

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000332-MR

PERRY T. RYAN

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 06-CI-00744

BOARD OF TRUSTEES OF THE
KENTUCKY RETIREMENT SYSTEMS

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: DIXON AND NICKELL, JUDGES; ROSENBLUM,¹ SENIOR JUDGE.

DIXON, JUDGE: Appellant, Perry T. Ryan, appeals *pro se* from an order of the Franklin Circuit Court that affirmed an administrative decision of Appellee, the Board of Trustees of the Kentucky Retirement Systems, finding that Appellant's cost to purchase seventy months of service had been correctly adjusted from \$41,198.42 to \$45,075.70. The adjustment occurred as a result of a change in Appellant's actual rate of pay due to

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

a settlement agreement between Appellant and his employer, the Office of the Attorney General (OAG). Finding no error, we affirm.

Appellant has been employed as an Assistant Attorney General in the Office of Criminal Appeals since December 1988. In December 2003, Appellant became eligible to purchase sixty months of retirement service credit, having completed fifteen years of service. See KRS 61.552(25). In addition, under KRS 61.552(3), Appellant was entitled to purchase ten months of retirement service credit because of his employment with other state agencies prior to December 1988, when he did not participate as a contributing member of Kentucky Retirement Systems.

On March 26, 2004, Appellant completed the required forms to purchase the full seventy months of retirement service credit. The cost of this service was \$41,198.42, as calculated under KRS 61.5525. Appellant's cost calculation date was March 31, 2004,² and the current rate of pay used to calculate Appellant's cost was \$60,633.84. Appellant made a down payment of \$17,500, and signed an after tax Installment Purchase of Service Agreement (IPS) to establish a payment plan for the remaining balance of \$23,698.42. Appellant subsequently terminated his IPS and paid the remaining purchase balance.

On June 2, 2004, Appellant entered into a settlement agreement with the OAG, terminating a lawsuit he filed against his employer in 1997 regarding the salary being paid to another attorney also employed by the OAG. The lawsuit alleged that the OAG manipulated the attorney's position and grade level to avoid paying several other attorneys in the same office, including Appellant, a higher salary. The settlement agreement provided that Appellant's salary would be retroactively increased for the time

² 105 KAR 1:330 Section 1(1).

period from December 1, 1996 through June 30, 2004, and going forward in an amount equal to 75% of the amount Appellant was seeking in the lawsuit. The agreement further stipulated that Appellant's employee contributions due on the back pay would be withheld and forwarded to Appellee, and that the OAG would similarly pay Appellee the employer contributions due on the back pay.

Thereafter, the OAG certified to Appellee, Kentucky Retirement Systems, that under the terms of the settlement agreement, Appellant's salary was increased for the time period from December 1, 1996 through June 30, 2004. Appellee subsequently audited Appellant's account and determined that his credible compensation for March 2004 had increased to \$5,528.35, making Appellant's current rate of pay \$66,340.20 as of March 31, 2004. Appellee then recalculated the cost of Appellant's prior purchase of retirement service credit using the revised current rate of pay, and advised him that he owed an additional \$6,682.86 for his purchase of the seventy months service credit.³ Appellant paid the additional amount under protest and requested an administrative hearing.

In February 2006, the administrative hearing officer entered a recommended order finding that pursuant to KRS 61.685, Appellee was authorized to adjust the cost of Appellant's service credit purchase to correct "errors and omissions in system records." The hearing officer's order was adopted and Appellant thereafter sought judicial review in the Franklin Circuit Court.

In February 2007, the circuit court upheld Appellee's administrative decision, noting,

³ Appellee later discovered an error in the calculations and the additional cost owed by Appellant was \$3,877.28, rather than \$6,682.86. The difference of \$2,805.58 was refunded to Appellant.

[T]he settlement agreement clearly indicated that the settlement was to reimburse the Petitioner for the period between December 1996 and June 2004. When the parties agreed to settle the case, the OAG reported back pay to KRS as required by statute and the settlement agreement. KRS then audited Petitioner's account and found that Petitioner's increased salary for that time period required a higher contribution for the purchase of service credit. KRS 61.685(1) and 105 KAR 1:330 Section 6(1)2004 clearly contemplate future audits and adjustments to the cost of service based on "discovery of any error or omission." This is what occurred in this case. The principle of equitable estoppel does not apply in this case to prevent KRS from performing a statutorily-prescribed duty. KRS acted according to the law.

Appellant thereafter appealed to this Court.

In reviewing an administrative decision, the circuit court must determine whether the agency based its decision upon substantial evidence. *Kentucky Commission on Human Rights v. Fraser*, 625 S.W.2d 852 (Ky. 1981). See also *Kentucky Retirement Systems v. Heavrin*, 172 S.W.3d 808 (Ky. App. 2005) "The test of substantiality of evidence is whether . . . it has sufficient probative value to induce conviction in the minds of reasonable men." *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972). The court's role is to review the administrative decision, not to reinterpret or reconsider the merits of the claim. *Kentucky Unemployment Ins. Commission v. King*, 657 S.W.2d 250, 251 (Ky. App.1983). As long as there is substantial evidence in the record supporting the agency's decision, the court must defer to the agency, even if there is conflicting evidence. *Fraser, supra*, at 856.

On appeal to this Court, "[o]ur task is to determine whether or not the circuit court's findings upholding the [administrative decision] are clearly erroneous. CR 52.01." *Jones v. Cabinet for Human Resources*, 710 S.W.2d 862, 866 (Ky. App. 1986).

See also Kirk v. Jefferson County Medical Society, 577 S.W.2d 419 (Ky. App. 1978).

Thus, at this level of review, Appellant has the very high burden of showing that the circuit court was clearly erroneous in finding that Appellee's decision was supported by substantial evidence. We conclude that Appellant has failed to meet his burden.

Appellant argues that the circuit court erred in determining that Appellee is authorized to retroactively recalculate an employee's salary based upon a personnel action settlement agreement. Appellant contends the cost to purchase the service credit was properly calculated as of March 31, 2004, with his then-current rate of pay, and further that the back pay received pursuant to the terms of the settlement agreement did not become credible compensation until received by him in June 2004. We disagree.

The settlement agreement between Appellant and the OAG clearly provided that Appellant would be paid "an amount equal to 75% of back pay claimed as well as all other employee benefits accrued from December 1996 through June 30, 2004." In fact, there is a spread sheet attached to and incorporated in the agreement that calculates the gross back pay and benefits attributable to each month of the period in question.

The settlement agreement cites 200 KAR 12:030, "Computing compensation due to a state employee after adjudicated penalization," as the method for computing Appellant's back pay and restoration of employee benefits. Although the regulation refers to employees who were wrongfully terminated and later reinstated, the parties to the settlement agreement herein stipulated that the agreement would be

implemented under the regulation, meaning that Appellant would receive reinstated salary or a retroactive increase in salary.

KRS 61.5525 sets forth the formula for calculating the cost to purchase service credit. Subsection (1) provides,

(1) Effective July 1, 2001, purchase of service under the provisions of KRS 16.505 to 16.652, KRS 61.510 to 61.705, and KRS 78.510 to 78.852, except as provided in subsection (2) of this section, shall be determined by multiplying the higher of the employee's current rate of pay, final rate of pay, or final compensation as of the end of the month in which the purchase is being made times the actuarial factor times the number of years of service being purchased.

After the OAG reported the settlement agreement and additional contributions on credible compensation as required by statute and regulation, Appellee audited Appellant's account and found that his current rate of pay as of March 31, 2004, was \$475.53⁴ higher than the amount used to initially calculate the cost of his service credit.

105 KAR 1:330 Section 6(1)(2004)⁵ states:

After the employee has purchased service, the retirement system may recalculate the cost of service if, upon audit, the actual current rate of pay or actual reported credible compensation is greater than reported by the employee or employer when the original calculation was made.

Similarly, KRS 61.685(1) provides, in pertinent part, that "[u]pon discovery of any error or omission in system records, the system shall correct the records including, but not

⁴ As a result of the settlement agreement, Appellant's monthly salary for the fiscal year July 2003 through June 2004 was adjusted in the amount of \$475.53 per month, increasing his credible compensation for March 2004 from \$5,052.80 to \$5,528.33.

⁵ 105 KAR 1:330 currently provides: "Section 5. (1) After the employee has purchased service, the retirement system may recalculate the cost of the service if, upon audit, the retirement system determines that any of the information utilized to calculate the cost of the service was incorrect."

limited to membership in the system, service credit, member and employer contributions, and benefits paid or payable”

Under the specific terms of the settlement agreement, the pay received was clearly intended to be and was treated as back pay from December 1996 through June 30, 2004. Just as clearly, Appellee had the statutory authority and obligation to treat it as such, and to make the necessary adjustment in Appellant’s cost to purchase service credit.

We find no merit in Appellant’s claim that the back pay did not become credible compensation until received in June 2004. “Credible compensation,” as defined in KRS 61.510(13), contemplates and prevents lump sum payments from being credited in a single month:

“Creditable compensation” means all salary, wages, tips to the extent the tips are reported for income tax purposes, and fees, including payments for compensatory time, paid to the employee as a result of services performed for the employer or for time during which the member is on paid leave, which are includable on the member’s federal form W-2 wage and tax statement under the heading “wages, tips, other compensation,” including employee contributions picked up after August 1, 1982, pursuant to KRS 61.560(4). . . . **A lump-sum bonus, severance pay, or employer-provided payment for purchase of service credit shall be included as creditable compensation but shall be averaged over the employee’s total service with the system in which it is recorded if it is equal to or greater than one thousand dollars (\$1,000).** (Emphasis added).

Subsection (13) dictates that any lump sum compensation over \$1,000 is not credited in the year that it is paid, but rather is averaged over the entire course of the member’s service in the system. Appellant’s lump sum payment was back pay for a specific time period and was reported and credited as such. If it had not been, it would

have been deemed a bonus as it was not for services performed in 2004, and would have then been averaged over Appellant's service period. Under no circumstances would it have been considered credible compensation for June 2004. To do so would not only give Appellant an undue windfall in the cost to purchase service credit, but an additional benefit if used as a basis for calculating his final retirement.

Appellant argues extensively that the circuit court erred in failing to address his contracts argument. Specifically, it is Appellant's position that the purchase agreement contained all of the elements of a contract, namely, a writing, offer, acceptance and mutual consideration. Thus, Appellant contends that it was unlawful for Appellee to unilaterally adjust the purchase price of the "contract" after it had been fully performed by both parties.

In fact, the circuit court in its order upholding Appellee's decision did note that "[t]he principle of equitable estoppel does not apply in this case to prevent KRS from performing a statutory prescribed duty." Nevertheless, we agree with Appellee that Appellant's service credit purchase is governed solely by KRS 61.552, KRS 61.5525, and 105 KAR 1:330. If the aforementioned statutes did not exist, the parties could not simply contract for the purchase of service credit, because Appellee would be without any authority to do so.

Further, Appellant is mistaken in his belief that there is mutual consideration. Appellant receives a benefit in that he purchased service that will enhance his monthly retirement allowance and will permit him to retire at an earlier date. Appellee, however, receives no benefit from Appellant's purchase. The funds paid by Appellant for his service purchase were credited to his member contribution account

and Appellee pays interest on the contributions at a rate not less than 2% on June 30 of each year and will continue to do so until Appellant retires or terminates his employment. See 61.552(16)(c), (17), and (25); KRS 61.575. Appellee simply has the statutory and fiduciary duty to ensure that Appellant qualifies to purchase the service credit and pays the full actuarial cost of such service.

The statutes and regulations at issue herein were enacted to make sure that the plans administered by Kentucky Retirement Systems are actuarially sound. The longstanding interpretations of such statutes and regulations are reasonable and entitled to considerable deference. As noted by a panel of this Court in *Homestead Nursing Home v. Parker*, 86 S.W.3d 424, 426 (Ky. App. 1999),

Although our review of the Board's statutory interpretations is less deferential than our review of its factual determinations, . . . nevertheless, an administrative agency's construction of its statutory mandate, particularly its construction of its own regulations, is entitled to respect and is not to be overturned on appeal unless clearly erroneous. (Citations omitted).

See also *J.B. Blanton Company v. Lowe*, 415 S.W.2d 376 (Ky. 1967); *Hughes v. Kentucky Horse Racing Authority*, 179 S.W.3d 865 (Ky. App. 2004).

We conclude that the circuit court properly upheld Kentucky Retirement Systems' administrative decision. Accordingly, the order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Perry T. Ryan, *Pro Se*
Georgetown, Kentucky

BRIEF FOR APPELLEE:

Jennifer A. Jones
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