

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002244-MR

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
JAMES C. CODELL, III, SECRETARY;
AND KENTUCKY PERSONNEL BOARD

APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 00-CI-01171

DAN HALL

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: GUIDUGLI, HUDDLESTON, AND KNOPF, JUDGES.

KNOPF, JUDGE: James C. Codell, III, as Secretary of the Transportation Cabinet (the Cabinet), and the Kentucky Personnel Board (the Board) appeal from an opinion and order by the Franklin Circuit Court which affirmed in part and reversed in part an order by the Board penalizing Cabinet employee Dan Hall. The Cabinet argues that the applicable regulations permit it to require that Hall submit to a psychological evaluation before he may return to work. If he refuses to submit to the evaluation, the Cabinet asserts that it may require him to take unpaid sick

leave. We agree with the circuit court that the regulations do not authorize the Cabinet to take these actions, and that Hall must be reinstated to his former position once his paid sick leave is exhausted. Hence, we affirm.

The facts of this action are not in dispute and are succinctly set forth in the circuit court's opinion as follows:

Petitioner [Hall] worked as a state employee for the Transportation Cabinet in the Pikeville District Office. He is a long-time state employee who has experienced no disciplinary actions or reprimands prior to this time. In the summer of 1999, Mr. Hall applied for a promotion to the position of Highway Administrative District Manager, but the position was awarded to Ms. Wilma Rice. In August 1999, Mr. Hall's wife was diagnosed with cancer. He took sick leave to care for her and returned to work full-time in mid-November 1999.

On November 11, 1999, Petitioner requested leave from Ms. Linda Justice, Chief District Engineer, to work on Veterans' Day. Although his request was denied, Petitioner reported to work. When he learned that other employees were in the building, he began to check every office to see who was present and asked those he encountered who had given them permission to work. Although the facts are disputed, some witnesses testified that Mr. Hall began slamming doors throughout this search. Additionally, Petitioner himself admits that he kicked a file cabinet in the hallway at this time. Ms. Justice testified that she felt threatened by Mr. Hall's actions.

Around this time period Ms. Wilma Rice decided to relocate the employee sign-in sheets to the front reception area so that she could determine who was present in the office. Mr. Hall refused to sign in at the new location, stating that people might forge his signature if it was in that location.

On January 11, 2000, Ms. Linda Justice presented Petitioner with his 1999 year-end evaluation. Mr. Hall received a "fails to meet" rating in the area of employee conduct for his conduct on Veterans' Day and other incidents. At the meeting, Ms.

Justice, Ms. Rice, and the Petitioner were present. When Ms. Justice presented the "fails to meet" rating, Petitioner refused to sign the evaluation and pitched it in a nearby chair. After being asked to refrain from calling Ms. Rice "honey," he continued to do so, and he shouted and pointed his finger in Ms. Justice's face. He then left the room before the evaluation was complete.

Three days later, on January 14, 2000, Mr. Hall signed the evaluation and an incident report documenting the events of January 11. At the time, Ms. Justice, who had known Mr. Hall for several years, asked him if he wanted to discuss anything with her because she was concerned about his recent change in attitude. He was uncommunicative at the time.

On January 26, 2000, Mr. Hall met with State Highway Engineer James Yowell and Douglas Doerting of the Personnel Office to reconsider his evaluation. Petitioner acknowledged his behavior in the earlier meeting with Ms. Justice, including that he pointed his finger at her during the evaluation meeting. When Mr. Yowell asked Petitioner to discuss any matters he believed to be of concern, Mr. Hall told him that "things were going on" in the district office, but he would not elaborate.

On February 1, 2000, Ms. Justice circulated a memorandum in the district office advising staff that door alarms were going to be added to the current locks. She explained that security concerns were the reason for this new addition. Mr. Hall had drafted and circulated a petition objecting to the door alarms. In response to Ms. Justice's memo, he also sent out a memo advising that any employees who had signed the petition could withdraw their signatures if they desired. The language of Mr. Hall's responsive memo concerned several employees who reported their concerns to Ms. Justice at home that same night.

On February 9, 2000, Doug Doerting went to the Pikeville District Office to conduct interviews with employees to determine the state of affairs. Mr. Doerting was one of the Transportation Cabinet representatives in the preparation and adoption of policy on work place incidents. At the time, Petitioner was interviewed and given an opportunity to address issues that

concerned him. Petitioner again indicated that "things were going on" in the office but again refused to give any further explanation or details.

Mr. Doerting was concerned about the change in Petitioner's behavior. Mr. Hall had recently experienced two traumatic events with his lack of promotion and his wife's cancer. He refused to take responsibility for his own actions, blaming others and exhibiting an unwillingness to cooperate with other employees. He also exhibited explosive behavior and egocentric thinking that others were "out to get him." At the time, Mr. Doerting believed that Mr. Hall exhibited certain warning signs which required definite action on the part of the Cabinet. He was concerned for the safety of other employees and contacted Ms. Patsy Blevins of the Kentucky Employee Assistance Program to research available resolutions. He also contacted the Personnel Cabinet General Counsel's Office, which recommended that Mr. Hall be placed on sick leave and that a psychological evaluation be done to determine the cause of Petitioner's problems.

The Personnel's General Counsel's recommendation ultimately resulted in a February 18, 2000 letter to Petitioner from the Director of Personnel Services, Betty C. Hawkins. This letter stated that Petitioner was being placed on sick leave for a January 11, 2000 incident in which he shouted at Chief District Engineer, Linda Justice; his February 2, 2000 memorandum to district employees referencing acts of violence by disgruntled employees; and his February 4, 2000 grievance advocating replacement of district management personnel. The letter indicated that the Transportation Cabinet and Personnel Board required Petitioner to remain off work on accrued sick leave with pay until he submitted to a psychological evaluation and the Cabinet found him capable of working without endangering his own health or the health of others.

Mr. Hall appealed the February 18, 2000, letter to the Personnel Board, and a hearing was held. In a September 11, 2000 Order, the Personnel Board adopted the Hearing Officer's Findings of Fact, Conclusions of Law, and Recommended Order denying Mr. Hall's appeal.

On appeal, the circuit court rejected Hall's argument that the regulations which permitted the Cabinet to place him on paid sick leave are unconstitutionally vague. The court also found that there was substantial evidence to support the Cabinet's finding that Hall's behavior presented a potential danger to himself and others. As a result, the court concluded that the Cabinet acted within its authority when it required Hall to take paid sick leave.

However, the circuit court also concluded that the Cabinet had no authority to require Hall to submit to a psychological evaluation before returning to work, or that he continue on unpaid sick leave after his paid leave was exhausted. The parties agree that 101 Ky. Admin. Regs. [KAR] 2:102 §2(2) (a) permits an appointing authority to grant or require the use of accrued sick leave with pay if, among other reasons, an employee "[w]ould jeopardize the health of himself or others at his work station because of a contagious disease or demonstration of behavior that might endanger himself or others" The circuit court focused on the language in 101 KAR 2:102 § 2(2) (b), which provides that "[a]t the termination of sick leave with pay, the appointing authority shall return the employee to his former position." The court also noted that the provision relating to unpaid sick leave does not expressly allow the appointing authority to require an employee to take unpaid sick leave,¹ and there are no provisions which allow the appointing authority to impose conditions on an employee's return to work.

¹ 101 KAR 2:102 §2(3)(a).

Consequently, the circuit court found that the Cabinet was required to reinstate Hall to his former position once his paid sick leave was exhausted. This appeal followed.

The Cabinet and the Board argue that the circuit court misinterpreted the applicable regulations. The Cabinet contends that this section must be read in conjunction with the regulations relating to use of unpaid sick leave. The Cabinet concedes that the regulations do not expressly permit it to require Hall to take unpaid sick leave or to submit to a psychological examination as a condition of his return to work. Nevertheless, the Cabinet asserts that these powers are necessarily implied within the scope of authority granted to it by the sick-leave regulations. In addition, the Cabinet contends that the circuit court's interpretation of the regulation leads to an absurd result: it cannot prevent an employee who poses a risk to other employees from returning to work after he has exhausted all his sick leave. Thus, the Cabinet concludes that it must have the authority to require Hall to remain on unpaid sick leave unless he submits to a psychological examination.

Judicial review of administrative decisions is about arbitrariness.² In Aubrey v. Office of the Attorney General,³ we stated, "both the circuit court's review and our review . . . is limited."

[T]he courts do not have the authority to review the agency decisions *de novo*. American

² See Hougham v. Lexington-Fayette Urban County Gov't, Ky. App., 29 S.W.3d 370, 373 (1999).

³ Ky. App., 994 S.W.2d 516, 518 (1998).

Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission, [Ky.,] 379 S.W.2d 450, 458 (1964). Judicial review of the administrative action is confined to a determination of whether the action taken was arbitrary. City of Louisville v. McDonald, Ky., 470 S.W.2d 173, 178 (1971). So long as the agency's decision is supported by substantial evidence of probative value, it is not arbitrary and must be accepted as binding by the appellate court. Starks v. Kentucky Health Facilities, Ky. App., 684 S.W.2d 5 (1984). Substantial evidence is defined as evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable persons. O'Nan v. Ecklar Moore Express, Inc., Ky., 339 S.W.2d 466 (1960). In 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, including its findings and conclusions of fact. Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298, 309 (1972).⁴

Because the underlying facts of this action are not in dispute, the only question before this Court involves a matter of law. We conclude that the circuit court's interpretation of the sick-leave regulations is correct. The circuit court merely applied the plain meaning of the regulations as written and refused to read in provisions which are not specifically set out. Although an appointing authority may require an employee to take paid sick leave, the corresponding regulation relating to unpaid sick leave conspicuously omits that power.

Furthermore, when read as a whole, the regulations do not anticipate that the appointing authority will require that the employee take unpaid sick leave, but that it will be the employee who will be requesting it. Thus, while the appointing

⁴ Aubrey, 994 S.W.2d at 518-519.

authority may require an employee to provide periodic doctor's statements to justify the continued use of unpaid sick leave,⁵ the regulations are silent as to the appointing authority's power to require a medical statement before allowing the employee to return to work. Therefore, we agree with the circuit court that the Cabinet cannot compel Hall to take unpaid sick leave or to receive a psychological evaluation before it will consider his return to work.

Finally, we disagree with the Cabinet that this interpretation leads to an absurd result. If the Cabinet is concerned that Hall has demonstrated behavior which might pose a danger to himself or others, then it may initiate disciplinary proceedings against him based on that behavior.⁶ The Cabinet may not use involuntary sick leave as a substitute for commencing such proceedings. Although the Cabinet may have sound reasons for pursuing the latter course of action, we must agree with the circuit court that it is not authorized to do so.

Accordingly, the opinion and order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEE:

Lawrence R. Webster
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⁵ 101 KAR 2:102 § 2(3)2(c).

⁶ See 101 KAR 1:345.

