RENDERED: AUGUST 23, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000847-MR

WILLIS L. WILSON APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 10-CI-00313

LOGAN ASKEW; LOGAN ASKEW, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF LAW OF THE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT; LESLYE BOWMAN; LESLYE BOWMAN, IN HER OFFICIAL CAPACITY AS DIRECTOR OF LITIGATION IN THE DEPARTMENT OF LAW OF THE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT; AND LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, COMBS AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Willis L. Wilson appeals the circuit court's order affirming the Civil Service Commission's order sustaining his dismissal from employment with the Lexington-Fayette Urban County Government (LFUCG). Because the Civil Service Commission (CSC) failed to make factual findings supporting its decision, we reverse and remand.

Wilson was originally employed as a contract specialist by the LFUCG's Division of Risk Management located in the Department of Law. Employees within the Division of Risk Management were aware that this division was to be divided into two parts. Wilson asked that his position be reclassified as an Attorney Senior position; he received this classification and began receiving assignments from the Department of Law. Later, when the Division of Risk Management was divided, the portion of the division involved with litigation was absorbed by the Department of Law while the other portion of the division was absorbed by the Department of Finance and Administration. The parties were in a dispute as to whether Wilson continued to be employed by the portion of the Division of Risk Management absorbed by the Department of Finance and Administration or by the Department of Law.

On July 27, 2009, LFUCG, Department of Law, brought charges against Wilson before the LFUCG Civil Service Commission alleging inefficiency and insubordination in violation of Sections 8a and 8d of the Uniform Discipline Code within the meaning of Kentucky Revised Statutes (KRS) 67A.280 and Section 21-44 of the Lexington-Fayette County Code of Ordinances, and requested

that Wilson be dismissed from his position. The Department of Law alleged inefficiency and insubordination as follows: Count I: failing to timely and adequately prepare a motion for discretionary review in January of 2009; Count II: failing to timely and adequately prepare a brief that was due on February 13, 2009; Count III: failing to timely and adequately prepare a response to a cross-motion for discretionary review on May 18, 2009; Count IV: failing to follow his supervisor's directions to request an extension to file a position statement before the Equal Employment Opportunity Commission (EEOC) in May of 2009; and Count V: repeatedly failing to demonstrate the ability to perform the duties of an Attorney Senior and failing to follow his supervisor's instructions. Each legal document was alleged to have been untimely and inadequately prepared because it was late, had numerous drafting and grammatical errors, required redrafting by another attorney to meet the filing deadline, and in some of these documents Wilson was alleged to have relied on improper legal arguments.

At Wilson's hearing before the CSC, testimony was provided by Logan Askew, Commissioner of Law of the LFUCG; Leslye Bowman, Director of Litigation in the Department of Law of the LFUCG; Attorney Senior Rochelle Boland and Wilson. The testimony by Askew, Bowman and Boland supported the Department of Law's position that Wilson was employed by the Department of Law and violated LFUCG's Uniform Discipline Code as to inefficiency and insubordination. These witnesses testified as follows: Wilson requested and was reassigned to the Department of Law, his office was moved into the Department's

space and all assignments he received, support personnel assisting him, and salary he drew were from the Department of Law. Bowman offered extensive training to Wilson to help him transition from his former position. Wilson knew of the policy that pleadings due to be filed within thirty days must be submitted in final draft five days before the due date and pleadings due sooner must be submitted three days before the due date (the five/three policy). Wilson repeatedly submitted deficient and untimely work that had to be substantially rewritten by other attorneys at the last minute in order to meet the filing deadlines. Bowman repeatedly instructed Wilson to get an extension of time to file a position statement with the EEOC, but the extension was not obtained until after her fourth request. Wilson was repeatedly advised that his work needed to improve, but Wilson was unable to develop the skills needed to perform adequately as an Attorney Senior.

Wilson testified he was reclassified as an Attorney Senior while still working for the Division of Risk Management, when he was "borrowed" by Department of Law, but he continued to be employed by the Division of Risk Management under the Department of Finance and Administration. He acknowledged being overwhelmed with the amount of work he was assigned by the Department of Law and having to work with other attorneys on every legal document referenced in the charges. He was unaware of the five/three policy but asserted he timely submitted his work. Wilson claimed he promptly followed Bowman's request to get an extension of time to file a position statement with the EEOC. Wilson claimed that although Bowman and Askew told him they had

problems with his work performance, instead they had a problem with his salary following his reclassification.

On December 17, 2009, the CSC issued a one-paragraph opinion which stated:

> On December 16, 2009, at the request of the Lexington-Fayette Urban County Government, the Civil Service Commission heard a request for termination of W. L. Wilson, Attorney Sr. – Department of Law. The Lexington-Fayette Urban County Government and the Defendant provided testimony, witnesses and exhibits. The Commission found in favor of Lexington-Fayette Urban County Government and unanimously sustains the termination of W. L. Wilson.

Wilson timely filed an appeal with the circuit court against Askew in his individual and official capacities, Bowman in her individual and official capacities, and the LFUCG (appellees); he also filed additional claims against Askew and Bowman. Wilson appealed his dismissal on the ground that the CSC acted in an arbitrary manner. The appeal was bifurcated from the other claims, which were stayed pending the outcome of the appeal.

Following a hearing before the trial court wherein additional evidence was offered, the trial court affirmed Wilson's termination on March 12, 2012. The trial court determined that Wilson was entitled to a quasi trial *de novo*, engaged in a quasi trial *de novo*, determined that there was no evidence the CSC acted arbitrarily, and affirmed its determination and termination of Wilson. The court made its own findings, which supported the CSC's ultimate conclusion sustaining termination. Wilson had been counseled numerous times on his work performance

and had adequate notice of his work deficiencies before the charges were filed, the notice of charges was adequate, the testimony and exhibits supported the charges, and Wilson was employed by the Department of Law at the time the charges were filed. The court determined progressive discipline was not mandatory. The trial court found that the CSC's determination did not need to be vacated for failing to make specific findings of fact or conclusions of law because the CSC complied with KRS 67A.280(4), which only required that the action and decision of the CSC on the charges be reduced to writing and kept in a book and those written charges be attached to the book containing the body's decision.

Wilson appeals, arguing that the trial court erred by (1) upholding the CSC's decision despite its failure to issue written findings of fact, and (2) exceeding its scope of review by grounding its judgment solely on its own findings of fact. Wilson also argues additional grounds for reversal which are moot because we are reversing and remanding. Accordingly, we do not address them.

Dismissed public employees are entitled to something less than a classic trial *de novo* before a trial court to review their administrative dismissal. *Brady v. Pettit*, 586 S.W.2d 29, 32-33 (Ky. 1979); *City of Henderson Civil Service Commission v. Zubi*, 631 S.W.2d 632 (Ky. 1982). This has been termed a quasi trial *de novo*. *Stallins v. City of Madisonville*, 707 S.W.2d 349, 350 (Ky.App. 1986). In a quasi trial *de novo*, the burden shifts to the employee, who must furnish the transcript and may call additional witnesses. *Brady*, 586 S.W.2d at 33. "The trial court in its review is to consider both the transcript and the additional

testimony and is limited to a determination of whether the administrative body acted arbitrarily in deciding whether the employee violated the rules and regulations of the [relevant] department." *Stallins*, 707 S.W.2d at 350. This process applies to all public employee dismissal cases. *Crouch v. Jefferson County, Kentucky Police Merit Bd.*, 773 S.W.2d 461, 464 (Ky. 1988). On appeal, we must affirm unless the trial court was clearly erroneous by making determinations which were not supported by substantial evidence. *Stallins*, 707 S.W.2d at 351.

The administrative body is required to make specific findings of fact, which the trial court reviews in determining whether the administrative body acted arbitrarily.

> Judicial recognition of strong practical reasons for requiring administrative findings is almost universal . . . . The accepted ideal as stated by the United States Supreme Court is that "the orderly functioning of the process of review requires that the ground upon which the administrative agency acted be clearly disclosed and adequately sustained." *S.E.C. v. Chenery Corporation*, 318 U.S. 80, 63 S.Ct. 454, 87 L.2d 626 (1943).

Pearl v. Marshall, 481 S.W.2d 837, 839 (Ky.App. 1973). An administrative decision "must set forth sufficient facts to support conclusions that are reached, so the parties understand the decision, and to permit a meaningful appellate review." *500 Associates, Inc. v. Natural Res. & Envtl. Prot. Cabinet*, 204 S.W.3d 121, 132 (Ky.App. 2006). "Without specific findings of fact it is difficult, if not impossible,

upon review to determine whether the administrative agency has acted arbitrarily or within its powers." *Pearl*, 481 S.W.2d at 839.

We determine that the trial court erred in upholding the CSC's decision to dismiss Wilson because the CSC's decision was entirely devoid of factual findings to support its ultimate conclusion. Just as in *Pearl*, "The finding [of the CSC] in this case does not give any clue that it even considered the real issues. We are unwilling therefore to supply the necessary findings by implication." *Id.* at 840. Even when considered with the specific charges brought against Wilson, we cannot determine whether the CSC found that Wilson was employed by the Legal Department, a contested issue required to be decided in the Legal Department's favor before it could bring charges against him or be authorized to dismiss him. Additionally, it is unclear whether the CSC found in favor of the LFUCG based on all, some, or only one of the charges, or on some other basis. Accordingly, the trial court's review appears to be based on the assumption that the CSC determined the predicate fact of which department employed Wilson in the Department of Law's favor and Wilson was found guilty on all charges. While the evidence underlying the administrative hearing and the quasi trial *de novo* may have been sufficient to allow the CSC to make such findings and the trial court to sustain them, an adequate review could not take place in the absence of findings by the CSC. Therefore, the trial court's affirmation of the CSC's decision is clearly erroneous.

Appellees argue that the CSC fulfilled its obligations by following KRS 67A.280. However, an administrative body's obligations are not limited solely to its statutory obligations; due process must still be observed.

We also determine that the trial court exceeded its scope of review by basing its judgment solely on its own findings of fact. In the absence of any factual findings by the CSC, it could not do otherwise. This is improper because the trial court was tasked with determining whether the CSC acted arbitrarily in light of the evidence from a quasi trial *de novo*, rather than making a completely independent assessment of the evidence in a classic trial *de novo.*

Wilson argues that we cannot remand for further factual findings because KRS 67A.230 and KRS 67A.290 do not authorize remand to the CSC. Wilson relies on the statement in *Phelps v. Sallee*, 529 S.W.2d 361, 365 (Ky.App. 1975), that "an administrative agency does not have any inherent or implied power to reopen or reconsider a final decision and that such power does not exist where it is not specifically conferred upon the agency by the express terms of the statute creating the agency."

Wilson misunderstands *Phelps*. *Phelps* is concerned with further action taken by an agency after its final order has been issued but not appealed. Its statement has no relevance to an agency's ability to act after its decision has been reversed on appeal.

We disagree with Wilson. Judicial review would be meaningless if review could not result in a remedy. The process by which an appeal may be taken

from an administrative dismissal by an urban county government is established by KRS 67A.290. However, the judicial review of such an appeal is governed by the general statute on judicial review of final administrative orders. KRS 13B.150 states that a court reviewing a final administrative order may affirm, reverse in whole or part "and remand the case for further proceedings if it finds the agency's final order is: "(a) In violation of constitutional or statutory provisions; . . . (d) Arbitrary, capricious, or characterized by abuse of discretion; . . . or (g) Deficient as otherwise provided by law." When there is an insufficient basis for meaningful review to determine whether an administrative action was arbitrary, remanding is usually the appropriate action. *See Smith v. O'Dea*, 939 S.W.2d 353, 356 (Ky.App. 1997); *Gen. Elec. Co. v. Martin*, 574 S.W.2d 313, 321-322 (Ky.App. 1978); *Wilder v. Great Atl. & Pac. Tea Co., Inc.*, 788 S.W.2d 270, 272 (Ky. 1990). If an administrative agency failed to make adequate findings but had adequate evidence upon which to make findings, a reviewing court should normally remand for further factual findings upon the evidence already received. *Ford Motor Co. v. N.L.R.B.*, 305 U.S. 364, 373-374, 59 S.Ct. 301, 306-307, 83 L.Ed. 221 (1939).

Accordingly, we reverse and remand the Fayette Circuit Court's decision so that the Civil Service Commission may make appropriate factual findings to support its decision based upon the evidence it had before it when it rendered its decision.

CLAYTON, JUDGE, CONCURS.

COMBS, JUDGE, DISSENTS BY SEPARATE OPINION.

COMBS, JUDGE, DISSENTING: I cannot agree that substantial evidence was lacking in this case. Ample evidence was present to substantiate the action taken by the administrative agency and the affirmance by the trial court. I would, therefore, affirm the decision of the Fayette Circuit Court.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEES:

Barbara A. Kriz
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