

RENDERED: NOVEMBER 20, 2015; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2013-CA-001781-MR

COMMONWEALTH OF KENTUCKY,  
TRANSPORTATION CABINET

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE PHILLIP J. SHEPHERD, JUDGE  
ACTION NOS. 11-CI-00777 AND 11-CI-00783

ELSWORTH TURNER AND THE  
KENTUCKY PERSONNEL BOARD

APPELLEES

AND

NO. 2013-CA-001786-MR

ELSWORTH TURNER

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE PHILLIP J. SHEPHERD, JUDGE  
ACTION NOS. 11-CI-00777 AND 11-CI-00783

COMMONWEALTH OF KENTUCKY,  
TRANSPORTATION CABINET AND  
COMMONWEALTH OF KENTUCKY,  
PERSONNEL BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: ACREE, CHIEF JUDGE; JONES AND NICKELL, JUDGES.

NICKELL, JUDGE: These associated appeals arise from an action instituted in Franklin Circuit Court by Elsworth Turner seeking review of an administrative order of the Kentucky Personnel Board related to his employment with the Commonwealth of Kentucky Transportation Cabinet. Turner has appealed claiming the trial court erred in failing to find he had been the victim of retaliation. In a separate appeal, the Transportation Cabinet contends the trial court erred in affirming the Board's decision to permit Turner to challenge what amounted to a favorable employee evaluation. Following a careful review of the record, the briefs and the law, we affirm.

Turner, who has been an employee of the Transportation Cabinet for many years, filed an action with the Personnel Board on March 19, 2009, claiming his 2008 employee evaluation had not been completed in a lawful manner. Further, Turner alleged he had been passed over for promotion and had his duties stripped of him in retaliation for filing a sexual harassment complaint against his first line supervisor.<sup>1</sup>

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<sup>1</sup> Because a detailed recitation of the historical facts will not aid our resolution of the issues presented, we provide only a truncated synopsis of necessary facts and procedural background.

The Cabinet argued provisions of the Kentucky Merit Act<sup>2</sup> and applicable administrative regulations only authorize an appeal to the Board if an employee receives one of the lowest two evaluation ratings.<sup>3</sup> Because Turner’s final evaluation score of 280 placed him in the “Good” rating range, it was not in either of the lower two categories, and the Cabinet thus argued he could not appeal his evaluation. The Cabinet also challenged Turner’s characterization of the events leading to his failure to be promoted and the reasoning for a reduction in his job duties, countering that he had failed to properly apply for the position before it was filled and poor job performance was the real reason some of his duties were assigned to other employees within his department.

It was undisputed Turner’s 2008 employee evaluation was not completed in accordance with the time limitations set forth in the applicable administrative regulations—requiring completion “no later than thirty (30) calendar days after the end of the annual performance period.” 101 KAR 2:180(2). However, Turner and the Cabinet attempted to place blame on the other party for

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<sup>2</sup> Codified at Kentucky Revised Statutes (KRS) Chapter 18A. Specifically applicable to this appeal are KRS 18A.005, KRS 18A.095, KRS 18A.110 and Kentucky Administrative Regulation (KAR) 2:180 Sec. 7(7).

<sup>3</sup> 101 KAR 2:180 Section 5(4) sets forth the numerical ratings for final performance evaluations as follows:

- (a) Outstanding: 450 to 500 points;
- (b) Highly effective: 350 to 449 points;
- (c) Good: 250 to 349 points;
- (d) Needs Improvement: 150 to 249 points; or
- (e) Unacceptable: less than 150 points.

the failure. The Board heard extensive testimony on the two main issues presented for its determination.

The Board ultimately concluded the evaluation had not been properly performed and ordered it stricken from Turner's personnel file, but determined Turner had not met his burden of proving retaliation. The Franklin Circuit Court affirmed the Board's decision. Both sides separately appealed from what they believed were portions of the circuit court's order adverse to their own interests. We consolidated the two appeals in the interest of judicial economy and will dispose of both in a single opinion.

### **Standard of Review**

In reviewing an agency decision, a court may only overturn that decision if the agency acted arbitrarily or outside the scope of its authority, if the agency applied an incorrect rule of law, or if the decision itself is not supported by substantial evidence in the record. *Kentucky State Racing Comm'n v. Fuller*, Ky., 481 S.W.2d 298 (1972). The court's role is to review the administrative decision, not to reinterpret or reconsider the merits of the claim. *Kentucky Unemployment Ins. Comm'n v. King*, Ky. App., 657 S.W.2d 250 (1983).

*Lindall v. Kentucky Retirement Systems*, 112 S.W.3d 391, 394 (Ky. App. 2003).

It is also typical that questions of law will be addressed *de novo*, with no deference to the circuit court or administrative agency. See *Workforce Development Cabinet v. Gaines*, 276 S.W.3d 789, 792 (Ky. 2008).

[W]e note that an administrative agency's interpretation of its own regulations is entitled to substantial deference. A reviewing court is not free to substitute its judgment as to the proper interpretation of

the agency's regulations as long as that interpretation is compatible and consistent with the statute under which it was promulgated and is not otherwise defective as arbitrary or capricious.

*Commonwealth, Cabinet for Health Services v. Family Home Health Care, Inc.*, 98 S.W.3d 524, 527 (Ky. App. 2003) (citations omitted).

*Trading Post Management Co., LLC v. Kentucky Unemployment Ins. Com'n*, 355 S.W.3d 451, 454 (Ky. App. 2011). With these standards in mind, we turn to the issues presented.<sup>4</sup>

### **2013-CA-001781-MR**

The Cabinet contends Turner's appeal to the Board was unauthorized under the plain language of the Merit Act and should have been dismissed. It argues the trial court erred in not so concluding. We disagree.

The crux of the Cabinet's argument is Turner cannot appeal from a "favorable" employee evaluation and focuses primarily on the score Turner received. In support of its position, the Cabinet relies on the language of KRS 18A.110(7)(j)(4) which provides, in pertinent part, for passage of administrative regulations which "[p]ermit a classified employee, with status, who receives either of the two (2) lowest possible evaluation ratings to appeal to the Personnel Board for review after exhausting the internal dispute resolution procedure." The

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<sup>4</sup> It is worth noting courts are also permitted to determine whether an agency's procedures satisfy the requirements of procedural due process. See *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406, 410 (Ky. App. 1995). However, no dispute on this issue has been raised in this appeal, so no further comment is necessary.

administrative regulation passed in response to this statutory mandate is 101 KAR 2:180 which sets forth a comprehensive scheme for review of employee evaluations. 101 KAR 2:180 Section 7(7) echoes the language contained in KRS 18A.110(7)(j)(4) permitting an employee to “appeal a final evaluation which has an overall rating in either of the two (2) lowest overall ratings to the Personnel Board.” As it did below, the Cabinet contends Turner’s final evaluation score did not place him in either of the two lower categories, thus eliminating any right to appeal to the Board.

Although we agree Turner cannot appeal based solely upon what amounts to a favorable employee evaluation, we believe the Cabinet misconstrues the basis of Turner’s complaint. This challenge to the evaluation was not based upon the score received—clearly, under the plain language of the statutory and regulatory provisions, any such attack would not be justiciable, as noted by the hearing officer and conceded by Turner—but rather was grounded on the Cabinet’s failure to follow proper protocols and statutory mandates in regard to timely completion of the evaluation. Although each side casts blame on the other for the delay in completing Turner’s 2008 evaluation, it is undisputed the specific timelines set forth in 101 KAR 2:180 were not followed. Likewise, it is beyond dispute that the proper procedures for completion of the evaluation were not followed, nor were the guidelines for up-the-ladder administrative reviews. It is these failures and blatant disregard for statutory and regulatory compliance which

are the foundation for Turner's claim that his 2008 evaluation was improper and should be removed from his employee record.

The Board concluded the Cabinet's failures to comply with statutory and regulatory requirements associated with Turner's evaluation constituted a "penalization" from which Turner had a right to appeal. In pertinent part, the Board's order stated:

[t]he Board finds [Turner] suffered a penalization in that his 2008 evaluation was not performed according to regulation and statute and thus constituted a penalization as that is defined at KRS 18A.005(24). The Board finds that the [Cabinet's] failure to comply with 101 KAR 2:180 constitutes a penalization as the "denial of other rights granted to state employees."

The Board's order makes no mention of the score Turner received on his evaluation as constituting a basis for its decision. In affirming, the trial court ruled the Board's conclusions related to the impropriety of the Cabinet's actions surrounding Turner's 2008 evaluation were supported by substantial evidence. The trial court further found the Board's determination that the Cabinet's failure to follow the statutory and administrative guidelines constituted a penalization triggering Turner's appeal rights.

We have reviewed the record and conclude the Board's decision was supported by substantial evidence as the trial court correctly found. The task of the courts in administrative matters is one of review, not reinterpretation. Because the Board received and relied upon substantial evidence of probative value to support its decision, we are without authority to alter that determination. The Board and

the trial court properly applied the correct rule of law, and we are unable to discern any arbitrariness or capriciousness in the administrative decision. *Lindall*, 112 S.W.3d at 394. Thus, we affirm.

### **2013-CA-001786-MR**

Turner contends the trial court erred in upholding the Board's determination that he had failed to carry his burden of proof on his claim of retaliation. He argues the evidence presented before the Board overwhelmingly supported his contention, thereby compelling a decision in his favor and the Board's failure to so find was erroneous, as was the trial court's decision to uphold the Board's conclusion. We disagree.

As we have previously stated, the decision of an administrative agency will not be disturbed if substantial evidence exists in the record supportive of the determination, even though conflicting evidence may have been presented.

It is important to note that "the fact that [we] may not have come to the same conclusion regarding the same findings of fact does not warrant substitution of [our] discretion for that of an administrative agency." *Kentucky Unemployment Insurance Commission v. Landmark Community Newspapers of Kentucky, Inc.*, 91 S.W.3d 575, 582 (Ky. 2002). As fact-finder, the Board is afforded great latitude in its evaluation of the evidence heard and the credibility of the witnesses appearing before it. *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972). The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. KRS 13B.150.



*Carreer v. Cabinet for Health and Family Services*, 339 S.W.3d 477, 484 (Ky. App. 2010), *as modified* (July 2, 2010).

The record before us is replete with conflicting evidence related to Turner's retaliation claim. Contrary to Turner's contention, we cannot say the evidence overwhelmingly supported his claim. Rather, it appears that the Board, being tasked with determining the weight and credibility of the evidence presented, found Turner's evidence less convincing than that presented on behalf of the Cabinet. Based on this assessment, the Board concluded Turner had failed to carry his burden of showing he had been subjected to retaliation. Clearly, Turner disagrees with the Board's decision, but a mere disagreement with the assessment of the evidence and the weight to be given thereto constitutes an insufficient basis upon which to reverse. Turner's vehement argument that his position was supported by substantial evidence before the Board is likewise insufficient for us to substitute our judgment for that of an administrative body. There has been no showing of a sufficient basis to disturb the decision of the Board as the trial court correctly concluded based on the same arguments presented below. Turner is simply not entitled to the relief he seeks.

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

ALL CONCUR.

BRIEFS FOR COMMONWEALTH  
OF KENTUCKY,  
TRANSPORTATION CABINET:

William H. Fogle  
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BRIEFS FOR ELSWORTH  
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BRIEFS FOR COMMONWEALTH  
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BOARD:

No brief filed.