

RENDERED: DECEMBER 21, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001392-MR

COMMISSIONER RICHARD W. SANDERS;
CAPTAIN SEAN MCKINNEY;
CAPTAIN HOWARD RICE;
TROOPER SCOTTIE PENNINGTON;
SERGEANT WILLIAM LINDON;
CAPTAIN JERRY WISE;
TROOPER GEORGE ATWOOD;
SERGEANT CHARLES KELTON;
TROOPER DALLAS EUBANKS (ALTERNATE);
LIEUTENANT JOHN YATES (ALTERNATE) AND
LIEUTENANT CLAUDE LITTLE (ALTERNATE) APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 17-CI-00577

WHITNEY HOWARD

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JONES, J. LAMBERT, AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Members of the Kentucky State Police (KSP) Trial Board (the KSP Trial Board)¹ appeal from the Franklin Circuit Court's opinion and order vacating Trooper Whitney Howard's conviction for dishonesty punished by termination after a disciplinary hearing. The KSP Trial Board argues the circuit court erred in concluding Howard's conviction was arbitrary and capricious and not supported by substantial evidence. As the circuit court correctly vacated Howard's conviction, we affirm.

Howard was a KSP trooper assigned to Post-8 in Morehead, Kentucky. She was employed in a light-duty capacity after a back injury incurred in the line of duty. Following multiple surgeries, Howard still required a substantial quantity of prescribed medications.

On the morning of July 29, 2015, Howard reported for duty and then went to a retirement luncheon for a captain. While at that luncheon, several KSP personnel observed Howard laughing uncontrollably, slurring her speech, talking at an unusually high volume, and staring blankly into space for extended periods of time. Some personnel observing Howard became concerned that she was possibly intoxicated. Then-Lieutenant Kenneth Bowman was made aware of concerns

¹ The members are: Commissioner Richard W. Sanders, Captain Sean McKinney, Captain Howard Rice, Trooper Scottie Pennington, Sergeant William Lindon, Captain Jerry Wise, Trooper George Atwood, Sergeant Charles Kelton, Topper Dallas Eubanks, Lieutenant John Yates and Lieutenant Claude Little.

about Howard's behavior. Lieutenant Bowman began observing Howard and noted her behavior was consistent with intoxication. Lieutenant Bowman instructed Sergeant Brian Evans to make sure Howard did not leave the restaurant in her vehicle and to bring her back to Post-8 following the luncheon.

Once Howard arrived at Post-8, she was called into a meeting with Lieutenant Bowman and Lieutenant John Dowdy. Both Lieutenants observed that Howard appeared to be intoxicated during their meeting. When Howard was asked whether she was intoxicated, she became angry and began to curse and raise her voice. Lieutenants Bowman and Dowdy questioned Howard about what medications she was currently on, then ordered Howard to submit to a urine test. As part of the urine test, Howard was required to fill out a form disclosing all medications she had taken within the last thirty days. Howard listed numerous medications on the disclosure form and, when questioned as to why she was listing more than what she had just informed them she had taken that day, Howard stated those were the medications she had taken in the past. Howard was placed on sick leave later that day.

The urinalysis report confirmed that Howard's urine contained numerous substances, all of which had been listed on her disclosure sheet. In March of 2016, now-Captain Bowman filed a formal complaint against Howard with the Internal Affairs Branch of the KSP concerning Howard's actions on July

29, 2015. During the investigation, Howard submitted verification that she had valid prescriptions for all the substances noted in the urinalysis report, excluding nicotine and Benadryl.

Following the investigation, Howard was charged with committing the following violations of the KSP standards of conduct: (1) use of intoxicants on duty; (2) operating a motor vehicle under the influence of an intoxicant; (3) dishonesty; (4) insubordination; (5) conduct unbecoming; and (6) conformance to law. A hearing on the charges against Howard was held on May 17 and 18 of 2017. Of those six charges, the Trial Board determined that Howard was guilty of conduct unbecoming and violating the dishonesty standard.² As a result of Howard being found guilty on the dishonesty charge, she was terminated from her position with the KSP.

Howard appealed the KSP Trial Board's order to the Franklin Circuit Court. The circuit court upheld Howard's conviction for conduct unbecoming of an officer but vacated her conviction for violating the dishonesty standard. In reaching that decision, the circuit court concluded that there had not been substantial evidence presented at the hearing for the Trial Board to conclude that

² The KSP Trial Board acquitted Howard on the charges of operating a motor vehicle under the influence of an intoxicant and insubordination. Howard was granted a directed verdict on the charges of use of intoxicants on duty and conformance to law.

Howard had made dishonest statements concerning the types and the amount of medication she had taken on July 29, 2015.

The KSP Trial Board argues the circuit court erred in concluding Howard's conviction was arbitrary and capricious and not supported by substantial evidence because the circuit court misunderstood which statements formed the basis of the dishonesty charge.

Kentucky Revised Statutes (KRS) 16.150(4) limits the circuit court's review. The only applicable ground for its vacating of Howard's dishonesty conviction was its review pursuant to KRS 16.150(4)(c), which allows the circuit court to review, "[i]f questions of fact are in issue, whether or not any substantial evidence supports the order appealed from." Substantial evidence has been defined as that which "has sufficient probative value to induce conviction in the minds of reasonable men." *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972). "The rule in Kentucky is that if there is substantial evidence in the record to support an agency's findings, the findings will be upheld, even though there may be conflicting evidence in the record." *Kentucky Comm'n on Human Rights v. Fraser*, 625 S.W.2d 852, 856 (Ky. 1981).

We agree with and adopt as our own the sound reasoning of the circuit court as to why it is proper to reverse Howard's conviction for not conforming to the dishonesty standard:

[Howard] was accused and convicted of being dishonest during her employment as a KSP trooper. . . [regarding] the medications she was taking In order to convict [Howard] of this charge, the KSP Trial Board had to conclude that the “multiple statements” made by [Howard] . . . were contradicted by her urine analysis and the corresponding pharmacology.

The evidence before this Court does not compel conviction in the minds of reasonable men, and therefore, does not meet the standard of “substantial evidence.” Here, the question is not one of disputed facts, but whether the Trial Board acted arbitrarily in its evaluation of those facts within the context of a meeting in which it is undisputed that [Howard] made a full, accurate and complete disclosure. If the only evidence before this Court were testimony of the oral statements made by [Howard], this Court would be hard pressed to overturn her conviction. When conducting a substantial evidence review, a court must not reweigh the evidence or substitute its judgment on the facts for the judgment of the adjudicating body. *Carreer v. Cabinet for Health and Family Services*, 339 S.W.3d 477 (Ky.App. 2010). [Howard’s] Trial Board testimony about her oral statements regarding any medications she had taken on July 29, 2016 conflicts with the testimony of several other officers. The Trial Board was well within its rights to determine which witnesses were truthful and to be believed. However, the Trial Board came to an erroneous factual conclusion in finding [Howard] guilty of dishonesty because it did not properly consider the written statement provided by [Howard] While the evidence may support a finding that her oral responses to the questions were incomplete, there is no factual basis to conclude that they were dishonest, especially in light of her truthful and complete written disclosure

. . . While there is a dispute about what [Howard] orally stated her medication to be, all parties agree that the disclosure form is an authentic document that

included every substance found in her system. . . . [The KSP Trial Board] cannot claim that the disclosure form was a statement separate from the others, or, that it was a letter statement made to correct for the dishonesty already expressed. . . . Indeed, as Commissioner Sanders stated, the disclosure form resolves any discrepancies that might have existed from . . . verbal exchanges.

A substantial evidence analysis must review whether the record *as a whole* supports the administrative determination. *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298 (Ky.App. 1972). The KSP's attempt to ignore the disclosure form while deciding the honesty of [Howard] is arbitrary. No amount of evidence produced by an administrative agency can prove and apply to be an orange. *Prestonia Area Neighborhood Association v. Abramson*, 797 S.W.2d 708, 712 (Ky. 1990). The factual basis for the finding of dishonest is dependent on the exclusion of the written disclosure of her prescription medications at the meeting with her superior officers. To ignore such relevant evidence in an administrative adjudication is an abuse of discretion, rendering the decision of the KSP Trial Board arbitrary and capricious on this charge. *Id.* Similarly, in determining whether [Howard] was dishonest, the KSP Trial Board may not cherry pick the oral statements made by [Howard] . . . to the exclusion of clearer, uncontroverted written statement. In fact, the KSP policy that requires a full written disclosure of prescription medications to accompany a urine test is an acknowledgment of the inherent problems of relying on oral disclosures of such data. A written disclosure eliminates the chance of miscommunication.

It was factually erroneous for the KSP Trial Board to conclude that [Howard] had been dishonest, when . . . [Howard] fully disclosed the information about her prescription medications that is at the heart of the alleged dishonesty. Thus, considering both the written disclosure form and the oral statements made by [Howard], the KSP

Trial Board's conclusion that [Howard] was dishonest about her medications is not supported by substantial evidence. The KSP Trial Board's finding completely ignores the context of the allegedly dishonest oral statements, which were made while she was on these same prescription medications that contributed to her unusual behavior Because these oral statements were accompanied by a full and accurate written disclosure, the finding of the Trial Board that the oral statements, taken out of this context, were dishonest, is arbitrary and capricious. In light of the fact that it is undisputed that she made a full and accurate written disclosure of her medications, as directed . . . the finding of dishonesty is not supported by the record and must be set aside.

Accordingly, we affirm the Franklin Circuit Court's opinion and order vacating Trooper Whitney Howard's conviction for violating the dishonesty standard on the basis that this conviction was arbitrary and capricious and not supported by substantial evidence.

LAMBERT, J., JUDGE, CONCURS.

JONES, JUDGE, DISSENTS.

BRIEF FOR APPELLANTS:

Shawna Virgin Kincer
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Thomas E. Clay
Louisville, Kentucky