

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000551-MR

JEFFERSON AUDIO VIDEO SYSTEMS, INC.

APPELLANT

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

KENNETH W. ROUSSEAU;
BRADLEY W. LAUFER, JR.; AND
COMMONWEALTH OF KENTUCKY, LABOR CABINET,
DIVISION OF EMPLOYMENT STANDARDS

APPELLEES

OPINION
REVERSING AND REMANDING
** **

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

SCHRODER, JUDGE: Jefferson Audio Video Systems, Inc. appeals from an order of the Franklin Circuit Court reversing that portion of a final order of the Kentucky Labor Cabinet which found that appellee, Kenneth W. Rousseau, was not entitled to an alleged unpaid bonus. As the Labor Cabinet's findings of fact as to net profits were supported by substantial evidence, we reverse and remand for reinstatement of the Labor Cabinet's final order with regard to Rousseau's claims.

Kenneth W. Rousseau and Bradley W. Laufer filed an action with the Labor Cabinet, No. 97-LABC-0837, pursuant to KRS Chapter 337, alleging unpaid wages owed to them by their former employer, Jefferson Audio Video Systems, Inc. (JAVS). (Laufer's claims are addressed in a separate appeal, 2000-CA-000524.) Rousseau alleged that JAVS owed him an unpaid balance on a profit-based bonus in the sum of \$20,369.50. The Labor Cabinet issued tentative findings of fact on August 13, 1997, finding that Rousseau was not entitled to the alleged amount due. Rousseau subsequently requested and was granted an evidentiary hearing, and, on August 3, 1998, the hearing officer entered his findings of fact, conclusions of law, and recommended order that the Labor Cabinet's tentative findings as to Rousseau be affirmed. The hearing officer's findings of fact stated, in pertinent part:

1. Rousseau was employed with JAV from December 1982 through August 29, 1995. He was initially an hourly employee but in 1990 he became sales manager for the company with a salary of approximately \$60,000 per year.

2. In 1993, Rousseau's pay structure changed. Although no written documents were ever executed between Rousseau and JAV, the evidence establishes that Rousseau agreed to receive \$50,000.00 per year in salary, supplemented by a bonus to be calculated as one-third of the combined profits of the various departments under his management.

3. In calendar years 1993 and 1994, Rousseau received no bonuses because the year-end income calculations revealed no total profits for these departments.

4. In April of 1995, Green telephoned Rousseau and stated, "Looks like you're going to make some money this year." Shortly thereafter, Green met with Rousseau and

presented him a ticker tape from an adding machine reflecting a total bonus owed Rousseau of \$40,369.50. [] Green requested that Rousseau accept the sum of \$20,000.00 as partial payment on this bonus, citing some cash flow problems the company was currently experiencing. Rousseau accepted this payment with the understanding that the balance of \$20,369.50 would be paid as soon as the company's financial situation improved. Rousseau previously let Green make a \$12,000.00 commission payment in three equal, monthly installments on a handshake agreement; thus Rousseau had some history with Green in receiving partial payments from JAV during its financial difficulties.

5. Rousseau never received the balance of \$20,369.50 from JAV, despite periodic requests. After Rousseau left employment on August 29, 1995, he made a demand for the balance of this bonus through legal counsel. To date he has received no payment towards this balance.

6. Green adamantly maintains that the ticker tape reflecting the total bonus of \$40,369.50 was a preliminary figure and not intended to serve as a binding agreement or promise to Rousseau that the balance would be paid. Green maintains that his decision to make the partial payment at this time frame was partly made due to his increasing distrust for Rousseau in the manner in which the sales and commission figures were being tabulated in the company's records.

7. Green also maintained, as referenced in detail in the Cabinet's tentative findings, that the year end financial statements prepared for JAV's tax returns reflected a revised profit for Rousseau's departments of \$29,614.00, thus entitling Rousseau to a bonus of only \$9,772.62. It is Green's position, therefore, that Rousseau was overpaid. Green maintained that the company had incurred a bad debt which had not been added against the profit and costs to be applied to Rousseau's departments, thus artificially inflating the profit for these departments. In support, and by example, Green referred to a change sales order on the Damon's account, introduced as Respondent's exhibit 2, where various hardware had been

invoiced at a no cost unit price within one of Rousseau's departments.

8. Although the testimony of Sharon Weller corroborated Rousseau's characterization of the events, in resolving this issue it is not necessary to look to Weller's testimony. The undersigned finds as fact that the agreement was for Rousseau to earn a bonus based on thirty-three percent of the net profit of Rousseau's departments. The undersigned is persuaded that the ticker tape evidence was, in fact, a preliminary compilation which Green prepared at his home based on tentative figures which did not, in fact, reflect an accurate report of the profits enjoyed by the various Departments Rousseau was managing. CPA McGee was clear in his testimony that a reviewed financial statement took two to three months after the completion of the fiscal year in which to prepare, and that the fiscal year for this company was April 1 through March 31. Accordingly, when Mr. Rousseau accepted the payment of \$20,000.00 on May 5, 1995, it is found as fact that the reviewed financial statements had not yet been prepared by McGee upon which Green could reasonably have relied in making an informed decision of the bonus Rousseau was entitled to receive.

9. The undersigned does not find significant the issue whether the bonus calculation is based on the company's monthly financial statements, or whether they are calculated based upon the CPA's year-end review report, as in either event the company would have legal justification to pursue collection of any overpayment made to Rousseau following a review of the year-end report.

10. Although Rousseau argued at hearing that JAV had waived any right to pursue collection efforts for any overpayment, and further that JAV was legally estopped from raising this as a defense in the proceeding, no legal authority was provided to the undersigned at any point during this administrative action to support that position.

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, Rousseau filed a petition and amended petition for review with the Franklin Circuit Court. On January 6, 2000, the court entered an order granting that portion of Rousseau's petition as to the issue of the unpaid bonus. The court stated:

This court finds that the handshake agreement between Green and Rousseau was a binding contractual agreement obligating JAVS to pay Rousseau \$20,369.50 in unpaid wages. Green promised a bonus to Rousseau in the sum of \$40,369.50. The actual payment of \$20,000 served as good and valuable consideration for JAVS to support the amount of the bonus. Rousseau's agreement to allow JAVS to postpone payment of the balance of the money due him was a sufficient legal detriment to serve as valid consideration binding JAVS to the contract.

Green's claims that his offer was merely preliminary and, thus, not paramount to an offer fall under the weight of scrutiny. No evidence suggests that Green placed any qualifying language upon the agreement with Rousseau that would reasonably inform Rousseau that what appeared to be an offer was merely a preliminary negotiation. Secondly, the setting where this agreement took place was a business setting in which Rousseau could reasonably expect that Green's words were meant to constitute an offer.

Therefore this Court finds that the Labor Cabinet's order denying Rousseau the remaining \$20,369.50 erroneously disregarded the contract between JAVS and Rousseau.

(In the same order, the court denied that portion of Rousseau's petition seeking prejudgment interest, double liquidated damages,

and attorney fees. Rousseau's appeal to this Court from the circuit court's denial of these claims is addressed in a separate appeal, 2000-CA-000524.) On January 18, 2000, JAVS filed a motion to reconsider, which the court denied on February 8, 2000. This appeal followed.

On appeal, JAVS argues that the circuit court erred by impermissibly overturning the Labor Cabinet's findings of fact regarding the bonus due Rousseau under the contract. The amount due under a contract can be a mixed question of fact and law. It is undisputed that the contract at issue originally provided for Rousseau to receive a bonus of 33% of the net profits of Rousseau's departments. The profits and what constitutes 33% of the profits are issues of fact.

In reviewing an agency decision, this Court may only overturn that decision if the agency acted arbitrarily or outside its scope of authority, if the decision itself is not supported by substantial evidence on the record, or if the agency applied an incorrect rule of law. Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298 (1972). This Court may review issues of law *de novo*. Mill Street Church of Christ v. Hogan, Ky. App., 785 S.W.2d 263 (1990). On questions of fact, however, this court's review is limited to "whether the agency's decision was supported by substantial evidence or whether the decision was arbitrary or unreasonable." Cabinet for Human Resources v. Jewish Hospital Healthcare Services, Inc., Ky. App., 932 S.W.2d 388, 390 (1996). However, on mixed questions of law and fact, this Court is given greater latitude to determine whether the

findings of the agency were supported by substantial evidence of probative value. Uninsured Employers' Fund v. Garland, Ky., 805 S.W.2d 116 (1991).

The Labor Cabinet found that the net profits of Rousseau's departments were actually \$29,614.00, based on which Rousseau's 33% bonus would be \$9,772.62. We conclude there was substantial evidence to support this finding that the actual net profits of Rousseau's departments were less than the original, preliminary figure on the ticker tape reflecting profits of \$121,108.49 (from which the 33% bonus of \$40,369.50 claimed by Rousseau was calculated). James McGee, a CPA who prepares JAVS's year end financial statements and income tax returns, testified that, in preparing the reviewed financial statements for JAVS, he discovered that the actual profits were much lower than the preliminary figures relied upon by Green, which indicated artificially high profits in Rousseau's departments due to improper record keeping. McGee testified that his review of the books revealed, for example, instances of sales entered into the books with zero costs associated with the sales, and instances where income showing in one department would have costs showing in another. McGee explained that such record keeping practices by employees would show abnormally large profits on sales.

JAVS president David Green testified that the original figure of \$40,369.50 presented to Rousseau was based on 33% of preliminary compilations from which it appeared that there was going to be a larger profit in Rousseau's departments. Green testified that when McGee prepared the reviewed financial

statements, it was revealed that the profits attributed to Rousseau's departments had appeared artificially high due to improper bookkeeping and postings. Green testified that the review revealed instances where inventory was not posted to a job, instances where salesmen were paid commissions on jobs that had lost money, and a bad debt that had not been accounted for. Green explained that the end result of such practices was that the profit and inventory in Rousseau's departments initially appeared high, when in reality, both profit and inventory were much lower.

Whether the "handshake agreement" for Rousseau to accept \$20,000 immediately and the balance of \$20,369.50 when the money became available raises the issue of whether there was an amendment or novation to the original contract, which provided for Rousseau to receive 33% of the profits. It is undisputed that Rousseau's contract called for a bonus of 33% of the net profits of his departments. We do not believe that the "handshake agreement" for a bonus of \$40,369.50 was meant to amend the 33% provision of the original contract, nor substitute a new contract in its place, but was a statement of 33% of a miscalculated amount of net profits. As stated previously, the amount of net profits is an issue of fact. "If the court finds the correct rule of law was applied to facts supported by substantial evidence, the final order of the agency must be affirmed." Commonwealth, Department of Education v. Commonwealth, Ky. App., 798 S.W.2d 464, 467 (1990), citing Brown Hotel Company v. Edwards, Ky., 365 S.W.2d 299, 302 (1963).

Having determined that the Labor Cabinet's findings regarding the amount of net profits were supported by substantial evidence, and that there was no amendment or novation of the original contract calling for Rousseau to receive a bonus of 33% of these profits, we conclude that the circuit court erred in overturning the Labor Cabinet's final order with regard to Rousseau's claim for the unpaid bonus.

Accordingly, that portion of the Franklin Circuit Court's order granting Rousseau's petition as to the unpaid bonus is reversed, and the case remanded for reinstatement of the final order of the Labor Cabinet denying Rousseau's claim for the unpaid bonus.

GUDGEL, CHIEF JUDGE, CONCURS.

EMBERTON, JUDGE, DISSENTS BY SEPARATE OPINION.

EMBERTON, JUDGE, DISSENTING. I respectfully dissent. I agree with the findings and holding of the trial court and would therefore affirm.

BRIEF FOR APPELLANT:

Rocco J. Celebrezze
Jeffery L. Parrish
Louisville, Kentucky

BRIEF FOR APPELLEES, KENNETH
ROUSSEAU AND BRADLEY LAUFER,
JR.:

H. Douglas Willen
Hopkinsville, Kentucky