

RENDERED: JANUARY 22, 2016; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001561-MR

DEBRA VAHLE

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 14-CI-00117

KENTUCKY CABINET FOR HEALTH
AND FAMILY SERVICES; J.P. HAMM,
APPOINTING AUTHORITY; JAY KLEIN,
APPOINTING AUTHORITY; KENTUCKY
PERSONNEL BOARD; AND MARK SIPEK,
EXECUTIVE DIRECTOR

APPELLEES

OPINION
REVERSING

** ** * * * * *

BEFORE: CLAYTON, THOMPSON AND VANMETER, JUDGES.

THOMPSON, JUDGE: Debra Vahle appeals from an opinion and order of the Franklin Circuit Court reversing an order of the Kentucky Personnel Board ordering her employment reinstated at the Kentucky Cabinet for Health and Family

Services. The Personnel Board found the Cabinet's termination of Vahle for misconduct to be excessive and modified her punishment to a thirty-day suspension without pay. The circuit court reversed the Personnel Board ruling that it acted arbitrarily. We conclude that under the appropriate standard of review, the circuit court erred and reverse.

Vahle was employed by the Cabinet from September 1, 1989 to June 12, 2012, when she was terminated from her position as Public Assistance Program Specialist with the Department for Community-Based Services, Division of Performance (DCBS) for repeatedly recording false information in the Cabinet's computer system in violation of 101 Kentucky Administrative Regulations (KAR) 1:345 (lack of good behavior) and the Cabinet's Personnel Procedure 2. Specifically, the dismissal letter alleged Vahle recorded false information in the records of fourteen clients under the care of DCBS for infirmities such as senility, retardation and other mental health issues. Vahle appealed to the Personnel Board.

A hearing was held at which evidence was produced that the majority of the DCBS clients had personal representatives to make healthcare and financial decisions for them. Vahle's work objective was to audit a client's eligibility for Medicaid benefits by collecting information from the client's personal representative and employees of the care facilities where the clients resided. There was evidence that Vahle recorded false information in ten documents called the "Worksheet for Medicaid Eligibility Quality Control Reviews" and recorded

information without attempting to contact personal representatives or care facilities to complete the Medicare quality control audits.

There was also evidence that Vahle had been a satisfactory employee with twenty-three years of service until the four months preceding her dismissal. However, Howard Jay Klein, appointing authority for the Cabinet and Division Director of Employee Management in the Office of Human Resources Management who signed the dismissal letter sent to Vahle, testified he approved the dismissal because he believed Vahle falsified the information and the Cabinet has a custom and practice of no tolerance for falsification of records. He testified he did not consider any other factors such as Vahle's work history or her claims of health problems and taking debilitating medication.

The hearing officer issued findings of fact, conclusions of law and a recommended order upholding the Cabinet's finding that Vahle engaged in serious misconduct and recommended upholding the Cabinet's decision to terminate her. Vahle filed exceptions.

The Personnel Board did not alter the hearing officer's finding that Vahle falsified information on at least ten occasions over a four month period. Nevertheless, it reduced the penalty from termination to a thirty-day suspension without pay. The Board concluded that the Cabinet's adherence to a "zero tolerance" practice was inappropriate considering Vahle's work record and performance evaluations. It ruled termination was excessive punishment and a lesser punishment would correct Vahle's misconduct. The Cabinet appealed.

The Franklin Circuit Court reversed and reinstated Vahle's dismissal.

The circuit court found the Board's reduction of the penalty for Vahle's misconduct was arbitrary in that it second-guessed the Cabinet's decision to terminate Vahle. In doing so, the circuit court noted that the repeated underlying misconduct was essentially undisputed and not excused by Vahle's years of service. The circuit court reasoned:

If long term employees can falsify records of eligibility for public assistance without running the risk of termination, the Cabinet will be confronted with an impossible management problem. Some infractions deserve termination; and those at issue in this case fall into that category.

Vahle appealed.

The standard of judicial review of an action of an administrative agency is limited to whether the agency's action was arbitrary. *Hughes v. Kentucky Horse Racing Auth.*, 179 S.W.3d 865, 871 (Ky.App. 2004). In *Kentucky Bd. of Nursing v. Ward*, 890 S.W.2d 641, 642-43 (Ky.App. 1994) (quoting *Commonwealth, Transp. Cabinet v. Cornell*, 796 S.W.2d 591, 594 (Ky.App. 1990) (internal brackets omitted), the Court set forth three factors to consider when determining whether an agency acted arbitrarily:

The court should first determine whether the agency acted within the constraints of its statutory powers or whether it exceeded them. Second, the court should examine the agency's procedures to see if a party to be affected by an administrative order was afforded his procedural due process.... Finally, the reviewing court must determine whether the agency's action is supported

by substantial evidence. If any of these three tests are failed, the reviewing court may find that the agency's action was arbitrary.

A court is not permitted “to consider new or additional evidence, or substitute its judgment as to the credibility of the witnesses and/or the weight of the evidence concerning questions of fact.” *Id.* at 642. Administrative findings of fact based upon substantial evidence are binding upon the appellate court and the court’s review is limited to whether the agency correctly applied the law to those facts. *Id.*

In Vahle’s case, the circuit court did not make additional findings of fact or make findings contrary to the Personnel Board regarding Vahle’s misconduct. However, it found the penalty of suspension without pay for thirty days was arbitrary and, instead, found termination was the appropriate penalty.

Like the issue of misconduct, the appropriateness of the penalty applied to Vahle is subject to review only for arbitrariness. What constitutes cause for dismissing a merit employee is a fact question for determination by the Personnel Board. *Perkins v. Stewart*, 799 S.W.2d 48, 51 (Ky.App. 1990). The burden of proof and the ultimate burden of persuasion before the Personnel Board were on the Cabinet “to demonstrate by a preponderance of the evidence the propriety of the penalty it had imposed for [Vahle’s] misconduct.” *Hughes*, 179 S.W.3d at 872. The issue for the Franklin Circuit Court was “whether the evidence favoring termination was so compelling that no reasonable person could have found facts as

the Personnel Board did.” *Id.* Merely because a different result may have been reached is insufficient to reverse. The evidence must compel a contrary result. *Id.*

Applying the stated standard of review, we must reverse the circuit court. Although the Personnel Board found Vahle engaged in misconduct and just cause to discipline her, it found her over twenty years of service with satisfactory reviews made suspension rather than termination the more appropriate penalty. We cannot say that its decision was arbitrary.

In *Hughes*, the Court was presented with a similar situation. In that case, the Franklin Circuit Court reversed a finding of the Personnel Board that an employee’s termination for misconduct was excessive and modified the punishment to a thirty-day suspension without pay. Noting that the evidence could sustain a different penalty, the Court nevertheless reversed the circuit court reasoning as follows:

In the final analysis, KRS 18A.095(23)(c) vests the Personnel Board with the exclusive authority, if “it finds that the action taken by the appointing authority was excessive or erroneous in view of all the surrounding circumstances,” to direct the appointing authority to alter, modify, or rescind the disciplinary action. The Board here found just cause existed to discipline Hughes for misconduct, but further found that a thirty-day suspension was more appropriate than termination based on all the circumstances. The Personnel Board exercised its statutory prerogative to alter or modify Hughes’s penalty as excessive.

Id. at 873 (internal brackets and footnote omitted). The same reasoning is applicable in this case and, based on that reasoning, we reverse.

Based on the foregoing, the order of the Franklin Circuit Court is reversed and the final order of the Kentucky Personnel Board is reinstated.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Paul F. Fauri
Frankfort, Kentucky

**BRIEF FOR APPELLEE, CABINET
FOR HEALTH AND FAMILY
SERVICES:**

Jennifer Wolsing
Frankfort, Kentucky

**BRIEF FOR APPELLEE,
KENTUCKY PERSONNEL BOARD:**

Boyce Andrew Crocker
Frankfort, Kentucky