

RENDERED: APRIL 14, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000136-MR

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 04-CI-00510

MARGARET TILLMAN
AND KENTUCKY PERSONNEL BOARD

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: BARBER, HENRY, AND KNOPF, JUDGES.

HENRY, JUDGE: The Commonwealth of Kentucky, Transportation Cabinet appeals from a judgment of the Franklin Circuit Court granting Margaret Tillman's appeal from the Personnel Board's denial of her request for reclassification. On review, we reverse and remand for reinstatement of the Personnel Board's Final Order.

Tillman was hired by the Transportation Cabinet's Office of General Counsel and Legislative Affairs as an

"Administrative Specialist III" (a Grade 12 position) on February 1, 2002. Her job duties included assisting with the promulgation of administrative regulations, legislative liaison support, and working with the attorneys in the office.

Beginning in February 2003, Tillman was additionally assigned a number of duties that had previously been the responsibility of Karen Meade, who was classified as an "Executive Staff Advisor," (a Grade 16 position) and Susan Davis, who was a "Staff Assistant" (a Grade 17 position). The assignment was due to the fact that Meade and Davis were retiring effective July 31, 2003. In an April 14, 2003 e-mail, Tillman asked Patricia Foley, the acting Executive Director of the office, if she would be getting Meade's position. In response, Foley indicated that Meade's duties would be transferred to Tillman, that she would be working in a new area by herself, and that she might be getting her own office. However, Foley further indicated that Tillman's position would not be reclassified because the Executive Staff Advisor position was not going to be filled after Meade's retirement.

On June 30, 2003, Tillman requested in writing that Foley audit her position and that her position be reclassified in accordance with 101 KAR¹ 2:020, Section 1(6), as she claimed that a material and permanent change in her duties had occurred

¹ Kentucky Administrative Regulations.

after she was assigned most of the responsibilities previously performed by Meade. On July 7, 2003, Foley verbally rejected Tillman's audit request and informed her that her position would not be reclassified. Tillman subsequently filed an appeal to the Personnel Board on July 11, 2003 again requesting reclassification. After the appeal was filed, the Office of General Counsel and Legislative Affairs was reorganized. Tillman's position was assigned to the Support Services Branch and a number of the duties that had been given to her were taken away. The Executive Staff Advisor position was also eliminated.

On January 28, 2004, following an evidentiary hearing, the Personnel Board's hearing officer entered its Findings of Fact, Conclusions of Law and Recommended Order as to Tillman's appeal. At the hearing, Tillman testified that she accepted the transfer of many of Meade's duties and began unusually short training periods for the remainder. In particular, she accepted Meade's responsibilities for Board of Claims cases under \$1,000.00 in February 2003 and liability insurance claims in June 2003. By July 2003, she had accepted almost all of Meade's duties while, at the same time, continuing to perform her own Administrative Specialist duties. She had also accepted responsibilities pertaining to the MARS System, 13B hearings and some workers' compensation claims. In June 2003, she also assumed Susan Davis' duties as an agency records officer.

Tillman also testified to her belief that Foley took away her new responsibilities in retaliation for her requesting a reclassification and subsequently filing an appeal when it was denied. She advised the hearing officer that she wanted these duties restored and that she wanted a position audit ordered to determine if she should be reclassified as an Executive Staff Advisor.

Also testifying on Tillman's behalf was Todd Shipp, Deputy General Counsel of the Transportation Cabinet's Office of General Counsel and Legislative Affairs. Shipp indicated that he thought the assignment of Meade's duties to Tillman was permanent and encouraged her to seek a reclassification. As Tillman's supervisor, he had worked with her to redefine her duties and responsibilities for 2003 evaluation purposes, but his description of them had been changed.

Foley was the first person to testify on behalf of the Office of General Counsel. She indicated that, because of several retirements, a decision was made to reorganize and cross-train the remaining employees, including Tillman. According to Foley, Tillman was cross-trained by being assigned many of Meade's duties, which were then reassigned to other Administrative Specialists. Foley denied that she intended to permanently assign Meade's duties to Tillman or that she ever considered recommending her for the position of Executive Staff

Advisor. She also testified that, as a result of the reorganization that would occur, no one was promoted or reclassified and no one filled Meade's position. Foley did admit that she told Tillman that Meade's duties would be transferred to her in a "program pretty much by yourself," and that she might receive a separate office, but she also indicated that she told her that reclassification would not occur. Foley finally testified that, while Meade held the position of Executive Staff Advisor, her duties and responsibilities had devolved after the former General Counsel left the office and she thereafter no longer functioned as an Executive Staff Advisor. Meade apparently even tendered a suggestion that the position be abolished.

Next to testify on behalf of the Office of General Counsel was Betty Hawkins, the Director of the Transportation Cabinet's Division of Personnel Services. Hawkins testified that she reviewed the class specifications for the position of Executive Staff Advisor and compared them to the duties done by Tillman after she had assumed Meade's responsibilities. She concluded that Tillman's duties did not correspond to the characteristics of the position because an Executive Staff Advisor is supposed to provide administrative support services to a department head, a cabinet head, or an executive director. According to Hawkins, as Tillman did not report to an agency

head or an executive director, she did not meet the characteristics required to be an Executive Staff Advisor.

In his Findings of Fact, the hearing officer concluded that Foley had assigned Tillman most of the duties previously performed by Meade and that the assignment was initially expected to be permanent; however, the officer believed that a reclassification of Tillman's position to the title of Executive Staff Advisor was never intended and that Foley did not believe that applicable regulations supported a classification. The officer also concluded that Foley's failure to inform Tillman of the plans to reorganize the office and cross-train all remaining employees misled Tillman, and also that the wholesale assignment of Meade's responsibilities to Tillman and the discussion of plans for a private office fed her expectations of promotion and reclassification.

However, the hearing officer also found that the duties claimed as a justification for reclassification "cannot be rationalized as fitting into or comparing with the characteristics of the class of the position of Executive Staff Advisor." As the officer explained: "An Executive Staff Advisor has a high level of responsibility and discretion in reporting to a department head, a cabinet head or an executive director. The reporting function is the *sine quo non* (sic) of an Executive Staff Advisor. Meade's level of discretion and responsibility

had also devolved so that she no longer, in 2003, performed at that high level."

Consequently, the hearing officer found in his Conclusions of Law that the duties transferred from Meade to Tillman "are not those of similar kind and quality expected to be performed by an Executive Staff Advisor. They were manifestly of a lower level of discretion and responsibility." The officer further found that the assignment of Meade's duties to Tillman "was a proper exercise of the authority given Foley to 'add to' and 'alter' the duties and responsibilities of the position, in this case the position of Administrative Specialist III" and concluded that the "newly assigned duties and responsibilities were of similar kind and quality to those that [Tillman] was performing as an Administrative Specialist III." Accordingly, the hearing officer rejected Tillman's appeal and ordered it to be dismissed.

On March 15, 2004, the Personnel Board entered a Final Order sustaining and adopting the hearing officer's "Findings of Fact, Conclusions of Law and Recommended Order," with a number of minor exceptions. Tillman's appeal was consequently dismissed.

On April 14, 2004, Tillman filed a petition in Franklin Circuit Court, pursuant to KRS² 13B.140 and 18A.100, appealing the final order of the Personnel Board. Following briefing, the circuit court entered an Order and Opinion on November 9, 2004 finding in Tillman's favor. The circuit court concluded that the hearing officer had found that Tillman's job duties had changed in a material and permanent way once most of Meade's duties were transferred to her. Accordingly, the court held that "Foley had no discretion to deny timely filing to the appointing authority a description of the duties and responsibilities (audit request) assigned to Tillman and her request for classification." The court further found that "the appointing authority, Ms. Hawkins, who reviewed Tillman's job duties and responsibilities, erred in her determination that Tillman's duties had not materialized in a permanent way so as to require reclassification as an Executive Staff Advisor." Consequently, the court held that the Personnel Board's decision was erroneous as a matter of law and that Tillman's appeal was incorrectly denied.

Regarding the correct remedy, the court held:

[T]he appropriate remedy is for Tillman to be compensated for the salary difference of what she was actually paid during the time period in which she experienced a permanent and material change in her job

² Kentucky Revised Statutes.

responsibilities and what she would have been compensated for that same time period, if she had correctly been reclassified as an Executive Staff Advisor.

The court also indicated that it would not order that Tillman be given back those responsibilities that had been taken from her or that she be retroactively reclassified as an Executive Staff Advisor as of July 1, 2003. However, on December 22, 2004, the circuit court entered an Order and Opinion amending its judgment as to the appropriate remedy for Tillman as follows:

However, upon review of the regulatory language, this Court agrees that the appropriate remedy is for Tillman to receive the greater of five (5) percent for each grade, from Administrative Assistant III to Executive Staff Advisor, or the new grade minimum for Executive Staff Advisor. In addition, consistent with the language of 101 KAR 2:034 section 3(3)(b), Tillman will continue to receive this increase in salary, despite the fact that most of Meade's former job duties as Executive Staff Advisor that were assigned to Tillman, have since been reduced or reallocated to others in response to Department reorganization.

This appeal followed.

"[T]he function of the court in an appeal from an administrative agency is to ensure that the agency did not act arbitrarily and that its decision is based on substantial evidence in the record and that the agency did not apply the wrong rule of law." Kentucky Retirement Systems v. Heavrin, 172 S.W.3d 808, 814 (Ky.App. 2005). Substantial evidence is that

which "when taken alone or in light of all the evidence has sufficient probative value to induce conviction in the minds of reasonable men." Kentucky State Racing Commission v. Fuller, 481 S.W.2d 298, 308 (Ky. 1972). "When substantial evidence exists in the record to support an administrative agency's action, the circuit court has no authority to overturn it." Jones v. Cabinet for Human Resources, 710 S.W.2d 862, 866 (Ky.App. 1986). "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." Aubrey v. Office of Attorney General, 994 S.W.2d 516, 519 (Ky.App. 1998). Indeed, as an appellate court we may not substitute our opinion as to the weight of the evidence given by the agency in question. See New v. Commonwealth, 156 S.W.3d 769, 772 (Ky.App. 2005).

If it is established that the agency's factual findings are supported by substantial evidence, then "[t]he duty of the court is to determine whether the agency misapplied the correct rule of law to the facts as found." Kosmos Cement Co., Inc. v. Haney, 698 S.W.2d 819, 820 (Ky. 1985). We are "authorized to review issues of law on a de novo basis." Aubrey, 994 S.W.2d at 519. If we find that "the correct rule of law was applied to facts supported by substantial evidence, the

final order of the agency must be affirmed." Commonwealth, Cabinet for Human Resources v. Bridewell, 62 S.W.3d 370, 373 (Ky. 2001).

Both the Personnel Board and the circuit court agree that the record supports the hearing officer's factual findings that most of Meade's duties were transferred to Tillman, and that the duties were initially expected to be permanently assigned to her. We similarly believe that these facts are supported by substantial evidence. Where the Board and the court disagree, however, is on the issue of whether the assignment of these duties merited a reclassification. Tillman, of course, contends that they do, relying on 101 KAR 2:020 Section 1(6), which provides:

Position descriptions shall state, in detail, the duties and responsibilities assigned to an individual position. If the duties and responsibilities assigned to a position are to be changed in a material and permanent way, the supervisor making the recommendation shall timely submit to the appointing authority for the agency a position description, stating the duties and responsibilities to be assigned. If the appointing authority approves the material and permanent assignment of the duties and responsibilities, the new position description shall be forwarded to the secretary with the appointing authority's recommendation for reclassification.³

³ This provision was promulgated in accordance with KRS 18A.005(29), which defines "reclassification" as "the change in the classification of an employee when a material and permanent change in the duties or responsibilities of that employee occurs."

As noted above, Patricia Foley, the acting Executive Director of Tillman's division, failed to submit Tillman's request for reclassification; however, Betty Hawkins, the Director of the Transportation Cabinet's Division of Personnel Services, and Foley both expressed their belief that Tillman's duties were not at the level of the Executive Staff Advisor position, and - accordingly - submission of her reclassification request was unnecessary.

The Board (via the hearing officer) concluded that "the duties performed by [Tillman], and used as a justification for reclassification, cannot be rationalized as fitting into or comparing with the characteristics of the class of the position of Executive Staff Advisor." The Board justified its reasoning by noting: "An Executive Staff Advisor has a high level of responsibility and discretion in reporting to a department head, a cabinet head or an executive director. The reporting function is the *sine quo non* (sic) of an Executive Staff Advisor." Consequently, as Tillman did not report to a department head, a cabinet head, or an executive director, she did not have the level of discretion and responsibility required by the position. In effect, while the hearing officer and the Board seemed to agree that the duties assigned to Tillman from Meade were "permanent," they did not agree that those duties differed in such a "material" way from the ones she was already performing

so as to merit a reclassification. The circuit court disagreed with this conclusion, finding that Tillman's duty changes were permanent and material and mandated her reclassification to the position of Executive Staff Advisor.

The hearing officer concluded - and we agree - that the question of whether the duties transferred to Tillman should result in reclassification is a mixed question of law and fact. Such questions are subject to judicial review and we may accordingly substitute our judgment for an agency's ruling, especially if that ruling was based on an incorrect view of the law. See Mill Street Church of Christ v. Hogan, 785 S.W.2d 263, 266 (Ky.App. 1990).

Of particular relevance to our consideration here is 101 KAR 2:020, which gives directions to the Personnel Cabinet as to the creation of job class specifications and the duties and responsibilities assigned to a position within a job class. 101 KAR 2:020 Section 1(2) provides:

Class specifications shall indicate the kinds of positions to be allocated to the various job classifications as determined by their characteristics and duties or responsibilities. Characteristics and duties or responsibilities of a class shall be general statements indicating the level of responsibility and discretion of positions in that job classification.

This specific provision is of particular note because the hearing officer and the Personnel Board concluded that Tillman

was not entitled to reclassification because the new duties that she was assigned did not encompass the level of responsibility and discretion afforded to the Executive Staff Advisor position. Accordingly, it becomes useful to examine the class specifications for the positions of "Executive Staff Advisor" and "Administrative Specialist III" to determine if Tillman's new duties are consistent with one classification or the other.

101 KAR 2:020 Section 1(1) sets forth that "[c]lass specifications shall describe and explain the job duties and responsibilities typically assigned to a position within a particular class." The class specification for the position of "Executive Staff Advisor" describes its primary class characteristic as follows: "Provides administrative support services to department head, cabinet head or executive director and provides technical management assistance to all organizational units within the agency; and performs other duties as required." The specification further provides the following examples of duties or responsibilities of the classification:

Reviews programs and management issues that cross division lines and makes a recommendation or reports to department head or cabinet head. Prepares briefing materials for department head or cabinet head to use in meetings within and outside of the agency. Reviews, analyzes, writes and monitors correspondence imminating (sic) from the office of the department head or

cabinet head for accuracy and conformity with policies and procedures. Provides technical assistance to all organizational units on matters dealing with the administration of all operational regulations, policies and procedures. Evaluates routine, special and technical reports to monitor efforts to increase efficiency and effectiveness of agency activities. Acts as liaison between department head or cabinet head and other organizations. Serves as agency records officer. Synthesizes data from all organizational units as well as from statutes and federal regulations to develop and recommend establishment or modification of policies and procedures. Attends professional meetings and in-service training sessions to update staff on policies and procedures.

In contrast, the class specification for the job title of "Administrative Specialist III" describes its primary class characteristic as follows: "Provides professional support to the division head, office or unit in developing, implementing and maintaining various complex programs, projects or activities; may supervise subordinate employees; and performs other duties as required." The specification further provides the following examples of duties or responsibilities of the classification:

Executes functions as they affect the programs of numerous and complex organizational segments for the evaluation and improvement of such programs. Plans, organizes, supervises and checks the work of employees engaged in performing administrative functions. Supervises and recommends policy regarding research studies to be initiated in connection with compiling complex interpretive reports and summaries

of statistical information. Recommends policy and determinations on fiscal, personnel and budgetary matters. Writes departmental annual reports. Interprets departmental policy to the public and departmental employees.

In the June 30, 2003 letter in which she requested an audit of her position, Tillman included a list of the responsibilities that she had been assigned from Karen Meade. According to this list, Tillman was assigned a number of duties pertaining to Board of Claims cases under \$1000.00, including the following: writing and mailing investigation requests; tracking Board of Claims deadlines; notifying attorneys of answer deadlines; reviewing, writing, and monitoring Board of Claims correspondence for accuracy and conformity with policies and procedures, with certain correspondence requiring the review and approval of attorneys; and faxing correspondence to the Board of Claims. Tillman was also assigned duties pertaining to liability insurance claims, including the following: faxing claims to the appropriate division with an inquiry form and investigation request; when a response is received, sending a denial letter to the claimant or assigning a claim number and notifying the applicable insurance company; and updating the database when information is received from the insurance company.

Upon much deliberation, we do not believe that the aforementioned duties differ in such a "material" way from Tillman's duties as an Administrative Specialist III so as to merit her reclassification to an Executive Staff Advisor. Indeed, we feel such duties are in accordance with the general administrative requirements of her current position, and that their assignment to Tillman was consistent with 101 KAR 2:020 Section 1(4), which allows for the "assignment of other duties and responsibilities not mentioned which are of similar kind or quality." Moreover, we agree with the hearing officer that - while these tasks might have previously been performed by Meade in her capacity as Executive Staff Advisor - they do not fit within the "high level of responsibility and discretion" that is anticipated by the "Executive Staff Advisor" job class description. Consequently, we do not believe that a reclassification was required in this case and conclude that the decision of the Personnel Board should be upheld.

Accordingly, we reverse the decision of the Franklin Circuit Court and remand for reinstatement of the Personnel Board's Final Order.

KNOPF, JUDGE, CONCURS.

BARBER, JUDGE, DISSENTS.

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