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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000731-MR

DONALD NEWELL — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 16-CI-00040

KENTUCKY ENERGY AND ENVIRONMENT CABINET; CHARLES G. SNAVELY, SECRETARY AND APPOINTING AUTHORITY; KENTUCKY PERSONNEL BOARD; AND MARK A. SIPEK, EXECUTIVE DIRECTOR — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; DIXON AND D. LAMBERT, JUDGES.

LAMBERT, D., JUDGE: Donald Newell appeals the order of the Franklin Circuit Court which dismissed his petition for judicial review of an administrative decision by the Kentucky Personnel Board. Newell asks this Court to determine whether

the circuit court acted outside its authority in departing from the agency's findings in the order for which judicial review was sought. After careful review, we conclude the circuit court did not step beyond its role, and we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

Newell was a merit employee of the Kentucky Energy and Environment Cabinet ("the Cabinet"). On June 16, 2009, he was reclassified from Environmental Scientist III to Environmental Scientist IV as part of the reorganization of the Department for Energy Development and Independence ("DEDI"). This reclassification came with an increase to pay grade 17. Newell assumed the working title of "acting director" of the Division of Fossil Energy Development within DEDI. He resigned and was reappointed as acting director (though his official title remained Environmental Scientist IV) on October 1, 2009, with another pay increase accompanying the reappointment. Newell continued working in that capacity until he retired in 2013.

As retirement loomed, Newell began making plans for his life after work, and realized that his pay rate would not afford him the standard of living in retirement that he wanted. In November 2013, he initiated proceedings before the Kentucky Personnel Board ("the Board"), after using a publicly available database of state employees to compare his salary to other division directors within DEDI. He argued that he had been penalized within the definition of KRS 18A.005(24), because his increase in salary did not sufficiently compensate him for the increase in responsibility. Other division directors were compensated at pay grade 19. His

own salary was still within the range for grade 17, which is the standard rate for Environmental Scientist IV.

The Cabinet moved to dismiss those proceedings as untimely, but the hearing officer allowed the claim to proceed on the merits. After an evidentiary hearing, the hearing officer made a specific finding as to the timeliness of Newell's action, that the Cabinet failed to put forth any proof that Newell became aware of the pay discrepancy earlier than 2013.

Ultimately, the hearing officer recommended that Newell receive a retroactive raise to a mid-point grade 19 salary from June 16, 2009, and continuing until his retirement. The Cabinet filed exceptions to this award, and the Board remanded the matter for a second review by another hearing officer.

After a second evidentiary hearing, the second hearing officer re-issued the same findings of fact regarding timeliness of the action and several other pertinent issues. The second hearing officer also issued other findings of fact relating to issues not addressed by the first hearing officer. The second hearing officer recommended a retroactive raise at a starting grade 19 salary covering the same time as the first hearing officer's recommendation.

The Board adopted the second hearing officer's recommendations and order. Newell filed a petition for judicial review, asking that the Franklin Circuit Court examine the record and reinstate the first hearing officer's recommendation. The Cabinet filed a response to the petition, again asserting the time limitation period of KRS 18A.095(29) as an affirmative defense. The circuit court agreed

with the Cabinet and dismissed the petition, notwithstanding the findings of fact of the two prior hearing officers on the issue. The circuit court opined that the Board had erred as a matter of law in holding that the limitations period runs from the date Newell had actual notice of the pay discrepancy that formed the basis of his complaint. Consequently, the circuit court's judgment dismissed the appeal, vacated the Board's final order awarding Newell additional retirement benefits and remanded with instructions to the Board to dismiss the administrative appeal before it.

Newell moved the circuit court to alter, amend, or vacate, the order dismissing. The circuit court denied the motion, prompting this appeal.

II. ANALYSIS

A. STANDARD OF REVIEW

This appeal presents a question as to the nature of the analysis of the statutory limitations period in KRS 18A.095(29). Newell argues the application of the one-year limitations period involves a simple finding of fact—whether Newell filed his claim within that one-year period. Conversely, the Cabinet contends the outcome depends on interpretation of the statute—analyzing the language to determine when the limitations period began to run—which makes the question one of law, not fact.

Statute dictates the role of a court sitting in review of an administrative decision. KRS 13B.150 provides that: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on

questions of fact[,]" but also allows courts to reverse and remand on a host of legal issues, including situations where the agency violated constitutional or statutory provisions, exceeded its authority, or made its decision without substantial evidentiary support. KRS 13B.150(2)(a)-(c).

A reviewing court must defer to the factual findings of the agency, even where evidence in record might support the opposite position. "[E]ven if this Court would have come to a different conclusion if it heard the case *de novo,* it must affirm the administrative agency's decision if supported by substantial evidence." *500 Associates, Inc. v. Nat. Res. and Envtl. Protection Cabinet*, 204 S.W.3d 121, 132 (Ky. App. 2006). The standard of review for findings of fact is an examination of the record for clear error.

However, where the agency's decision reflects a flawed interpretation or application of statutory or constitutional provisions, judicial review is not so constrained. "The reviewing court acts within its authority in reversing [the agency decision] if it finds the order is in violation of 'constitutional or statutory provisions.' KRS 13B.150(2)(a). '[A]n erroneous interpretation or application of the law is reviewable by the court which is not bound by an erroneous administrative interpretation[.]'" *Freeman v. St. Andrew Orthodox Church, Inc.*, 294 S.W.3d 425, 428 (Ky. 2009) (quoting *Camera Ctr., Inc. v. Revenue Cabinet*, 34 S.W.3d 39 (Ky. 2000)). The standard of review for issues of law is *de novo*.

Here, the Board and the hearing officers did more than make findings of fact when ruling that the passage of more than one year had not

precluded Newell's appeal. The agency ruling necessarily involved an analysis and application of the language of KRS 18A.095(29). That provision reads:

> Notwithstanding any other prescribed limitation of action, an employee that has been penalized, but has not received a written notice of his or her right to appeal as provided in this section, shall file his or her appeal with the Personnel Board within one (1) year from the date of the penalization or from the date that the employee reasonably should have known of the penalization.

Despite the language of the statute clearly reflecting a "should have known" standard, the agency essentially required that Newell have actual notice of the pay discrepancy before the limitations period began to run. This was an erroneous application of the law to the facts, and for that reason, the circuit court was not bound by the agency's interpretation and this review will be *de novo*.

B. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT KRS 18A.095(29) PRECLUDED NEWELL'S APPEAL

Newell offered evidence before the first hearing officer that he learned of the pay discrepancy between himself and other division directors by comparing his pay to a publicly available database of state employee salaries. The hearing officer allowed the appeal to proceed based on the failure of the Cabinet to produce evidence of Newell's actual awareness of the pay discrepancy until 2013.

The hearing officer essentially ruled that Newell's lack of actual notice tolled the statute of limitations, ignoring clear statutory language prescribing a different standard. Noticing this, the circuit court corrected the error of law perpetuated by both of the hearing officers and the Board, determining they lacked

jurisdiction to hear this time-barred action. The circuit court, therefore, correctly dismissed the appeal before it.

C. THE TIMELINESS ISSUE WAS PROPERLY PRESERVED FOR REVIEW BY THE CIRCUIT COURT

Newell also asserted a jurisdictional argument that the Cabinet failed to properly preserve the timeliness issue for this Court by failing to file a cross-petition with the circuit court. The record reflects that the Cabinet asserted the statutory limitations period at every point in these proceedings that it possibly could have asserted it, including in its response to the petition for review by the circuit court.

The language of KRS 18A.100, which authorizes appeals of rulings by the Board to the Franklin Circuit Court, does not preclude the assertion of affirmative defenses or require their assertion in a cross-appeal. Indeed, the assertion of affirmative defenses is only required to be made in a "responsive pleading" under CR 12.02, no matter what form that responsive pleading may take.

Given that the Cabinet has consistently asserted the timeliness issue, and that it asserted the defense again in its response to Newell's petition, we must conclude that the circuit court correctly considered it.

D. THE ALJS' RULINGS WERE VOID *AB INITIO*

Even if not asserted, "[a] reviewing body or court has an affirmative obligation to ensure that it is acting within its subject-matter jurisdiction. Even if not raised by the parties, a court must dismiss if it determines at *any* point in the

litigation that it lacks subject-matter jurisdiction." *Basin Energy Co. v. Howard*, 447 S.W.3d 179, 187 (Ky. App. 2014). The language of KRS 18A.095(29) clearly requires a penalized employee to bring their appeal within one year of either the penalization or the date the employee should have known of the penalization. Because Newell's ability to bring such appeal is limited by KRS 18A.095(29), any deviation from the language describing the procedure deprives the agency of jurisdiction, and the ALJs were not permitted to hear the matter. "When a statute prescribes the procedures that an administrative agency must follow, the agency may not add or subtract from those requirements." *Pub. Serv. Comm'n of Ky. v. Attorney General of the Commonwealth*, 860 S.W.2d 296, 298 (Ky. App. 1993) (citing *Union Light, Heat, and Power Co. v. Pub. Serv. Comm'n*, 271 S.W.2d 361 (Ky. 1954)).

"If an administrative body or court acts outside its general authority, any action it takes is considered void *ab initio*. It has no effect because a court or administrative body only has the power to act with its general jurisdiction." *Basin Energy*, 447 S.W.3d at 187. The agency here acted outside its authority by adjudicating a case initiated after the statutory limitations period lapsed. The award by the first ALJ was void upon entry because the ALJ exceeded the agency's authority to even entertain Newell's claim. As the circuit court correctly recognized, everything that came after was likewise a legal nullity.

We can find no error by the court in its dismissal of the petition before it, vacating the Board's Final Order, and directing the Board to dismiss the administrative appeal on remand.

III. CONCLUSION

Having reviewed the record, we agree with the circuit court that the timeliness issue presented here was an issue of statutory interpretation and application necessitating a non-deferential *de novo* review. Applying the appropriate standard of review, we further agree with the circuit court that the agency incorrectly interpreted the statutory language and improperly allowed Newell's appeal to proceed. Consequently, we affirm the dismissal of Newell's petition by the Franklin Circuit Court, and because the agency entered its rulings without jurisdiction to do so they are void *ab initio* and must be set aside.

CLAYTON, CHIEF JUDGE, CONCURS.

DIXON, JUDGE, CONCURS IN RESULT ONLY.

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