RENDERED: June 1, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000015-MR

BRENDA BANKS BURKETT;
MELISSA L. CARROLL; AND
JEFFREY BURKETT — APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER CRITTENDEN, JUDGE
ACTION NO. 98-CI-00401

COMMONWEALTH OF KENTUCKY,
KENTUCKY COMMUNITY &
TECHNICAL SYSTEM; AND
DR. JEFF HOCKADAY, PRESIDENT — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUIDUGLI, KNOPF AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Brenda Banks Burkett, Jeffrey Burkett (the Burketts), and Melissa Carrol (Carrol) (collectively the Appellants) appeal from an opinion and order of the Franklin Circuit Court entered November 24, 1999, which affirmed a final order of the State Board for Adult and Technical Education (the Board) denying them credit for seventy-five hours of personal leave used to pursue continuing education. We affirm.

During the summer of 1996, the Appellants were business instructors at the Rowan Regional Technology Center (RRTC). As instructors, the Appellants are required to obtain twenty-five clock hours of continuing education credits per year in order to maintain their teaching certification. Historically, instructors at RRTC use the break between school terms in June through August when students are not on campus to take continuing education courses.

Requests for educational leave[1] to pursue continuing educational credits are handled according to 780 KAR 3.070, which is entitled "Attendance, Compensatory Time, and Labor." Although there is nothing in this regulation dealing specifically with educational leave, time requested for educational leave falls under the "special leave of absence" category. Pursuant to the regulation, the school director is given discretion to approve or disapprove leave requests. The school director at RRTC during the summer of 1996 was Kenneth Brown (Brown).

In May 1996 the Appellants developed an interest in the "school-to-work" educational program used in Great Britain following their participation in an exchange program. As a result of this interest, the Appellants signed up for IET-670 for the 1996 summer term at Morehead State University (MSU). This class is a graduate-level independent study course where the Appellants would propose an independent research project,

[1]Although time taken to pursue continuing education requirements is referred to as "leave," the time taken by educators for this activity is treated as regular paid working days where the teacher is in class as opposed to reporting to RRTC.

complete it, and prepare a report on the results. The Burketts had previously obtained educational leave to complete an IET-670 course in the summer of 1994. As part of the research project, the Appellants were to travel to Sunderland, England and further study Great Britain's use of the school-to-work concept. There is no dispute that all of the expenses involved in traveling to and staying in England were to be borne by the Appellants and were not subject to reimbursement.

On May 8, 1996, Brown circulated a memo at RRTC directing the instructors to submit tentative schedules for July 1996. Although the Appellants were asked to submit their requests as soon as possible, they continued finalizing air travel, ground transportation, and housing for their trip before submitting their requests for leave. Carrol submitted her calendar requesting educational leave on June 10, 1996, the Burketts made their request by memo dated June 19, 1996. When Brown asked the Appellants about their intended course of study, they told him that their research would take place partly at RRTC and partly in Great Britain. At Brown's request, the Appellants also submitted separate "Requests for Authorization of Out of State Travel."

In a memo to the Appellants dated June 27, 1996, Brown indicated that after discussions with Howard Moore, Regional Executive of the Northeast Region, and Jeanette Downey, Office Head for Adult Technical Education, he would not approve the requests for educational leave because "this activity is not in the best interest of the State of Kentucky." Despite being

denied educational leave, the Appellants went ahead with their plans. Each of the Burketts used seventy-five hours of accumulated annual leave. Carroll used two days of annual leave and took unpaid status for the remainder of the time.

The Appellants filed formal employee grievances from the denial of leave on July 23, 1996. Brown, who was the first person to consider the grievances, entered his findings on July 29, 1996, stating:

> The educational request was not presented in a timely fashion. The educational leave was denied because it was deemed not to be in the best interest of the state of Kentucky.

Howard Moore, the next person to review the grievances, affirmed Brown's decision, stating:

> The State School Director has the authority to approve or disapprove out of state travel and I concur with Mr. Brown's decision.

The grievance was then submitted to mediation by ombudsman. Upon failure of mediation to resolve the dispute, the grievance was submitted to Commissioner Charles Wade, who affirmed Brown's decision by noting that his decisions was "appropriate."

On November 14, 1996, the Appellants appealed their grievances to the Board. The Appellants argued that their requests for leave had been denied because each of them had signed a petition circulated by a student in the Spring of 1996 in opposition to a proposed layoff of teachers in the Workforce Development Cabinet. Following a two-day hearing, Hearing Officer Scott D. Majors submitted his findings of fact, conclusions of law, and recommended order on November 14, 1997. As to the Appellants' retaliation claims, Majors found that "the

evidence presented on behalf of the [Appellants] on the claim of political discrimination simply does not meet the requisite threshold to support a factual finding in their favor." However, in finding that Brown's denial of the requests for leave was an abuse of discretion, Majors stated:[2]

> It is found as fact that School Director Brown's decision to deny Petitioners' applications for "educational leave" constitutes a failure to exercise sound, reasonable, or legal discretion. There simply was no evidence presented to justify Brown's explanation in response to the Petitioners' grievance that "the educational leave request was not presented in a timely fashion." Had this been the legitimate reason for denying the request, certainly it would have been reasonable for the Petitioners to have been advised of this fact when Brown personally spoke with Petitioner Jeffrey Burkett shortly following the June 19, 1996 memorandum. At the latest, this explanation should have been provided to the Petitioners in Brown's memorandum dated June 27, 1996, in which he informed the Petitioners that their request was "not in the best interest of the State of Kentucky.
>
> Furthermore, Petitioners' evidence overwhelming [sic] supports the proposition that the concept of "school-to-work" has been used with great success in Great Britain, that the Petitioners' participation in the program in Great Britain was extremely well received, and that the information Petitioners gathered from this program certainly has been as beneficial towards the advancement of their professional careers as have other educational leave approved for employees and instructors at the RRTC, including both Petitioners in 1994[.] . . . While the concept of "the best interest of the State of Kentucky" necessarily cannot be defined in such terms as to encompass every specific situation included in an educational leave request, the fact remains that the

[2]We have deleted the paragraph numbers from the following quote.

denial of Petitioners' application for educational leave in the present action was made capriciously and without fair, solid, or substantial cause. It is not necessary to determine that this rejection for their application for "educational leave" was premised on political discrimination in order to find that the denial was improper; rather, it is sufficient to find that the denial did not follow the procedures and policies previously applied to similar requests. In this case, the undersigned finds that the decision made for the Petitioners' application did not honor the practices and procedures which have been utilized in previous cases.

. . . .

Although there is no formal provision in 780 KAR 3:070(4) "educational leave," as that term is used by the Petitioners, the practice of granting it has become a common practice by usage and custom.

As the custom of "educational leave" is by usage and custom only, so also is the application and policy as to its approval or disapproval.

The custom and usage in the Department for Technical Education was to liberally grant such applications.

Petitioners have failed to prove by a preponderance of the evidence that their requests for "educational leave" were denied in retaliation for any protected political expression, in violation of KRS 151B.096.

Petitioners have proved by a preponderance of the evidence that the Respondent abused its discretion and acted in an arbitrary manner in denying their requests for "educational leave." Section 2 of the Kentucky Constitution prohibits an administrative agency from acting in an arbitrary manner. Bunch v. Personnel Board, Ky.App., 719 S.W.2d 8, 10 (1986). Administrative discretion will not be disturbed unless it is abused, unreasonably exercised, or otherwise unlawful. Com. Ex. Rel. Merrideth v. Frost, Ky., 72 S.W.2d 905-909 (1943). Administrative officers must execute the law

> committed to them fairly and honestly and treat everyone alike according to the standards and rules of action proscribed. When there is failure in this respect, and it extends beyond the rudimentary requirements of fair play, it enters the realm of unreasonable and arbitrary action. Id. The undersigned concludes as a matter of law that the Respondent's action in denying Petitioners' application for educational leave, under the circumstances presented, and in concert with the testimony concerning the usual customs, practices, and procedures applied to similar requests, demonstrates a capricious, arbitrary decision which constitutes an abuse of discretion. There simply was no hard evidence presented at the hearing which justified the departure from the practice of liberally granting such applications in these instances. While Respondent referenced various concerns, ranging from liability issues to the untimeliness of the submission of the application, there simply was no evidence presented which established how these concerns were legitimately harbored.

Majors recommended that the Appellants be credited with 75 hours of personal leave.

Following entry of Majors' recommendation, the Department filed exceptions and submitted its own proposed findings of fact, conclusions of law, and recommended order. Aside from filing their own proposed findings of fact and conclusions of law, the Appellants filed no exceptions to Majors' findings or recommendations.

On February 12, 1998, the Board entered its final order rejecting Majors' recommended order and denying the Appellants' appeal. The Board chose to adopt and incorporate by reference the findings of fact and conclusions of law and final order submitted by the Department. Although the Board adopted Majors' findings that the denial of the requests for leave was not

politically motivated, it rejected the finding that Brown's decision was arbitrary, stating:

> [T]he Board specifically finds that substantial evidence exists in the record to support the Board's holding that the agency's decision to deny Petitioners' request for paid leave was not arbitrary. Under 780 KAR 3:070, the school director is granted discretionary authority to approve or disapprove the paid leave for a trip to England to do an independent study requested by the Petitioners. School Director Brown denied the requests in a memorandum dated June 27, 1996 after he had discussed Petitioners' requests with the Regional Executive Director, Mr Howard Moore, as well as the Director of the Division of School Management, Ms. Jeanette Downey. School Director Brown stated in that memorandum the request was not deemed to be "in the best interests of the State of Kentucky." [citation to record omitted] According to the testimony of School Director Brown, he based this decision on four factors: (1) The location of the research, (2) Issues concerning liability, (3) The course description, and (4) The responsibilities of the Petitioners. [citation to record omitted]
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> In addition, the Board finds persuasive the fact that the request was for paid leave outside the United States and that in the employee grievances subsequently filed by the Petitioners over denial of their requests for paid leave, School Director Brown's decision was supported first by his supervisors beginning with Mr. Moore. . . . Petitioners then requested mediation, which was conducted with School Director Brown, Mr. Moore, and Ms. Downey. That review and the previous rulings were confirmed by the Acting Commissioner of the Department for Technical Education, Dr. Charles D. Wade. [citation to record omitted]
>
> Furthermore, this Board finds that it derives its power to hear and decide cases on employee appeals which are based upon adverse employment actions, not an abridgement of rights guaranteed under the Kentucky Constitution. Powers of this Board must affirmatively appear from the enactment under

> which the Board's jurisdiction comes, KRS Chapter 151B. The Board not only lacks power and jurisdiction to pass on a constitutional issue, but, also, the Board lacks the expertise in the constitutional areal.
>
> Moreover, this Board promulgated an administrative regulation conferring plenary jurisdiction to the school director to grant or deny the benefit of special paid leave; therefore, there is created no justifiable expectation that the benefit will be received at all, and, hence, cannot form the predicate for invoking the protection of Article II of the Kentucky Constitution. The determination of whether to permit these leave requests requires the exercise of expert judgment within the competence of the managers in the Department of Technical Education. The Hearing Officer committed a clear error of law when he used Article II of the Kentucky Constitution to substitute his discretionary judgment for that of the agency's staff who have the expertise as determined by the General Assembly to decide whether or not it is in the best interests of the Commonwealth to award special paid leave.

The Board's decision was affirmed by the trial court and this appeal followed.

The Appellants maintain that the Board's order is violative of KRS 13B.120(3) because it does not contain any language advising them of their right to appeal. Although the Appellants are correct that KRS 13B.120(3) requires a final order stemming from an administrative hearing to contain "a statement advising the parties fully of available appeal rights," and although the Board's order itself does not contain such language, this argument is without merit. As we noted, the Board indicated in its order that it adopted and incorporated "by reference as though fully set out herein" the findings of fact and conclusions of law and recommended order of the Department. The Board also

attached copies of the Department's pleadings to its order. A review of the Department's proposed findings and order shows that it contained the language required by KRS 13B.120(3) on pages 9-10. As the Board fully adopted and incorporated the Department's proposed findings and order in its entirety, KRS 13B.120 is satisfied.

The Appellants also argue that the Board's order is violative of KRS 13B.120 because the Board failed to make its own findings of fact based on a review of the record and because the Board chose to adopt the Department's findings of fact and conclusions of law and recommended order. This argument is also without merit.

KRS 13B.120(1) requires the Board to "consider the record including the recommended order and any exceptions duly filed to a recommended order." Although the Appellants argue that the Board "did not consider the record as a whole, but rather chose from various Findings tendered by counsel for the Department," and that the Board merely parroted the Department's findings, they present no evidence to back up their allegations. We note that the Board's order stated that it did review the record in this case and having reviewed the record ourselves we find that the Board's final order is not so divergent from the record so as to indicate that the Board failed to make its own independent review of record.

KRS 13B.120(3) states that "if the final order differs from the recommended order, it shall include separate statements of findings of fact and conclusions of law." As the trial court

noted, the only area in which the Board's order differed from the recommended order was on the issue of whether the denial of leave was arbitrary. The Board spent two page outlining why it disagreed with Majors' recommendations, and we believe this is sufficient to satisfy KRS 13B.120.

The Appellant's reliance on Kentucky Milk Marketing and Anti-Monopoly Commission v. Borden Co., Ky., 456 S.W.2d 831 (1969) is misplaced. Although dicta in that opinion criticized the practice of adopting findings of fact and conclusions of law submitted by litigants, it did not prohibit the practice outright. Furthermore, the dicta was not so much concerned with the practice itself as it was the fact that it gave attorneys the opportunity to "clutter up the record by filing detailed, lengthy, contradictory findings of fact and conclusions of law." Kentucky Milk Marketing, 456 S.W.2d at 835.

Finally, the Appellants argue that the Board's order is not supported by substantial evidence and is incorrect as a matter of law. Again, we disagree.

Having reviewed the transcript of the hearing, we agree with the trial court that the Board's decisions is supported by substantial evidence, specifically Brown's testimony as to why he denied the Appellant's requests for leave. Contrary to the Appellant's allegations in their brief on appeal that "[t]here is no evidence in the record to sustain the finding that the location of the research, issues concerning liabilities or the "responsibilities" of the Appellants played any role whatsoever in Mr. Brown's decision to deny their requests," Jeffrey Burkett

testified at the hearing that Brown expressed concerns regarding liability during a discussion pertaining to the requests for leave. See Transcript of Administrative Hearing, Volume I, page 177-179.

As to the Appellant's argument that the Board's order is legally incorrect, that argument is a mere tempest in a teacup. In Paragraph 41 of the recommended order, Majors made a passing reference to Article II of the Kentucky Constitution in support of the proposition that an administrative agency may not act arbitrarily. We agree with the Department that the Board's opinion concerning Majors' use of Article II was mere dicta.

The opinion and order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Steven G. Bolton
Frankfort, KY

BRIEF FOR APPELLEES:

A. B. Chandler, III
Attorney General

Bill Pettus
Assistant Attorney General
Frankfort, KY