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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001897-MR

STEVEN JACKSON

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 02-CI-00934

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET
JAMES C. CODELL, III,
APPOINTING AUTHORITY AND
COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD

APPELLEES

AND:

NO. 2004-CA-002445-MR

COMMONWEALTH OF KENTUCKY
TRANSPORTATION CABINET

CROSS-APPELLANT

CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 02-CI-00934

STEVEN JACKSON AND
COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD

CROSS-APPELLEES

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: BARBER, HENRY, AND KNOFF, JUDGES.

BARBER, JUDGE: This appeal stems from a Personnel Board (Board)
action between Appellant/Cross-Appellee, Steven Jackson

(Jackson), and the Appellee/Cross-Appellant, Commonwealth of Kentucky Transportation Cabinet (Cabinet). Jackson's employment with the Cabinet ended on July 25, 2001 after twelve years of service.¹ The events leading up to and including July 25, 2001 are in dispute between the parties.

Jackson was issued a letter of suspension dated June 11, 2001 that stated his fifteen-day suspension was to begin June 12, 2001 and end on July 4, 2001.² Jackson had been suspended on three prior occasions that year and was familiar with the procedure of returning to work at the end of a suspension.³ Jackson failed to report back to work on July 5, 2001 as instructed in his suspension letter. He called in July 9, 2001 and spoke to a co-worker, Jennifer Dews, and informed her that he would not be in until after July 19, 2001. Ms. Dews forwarded the message to Jackson's supervisor, Robert Sudduth. Additional calls were made by Jackson but the dates and contents thereof are in dispute.

¹ After twelve years of service, Jackson had no accumulated annual or sick leave time.

² The suspension was based upon Jackson's inability to perform his job duties due to his driver's license being revoked from a DUI charge.

³ Jackson received a one day suspension on January 17, 2001; a five day suspension beginning April 27, 2001; and a ten day suspension beginning May 11, 2001.

On July 25, 2001, Jackson submitted his resignation to his supervisor, Robert Sudduth.⁴ On the same day, the Cabinet resigned Jackson pursuant to 101 KAR 2:102, Section 9(3), a job abandonment regulation applicable to state employees.⁵ Betty C. Hawkins, Director of the Division of Personnel Services at the Cabinet, prepared a letter, dated July 25, 2001, advising Jackson that he had been resigned pursuant to 101 KAR 2:102, Section 9.⁶

Jackson timely appealed to the Personnel Board September 13, 2001. A hearing was subsequently held on March 4, 2002. On April 18, 2002, the hearing officer rendered his Findings of Fact, Conclusions of Law, and Recommended Order. The hearing officer recommended that the appeal of Jackson be sustained and that he be reinstated to his prior position of Stores Worker II.⁷ The hearing officer concluded that Jackson's July 25, 2005 resignation was moot because he could not resign from a position from which he had already been terminated, i.e.

⁴ The resignation letter Jackson submitted was dated July 12, 2001, but stated it was not effective until July 25, 2001. This date appears to be merely coincidental.

⁵ 101 KAR 2:102, Section 9(3) states "An employee who has been absent without leave or notice to the supervisor for a period of ten (10) working days shall be considered to have resigned the employment.

⁶ Jackson testified that he received Ms. Hawkins' July 25, 2001 letter and the P-1 dated July 27, 2001 on July 25, 2001. Jackson later testified that he only got the P-1 on July 25, 2001, and not Ms. Hawkins' letter.

⁷ The Hearing Officer further recommended that the "matter be remanded for further proof on the status of [Jackson's] driver's license, and if driving privileges were suspended, the effect on his ability to perform his job during that time, and concomitantly, the necessity of making him whole."

the Cabinet's resignation pursuant to 101 KAR 2:102, Section 9(3).

Both parties filed exceptions to the hearing officer's Recommended Order. On June 17, 2002, the Personnel Board issued its Final Order Altering the hearing officer's findings of fact, conclusions of law, and recommended order. The Board altered two of the findings of fact, deleted one of the conclusions of law, and deleted the recommended order of the hearing officer. Specifically, the Board found that it was the intention of the Cabinet for their implied resignation to be effective close of business July 25, 2001 since no effective date was listed on the July 25, 2001 letter and that Jackson's letter of resignation was received by the Cabinet before the resignation initiated by the Cabinet became effective. Thus, Jackson resigned before the Cabinet's actions took effect. The Board then ordered that Jackson's appeal be dismissed.

On July 16, 2002, Jackson appealed the Board's final order to the Franklin County Circuit Court. Following a review of the record, the circuit court issued its Order and Opinion May 4, 2004. The Court agreed with the Hearing Officer and opined that Jackson "could not resign from a position from which he had been terminated." As a result, the circuit court reversed the Board's order and remanded to the Cabinet. The circuit court further stated that the matter was remanded to the

Cabinet to determine if there were other valid grounds to dismiss Jackson. Jackson filed a motion to alter or amend Judgment May 14, 2004 asking for the court to remove the remand portion of its judgment. The motion was denied by the circuit court August 16, 2004. Jackson then appealed to our court from the circuit court's judgment related to the remand. The Cabinet subsequently filed a cross-appeal of the circuit court's judgment reversing the Board.

Jackson's sole argument is that the circuit court should have ordered Jackson reinstated and made whole rather than remand to the Cabinet for a determination whether there were other valid grounds to dismiss him. In its cross-appeal, the Cabinet has four arguments: (1) the Cabinet should be allowed to proceed with other alternatives under 101 KAR 2:102, Section 9 if Jackson provided adequate notice to his supervisor and thus did not resign; (2) substantial evidence supported the order of the Board; (3) the Cabinet properly complied with the provisions of 101 KAR 2:201, Section 9(3); and (4) Jackson waived any rights for re-employment with the submission of his resignation.

Judicial review of an administrative agency's decision is concerned with the question of arbitrariness. Kentucky Board of Nursing v. Ward, 890 S.W.2d 641, 642 (Ky.App. 1994). In determining whether an agency's action was arbitrary, the

reviewing court should look at three primary factors. Bowling v. Natural Resources and Environmental Protection Cabinet, 891 S.W.2d 406, 409 (Ky.App. 1995). The court should first determine whether the agency acted within the constraints of its statutory powers or whether it exceeded them. Id. Second, the court should examine the agency's procedures to see if a party to be affected by an administrative order was afforded his procedural due process. Id. Finally, the reviewing court must determine whether the agency's action is supported by substantial evidence. Id. If any of these three tests are failed, the reviewing court may find that the agency's action was arbitrary. Id. No arguments were raised regarding the first two factors, but we do believe they are satisfied based upon the record. Therefore, we focus upon whether the Board's final decision is supported by substantial evidence.

On factual issues, an appellate court, in reviewing the agency's decision, is confined to the record of proceedings held before the administrative body and is bound by the administrative decision if it is supported by substantial evidence. Id. If there is any substantial evidence to support the action of the administrative agency, it cannot be found to be arbitrary and will be sustained. Id. Substantial evidence has been conclusively defined by Kentucky courts as that which, when taken alone or in light of all the evidence, has sufficient

probative value to induce conviction in the mind of a reasonable person. Id.

In determining whether the evidence is substantial, the court must take into account whatever in the record fairly detracts from its weight. Kentucky Board of Nursing, supra 890 S.W.2d at 643. In weighing the substantiality of the evidence supporting an agency's decision, a reviewing court must hold fast to the guiding principle that the trier of facts is afforded great latitude in its evaluation of the evidence heard and the credibility of the witnesses appearing before it. Bowling, supra, 891 S.W.2d at 409-10. The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. Id. at 410. It is the exclusive province of the administrative trier of fact to pass upon the credibility of witnesses and the weight of the evidence. Id.

If an agency decision is supported by substantial evidence, the reviewing court must then determine whether the agency applied the correct rule of law to its factual findings. Id. If the court finds the correct rule of law was applied to the facts supported by substantial evidence, the final order of the agency must be affirmed. Id.

We now turn to examine whether the final order of the Board was supported by substantial evidence. The Board adopted

all of the hearing officer's Findings of Fact, and added additional findings. It stated as follows in its Final Order:

2. Add the following to Finding of Fact number 12:

The P-1 reflects that [Jackson's] separation was effective July 25, 2001. The letter from Ms. Hawkins does not contain an effective date, however, the letter is dated July 25, 2001 and informs Jackson that he is "considered to have resigned" his position. The Board finds that it was the intention of [the Cabinet] for the "implied resignation" to be effective close of business July 25, 2001.

3. Add the following to Finding of Fact number 13:

The testimony of Jackson and Suddeth [sic] establishes that Jackson turned in his letter of resignation on July 25, 2001. The letter of resignation was not rejected in any way nor was it ever retracted. The letter of resignation was received by [the Cabinet] before the resignation initiated by [the Cabinet] became effective (close of business July 25, 2001).

We believe the finding by the Board that it was the intention of the Cabinet for its resignation to be effective at the close of business July 25, 2001 is not supported by substantial evidence. There was no testimony on this issue received from any witness. Also, the P-1 submitted as a joint exhibit simply lists the resignation on July 25, 2001, but does not explain if it became effective at the close of business that day. We believe this fact is determinative in this matter. Therefore, we remand to the Board for additional findings to determine when the effective date of the Cabinet's resignation

occurred.⁸ If the Board concludes that the Cabinet's resignation was effective as of the close of business July 25, 2001, then Jackson's resignation letter did, in fact, take effect prior to the Cabinet's action. However, if the Board concludes that the Cabinet's resignation was effective at the beginning of business July 25, 2001, then Jackson's resignation letter would have been moot.

The Board adopted the following Conclusions of Law of the Hearing Officer in its Final Order:

9. Implied, involuntary dismissal under the provisions of 101 KAR 2:102, Section 9(3) is clearly a "penalization" as that term is defined in KRS 18A.005(22)[sic].

10. The Cabinet failed to give the Appellant adequate notice of the action taken against him under the provisions of KRS 18A.095(9). Separation of a status employee pursuant to 101 KAR 2:102 is a penalization requiring notice of appeal rights under KRS 18A.095(9)(d).

We agree with the Board that a resignation pursuant to 101 KAR 2:102, Section 9(3) constitutes a penalization⁹ requiring appropriate notice be given to the employee in accordance with KRS 18A.095(9). We agree with the Board that the Cabinet's July 25, 2001 letter failed to meet the requirements of KRS 18A.095(9). Thus, if the Board determines that the Cabinet's

⁸ The Board should take proof related to Jackson's P-1, pay records, and any applicable internal policies of the Cabinet, etc. to determine if the Cabinet's resignation pursuant to 101 KAR 2:102, Section 9(3) took effect at the beginning or close of business July 25, 2001.

⁹ Penalization is defined in KRS 18A.005(24).

resignation took effect at the beginning of business July 25, 2001, it must sustain Jackson's appeal based on the inadequacy of the Cabinet's July 25, 2001 letter.

Even though it is not necessary, we would like to examine Jackson's argument related to the circuit court's partial remand to the Cabinet. Jackson argues that the circuit court erred when it remanded to the Cabinet for a determination of whether there were other valid grounds to dismiss Jackson. We believe the remand portion of the circuit court's order is prohibited by statute. Kentucky Revised Statute 13B.150(2), which deals with administrative hearings states in pertinent part,

The court may affirm the final order or it may reverse the final order, in whole or in part, and remand the case for further proceedings if it finds the agency's final order is: . . .

A reviewing court must interpret a statute according to its plain meaning. Floyd County Board of Education v. Ratliff, 955 S.W.2d 921, 925 (Ky. 1997). There is nothing in this statute which gives the circuit court the authority to remand an issue to the Cabinet. The clear language of the statute allows a remand to the Board and nothing more. We felt this issue should be addressed in effort to avoid future problems in this matter. Further, due to the remand, we will not address the Cabinet's arguments at this time.

Based on the foregoing, we vacate the circuit court's judgment and remand to the Board for the taking of additional proof and to enter a judgment consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT/CROSS
APPELLEE:

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BRIEF FOR APPELLEE/CROSS
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