1979

Dan C. Worrall v. Ogden City Fire Department & Ogden City, A Utah Municipal Corporation : Brief of Respondents

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

DAN C. WORRALL, Plaintiff/Appellant, vs. OGDEN CITY FIRE DEPARTMENT & OGDEN CITY, A Utah Municipal Corporation, Defendants/Respondents.	Case No. 16375

BRIEF OF RESPONDENTS

Appeal from a judgment of no cause of action against the plaintiff in the Second Judicial District Court, County of Weber, State of Utah, the Honorable John F. Wahlquist presiding.

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STATEMENT OF FACTS

Respondents take issue with the following facts as stated by appellant.

Fact as stated by appellant:

Evidence was further produced by other firemen indicating that there were no health or safety problems with the wearing of a mustache, (T-24,T-33), although some individuals felt there could be a problem with the sealing of face masks in fighting a fire with certain facial hair, and that was the reason for the promulgation of the rule (T-33).

Chief Hansen testified that the extreme heat or exposure to a flash fire can burn exposed skin, hair or the like causing injury (T-45-46). He also testified that through his research he found that beards and sideburns can cause the protective oxygen mask not to seal properly. (T-45).

The Assistant Chief Hilton testified that masks cannot se properly when hair gets in the way as seepage will occur. (T-53).

He further testified that hair burns and that was a facto they considred in adopting General Order 160. (T-53).

Fact as stated by appellant:

Evidence was also adduced that indicated that other individuals were also in violation of Rule 160, but were not discipl as was the appellant. (T-10-T-27-T-33).

Fact as stated by respondent:

Chief Hansen testified as follows:

Q. Now, after you issued Order No. 160, did you have a conversation with the plaintiff, Mr. Dan Worrall, concerning the order, Chief Hansen:

A. Yes, Mr. Worrall was accosted in the outer office or hallway the day that he came onto the shift. He stated or demande did I, in fact, intend to enforce this order.

Q. What was your response:

A. I said, "Dan yes, I do. I intend to enforce any ord that I issue in regard to this Fire Department." And he stated, "well, I intend to fight you because I have no intentions of cutt off this mustache."

Q. Okay. What occurred after that confrontation?

A. ". . . at that particular time no action was taken. I discussed it with his supervisor which was mentioned before Lawrence Todd. We talked about it again. I had Dan into my offi later that day or the next shift. I am not really sure now. We

talked about it and discussed the matter, and he said he wanted to think about it a little more at that time, and we did. Shortly thereafter, there was no compliance again to the order. I directed a letter to the city manager and to all concerned at the particular time that Mr. Worrall be suspended, only that suspension be not in effect and in fact enforced, that I give him some time to think about it, that we wanted to work on it. Like I say, I don't take no exception with Danny's work ability and that. I give him every opportunity possible to comply with the order, and each step no compliance was felt. . . . ."

Q. What was the reason why he was terminated, then?

A. He was terminated for failure to compliance--for compliance with this order which is correctly called insubordination, whatever the fact that he did not comply. He refused to comply. And he did not. (T-46-47)

Q. . . .What is the procrdure the Fire Department goes through to bring people into conformity with Order No. 160?

A. . . . As has been brought out in here before, people have been approached and told that they should straighten up, they should cut mustaches, and in most cases that is all it takes to do it. They have shaving facilities, bathroom facilities, and the like, and in general, it is just taken care of immediately, right then, without any quibbling or the like.

Q. Now, do you know of any other individuals besides Mr. Worrall that have not, when requested to get a haircut or trim a mustache or a beard--or not beard, but sideburns, that have not done it? (T-48)

A. No. I do not know. They have been requested and they have complied. (T-48)

POINT I.

THE TRIAL COURT'S RULING THAT THE PLAINTIFF HAD NOT PROPERLY APPEALED TO THE OGDEN CITY CIVIL SERVICE COMMISSION WITHIN THE APPROPRIATE TIME AND DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL WAS CORRECT.

Appellant cites Vetterli vs. Civil Service Commission of Salt Lake City, 145 P.2d 792 (Utah) (1946) as authority for his position that the Civil Service Commission may review an appeal that is not filed within five (5) days. The Court in Vetterli, however, declined to discuss the issue that his appeal was not fi in time. The language from Vetterli reads as follows:

> "Owing to the fact that the Chief of Police and the Civil Service Commission desire to have the statute involved in this case construed by the Court and in view of the conclusion reached as to its meaning, we shall not discuss either (a) the proposition that the appeal was not in time. . . ." (Emphasis added) See 145 P.2d at 794

Vetterli is not authority for the position that the Civ Service Commission may review appeals untimely filed.

The reason Vetterli came before the Supreme Court is bec all parties involved "desired to have the statute involved in t case construed by this court." See 145 P.2d at 794

Plaintiff is correct that an objection was made by the chief that Vetterli's appeal had not been perfected within the allowed by law and that the commission overruled that objectio and heard the matter. However, we do know upon what facts the Civil Service Commission overruled the police chief, it could been the same reason the Supreme Court gave in declining to ru

on the five day appeal period; that is the importance of determining the scope of Civil Service Commission authority.

We agree that the notices appellant received did not tell him that he had five days to appeal. However, we do not agree that some vague reference was made during the course of the trial, that the five day appeal provision is contained within a handbook of rules and regulations passed out to all employees by the department. The appellant was given, as is all employees, a handbook that specifically explains the procedure and time limits involved when appealing termination. It is not vague, but is specific. Also, Section 10-10-21 Utah Code Annotated (1953) spells out the time limits to file an appeal.

Appellant's argument is: I was not aware of the time period to file an appeal, therefore, do not penalize me for not filing within the required time. Appellant is not trying to justify the tardy appeal on any other grounds. There is little question that he should have known the time period to file an appeal. The law charges everyone with a knowledge of published statutes, and because this information was available, and in fact the appellant should have known the time requirements, this Court should not allow his ignorance to allow him a hearing before the Industrial Commission.

I agree with appellant's analysis of Entre Nous Club v. Toronto, 287 P.2d 670 (1955), that appellant is entitled to a reasonable time and place for hearing where interested parties may attend with reasonable effort; . . . reasonable notice to interested

parties . . .; and a reasonable opportunity for presentation of such evidence and argument as are appropriate to the proceedi . . . . However, the notice the Court is referring to is the not of the hearing, not notice that the appellant should be notified of the time limit in which to file an appeal.

The facts of Toronto are the Secretary of State was sued Entre Nous Club to restrain the Secretary of State from revoking their charter.

The Secretary of State was proceeding to revoke their charter pursuant to a statute that authorized the Secretary of State, after a hearing, to revoke the charter of any non-profit club if it was actually organized for pecuniary profit, or is used for gambling or other unlawful purposes.

The Secretary of State had given notice of the hearing, but the notice as issued was not notice "which we could general characterize as reasonably calculated to give actual notice" and was not given to the club as required by the statute.

As the Court can plainly determine, the facts of Toronto are not even similar to the facts before this Court, and the not requirement that is spoke of is the notice involved in notifyin the corporation of the hearing for revocation, not the time in which to file an appeal. Due process of law does not require t City to notify the appellant of the time period in which to fil an appeal contesting termination. I agree, due process would require the City to notify the appellant of any hearings that c with his termination.

I agree with appellant that there are administrative agencies that send notice of the time period in which to appeal; however, it is not a procedure mandatory by law. In this type case it is not mandatory that the city notify the appellant that he has five days to appeal upon termination. As stated previously, appellant was notified of his right to appeal by receiving a copy of the Civil Service Rules and Regulations when he commenced his employment. Also, not only appellant but every civil service employee is put on notice of their right to appeal by Section 10-10-21 Utah Code Annotated (1953). There is no legal duty for the City to notify the appellant of the time to appeal upon termination.

Respondents agree with appellant's interpretation of Rose Marie Hume v. Small Claims Court of Murray City, No. 15634, filed January 10,1979, in that the appeal period runs from notice of judgment. Applying the facts of Rose Marie Hume to the facts of this case, appellant should have been notified that he was terminated, and there is little question he was notified of the fact. Rose Marie Hume is not authority for appellant's position that the City must notify the appellant of the appeal period.

Respondents did try to use the five day appeal period in their motion for summary judgment to prevent the Court from hearing the case on its merits. However, the trial court ruled that respondents' motion was not timely filed and proceeded to the merits of the case. As respondents read the Order and Judgment, the Court is saying "if the motion for summary judgment was timely filed, the Court would have ruled the appellant had not exhausted

his administrative remedies and granted the motion; however, because it was not timely filed the Court heard the facts and held the facts were not sufficient to carry appellant's burden of proof.

As this Court can plainly determine, there was not any evidence presented that would demonstrate Order No. 160 had no rational, reasonable relationship to a bona fide public purpose. The district court was correct in ruling that there was not cause of action against the City.

Appellant had an effective review of the merits, by the district court hearing the case.

POINT II.

GENERAL RULE NO. 160 WAS NOT ARBITRARILY AND CAPRICIOUSLY APPLIED AGAINST THE APPELLANT DENYING HIM EQUAL PROTECTION OF THE LAW GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Appellant in his complaint alleged that "administering the regulation in question was a denial of equality of rights and was arbitrary and capricious, thereby denying him due process and equal protection under the law contrary to the Fourteenth Amendment of the Constitution of the State of Utah. Appellant's allegations were not that the fire department actions were arbitrary and capricious against the appellant, but rather General Order No. 160 denied appellant's rights guaranteed by the United States and State Constitutions. Appellant tried to receive a new trial on issues that were not alleged in his complaint and not properly before the Court. The Court did, however, receive testimony that other firemen were called in and requested to bring their hair, sideburns and mustaches in conformity with the order and they complied.

Assistant Chief Hilton testified that to keep grooming standards in conformity to General Order No. 160 is an ongoing process and men tend to let their hair grow beyond the requirements; however, when requested they get a trim and meet the requirement of the Order.

I agree that the appellant was singled out, but why was he singled out? That question is easily answered from the evidence; the appellant wanted to challenge General Order No. 160. The method by which he chose to challenge the order was by non-compliance. There can be no arbitrary and capricious application of Order 160 when the appellant is given the same opportunity as the other firemen but he refuses to comply. The record is repleat, and there is a specific finding that appellant realized his mustache did not comply and he was officially challenging the validity of the department's action in issuing Order No. 160.

I also agree that the appellant was an excellent employee; but I disagree that he was "made an example." There is no evidence to support that allegation; on the contrary, all the evidence supports the findings of the Court that he was given an opportunity to comply but refused because "he was challenging the validity of the Order." There can be no violation of the equal protection clause of the Fourteenth Amendment, under the facts before this Court.

CONCLUSION

The appellant was notified of his right to appeal his termination within five (5) days by Section 10-10-21, Utah Code

Annotated (1953). Also, the Civil Service Rules and Regulations he received upon being employed by the City notified him of the period to appeal termination.

There is no duty on the part of the respondents to notify the appellant at the time of his termination that he has five days to appeal said termination.

The appellant challenged the validity of General Order No. 160 by not trimming his mustache as requested. Appellant took a chance and lost the challenge. He allowed his personal preference to appearance take precedence over his employment. There is nothing wrong with that decision if you are prepared to face the consequences. There is no violation of the Fourteenth Amendment equal protection, under these facts.

The trial court did not make any errors that have prejudiced the rights of the appellant, and its decision should be upheld by this Court.

DATED this 9 day of August, 1979.

Respectfully submitted

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