

RENDERED: April 15, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2004-CA-000995-MR

ROBERT JOHNSON

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 02-CI-01199

COMMONWEALTH OF KENTUCKY,
CABINET FOR FAMILIES AND
CHILDREN (NOW KNOWN AS
CABINET FOR HEALTH AND
FAMILY SERVICES); MARK A. ROSEN,
APPOINTING AUTHORITY;
COMMONWEALTH OF KENTUCKY,
PERSONNEL BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; McANULTY, JUDGE; MILLER, SENIOR
JUDGE.¹

MILLER, SENIOR JUDGE: Robert Johnson appeals from an order and
opinion of the Franklin Circuit Court affirming a decision by
the Kentucky Personnel Board, which upheld Johnson's termination

¹ 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.

from his employment with the Cabinet for Human Resources (Cabinet).² For the reasons stated below, we affirm.

On February 14, 1989, Johnson was hired by the Cabinet as a Child Support Office Manager in Jefferson County. At the end of his six-month probationary period, his immediate supervisor, Patricia Niceley, recommended Johnson's termination. Johnson was given an additional 30 days to improve his job performance and reach merit status. However, on September 26, 1989, Niceley again recommended that Johnson be removed as office manager.

On Johnson's first employee evaluation, completed by Niceley, for the period of January 1, 1990, to June 30, 1990, he received a "fails to meet" rating in all five categories: 1) job knowledge/skills; 2) quality of work; 3) productivity; 4) improvement in performance; and 5) employee conduct. As a result, he received a mid-year performance rating of "fails to meet."

Because of his poor job performance, on July 31, 1990, the Cabinet demoted Johnson to the position of Child Support Specialist, a non-supervisory position. His next evaluation covered January 1, 1990, to December 31, 1990, and thus encompassed his work as both an office manager and a case

² The Cabinet for Human Resources was later known as the Cabinet for Families and Children, and is currently known as the Cabinet for Health and Family Services.

worker. Niceley again rated him as "fails to meet" in all categories and overall.

Johnson's final evaluation covered January 1, 1991, to June 30, 1991. The new office manager, Louise Hulker, completed the evaluation. Johnson again received only "fails to meet" ratings and a "fails to meet" mid-year rating of performance.

Johnson appealed his evaluations and demotion to the Personnel Board to challenge their validity. The Personnel Board found that Johnson's demotion was appropriate based on his failure to follow the work schedule and process 138 cases monthly with an error rate equal to or less than 15%. Regarding the three evaluations, the Personnel Board determined that the Cabinet was justified in rating Johnson as "fails to meet" in the areas of job knowledge and skills, quality of work, productivity, and improvement in performance.

As to the category of employee conduct, however, the Personnel Board determined that the ratings for Johnson's employee conduct for the January 1, 1990, to December 31, 1990, and January 1, 1991, to June 30, 1991, evaluations should be changed to "meets," and, as a corollary, that he receive an overall rating of "meets" for these two evaluations

The Cabinet appealed the Personnel Board's decision to the Franklin Circuit Court, which reversed the Board's decision and reinstated the "fails to meet" rating for the two

evaluations. Johnson appealed to this Court, whereupon we upheld the circuit court's decision reinstating the two "fails to meet" evaluations. Johnson v. Cabinet for Human Resources, Case No. 95-CA-2004-MR, Opinion Rendered November 8, 1996.

In the meantime, on July 24, 1991, while Johnson's appeal from the two "fails to meet" evaluations was pending, the Cabinet terminated Johnson from his employment as a Child Support Specialist pursuant to KRS 18A.112(14)³ based upon his two successive "fails to meet" evaluations. Johnson appealed his dismissal to the Personnel Board, and that appeal was held in abeyance pending the appeal proceedings addressing the validity of the two "fails to meet" evaluations. After this Court's decision in Case 95-CA-2004-MR became final, the Personnel Board dismissed Johnson's appeal challenging his termination without having conducted an evidentiary hearing.

Johnson appealed the Personnel Board's dismissal of his challenge of his termination to Franklin Circuit Court wherein he asserted a right to an evidentiary hearing before the Board regarding "just cause" for dismissal under KRS 18A.095(2) (A classified employee with status shall not be dismissed, demoted, suspended, or otherwise penalized except for cause). On June 20, 2000, the circuit court entered an order reversing

³ KRS 18A.112(14) was repealed effective July 14, 2000.

the Board's order and remanding the case for an evidentiary hearing.

On March 19, 2002, an evidentiary hearing was held before Personnel Board Hearing Officer Don C. Meade on the Cabinet's dismissal of Johnson. On July 10, 2002, the Hearing Officer issued Findings of Fact, Conclusions of Law, and a Recommended Order wherein he concluded that the Cabinet had carried its burden of proof by demonstrating just cause for termination of Johnson's employment. The Hearing Officer also concluded that the dismissal was not arbitrary or excessive under the circumstances of the case, and recommended that the Personnel Board uphold Johnson's dismissal.

On August 12, 2002, the Personnel Board entered an order adopting the Hearing Officer's recommendations. Johnson subsequently appealed the Personnel Board's decision to Franklin Circuit Court. On April 22, 2004, the circuit court issued an opinion upholding the decision of the Personnel Board. This appeal followed.

First, Johnson argues that the Personnel Board's order upholding his dismissal is not supported by substantial evidence because the Cabinet failed to meet its burden of proving just cause for dismissal of Johnson.

When reviewing the action of an administrative agency, a court is concerned with whether the agency's action was

arbitrary, which is defined as "clearly erroneous"; clearly erroneous means not supported by substantial evidence. Kentucky Bd. of Nursing v. Ward, 890 S.W.2d 641, 642 (Ky.App. 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, 891 S.W.2d 406, 409 (Ky.App. 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, 481 S.W.2d 298, 308 (Ky. 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." What constitutes cause for dismissing a merit employee is a fact question for determination by the Personnel Board. Perkins v. Stewart, 799 S.W.2d 48, 51 (Ky.App. 1990).

In the case at hand, the Personnel Board properly placed the burden of proof and the ultimate burden of persuasion on the Cabinet to demonstrate by a preponderance of the evidence the propriety of the penalty it had imposed for Johnson's work performance. KRS 13B.090(7); Commonwealth, Transportation Cabinet v. Woodall, 735 S.W.2d 335 (Ky.App. 1987).

There is substantial evidence in the record in support of the Cabinet's decision to terminate Johnson's employment. The record is replete with evidence that Johnson was incompetent first as a Child Support Office Manager, and, following his demotion, as a Child Support Specialist. The record demonstrates that Johnson was unable to process his quota of child support cases within the error rate guidelines of the Cabinet and that he repeatedly performed his job functions at a substandard level. These factors comprise substantial evidence supporting the Cabinet's decision. In addition, we believe that the circuit court carefully addressed this matter and adopt its discussion of the issue:

[Johnson] argues that the Board's Order is not supported by substantial evidence. He underscores that fact that the Cabinet merely produced one witness, Mr. Hanson Williams, during the evidentiary hearing. Mr. Williams was the personnel attorney for the Cabinet at the time of Johnson's dismissal. [Johnson] asserts that Mr. Williams did not know what considerations the appointing authority used in arriving at the decision to dismiss rather than demote.

This does not appear to be the case. Mr. Williams testified that he provided legal advice to Ms. Georgia Lutcavish, the appointing authority, which she relied upon when making her decision to dismiss Johnson. He advised Ms. Lutcavish that she should or could dismiss Johnson based upon Johnson's two successive "fails to meet" evaluations as required by KRS 18A.112(14). Mr. Williams also testified that he felt the evidence in the record was sufficient to uphold the "fails to meet" evaluations. Indeed, the administrative record is replete with evidence that indicates Johnson's performance was substandard. In general the record indicates that his supervisors observed that Johnson had not learned the concepts of the program, failed to perform his duties and did not demonstrate a willingness to improve. Mr. Adriel Harrod, a supervisor, provides an example of Johnson's work performance when he commented about his inability to review casework for errors. He stated, "these duties could be taught to almost anyone and Mr. Johnson continued to have problems even with these tasks." Mr. Harrod concluded, "Mr. Johnson is more of a hindrance than help." Overwhelming evidence supports the Board's decision to dismiss Johnson.

Next, Johnson argues that the Personnel Board's order upholding his dismissal is not supported by law on the basis that KRS 18A.112(14) requires that the two successive evaluations supporting a dismissal must be successive evaluations for the same position and for the full rating period, whereas for the rating period of January 1, 1990, to December 31, 1990, five months of the period were for the period

his job title was "Child Support Specialist" and seven months were for his tenure spent as an office manager.

The statute relied upon by the Cabinet in its termination of Johnson, KRS 18A.112(14), which was repealed effective July 14, 2000, provided as follows:

If an employee receives a "fails to meet performance requirements" rating in all categories on two (2) successive evaluations, he shall be:

(a) Demoted to a position commensurate with his abilities; or

(b) Terminated.

The words used in a statute are to be given their customary meaning, and the statute is to be given effect as written if it is both unambiguous and plain. Lynch v. Commonwealth, Ky., 902 S.W.2d 813, 814 (1995). KRS 18A.112(14) has previously been interpreted as mandating that if an employee receives two successive unsatisfactory performance evaluations, he must be either demoted or terminated. Wade v. Com., Dept. of Treasury, 840 S.W.2d 215, 217 (Ky.App. 1992).

KRS 18A.112(14), on its face, includes no language which would require the two successive "fails to meet" evaluations to be for the same job category. The statute speaks in terms of two successive evaluations only -- not two successive evaluations for the same job category. Courts are not at liberty to add or subtract from a legislative enactment,

nor to discover meaning not reasonably ascertainable from the language used. Beckham v. Board of Education of Jefferson County, Ky., 873 S.W.2d 575, 577 (1994). The interpretation urged by Johnson would require us to read into the statute a proviso not apparent from the face of its text, and which the legislature could have easily expressed if such were its intent in enacting the statute.

Finally, Johnson contends that the evidentiary hearing on remand did not comply with the June 20, 2000, opinion of the Franklin Circuit Court. Johnson contends that the Franklin Circuit Court set forth five areas on which Johnson had the right to be heard: whether demotion would have been more proper than dismissal; whether dismissal was excessive under the circumstances; whether his prior demotion should have been considered by the Board; whether two year-end evaluations were required under KRS 18A.112(14) rather than a year-end and mid-year; and the Cabinet had the burden of proof to show cause for his dismissal, and to show why dismissal was selected over demotion.

While the Hearing Officer's Findings of Fact, Conclusions of Law, and Recommended Order does not specifically address each of the five issues mentioned in the Franklin Circuit Court order, Johnson does not cite us to any evidentiary ruling by the Hearing Officer which would have precluded him

from raising the issues, nor does he claim that he was precluded from raising the issues. As previously discussed, the Personnel Board's decision contains substantial evidence supporting the Cabinet's decision to terminate his employment. Any failure by the Personnel Board to further discuss the specific issues identified by Johnson in its decision was harmless error. Ky. R. Civ. P. 61.01. In addition, we adopt the circuit court's discussion of this issue:

The Petitioner argues that the Board's Order must be rejected as a matter of law since it did not address five specific points as mandated by the Circuit court Order. But Johnson misinterprets the Order. The Court's Order required the Board allow the issues *to be raised* during the evidentiary hearing but did not compel findings to be made concerning each point. The Board complied with the Court's ruling by providing Johnson the opportunity to present these issues.

For the foregoing reasons the judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:
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BRIEF FOR APPELLEE CABINET FOR
HEALTH AND FAMILY SERVICES:
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