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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001913-MR

DALE KLEINJAN — APPELLANT

v.

APPEAL FROM SPENCER CIRCUIT COURT
HONORABLE CHARLES R. HICKMAN, JUDGE
ACTION NO. 03-CI-00111

SPENCER COUNTY BOARD OF EDUCATION — APPELLEE

OPINION
AFFIRMING

** ** ** ** ** ** ** **

BEFORE: JOHNSON AND WINE, JUDGES; MILLER,[1] SPECIAL JUDGE.

MILLER, SPECIAL JUDGE: Dale Kleinjan brings this appeal from an order of the Spencer Circuit Court affirming a final order of the Spencer County Board of Education ("Board"), appellees, demoting him from his position as principal of Spencer County Elementary School to a teaching position. For the reasons stated below, we affirm.

[1] Retired Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

BACKGROUND

In June of 2003, Kleinjan was serving as principal of the Spencer County Elementary School. At that time, Kleinjan had been serving as a principal for thirteen years. Part of Kleinjan's duties required the proper reporting of school activity accounts and submitting an annual financial report to the school superintendent, per Board policy. The Board required Kleinjan to comply with the uniform financial accounting system and activity fund accounting procedures detailed in 702 KAR[2] 3:130. This regulation, which provides standards governing internal accounting for each school, incorporates the "Accounting Procedures for School Activity Funds" (commonly referred to, and hereinafter, as the "Red Book").[3]

In November of 2002, after a mandated audit of the school district's internal accounts that included Spencer County Elementary School, auditors informed the Board that Kleinjan's annual financial report failed to include a school savings account totaling in excess of $15,000.00. Kleinjan was present at the auditor meeting with the Board, but was unable to provide an explanation for the discrepancy. Additionally, Kleinjan

[2] Kentucky Administrative Regulations

[3] The Red Book requires a principal, i.e. Kleinjan, as the designated administrator of a school's activity fund, to approve or sign activity fund documentation, and to prepare and submit annual internal accounts, budgets, and monthly and annual financial reports to the superintendent. The Red Book also provides that the required annual financial report signed by the principal as administrator "shall include the amount invested and indicate that amounts in checking and investment accounts."

failed to include in his annual financial reports seven certificates of deposit, with various inception dates from 1997 to 2000, totaling in excess of $60,000.00.

At his demotion hearing, Kleinjan conceded that he did not report those amounts in his annual financial reports to the superintendent, nor did he include them in his monthly financial reports to the School Based Decision Making ("SBDM") council. In his defense, Kleinjan testified that he did not report the $60,000.00 because he did not know he was required to do so, stating, "I did have a copy of the Red Book and, had I had training or gone through it sufficiently, and you know, I have to admit I screwed up. I did not follow it line by line. . . . I did not know." Regarding the $15,000.00, Kleinjan admitted that "directions were given to us to report that on the reports" and "[t]here was direction given to me to report it on the bottom of the monthly things . . . ." Nevertheless, it is undisputed that the signed and approved financial reports submitted by Kleinjan to the Board and the SBDM counsel failed to include said amounts.

On May 1, 2003, the superintendent issued a letter to Kleinjan demoting him from his position as principal. On May 12, 2003, pursuant to his request and KRS[4] 161.765, Kleinjan was provided with written reasons setting forth the grounds for his

[4] Kentucky Revised Statutes

demotion. Kleinjan made a timely request and was granted a hearing before the Board to contest his demotion.

The demotion hearing was scheduled for June 6, 2003. Kleinjan appeared with counsel. The Honorable Larry Bryson had been retained to serve as counsel to the Board. Bryson arrived late for the hearing and was unable to confer with the Board prior to the time it was scheduled to commence. Bryson explained to Kleinjan and his counsel that he needed time to advise the Board regarding the procedural format of a demotion hearing. Neither Kleinjan nor his counsel made an objection under KRS 61.846. Hearing no objection, Bryson and the Board proceeded into a closed session to discuss the hearing procedures. After the closed pre-hearing session with the Board, the hearing commenced. After hearing all the evidence, the Board voted unanimously to affirm the superintendent's decision to demote Kleinjan.

On July 7, 2003, as authorized by KRS 61.846, Kleinjan appealed the Board's decision to the Spencer Circuit Court. He argued that the decision was arbitrary and capricious. On August 25, 2005 the circuit court entered an opinion and order affirming the decision of the Board. This appeal followed.

STANDARD OF REVIEW

The standard of review with regard to a judicial appeal of an administrative decision is limited to determining

whether the decision was erroneous as a matter of law. See Kroger Limited Partnership I v. Cabinet for Health Services, Commonwealth of Kentucky, 174 S.W.3d 516, 518 (Ky.App. 2005). Kleinjan's appeal of the Board's decision is governed by KRS 13B.150. (Administrative Hearings; the Albert Jones Act of 1994). Section 150 provides that "[r]eview of a final order shall be conducted by the court without a jury and shall be confined to the record . . . ." and that the reviewing court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." Id. Where, as here, we review the decision of the circuit court, we stand in that court's shoes. Courts are to provide review, not reinterpretation. See Kentucky Unemployment Insurance Commissioner v. King, 657 S.W.2d 250 (Ky.App. 1983). When substantial evidence exists in the record to support an administrative agency's factual determination, we have no authority to overturn it. See Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298 (1972); KRS 13B.150(2)(a). Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B.F. Goodrich Chemical Co., 474 S.W.2d 367, 369 (Ky. 1971). In this case, the crux of our inquiry on appeal is whether the findings of the Board were so unreasonable under the evidence that it

must be viewed as erroneous as a matter of law. See e.g., Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

ANALYSIS

First, Kleinjan contends that he was denied notice of the conduct which led to his demotion and was thus a violation of due process. We disagree.

Kleinjan argues that he was not given adequate notice regarding the grounds for his demotion and consequently the demotion hearing amounted to a "trial by ambush." We are compelled to reject this contention.

KRS 161.765(2)(a) requires that a superintendent "give written notice of the demotion to . . . . the administrator[5]." If an administrator intends to contest the demotion, as Kleinjan did, and files notice of such intent with the superintendent, the superintendent must then provide him with a written statement of the grounds for demotion containing "[a] specific and complete statement of grounds upon which the proposed demotion is based, including, where appropriate, dates, times, names, places, and circumstances . . . ." KRS 161.765(2)(b)(1).

Kleinjan was provided with such written notice and the statute required nothing more of the superintendent. On May 12, 2003, Kleinjan acknowledged receipt of a five page letter,

[5] The term "administrator" includes one employed as a principal. See KRS 161.720(8).

including four attached exhibits, from the superintendent detailing not only Kleinjan's obligations as a principal, but also the dates, account numbers, and amounts of the erroneous financial reports. The letter demonstrated in minute detail the grounds for Kleinjan's demotion. Consequently, we are of the opinion that Kleinjan was provided more than enough notice of the prohibited conduct with specificity sufficient to prepare an adequate defense.

Similarly, Kleinjan argues that because the superintendent never trained him regarding his accounting obligations, Kleinjan did not have adequate notice of the conduct that violated policy and led to his demotion. Kleinjan contends that this failure abridged his due process rights. While we note that the superintendent conceded that he never trained Kleinjan regarding compliance with the Red Book procedures, this argument nevertheless fails. Kleinjan admitted on the record, during the demotion hearing, that he had access to the Red Book. Additionally, Kleinjan admitted that he failed to follow the Red Book procedures "line by line." Moreover, regarding his financial reporting obligations, Kleinjan testified that he "should have been reporting [the investment monies] according to the Red Book information . . . ." and that he had not "gone through it sufficiently." Kleinjan is an educated professional who admittedly had access to the pertinent

information regarding his responsibilities and thus should have known of his financial reporting obligations. Finally, we note that the financial reporting requirements imposed upon principals such as Kleinjan are straightforward and simplistic. We agree with the circuit court that substantial evidence was presented to the Board that Kleinjan did not report funds in accordance with the requirements of the readily available Red Book.

Next, Kleinjan avers that his right to a fair hearing was violated because he was denied an impartial decision-maker pursuant to KRS 13B.040(2)(b)(3). Again, we disagree.

Kleinjan argues that at the time of the demotion hearing, the Board chairperson, Vickie Goodlett, had applied for a salaried position as chief accountant with the Spencer County Board of Education. Consequently, Kleinjan's superintendent would potentially become Goodlett's supervisor if she was offered the position. Kleinjan argues this constituted a pecuniary interest in the outcome of the demotion proceeding and thus Goodlett should have disqualified herself from serving as a hearing officer. This argument is without merit.

KRS 13B.040(2)(a) states that "[a] hearing officer, agency head, or member of an agency head who is serving as a hearing officer shall voluntarily disqualify [her]self and withdraw from any case in which [s]he cannot afford a fair and

impartial hearing or consideration." Grounds for disqualification of a hearing officer include the hearing officer "[h]aving a pecuniary interest in the outcome of the proceeding." KRS 13B.040(2)(b)(3).

Prior to the start of the demotion hearing, Goodlett disclosed that she had applied for a financial officer position with Spencer County. Goodlett also indicated that she would not allow the potential employment to influence her decision at the hearing. Even after this admission, Goodlett offered to recuse herself from the hearing if Kleinjan so desired. Kleinjan presented no objection. The Kentucky Supreme Court has recognized it is a mandatory prerequisite prior to claiming error on appeal that it be preserved in the record. See Commonwealth Transportation Cabinet Bureau of Highways v. Roof, 913 S.W.2d 322, 325 (Ky. 1996). Kleinjan not only failed to preserve the issue, but he also affirmatively waived any objection when, after consulting with counsel and with full opportunity to *voir dire* Goodlett, agreed that she could stay on as a hearing officer. Moreover, Kleinjan, through counsel, stated to Goodlett on the record that "we feel you could be able to hear this case fairly and render a fair and impartial decision . . . ." Because Kleinjan did not object to Goodlett's participation as a hearing officer, we deem this issue waived.

Finally, Kleinjan contends that the hearing violated the Open Meetings Act (KRS 61.805 et seq.) and for that reason the demotion must be set aside. Again, we disagree.

Kleinjan asserts that because the Attorney General concluded the Board's pre-hearing session with Bryson violated the Open Meetings Act[6] his demotion is rendered void pursuant to KRS 61.848(5). This assertion fails, however, because Kleinjan not only failed to object on the record, but also failed to submit an individual written complaint to the presiding officer of the Board as contemplated under KRS 61.846 and KRS 61.848(2). While the applicable Open Meetings Act provision does not require full exhaustion of remedies under KRS 61.846 prior to filing suit in a circuit court, such provision does require the submission of a written Open Meetings Act complaint to the presiding officer of the Board as a prerequisite to judicial relief. See KRS 61.848(2). Kleinjan did not submit the required complaint to the Board, rather another person with no affiliation to him whatsoever filed the complaint. Kleinjan's attempt to "piggy-back" onto that complaint is disingenuous where he made no complaint or objection in his own capacity. Kleinjan's failure to make such a complaint, in his own right,

[6] It appears that one Tom Watson observed the hearing and, as a concerned citizen, presented an Open Meetings Act complaint, pursuant to KRS 61.846, to the chairperson of the Board on June 21, 2003. Watson appealed the Board's response denying the complaint to the Attorney General, which in turn issued an opinion. Watson was not a party to the hearing, nor a representative of Kleinjan.

constitutes an independent procedural ground to reject his Open Meetings claim.

Even assuming Kleinjan did make the complaint as required by statute, his argument nevertheless fails. We are of the opinion his demotion should not be declared void. The Attorney General opinion upon which he relies dealt with the Board's meeting with counsel during which no action was taken. Moreover, the Attorney General opinion did not find the substantive decision of the Board in violation of the Open Meetings Act. We decline to void the Board's decision under these facts where Kleinjan did not object to the pre-hearing meeting on Open Meetings Act grounds (or any grounds); was permitted to conduct a *voir dire* of the panel; and, the complained of violation was wholly an administrative matter.

For the foregoing reasons the judgment of the Spencer Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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