

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000524-MR

KENNETH W. ROUSSEAU AND
BRADLEY W. LAUFER, JR.

APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 98-CI-01195

JEFFERSON AUDIO VIDEO SYSTEMS, INC. AND
COMMONWEALTH OF KENTUCKY, LABOR CABINET,
DIVISION OF EMPLOYMENT STANDARDS

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GUDGEL, CHIEF JUDGE, EMBERTON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Bradley W. Laufer and Kenneth W. Rousseau appeal from an order of the Franklin Circuit Court which reviewed an order of the Labor Cabinet addressing appellants' claims for unpaid wages. The issues raised by Rousseau in this appeal have been rendered moot by this court's opinion in 2000-CR-000551. With regard to Laufer's claims, we affirm on all issues.

Bradley W. Laufer and Kenneth W. Rousseau filed an action with the Labor Cabinet, No. 97-LABC-0837, alleging unpaid wages were owed to them by their former employer, Jefferson Audio

Video Systems, Inc. (JAVS). Laufer was employed by JAVS from January, 1988, until September 22, 1995, during which time he worked as a sales representative. Laufer was initially employed on a salary basis, but subsequently his compensation was changed to a draw against commission arrangement. Laufer's claim sought \$44,475.55 in unpaid commissions. As Rousseau's claims are moot, they will not be addressed. The Labor Cabinet issued tentative findings of fact on August 13, 1997, which concluded that Laufer was owed a total of \$23,436.58 in unpaid commissions. An evidentiary hearing was held before the Labor Cabinet on May 14, 1998, and on August 3, 1998, the hearing officer issued his findings of fact, conclusions of law, and recommended order. The hearing officer found that Laufer had earned commissions totaling \$42,635.80, but also had been overpaid various commissions. The hearing officer concluded that Laufer was owed a net total of \$30,178.78. The hearing officer recommended that JAVS be held liable for the \$30,178.78 in unpaid commissions, and additionally assessed a \$200.00 penalty against JAVS for violation of KRS 337.055. Exceptions were filed, and on September 2, 1998, the Secretary of the Labor Cabinet issued a final order adopting the findings of fact, conclusions of law, and recommended order of the hearing officer.

On September 30, 1998 and October 5, 1998, Laufer filed a petition and amended petition for review with the Franklin Circuit Court, requesting that the court reverse the Labor Cabinet's order and enter judgment for the original amount claimed by Laufer of \$44,475.55, as well as double liquidated

damages, attorney fees, and prejudgment interest. On January 6, 2000, the court entered an order denying Laufer's petition. Laufer's CR 59.05 motion to alter or amend was denied on February 8, 2000. This appeal followed.

On appeal, Laufer first contends that the Labor Cabinet and the Franklin Circuit Court erroneously denied his claim for prejudgment interest on the unpaid wages, as his damages were liquidated. JAVS complains on appeal that Laufer did not raise the issue of prejudgment interest with the Labor Cabinet. "Failure to raise an issue before an administrative board precludes a litigant from asserting that issue in an action for judicial review of the agency's action." Taxpayer's Action Group of Madison County v. Madison County Board of Elections, Ky. App., 652 S.W.2d 666, 667-668 (1983). Also, an agency may not act in excess of its granted powers. American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission, Ky., 379 S.W.2d 450, 456 (1964). JAVS does not provide this Court with any statutory or other authorization for the award of prejudgment interest by the Labor Cabinet, contrary to KRS 13B.090(7). See also KRS 337.310 and KRS 13B.150 which limits the circuit court's appellate review of administrative decisions.

Laufer next contends that the Labor Cabinet and the circuit court erroneously denied his claims for double liquidated damages and attorney's fees pursuant to KRS 337.385(1). KRS 337.385(1) states, in pertinent part:

Any employer who pays any employee less than wages and overtime compensation to which such employee is entitled under or by virtue of KRS 337.020 to 337.285 shall be liable to

such employee affected for the full amount of such wages and overtime compensation, less any amount actually paid to such employee by the employer, for an additional equal amount as liquidated damages, and for costs and such reasonable attorney's fees as may be allowed by the court. Provided, that if, in any action commenced to recover such unpaid wages or liquidated damages, the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of KRS 337.020 to 337.285, the court may, in its sound discretion, award no liquidated damages, or award any amount thereof not to exceed the amount specified in this section.

Laufer contends that JAVS did not act in good faith and did not have reasonable grounds for believing that he was not entitled to the commissions due. Laufer further complains on appeal that the trial court denied his claims for double liquidated damages and attorney fees without making a finding that JAVS acted in good faith. The record indicates that Laufer made no request or motion for more specific or additional findings by the trial court. CR 52.04; CR 52.02. Therefore, any alleged errors as to the adequacy of the trial court's findings are deemed waived on appeal. CR 52.04; Crain v. Dean, Ky., 741 S.W.2d 655 (1987); Cherry v. Cherry, Ky., 634 S.W.2d 423, 425 (1982). In the absence of such findings, the appellate court may consider the record as a whole to see if the trial court's action was clearly erroneous or an abuse of discretion. Cherry, 634 S.W.2d at 425. Our review of the record indicates there was sufficient evidence which would support a finding that JAVS acted in good faith and had reasonable grounds for believing that Laufer was not owed the amount found to be due. Hence, we cannot

say the Labor Cabinet and the trial court abused their discretion in denying Laufer's claims for double liquidated damages and attorney fees.

Finally, Laufer contends that the Labor Cabinet and the circuit court erred in denying his claims for additional commissions. Specifically, Laufer contends that he was entitled to commissions totaling \$8,700.00 for accounts referred to as TMM-1 and DMI-11, as well as to \$1,778.35 in miscellaneous commissions. The hearing officer found as follows:

22. It is found as a matter of fact that Laufer's claims under the DMI-11 and TMM-1 accounts, totaling \$8,700.00 have not been established by a preponderance of the evidence. The undersigned does not find Laufer's estimation of the commission amount to meet the requisite evidentiary threshold to establish this claim. While the absence of any documentation which might support this claim may have been the result of JAV's failure to voluntarily provide them to Laufer upon request, no order was sought compelling either their production or relief for their non-production. The mere, estimated, speculative nature of these two claims simply does not establish their legitimacy by a preponderance of the evidence.

23. At hearing, Laufer withdrew his claim of \$1,808.00 which represents an amount due from vacation and sick days which were not used prior to his termination. This claim was not originally asserted by Laufer, but was detected in the Cabinet's investigation as an amount Laufer was entitled to claim. As a result of some discussions with JAV on this issue, Laufer withdrew this claim at hearing and substituted in its place a claim of \$1,778.35 for miscellaneous accounts. The nature of these miscellaneous accounts, however, was not detailed in any fashion at hearing. There was no evidence presented as to how this claim was calculated, the time frame that the sales for these accounts were transacted, possible associated costs with these accounts, etc. Accordingly, the

undersigned finds too indefinite to establish by a preponderance of the evidence both the existence of and Laufer's entitlement to commission on these accounts.

Whether Laufer was entitled to these commissions is a question of fact. If an administrative agency's findings of fact are based upon substantial evidence, then those findings are binding upon the appellate court. Kentucky Board of Nursing v. Ward, Ky. App., 890 S.W.2d 641, 642 (1994). If the agency's decision is not supported by substantial evidence, it is classified as arbitrary. American Beauty Homes Corp., 379 S.W.2d at 456. The record supports the Labor Cabinet's findings that Laufer failed to establish by a preponderance of the evidence that he was owed the amounts claimed, in that he provided insufficient supporting documentation. We reject Laufer's claim that his lack of supporting documentation was the result of JAVS's refusal to provide such documentation, as he makes no showing that he attempted to compel production of any supporting documents, i.e. no subpoena duces tecum. The record indicates that JAVS president David Green testified that Laufer left JAVS before the DMI-11 and TMM-1 accounts were completed to the point where he would be entitled to commissions. The appellate court is not free to substitute its judgment as to the credibility of the witnesses and/or the weight of the evidence concerning questions of fact. Kentucky Board of Nursing, 890 S.W.2d at 642. Having reviewed the record, we cannot say that the Labor Cabinet acted arbitrarily in denying Laufer commissions on the DMI-11, TMM-1, and miscellaneous accounts.

For the aforementioned reasons, we affirm the Franklin
Circuit Court.

ALL CONCUR.

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