct themselves in such a manner as will bring no reproach or reflection upon the Department, the company or themselves.” The suspension followed the Appellee’s arrest on or about April 10, 2004, for the alleged possession of a controlled substance.

On July 14, 2004, a hearing was held before the Firemen’s Hearing Board regarding the Appellee’s charge of violating Paragraph 2 of the General Rules and Regulations of the Huntington Fire Department. (See generally Fireman’s Hearing Board Transcript, hereinafter referred to as “FHBT”). Testimony was elicited wherein Chief Greg Fuller admitted that the Appellee was never under the influence of controlled substances on the job and that two (2) other fireman were previously found guilty of a misdemeanor DUI and were not terminated. (See FHBT, pp. 30, 31 and 33). Further, Chief Fuller testified that a violation of Paragraph 2 of the General Rules and Regulations of the Huntington Fire Department is not automatically a terminable offense, but is up to his discretion as the Chief. (See FHBT, p. 29).

At the hearing, it was stipulated that the Appellee was an exemplary fire fighter, that he received a commendation of valor for saving a woman’s life, and the Appellee has had no past disciplinary action taken against him while working as a firefighter. (See FHBT, pp. 38-39). No testimony or evidence was submitted at the hearing by the City of Huntington regarding the

Appellee's arrest other than the police report. (See generally FHBT). The arresting officer did not testify at the hearing and no laboratory test results were entered into evidence to prove that the Appellee was in possession of a controlled substance. Id.

Ultimately, the Hearing Board found that the Appellee should be reinstated and the Board awarded the Appellee back pay. No findings of facts or conclusions of law were issued by the Hearing Board. Upon an appeal of the decision by the City of Huntington, a hearing was held before the Fire Civil Service Commission on or about August 26, 2004. (See generally Fire Civil Service Commission Transcript, hereinafter referred to as "FCSC").

At the August 26, 2004, hearing, it was again stipulated that the Appellee was an exemplary fire fighter, that he received a commendation of valor for saving a woman's life, and the Appellee has had no past disciplinary action taken against him while working as a firefighter. (See FCSC, pp. 45-46). Further, Chief Greg Fuller admitted that the Appellee was never under the influence of controlled substances on the job and that two (2) other firemen were previously found guilty of a misdemeanor DUI and were not terminated. (See FCSC, pp. 47-48).

Chief Fuller and Captain Earl testified that the Appellee was never tested for drugs by the Department based upon reasonable suspicion because no one ever suspected the Appellee of being under a controlled substance in the course of his employment. (See FCSC, pp. 49 and 57). Chief Fuller also testified that a violation of Paragraph 2 of the General Rules and Regulations of the Huntington Fire Department is not automatically a terminable offense, but is up to his discretion as the Chief. (See FCSC, p. 47).

Officer Levi Livingston testified as the patrolman employed by the Huntington Police Department who arrested the Appellee on April 10, 2004. Officer Livingston testified that he pulled

the vehicle the Appellee was operating over on a traffic violation. (See FCSC, p. 25). After pulling the Appellee over and receiving the Appellee's consent to search the vehicle, Officer Livingston found what was determined by him through a field test to be a small amount of crack cocaine. Id. No laboratory tests were conducted on the substance, nor was the substance's chemical composition ever confirmed. (See FCSC, p. 29).

The Appellee did not testify at the August 26, 2004, hearing before the Fire Civil Service Commission because of his Fifth Amendment privilege. (See FCSC, p. 55). In addition, Appellee's counsel stated at the hearing that the Appellee entered into addictions counseling services at St. Mary's Hospital in Huntington, West Virginia in April 10, 2004, where he was referred by the Chief Deputy of the Huntington Fire Department. (See FCSC, p. 54). St. Mary's Medical Services contracts with the Huntington Fire Department to provide counseling services to the fire department's employees and their families. Id.

On November 19, 2004, the Fire Civil Service Commission found that the Appellee did violate the General Rules and Regulations of the Fire Department by conducting himself in a manner to bring reproach and negative reflection upon the Fire Department and that he failed to observe the ordinary rules of good behavior by self-respecting, law-abiding citizens, and upheld the suspension of the Appellee. (See Findings of Fact/Conclusions of Law Dated November 19, 2004). On November 22, 2004, the Appellee was terminated from the City of Huntington Fire Department by Mayor David Felinton. (See November 22, 2004, Letter, attached as Exhibit E to the Appellee's Memorandum of Law in Support of Writ of Certiorari).

On February 9, 2005, the charge of misdemeanor possession of a controlled substance was dismissed, with prejudice, against Michael David Giannini.¹ (See Ruling, attached as Exhibit F to the Appellee's Memorandum of Law in Support of Writ of Certiorari). On February 14, 2005, the Appellee appealed the decision of the Fire Civil Service Commission by filing a Petition for Writ of Certiorari with the Cabell County Circuit Court. On August 25, 2005, the Cabell County Circuit Court filed its Findings of Fact and Conclusions of Law for Order Granting Petitioner's Writ of Certiorari. Specifically, the lower court reversed the decision of the Fire Civil Service Commission by finding that no just cause existed to terminate the Appellee and the November 19, 2004, decision suspending the Appellee was against the evidence and not supported by any admissible evidence. (See Findings of Fact and Conclusions of Law for Order Granting Petitioner's Writ of Certiorari dated August 26, 2005).

¹ The misdemeanor charge of possession of a controlled substance was dismissed before the Appellee could be tried for the charge. Consequently, the Appellee did not challenge the validity of the initial traffic stop and/or subsequent search of his vehicle in a court of law.

II. STATEMENT REGARDING ALLEGED ERRORS

The Circuit Court of Cabell County's decision reversing the Fire Civil Service Commission's decision to terminate the employment of the Appellee, Michael Giannini, on the basis that just cause did not exist and its decision was against the evidence and not supported by any admissible evidence, was, and is, plainly right and without error.

III. TABLE OF AUTHORITIES

CASES:

American Federation of State, County & Municipal Employees v. Civil Service Commission,
174 W. Va. 221, 324 S.E.2d 363 (1984) 7

City of Minneapolis v. Moe, 450 N.W.2d 367 (Minn.App.1990) 12

In re Queen, 196 W. Va. 442, 473 S.E.2d 483 (1996)7

Johnson v. Ashley, 190 W. Va. 678, 441 S.E.2d 399 (1994) 12

Johnson v. City of Welch, 182 W. Va. 410, 388 S.E.2d 284 (1989) 8,10, 11

Magnum v. Lambert, 183 W. Va. 184, 394 S.E.2d 879 (1990) 7, 8, 11

Neely v. Mangum, 183 W. Va. 393, 396 S.E.2d 160 (1990)12

Oakes v. Department of Finance and Administration, 164 W. Va. 384, 264 S.E.2d 151 (1980) .. 11

Recommendation for Discharge of Kelvie, 384 N.W.2d 901 (Minn.App. 1986) 11,12

OTHER:

West Virginia Code § 8-15-25(a) 7

IV. ARGUMENT

A. Standard Of Review

Previously, this Court has held that “[a] final order of the Civil Service Commission, based upon findings not supported by the evidence, upon findings contrary to the evidence, or upon a mistake of law, will be reversed and set aside by this Court upon review. . . .” Magnum v. Lambert, 183 W. Va. 184, 394 S.E.2d 879 (1990); *quoting* Syl. Pt. 1, American Federation of State, County & Municipal Employees v. Civil Service Commission, 174 W. Va. 221, 324 S.E.2d 363 (1984). Generally, the West Virginia Supreme Court of Appeals’ review of a circuit court’s decision regarding a civil service commission’s decision is *de novo*. In re Queen, 196 W. Va. 442, 473 S.E.2d 483 (1996).

A commission’s decision should be overturned when the decision is “clearly erroneous, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” Id. A decision is clearly wrong, arbitrary or capricious when there is a misapplication of the law, the commission entirely failed to consider an important aspect of the problem, it offered an explanation which ran counter to the evidence before the commission, or it offered an explanation so implausible that it could not be ascribed to a difference in view or the product of commission expertise. Id.

B. The Fire Civil Service Commission’s Decision To Terminate The Appellee Upon A Finding Of Just Cause Was Not Supported By Substantial Evidence

West Virginia Code § 8-15-25(a) states that “[n]o member of any paid fire department subject to the civil service provisions of this article may be removed, discharged, suspended or reduced in rank or pay except for just cause, . . .” This Court has defined “just cause” in the following manner:

Just cause has been defined as a substantial cause which specially relates to and affects that administration of the office, and must be restricted to something of a substantial nature directly affecting the rights and interest of the public. An officer should not be removed from office for matters which are trivial, inconsequential, or hypothetical, or for mere technical violations of statute or official duty without wrongful intention.

Magnum v. Lambert, 183 W. Va. 184, 394 S.E.2d 879 (1990); *citing* Johnson v. City of Welch, 182 W. Va. 410, 388 S.E.2d 284 (1989). The burden of proving that the Appellee was dismissed for just cause is on the City of Huntington. Magnum v. Lambert, 183 W. Va. 184, 394 S.E.2d 879 (1990).

The Appellee was charged and ultimately terminated for violating the City of Huntington Fire Department General Rules and Regulations, Paragraph 2, which states that “. . . personnel shall be governed by the ordinary rules of good behavior observed by self respecting, law abiding citizens and shall conduct themselves in such a manner as will bring no reproach or reflection upon the Department, the company or themselves.” Chief Fuller testified on two separate occasions that a violation of Paragraph 2 of the General Rules and Regulations of the Huntington Fire Department is not automatically a terminable offense.

The Appellee’s arrest for possession of a controlled substance alone does not constitute a substantial cause which specially relates to and affects the administration of being a fire fighter. The Appellee was never convicted of any charge, including that of possession of a controlled substance, and the Appellee was never disciplined in his employment as a fire fighter with the Huntington Fire Department prior to this incident.

The alleged controlled substance found in the Appellee’s vehicle upon his arrest was never tested by a laboratory to determine the makeup of the substance. The City of Huntington did not prove the substance found in the vehicle was actually the Appellees nor was it alleged that the

Appellee ingested the substance or was operating the vehicle under the control of said substance. Further, Chief Fuller testified that the Appellee was never tested for drugs by the Fire Department based upon reasonable suspicion because no one ever suspected the Appellee of being under the control of an illegal substance in the course of his employment.

The occupation of a firefighter is highly stressful. It is not uncommon for firefighters to turn to alcohol and drugs in an attempt to relieve the stress. At the recommendation of his Chief Deputy for the Huntington Fire Department, the Appellee took advantage of addiction counseling services provided through his employment as a firefighter. However, the action of firing the Appellee because of an addiction which did not affect the Appellee's employment begs the question of why the department would contract for such services for their employees if the reason why the employees would utilize such services was a terminable offense?

The Appellee's dismissal must be restricted to something of a substantial nature directly affecting the rights and interest of the public. No evidence was presented to the Fire Civil Service Commission ("Commission") that the Appellee used a controlled substance in the course of his employment by the City of Huntington. Further, it was never proven in a court of law that the substance found in the possession of the Appellee was crack cocaine or that he was under the influence of cocaine at the time of the arrest. As set forth above, the charge against the Appellee for which he was arrested was dismissed by the State of West Virginia, with prejudice, in February, 2005.

The Commission's decision to terminate the Appellee was arbitrary. The decision to terminate the Appellee based solely on an arrest for possession of a controlled substance is inconsistent with past disciplinary actions taken by the Huntington Fire Department and the Fire

Civil Service Commission. Other firefighters employed by the City of Huntington were not terminated when not only arrested for, but found guilty of, misdemeanor Driving Under the Influence (DUI). Although Chief Fuller testified that the Appellee's arrest put the Huntington Fire Department and City of Huntington in a bad light, the Chief stated the same about the two Huntington firefighters previously convicted of DUI offenses who were not terminated.²

The Appellant discussed at length this Court's decision in Johnson v. City of Welch, 182 W. Va. 410, 388 S.E.2d 284 (1989). However, the three separate incidents considered in Johnson can be distinguished from the case at bar. As set forth in the Appellant's brief, the three officers discussed in Johnson were discharged for unexcused absences, failure to complete paperwork concerning an investigation, and consuming alcohol while on duty and in uniform. Id. All three matters involved infractions by the officers which directly affected their employment, either by failing to show up for work, failing to properly perform their job duties, or conducting themselves inappropriately on the job.

The Commission based its termination of the Appellee on an arrest for possession of a controlled substance which occurred while the Appellee was off duty and which charges were later dropped, with prejudice. At the hearing before the Fire Civil Service Commission, the Fire Chief and the Appellee's Captain testified that the Appellee was an exemplary firefighter, he had never been disciplined during his tenure as a Huntington firefighter, and he had never been suspected of being under the control of a substance while in the course of his employment as a firefighter. In short, the City of Huntington did not present substantial evidence to the Commission that the Appellee's

² The Appellee does not dispute that alcohol is a legal substance. However, driving a vehicle under the influence of alcohol is a violation of the law in West Virginia and surrounding states.

alleged conduct directly affected his employment as a firefighter. Consequently, the Appellant cannot use the Court's decision that the infractions committed in Johnson were substantial enough to constitute just cause to argue the Commission had just cause to terminate the Appellee.

The definition of "just cause" as set forth above is virtually identical to the standard for judging "good cause" for dismissal under the state civil service system. See Magnum v. Lambert, 183 W. Va. 184, 394 S.E.2d 879 (1990). In Oakes v. Department of Finance and Administration, 164 W. Va. 384, 264 S.E.2d 151 (1980), the postmaster for the state capitol post office was not terminated for "good cause" due to negligent mail handling because "nothing in the record indicate[d] that Mr. Oakes had a prior history of negligent or inefficient conduct in his supervision of the Capitol Post Office, nor that he had received any reprimands or been subjected to any disciplinary proceedings." Here, it was stipulated by the City of Huntington that the Appellee was an exemplary firefighter, he had never been disciplined during his tenure as a Huntington firefighter, and no had ever suspected him of being under the control of a substance while in the course of his employment as a firefighter.

Although not controlling on this Court, a case in Minnesota, which contains a similar factual scenario and virtually identical definition of "just cause," revealed a decision by the Minnesota Court of Appeals affirming an order by the Minneapolis Civil Service Commission that just cause did not exist to discharge a Minneapolis firefighter. Recommendation for Discharge of Kelvie, 384 N.W.2d 901 (Minn.App. 1986) (attached as Exhibit B to the Appellant's Brief). Specifically, John Kelvie, a firefighter, was arrested and charged with three misdemeanor counts of possession of marijuana, injection equipment, and drugs not in an original container. Id. Mr. Kelvie was then discharged as a firefighter because he allegedly violated his oath of office and sections of the Minneapolis Civil

Service Commission rules. Id. In affirming the Commission's decision that no just cause exists for Mr. Kelvie's discharge, the Court found that the Commission's findings that Mr. Kelvie possessed a small quantity of marijuana and there was no relationship between the charges against him and his job performance were supported by substantial evidence. Id.

The Appellant argues that Kelvie does not apply to this matter because the decision to discharge Kelvie was principally based upon his assertion of his Fifth Amendment rights, not necessarily on the misdemeanor charges. However, Kelvie is not distinguishable on that basis as suggested by the Appellant because the Appellee also invoked his fifth amendment privilege due to the pending criminal charges and did not testify on his own behalf at the administrative hearings. Further, the Minnesota case cited by the Appellant, City of Minneapolis v. Moe, 450 N.W.2d 367 (Minn.App.1990) (attached as Exhibit C to the Appellant's Brief), is distinguishable from this matter because it involved a police officer who actually plead guilty to charges of felony possession of cocaine.³

Most of the cases cited by the Appellant can be distinguished from the matter at hand because they involve police officers who are terminated from their jobs for violating laws either on or off the job. The job duties of police officers and firefighters differ to the extent that the primary function of a police officer is to enforce the laws. Although a firefighter is held to certain standards in a community, a firefighter is not an enforcer of laws.

³ The other cases cited by the Appellant, Johnson v. Ashley, 190 W. Va. 678, 441 S.E.2d 399 (1994) and Neely v. Mangum, 183 W. Va. 393, 396 S.E.2d 160 (1990), are also distinguishable from the case at bar. Johnson involves an off duty police officer caught in the act of domestic violence who was discharged because of the incident involved, plus a history of domestic violence and problems which encroached on his employment. Neely is a political discharge case which does not involve a police officer or firefighter and/or require a finding of just cause for termination.

The reason given as the basis for the Appellee's termination as the violation of the City of Huntington Fire Department General Rules is just a pretext for terminating the Appellee for his arrest for possession of a controlled substance. The Appellee was not on trial before the Commission on a misdemeanor charge of possession of a controlled substance. The Commission's job was to determine whether just cause existed to terminate the Appellee's employment as a firefighter. The evidence before the Commission was testimony by the arresting officer that he found a substance that field tested a crack cocaine in the vehicle driven by the Appellee. No evidence was submitted that the substance belonged to the Appellee or that he had ingested the substance. No evidence was submitted that the Appellee had been disciplined in the course of his employment as a firefighter. The Fire Chief and the Appellee's Captain agreed the Appellee was an exemplary firefighter whom they never suspected of having a substance abuse problem because of his job performance. The decision to terminate the Appellee was against the substantial evidence, subjective, arbitrary and capricious, and inconsistent with other disciplinary actions taken by Chief Fuller.

V. CONCLUSION

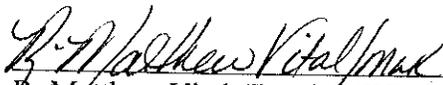
The Circuit Court's decision should be upheld because the findings and rulings made by the Cabell County Circuit Court Judge were all clearly proper and without error. The decision to terminate the Appellee by the Commission was arbitrary and not supported by a rational basis. The charge of possession of a controlled substance against the Appellee was dismissed, the Appellee was never tested for drugs by the Department based upon reasonable suspicion because no one ever suspected the Appellee of being under the control of an illegal substance in the course of his employment, the Appellee had never been disciplined in the course of his employment, and other firefighters who had actually been convicted of misdemeanor DUI were not terminated by the Fire

Civil Service Commission. Further, insufficient evidence was presented by the City of Huntington showing the Appellee actually possessed the substance found in the vehicle or that he ingested the substance. As a result, the City of Huntington did not have just cause to terminate the Appellee's employment as a firefighter and the Appellee's employment should be reinstated.

WHEREFORE, the Appellee, by counsel, for the reasons set forth above, respectfully requests this Court to reject the Appellant's request for relief and uphold the Circuit Court's decision finding no just cause to terminate the Appellee in its entirety.

Respectfully submitted,

Michael Giannini
By Counsel,


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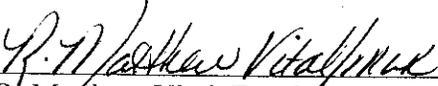
THE FIREMEN'S CIVIL SERVICE
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CERTIFICATE OF SERVICE

I, R. Matthew Vital, counsel for the Appellee, Michael Giannini, do hereby certify that a true and accurate copy of the *APPELLEE'S BRIEF* was served on counsel of record by U. S. Mail, First Class, postage prepaid, this 13th day of July, 2006:

Scott McClure, Esquire
Christopher Dean, Esquire
City of Huntington
Box 1659
Huntington, WV 25717



R. Matthew Vital, Esquire (WV Bar No. 7246)