

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000644-MR

MILTON DALE MALONE

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
CIVIL ACTION NO. 98-CI-01002

COMMONWEALTH OF KENTUCKY,
TOURISM DEVELOPMENT CABINET,
DEPARTMENT OF PARKS, KENNY RAPIER,
APPOINTING AUTHORITY and
COMMONWEALTH OF KENTUCKY PERSONNEL BOARD

APPELLEES

OPINION

AFFIRMING IN PART,

REVERSING IN PART AND REMANDING

** ** * * *

BEFORE: HUDDLESTON, PAISLEY and TACKETT, Judges.

HUDDLESTON, Judge: Milton Dale Malone appeals from a Franklin Circuit Court order affirming an order of the Commonwealth of Kentucky's Personnel Board that adopted the findings of fact, conclusions of law and recommended order of a hearing officer who found that the "actions taken by the agency against [Malone] in dismissing him as Maintenance Supervisor at Lake Cumberland

State Resort Park were excessive and erroneous in light of the overall circumstances." Consistent with the foregoing, the hearing officer ordered that Malone "be reinstated and restored to his former position, if available," or a position in "the same grade at the same salary level," receive all benefits and salary that he would have received commencing with his termination date and continuing until he was restored to such a position and otherwise "be made whole" to the extent delineated. Relying on the fact that the Personnel Board continued the hearing on his appeal from the dismissal at his request pending resolution of the criminal charges arising from the events in question, the hearing officer determined that Malone should not receive compensation for the period during which his appeal was held in abeyance. It is from that portion of the circuit court's order affirming this determination that Malone appeals.

Malone was dismissed from his position as maintenance supervisor at Lake Cumberland for reasons outlined in previous correspondence and elaborated upon in a letter dated May 16, 1995. As categorized by the Department of Parks, the allegations against Malone included the "failure to inventory, maintain possession, investigate and recover lost or stolen property[,] falsification of time cards [and] falsification of payroll and time card documents and/or obstruction of appointing authority's administrative investigation." Malone appealed his

dismissal to the Personnel Board, unequivocally proclaiming his innocence as to "each and every one of these allegations."

An evidentiary hearing on the matter was originally scheduled for September 5, 1995. By then, however, the Kentucky State Police had been notified since some of the allegations involved the violation of criminal statutes. Following an investigation, the detective assigned to the case delivered his report to the Russell County Commonwealth Attorney who, in turn, presented the information to a grand jury which returned an indictment against Malone for second degree forgery.

In February 1996, Malone advised the executive director of the Personnel Board that he had been granted pretrial diversion for twenty-four months pursuant to a Russell Circuit Court order of October 1995, whereby the criminal charges stemming from the alleged sequence of events resulting in his termination would be dismissed if he complied with certain conditions for the requisite time frame. By agreement of the parties,¹ Malone's timely appeal was held in abeyance pending disposition of the criminal charges. Having satisfied the terms of the pretrial diversion order, Malone sought to reactivate his appeal in December 1997, requesting a full

¹ In its response to Malone's motion, the Department of Parks waived its objections in the "interest of justice."

evidentiary hearing. Malone was represented by counsel throughout these proceedings.

On February 26-27, 1998, the hearing officer conducted an extensive hearing on the matter, ultimately issuing a twenty-seven page order outlining the evidence presented by both parties in painstaking detail. Although the sole question presented for our review is whether the Personnel Board properly denied Malone compensation for the period during which his appeal was held in "voluntary suspension," a strictly legal inquiry, a better understanding of the unique factual background against which Malone was reinstated provides context in which to address this determinative issue. Because the factual findings of the hearing officer are both thorough and undisputed, we adopt them as our own:

1. In April, 1994 Gerald Wayne Murray, an auto mechanic at Lake Cumberland State Resort Park, visited with Kathleen Jackson, Business Manager at the facility and informed her he had information, or at least believed, that Milton Dale Malone, Maintenance Supervisor, had utilized the services of two or three of the seasonal workers at the Park to harvest his tobacco in August, 1993 and that Mr. Malone had thereupon altered the payroll time cards of these men to camouflage the fact that they had worked on his

farm while on state time. Ms. Jackson dutifully reported this to the Superintendent, Harry T. "Pete" Sherrow who, in turn, interviewed Mr. Murray and thereupon contacted his supervisor at Frankfort for directions. Mr. Sherrow also procured the cards from Ms. Jackson, where they had been turned in and stored, and did note certain alterations and changes on them for the date in question, specifically August 27, 1993. In light of the fact Mr. Malone was just then out on medical leave with knee surgery, it was decided to postpone interviews and investigation and, upon his return on or about May 16, 1994 the four individuals asserted to have been involved were "separated" and interviewed by Mr. Sherrow in the presence of one or another Ranger at the Park as to what had gone on.

2. In the latter part of May, 1994, after procuring oral statements from the workers and a written letter or memorandum from Mr. Malone on the subject, Mr. Sherrow reported to Jim Goodman, Director of Resort Parks at Frankfort, that he was satisfied there had been no wrongdoing, that the three men denied ever cutting tobacco for Mr. Malone on state time or, for that matter, on any weekdays other than holidays and that, while one or more of the cards

appeared to have stray or strange markings the important changes thereon had been accomplished by Mr. Malone in the ordinary course of his job duties and appropriately initialed by him. The only unexplainable circumstances were one or more "blotting out" or obliteration of certain entries, denied as done by Mr. Malone and noted by Mr. Sherrow to "not be his style." The matter was thereupon deemed handled and closed.

3. In February, 1995 Gerald Murray, uniformly characterized by all witnesses who know him as having a reputation for being disgruntled, anti-management, threatening, and revengeful, wrote a somewhat lengthy letter to the Governor of the Commonwealth of Kentucky with copies to several other public office holders and management persons, alleging a "cover up" at Lake Cumberland State Resort Park and accusing Mr. Sherrow, the Superintendent, and Mr. Malone, Appellant herein, as the primary instigators and participants thereof. Thereupon Mr. Goodman renewed the investigation, reviewed the payroll cards himself, and notified the Kentucky State Police, since some of the acts alleged involved violation of criminal statutes.

4. The Kentucky State Police assigned Detective Tim Simpson of the Special Investigation Unit out of Bowling Green, Kentucky to look into the matter. Detective Simpson commenced his interviews on February 22, 1995 and spoke with all individuals whom he was informed may have been connected with the events or had information about them. Following the gathering of such information as was available, Detective Simpson delivered his report, then in excess of 1 1/2 years after-the-fact of the original events, to the Commonwealth Attorney of Russell County who, in turn, presented the materials to the Grand Jury. Mr. Malone was thereupon indicted by the Grand Jury for the offense of second degree forgery and promptly terminated from his position as Maintenance Supervisor at Lake Cumberland State Resort Park. In due course he was processed through the criminal system and placed under pre[-]trial diversion for 24 months. It appears he satisfactorily followed orders relative thereto and in due course the criminal charges were dismissed. By agreement of the parties, appeal of his termination at the Park, which was timely taken when it occurred, was placed in abeyance pending disposition of the criminal charges and reactivated in

December, 1997, having been actually heard in February, 1998.

5. Appellant steadfastly denied from the outset that he ever used Park personnel in tobacco on his farm while on the Park clock or that he ever improperly altered any time cards for that or any other reason. He pointed to the fact that the instigator of the charges, Mr. Murray, was a known troublemaker who publicly announced he was "going to close the Park down" and "get rid of" either Mr. Sherrow, himself, or both. In that regard he urges, undisputed, that Mr. Murray has since instigation of the investigation advised him upon more than one occasion that Mr. Murray was "sorry it happened" and has admitted the step was taken to "get Pete." Appellant likewise also acknowledges that as part of his duties he routinely corrected time cards for any employee who clocked in or out on the wrong card, in the wrong place on the card, or where it had been improperly inserted or misaligned in the time clock so that it was mis-struck. Appellant always did this in the same manner, which was to draw a single line through the incorrect entry, change the entry to the correct time and place by a handwritten notation, and

initial the change. He indicates he did do so on the particular day in question, but it was never his practice nor did he ever completely obliterate an entry to render it unreadable.

6. Although the procedure and security surrounding handling of the time cards has since been tightened, at the time of the events the physical location of the time clock and the cards was in a maintenance building on the grounds and readily accessible to virtually anyone seeking access thereto. Most personnel involved with maintenance, including the three seasonal workers whose cards were questioned, routinely came and went through the location but did not ordinarily linger other than to clock in and out. On the other hand, the job station of Mr. Murray, the instigator of the investigation of which the altered time cards formed the core, was in this building, where he spent considerable amounts of his working day without others present. Other than the complaints he registered, the letter he wrote, and previous interviews with one or another investigator, Mr. Murray declined to further comment in connection with the hearing herein, having obeyed the subpoena issued to him and appearing but thereupon exercising

his U.S. Constitutional Fifth Amendment rights and refusing to testify. Likewise, the original time cards are no longer available, having been routinely destroyed by the Kentucky State Police following conclusion of the criminal aspects.

7. Notwithstanding various allegations and accusations, there is no direct, documented proof of any wrongdoing in connection with this or any other matter on the part of Mr. Murray other than the firm belief by Appellant and others who testified of his connection to several destructive events. There is likewise no allegation nor proof that any of the three seasonal workers whose time cards were questioned ever improperly altered their cards, although one of the three who had cut tobacco for Appellant over the years at one time or another thought he may have done so on the day in question. This recollection is defeated by the actual records themselves, specifically the farm records of Appellant which demonstrate no sums were paid to any of the three on that date, the standard practice being to pay them at the end of each working day or sometime soon thereafter for their work in the tobacco. Additionally, this particular employee took a sick day on the day in question from his work at the

Park. Appellant himself did clock out on August 27, 1993 at around 10:00 or 10:30 a.m. to confer with his banker and was accordingly not present on the grounds during the particular time frame and so was personally unaware whether any or all of the three employees worked there that afternoon. However, he trusted the word of all three and routinely corrected their cards to reflect whatever they told him on any occasion when they reported to him they "messed up" when working the clock.

The conclusions of law reached by the hearing officer include the following:

The agency has not met its burden to prove the facts that formed the basis for dismissing [Malone], and it follows that it did not have just cause as defined by [Kentucky Revised Statutes (KRS)] Chapter 18A to penalize him. The argument of the agency that disposition of any criminal charges arising from the same circumstances does not impact or influence the outcome of an administrative hearing cuts both ways and, consequently, the actions in the Russell Circuit Court are viewed as having no bearing herein.

At its regular meeting in July 1998, the Personnel Board considered the recommended order of the hearing officer as well as the exceptions and oral arguments of the parties, ultimately adopting the order in its entirety and sustaining Malone's appeal in an order entered on July 13, 1998.²

Malone appealed to Franklin Circuit Court in accordance with Kentucky Revised Statutes (KRS) 13B.140 and 18A.100. Finding substantial evidence of record to support the decision of the Personnel Board to reinstate Malone, the court specifically determined that substantial evidence also supported "the Board's decision to not award compensation for the period of time between September 6, 1995, and December 8, 1997 [the period during which the appeal was held in abeyance]," in an order entered on February 17, 2000. In so doing, the court rejected Malone's argument that continuing the dismissal hearing during that period of time would have operated to restrict the exercise of his right not to incriminate himself preserved by the Fifth Amendment to the United States Constitution.³ Citing

² In its final order, the Personnel Board also directed that the hearing officer's recommended order be altered to add a citation which is irrelevant for present purposes.

³ No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall

the purpose of KRS 18A.095, the court reasoned as follows: "Since the loss of pay during the time period in question was not the result of actions by the agency, the agency is not responsible for making the employee whole during this period of time."

On appeal, Malone argues that the Personnel Board's denial of pay and benefits for the period during which his appeal was held in abeyance violates both KRS 18A.095(23)(b) and the protection against self-incrimination guaranteed him by the Fifth Amendment of the United States Constitution and its state counterpart, Section Eleven of the Kentucky Constitution.⁴ In response, the Commonwealth contends that Malone was afforded "all the procedural due process to which he was entitled during the voluntary suspension of his appeal" and, further, that the Personnel Board's decision was "based upon [Malone's] election of remedies."

private property be taken for public use, without just compensation. U.S. Const. Amend. V.

⁴ In all criminal prosecutions the accused has the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor. He cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land; and in prosecutions by indictment or information, he shall have a speedy public trial by an impartial jury of the vicinage; but the General Assembly may provide by a general law for a change of venue in such prosecutions for both the defendant and the Commonwealth, the change to be made to the most convenient county in which a fair trial can be obtained. Ky. Const. § 11.

"The position of the circuit court in administrative matters is one of review, not reinterpretation."⁵ When reviewing the action of an agency, a court is concerned with whether the action was arbitrary which is defined as "clearly erroneous;" clearly erroneous means not supported by substantial evidence.⁶ "Substantial evidence" is evidence which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the minds of reasonable persons.⁷

In weighing whether an agency's decision is supported by substantial evidence, a reviewing court must adhere to the principle that the fact-finder is afforded great latitude in its evaluation of the evidence heard and the credibility of the witnesses appearing before it.⁸ There may be substantial evidence to support an agency's decision even though a reviewing court may have arrived at a different conclusion.⁹ If an agency's findings are supported by substantial evidence, "the findings will be upheld, even though there may be conflicting

⁵ Kentucky Bd. of Nursing v. Ward, Ky. App., 890 S.W.2d 641, 642 (1994).

⁶ Id.

⁷ Bowling v. Natural Resources and Environmental Protection Cabinet, Ky. App., 891 S.W.2d 406, 409 (1994).

⁸ Kentucky State Racing Comm. v. Fuller, Ky., 481 S.W.2d 298, 308 (1972).

⁹ Id.

evidence in the record."¹⁰ Such findings are binding upon the appellate court and the only question remaining to be addressed by the appellate court is whether the agency applied the law to those facts correctly.¹¹ If an administrative agency bases its ruling on an incorrect view of the law, the reviewing court may substitute its judgment for that of the agency.¹² Guided by these principles, we turn our attention to the dispositive legal question of whether the Personnel Board correctly applied governing law in concluding that Malone was not entitled to compensation for the period during which his appeal was held in abeyance.

Our analysis necessarily begins with an examination of the relevant statutory provision, KRS 18A.095.(23)(b), which provides:

If the board finds that the action complained of was taken without just cause, the board shall order the immediate reinstatement of the employee to his former position or a position of like status and pay, without loss of pay for the period of his penalization, or otherwise make the employee whole

¹⁰ Kentucky Comm. on Human Rights v. Fraser, Ky., 625 S.W.2d 852, 856 (1981).

¹¹ Kentucky Bd. of Nursing, supra, n. 5, at 642.

¹² Id.

unless the order is stayed by the board or the court on appeal[.]

With respect to statutory construction, courts have a duty to ascertain and give effect to the intent of the legislature.¹³ In determining legislative intent, a court must refer to the language of the statute and is not at liberty to add or subtract from the legislative enactment or interpret it at variance with the language employed.¹⁴ All statutes should be interpreted so as to give meaning to each provision in accord with the statute as a whole.¹⁵ Courts have a duty to accord the words of a statute their literal meaning unless to do so would lead to an absurd or wholly unreasonable conclusion.¹⁶ "Where the words of a statute 'are clear and unambiguous and express legislative intent, there is no room for construction or interpretation and the statute must be given its effect as

¹³ Commonwealth v. Harrelson, Ky., 14 S.W.3d 541, 546 (2000); Hale v. Combs, Ky., 30 S.W.3d 146, 151 (2000).

¹⁴ Id. (citations omitted).

¹⁵ DeStock No. 14, Inc. v. Logsdon, Ky., 993 S.W.2d 952, 957 (1999); Aubrey v. Office of Attorney General, Ky. App., 994 S.W.2d 516, 520 (1998).

¹⁶ McElroy v. Taylor, Ky., 977 S.W.2d 929, 931 (1998).

written.'"¹⁷ Statutory interpretation is a question of law subject to de novo review.¹⁸

Here, the hearing officer specifically determined that the Department of Parks did not meet its burden to establish the facts which formed the basis for Malone's dismissal and, therefore, "did not have just cause as defined by KRS Chapter 18A to penalize him." This is in stark contrast to Commonwealth of Kentucky Personnel Bd. v. Gregory¹⁹ in which this Court found that the Personnel Board could not make a finding under KRS 18A.095(23)(b) upon which it could order Gregory made whole as "[t]here was nothing in the record to establish whether the action complained of was taken without just cause."²⁰ Pursuant to this requisite finding, the Department of Parks immediately reinstated Malone to his former position as mandated by the unambiguous terms of KRS 18A.095.(23)(b) and properly awarded him salary and benefits retroactive to the date of his dismissal. Giving effect to the provision as written, however, a wrongfully terminated employee is entitled to this relief "without loss of pay for the period of his penalization" and the

¹⁷ White v. Check Holders, Inc., Ky., 996 S.W.2d 496, 497 (1999)(citation omitted).

¹⁸ Marks v. Bean, Ky. App., 57 S.W.3d 303, 306 (2001); Bob Hook Chevrolet Isuzu v. Commonwealth, Transportation Cabinet, Ky., 983 S.W.2d 488, 490-91 (1999).

¹⁹ Ky. App., 864 S.W.2d 919, 920 (1993).

²⁰ Id.

Board is ordered to "otherwise make the employee whole," with the necessary implication being that such measures are required to cure the evil which this provision was designed to remedy.

The decision of the Personnel Board facially contradicts this express directive. However, the Personnel Board attempts to distinguish this case by emphasizing the allegedly voluntary nature of the suspension. In its view, because the delay was attributable to Malone's actions rather than actions taken by the Department of Parks, the "period of his penalization" does not encompass the time frame for which he was denied compensation. We disagree, as the legitimacy of this assertion hinges on the faulty premise that a wrongfully terminated employee such as Malone who employs such permissible cautionary measures is acting voluntarily despite the potentially negative consequences, a notion which both ignores reality and is directly refuted by the lesson taught here.

Although we are not cited to nor did our research reveal any authority which is directly on point, one of the common threads among cases involving related issues serves to further validate our reasoning. Regardless of the specific context, this Court has consistently emphasized the necessity of following established procedures to pursue an administrative

appeal through the proper channels.²¹ In Kidd, the appellant made "no effort to follow the procedures for a merit system appeal, where at a hearing before the personnel board, she might have sought delay of the proceedings or asserted her right to remain silent" ²² As the instant case is readily distinguishable in this crucial respect, it stands to reason that Malone was not precluded from pursuing these options.

Malone was confronted with the prospect of losing his freedom initially and that possibility still existed even with the relatively favorable outcome of the criminal proceedings against him considering the court's authority to deviate from its order of pretrial diversion, which, incidentally, was a preferable alternative from Malone's perspective given the circumstances. Thus, Malone's strategy was both consistent with the statutory scheme and imminently reasonable, a conclusion which is supported by the determination of the hearing officer. The decision of the Personnel Board essentially penalized Malone for complying with the designated procedural framework in a manner agreed to by the parties. On the unique facts presented, this result is both counterintuitive and contrary to the intent of the General Assembly as reflected by the language of the governing statutory provision. Since our interpretation of KRS

²¹ See Kentucky Personnel Bd. v. Elkins, Ky. App., 723 S.W.2d 877 (1987); Kidd v. Montgomery, Ky. App., 583 S.W.2d 87 (1979).

²² Kidd, supra, n. 20, at 90.

18A.095(23)(b) is dispositive, further elaboration as to the remaining issues is rendered unnecessary.

In accordance with the foregoing, that portion of the Franklin Circuit Court order denying benefits to Malone for the period commencing September 6, 1995, and ending December 7, 1997, is reversed and this case is remanded with directions to enter an order consistent with this opinion. The order is otherwise affirmed.

ALL CONCUR.

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