

RENDERED: AUGUST 17, 2018; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2017-CA-000867-MR

KRISTEN SHAW

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT  
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE  
ACTION NO. 15-CI-001408

LOUISVILLE/JEFFERSON COUNTY METROPOLITAN  
GOVERNMENT ACTING THROUGH ITS  
POLICE DEPARTMENT;  
AND LOUISVILLE METRO POLICE MERIT BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: JOHNSON, D. LAMBERT, AND J. LAMBERT, JUDGES.

LAMBERT, D., JUDGE: Kristen Shaw appeals from an order of the Jefferson Circuit Court affirming the findings and order of the Louisville Metro Police Merit Board (Merit Board). The Merit Board upheld Louisville Metro Police

Department (LMPD) Chief Steven Conrad's (Chief Conrad) decision to terminate Shaw's employment. For the reasons set forth below, we affirm.

Based on an incident that occurred on August 16, 2013, a Professional Standards Unit (PSU) investigation took place and Chief Conrad terminated Shaw's employment with LMPD on June 18, 2014. Pursuant to KRS<sup>1</sup> 67C.323(1), Shaw timely appealed her termination to the Merit Board. Prior to the hearing before the Merit Board, Shaw filed several objections to evidence due to insufficient notice of charges, hearsay statements, and violations of her right to confront witnesses against her. The Merit Board held a two-day hearing and decided Chief Conrad was justified in his decision to terminate Shaw.

We incorporate herein the following summary of the facts and the Merit Board's decision set forth by the circuit court in its order:

On August 16, 2013, Shaw was involved in an incident with Scott Koch ("Koch"), a Kentucky Vehicle Enforcement Officer. They had been engaged in a long-term romantic extra-marital relationship. Shaw went to Koch's house to confront him about their relationship. Although she was off-duty at the time, she drove her marked LMPD car. Once at Koch's residence, an altercation ensued. Koch called radio dispatch and requested assistance. Several LMPD officers responded Code 3. The responding Sergeant advised Shaw to leave, which she did.

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<sup>1</sup> Kentucky Revised Statutes.

Following the incident, the Professional Standards Unit (“PSU”) was instructed by LMPD Chief Steven Conrad to investigate whether Shaw had violated any rules, standards, polices [*sic*] and procedures. Following the PSU investigation and Shaw having an opportunity to present mitigating factors, Chief Conrad terminated Shaw’s employment on June 18, 2014. Chief Conrad stated Shaw violated several Standard Operating Procedures as a result of the August 16, 2013 incident, including Conduct Unbecoming, Vehicle Usage and Usage Restrictions. He further found she had violated procedures regarding Obedience to Orders and Untruthfulness for her conduct after the incident and during the PSU investigation. Shaw appealed to the Merit Board, which held a hearing on September 15, 2014. The Merit Board upheld Shaw’s termination on February 23, 2015, determining she had violated procedures regarding Conduct Unbecoming, Obedience to Orders and Vehicle Usage, but there was insufficient evidence presented to determine whether she had violated Truthfulness and Usage Restriction policies.

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According to the Merit Board’s Findings and Order issued February 23, 2015, Shaw admitted that she had been untruthful concerning the use of LMPD equipment to gain personal information about Koch and/or his family, that she had violated the Conduct Unbecoming policy by going to Koch’s residence, that she had violated the Vehicle Usage policy by excessively speeding and disregarding a traffic control device on her way to Koch’s residence in her marked LMPD vehicle and that she had failed to follow orders to have no further contact with Koch after the August 16, 2013 incident.

Shaw filed an appeal of the Merit Board’s decision with the Jefferson Circuit Court in accordance with KRS 67C.323(3)(a). On May 1, 2017, the circuit court entered

an order affirming the Merit Board's decision upholding Shaw's termination, stating that the decision could not be arbitrary or unsupported by substantial evidence when it was based on Shaw's own admissions to the violations. This appeal followed.

On appeal, Shaw argues the Merit Board's decision was arbitrary and must be reversed based on three grounds. First, she was not provided adequate notice of two of the charges against her. Second, her constitutional rights to equal protection and privacy were violated due to the charge of immorality. Lastly, during the Merit Board hearing, she was denied her right to confront witnesses violating her right to due process, and the admission of hearsay evidence was arbitrary.

Before we discuss the merits of Shaw's claims, however, we must address Shaw's non-compliance with CR<sup>2</sup> 76.12. CR 76.12(4)(c)(v) requires that each argument contain an explicit statement of preservation. There is no such statement found in her brief. "Our options when an appellate advocate fails to abide by the rules are: (1) to ignore the deficiency and proceed with the review; (2) to strike the brief or its offending portion, CR 76.12(8)(a); or (3) to review the issues raised in the brief for manifest injustice only[.]" *Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010). Because Shaw's first and third claims were, in

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<sup>2</sup> Kentucky Rules of Civil Procedure.

fact, preserved through her objections made to the Merit Board and her complaint in Jefferson Circuit Court, we shall ignore the missing preservation statement and review those issues on the merits. However, her constitutional claims in her second argument were not raised at the Merit Board hearing or in the action before the circuit court. For that reason, we will not address Shaw's second argument.<sup>3</sup> We now address her remaining claims.

“Basically, judicial review of administrative action is concerned with the question of arbitrariness.” *Kaelin v. City of Louisville*, 643 S.W.2d 590, 591 (Ky. 1982). The scope of appellate review for arbitrariness extends to “(1) action in excess of granted powers, (2) lack of procedural due process, and (3) lack of substantial evidentiary support.” *American Beauty Homes Corp. v. Louisville & Jefferson County Planning and Zoning Comm’n*, 379 S.W.2d 450, 456 (Ky. 1964); *See also Hilltop Basic Resources, Inc. v. County of Boone*, 180 S.W.3d 464, 467 (Ky. 2005). On appeal to the circuit court, the standard of review for an administrative action is modified *de novo*, allowing the court to review the record, briefs, and any other evidence relevant to the specific, limited issues on appeal. *Crouch v. Jefferson County, Kentucky Police Merit Board*, 773 S.W.2d 461, 464 (Ky. 1988). Such review does not involve a retrial of the merits. *Id.*

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<sup>3</sup> Regardless, her second claim is without merit because it was based on a charge of immorality that was not levied against her in the PSU's preliminary findings and conclusions, in Chief Conrad's termination letter, or in the Merit Board's decision.

Our review, however, is governed by the clearly erroneous standard set out in CR 52.01. The circuit court's findings shall not be set aside unless they are not supported by substantial evidence. *Stallins v. City of Madisonville*, 707 S.W.2d 349, 350 (Ky. App. 1986). Of course, appellate review of questions of law remains *de novo*. *Aubrey v. Office of Attorney General*, 994 S.W.2d 516, 519 (Ky. App. 1998).

Shaw's first ground that she did not receive adequate notice for two of the charges against her is meritless. First, she argues that the charge of Truthfulness/Untruthfulness, Standard Operating Procedure (SOP) 5.1.5, was too vague and did not provide sufficient information for her to properly prepare a defense. Chief Conrad's termination letter stated:

You violated [SOP 5.1.5] when you made false statements in your memorandum to Maj. M. Sullivan regarding the use of any police equipment or police databases to gain information on anyone in Officer Koch's household. You continued your deception in your Professional Standards investigation.

Then, Shaw argues that an immorality charge based upon the extramarital affair played a role in the termination decision and that she did not receive adequate notice of this charge against her because it was not listed in the termination letter. She claims these insufficient notices ran afoul of her guarantees to procedural due process, and thus, the Merit Board's hearing and decision was arbitrary.

Procedural due process requires, “at a minimum, reasonable notice of [the] intended action and a meaningful opportunity to be heard.” *Abul-Ela v. Kentucky Bd. of Medical Licensure*, 217 S.W.3d 246, 251 (Ky. App. 2006) (citation omitted). Additionally, “[u]nder Kentucky law no less than under federal law, the concept of procedural due process is flexible.” *Smith v. O’Dea*, 939 S.W.2d 353, 357 (Ky. App. 1997).

Yet, neither the charge of untruthfulness nor the charge of immorality was involved in the Merit Board’s decision to uphold the termination. The Merit Board determined that there was insufficient evidence to sustain the charge of Truthfulness/Untruthfulness, but that Chief Conrad’s decision was justified based on the findings of violations of Conduct Unbecoming (SOP 5.1.3), Obedience to Orders (SOP 5.1.4), and Vehicle Usage (SOP 4.14.7). Those sustained charges were significantly based on Shaw’s own admissions to the violations and her poor judgment. The charge of untruthfulness was not sustained by the Merit Board after a two-day hearing. Any potential inadequacy of notice regarding Untruthfulness is immaterial because it was not used to uphold Shaw’s termination.

Similarly, there was no charge of immorality based on the extramarital affair contained in Chief Conrad’s termination letter. During Chief Conrad’s testimony at the hearing, he briefly mentioned his consideration of the extramarital affair as part of the charge of Conduct Unbecoming. However, the

Merit Board specifically found that immorality was not one of the charges against Shaw. In her brief, Shaw states that nowhere in the charging document does it allege “that Shaw violated any policy by having an extra-marital affair, nor does it even contain the words ‘moral,’ ‘morality,’ or ‘affair[.]’” Thus, the failure to give any notice of immorality is inconsequential because the charge did not exist.

Turning to Shaw’s other preserved claim, we hold that the hearing was properly conducted in accordance with due process principles. According to Shaw, some of the exhibits were improperly admitted during the Merit Board hearing as the documents denied her right to confront witnesses and the documents contained hearsay statements. Three memoranda from Lieutenant DeSpain, Major Burbrink, and Major Sullivan contained hearsay, and Lieutenant DeSpain and Major Burbrink were not called as witnesses at the Merit Board hearing.

“Ordinarily, notice and an opportunity to be heard are the basic requirements of due process.” *Storm v. Mullins*, 199 S.W.3d 156, 162 (Ky. 2006) (citation omitted). Specifically, an opportunity to be heard means “an opportunity to confront and cross-examine adverse witnesses.” *Goldberg v. Kelly*, 397 U.S. 254, 269, 90 S.Ct. 1011, 1021, 25 L.Ed. 287 (1970) (citations omitted).

Shaw was given notice of these exhibits prior to the hearing. The Appellees urge us to hold that the onus is on Shaw to subpoena adverse witnesses to rebut their written statements. Instead, we decide that if there was a violation of



her right to confront witnesses, it was harmless error because it did not affect Shaw's substantial rights. CR 61.01. Shaw admitted to multiple violations of the SOP, and the three memoranda were not cited to in any part of the Merit Board's findings or conclusions. Accordingly, there is no reason to believe that the testimony of these witnesses would have had any effect on the Merit Board's decision.

It was also proper for the memoranda to be admitted as exhibits at the hearing even though they contained hearsay. The Board's Hearing Procedure 9.2 states that all evidence considered in the Chief's decision may be presented to the Board. Additionally, the residuum rule, explained in detail in *Cabe v. City of Campbellsville*, 385 S.W.2d 51 (Ky. 1964), allows for the introduction of incompetent evidence but the fact-finder must base its decision solely on the competent evidence. *Drummond v. Todd County Bd. of Educ.*, 349 S.W.3d 316, 321 (Ky. App. 2011). For us to affirm the ruling on appeal, the competent evidence must rise to the level of substantial evidence. *Id.* "Substantial evidence is defined as 'that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person.'" *Board of Com'rs of City of Danville v. Davis*, 238 S.W.3d 132, 135 (Ky. App. 2007) (quoting *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406, 409 (Ky. App. 1994)). In administrative proceedings,

any factual determination made without substantial evidence to support it is deemed arbitrary. *Smith v. O'Dea*, 939 S.W.2d 353, 358 (Ky. App. 1997) (citing *American Beauty Homes Corp.*, 379 S.W.2d at 456).

Upon reviewing the Merit Board's written decision, it appears that none of the three memoranda were cited or alluded to in any part of its findings or conclusions. The Merit Board sustained the charges of Conduct Unbecoming, Vehicle Usage, and Obedience to Orders based on Shaw's own testimony admitting to those violations. Regardless as to whether they constituted competent or incompetent evidence, the memoranda did not contribute to the decision and there was substantial evidence that Shaw violated the Standard Operating Procedures. Accordingly, the Merit Board's decision was not arbitrary, and the circuit court properly denied Shaw's appeal and upheld the Merit Board's decision. Whether the punishment was appropriate or warranted is not within the purview of this Court. *Stallins*, 707 S.W.2d at 350.

For the foregoing reasons, we affirm the order of the Jefferson Circuit Court.

ALL CONCUR.

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