

RENDERED: OCTOBER 12, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000867-MR

RICHARD DARYL HARDIN

APPELLANT

v. APPEAL FROM NELSON CIRCUIT COURT
HONORABLE CHARLES C. SIMMS, III, JUDGE
ACTION NO. 10-CI-00705

NELSON COUNTY SCHOOLS and
NELSON COUNTY BOARD OF EDUCATION

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON AND VANMETER, JUDGES; LAMBERT,¹ SENIOR
JUDGE.

VANMETER, JUDGE: Appellant, Richard Daryl Hardin, appeals from an order
affirming an administrative decision to terminate Hardin's employment for cause.

Hardin argues that: (1) the results of an alcohol breathalyzer test were admitted

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

into evidence without a proper foundation; and (2) the evidence compelled a finding that Hardin's medical condition rendered the breathalyzer results unreliable. We affirm.

Hardin was employed as a school bus driver by the Nelson County Board of Education. Following the completion of the morning route on February 22, 2010, Hardin was administered a random alcohol breath test by Lessa O'Banion. O'Banion is employed by Forward Edge Associates, a private testing company located in Frankfort, Kentucky. O'Banion has been certified to perform alcohol breath testing by the Department of Transportation since 1995. O'Banion administered an Intoximeter EBT 4 breath test upon Hardin with a resulting reading of .069. O'Banion then informed Hardin that he should not eat or drink or burp so as not to affect the subsequent confirmation test.

Standard procedure for alcohol testing requires the administrator to observe the subject for fifteen minutes between the initial positive test and the confirmation test to rule out the presence of any residual alcohol. O'Banion left the presence of Hardin to retrieve additional equipment for the confirmation test and when she returned she observed him for ten minutes before administering the confirmation test. The confirmation test resulted in reading of .063.

Todd Sanders, Director of Transportation for the Nelson County School System, was informed of the results of Hardin's breathalyzer tests. Sanders met with Hardin that morning and stated that he observed Hardin was a bit

disoriented, slurring his speech, and had glossy eyes. Janice Lantz, Superintendent of the Nelson County School System, also met with Hardin and also observed Hardin slurring his speech and that his eyes were bloodshot. On February 23, 2010, the Superintendent terminated Hardin's employment pursuant to KRS 161.011(7) and Nelson County School Board Policy 3.27.

Hardin appealed the termination of his employment to the Kentucky Board of Education. The Board affirmed in the termination in a decision entered on July 9, 2010. Hardin then appealed the decision to the Nelson Circuit Court. The Kentucky Board of Education was dismissed as a party by an agreed order entered on September 15, 2010. On April 26, 2011, the trial court entered an order affirming the decision of the Board. This appeal followed.

Hardin first argues that the results of the breathalyzer test were admitted into evidence without a proper foundation. Hardin concedes that the alleged error was not properly preserved for review, but requests review under the palpable error standard pursuant to RCr 10.26 and CR 61.02.

Hardin argues that the standards set forth in *Commonwealth v. Roberts*, 122 S.W.3d 524 (Ky. 2003) should be applied to administrative proceedings. In *Roberts*, the Court applied the evidentiary foundation requirements in the context of a criminal prosecution. We agree with the trial court that *Roberts* is inapplicable to the present case. Further, we are cited to no authority justifying the application of the more stringent criminal evidentiary procedures to administrative proceedings which are governed by a preponderance

of the evidence standard. *See Drummond v. Todd County Bd. of Educ.*, 349 S.W.3d 316, 323 (Ky.App. 2011). We discern no manifest injustice.

Next, Hardin argues that the testimony of Dr. Fredericka Lockett compelled a finding that the results of the breathalyzer test were inaccurate. We disagree.

An appellate court may reverse such a finding only if it was unsupported by substantial evidence. KRS 13B.150(2)(c). “Where the fact-finder's decision is to deny relief to the party with the burden of proof or persuasion, the issue on appeal is whether the evidence in that party's favor is so compelling that no reasonable person could have failed to be persuaded by it.” *McManus v. Kentucky Ret. Sys.*, 124 S.W.3d 454, 458 (Ky.App. 2003).

Dr. Lockett testified that Hardin suffers from gastro-esophageal reflux disease and that an attack prior to a breathalyzer test can cause a false reading. However, Hardin ignores substantial evidence in the record to the contrary. There was testimony indicating that reflux disease would only affect the breathalyzer test if alcohol was still in Hardin’s stomach and that alcohol passes from the stomach to the small intestine within four hours. This evidence contradicted Hardin’s claim that he last consumed alcohol twelve hours before the test. Further, Director Sanders and Superintendent Lantz both provided evidence that Hardin was under the influence of alcohol. We cannot conclude that the evidence compelled a finding in Hardin’s favor.

Therefore, the order of the Nelson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Larry D. Raikes
Bardstown, Kentucky

BRIEF FOR APPELLEE:

Arch C. McKay, III
Bardstown, Kentucky