

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001946-MR

SHARI BENNETT

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 08-CI-01869

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES; JOHN P. HAMM,
APPOINTING AUTHORITY; AND
COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON AND COMBS, JUDGES; LAMBERT,¹ SENIOR
JUDGE.

¹ Senior Judge Joseph E. Lambert 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.

LAMBERT, SENIOR JUDGE: Shari Bennett appeals from an Opinion and Order of the Franklin Circuit Court upholding the decision of the Cabinet for Health and Family Services to terminate her employment before the end of her initial six-month probationary period. This decision had been previously upheld by the Kentucky Personnel Board. Appellant contends that her dismissal was unlawfully discriminatory due to a physical disability. Upon review, we discern no error and affirm.

Facts and Procedural History

On June 16, 2005, Appellant was hired by the Cabinet as a Nurse Consultant/Inspector (NC/I), grade 16, in the Office of the Inspector General (OIG), Division of Health Care Facilities and Services. Appellant's duties with the OIG generally required her to inspect nursing homes and healthcare facilities to ensure that they met government standards. She also investigated complaints made against those entities. There is no dispute that Appellant was amply qualified for this position at the time she was hired. Appellant worked for nearly six months in the OIG's Louisville branch, but she was terminated from her position prior to completion of her six-month probationary period due to her allegedly unsatisfactory performance. This appeal concerns the circumstances surrounding that decision.

On December 5, 2005, Martha Brame, the Regional Program Manager of the Louisville OIG branch, sent a letter to the director of the OIG's Division of Health Care Facilities and Services in Frankfort recommending that Appellant be

separated from her employment due to poor performance. Specifically, it was contended that Appellant consistently failed to produce satisfactory written narrative reports in compliance with the OIG's "principles of documentation" following a complaint investigation or a health care facility review. The letter included numerous accounts of occasions on which Appellant had presented complaint narratives, investigative reports, and surveys that contained such errors as misspelled words, grammatical mistakes, incomplete sentences, confusing structure, incorrect formatting, and poor documentation. The letter also stated that Appellant had received ample one-on-one help and instructions with respect to these deficiencies but had failed to show notable improvement afterwards and had shown no initiative to correct identified problems. According to Brame, on one occasion, the errors were so numerous that "it was extremely difficult to determine if [Appellant] actually completed a thorough investigation." The letter further documented a number of instances in which Appellant was asked to correct and resubmit reports but she failed to make all of the requested corrections. The letter also set forth a number of other minor incidents reflecting arguably inappropriate conduct on Appellant's part, but the clear basis for Brame's recommendation that Appellant not be retained was her alleged inability to complete her narrative reports in the required manner.²

² The letter concludes with the following paragraph: "Ms. Bennett has shown no initiative to correct identified problems. She continues to make excuses for errors in her work product and does not accept accountability. After one to one meetings, she continues to make numerous grammatical errors in her final product for review. A considerable amount of time spent with Ms. Bennett correcting her work has proven to be fruitless as she shows no improvement. Therefore, I am requesting Shari Bennett not gain permanent status."

On December 6, 2005, the OIG asked the Appointing Authority to separate Appellant from her position as NC/I prior to her achieving permanent status “due to unsuccessful completion of her probationary period.” The OIG’s memorandum to the Appointing Authority asserted that Appellant had “demonstrated consistent problems with performance issues, including completing the required paperwork appropriately as reported by her Branch Manager[.]”

While the matter was pending before the Appointing Authority, Appellant visited an eye doctor and procured a doctor’s note indicating that she had a history of esotropia in the left eye with secondary amblyopia (or “lazy eye”). Appellant gave this note to Martha Brame upon returning to work. Later, after her termination from employment, Appellant was diagnosed as being legally blind in her left eye due to these conditions.

On December 12, 2005, Appellant was officially notified by the Appointing Authority that she would be terminated from her position as NC/I prior to completion of her probationary period. Following her termination, Appellant filed an appeal with the Personnel Board in which she alleged that her dismissal was inappropriate because it was based on discriminatory grounds. Specifically, Appellant alleged that she suffered from a physical disability as a result of problems with her eyesight and that the Cabinet had fired her because of this.

A hearing was subsequently held, during which the Personnel Board’s Hearing Officer heard testimony from a number of witnesses who had worked with Appellant. The “Background” section of the Hearing Officer’s “Findings of Fact,

Conclusions of Law and Recommended Order” recites in extensive detail the substance of all witness testimony and the exhibits presented at the hearing. Since the facts presented in that section are familiar to the parties and are neither novel nor unusual, we need not reference them all herein. However, certain testimony bears mention.

Appellant testified that she had only met with Martha Brame on two occasions. During the first occasion, the two discussed concerns with the Appellant’s writing skills. During the second occasion, which occurred on November 22, 2005, Appellant was asked to read a scenario on a line-by-line basis with Brame and Paula Horn, the branch’s Assistant Manager, in attendance. Appellant testified that she was interrupted frequently and did not have her reading glasses, so she struggled to stay focused on what she was reading. According to Appellant, Brame asked her what was wrong with her eyes and told her, “You can’t see, can you?” Appellant explained to Brame that she had worn glasses since she was two years old. The following day, Appellant scheduled an appointment with an eye doctor, and she visited him on December 9, 2005. The doctor’s note produced by this visit was allowed into the record for the limited purpose of showing that Appellant visited an eye doctor.

Appellant further testified that her termination came as a shock to her because she believed she had been doing just fine at work. She further indicated that a number of the issues raised in Brame’s recommendation letter were minor in nature and that, as to the reporting issues, she believed she had received inadequate

training. She also blamed her poor eyesight for the typographical or grammar errors contained in her reports. Appellant also indicated that at one point Brame had instructed other NC/Is to refrain from helping her with her work.

When questioned by the Cabinet, Appellant admitted that she had never requested any accommodation due to her eyesight or discussed the need for such with Brame due to her eye condition. She also admitted that she had not discussed her eyesight with Brame prior to the meeting of November 22, 2005, and that she had not mentioned any problems with her eyesight when she was presented with her intent-to-terminate letter.

The Cabinet presented multiple witnesses who testified to Appellant's consistent inability to comply with the OIG's reporting and documentation requirements despite repeated efforts to assist her in that regard. One such witness, Linda Murphy, another NC/I in the Louisville office and Appellant's preceptor, acknowledged that four months into Appellant's employment she had been instructed by Martha Brame to not help Appellant anymore. Other witnesses repeated this testimony. However, Murphy believed that this was done to gauge Appellant's progress. Murphy denied being aware of any problems with Appellant's eyesight and testified that she had not had any conversations with Brame regarding this issue. The majority of the other witnesses who were questioned testified similarly.

Jerry Mayo, a supervisor serving under Martha Brame at the Louisville OIG branch at the time of the events in question, testified that Brame

was consistently unhappy with Appellant's narrative reports and that he had worked with Appellant on three different occasions to address the matter. Mayo testified that a number of Appellant's reports had been sent back for her to correct because they contained serious flaws and that she was the NC/I who had the most trouble preparing her reports. He believed that Appellant had had difficulty transitioning from the typical "charting" done by a nurse to the narrative reports required by the OIG. Mayo also could not recall ever having a conversation with Appellant regarding her eyesight.

Paula Horn, the Assistant Manager of the Louisville OIG branch, testified that she had numerous conversations with Appellant about her work product and that Appellant's level of performance in that regard was very poor. Horn indicated that Appellant failed to follow direction with respect to correcting her reports and that she never caught on to writing in a narrative format. Horn denied being aware of problems with Appellant's eyesight and agreed that she should not have been allowed to become an employee with status.

Martha Brame further testified to Appellant's work difficulties and noted that she had met with Appellant several times regarding these issues. Brame recalled one occasion on which she had asked Appellant where her glasses were, and she was told that Appellant was wearing contacts. Brame also recalled being told by Appellant that she had started wearing glasses at a young age "because of some kind of disease." Brame also acknowledged telling some of the NC/Is to stop helping Appellant because she wanted to enforce office protocol, which held that

NC/Is were to ask their preceptor or another manager for help if needed. Brame testified that no other NC/I required as much attention with respect to her reports as Appellant and that she had asked that Appellant be terminated simply because she did not think that Appellant could do the job. Brame also testified that Appellant had never asked for any accommodations with respect to her eyesight and that she had never discussed Appellant's eye problems in any detail prior to her termination. However, she did acknowledge receiving a doctor's note from Appellant regarding her eyesight issues prior to her termination.

On September 15, 2008, the Hearing Officer recommended that the Personnel Board dismiss Appellant's appeal. In support of that decision, the Hearing Officer made the following Findings of Fact:

1. The Appellant, Shari Bennett, was hired by the Appellee, Cabinet for Health and Family Services, as a Nurse Consultant/Inspector, grade 16, in the Office of the Inspector General, Division of Health Care Facilities and Services, with her duty station in Louisville, Kentucky, on June 16, 2005. With approximately twenty-five years of pertinent experience, the Appellant appeared to be well-qualified for the position as described. [See Appellant's Exhibits 1 and 2.] Along those lines, it should be noted that there was no evidence submitted at [the] hearing to indicate that at any point during the Appellant's career was she unable to perform any aspect of her job due to an alleged eye condition.
2. The Appellant appears to have been trained for her position in the typical manner. She was first required to review various resource materials and complete various computer module certifications. She was then sent on various survey assignments with the help and assistance of NC/I preceptors who were charged with imparting the knowledge and guidance necessary to eventually perform the duties of her job. In short, the Appellant appeared to

receive most of her training while on the job with the assistance of a more experienced NC/I.

3. An important element of an NC/I's job is to properly prepare a report following a complaint investigation or health care facility review. These reports are done in the narrative form and are to follow what is known as the "principles of documentation." It is imperative that these reports be prepared correctly as they constitute legal documents which may be relied upon in a court of law.

4. Within a month or two on the job, NC/Is begin preparing reports on their own with the help and guidance of their preceptor. The reports are reviewed and corrections are suggested by the trainee's preceptor. Once the corrections are made, the report is passed up the chain to Martha Brame, Jerry Mayo, or Paula Horn for review. If corrections to the report are required, they are returned to the NC/I. If the report passes muster, it is then sent on to Frankfort.

5. The Appellant testified that she met twice with Martha Brame. The first time they discussed Ms. Brame's concern with the Appellant's writing skills. The Appellant was asked to repeat a computer module which she satisfactorily completed. The second meeting occurred on November 22, 2005, and Paula Horn was also in attendance. The Appellant was asked to read over a report she had prepared on a line-by-line basis. The Appellant testified that during this meeting, Martha Brame asked her what was wrong with her eyes and told the Appellant, "You can't see, can you?"

6. The next day the Appellant scheduled an eye doctor appointment which she attended on December 9, 2005. The doctor's notes marked as Appellant's Exhibit 4 stem from this visit and were given to Martha Brame either on Friday, December 9, 2005, or on the following Monday, December 12, 2005. The Appellant testified that she is legally blind in the left eye and was experiencing problems with her eyes during the November 22, 2005 meeting. It should be noted that Appellant's Exhibit 4 was introduced for the limited purpose of confirming that the Appellant went to an eye doctor's appointment. The

contents of Appellant's Exhibit 4 as entered into the record do not constitute evidence that the Appellant is disabled due to her eye condition.

7. The Appellant did not speak to anybody concerning her eye condition prior to the November 22, 2005 meeting with Martha Brame and Paula Horn. The Appellant also never requested accommodations to assist her in performing her job duties as a result of her eye condition. The Appellant testified that she has worn corrective lenses since the age of two. Other than wearing glasses, especially when using the computer, prior to the subject termination, the Appellee was unaware that the Appellant suffered from an eye condition which the Appellant believed affected her ability to perform her job duties or her ability to prepare investigative reports.

8. Martha Brame instructed various NC/Is and other employees at the Appellee's Louisville office to discontinue helping the Appellant well into the Appellant's tenure in what appears to be an effort to gauge the Appellant's progress on the job. Though atypical, such action appears to be justified on the basis that Ms. Brame did not have faith in the Appellant's ability to write a satisfactory report on her own.

9. On December 5, 2005, Martha Brame prepared the memorandum marked as Appellant's Exhibit 6. The memorandum lists in detail the basis for Ms. Brame's request that the Appellant not be allowed to successfully complete her initial probation. Despite including some minor offenses which were corrected by the Appellant upon admonition, the overriding theme of the memorandum had to do with the Appellant's continued inability to grasp some of the finer details, such as using proper grammar and correct spelling, when she authored her reports. The memorandum and request for termination was prepared by Martha Brame before she had received the doctor's notes marked as Exhibit 4 from the Appellant.

10. The testimony of Jerry Mayo was found to be extremely credible and unbiased. Taken together with

the testimony of Linda Murphy, Paula Horn, and Martha Brame, it is apparent that the Appellant continued to use incorrect grammar and misspell words and otherwise failed to use the principles of documentation when writing her reports well into her probationary period.

11. There was no evidence of record that demonstrated that Martha Brame, or anyone involved in the decision to terminate the Appellant prior to the end of her probation, took into consideration the Appellant's problems with her eyesight when making such decision. The doctor's note marked as Appellant's Exhibit 4 only indicates that the Appellant has a medical condition involving her left eye. To the layperson, it does not serve to communicate that such condition was disabling or otherwise affected the Appellant's ability to perform her job duties. Further, said note was not received until December 9 or December 12, 2005, well after the decision to terminate the Appellant had already been made.

12. By letter from J.P. Hamm, the Appointing Authority, dated December 12, 2005, the Appellant was terminated from her position as NC/I in the Office of the Inspector General, Division of Health Care Facilities and Services, Louisville office, effective close of business December 14, 2005.

Based upon these findings, the Hearing Officer made the following

Conclusions of Law:

1. ... The evidence of record demonstrates conclusively that other than the obvious (that the Appellant required the use of corrective lenses to see properly), the Appellee was not made aware of and had no knowledge that the Appellant suffered from an eye condition which could be considered disabling when the decision to terminate the Appellant was made. It is clear from the evidence that the Appellee had no reason to believe the Appellant's problems with her eyesight played a role in her inability to complete her investigative reports in the prescribed manner. To the contrary, the true basis for the Appellant's termination was clearly her ongoing inability to grasp the concept of narrative reporting done in

accordance with the principles of documentation. It further appears that the instructions to various employees at the Louisville office of the Inspector General given by Martha Brame to discontinue helping the Appellant with her reporting duties occurred in approximately the Appellant's fourth month of her probation and though unusual, were made in an effort to determine whether the Appellant's reporting abilities could stand on their own. The Appellant continued to make the same mistakes in her reporting throughout the tenure of her employment and was counseled concerning the same as late as November 22, 2005. Thus, her termination was justified on a purely legal basis.

2. The Appellant's dismissal was neither erroneous or arbitrary and was not in violation of KRS 18A.095(13) or KRS 18A.095(15) because it was not based on discrimination due to her disability.

The Personnel Board adopted the Hearing Officer's recommendation, in full, and dismissed Appellant's appeal. Appellant subsequently filed an appeal with the Franklin Circuit Court, but the court affirmed the Personnel Board's decision upon finding that it was supported by substantial evidence and was not otherwise clearly erroneous as a matter of law. The current appeal followed.

Standard of Review

“Our standard of review of a circuit court's affirmance of an administrative decision is to determine whether the circuit court's findings upholding the Cabinet's decision are clearly erroneous.” *500 Associates, Inc. v. Natural Res. & Envtl. Prot. Cabinet*, 204 S.W.3d 121, 131 (Ky. App. 2006). “[I]n essence, on review the function of the Court is to ensure that the agency's decision is based on substantial evidence of fact in the record and that the agency did not

apply an incorrect rule of law.” *Alliance for Kentucky’s Future, Inc. v. Env’tl. & Pub. Prot. Cabinet*, 310 S.W.3d 681, 686 (Ky. App. 2008); *see also* KRS 13B.150(2). “The test of substantiality of evidence is whether when taken alone or in the light of all the evidence it has sufficient probative value to induce conviction in the minds of reasonable men.” *Kentucky State Racing Comm’n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972).

If the agency’s decision is supported by substantial evidence, we must uphold that decision even if there is conflicting evidence in the record and even if we might have reached a different conclusion had we heard the case *de novo*. *500 Associates, Inc.*, 204 S.W.3d at 131-32; *see also Kentucky Comm’n on Human Rights v. Fraser*, 625 S.W.2d 852, 856 (Ky. 1981). We may not reinterpret or reconsider the merits of the claim, nor can we substitute our judgment for that of the agency as to the weight of the evidence. *500 Associates, Inc.*, 204 S.W.3d at 131. We further note that “[i]n its role as a finder of fact, an administrative agency is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses[.]” *Aubrey v. Office of Attorney Gen.*, 994 S.W.2d 516, 519 (Ky. App. 1998); *see also McManus v. Kentucky Ret. Sys.*, 124 S.W.3d 454, 458 (Ky. App. 2003).

Analysis

KRS 18A.111 provides, in relevant part, that “an employee shall serve a six (6) months probationary period when he is initially appointed to the classified service. An employee may be separated from his position, reduced in class or

rank, or replaced on the eligible list during this initial probationary period and shall not have a right to appeal, except as provided by KRS 18A.095.” KRS 18A.111(1). Here, Appellant was terminated from her employment by the Cabinet prior to the expiration of this probationary period. Thus, she could only challenge this decision under the grounds set forth in KRS 18A.095. Appellant specifically relies upon what was then KRS 18A.095(13) but is now KRS 18A.095(12),³ which provides, in relevant part: “Any classified employee⁴ may appeal to the board an action alleged to be based on discrimination due to ... disability[.]”⁵

Essentially, then, because Appellant was terminated from her employment prior to completion of her initial probationary period, she was required to plead and prove an illegal, discriminatory cause for the termination – in this case, discrimination due to disability. Appellant alleges that discrimination occurred here because her dismissal was actually due to a disabling eye condition and not because of any inadequacies in her work. The Hearing Officer, the Personnel Board, and the circuit court disagreed. After reviewing the record and the parties’ briefs, we discern no reason to reach a different conclusion. The substance of the Hearing Officer’s recommended order clearly reflects that the Hearing Officer had a full grasp of the testimony and the other evidence presented

³ The statute was amended in 2009. *See* 2009 Kentucky Laws Ch. 75 (HB 411).

⁴ A “classified employee” is defined as “an employee appointed to a position in the classified service whose appointment and continued employment are subject to the classified service provisions of this chapter[.]” KRS 18A.005(7).

⁵ KRS 18A.140 (1) similarly provides that “[n]o person shall be appointed or promoted to, or demoted or dismissed from, any position in the classified service, or in any way favored or discriminated against with respect to employment in the classified services because of his political or religious opinions, affiliations, ethnic origin, sex, race or disability.”

by both parties. Indeed, eleven pages of that order are dedicated to summarizing the substance of that evidence in extensive detail. Thus, the Hearing Officer demonstrated an obvious understanding of the facts of the case. Moreover, we fail to see how the Hearing Officer – or the Personnel Board or the circuit court – applied the law to those facts in an arbitrary or otherwise erroneous manner in reaching its decision. We particularly note that the Hearing Officer was presented with substantial evidence showing the difficulties Appellant had in complying with the OIG’s reporting standards and her ultimate inability to rectify those mistakes in a satisfactory manner. Moreover, the evidence of disability – and the Cabinet’s awareness of it – produced by Appellant was sparse, at best.

Appellant argues that the testimony of three witnesses, herself and two employees named Betty Branham and Sandy Burke, demonstrates that the Cabinet was aware of her eye problems before the decision had been made to dismiss her. Appellant’s brief reflects only that Branham recalled Appellant telling her that she was not seeing well and had trouble reading, while Burke testified that she had had a conversation with Appellant two or three days prior to Appellant’s termination about her eyesight issues. However, this testimony is simply not enough to compel a different result than that reached by the Hearing Officer and the Personnel Board.

Appellant also asserts that Martha Brame received a copy of the medical note evidencing Appellant’s eye condition prior to her termination. Thus, Appellant argues, “when Brame became aware of the problem she should have

notified Frankfort and sought accommodation for Bennett rather than to proceed with dismissal.” However, as the Cabinet notes, Brame had already recommended that Appellant be separated from her employment with the OIG before Appellant had even visited a doctor and procured this note. Moreover, the medical report itself contained nothing firmly indicating that Appellant’s eye condition was disabling, and Appellant produced no medical evidence linking her work performance to her alleged disability. Appellant also did not produce any significant evidence showing that the Cabinet had been aware that she suffered from a disabling condition or that she had requested (and been refused) accommodations for that condition prior to her termination. Consequently, the Hearing Officer, the Personnel Board, and the circuit court were fully justified in concluding that Appellant’s termination from employment was proper.

Appellant further alleges that the fact that Martha Brame began directing others to not help Appellant with her work constituted evidence of discrimination. However, the Hearing Officer and the Personnel Board were fully apprised of the circumstances surrounding this issue – as reflected in the Hearing Officer’s Findings of Fact – and nonetheless found no grounds to overturn the Cabinet’s termination of Appellant’s employment. We particularly note that Brame’s directive appears to have occurred after Appellant had been on the job for several months and after Appellant had worked with a number of individuals to address the issues she had been having. The Hearing Officer concluded that this

was done in “an effort to gauge the Appellant’s progress on the job.” Given the standard of review this Court must observe, we discern no error.

Conclusion

For the foregoing reasons, the judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

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