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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001291-MR

COMMONWEALTH OF KENTUCKY; FINANCE & ADMINISTRATION CABINET; WILLIAM M. LANDRUM, III, SECRETARY; AND KENTUCKY PERSONNEL CABINET — APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 17-CI-00038

KELLIE LANG; AND KENTUCKY PERSONNEL BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, JOHNSON,[1] AND SMALLWOOD, JUDGES.

JOHNSON, JUDGE: The single question in this appeal is whether the Franklin Circuit Court erred in concluding that appellee Kelly Lang's years of unclassified

[1] Judge Robert G. Johnson authored this opinion prior to the expiration of his term of office. Release of the opinion was delayed by administrative handling.

service as an assistant/deputy Property Valuation Administrator ("PVA") must be included in calculating her entitlement to career employee status and the right to revert to her previous classified position in the Department of Revenue. After reviewing the record in conjunction with the applicable legal authority, we affirm the judgment of the Franklin Circuit Court.

BACKGROUND

The facts are not in dispute. From 1994 to 2003, Lang held a position as an assistant/deputy employee in various PVA offices. In August 2003, Lang went to work for the Kentucky Department of Revenue where she attained status in the classified service. After returning to a position in a PVA office in 2005, Lang was again employed at the Department of Revenue as a classified employee from 2008 to 2015 and then as an unclassified employee from 2015 until 2016. In 2016, she was terminated without cause from her position as a Division Director.

Upon her termination without cause, Lang invoked the provisions of Kentucky Revised Statute ("KRS") 18A.130(2), which permits a career employee who has attained "status" or tenure in a classified service position to qualify for reversion rights upon dismissal. Lang predicated her request for reversion upon the contention that she had attained career employee status by having accumulated more than sixteen years of service, the minimum requirement, through her cumulative years of employment in both the PVA offices and the Department of

Revenue. The Finance Cabinet denied her request, stating that Lang had not obtained the required sixteen years of service. The Finance Cabinet notified Lang that while it recognized her eight years in state service, it did not consider her twelve years of service in the PVA offices as qualifying service under the reversion statute. Lang then appealed that decision to the Personnel Board.

After determining that the facts were not in dispute and no evidentiary hearing was required, the Hearing Officer decided the case on the briefs submitted by the parties. As part of his final order, the Hearing Officer found that Lang had 7.8 years in classified service and one year in unclassified service with the Department of Revenue, and 12.7 years of unclassified service in four PVA offices for a total of 21.5 years of classified and unclassified state service at the time of her termination. Based upon those findings, the Hearing Officer concluded that Lang was a "career employee" as defined by KRS 18A.005(4) and was therefore entitled to reversion rights.

Both the Finance Cabinet and the Personnel Cabinet appealed the Hearing Officer's findings to the Personnel Board. Upon reviewing the record and receiving oral arguments, the Board reversed the Hearing Officer's findings, concluding that Lang's service in the PVA offices did not qualify as unclassified state service for the purposes of KRS 18A.005(4) and thus Lang was not entitled to invoke the reversion statutes.

Lang's appeal of the Board's decision to the Franklin Circuit Court resulted in a judgment reversing the decision of the Personnel Board on the basis that the unambiguous language of the statutes in question required counting Lang's years of PVA service in determining career employee status and that she had thus attained the right to revert to her previous classified position in the Department of Revenue.

This appeal followed.

STANDARD OF REVIEW

We review an agency's determination of law *de novo.*

> So long as it is in the form of an adopted regulation or formal adjudication, we review an agency's interpretation of a statute that it is charged with implementing pursuant to the doctrine enunciated in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed.2d 694 (1984). Under *Chevron*, we defer to the agency's interpretation if the statute is silent or ambiguous with respect to the specific issue.

Metzinger v. Kentucky Ret. Sys., 299 S.W.3d 541, 545 (Ky. 2009) (internal citations and quotation marks omitted).

ANALYSIS

Whether Lang's PVA service should be considered in calculating career employee status requires construction of several statutory enactments. Central to our review is KRS 18A.005(4), which defines a "career employee" as

> [A] state employee with sixteen (16) or more years of permanent full-time state service, or the part-time

> employment equivalent of at least sixteen (16) years of full-time state service. **The service may have been in the classified service, the unclassified service, or a combination thereof**.

(Emphasis added).

The question is whether Lang's 12 years of service in PVA offices must be counted in reaching the 16-year threshold. If Lang is entitled to career status, she is then entitled to revert back to the last position she held in the classified service, an assistant director in the Department of Revenue. However, if she is not entitled to reversion rights, Lang's termination from the Finance Cabinet is final, with no appeal rights.

Although there is no definition, either by statute or regulation, as to what constitutes "unclassified service," the term "classified service" is defined in KRS 18A.005(9) as: "all the employment subject to the terms of this chapter except for those positions expressly cited in KRS 18A.115; a 'classified position' is a position in the classified service." During her employment with the state, Lang worked under two different employee systems. Lang's 12.7 years in different PVA offices were as an unclassified employee under KRS 132.370(1):

> There shall be a property valuation administrator in each county in lieu of a county assessor. **Property valuation administrators shall be state officials and all deputies and assistants of their offices shall be unclassified state employees.**

(Emphasis added).

In addition, Lang accumulated 8.8 years of service in the Department of Revenue in different positions under KRS Chapter 18A, ranging from supervisor to assistant director. In 2016, after her termination from an unclassified position in the Department of Revenue, Lang requested to revert back to an assistant director's position in the Department of Revenue, as provided for in KRS 18A.130:

> (1) A career employee whose employment is terminated on or after January 1, 1980, by lay-off, dismissal, other than for cause, and, in the case of an unclassified management employee, resignation other than resignation in lieu of dismissal for cause, shall, upon his written request, be reemployed or placed on reemployment lists in accordance with this section and KRS 18A.135.
>
> (2) If the career employee has previously attained status in a position in the classified service, he shall revert to a position in that class in the agency from which he was terminated if a vacancy in that class exists. If no such vacancy exists, he shall be considered for employment in any vacant position for which he is qualified pursuant to the reemployment procedures.

The Department of Revenue denied her request based upon its determination that her years as an unclassified PVA employee did not count toward the sixteen years needed to obtain reversion rights. Lang then appealed that decision to the Personnel Board.

In reversing the decision of its hearing officer, the Board concluded that PVA employees, while defined by statute to be **unclassified state employees** under KRS 132.370, are entitled only to the KRS Chapter 18A benefits which are specifically identified in KRS 132.370(3): entitlement to participate in life insurance under KRS 18A.205; deferred compensation benefits under KRS 18A.230-275; annual increments under KRS 18A.355; and state retirement benefits under KRS 61.510-705.

The circuit court reversed the Board's decision based upon its application of the *Chevron* standard as adopted in *Metzinger*, *supra.* In reviewing an agency's interpretation of a statute the agency is charged with implementing, courts must defer to the agency's interpretation "if the statute is silent or ambiguous with respect to the specific issue." *Id.* at 545. If the statute in question is ambiguous, courts must defer to the agency's reasonable interpretation of the enabling statute, provided the agency's actions are not arbitrary, capricious, or manifestly contrary to the statute. *Chevron, supra*; *Ky. Occupational Safety and Health Review Comm'n v. Estill Cty. Fiscal Court*, 503 S.W.3d 924, 929 (Ky. 2016). However, if the statute is clear and unambiguous, the court must apply the clear interpretation. *Id.*, at 927.

Here, the circuit court found that KRS 132.370(1) and KRS 18A.005(4) both refer to unclassified employees or unclassified service. It also

found, however, that "[n]othing in KRS 18A.370(3) indicates that the [KRS 132.270(1)] designation of PVA employees as 'unclassified state employees' is not applicable to the definition of 'career employee' in KRS 18A.005(4)." On the basis of their plain language, the circuit court determined that the statutes in question were unambiguous and must be applied to grant Lang career employee status and reversion rights. We do not agree that the statutes are unambiguous.

A statute which contains undefined words or terms which give rise to two mutually exclusive, yet reasonable, constructions is ambiguous. *MPM Fin. Group, Inc. v. Morton*, 289 S.W.3d 193, 198 (Ky. 2009). In the case *sub judice*, all parties agree that there is no definition of "unclassified employee" in statute or regulation. Because the undefined term "unclassified employee" as used in both KRS 18A.005 and KRS 132.370 gives rise to two reasonable and mutually exclusive constructions of what the statutes intend, it is ambiguous. We therefore conclude that reading KRS 18A.005 in conjunction with KRS 132.370 creates an ambiguity that makes it unclear whether the Legislature intended to include the definition of PVA service as unclassified state service in KRS Chapter 132 into the provisions of KRS Chapter 18A, or if it intended otherwise. In fact, the Board argues that the definition of unclassified employee is always ambiguous, citing the use of the term "unclassified" in multiple statutes with different constructions depending upon the Personnel Board's reading of the statute's context.

Applying the *Chevron* standard to our review, if the statute is ambiguous, the question becomes whether the agency's determination is based on a permissible construction of the statute. *Chevron*, 467 U.S. at 843. Appellants argue that, given the ambiguity in the statute, this Court owes deference to their determination that unclassified PVA employees are not the same as unclassified state employees for calculating career employee status under KRS 18A.005(4). They support their position by pointing out that the Legislature designated PVA employees as subject to the statutory rights and benefits contained in KRS Chapter 18A only as specifically enumerated in KRS 132.370(3). Because the legislature chose to specifically include PVA employees in certain benefits under KRS Chapter 18A, appellants insist that they are precluded from any other additional Chapter 18A benefits. Although we agree that the undefined term "unclassified employee" creates an ambiguity, we need not defer to the Board's interpretation of the statute because we are convinced that it is unreasonable and arbitrary.

Were we to give the usual deference to the agency's interpretation, we would be left to consider appellants' use of Lang's years of PVA service for some purposes but not for others. For example, appellants used both her years of PVA employment as well as her state employment in awarding Lang a 20-year recognition certificate and in giving her additional KRS Chapter 18A benefits. Although the additional benefits are not enumerated in KRS 132.370, the

Department of Revenue recognized Lang's PVA service in conferring certain benefits based upon her longevity of service alone.

Thus, while we may agree that the statute is ambiguous, we are also convinced that the agency failed to consistently follow its own interpretation of the statutes. The agency's refusal to include all of Lang's employment years in determining her "career status" conflicts with its use of the same service in granting her extra sick days based on her ten years and twenty years of service; allowing her to participate in the sick leave sharing provisions; and awarding her increases in annual leave accrual. Again, none of those benefits is enumerated in KRS Chapter 132 as available to PVA employees but were nevertheless granted to Lang without direct statutory authority. Because we are convinced that the agency's interpretation of the ambiguous statutes is arbitrary and capricious, we need not defer to its interpretation KRS 18A.005(4) concerning Lang's career status. *Chevron, supra*; *Com., Transportation Cabinet v. Weinberg*, 150 S.W.3d 75, 77 (Ky. App. 2004).

In this case, the agency accepted Lang's employment years in both the PVA office and the Department of Revenue when granting some benefits under KRS Chapter 18A, but declined to do the same for another benefit, that of career status. "[I]t is axiomatic that failure of an administrative agency to follow its own rule or regulation generally is *per se* arbitrary and capricious." *Weinberg*, at 77.

We are convinced that the agency's recognition of Lang's cumulative years of service for some benefits and refusal to recognize it for the purpose of attaining "career status" is arbitrary and capricious on its face under these facts alone.

We therefore affirm the circuit court's determination that Lang was entitled to career employee status and reversion benefits, albeit on a different basis than set out in the circuit court opinion. "Even if a lower court reaches its judgment for the wrong reason, we may affirm a correct result upon any ground supported by the record." *Wells v. Commonwealth*, 512 S.W.3d 720, 721-22 (Ky. 2017). While we disagree with the circuit court's conclusion that the statues in question are unambiguous, we affirm its decision based upon our application of the *Chevron* standard to the agency's interpretation in this case.

CONCLUSION

Based upon the foregoing we affirm the judgment of the Franklin Circuit Court.

ALL CONCUR.

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