

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001706-MR

CATHERINE BROWNING

APPELLANT

v.

APPEAL FROM LINCOLN CIRCUIT COURT
HONORABLE WILLIAM T. CAIN, JUDGE
ACTION NO. 03-CI-00176

TRANSPORTATION CABINET,
DEPARTMENT OF VEHICLE REGULATION,
COMMONWEALTH OF KENTUCKY; AND
WILLIAM M. BUSHART, COMMISSIONER OF
DEPARTMENT OF VEHICLE REGULATION

APPELLEES

OPINION

REVERSING AND REMANDING

** **

BEFORE: DYCHE, GUIDUGLI, AND McANULTY, JUDGES.

DYCHE, JUDGE: Catherine R. Browning, age 78, was stopped by a police officer in a driving rainstorm at night; the officer's probable cause for the traffic stop was that Ms. Browning was driving 20 miles per hour in a 55 miles per hour speed zone. The officer filed an "affidavit for recertification," which

recommended that she be "restricted to day driving if not completely taken away."

As a result, appellee Transportation Cabinet sent Ms. Browning a form to be filled out by her physician after an examination at her cost; the form was sent pursuant to KRS 186.444 and 186.570(1)(c) to help the Cabinet determine if Ms. Browning had a "physical or mental disability which may affect or limit a person's ability to safely operate a motor vehicle."

Ms. Browning's physician filed the required report, indicating that her driving abilities were "OK-daytime driving only." Apparently not deterred by a result in Ms. Browning's favor, the Cabinet then ordered her to take a road test of her driving abilities, purportedly (though not substantiated) at the recommendation of the Medical Review Board. Ms. Browning failed three road tests, and, following a hearing (the true nature of which is still in dispute), the Cabinet suspended her driving privileges. She filed this action in the Lincoln Circuit Court contesting the suspension, and that court dismissed the action for her failure to exhaust her administrative remedies prior to filing the action. She now appeals.

The administrative procedure for the suspension of driving privileges due to physical or mental infirmity is set out in the above statutes and in 601 KAR 13:090 and 601 KAR 13:100. Sections 3(1)(a) and (b) of the former regulation

provide for two kinds of hearings available to a licensee if the medical review board recommends any limitations on the licensee's driving privilege: an informal hearing before the board; and an appeal to the board for a formal administrative hearing pursuant to KRS Chapter 13B.

The problem herein is that the hearing conducted on May 22, 2003, relating to Ms. Browning's license was not clearly identified as either of those options. As a matter of fact, the Cabinet has taken contradictory positions on whether the hearing was an informal hearing or an actual KRS 13B hearing.

If the hearing was a formal KRS 13B hearing as the Cabinet argued in a pleading filed with the trial court on June 27, 2003, then the trial court was in error by ruling that she had failed to exhaust her administrative remedies. The record would seem to support this result; the March 18, 2003 "Summary" signed by the hearing examiner refers to an informal hearing on March 7, 2003, and the scheduling of a formal hearing, which was then held on May 23.

Even if the hearing was an informal hearing, as the Cabinet **now** insists, the verbal notice of her appeal rights to a formal KRS 13B hearing given Ms. Browning at the conclusion of the informal hearing was inadequate under the regulations. 601 KAR 13:090(3) provides that

(8) Within ten (10) working days after the [informal] hearing, the commissioner shall issue a decision which shall be promptly forwarded to the petitioner along with the notice required pursuant to subsection (9) of this section.

(9) The petitioner shall be informed of his right to an administrative hearing pursuant to the provisions of KRS 13B.

There is nothing in the record to indicate that the hearing officer's decision following the informal hearing was accompanied by the notice of right to hearing required by the regulation.

The order of the Lincoln Circuit Court is therefore reversed, and this matter is remanded for full consideration of Ms. Browning's complaint and cause of action.

ALL CONCUR.

BRIEF FOR APPELLANT:

Richard Clay
Danville, Kentucky

BRIEF FOR APPELLEES:

W. David Shearer, Jr.
Christopher G. Newell
W. David Shearer, Jr., P.S.C.
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