

RENDERED: AUGUST 2, 2013; 10:00 A.M.  
TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2011-CA-000750-MR

DEPARTMENT OF KENTUCKY STATE  
POLICE; COMMISSIONER RODNEY BREWER;  
CAPTAIN JAMES D. PEARMAN; LIEUTENANT  
JONATHAN BLEVINS; SERGEANT MICHAEL  
SIMPSON; OFFICER JAMES MEDLEY;  
SERGEANT GREG HARTLE; DETECTIVE  
JAMES W. ADKINS; AND DETECTIVE  
HENRY NUNN

APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE THOMAS D. WINGATE, JUDGE  
ACTION NO. 10-CI-01749

CHARLES GARLAND AND  
KENTUCKY PERSONNEL BOARD

APPELLEES

OPINION  
REVERSING AND REMANDING

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BEFORE: MAZE, MOORE, AND VANMETER, JUDGES.

VANMETER, JUDGE: The Department of Kentucky State Police (“KSP”) and members of the KSP Trial Board,<sup>1</sup> appeal from the March 25, 2011, Order of the Franklin Circuit Court which vacated the Final Order of the Trial Board and remanded the case to the Kentucky Personnel Board to conduct an administrative proceeding pursuant to KRS<sup>2</sup> 18A.095 regarding the KSP’s intent to terminate the employment of Charles Garland. For the following reasons, we reverse the Franklin Circuit Court’s Order and remand the matter to that court with directions to conduct a review of the Trial Board’s order in accordance with KRS 16.193 as expeditiously as possible.<sup>3</sup>

This action arises from the involuntary termination of Garland’s employment as a sworn law enforcement officer with the Commercial Vehicle Enforcement (“CVE”) Division of the KSP. Garland was previously employed by the Department of Kentucky Vehicle Enforcement (“KVE Department”) which was established as a separate department within the Justice and Public Safety Cabinet (“Cabinet”) per the now-repealed KRS 15A.370(1). Employees of the KVE Department were considered state merit employees of the Cabinet and any disciplinary action brought against such an employee was to be conducted pursuant

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<sup>1</sup> Commissioner Rodney Brewer, Captain James D. Pearman, Lieutenant Jonathan Blevins, Sergeant Michael Simpson, Officer James A. Medley, Sergeant Greg Hartle, Detective James W. Adkins, and Detective Henry Nunn.

<sup>2</sup> Kentucky Revised Statutes.

<sup>3</sup> We note that this appeal has been delayed due to this Court’s granting of leave for KSP to cite supplemental authority, our reassignment of the appeal upon the former presiding Judge’s retirement, and our denial of Garland’s motion to consolidate the appeal. Due to this delay, the Franklin Circuit Court should review the Trial Board’s order as soon as possible.

to KRS 18A.095. On June 25, 2009, the General Assembly enacted KRS 16.186, *et seq.*, which created the CVE Division within the KSP. Contemporaneously, KRS 15A.370 was repealed. 2009 Ky. Laws Ch. 75 § 22. This legislative enactment effectively reclassified employees of the KVE Department as officers within the CVE Division of the KSP.

On May 23, 2010, Garland pursued a vehicle reported as stolen and arrested the driver. Four days later, Garland's superior, Captain Charles Marcum, filed an administrative complaint against him with the Office of Internal Affairs regarding his conduct during the arrest. On June 16, 2010, Garland was formally informed by letter from the KSP of the reclassification of his employment. Following an investigation by Internal Affairs, on August 23, 2010, the KSP notified Garland of its intent to terminate his employment. On September 8, 2010, Garland responded to the notice and requested administrative proceedings in accordance with KRS Chapter 18A. The KSP did not respond, and Garland's termination became effective as of the August 23 notice. On November 1, 2010, the Trial Board held a full hearing regarding KSP's intent to terminate Garland, after which it affirmed the termination by a final order.

Garland appealed to the Franklin Circuit Court alleging that he was denied due process during the KSP's administrative proceedings resulting in his termination; in particular, that he was denied a pretermination hearing under KRS Chapter 18A. Garland also sought a declaration of rights that he should have been

afforded administrative proceedings under KRS 18A.095, rather than those provided for under KRS 16.192.

The circuit court agreed with Garland, reasoning that due to his reclassification from an employee protected under KRS 18A.095 to an employee under KRS 16.192, Garland lost his right to a pretermination hearing. The court found that this loss effectively amounted to the loss of a fundamental right, and as such, Garland was entitled to notice of the loss of that right before the administrative action was initiated against him. Since Garland did not receive notice of his reclassification until June 16, 2010, after the administrative proceeding was initiated, the court determined that the denial of his right to a pretermination hearing before the Personnel Board was arbitrary. The court, citing *Commonwealth of Kentucky, Cabinet for Human Res. v. Bridewell*, 62 S.W.3d 370, 373 (Ky. 2001), held that it “can look past technical classifications and prevent [an agency] from arbitrarily denying employees’ rights and benefits to which they are entitled under a specific fact pattern.” Based on the above reasoning, the court vacated the KSP’s Final Order and remanded the matter to the Personnel Board with instructions to conduct an administrative proceeding pursuant to KRS 18A.095. This appeal followed.

Appellants argue the court erred by finding the KSP acted arbitrarily by not affording Garland a pretermination hearing in accordance with KRS 18A.095. We agree.<sup>4</sup>

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<sup>4</sup> As noted by Garland, Appellants did not refer to specific pages of the record in either the “Statement of the Case” section or the “Argument” section in their brief as required by Kentucky

Typically, judicial review of an administrative action is concerned with whether the agency action was arbitrary. *Bd. of Comm'rs of City of Danville v. Davis*, 238 S.W.3d 132, 135 (Ky. App. 2007) (citation omitted). Indeed, state agencies may not exercise arbitrary power over the lives, liberty and property of citizens of the Commonwealth. Kentucky Constitution Section 2. Arbitrariness may arise when an agency: (1) takes an action in excess of granted powers, (2) fails to afford a party procedural due process, or (3) makes a determination not supported by substantial evidence. *Hilltop Basic Res., Inc. v. County of Boone*, 180 S.W.3d 464, 467 (Ky. 2005) (citation omitted). We defer to an agency's factual findings that are supported by substantial evidence, but review whether the agency correctly applied the law under a *de novo* standard of review. *Davis*, 238 S.W.3d at 135 (citation omitted).

We do not find the KSP acted arbitrarily by proceeding under KRS 16.192 to carry out the investigation of the claims made against Garland and effectuate his termination. Garland was provided notice of the KSP's intent to terminate his employment on August 23, 2010, some two months after he was given notice of his reclassification on June 16, 2010. Notice of Garland's reclassification was only pertinent with respect to the change in his rights upon the agency's informing him

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Rules of Civil Procedure (CR) 76.12(4)(c)(iv) and (v). Our options in the face of a procedurally defective brief are: "(1) to ignore the deficiency and proceed with the review; (2) to strike the brief or its offending portions, CR 76.12(8)(a); or (3) to review the issues raised in the brief for manifest injustice only, *Elwell v. Stone*, 799 S.W.2d 46, 47 (Ky. App. 1990)." *Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010). Despite these deficiencies, Appellants' brief permits us to grant meaningful review. The facts are not in dispute, and thus we were only tasked with review of the legal issues. As a result, our review does not heavily rely on specific references to the record.

of its intended disciplinary action. Furthermore, the incident that led to the charges against Garland occurred after the effective date of the statute which created the CVE Division within the KSP. Therefore, Garland was an employee of the KSP at all times relevant to the administrative action, and was given notice of the reclassification prior to his rights being triggered under KRS 16.192. As a result, we do not find the KSP acted arbitrarily by pursuing the administrative action against Garland per KRS 16.192 since that statute effectively applied to his employment at the time of the incident, and at the time of his termination.

The Order of the Franklin Circuit Court is reversed, and this case is remanded to that court with directions to review the Trial Board's order in accordance with KRS 16.193 as expeditiously as possible.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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