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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001906-MR

MICHAEL L. HOPE — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH MCDONALD-BURKMAN, JUDGE
ACTION NO. 16-CI-006135

EASTWOOD FIRE PROTECTION DISTRICT — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; JOHNSON AND KRAMER, JUDGES.

KRAMER, JUDGE: Michael L. Hope was a firefighter with the Eastwood Fire Protection District for sixteen years where he had attained the rank of Sergeant. On August 4, 2016, the District's Fire Chief, Tony Arnold, filed disciplinary

charges with the District's Board of Trustees[1] against Hope based upon several instances of Hope's alleged misconduct, inefficiency, and insubordination. The Board held a three-day hearing with respect to those charges; and on November 17, 2016, following the Board's ultimate determination that most of the charges were well founded, the Board terminated Hope's employment. Hope then filed an original action in Jefferson Circuit Court to contest the Board's decision;[2] the circuit court affirmed the Board's action; and this appeal followed.[3] Upon review, we likewise affirm.

Before addressing the substance of Hope's appellate arguments, we begin with the applicable standard of review. In the context of public employee discharge cases, the circuit court provides a modified *de novo* review. *Crouch v. Jefferson County, Police Merit Bd.*, 773 S.W.2d 461, 464 (Ky. 1988). This requires the circuit court to determine whether or not the action was arbitrary. *Id*. Three factors are to be considered in determining whether the decision of the administrative agency was arbitrary: "(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 County Planning & Zoning Comm'n*,

[1] *See* Kentucky Revised Statute (KRS) 75.130(2).

[2] *See* KRS 75.140(1).

[3] *See* KRS 75.140(4).

379 S.W.2d 450, 456 (Ky. 1964). Substantial evidence is defined as "evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable persons." *Aubrey v. Office of Attorney Gen.*, 994 S.W.2d 516, 519 (Ky. App. 1988).

Modified *de novo* review requires something less than a new trial. *Crouch*, 773 S.W.2d at 463. Review is limited only to the question of whether the administrative agency's decision is clearly unreasonable. *Id*. However, only the determination of whether the public employee violated the agency's rules is subject to judicial review; the penalty imposed is not. *Stallins v. City of Madisonville*, 707 S.W.2d 349, 350 (Ky. App. 1986). This Court reviews the circuit court's decision under a clearly erroneous standard as set forth in CR[4] 52.01. *Howard v. City of Independence*, 199 S.W.3d 741, 743 (Ky. App. 2005). The circuit court's application of the law to the facts is reviewed *de novo*. *Id*.

With that said, Hope does not contest that substantial evidence supported the Board's decision to terminate his employment on grounds of misconduct, inefficiency, and insubordination. Rather, the thrust of his appeal is that in his view his procedural rights were violated. To that end, his first argument focuses upon KRS 75.130(2), which required the Secretary of the Board to "communicate the charges to the board of trustees by mailing or delivering a copy

[4] Kentucky Rule of Civil Procedure.

of the charges to each member of the board of trustees within seven (7) days of receipt of the charges at the principal fire house." Hope points out that his charges were received at the principal fire house on August 4, 2016; the copy of the charges mailed to each member of the Board was dated August 12, 2016; and he argues that because the difference between the two dates was *eight days*, rather than seven, the Board's decision to terminate him procedurally defective and therefore unwarranted.

We disagree. The issue of whether documents were *in fact* mailed on a specific date is, of course, an issue of fact that requires evidence to prove, and a fact-finder to resolve. *See*, *e.g.*, CR 5.03 (explaining that proof of service, which is often effectuated by mailing, "may be by certificate of a member of the bar of the court or by affidavit of the person who served the papers, or by any other proof satisfactory to the court.") And, while it is true that the date listed on the copy of the charges qualified as evidence of when the charges were mailed, it was not, as the Board (in its capacity as administrative fact-finder) and circuit court each pointed out below, the *only* evidence.

To the contrary, during the proceedings before the Board: (1) one Board member testified she received her copy on August 11, 2016, via hand-delivery; (2) the Secretary testified she gave the remaining copies to Chief Arnold on the evening of August 11, 2016, and directed him to immediately mail them

out; (3) Chief Arnold testified that he placed the remaining copies in the mail that evening; (4) Lieutenant Colonel Michael Sutt, another firefighter employed by the District, testified he accompanied Chief Arnold to the mailbox that evening and witnessed and recorded him on his cellular telephone mailing the copies; (5) without any objection from Hope, Sutt's recording of the mailing – which bore an electronic date stamp of August 11, 2016, and was timed as running from 8:38 p.m. to 8:39 p.m – was viewed by the entirety of the Board; and (6) likewise without any objection from Hope, pictures of a still frame of the beginning of Sutt's recording, and a still frame of the ending (depicting several stamped envelopes being placed in a mailbox) were entered into the administrative record. The Board cited this evidence when concluding, despite the date written on the mailed copies, that the seven-day deadline had been met; the circuit court regarded this evidence as substantial; and we agree with the circuit court's conclusion. Accordingly, Hope's argument in this vein lacks merit.

Next, Hope argues the Board's decision to terminate his employment should be rescinded because, as he asserts, prior to the date of his hearing the Board received *ex parte* contacts. Hope describes these *ex parte* contacts in his brief as "settlement discussions with the Chief through his counsel." But, Hope provides no indication of the substance of those discussions apart from adding that they were "confidential."

In its own review the circuit court determined this argument lacked merit, and we agree and adopt its reasoning. Improper *ex parte* communications, in and of themselves, provide no basis for reversing an administrative decision; rather, an appellant must prove that the *ex parte* communications actually tainted the administrative tribunal's decision. *See Louisville Gas and Elec. Co. v. Commonwealth*, 862 S.W.2d 897, 901 (Ky. App. 1993). Here, Hope has offered no such proof; he merely offers his own speculation to that effect, and he further invites this Court to speculate about *what* was communicated to the Board in *ex parte* fashion. We decline to do so.

Lastly, Hope argues the Board was biased against him.

Generally speaking, if an administrative agency's action or decision was the product of improper bias, it is considered arbitrary and grounds for reversal. *See Hart Cty. Bd. of Ed. v. Broady*, 577 S.W.2d 423 (Ky. App. 1979); *see also Warren Cty. Citizens for Managed Growth, Inc. v. Board of Comm'rs of City of Bowling Green*, 207 S.W.3d 7, 17 (Ky. App. 2006) ("Any bias involving a conflict of interest or blatant favoritism, or which demonstrates malice, fraud, or corruption is expressly prohibited as arbitrary."). The onus is upon the claimant, however, to prove that the administrative agency's action or decision was the product of improper bias. *Reed v. City of Richmond*, 582 S.W.2d 651, 655 (Ky. App. 1979).

As an aside, the appellee Board contends that although the circuit court resolved this remaining issue in its favor, the circuit court nevertheless erred in addressing it *at all* because Hope failed to raise his allegations of bias during the administrative proceedings. We disagree with the Board in this respect, however, because the circuit court is a proper tribunal for resolving assertions of administrative bias in this and other administrative contexts and is authorized to make additional findings of fact relating to this issue. *See id.* ("[A]ppellants had a statutory right of appeal and presumably an opportunity to show any evidence of prejudice by the board members at the hearing before the circuit court."); *Maggard v. Com., Bd. of Examiners of Psychology*, 282 S.W.3d 301 (Ky. 2008); *see also Howard*, 199 S.W.3d at 745 (explaining, in the context of this type of administrative review, that "[b]ecause the circuit court has the authority to take additional proof, it must have the authority to make additional findings of fact" which are likewise reviewed under the clearly erroneous standard). Indeed, this is a point the Board itself recognized at the onset of its administrative hearing, when it preemptively informed Hope that it would be improper, at that phase, to allow him[5] to *voir dire* any of its individual members.

[5] As discussed below, during the hearing the Board's counsel asked the individual members of the Board to "speak up" if any of them felt unable to fairly and impartially adjudicate the administrative proceedings.

Hope contends the Board was biased. He alleges that before his administrative hearing took place, he came upon information leading him to believe that the Chairperson of the Board, Melinda Sunderland, had contacted other Board members to ask them how they intended to vote. The apparent source of this information was Captain Dewayne McCray, one of the other Board members Sunderland allegedly contacted. Before the circuit court, Hope produced an affidavit from McCray, dated February 28, 2017, in which McCray represented in relevant part that Sunderland not only asked him how he intended to vote, but told him that four other Board members intended to vote in favor of terminating Hope.

In rebuttal, however, the Board produced a counter-affidavit from Sunderland in which she denied McCray's averments. It pointed out that McCray never indicated in his affidavit that *he* failed to act impartially or felt coerced when he, himself, voted to terminate Hope's employment. And, despite the statements McCray made in his February 28, 2017 affidavit about what Sunderland allegedly told him *before* Hope's hearing, neither McCray nor any other Board member spoke up on October 13, 2016 – *during* Hope's hearing – when the Board's counsel asked them the following question:

> If you feel that you have some bias greater than your knowledge of this department and its activities and its members, then you may wish to speak up and advise us of your bias that you think would impact your ability to

> hear this case. And I'm talking about a bias beyond normal human knowledge of people and their ways. I'm talking about a bias that goes to your inability to follow evidence and testimony and rules of procedure. If your bias extends to your inability to do that, then I think you should tell us about it. Does anyone feel that they're in that position, that they need to tell us about a bias that's affecting their ability to hear evidence, weigh evidence, be fair, and reach a proper decision? Anyone have that kind of feeling?

This was the extent of what was adduced below regarding Hope's contention of bias. The circuit court considered this evidence and determined, on balance, that Hope had failed to carry his burdens of proof and persuasion in this respect. Likewise, we find nothing of record compelling a contrary result.

In conclusion, Hope presents nothing indicative of reversible error. We therefore AFFIRM.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
David O'Brien Suetholz Louisville, Kentucky	Jonathan S. Ricketts Christopher D. Bush Louisville, Kentucky