RENDERED: September 10, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-001740-MR

CITY OF NEWPORT, KENTUCKY;
AND PHILIP G. CIAFARDINI — APPELLANTS

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE LEONARD L. KOPOWSKI, JUDGE
ACTION NO. 03-CI-00148

NEWPORT PROFESSIONAL FIREFIGHTERS UNION,
I.A.F.F. LOCAL 45 AND
KENTUCKY STATE LABOR RELATIONS BOARD — APPELLEES

OPINION
AFFIRMING IN PART
AND REVERSING IN PART

** ** ** ** **

BEFORE: KNOPF, JUDGE; EMBERTON, SENIOR JUDGE;[1] AND MILLER, SENIOR JUDGE.[2]

KNOPF, JUDGE: The City of Newport appeals from an order by the Campbell Circuit Court affirming a final order issued by the

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Kentucky State Labor Relations Board (Board) in favor of the Newport Professional Firefighters Union, International Association of Firefighters, Local 45 (Local 45), and awarding damages to Local 45. The City argues that the circuit court erred by granting Local 45's motion for summary judgment, and by awarding damages and attorney's fees to Local 45. We conclude that the trial court properly granted Local 45's motion for summary judgment thus enjoining the City from engaging in the unfair labor practices identified by the Board. However, we also conclude that the trial court was not authorized to enter a judgment awarding damages and attorney's fees to Local 45. Hence, we affirm in part and reverse in part.

The underlying facts of this action and its procedural history are not in dispute. Local 45 is a chartered labor organization in which the firefighters employed by the City participate. On July 17, 2001, Local 45 filed an unfair labor practices complaint with the Board, charging that the City had implemented changes affecting the firefighters' wages, hours, and other conditions of employment without first engaging in collective bargaining. Local 45's complaint addressed two distinct matters. First, Local 45 alleged that, in October of 2000, the City Manager, Philip Ciafardini, assigned on-duty firefighters to hand-deliver copies of the City's newsletter to every home and business in the city, thereby imposing additional

duties upon the firefighters in violation of the parties' collective bargaining agreement. And second, Local 45 alleged that, in June of 2001, the City's Board of Commissioners had approved Ciafardini's proposal to increase the number of firefighters in the department from 36 to 39, while maintaining a minimum shift level of 12, thereby reducing the firefighters' unscheduled overtime compensation in violation of the parties' collective bargaining agreement. The City admitted the factual allegations, but denied that either of these actions constituted a significant change in the firefighters' working conditions. Consequently, the City asserted that it was not obligated to engage in collective bargaining with Local 45 on these issues.

Following a hearing, a hearing officer issued findings of fact, conclusions of law and a recommended order on June 10, 2002. The hearing officer first found that the delivery of the newsletter falls within the firefighters' job duties as contemplated by the collective bargaining agreement. As a result, the hearing officer concluded that the City was not obligated to engage in collective bargaining with Local 45.

On the second question, the hearing officer found that the collective bargaining agreement provided that the total number of members in the department would be 36, with a minimum staffing level of 12 members per shift. By increasing the total number of firefighters from 36 to 39 without changing the

minimum staffing level, the City had affected the firefighters' opportunity to work unscheduled overtime on occasions when a scheduled member was off. The hearing officer concluded that this constituted a material change in the firefighters' working conditions, and that the City's failure to engage in collective bargaining prior to implementing this change violated KRS 345.050(1)(e) and (3). Accordingly, the hearing officer recommended that the Board issue a cease-and-desist order compelling the City to engage in collective bargaining with Local 45 on this issue. However, the hearing officer also found that the firefighters were not entitled to be compensated for lost overtime pay because there was no evidence concerning how much overtime the firefighters lost as a result of the City's actions.

Local 45 filed exceptions to the hearing officer's report, specifically objecting to the hearing officer's conclusions with respect to delivery of the City's newsletter and that an award of overtime compensation was too speculative. The City did not file exceptions to the hearing officer's report. The Board reviewed the entire record compiled before the hearing officer and entered a final order on December 30, 2002.

The Board substantially adopted the hearing officer's factual findings. However, the Board found that the City's

requirement that the firefighters deliver the newsletter did not fall within the firefighters' job description. As a result, the Board concluded that the City had engaged in an unfair labor practice when it imposed this requirement. In addition, the Board agreed with the hearing officer's conclusion that the City's hiring of three additional firefighters violated the collective bargaining agreement. But the Board also found that the firefighters should be compensated for lost overtime pay. Consequently, the Board issued a cease-and-desist order compelling the City to engage in collective bargaining with Local 45 on the issues involving the delivery of the newsletter and the increase in the total number of firefighters. The Board further directed the parties "to determine an equitable formula for making the firefighters whole for unscheduled overtime opportunities missed as a result of hiring additional firefighters without increasing minimum staffing levels."

On January 29, 2003, the City filed an appeal to the circuit court from the Board's final order. Local 45 filed an answer and counter-claim, seeking judicial enforcement of the Board's final order, including imposition of damages. The matter was submitted to the court on Local 45's motion for summary judgment. The City failed to file a written response to the motion.

In an opinion and order entered on June 4, 2003, the circuit court granted Local 45's motion for summary judgment and affirmed all aspects of the Board's final order. The court found that the record supported the Board's conclusions regarding delivery of the newsletter and the staffing of the fire department. The court also ordered Local 45 "to prepare a proposed order that will deter future violations and make the City's Firefighters whole for all wages and benefits that they lost as a result of the City's labor practices." Local 45 tendered an order which incorporated the Board's prior cease-and-desist order. The tendered order also included a judgment for lost overtime pay in the amount of $306,635.92 and for attorney fees in the amount of $14,457.46. The circuit court entered the tendered order on June 19, 2003, and this appeal followed.

As a preliminary matter, the circuit court found that the City was precluded from raising objections to the Board's findings or conclusions because it had failed to file exceptions from the hearing officer's recommended order. In Swatzell v. Commonwealth,[3] the Kentucky Supreme Court held that a party's failure to file exceptions to an administrative officer's report and recommendation after a hearing constitutes a failure to

[3] Ky., 962 S.W.2d 866 (1998).

exhaust administrative remedies, thereby precluding court review of the final administrative order.[4] However, the Kentucky Supreme Court recently overruled this holding in Rapier v. Philpot.[5]

The Court held that the filing of exceptions under Chapter 13B is not a means of obtaining further administrative review of a hearing officer's recommendation. Rather, regardless of whether exceptions are filed, the hearing officer is required to submit to the agency head "a written recommended order which shall include his findings of fact, conclusions of law, and recommended disposition of the hearing, including recommended penalties, if any."[6] After receiving the recommended order and the other material, the agency head is required to "render a final order in an administrative hearing within ninety (90) days."[7] Further, "[i]n making the final order, the agency head shall consider the record including the recommended order and any exceptions duly filed to a recommended order."[8] Nor is the agency head limited to the issues raised by the exceptions

---

[4] Id. at 870.

[5] Ky., 130 S.W.3d 560 (2004).

[6] KRS 13B.110(1).

[7] KRS 13B.120(4)(b).

[8] KRS 13B.120.

in rendering a final order. The agency head is required to review the entire record and to determine whether there is justification--according to the facts and the applicable law--for adopting the recommended order. If the agency head deviates from the recommended order, it must make separate findings of fact and conclusions of law for any deviation from the recommended order.[9] Thus, the Court concluded that the filing of exceptions under a Chapter 13B administrative proceeding is not a prerequisite to obtaining administrative review of a hearing officer's recommended order, and the failure to file exceptions to the hearing officer's report does not deprive the circuit court of jurisdiction to subsequently review the case.[10]

Accordingly, the City's failure to file exceptions to the hearing officer's report did not deprive the circuit court of jurisdiction to review the Board's final order. However, the Court in Rapier went on to note that, under Chapter 13B, the filing of exceptions provides the means for preserving and identifying issues for review by the agency head. In turn, filing exceptions is necessary to preserve issues for further judicial review. This rule of preservation precludes judicial review of any part of the recommended order not excepted to and adopted in the final order. Thus, when a party fails to file

[9] KRS 13B.120(2).
[10] Rapier, 130 S.W.3d at 563.

exceptions, the issues the party can raise on judicial review under KRS 13B.140 are limited to those findings and conclusions contained in the agency head's final order that differ from those contained in the hearing officer's recommended order.[11]

In the current case, the City did not file exceptions to the hearing officer's finding that increase in staffing levels above 36 violated the collective bargaining agreement. Consequently, this issue was not preserved for review. However, the hearing officer found that the City properly ordered the firefighters to deliver the newsletter and that Local 45 had failed to prove the amount of overtime pay which the firefighters had lost. Therefore, the City was not required to file exceptions to these findings.

The City next argues that the circuit court improperly granted summary judgment for Local 45. The City asserts that the circuit court viewed its failure to file a written response to Local 45's motion as a waiver of the factual and legal arguments raised on appeal. The City also contends that the circuit court should have addressed its substantive legal challenges to the Board's findings. Given the circumstances of this case, we conclude that summary judgment was appropriate.

[11] Id. at 563-64.

Under KRS 13B.150(2), "[r]eview of a final order shall be conducted by the court without a jury, and shall be confined to the record, unless there is fraud or misconduct involving a party engaged in administration of this chapter. The court, upon request may hear oral argument and receive written briefs." Furthermore, as noted by this Court in Aubrey v. Office of Attorney General:[12]

> [B]oth the circuit court's review and our review of this issue is limited. Where the legislature has designated an administrative agency to carry out a legislative policy by the exercise of discretionary judgment in a specialized field, the courts do not have the authority to review the agency decisions de novo. American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission, 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. 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. Substantial evidence is defined as evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable persons. 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. However, this Court is authorized to review issues of law on a *de novo* basis.[13]

[12] Ky. App., 994 S.W.2d 516 (1998).

[13] Id. at 518-19.

As the party seeking review of the Board's final order, the City had the burden of setting out its factual and legal bases supporting its assertions that the Board's factual conclusions were not supported by substantial evidence or that its legal conclusions were erroneous. Contrary to the City's argument, the circuit court was not obligated to search the administrative records to identify grounds supporting the City's positions. Furthermore, a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial.[14] Because the City failed to identify to the circuit court any grounds for review pursuant to KRS 13B.150, the circuit court properly granted Local 45's motion for summary judgment.

However, the Board's final order did not award damages to Local 45 for lost overtime pay or for attorney's fees. Indeed, the Board did not determine any amount of overtime pay which the firefighters lost, and it did not address the matter of Local 45's attorney fees. Rather, the circuit court entered a judgment based upon Local 45's counterclaim. Therefore, these issues are properly presented to this Court.

[14] Steelvest, Inc. v. ScanSteel Service Center, Inc., Ky., 807 S.W.2d 476, 482 (1991).

The City's primary argument is that the trial court erred by awarding damages to Local 45 for lost overtime wages. The General Assembly constitutionally may delegate to an administrative agency the authority to award damages to a party aggrieved by a violation of a right created by statute.[15] The legislature has specifically given to the Board the authority to award back-pay which the firefighters lost as a result of the City's engaging in an unfair labor practice.[16]

However, the Board's order is problematic for a number of reasons. First, the Board serves as the ultimate fact-finder in this administrative proceeding. The Board may accept the recommended findings and order tendered by the hearing officer, or it may reject or modify the recommended order in whole or in part, or it may remand the matter to the hearing officer for further proceedings.[17] But the Board chose none of these options.

Rather, the Board adopted the hearing officer's finding that "the record is devoid of information" which would allow even an approximation of damages. Nevertheless, the Board concluded that the firefighters were entitled to overtime wages

---

[15] Kentucky Commission on Human Rights v. Fraser, Ky., 625 S.W.2d 852, 854-55 (1981).

[16] KRS 345.070(2).

[17] KRS 13B.120(2).

lost as a result of the City's actions. But the Board did not attempt to determine the amount of those damages, did not identify any evidence which would have supported an award of damages, nor did it remand the matter to the hearing officer for additional findings. The Board simply directed the parties to negotiate an amount which would compensate the firefighters for their lost overtime opportunities.

We find no authority for the Board to act in this manner. Local 45 suggests that the Board relied on KRS 345.070(2), which authorizes the Board to "take any affirmative action including reinstatement of firefighters with or without back pay, as will effectuate the policies of this chapter." The statute goes on to provide that "[t]he final order may require the person to make reports from time to time showing the extent to which he has complied with the order." The Board apparently assumed that it could direct the parties to reach an agreement regarding the amount of lost overtime opportunities.

KRS 345.070(2) clearly contemplates that the Board could require a party who has been found to engage in an unfair labor practice to show compliance with the affirmative relief ordered by the Board. The Board may also order the parties to engage in collective bargaining, require periodic reports from the parties, and make findings if such negotiations become

deadlocked.[18] But KRS 345.070(2) was not designed to allow the Board to delegate its authority to make necessary findings on disputed facts. Indeed, the calculation of damages is a core fact-finding responsibility which cannot be delegated. By failing to make any findings regarding the amount of damages, the Board abrogated its obligation as the trier of fact.

Furthermore, the circuit court was not authorized to enter an award of damages for lost overtime pay. As previously noted, in reviewing an order by the Board, the circuit court sits as an appellate court. The circuit court's role in reviewing an award of damages by an administrative agency is whether there was substantial evidence to support the award made by the agency.[19] In the absence of sufficient findings by the Board, the circuit court was not authorized to make its own factual findings. KRS Chapter 345 vests the Board with jurisdiction to decide disputes related to collective bargaining.[20] If the circuit court deemed the Board's order to be deficient, the court should have remanded the case to the

[18] KRS 345.080.

[19] *See* Kentucky Commission on Human Rights v. Lesco Manufacturing & Design Co., Inc., Ky. App., 736 S.W.2d 361, 364 (1987).

[20] City of Louisville v. Louisville Professional Firefighters Association, Ky., 813 S.W.2d 804, 808 (1991).

Board for further proceedings.[21] Instead, the circuit court acted outside of its authority, and took it upon itself to award damages even though the Board had failed to do so.

Unfortunately, the procedural posture of this case renders that remedy impossible. As a matter of law, damages may not be recovered unless proven with reasonable certainty.[22] The Board expressly found that Local 45 failed to prove the amount of their lost overtime pay with reasonable certainty. This factual finding is not deficient. Rather, it is entirely at odds with the Board's legal conclusion that damages should be awarded. Moreover, the Board's finding that Local 45 failed to prove damages with reasonable certainty has not been appealed by any party. Therefore, the matter is not properly presented on appeal to this Court.

The City also argues that damages for lost overtime pay are not available as a matter of law. In Maggard v. Commonwealth, Cabinet for Families and Children,[23] a panel of this court addressed the issue of whether an illegally-discharged employee is entitled to recover overtime pay as part of back-pay compensation. This Court concluded that any award

[21] KRS 13B.150(2).

[22] Pauline's Chicken Villa, Inc. v. KFC Corp., Ky., 701 S.W.2d 399, 401-02 (1985).

[23] Ky. App., 991 S.W.2d 659 (1998).

of overtime pay for that period would necessarily be based in part upon speculation and conjecture. Consequently, the Court concluded that the employee was only entitled to recover back-pay which would have been earned as a part of the employee's base salary.[24]

We question whether Maggard can be read as broadly as the City asserts. In this case, the firefighters had more than an expectancy of working overtime – it was a right guaranteed by their collective bargaining agreement. Unlike it Maggard, the firefighters negotiated their base-pay with the understanding that they would have the right to work scheduled and unscheduled overtime. Given the limited number of firefighters and the availability of evidence concerning their individual wage rates and overtime history, it would seem that there should be some way to quantify the value of the lost overtime.[25] Nonetheless,

---

[24] Id. at 661.

[25] Although the matter is not properly before this Court, we do not believe that the evidence presented by Local 45 was sufficient to calculate the amount of lost overtime with any reasonable certainty. Local 45 presented evidence showing that, between June of 2001 and June of 2003, there were a total of 512 shifts when there was an absence which would have required a replacement firefighter working overtime at the prior staffing levels. However, both the hearing officer and the Board noted that there was no evidence of how many absences were caused by the new firefighters, which firefighters commonly chose to accept overtime, or the various wage rates of the firefighters who were off-duty. The evidence offered by Local 45 was insufficient to allow an accurate calculation of overtime pay the firefighters have lost as a result of the policy change.

even if overtime pay may be recoverable as a matter of law, the Board found that the amount had not been proven with reasonable certainty. Therefore, any question regarding the extent of Maggard is moot.

Lastly, the City argues that the circuit court erred by entering an award of attorney's fees to Local 45. The City contends that there is no express statutory authorization for an award of attorney's fees, and that an award was not justified in any event because the firefighters are not entitled to any back pay. Local 45 responds that its counter-claim raised a valid cause of action in the circuit court for lost overtime wages and attorney's fees. KRS 337.385(1) authorizes a circuit court to award damages against an employer who improperly withholds wages or overtime compensation to which such employee is entitled. In addition, KRS 337.2385(1) and KRS 337.060 authorize the court to award costs and reasonable attorney's fees.

In this case, however, the Local 45 has never alleged that the City has improperly withheld overtime compensation which the firefighters have earned. Rather, Local 45 alleges that the City violated their collective bargaining agreement by limiting the firefighter's opportunities to earn overtime pay.

The absence of evidence on these variables would render speculative any attempt to calculate the amount the lost overtime pay.

As such, this action is not governed by KRS Chapter 337, but by KRS Chapter 345.

The language used in the KRS 345.070(2) is broad enough to encompass most forms of relief which could make employees whole for a violation of their collective bargaining rights, including compensation for attorney's fees. Although the firefighters are not entitled to compensation for overtime opportunities which they lost as a result of the City's conduct, the City still engaged in an unfair labor practice by refusing to bargain collectively on the matters relating to the staffing of the fire department and delivery of the City's newsletter. If attorney's fees are not available, then the lack of a monetary remedy and the cost of vindicating these rights would undermine any benefit that the firefighters might otherwise gain. Under the circumstances, we conclude that the Board would have been authorized to make an award for attorney's fees.

However, as noted above, the circuit court's review of the Board's final order is limited by KRS 13B.150. The court may also enter an order enforcing the Board's final order, including a judgment and any injunctive relief necessary to carry out the Board's order.[26] But there is no statutory authorization for the circuit court to enter a separate judgment

[26] KRS 345.070(2).

for attorney's fees. Furthermore, Local 45 concedes that it never sought to recover attorney's fees during the proceedings before the Board. Therefore, the issue was not properly before the circuit court, and the circuit court did not have the authority to award attorney's fees to Local 45.

Accordingly, the order of the Campbell Circuit Court is affirmed insofar as it upheld the State Labor Relations Board's final order enjoining the City from engaging in the unfair labor practices identified by the Board, but is reversed insofar as the court awarded damages and attorney fees to Local 45.

EMBERTON, SENIOR JUDGE, CONCURS.

MILLER, SENIOR JUDGE, CONCURS BY SEPARATE OPINION.

MILLER, SENIOR JUDGE, CONCURRING BY SEPARATE OPINION. I concur but write separately to express my concern as to a labor contract which limits the hiring of additional employees. Though the issue is not clearly presented, I am not of the opinion that a limitation upon the hiring of additional employees is a fit subject for a collective bargaining agreement.

BRIEF AND ORAL ARGUMENT FOR APPELLANTS:

Mary Ann Stewart
Adams, Stepner, Woltermann & Dusing, PLLC
Covington, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE
NEWPORT PROFESSIONAL FIREFIGHTERS UNION:

Dennis F. Janes
Segal, Stewart, Cutler, Lindsay, Janes & Berry PLLC
Louisville, Kentucky