

RENDERED: AUGUST 30, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001237-MR

KATHY CARTER

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 10-CI-01371

CITY OF FRANKFORT; KENTUCKY
BOARD OF ETHICS; DAWN HALE,
Chairperson; EDWARD ADAMS, Member;
and BARRY HOLDER, SR., Member

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * ** * **

BEFORE: COMBS, MAZE, AND NICKELL, JUDGES.

COMBS, JUDGE: Kathy Carter appeals the judgment of the Franklin Circuit Court that affirmed a final order of the Frankfort Board of Ethics (the Board). The Board of Ethics determined that she had violated the Code of Ethics of the City of

Frankfort during her tenure as City Commissioner. After a review of the record, we reverse and remand.

Carter is a former City Commissioner of Frankfort, Kentucky.¹ She claimed that Electrical Inspector Angie Willoughby had been overheard as saying that the city inspectors were going to “nit-pick” Carter’s renovation project to death. This statement was allegedly made after Commissioner Carter had voted against longevity raises for city employees. Commissioner Carter also claimed that Building Inspector Robert Engle had been very vocal and angry with regard to Carter’s vote on cutting longevity raises.

Carter renovates houses in Frankfort in order to revitalize her neighborhood and for investment purposes. She owns nine (9) rental properties. This appeal arises out of circumstances surrounding her renovation project at a duplex at 708-710 Hoge Avenue, which she purchased because her late husband was born there. On July 9, 2009, Carter obtained a building permit from the city for the duplex. A framing inspection and an electrical inspection were required under the terms of the permit. During the inspection process, Carter believed she was treated unfairly by the city inspectors. Therefore, she requested – and was

¹ Carter’s third term as City Commissioner of Frankfort ended on December 31, 2010, after she was unsuccessful in her re-election bid in November 2010.

granted – a meeting with Frankfort Mayor Harry Graham and City Manager Tony Massey.

Following a City Commission meeting on December 17, 2009, Gary Muller, the Director of the Planning and Building Codes, presented Carter a waiver for her to sign. The waiver would have exempted the city from liability on any claim that Carter might have against the city as a result of not having had a framing inspection conducted on the property. Carter refused to sign her name to the waiver because her general contractor told her (and testified) that the framing inspection had been done. Thus, she believed that the putative waiver was essentially a subterfuge. Mayor Graham stated to Muller that “Massey [the City Manager] was taking care of it.”

The property failed the city’s final electrical inspection on January 14, 2010. Again, it is disputed whether a framing inspection was conducted; the record includes evidence which supports both contentions. Nonetheless, on January 15, 2010, Massey called Muller into work on his day off in order to perform a final building inspection on Carter’s property.

At the time, Muller was a “builder inspector in training,” acting under Building Inspector Robert Engle. Engle did not perform any inspections on Carter’s property because he was on workers’ compensation leave. Muller lacked authority to sign off on the inspection because Engle was the only city official

authorized to sign Certificates or Temporary Certificates of Occupancy.

Nonetheless, after Muller performed the building inspection, he instructed a part-time employee, Vickie Sewell, that she *should be prepared to* print out a Temporary Certificate of Occupancy. Sewell printed a Temporary Certificate of Occupancy and took it to Massey's office. Massey then signed the Certificate and returned it to Sewell -- although he had no legal authority to do so and was notified that Engle would not sign it because of the property's failed inspections.

Following the issuance of the Temporary Certificate of Occupancy, Muller and Massey decided that the county should take over inspections on Carter's project in lieu of the city. The property failed the initial final county electrical inspection on January 26, 2010.

In a letter dated February 25, 2010, Carter wrote to Massey stating that she was writing the letter "as a taxpayer and a citizen." The letter was a written complaint regarding the treatment she had received on her renovation project and listing the problems she had encountered with city employees. The letter also expressed her gratitude for the meeting with Massey and Mayor Graham.

On March 3, 2010, two city employees, Building Inspector Robert Engle and Electrical Inspector Angie Willoughby, filed separate complaints against

City Commissioner Carter and City Manager Tony Massey² charging ethical violations. The complaints alleged that Carter had requested preferential treatment from city employees relating to certain electric, building, and occupancy inspections on her renovation project at 708-710 Hoge Avenue. They claimed that Massey had improperly signed the defective Temporary Certificate of Occupation on January 15 because Carter wanted a tenant to be able to move in on January 16. Carter's property passed the county's final inspection on March 24, 2010.

Following the ethics complaints, the Board convened a Preliminary Inquiry pursuant to Section 39.17 of the Ethics Code to determine whether there was cause to issue charges and to set the matter for a hearing. After filing charges against Carter and Massey, the Board held a lengthy hearing on July 6, 7 and 20, 2010. During the hearing, numerous witnesses were called and presented extensive testimony regarding Carter's renovation project. The witnesses presented conflicting evidence regarding which electrical code applied; whether a framing inspection had been performed; whether tenants occupied the residence; and why a Temporary Certificate of Occupancy had been issued despite the property's failing inspections.

On August 6, 2010, the Board issued Findings of Fact, Conclusions of Law, and an Order. After reviewing the hearing record, the Board concluded that:

² City Manager Tony Massey is not a party to this appeal.

Commissioner Carter, by approaching the Mayor of the City of Frankfort regarding her perceived mistreatment relating to the 708-710 Hoge Avenue renovation, set in motion a chain of events involving her and the City Manager Massey, which resulted in Commissioner Carter receiving a benefit or benefits to which she was not entitled.

The Board held that Commissioner Carter had violated the Standards of Conduct established in Section 39.05(B) of the City's Ethics Code and imposed a civil fine of \$1,000.

On August 30, 2010, Carter filed a Petition for Judicial Review of the Board's Order in the Franklin Circuit Court. On June 21, 2012, the circuit court entered an Opinion and Order affirming the decision of the Board, holding that the Board's Order was supported by substantial evidence and that it was based upon "clear and convincing proof" as required by the City's Code of Ethics Section 39.18(B)(8). This appeal followed.

The standard of review of a circuit court's decision regarding an administrative decision is whether the court was clearly erroneous. Kentucky Rule[s] of Civil Procedure (CR) 52.01; *Johnson v. Galen Health Care, Inc.*, 39 S.W.3d 828, 833 (Ky. App. 2001). Judicial review of an agency decision is limited to the determination of whether the decision was arbitrary. *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450, 456 (Ky. 1964). Arbitrariness of an agency

decision depends on whether the action was taken in excess of granted powers, whether affected parties were afforded procedural due process, and whether decisions were supported by substantial evidence. *Id.* “Substantial evidence” has been defined as some evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable people. *Smyzer v. B.F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971). “The crux of the inquiry on appeal is whether the finding which was made is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law.” *Kroger Ltd. Partnership I v. Cabinet for Health Services, Com. of Ky.*, 174 S.W.3d 516, 518 (Ky. App. 2005) (citing *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986)). Questions of law resulting from an administrative agency decision are reviewed *de novo* by the courts. *Cabe v. Toler*, 411 S.W.2d 41, 43 (Ky. 1967); *see also Louisville Metro Health Dept. v. Highview Manor Ass'n, LLC*, 319 S.W.3d 380, 383 (Ky. 2010).

Carter argues that the evidence in the record compels vacating the decision of the circuit court affirming the Board’s final order. Although Carter presents several arguments on appeal, they can be distilled into one: that the Board’s decision was erroneous as a matter of law because it was not supported by substantial evidence. Carter asserts that the Board’s decision was a result of conclusory personal opinions and that it wholly lacked clear and convincing proof

that she *intentionally* used or attempted to use her official position to secure unwarranted privileges or advantages as required by the City’s Code of Ethics. Essentially, she claims that the critical element of intent was *inferred rather than demonstrated*. We agree.

The City of Frankfort’s Code of Ethics requires clear and convincing proof of an intentional act for an official to be charged with violating the standards of conduct. Section 39.05(B) of the Code of Ethics provides, “no officer or employee shall intentionally use or attempt to use his or her official position with the city to secure unwarranted privileges or advantages for himself or others.” Since the administrative regulations do not contain the definition of “intentionally,” we must ascertain its plain meaning. “In the construction and interpretation of administrative regulations, the same rules apply that would be applicable to statutory construction and interpretation.” *Revenue Cabinet, Com. v. Gaba*, 885 S.W.2d 706, 708 (Ky. App. 1994) (citing *Revenue Cabinet v. Joy Technologies, Inc.*, 838 S.W.2d 406 (Ky. App. 1992)). Kentucky Revised Statute[s] (KRS) 446.080(4) directs that “[a]ll words and phrases shall be construed according to the common and approved usage of language. . . .” Further, “[w]hen language is clear and unambiguous, it will be held to mean what it plainly expresses.” *Hawley Coal Co. v. Bruce*, 252 Ky. 455, 67 S.W.2d 703, 705 (1934).

We must, therefore, determine the common, plain meaning of the word *intentionally*.

Black's Law Dictionary 25 and 814 (7th ed. 1999) contains several definitions and forms of *intent*, but those most pertinent to this discussion are defined as follows:

Intentional Act, n. An act resulting from the actor's will directed to that end. An act is intentional when foreseen and desired by the doer, and this foresight and desire resulted in the act through the operation of the will.

Intentional, adj. Done with the aim of carrying out the act.

Intention, n. The willingness to bring about something planned or foreseen; the state of being set to do something. – **intentional**, adj.

In order for Carter's alleged ethical violation to be viable, there must have been substantial evidence supporting the charge that she *intentionally* used or attempted to use her position as City Commissioner to obtain unwarranted privileges. Although it is replete with innuendos, the record does not contain sufficient evidence to support a finding of intentional misconduct – or misconduct at all.

The Board essentially assumed and then concluded that Carter intentionally used her position to obtain a meeting with the Mayor and City Manager, which in turn set in motion a chain of events that led to the improperly

issued Temporary Certificate of Occupancy. However, there was absolutely no evidence in the record that Carter had ever asked *any* of the relevant parties (City Manager, Mayor, Electrical Inspectors, Building Inspectors, Contractors, etc.) for favors or benefits. On the contrary, every party denied that Carter had done so -- including the complainants, who had not even spoken to Carter regarding her renovation project. Additionally, Mayor Graham testified that the meeting with Carter and Massey was held for Carter to complain “as a citizen” regarding mistreatment in her renovation project. Mayor Graham also stated that his door was open “to all citizens” who wished to voice complaints; that sometimes citizens walked in off the street to discuss issues with him; and that he had listened to complaints similar to Carter’s from other citizens of Frankfort. Finally, in her letter to Massey, Carter reiterated and emphasized in deliberate language that she was complaining as “a taxpayer and a *citizen*.” (Emphasis added.)

Nothing in the record demonstrated that Carter intentionally used her position to obtain favorable treatment on her renovation project. In affirming the Board, the court held as follows:

The testimony from the hearing makes it clear that Carter requested and was granted a meeting with the Mayor and City Manager, Tony Massey, regarding her property on Hoge Avenue. *She intended this meeting to serve as a voicing of her concerns as a private citizen that she was being treated unfairly.* The events that occurred after this meeting, *while maybe not necessarily and fully intended by Carter*, culminated in her receipt of an

unwarranted benefit—namely, a certificate of temporary occupancy signed by Massey, even though her property had failed or had not even received final inspections for framing, electric and building safety. (Emphasis added).

We believe that the circuit court erred because its opinion does not support the finding that Carter possessed the requisite level of intent as required by the City's Code of Ethics. Indeed, it is equivocal on this point, falling short of the clear-and-convincing standard required by the City's Code of Ethics at Section 39.18(B)(8). The court acknowledged that Carter had attended the meeting with the Mayor and City Manager as a private citizen and not in an attempt to use her position as City Commissioner. Indeed, it specifically noted that the events at issue may *not* have been intended. The circuit court also held that:

Carter maintains that there is no direct evidence connecting her to any actions which would have resulted in an unwarranted benefit, but the reality is that she received an unwarranted benefit, and there is no other explanation for how that end was achieved than that she intentionally used her position as City Commissioner to receive it.

This leap in logic is legally unwarranted and is vitiated by the record rather than supported by it.

Finally, we are persuaded that there was significant evidence in the record indicating bias against Carter. First, board member Edward Adams repeatedly commented that the hearing would have never taken place if Carter had signed the waiver, implying that she had brought this act of reprisal or retaliation

upon herself. Adams failed to take into consideration that Carter believed the document to be false and that if Carter had believed it to be so, her signature arguably would have constituted perjury. Second, Carter's election challenger, Terry Sutton, was called to testify. Adams proceeded to chastise his fellow board member, Barry Holder, for "attacking" Sutton with pertinent questions. Adams continued to state, on the record, that he had known Sutton for thirty (30) years and attested to Sutton's good character and citizenship. The issue of Sutton's character was wholly peripheral to the matter before the Board and served as a distraction rather than either relevant or substantial evidence. After all the witnesses had been called at the hearing but before the Board had adjourned, Adams offered his personal opinion that Carter could not separate her personal identity from her position as Commissioner. Adams's line of reasoning erroneously implied that elected officials waive their status and rights as private citizens upon assuming public office.

In summary, there is no evidence in the record to support the allegation that Carter acted in her official capacity rather than as a private citizen. The two roles are not mutually exclusive. The fact that an unwarranted benefit flowed from the sequence of events cannot serve as a basis to prove intent. And again, intent must be established by clear and convincing evidence rather than

inferred from supposition or innuendo. That necessary threshold of evidence was never achieved in this case.

Accordingly, we reverse the decision of the circuit court affirming the Order of the Board and remand this case for entry of an order consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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