

RENDERED: MAY 10, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

OPINION OF SEPTEMBER 28, 2018, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001018-MR

NICOLE TRAVIS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA MCCORMICK BISIG, JUDGE
ACTION NO. 16-CI-005806

STATE EVALUATION APPEALS PANEL,
KENTUCKY BOARD OF EDUCATION,
KENTUCKY DEPARTMENT OF EDUCATION,
EDUCATION AND WORKFORCE
DEVELOPMENT CABINET, AND THE
JEFFERSON COUNTY BOARD OF EDUCATION
d/b/a JEFFERSON COUNTY PUBLIC SCHOOLS

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON, CHIEF JUDGE; DIXON AND JONES, JUDGES.

DIXON, JUDGE: Appellant, Nicole Travis, appeals from an order of the Jefferson Circuit Court granting the motion to dismiss filed by the Jefferson County Board of Education (“JCBE”). Finding no error, we affirm.

This case arises out of Travis’s employment by the Jefferson County Public Schools as an Assistant Principal at Smyrna Elementary School in Louisville, Kentucky, for the 2014-2015 school year and part of the 2015-2016 year. On August 10, 2015, Smyrna Elementary Principal, Tiffany Stith, issued a summative evaluation of Travis in which she recommended that Travis be demoted to a teacher position. Travis, thereafter, appealed her evaluation to JCBE’s Local Evaluation Appeals Panel (“LEAP”). A LEAP hearing was held on February 8, 2016. On February 23, 2016, LEAP rendered a decision upholding Travis’s evaluation. Travis then appealed the LEAP decision to the State Evaluation Appeals Panel (“SEAP”). A SEAP hearing was conducted on October 5, 2016. By order dated October 25, 2016, SEAP upheld the LEAP decision.

On November 23, 2016, Travis filed a verified petition pursuant to KRS Chapter 13B in the Jefferson Circuit Court seeking to have the SEAP decision vacated. Therein, she alleged that the SEAP order was in violation of KRS 156.557, 704 KAR 3:370, and § 2 of the Kentucky Constitution. Further, Travis argued that the SEAP decision was arbitrary, capricious and an abuse of discretion. Thereafter, JCBE filed a motion to dismiss, arguing that the trial court

was without jurisdiction to review the LEAP and SEAP decisions. Following a hearing on April 17, 2017, the trial court entered an order dismissing Travis's petition. Therein, the trial court observed,

While KRS 13B.140(1) states that final orders of an agency are subject to judicial review, the Court finds that the LEAP and SEAP are not agencies for the purposes of this statute. LEAP and SEAP were created by statute to provide standards for evaluation and an appeals process. *See* KRS 156.557 and 704 KAR 3:370. While the statutes and regulations specifically provide for an appeal to LEAP and then a subsequent appeal to SEAP, there is no language indicating that a decision by SEAP regarding performance evaluations may be appealed to any other body, including the courts. The Court noted that this is an appeal of a performance evaluation that resulted in a demotion. The Court agrees with JCBE that allowing such appeals would open the courts to any and all certified school employees who disagree with the result of their LEAP and SEAP appeals process. The Court does not believe that this was the intention of the Legislature when creating these statutes. Therefore, the Court finds that the LEAP and SEAP decisions are not subject to judicial review. Absent jurisdiction to review [these] claims, the claims must be dismissed.

Following the denial of her motion to alter, amend or vacate the trial court's decision, Travis appealed to this Court as a matter of right. Additional facts are set forth as necessary.

Travis argues herein that the trial court erred in finding that the SEAP is not an administrative agency and its orders are not subject to judicial review. Travis contends that the SEAP clearly falls within the definition of an agency as

defined in KRS 13B.010. Alternatively, Travis argues that if the SEAP is not an agency that is subject to judicial review, then KRS 156.557, the statute that created it, is facially unconstitutional.

A motion to dismiss for failure to state a claim upon which relief may be granted “admits as true the material facts of the complaint.” *Upchurch v. Clinton County*, 330 S.W.2d 428, 429–30 (Ky. 1959). As such, a trial court should not grant the motion “unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved” *Pari–Mutuel Clerks’ Union of Kentucky, Local 541, SEIU, AFL–CIO v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977). Accordingly, “the pleadings should be liberally construed in the light most favorable to the plaintiff, all allegations being taken as true.” *Morgan v. Bird*, 289 S.W.3d 222, 226 (Ky. App. 2009). This standard of review eliminates any need by the trial court to make findings of fact; “rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?” *James v. Wilson*, 95 S.W.3d 875, 884 (Ky. App. 2002). Since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court's determination; instead, an appellate court reviews the issue *de novo*. *Morgan*, 289 S.W.3d at 226.

KRS 156.557¹ establishes a “statewide framework for teaching that shall promote the continuous professional growth and development of skills needed to be a highly effective teacher or a highly effective administrator in a school or district.” KRS 156.557(2). The statute sets forth performance criteria by which teachers and administrators shall be evaluated and requires that all evaluations of certified school personnel below the level of district superintendent shall be in writing on evaluation forms and under evaluation procedures developed by a committee composed of an equal number of teachers and administrators. KRS 156.557(8), which creates the LEAP, provides that “[c]ertified school personnel who think they were not fairly evaluated may submit an appeal to the panel for a timely review of their evaluation.” Further, KRS 156.557(7), which creates the SEAP, states,

The Kentucky Board of Education shall establish an appeals procedure for certified school personnel who believe that the local school district failed to properly implement the evaluation system. The appeals procedure shall not involve requests from individual certified school personnel members for review of the judgmental conclusions of their personnel evaluations.

¹ KRS 156.557 was amended and renumbered in April 2017. The language of the quoted provisions remains the same.

704 KAR 3:370² was promulgated to govern the process of appeals to LEAP and SEAP, and provides in relevant part,

Section 11. District³ Evaluation Appeals Panel.

The district shall provide the following in its system plan for an appeal to the district evaluation appeals panel:

- (1) A right to a hearing as to every appeal;
- (2) An opportunity, five (5) days in advance of the hearing, for the evaluator and evaluatee to adequately review all documents that are to be presented to the district evaluation appeals panel; and
- (3) A right to have the evaluatee's chosen representative present at the hearing.

Section 12. State Evaluation Appeals Panel.

- (1) A certified school personnel who believes that the local district is not properly implementing the district certified evaluation plan as approved by the department shall have the opportunity to appeal to the Kentucky Board of Education.
- (2) The appeal procedures shall be as established in this subsection.

- (a) The Kentucky Board of Education shall appoint a committee of three (3) state board members to serve on the state evaluation appeals panel (SEAP). The SEAP's jurisdiction shall be limited to

² 704 KAR 3:370 was amended and renumbered in March 2018. The substance of the quoted provisions remains the same.

³ Prior to the 2018 amendment, Section 11 was numbered Section 17 and was titled "Local Evaluation Appeals Panel."

procedural matters already addressed by the local appeals panel related to the district's alleged failure to implement an evaluation plan as approved by the department. The SEAP shall not have jurisdiction of a complaint involving the professional judgment conclusion of an evaluation, and the SEAP's review shall be limited to the record of proceedings and documents therein, or lack thereof, at the local district level.

As noted by the trial court, neither KRS 156.557 nor 704 KAR 3:370 includes any provision authorizing judicial review of a SEAP decision.

Nevertheless, Travis takes the position that the SEAP is an administrative agency within the purview of KRS Chapter 13B whose decisions are subject to judicial review regardless of whether the statute provides for such. We must disagree.

KRS 13B.010(1) defines an “administrative agency” or “agency” as a “state board, bureau, cabinet, commission, department, authority, officer, or other entity in the executive branch of state government authorized by law to conduct administrative hearings.” Further, KRS 13B.010(2) provides that an “[a]dministrative hearing’ or ‘hearing’ means any type of formal adjudicatory proceeding conducted by an agency as required or permitted by statute or regulation to adjudicate the legal rights, duties, privileges, or immunities of a named person.”

Unlike an administrative hearing, the focus of a SEAP review under Kentucky's statutory scheme is not a formal adjudication of a teacher's legal rights, duties, privileges, or immunities. Rather, the SEAP is charged with determining whether "the local school district failed to properly implement the evaluation system." KRS 156.557(7); 704 KAR 3:370 §12(2)(a). The SEAP cannot adjudicate a teacher's legal rights, duties, privileges, or immunities because, as set forth in KRS 156.557(7), it does not have jurisdiction to review the "judgmental conclusions of [a] personnel evaluation[.]" *See also* 704 KAR 3:370 § 12(2)(a). The SEAP is not authorized to make findings of fact regarding an evaluator's conclusions, nor can it legally find that a teacher was wronged so as to entitle her to reinstatement, back pay, or other monetary remedy. The authority of the SEAP is limited to voiding a personnel evaluation, which then simply allows that teacher to be reevaluated.⁴ As such, the SEAP proceeding cannot be characterized as an adjudication of a teacher's legal rights because the result of the proceeding has no substantive impact on the teacher.

Travis cites to *Thompson v. Board of Education of Henderson County*, 838 S.W.2d 390 (Ky. 1992), for the proposition that the SEAP's review process

⁴ Interestingly, JCBE points out that even if the SEAP concludes that a teacher is entitled to be reevaluated because the local school district failed to properly implement the evaluation process, the evaluator will, more likely than not, include substantially the same information regarding that teacher's deficiencies in his or her reevaluation. The result still being a poor performance evaluation in the teacher's file.

creates “a property interest that inures to certified employees like [her] for the purpose of the due process clause of the Kentucky constitution.” However, the issue in *Thompson* concerned the jurisdiction of a LEAP, not a SEAP. Therein, the appellant appeared before the Henderson County LEAP for a review of his job performance evaluation. Denying the appellant’s request for the assistance of counsel and the opportunity to present an expert witness for the purpose of establishing the unfairness of the evaluation, the LEAP ruled that the purpose of the panel was “not to issue any judgments but only to determine if the proper procedures of evaluation had been followed.” *Id.* at 391. Further, the LEAP did not allow the appellant to dispute the assertions contained in the evaluation documents. After the school board terminated the appellant’s employment, he filed suit challenging the school board's evaluation appeals policy and the decision of the LEAP based on that policy. The trial court determined that the judgmental conclusions reached by the evaluators were subject to review by the LEAP and ordered it to conduct an evidentiary hearing on both the substantive and procedural fairness of the evaluation. *Id.* at 391-92. A panel of this Court subsequently reversed the trial court and held that the LEAP properly limited its review to procedural issues only. *Id.* at 392.

On discretionary review, our Supreme Court held,

The Henderson County Evaluation Appeals Panel
apparently reached the conclusion that it did in this case

because it believed that the scope of its authority was limited by the Board of Education's written policy which prohibited the panel from reviewing the “judgmental conclusions” of an individual teacher evaluation. However, the Board of Education had no authority to so limit the statutory jurisdiction of the panel. The rule making authority of the board pursuant to K.R.S. 160.290(2) is restricted. The statute provides that the rules, regulations and by-laws made by a school board shall be consistent with the general school law of the state. K.R.S. 160.290(1) provides in part that the board's general control and management of the public schools in its district must be exercised in a manner consistent with the rules and regulations of the state board of education. K.R.S. 156.101(10) authorizes the panel to conduct any review necessary to insure that the teacher was “fairly evaluated.” The statute has no restriction on the authority of the panel to review the “judgment conclusions” of the evaluator of the teacher. The statute does not restrict the panel to a consideration of only procedural matters.

704 KAR 3:345 § 9^[5] is clear that the limitations contained therein apply only to the state appeals panel. There is no statutory or administrative authority supporting the Henderson School Board's limitation on the jurisdiction of the evaluation appeals panel.

The State Evaluation Appeals Panel on March 14, 1988 ruled that, although its jurisdiction is limited to a review of procedural matters, a local evaluation appeals panel has a statutory obligation to resolve conflicting testimony and assure compliance with its own evaluation policies.

Id. at 392-93. We are of the opinion that the language of *Thompson* actually supports the Appellees’ position. While the *Thompson* Court concluded that the

⁵ Now 704 KAR 3:370 § 12(2)(a).

LEAP was required to conduct a substantive review of an evaluation, it nevertheless recognized that the SEAP is, in fact, limited in its ability to review an evaluator's "judgmental conclusions." As such, its narrow purpose is to ensure procedural compliance, not adjudicate a teacher's legal rights.

It is the duty of the courts to ascertain and give effect to the intent of the legislature. *Hale v. Combs*, 30 S.W.3d 146, 151 (Ky. 2000). In determining legislative intent, a court must refer to the language of the statute, and it is not at liberty to add or to subtract from the statute or to interpret it at variance with the clear language employed. *Id.* All statutes should be interpreted so as to give meaning to each provision in accord with the statute as a whole. *DeStock # 14, Inc. v. Logsdon*, 993 S.W.2d 952, 957 (Ky. 1999). The interpretation should not be done in such a way as to render any part of the statute meaningless or ineffectual. *Stevenson v. Anthem Casualty Insurance Group*, 15 S.W.3d 720, 724 (Ky. 1999). A court should construe a statute so as to render it constitutional if it can be done without violence to its intent. *Magruder v. Griffith*, 274 Ky. 293, 297, 118 S.W.2d 694, 696 (1938). A statute should not be interpreted so as to bring about an unreasonable result. *Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Co.*, 983 S.W.2d 493, 500 (Ky. 1998).

Travis seeks an interpretation of KRS 156.557 that would allow her and all other certified school personnel in this Commonwealth to not only

challenge any adverse employment decisions to which they are subjected, but also to seek judicial review in a separate proceeding of all performance evaluations.

It should be noted that evaluations themselves are not disciplinary in nature. An evaluation does not terminate, demote, suspend, or reprimand. Other documents advise of and execute such discipline, and all are subject to a myriad of procedural due process requirements and include various avenues of appeal. The evaluation appeals process provided Travis the opportunity to submit a rebuttal letter to be placed in her file with the evaluation, to appeal the evaluation to the LEAP, which is required to hold a hearing, and then to appeal the LEAP's decision to the SEAP. In addition to the review process in place for an evaluation, KRS Chapter 161 provides procedures by which a teacher can contest adverse employment action, which include the availability of a Chapter 13B hearing before the local board of education, as well as judicial review of any decision. In fact, the record herein reveals that Travis has filed a separate lawsuit challenging her demotion from assistant principal to a teaching position. That KRS 156.557 contains no similar provision authorizing judicial review indicates that the General Assembly did not contemplate that SEAP decisions would be subjected to judicial review.⁶

⁶ However, as has been observed in previous decisions, courts may assume jurisdiction in the absence of statutory authority in order to prevent arbitrary action. *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450,

Next, Travis argues that if SEAP is not an administrative agency subject to judicial review then the delegation of authority from the General Assembly to the Kentucky Board of Education contained in KRS 156.557 violates the nondelegation doctrine and is unconstitutional on its face. We find this argument to be wholly without merit.

As noted by the Kentucky Supreme Court in *TECO Mechanical Contractor, Inc. v. Commonwealth*, 366 S.W.3d 386 (Ky. 2012),

The nondelegation doctrine recognizes that the Constitution vests the powers of government in three separate branches and, under the doctrine of separation of powers, each branch must exercise its own power rather than delegating it to another branch. *Board of Trustees of Judicial Form Retirement System v. Attorney General of Commonwealth*, 132 S.W.3d 770, 781 (Ky. 2003).

.....

The General Assembly may validly vest legislative or judicial authority in an administrative agency if the law delegating that authority provides “safeguards, procedural and otherwise, which prevent an abuse of discretion by the agency.” *Kentucky Commission on Human Rights v. Fraser*, 625 S.W.2d 852, 854 (Ky. 1981) (citing *Butler v. United Cerebral Palsy of Northern Ky., Inc.*, 352 S.W.2d 203, 208 (Ky. 1961)). Factors to consider in determining whether the law in question provides sufficient safeguards include the experience of the agency to which the authority is delegated, the subject matter of the law, and the availability of judicial review. *Butler*, 352 S.W.2d at 208. With regard to

456 (Ky. 1964); *Hardin v. Jefferson County Bd. of Educ.*, 558 S.W.3d 1, 10 (Ky. App. 2018). Nevertheless, Travis has not argued such in this court.

delegations of legislative authority, we also consider whether the law prescribes sufficient standards to prevent the agency from exercising unfettered discretion. *Holsclaw*, 507 S.W.2d at 471.

TECO Mechanical Contractor, Inc., 366 S.W.3d at 397-98. See also *Brewer v. Commonwealth*, 478 S.W.3d 363, 375 (Ky. 2015). We are of the opinion that the evaluation scheme set forth in KRS 156.557 is not the type of action that falls within the purview of the nondelegation doctrine. As we have previously concluded, the SEAP itself is not an administrative agency. Further, the evaluation process and the SEAP review do not result in an adjudication of a teacher's legal rights. As such, we simply cannot conclude that any delegation of authority to the Kentucky Board of Education to implement the evaluation system results in a violation of the nondelegation doctrine simply because the SEAP decisions are not ordinarily subject to judicial review.

For the reasons set forth herein, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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