

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001700-MR

THOMAS HOLLARS

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE WILLIAM T. CAIN, JUDGE
ACTION NO. 95-CI-000621

MARILYN PHILLIPS, FORMER WIFE
OF THOMAS HOLLARS;
JACKELYN DEROSSETT,
HUMAN RESOURCES, SOCIAL INSURANCE;
LARRY W. PARMAN, HEARING OFFICER,
HUMAN RESOURCES, SOCIAL INSURANCE;
AND CABINET FOR HUMAN RESOURCES,
DEPARTMENT FOR SOCIAL INSURANCE

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GUDGEL, CHIEF JUDGE; GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. This is an appeal by Thomas Hollars (Hollars) from a judgment of the Pulaski Circuit Court entered May 21, 1998, affirming the decision of the Commonwealth of Kentucky Cabinet of Human Resources Department of Social Services (Cabinet) of August 10, 1995, setting Hollars' child support arrearage at \$28,647.46. We affirm.

On November 17, 1974, Hollars was ordered by the Lorain County, Ohio Common Pleas Court to pay \$20.00 per week per child

for his two infant children, Vicki, born March 7, 1971, and Tanya, born March 23, 1974. The Cabinet determined that between April of 1975 and October of 1991, Hollars was \$28,647.46 in arrears for child support. The Cabinet issued an order to withhold a workers' compensation award to Hollars' employer, National Security Incorporation, on March 7, 1995. The Cabinet further issued a letter to Hollars showing his child support arrearage to be \$28,647.46, which was received by him via certified mail on March 14, 1995. The letter further notified Hollars of his right to appeal the decision, to bring witnesses to the hearing and to be represented by counsel. Hollars exercised his right to appeal the decision in a timely fashion. However, he chose not to bring witnesses with him nor to be represented by counsel at the July 20, 1995, hearing.

Present at the July 20, 1995, hearing were Hollars; Jackelyn DeRossett (DeRossett), Senior Child Support Specialist; Marilyn Phillips (Phillips), Hollars' ex-wife; and Larry W. Parman, Hearing Officer. DeRossett presented evidence to the Hearing Officer on behalf of the Cabinet and Phillips. Hollars presented evidence on his own behalf and was given the opportunity to question DeRossett concerning her testimony. On August 10, 1995, the Hearing Officer issued a decision setting Hollars' arrearage at \$28,647.46 based upon the evidence presented at the hearing. Hollars exercised his right to appeal that decision to the Pulaski Circuit Court and chose, at that time, to hire an attorney. The August 10, 1995, decision was affirmed by the trial court on May 21, 1998. On June 9, 1998,

the trial court denied Hollars' motion to alter, amend or vacate the May 21, 1998, decision. This appeal followed.

Hollars raises three issues on appeal: (1) the Cabinet denied Hollars procedural due process; (2) the decision of the Cabinet was not supported by substantial evidence of record; and (3) the actions of the Cabinet were arbitrary and capricious and constituted an abuse of discretion.

Hollars claims that he was denied procedural due process because he was not told orally at the hearing of his right to counsel and his right to cross-examine witnesses. He alleges that he is "functionally illiterate" and that the written notice he received concerning his right to be represented by counsel at the hearing was insufficient to satisfy procedural due process. Further, he claims that he "had no concept of the probative force of evidence, the method of presenting evidence, or the method of challenging evidence. The Hearing Officer should have explained orally his right to have counsel present and should have afforded him the opportunity and right of cross-examination."

The components of procedural due process in the context of an administrative hearing are well settled in the Commonwealth:

In order that the requirements of due process of law be satisfied, the litigant must be afforded procedural due process as well as substantive due process. This includes a hearing, the taking and weighing of evidence, if such is offered, a finding of fact based upon consideration of the evidence, the making of an order supported by substantial evidence, and, where the party's constitutional rights are involved, a

judicial review of the administrative action.
(Citations omitted).

Kentucky Alcoholic Beverage Council Board v. Jacobs, Ky., 269 S.W.2d 189, 192 (1954); Bentley v. Aero Energy, Inc., Ky. App., 903 S.W.2d 912 (1995).

First, we are unclear as to what disability, if any, Hollars suffers. Hollars provided no proof to the trial court regarding his claim of being "functionally illiterate." We know that upon receiving the Cabinet's letter notifying him of the \$28,647.46 arrearage and his right to appeal, he timely exercised that right. He also represented himself at the July 20, 1995, hearing where he testified and presented evidence to the Hearing Officer. Without proof to the contrary, we cannot say that Hollars is "functionally illiterate."

Hollars was notified in writing of his right to appeal the Cabinet's decision and his right to be represented by counsel at the hearing and present evidence. He chose to exercise his right to the appeal but declined to hire legal counsel. If he was hoping to save money by representing himself at the hearing instead of hiring counsel, it appears this was a costly decision on his part. Hollars cites no authority for the proposition that the Hearing Officer was required to orally notify him of his right to counsel and indeed this Court has been unable to find any authority to support his contention.

Further, although the Hearing Officer did not specifically state at the hearing that Hollars had the right to cross-examine witnesses, the record is clear that not only was he given that opportunity but that he exercised that right when he

questioned DeRossett and the Hearing Officer. Although the Hearing Officer could have outlined Hollars' rights more thoroughly at the hearing, we believe the requirements of procedural due process were satisfied in this instance.

Hollars also argues that his ability to understand the weight and probative value of evidence was a denial of procedural due process. He argues that the "fundamental flaw of the hearing given to [him] in this case is that he was not aware of the nature of the issues involved, nor the underlying facts until the hearing had already commenced." (emphasis in original). As such he argues he was denied a "meaningful" opportunity to be heard. We find Hollars' argument in this regard completely without merit. Appellant admitted he was aware from the letter that he could have an attorney present. He chose not to be represented although he was aware that the hearing was to contest the arrearage. Moreover, he presented his "evidence" relative to that issue and cross-examined the witness on this matter.

Hollars next argues that the Cabinet's decision was not supported by substantial evidence of record. "The test of whether evidence is 'substantial' is 'whether taken alone or in the light of all the evidence' it has sufficient probative value to induce conviction in the minds of reasonable men." Blankenship v. Lloyd Blankenship Coal. Co., Ky. App., 463 S.W.2d 62 (1970). The Cabinet based its decision on the following evidence:

- (1) The Ohio child support order;
- (2) The Cabinet's calculations of payments and arrearages,

(3) A copy of the history and type of payments made by Hollars;

(4) The testimony of DeRossett, Senior Child Support Specialist;

(5) The testimony of Hollars; and

(6) The arrearage statements presented by Hollars.

We believe this evidence has sufficient probative value to induce conviction in the minds of reasonable men. The Cabinet's decision was clearly supported by substantial evidence of record.

In contravention of the trial court's order of November 18, 1995, Hollars attached affidavits to his appeal that were not presented at the administrative hearing. The trial court did not consider these affidavits in reaching its decision in accordance with Com. Transp. Cabinet Dept. Of Vehicle Regulation v. Cornell, Ky. App., , 796 S.W.2d 591 (1990), which held that "on factual issues...a circuit court in reviewing the agency's decision is confined to the record of proceedings held before the administrative body and is bound by the administrative decision if it is supported by substantial evidence." (citations omitted). Since we found that the Cabinet's decision was supported by substantial evidence of record, we did not take Hollars' affidavits into consideration in reaching our decision.

Finally, Hollars argues that the Cabinet's decision was arbitrary and capricious and constituted an abuse of discretion. The test for arbitrariness is well stated in Cornell:

The court should first determine whether the agency acted within the constraints of its statutory powers or whether it exceeded them. Second, the court should examine the agency's procedures to see if a party to be affected

by an administrative order was afforded his procedural due process. The individual must have been given an opportunity to be heard. Finally, the reviewing court must determine whether the agency's action is supported by substantial evidence. If any of these three tests are failed, the reviewing court may find that the agency's action was arbitrary.

Id. at 594 (citations omitted). Hollars does not argue that the Cabinet exceeded its statutory powers and we have already determined that Hollars was afforded procedural due process and that the Cabinet's decision was supported by substantial evidence of record. Thus, we cannot say that the Cabinet's decision was arbitrary or capricious or constituted an abuse of discretion.

For the foregoing reasons, the decision of the trial court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michelle Ross Altobella
Somerset, KY

BRIEF FOR APPELLEES:

Graddy Johnson
Office of General Counsel
Frankfort, KY