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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001822-MR

DEPARTMENT OF REVENUE, FINANCE
AND ADMINISTRATION CABINET; AND
JONATHAN MILLER, APPOINTING AUTHORITY

APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NOS. 06-CI-00821, 06-CI-00870, 07-CI-00024

WANDA FAYE WADE; AND PERSONNEL
BOARD, COMMONWEALTH OF KENTUCKY

APPELLEES

OPINION AFFIRMING

** ** * * *

BEFORE: DIXON AND WINE, JUDGES; HENRY,¹ SENIOR JUDGE.

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580. Senior Judge Henry concurred in this opinion prior to the expiration of his term of senior judge service. Release of the opinion was delayed by administrative handling.

DIXON, JUDGE: The Finance and Administration Cabinet appeals from an order of the Franklin Circuit Court affirming two opinions rendered by the Kentucky Personnel Board in favor of Wanda Faye Wade, an employee of the Cabinet. We affirm.

In its August 12, 2008, opinion, the Franklin Circuit Court set forth the facts of this case as follows:

This case involves three separate appeals to the Franklin Circuit Court from final orders of the Personnel Board. Ms. Wade was a career employee at the time of her dismissal from employment with the Finance and Administration Cabinet, Department of Revenue (Cabinet). Ms. Wade was notified of the Cabinet's intent to dismiss her in a letter dated February 14, 2005. Pursuant to the requirements of KRS 18A.095, Ms. Wade was advised in the pre-termination letter that she had five (5) days from the date the letter was received to request a pre-termination hearing. Ms. Wade's attorney, Mr. Dave Emerson[,] contacted the Cabinet's Human Resource director in a timely manner and the pre-termination hearing was scheduled for February 23, 2005. Before the pre-termination hearing was to take place, Mr. Emerson contacted Cabinet's Counsel by telephone to postpone the pre-termination hearing.

Mr. Emerson advised Cabinet Counsel that Ms. Wade had been injured and was physically incapable of attending the scheduled hearing. Mr. Emerson explained that Ms. Wade was scheduled to visit her specialist on March 8, 2005, and after that visit, he would be in a better position to determine when the pre-termination hearing could be rescheduled. Cabinet Counsel agreed to postpone and reschedule the pre-termination hearing, on the condition that Mr. Emerson contact her no later than March 9, 2005, to reschedule the pre-termination hearing.

Having received no call from Mr. Emerson on the afternoon of March 9, 2005, counsel called Mr. Emerson to schedule the pre-termination hearing. Cabinet Counsel then received a fax from Ms. Wade requesting ninety days of Family Medical Leave, claiming that she was too physically ill to appear for work or a pre-termination hearing. Cabinet Counsel advised Mr. Emerson that the Family

Medical Leave would not be approved and that if the pre-termination hearing was not rescheduled, the termination letter would be issued.

The following day, the Cabinet issued notice of termination to Ms. Wade, effective at the close of business on March 10, 2005. In that notice of termination, Ms. Wade was advised that she was considered to have waived her right to a pre-termination hearing and that she was dismissed for cause as required by the provisions of 101 KAR 1:345.

Soon thereafter, Ms. Wade found new counsel and filed a timely appeal to the Personnel Board, asserting that she had been improperly terminated. Ms. Wade claimed that she had not been given the opportunity for a pre-termination hearing as required in KRS 18A.095, and as a matter of law, her appeal should be sustained and her dismissal set aside. A hearing on this issue was held before a Hearing Officer on September 19, 2005.

In Personnel Board Appeal No. 2005-120, the Board ruled as a matter of law that Ms. Wade was not given a pre-termination hearing and, therefore, her dismissal by letter dated March 10, 2005 was improper, illegal and violated her rights. The Board found that she had not waived her Merit System rights to a pre-termination hearing. However, the Board did believe that there had to be a determination as to what relief she was entitled to. Accordingly, a hearing was held [on February 16, 2006,] to determine the remedy for Ms. Wade. The Board concluded that, while she was entitled to back pay, it was not to include back pay for the period of March 10, 2005 to June 9, 2005. The Board then concluded that she was entitled to receive her pay through January 11, 2006.

The final order was appealed to this Court by both Ms. Wade and the Department of Revenue. Ms. Wade's appeal was solely for full back pay for the period of March 10, 2005 to January 11, 2006. The Department of Revenue contended that the Board's order was incorrect as to Ms. Wade's pre-termination hearing and the dismissal was proper.

Ms. Wade was advised in a letter dated January 6, 2006, that she was to report to work on January 11, 2006. On January 11, 2006, Ms. Wade called Ms. Bonnie Waldrige, and advised her that she was not going to report to work and that any further questions should be directed to her attorney. Ms. Wade failed to report to work or to call

in for ten consecutive work days. On January 11, 2006, the Cabinet also reissued the intent to dismiss letter to Ms. Wade. As with the first notice, Ms. Wade was advised of her right to a pre-termination hearing. Pursuant to the provisions of 101 KAR 2:102, §9(3), the Cabinet advised Ms. Wade in writing on January 27, 2006, that she was considered to have resigned her position. The Cabinet, having not received a request for a pre-termination hearing, reissued the dismissal letter, effective January 27, 2006, finding that there was sufficient cause to support Ms. Wade's dismissal. Ms. Wade also appealed these actions in Personnel Board Appeal No. 2006-128.

The Board ruled as a matter of law that the Department of Revenue could not unilaterally reinstate an employee whom it had terminated without a resolution of the first appeal. The Board's final order did result in an order of reinstatement as of January 11, 2006 with her full back pay as of that date, and ordered that she otherwise be made whole. The Department of Revenue appealed the Board's final order.

The Franklin Circuit Court upheld the Board's finding that Wade did not waive her right to a pre-termination hearing and that the Cabinet acted improperly by terminating her employment without a hearing. As to the second appeal by the Cabinet, regarding Wade's reinstatement, the court upheld the Board's finding that the Cabinet acted without authority by reinstating and then terminating Wade's employment in January 2006. Finally, the court also upheld the Board's decision regarding Wade's back pay.

On appeal, the Cabinet raises the same arguments as it did before the Board and the circuit court. First, the Cabinet asserts that Wade's March 2005 termination was proper because she waived her right to a pre-termination hearing. Secondly, the Cabinet contends that the subsequent reinstatement and termination of Wade in January 2006 was permissible.

When this Court reviews an administrative decision, “if there is substantial evidence in the record to support an agency's findings, the findings will be upheld, even though there may be conflicting evidence in the record.” *Kentucky Comm’n on Human Rights v. Fraser*, 625 S.W.2d 852, 856 (Ky. 1981) (citation omitted). “In weighing the substantiality of the evidence supporting an agency's decision, a reviewing court must hold fast to the guiding principle that the trier of facts is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses appearing before it.” *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406, 409-10 (Ky. App. 1994) (citation omitted). If substantial evidence supports the agency’s decision, “the reviewing court must then determine whether the agency applied the correct rule of law to its factual findings.” *Id.* at 410 (citation and internal quotation marks omitted).

The Cabinet’s first argument relates to the termination of Wade’s employment in March 2005. The Cabinet asserts that the evidence clearly supported a finding that Wade waived her statutory right to a pre-termination hearing before the head of the Cabinet. KRS 18A.095(4). The Cabinet insists that Wade’s conduct constituted a waiver because her attorney improperly sought to postpone the pre-termination hearing to avoid “what she likely perceived to be inevitable termination.” (Appellant’s Brief at 13).

At the hearing before the Board, counsel for both parties testified regarding the circumstances of Wade’s request to postpone the pre-termination hearing. The Board weighed the conflicting evidence, noting that the conversation between the

attorneys “was fraught with ambiguity and misunderstanding.” The Board concluded that, while Wade sought to delay the hearing, she did not knowingly waive her right to the pre-termination hearing by seeking a postponement.

As noted by the Board, “The essential requirements of due process . . . are notice and an opportunity to respond.” *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). The Board cited *D. H. Overmyer Co., Inc., of Ohio v. Frick Co.*, 405 U.S. 174, 185-86, 92 S. Ct. 775, 31 L. Ed. 2d 124 (1972), in concluding that waiver of the right to a pre-termination hearing must “be voluntary, knowing, and intelligently made.” The Board further stated that the Cabinet could “not presume acquiescence in the loss of fundamental rights.” *Ohio Bell Tel. Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292, 307, 57 S. Ct. 724, 81 L. Ed. 1093 (1937).

Although the Cabinet disputes the judgment of the Board regarding the credibility of the evidence, there is substantial evidence to support the Board’s finding that Wade did not waive her right to a pre-termination hearing. While the Cabinet characterizes Wade’s attempt at postponing the hearing as improper, the Cabinet was without authority to dispense with the “minimal requirement” of a hearing in the interest of “convenience or expediency, or because of a natural desire to be rid of harassing delay[.]” *Id.* at 305. We are mindful that the pre-termination hearing “need not be elaborate” to satisfy due process. *Loudermill*, 470 U.S. at 545. However, in the case at bar, the Cabinet’s action deprived Wade of a fundamental right, “[t]he opportunity to present reasons, either in person or in

writing, why proposed action should not be taken” *Id.* at 546. After careful review, we conclude that substantial evidence supported the Board’s findings, and the Board correctly applied the law.

Next, we address the Cabinet’s argument regarding Wade’s reinstatement and subsequent termination in January 2006. On December 2, 2005, the Cabinet filed a motion with the Board requesting an order reinstating Wade to her former position. The Board denied the motion to reinstate Wade because her appeal was still pending at that time. Thereafter, the Cabinet notified Wade to report to work on January 11, 2006. When Wade failed to report to work, the Cabinet began the termination process anew. Wade appealed this second termination, and the Board concluded the Cabinet had acted without authority by unilaterally reinstating Wade to her former position “while continuing to support her dismissal” in the then-pending first appeal. The Board pointed out that KRS 18A.005(34) defines “reinstatement” as the restoration of employment pursuant to a Board order or a court order.

On appeal, the Cabinet asserts that it properly reinstated Wade’s employment in order to mitigate its damages and carry out the implicit mandate of the Board’s interim order that found the March 2005 termination improper. We disagree.

KRS 18A.095(22) delineates the remedies available to the Board upon the resolution of an appeal, and the statute provides for the Board to order reinstatement of employment if appropriate. KRS 18A.095(22)(b). That this is an

accurate assessment of the law is evidenced by the fact that the Cabinet initially, though unsuccessfully, moved the Board to order Wade's reinstatement in December 2005. Indeed, the Cabinet has not cited any law granting it the authority to unilaterally reinstate a terminated employee during the appeal process.

After careful review, we agree with the Board's conclusion that the Cabinet simply did not have the authority to reinstate Wade's employment without an order from the Board. As the Board's findings and conclusions were properly supported by the evidence, we find no error in the Board's decision.

Finally, the Cabinet raises a third argument relating to the sufficiency of the evidence regarding Wade's physical condition. Because we believe the Board's findings were supported by substantial evidence, we decline to address this argument.

For the reasons stated herein, the judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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