

RENDERED: August 6, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001479-MR

RICHARD E. HUGHES

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 01-CI-00436

KENTUCKY HORSE RACING AUTHORITY,
Successor to the KENTUCKY RACING
COMMISSION¹

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** * * *

BEFORE: BARBER, SCHRODER, AND VANMETER, JUDGES.

SCHRODER, JUDGE. Richard E. Hughes (Hughes) appeals the decision of the Franklin Circuit Court that upheld the decision of the Kentucky Racing Commission (Commission) to suspend and

¹ The Kentucky Racing Commission was abolished, recreated, restructured, and renamed the Kentucky Horse Racing Authority by Executive Order 2004-030, dated January 6, 2004.

revoke his license as a Racing License Inspector.² We affirm in part, reverse in part, and remand.

This is a case of bad tempers which demonstrates how juvenile supposedly mature adults can act. On August 6, 2002:³

2. Richard Hughes was a licensed employee of the Commission who worked as a race license inspector at the various racetracks in Kentucky. 3. Gerald O'Brien was licensed by the Commission as a trainer. 4. On the morning of August 6, 2000, O'Brien was exercising one of his horses at Ellis Park. Hughes was standing at the rail talking with another trainer, Elvis Cobb. 5. Apparently, O'Brien was having a difficult time with his horse, and as he passed by Hughes to take the horse back to the stable, Hughes stated to him something to the effect that he should smile more. O'Brien responded with the comment that Hughes was doing all right if his biggest worry was whether O'Brien was smiling or not.

The hearing officer found nothing else was said between the two, although Hughes, who is African-American, testified he heard O'Brien address him as "nigger". After a brief exchange of words,

O'Brien proceeded back to the barn. Hughes and Cobb also then parted company, and neither commented on O'Brien's statement.

² Hughes was also terminated from his merit position of Racing License Inspector as a result of the same conduct. The termination was modified to a thirty-day suspension by the Kentucky Personnel Board and the Commission's appeal of the modification is currently before the Supreme Court in Case No. 2004-SC-000410-D.

³ These facts are per the Commission's Hearing Officer's findings from the October 9, 2000, hearing.

7. O'Brien and Hughes had no more than a passing acquaintance and had no previous confrontations or disagreements. 8. An hour or two later, Hughes saw O'Brien in the parking lot and approached him as he entered his automobile. 9. Hughes told O'Brien that he had embarrassed Hughes in front of his client. O'Brien responded by stating, "Why don't you take care of your business, and I'll take care of mine." Seeing that Hughes was very agitated, O'Brien then drove away. 10. As he did, Hughes banged on hood of the car and shouted, "I'll kill you, you mother f___r." 11. That was the last direct confrontation between the two, and Hughes was not scheduled to work the next two days since the track was closed.

Hughes returned to Ellis Park on the morning of Wednesday, August 9, 2000. While there, he talked to David Paulus, a trainer, about O'Brien who Hughes mistakenly thought worked for Paulus as an exercise boy. Hughes repeated the threat to Paulus, but there was a question as to whether the threat was being given again or was being revealed to Paulus. The hearing officer found "Hughes went on to state that if O'Brien wanted to mess with him, he would get his gun out of his car and blow his head off." Paulus relayed the message to O'Brien who told his girlfriend who called the Commission which instructed the Director of Security (Jim Cain) for the Commission to investigate the threat. Per the hearing officer:

18. That same day Cain interviewed O'Brien and then Hughes. O'Brien confirmed the confrontation at the car but denied making any racial remarks. Hughes stated that O'Brien had "smartered off" and had made some

type of racial remark. Hughes, however, could not recall the specific remark which had made him so angry. 19. Hughes did acknowledge that he had threatened to kill O'Brien while confronting him at the car, and in fact, Hughes reiterated that same intent in the discussion with Cain, stating that he was 70 years old, was "not going to take any crap off anybody," and would kill O'Brien. 20. Cain then asked whether Hughes had a gun on the property at Ellis Park. He stated that he had an automatic pistol locked in the trunk of his car. 21. Upon concluding the interview, Cain accompanied Hughes to his car to inspect the gun. Hughes opened the driver's side door and removed a loaded pistol from the door panel or from next to the seat. 22. Cain unloaded the shells from the gun and asked Hughes to secure the gun in the truck and shells in the glove compartment. Cain then directed Hughes to leave Ellis Park and not to bring the gun back. 23. Hughes has a permit to carry a concealed weapon, but in addition to the Commission's regulation prohibiting weapons at a track, Ellis Park has signs at the entry to the track stating that firearms were prohibited on the property.

The Commission issued a "Notice of Hearing" against Hughes charging that the August 6 and 9, 2000, threats constituted disorderly conduct in violation of 810 KAR 1:025, Section 3(9), and the possession of a firearm was a violation of 810 KAR 1:025, Section 3(12)(a). On August 23, 2000, the stewards found Hughes guilty as charged and suspended Hughes's license through December 31, 2000. Hughes appealed his suspension to the Commission. A hearing officer conducted an administrative hearing on October 9, 2000, and after making

extensive findings, recommended the Commission affirm the suspension through December 31, 2000. The Commission upheld the hearing officer's findings and extended the stewards' suspension of Hughes's license one year through December 31, 2001,⁴ and also revoked Hughes's license pursuant to 810 KAR 1:028 Sections 3 and 4. Hughes appealed to circuit court which upheld the Commission. The appeal to our Court followed.

On appeal, Hughes contends that the Commission's suspension and revocation of his license is not supported by substantial evidence. We have reviewed the record and the hearing officer's "Findings Of Fact, Conclusions of Law, and Recommended Order". A court reviewing an administrative agency's decision is concerned with whether the agency's decision was arbitrary or clearly erroneous; if the agency acted outside the scope of its authority; if the agency applied an incorrect rule of law; or if the decision itself was not supported by substantial evidence in the record. Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298 (1972).

"Clearly erroneous" means not supported by substantial evidence. Kentucky Bd. of Nursing v. Ward, Ky. App., 890 S.W.2d 641, 642

⁴ The one-year extension may be a typo as the Commission in its brief argues Hughes received a 90-day suspension. The circuit court simply upheld the suspension of the Commission.

(1994). "Substantial evidence" is evidence which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the minds of reasonable persons.

Bowling v. Natural Resources and Environmental Protection Cabinet, Ky. App., 891 S.W.2d 406, 409 (1994).

In reviewing whether an agency's decision is supported by substantial evidence, the reviewing court must adhere to the principle that the agency, as fact finder, 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, Ky., 481 S.W.2d 298 (1972).

In addition to the principles established by case law, the judicial review process of Kentucky's Administrative Procedures Act at KRS 13B.150(2) circumscribe the scope of judicial review of factual determinations made in an agency's due process hearing, as follows: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact."

In its findings of fact, the Commission adopted the hearing officer's findings which were extensive, and even though there was evidence that, under the circumstances, the threats were not as serious as they sound, there was substantial evidence to support the agency's findings of fact. Therefore,

we must defer to those findings of fact. Kentucky Commission on Human Rights v. Fraser, Ky., 625 S.W.2d 852 (1981).

The hearing officer determined the threatening statements on August 6 and 9, 2000, were disorderly conduct in violation of 8 KAR 1:025, Section 3(9), and that the possession of a firearm in the car in the parking lot violated 810 KAR 1:025, Section 3(12)(a). Although we agree with the finding of disorderly conduct, we disagree with the hearing officer's conclusions of law as it relates to the firearm. We acknowledge that 810 KAR 1:025, Section 3(12)(a), does prohibit the "Possession on association grounds, without written permission from the commission or stewards, of: (a) Firearms," However, KRS 527.020(8) provides in part:

No person or organization, public or private, shall prohibit a person from keeping a firearm or ammunition, or both, or other deadly weapon in a glove compartment of a vehicle in accordance with the provisions of this subsection. Any attempt by a person or organization, public or private, to violate the provisions of this subsection may be the subject of an action for appropriate relief or for damages in a Circuit Court or District Court of competent jurisdiction.

There is a conflict between the statute and the administrative regulation. "[I]t is axiomatic that the grant of the power to make regulations does not authorize an administrative agency to adopt regulations which are contrary to legislative policy as

expressed in the statutes." Kentucky Alcoholic Beverage Control Board v. Anheuser-Busch, Inc., Ky. App., 574 S.W.2d 344, 345 (1978).

"Administrative regulations of any kind which have been duly adopted and properly filed have the full effect of law." Flying J Travel Plaza v. Commonwealth, Transportation Cabinet, Department of Highways, Ky., 928 S.W.2d 344, 347 (1996). The regulations, however, "are valid only as subordinate rules when found to be within the framework of the policy defined by the legislation" as an administrative agency's authority "is limited to a direct implementation of the functions assigned to the agency by the statute." Id. Any doubts concerning the existence or extent of an administrative agency's power should be resolved against the agency. [Henry v. Parrish, 307 Ky. 559, 211 S.W.2d 418, 422 (1948)].

United Sign, Ltd. v. Commonwealth, Ky. App., 44 S.W.3d 794, 798 (2000).

We believe the Commission's reliance on the prohibition in 810 KAR 1:025, Section 3(12)(a), against firearms was in error. The findings of fact make it very clear that Hughes had a permit to carry a concealed weapon, that the weapon was locked in the car in the parking lot of Ellis Park, and that Hughes did not have the weapon on his person. To the extent the regulation contradicts KRS 527.020(8), it is void and should not have been a consideration by the Commission in its conclusions of law or disposition. A reviewing court must determine if the

agency is applying the correct rule of law to its factual findings. Bowling v. Natural Resources and Environmental Protection Cabinet, Ky. App., 891 S.W.2d 406, 410 (1994). We are not saying what the Commission's disposition should be, only that it should reconsider its disposition without considering the firearm in the car.

For the foregoing reasons, the judgment of the Franklin Circuit Court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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