

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001716-MR

SHERRY PRESTON

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
CIVIL ACTION NO. 03-CI-01109

DEPARTMENT OF VOCATIONAL REHABILITATION,
BRUCE CRUMP, APPOINTING AUTHORITY
(NOW EDUCATION CABINET, DEPARTMENT FOR
WORKFORCE INVESTMENT, OFFICE OF
VOCATIONAL REHABILITATION, VIRGINIA
FOX, APPOINTING AUTHORITY);
KENTUCKY PERSONNEL BOARD, MARK A. SIPEK,
EXECUTIVE DIRECTOR

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: MINTON, SCHRODER, AND TAYLOR, JUDGES.

MINTON, JUDGE: Sherry Preston brings this appeal from a circuit court's opinion and order affirming the Kentucky Personnel Board's decision to uphold her suspensions and ultimate dismissal from the Carl D. Perkins Comprehensive Rehabilitation Center, a Division within the Department of Vocational Education

of the Workforce Development Cabinet.¹ Because we agree that substantial evidence supports the Board's findings and that it correctly applied the law, we affirm.

The underlying facts are succinctly set forth in the circuit court's opinion and order:

Preston was a merit employee of the Commonwealth of Kentucky under the [Kentucky Revised Statutes] KRS Chapter 18A personnel system. Since 1995, she worked as a registered nurse for a hospital, a home health agency[,] and a skilled nursing facility, before beginning her employment with the Carl D. Perkins Comprehensive Rehabilitation Center in 1999. After joining the Center, Preston taught a Certified Nurse Assistant (CNA) Program. Medicaid regulations require a CNA instructor to be a registered nurse.

Early in her new employment, the Center's personnel discovered that Preston lacked the requisite Medicaid credentials to teach the Program. The CNA Program was briefly suspended[,] and Preston was assigned to work in the Medical Unit. She willingly accepted this assignment. Preston resumed teaching the CNA Program after she completed one year of long-term care experience as prescribed by Medicare. As a CNA Program instructor, Preston worked from 8:00 a.m. until 4:30 p.m. during the Vocational Training Unit's operational hours. Based upon her evaluations and the high graduation rate of her students, Preston was considered a very good teacher.

Enrollment in the CNA Program dropped to zero by July 2001. During this period, the Center's Medical Unit experienced a need for nursing help during the third shift,

¹ Kentucky Revised Statutes (KRS) 151B.180.

11:00 p.m. to 7:00 a.m. Barry Newill, the Center's Director, implemented a new Center policy. The Center would not begin a new CNA class unless at least five students enrolled in the Program, one-half the size of a full class. Director Newill also indicated that he desired to assign Preston to the Medical Unit to work as a registered nurse.

On November 9, 2001, Doug Wireman, Unit Director of Vocational Services, notified Preston by a letter of the change in her job assignment and her designated work shift. The letter informed Preston that she was to work as a registered nurse during the third shift at the Medical Unit and that she would resume her teaching duties when a sufficient number of students enrolled in the CNA Program. Preston resisted the change because she had not practiced as a registered nurse for three years and feared that she would jeopardize her nursing license. Preston did not report to the Medical Unit for work. She was twice suspended and finally dismissed after she left her workplace on November 16, 2001, and never returned.² (FN: From November 16 through November 20, 2001, Preston continued to appear for work at the Center during her old hours, and never reported to work at the Medical Unit. She also used her computer to send e-mails to other teachers accusing the Center's personnel of conspiring against her. Eventually, Mr. Wireman told her she would not be paid until she reported to her reassigned position in the Medical Unit. The Center paid Preston for holidays, the

² Preston separately appealed claims of (1) demotion, involuntary transfer, reclassification, and discrimination (age and political); (2) her five working day suspension from December 10 through 14, 2001, and her ten working day suspension from December 26, 2001, through January 10, 2002; and (3) her dismissal effective close of business February 11, 2002, to the Kentucky Personnel Board (2001-391; 2002-016; and 2002-072). The Board consolidated the three appeals into the one action that forms the basis for the instant appeal.

time she spent filing grievances[,] and for the time she spend meeting with Deputy Commissioner Crump.) The Department of Vocational Rehabilitation terminated her employment effective February 11, 2002.

The [Kentucky Personnel Board] Hearing Officer found, and the Personnel Board agreed, that based upon the substantial evidence of record,

"the Department [of Vocational Rehabilitation] had the authority to temporarily assign Preston the nursing duties it did on November 9, 2001. KRS 18A.110; 101 [Kentucky Administrative Regulations] KAR 2:095, Section 1; 101 KAR 2:020."

The Board also rejected the argument that Preston should be reclassified as a vocational rehabilitation teacher. When Preston failed to return to work, the Department used 101 KAR 1:345, a regulation that authorizes suspensions and dismissals for a lack of good behavior or unsatisfactory performance. The Board upheld the Department's actions.

Preston appealed to the circuit court, which upheld the Board's actions. In so doing, the court concluded that because the unit director notified Preston of her new assignment, the Department acted unlawfully by failing to follow its own regulation 101 KAR 2:095,³ which requires that such an

³ Section 2. Attendance; Hours of Work. (1) The number of hours a full-time employee shall be required to work shall be thirty-seven and one-half (37 1/2) hours per week unless specified otherwise by the appointing authority or the statutes.

(2) The normal work day shall be from 8 a.m. to 4:30 p.m., local time, Monday through Friday.

action be taken at the direction of the appointing authority. Regardless, the court held that Preston's suspensions and dismissals were not void *ab initio* because overwhelming evidence in the record demonstrated that (a) Preston would have disregarded the temporary assignment had the appointing authority notified her of the change; and (b) the Department never intended to dismiss Preston until her unreasonable behavior and absences from work led to her suspensions and dismissal.

(3) An appointing authority may require an employee to work hours and days other than regular days and hours, including an overtime or inclement weather schedule if it is in the best interest of the agency.

(4) An employee who works for an agency which requires more than one (1) shift or seven (7) days a week operation may be reassigned from one shift to another or from one post to another or alternate days off by the agency to meet staffing requirements or to maintain security or provide essential services of the agency.

(5) An employee shall give reasonable notice in advance of absence from a work station.

Section 3. Work Station and Temporary Assignment. (1) Each employee shall be assigned a work station by the appointing authority.

(2) A work station may be changed to better meet the needs of the agency.

(3) An employee may be temporarily assigned to a different work station in a different county for a period of up to sixty (60) calendar days. Temporary assignment may be renewed with the approval of the Secretary of Personnel. A temporarily reassigned employee shall be reimbursed for travel expenses in accordance with regulatory provisions and the appointing authority shall notify the employee in writing prior to the effective date of the action.

(4) An appointing authority may assign an employee to work in a different site within the county of employment.

Additionally, despite Preston's arguments that her position description and evaluation listed her duties as that of a teacher and not a registered nurse and that the Department erred by assigning new duties of a registered nurse to her in contravention of 101 KAR 2:095, the court concluded that the Department did not err by not reclassifying Preston as a teacher, as the evidence supported that at all times Preston held the state position and classification of a registered nurse and lacked the teaching certificate or statement of eligibility in the appropriate subject area for a teacher. This appeal followed.

Before us, Preston makes alternative arguments. First, she argues that the circuit court incorrectly applied the law when it determined that although the Department did not act in accord with its regulations in that others than the appointing authority suspended or dismissed Preston, it was not illegal because there was substantial evidence that Preston would not have acted any differently had the regulation been followed and the appointing authority had formally reassigned her. Alternatively, Preston argues that even if the appointing authority had legally reassigned her, the circuit court incorrectly applied the law when it upheld the Board's decision that there was no substantial change in her job duties. We disagree.

On appeal of the decision of the circuit court, in reviewing the decision of an administrative agency, our standard of review is as follows. If there is substantial evidence in the record to support an agency's findings, the findings are not clearly erroneous or arbitrary and will be upheld even though there may be conflicting evidence in the record.⁴ "The fact that a reviewing court may not have come to the same conclusion regarding the same findings of fact does not warrant substitution of a court's discretion for that of an administrative agency."⁵

So the fundamental question before us is whether the facts found by the Board are "supported by substantial evidence"⁶ and, if so, whether the Board "incorrectly applied the correct rule of law to the facts presented to it[,]"⁷ or, stated another way, the applicable standard of review is as follows:

Judicial review of the acts of an administrative agency is concerned with the question of arbitrariness. The findings of fact of an administrative agency which are supported by substantial evidence of

⁴ Kentucky Commission on Human Rights v. Fraser, 625 S.W.2d 852, 856 (Ky. 1981).

⁵ Kentucky Unemployment Insurance Commission v. Landmark Community Newspapers of Kentucky, Inc., 91 S.W.3d 575, 582 (Ky. 2002).

⁶ Kentucky Unemployment Insurance Commission v. Springer, 437 S.W.2d 501, 502 (Ky. 1969).

⁷ Kentucky Unemployment Insurance Commission v. Stirrat, 688 S.W.2d 750, 751-752 (Ky.App. 1984).

probative value must be accepted as binding by the reviewing court. The court may not substitute its opinion as to the weight of the evidence given by the Commission. Upon determining that the Commission's findings were supported by substantial evidence, the court's review is then limited to determining whether the Commission applied the correct rule of law.⁸

Preston's first argument addresses the circuit court's conclusion that the Department failed to follow the regulation requiring the appointing authority to make the temporary reassignment but that this failure did not void the reassignment.

These are the facts as found by the Personnel Board hearing officer and adopted by the Board. First, in September 2001, Preston did not accept well her immediate supervisor's comment that she would probably be assigned to the Medical Unit as her enrollment had dropped to zero. Preston voiced an objection, citing mistreatment by the Medical Unit; and she may also have cited concerns about her own competence to practice nursing in that unit. Preston and her supervisor then worked on starting a phlebotomy class for her to teach and worked on recruiting more students for the CNA class. Second, in October 2001, Preston's supervisor and the Center director found that no new students had been enrolled in the CNA class. And Preston

⁸ Burch v. Taylor Drug Store, Inc., 965 S.W.2d 830, 834 (Ky.App. 1998) (citations omitted).

and the director discussed the class enrollment and a temporary assignment to the Medical Unit. Preston vociferously voiced concerns about being a nurse since she had been teaching so long and she had had conflicts in the past with the Medical Unit staff, stating that she should be fired or layed off, which the director indicated were not options. The director told the commissioner (the appointing authority) that he was considering temporarily assigning Preston to the Medical Unit as she was a registered nurse (RN) but that Preston had said that she would not work there. The commissioner considered temporary reassignment, detail to special duty, and layoff. The latter two reassignments he thought did not fit as the CNA class was expected to continue when students enrolled. Third, in November 2001, the commissioner, as appointing authority, authorized the director and Preston's immediate supervisor to temporarily reassign her to the Medical Unit. When Preston received the memo, she loudly and angrily responded that she would not work in the Medical Unit and asked for leave and to be fired.

Despite the circuit court's conclusion to the contrary, the commissioner testified before the Board's hearing officer that as appointing authority, he "could approve (the temporary reassignment) verbally[,] which is the way (he) approved it . . . to (the director) who passed it on to (the immediate supervisor)." The Board made findings based upon the

commissioner's testimony. As the reviewing court, we must accept these findings as correct if supported by substantial evidence, defined as:

[E]vidence, taken alone or in light of all the evidence[] that has sufficient probative value to induce conviction in the minds of reasonable people. If there is substantial evidence to support the agency's findings, a court must defer to that finding even though there is evidence to the contrary.⁹

Based on this testimony, we conclude that there is substantial evidence that this Court must accept as binding that the commissioner did authorize Preston's temporary reassignment to the Medical Unit.¹⁰ And, as 101 KAR 2:095 § 3(4) provides that "[a]n appointing authority may assign an employee to work in a different site within the county of employment[,]" the Board correctly applied the law in holding that the Department had the authority to temporarily reassign Preston.

Similarly, there is substantial evidence, which we must accept as binding, to support the Board's finding that the Center needed nursing help on the Medical Unit's third shift. Testimony from the Medical Unit's manager indicated that the third shift was understaffed. The unit operated three shifts. Full staffing on each shift was one RN, three Licensed Practical Nurses (LPNs), and two patient aides. The RN position on each

⁹ Thompson v. Kentucky Unemployment Insurance Commission, 85 S.W.3d 621, 624 (Ky.App. 2002) (citations omitted).

¹⁰ Burch, *supra* at 834.

shift was filled. The first shift was fully staffed. The second shift needed a patient aide. The third shift needed a LPN and a patient aide. Thus, reassigning Preston to the third shift in the LPN position was authorized by the appointing authority, under 101 KAR 2:095 § 2, which provides:

(2) The normal work day shall be from 8 a.m. to 4:30 p.m., local time, Monday through Friday.

(3) An appointing authority may require an employee to work hours and days other than regular days and hours

(4) An employee who works for an agency which requires more than one (1) shift or seven (7) days a week operation may be reassigned from one shift to another to meet staffing requirements

While Preston argues that 101 KAR 2:095 § 2 does not allow for a temporary change in work hours as her Vocational Training Unit was a single shift unit, unlike the three shift Medical Unit, that section of the regulation speaks to the needs of the agency that requires more than one shift, not a particular unit of an agency. We find no incorrect application of the law.

In so concluding, we note that this Court has reached the same conclusion, albeit on different grounds, as the circuit court below. In concluding that the Department acted unlawfully by failing to follow the procedure which requires the appointing authority to approve a temporary reassignment, the circuit court failed to take note of the binding findings of fact that the

temporary reassignment to the third shift was authorized by the commissioner as the appointing authority. Our review, conducted under Burch supports our conclusion that the facts relied upon by the Board are supported by substantial evidence and that the Board correctly applied the law. The order of temporary reassignment was authorized by the appointing authority; thus, the Board acted within its statutory authority.¹¹ As the order was not void, the disciplinary actions and the dismissal are not void *ab initio*.

Preston's second issue asserts that the circuit court's opinion and order was erroneous and contrary to law in that even if the Department had the authority to change her work site and hours, it had no authority to change her job duties; and her reassignment from a position in which she taught to a position in which she was required to perform nursing duties resulted in her being constructively discharged. We disagree.

Preston concedes the Board's finding that she was always classified as a RN but questions the Board's and the circuit court's conclusions that she could be reassigned to duties within her RN classification but not within her position description of CNA program teacher. In accord with 101 KAR

¹¹ Commonwealth of Kentucky Transportation Cabinet Department of Vehicle Regulation v. Cornell, 796 S.W.2d 591, 594 (Ky.App. 1990).

2:020 § 1(1),¹² class specifications are general in nature.

Still, consistent with her CNA program teaching duties and her reassignment to the Medical Unit, Preston's RN specification generally included teaching in addition to nursing duties.

According to 101 KAR 2:020 § 1(6), the more detailed listing of

¹² Section 1. Interpretation of Class Specifications. (1) Class specifications shall describe and explain the job duties and responsibilities typically assigned to a position within a particular class.

(2) Class specifications shall indicate the kinds of positions to be allocated to the various job classifications as determined by their characteristics and duties or responsibilities. Characteristics and duties or responsibilities of a class shall be general statements indicating the level of responsibility and discretion of positions in that job classification.

(3) Examples of duties or responsibilities shall not be construed as:

(a) Describing what the duties or responsibilities of an individual position shall be; or limiting the appointing authority's ability to temporarily take away from, add to, or otherwise alter the duties and responsibilities of an individual position.

(4) The use of an individual expression or illustration describing the duties or responsibilities of a class shall not be regarded as excluding assignment of other duties or responsibilities not mentioned which are of similar kind or quality.

(5) Minimum requirements shall be comprehensive statements of the minimum background as to education, experience and other qualifications which will be required in all cases as evidence of an appointee's ability to perform the work [properly].

(6) Position descriptions shall state, in detail, the duties and responsibilities assigned to an individual position. If the duties and responsibilities assigned to a position are to be changed in a material and permanent way, the supervisor making the recommendation shall timely submit to the appointing authority for the agency a position description, stating the duties and responsibilities to be assigned. If the appointing authority approves the material and permanent assignment of the duties and responsibilities, the new position description shall be forwarded to the secretary with the appointing authority's recommendation for reclassification.

duties and responsibilities assigned to an individual position is in a position description. While Preston's position description listed her title as registered nurse, under the work performed, her duties were described as a teacher in the CNA program. Regardless, in accord with 101 KAR 2:020 § 1(3)(a), the appointing authority may "temporarily take away from, add to, or otherwise alter the duties and responsibilities of an individual position[,]" and in accord with 101 KAR 2:020 § 1(6), the appointing authority only needs to change a position description if the duties and responsibilities change in a *material and permanent way*. So even if Preston's position description was insufficient to cover her duties and responsibilities in the Medical Unit, as it was a temporary assignment, it was allowed under the regulation without a corresponding change in the position description.

Based on Preston's concession, we conclude that there is substantial evidence to support the Board's findings that Preston was classified as a RN, a position that indisputably fit within the job duties and responsibilities in the Medical Unit. Additionally, the Board correctly applied the law in that the regulations allow an appointing authority to add to or otherwise alter the duties and responsibilities of an individual position; and no change in the position description is needed unless the

change is material and permanent. As this reassignment was temporary, the Board correctly followed the law.¹³

As to Preston's argument that the reassignment amounted to a constructive discharge, as has been shown above, the temporary reassignment was authorized. The facts indicate that Preston was reassigned because she had no class enrollment and was reassigned to a position with duties within her classification of RN to a shift that was understaffed. While the change was obviously not optimum for her, it is difficult based on this record to conclude that the Department's actions were so intolerable as to compel a reasonable person to resign.¹⁴

For the foregoing reasons, the opinion and order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Paul F. Fauri
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Sue G. Simon
Frankfort, Kentucky

¹³ This Court notes that Preston is correct that the Board incorrectly cited 101 KAR 2:095 § 1(3) in paragraph seven of its conclusion, but a reading of the conclusions in context indicates that the Board *quoted* from 101 KAR 2:020 § 1(3) in paragraph four (also incorrectly cited as 2:095) of its conclusions, and from context apparently meant to carry that citation through to paragraph seven.

¹⁴ Commonwealth Tourism Cabinet v. Stosberg, 948 S.W.2d 425 (Ky.App. 1997).