

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-002089-MR

PAUL PRINCE

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE SAM G. MCNAMARA, JUDGE
ACTION NO. 05-CI-00044

COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF VETERAN'S AFFAIRS;
AND KENTUCKY PERSONNEL BOARD

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: MOORE AND STUMBO, JUDGES; ROSENBLUM,¹ SENIOR JUDGE.

STUMBO, JUDGE: Paul Prince appeals from an order of the Franklin Circuit Court affirming an order of the Kentucky Personnel Board. The Board's order sustained an action of the Thomas-Hood Veterans Center terminating Prince's employment based on Prince's failure to complete work assignments, his alleged threatening remarks to staff, and his poor personal hygiene. Prince, through counsel, contends that the Board

¹ Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

improperly failed to explain its rejection of portions of a Hearing Officer's recommended order, and improperly failed to allow him to conduct discovery to determine if ex parte contact with the Board had occurred. For the reasons stated below, we affirm the order on appeal.

Prince began his employment as a Patient Aide at the Thomas-Hood Veterans Center (THVC) in 1992. THVC is a nursing home for veterans. The following year he was promoted to Maintenance Worker II. His duties at the new position included performing minor maintenance duties as well as cleaning floors and walls. It was acknowledged by Prince that he is a military veteran with a 10% disability. During the course of his employment, the disability may have increased to 20% due to diabetes.

In late 2002 or early 2003, Prince received a poor performance evaluation, resulting in a "Performance Improvement Plan" being given to him on September 24, 2003. The plan set forth five areas in which Prince was required to show improvement. He was directed to 1) refrain from making threatening remarks to staff, visitors or residents; 2) clean assigned areas more thoroughly; 3) complete his assignments; 4) follow assigned cleaning schedules; and 5) improve his personal hygiene. Prince denied making threatening remarks, stating that he told a staff member to leave him alone which was incorrectly interpreted as threatening. The facility's administrator, Fran Williamson, placed Prince on sick leave until he produced a letter from a psychiatrist or psychologist that he was not a threat to himself or others. It appears that Prince was later evaluated by the Saint Joseph Behavioral Medicine Network and allowed to return to work.

At some point, Prince's supervisor, Florence Bruner, referred Prince to the Kentucky Employee Assistance Program (KEAP). It was alleged that Prince remarked that if he was fired, he was going to come in to work and shoot everyone. Prince denied the allegation. It was also noted that Prince smelled of urine, and declined his supervisor's offer to use the shower facility at THVC and to wash his clothes there.

On October 8, 2003, Prince received a written reprimand for failing to make the changes set forth in the Performance Improvement Plan, and he received a three-day suspension on October 30, 2003, for failing to clean his assigned areas. On November 7, 2003, Prince yelled at other employees to leave him alone. The other employees found the outburst to be threatening, but Prince stated that the remark was not intended for anyone in particular and he was just having a bad day. The record contains several additional complaints that Prince smelled so strongly of urine that it made other staff members sick.

Prince received a letter dated December 12, 2003, notifying him that his employment with THVC was being terminated. The basis for the termination was 1) violation of various KAR employment provisions; 2) violation of THVC policies and procedures; 3) the making of threatening remarks to co-workers; 4) failing to clean assigned work areas; and 5) deficiency of personal hygiene and smelling of urine. A pre-termination hearing was conducted on December 23, 2003, which Prince attended with counsel. Proof was taken, which resulted in Prince's termination from employment. Prince appealed the dismissal to the Personnel Board, which assigned a Hearing Officer

to the matter who conducted a hearing on May 19, 2004. Prince was again represented by counsel. Proof was heard, and the matter was videotaped.

After considering the evidence, the Hearing Officer rendered Findings of Fact, Conclusions of Law, and Recommended Order dated September 24, 2004. The Hearing Officer found that THVC had not proved Prince either threatened his co-workers or failed to clean his assigned work areas. The Officer did find proof that Prince was lacking in personal hygiene. He found Prince's dismissal from employment to be excessive, and recommended modifying the dismissal to a ten-day suspension.

The matter was then submitted to the full Personnel Board for consideration. Upon review of the proof, the Board modified the Hearing Officer's findings to indicate that Prince failed to perform his assigned job duties and was lacking in personal hygiene. It rejected the Hearing Officer's recommendation of a ten-day suspension, and upheld Prince's dismissal from employment.

Prince appealed to Franklin Circuit Court, arguing that the Board's decision violated KRS 13B.120, violated Prince's due process rights, was not supported by substantial evidence and may have been based on an unspecified ex parte communication. After considering the claim, the Circuit Court rendered an order on September 5, 2006, affirming the Board's decision. It found that Prince failed to demonstrate that the Board's decision was not supported by substantial evidence, and found that the Board followed the proper procedure in modifying in part and rejecting in part the Hearing Officer's recommended order. Lastly, it rejected Prince's claim that the

Board was bound by the Hearing Officer's recommendations if they were supported by substantial evidence. The result was that Prince's termination from employment was upheld. This appeal followed.

Prince now argues that the circuit court erred in failing to reverse the Personnel Board's decision. Specifically, he argues that the Board improperly failed to recognize the Hearing Officer's role of fact finder, and improperly rejected the Hearing Officer's recommendations without sufficient explanation. The corpus of this argument appears to be that the circuit court erred in failing to conclude that the Personnel Board did not adequately justify its deviation from the Hearing Officer's recommended order. Prince also argues that the circuit court erred in denying him the opportunity to investigate whether the Board's action was tainted by ex parte communication. He maintains that he was entitled to an impartial administrative process, and that ex parte communication with the Board - if it occurred - tainted that process. Prince seeks an order reversing the Board's decision and reinstating him to employment.

We have closely examined the record, the law and the written arguments, and find no error with the circuit court's affirmation of the Board's decision. The circuit court is bound by the Personnel Board's findings of fact if they are supported by substantial evidence of probative value. *Kentucky Unemployment Insurance Commission v. Landmark Community Newspapers of Kentucky, Inc.*, 91 S.W.3d 575 (Ky. 2002). Substantial evidence is evidence taken by itself or as a whole that "has sufficient probative value to induce conviction in the minds of reasonable men." *Commonwealth*,

Cabinet for Human Resources v. Bridewell, 62 S.W.3d 370, 373 (Ky. 2001). The record contains such evidence, in the form of the testimony of several witnesses including the Executive Director of the Office of Kentucky Veteran's Centers, THVC Administrator Fran Williamson, a THVC laundry and housekeeping supervisor, Prince's supervisor, Florence Bruner, and Prince himself. Various individuals stated that Prince showed no improvement after participating in the Performance Improvement Plan; that his assigned work areas were not cleaned; that he made remarks which some staff members found threatening; and, that he often smelled of urine. The dispositive inquiry for the circuit court was not whether evidence existed in the record upon which a different conclusion could have been reached, but whether substantial evidence existed to support the Board's action. *Landmark, supra*. Such evidence does exist in the record, and the circuit court properly so found.

Prince next argues that the Board was bound by the Hearing Officer's recommendations, and that the Board gave an insufficient explanation for its decision to depart from the recommendations. KRS 13B.120 states,

(1) In making the final order, the agency head shall consider the record including the recommended order and any exceptions duly filed to a recommended order.

(2) The agency head may accept the recommended order of the hearing officer and adopt it as the agency's final order, or it may reject or modify, in whole or in part, the recommended order, or it may remand the matter, in whole or in part, to the hearing officer for further proceedings as appropriate. (Emphasis added).

Contrary to Prince's assertion, the Board was under no duty to adopt the Hearing Officer's recommended order as that of the Board's, nor to justify its departure other than by the issuance of findings of fact and conclusions of law. KRS 13B.120(3). Rather, KRS 13B.120 allows the Board to reject or modify, in whole or in part, the recommended order. The Board was availed of the entire record, including the testimony of witnesses and counsels' written and oral arguments, and properly exercised its authority under KRS Chapter 13B to reject or modify the Hearing Officer's recommended order. As such, we find no error.

Prince's last argument is that the circuit court erred in refusing his request to investigate whether ex parte communications tainted the proceeding before the Board. He asserts that one of the most fundamental elements of administrative due process is an impartial decision maker, and claims that if ex parte communications occurred, that a crucial element of the administrative process was lacking.

KRS 13B.150 states that,

(2) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. 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: . . .
(e) based on an ex parte communication which substantially prejudiced the rights of any party and likely affected the outcome of the hearing”

We do not interpret this provision as allowing a party leave of court to conduct discovery of an unsupported claim of ex parte communication. That is to say, in order to support a claim of error on this issue, the aggrieved party would have to show at a minimum that

some rational basis exists in support of the claim that ex parte communications occurred. Prince has produced no evidence of ex parte communication aside from the bald claim that “there may have been ex parte contact.” While we recognize that such evidence may be difficult to produce without discovery, no error arising in the circuit court could be found absent the production of an affidavit, witness testimony or other evidence sufficient to provide at least minimal support for the allegation. In the absence of even a scintilla of evidence in the record to support the possibility of ex parte communications, we cannot conclude that the circuit court erred in refusing Prince’s request for discovery on the issue.

For the foregoing reasons, we affirm the order of the Franklin Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE,
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NO BRIEF FOR APPELLEE,
KENTUCKY PERSONNEL BOARD