RENDERED: APRIL 26, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001060-MR

KENTUCKY CABINET FOR HEALTH
AND FAMILY SERVICES — APPELLANT

APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 10-CI-01144

PERRY PUCKETT AND THE
KENTUCKY PERSONNEL BOARD
APPELLEES

AND

NO. 2017-CA-001143-MR

PERRY PUCKETT — CROSS-APPELLANT

CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 10-CI-01144

KENTUCKY CABINET FOR
HEALTH AND FAMILY SERVICES
AND THE KENTUCKY PERSONNEL
BOARD CROSS-APPELLEES

OPINION
AFFIRMING, IN PART,
AND REVERSING, IN PART

** ** ** ** **

BEFORE: ACREE, GOODWINE, AND JONES, JUDGES.

ACREE, JUDGE: The Kentucky Cabinet for Health and Family Services (CHFS) appeals the October 4, 2012 opinion and order of the Franklin County Circuit Court reversing the Kentucky Personnel Board's decision to dismiss Perry Puckett from his job at CHFS. On cross-appeal, Puckett asks that this Court affirm the ruling, but also to address the issue of discrimination in the work place if the Court overrules the circuit court.

We reverse the opinion and order, in part, as to the appeal and reinstate the Kentucky Personnel Board's final order. As to Puckett's cross-appeal, we affirm that part of the opinion and order dismissing Count II of Puckett's complaint.

BACKGROUND

Puckett worked at CHFS for more than ten years with no disciplinary record and the highest possible overall performance ratings. He held the position

of Disability Adjudicator III – Trainer. That Puckett is a homosexual was well known throughout the office. However, CHFS eventually discovered that Puckett routinely spent his hours at work, over an extended period of time, e-mailing hundreds of inappropriate messages to twenty-five of his subordinates and colleagues. The e-mails included a variety of lascivious content, racist comments regarding superiors, offensive language, and solicitation of sexual photographs.

Upon discovering the e-mails, and with no warning, CHFS terminated Puckett. CHFS provided Puckett with a dismissal letter bearing the signature of Human Resources Executive Director J.P. Hamm, but it is undisputed that Human Resources Division Director Jay Klein actually signed the letter on behalf of Hamm. Klein believed Hamm authorized him to sign the letter because, in 2005, Hamm delegated appointing authority to Klein by means of a Signature Authorization form. Since that time, Klein routinely endorsed disciplinary letters on behalf of Hamm. Klein signed such letters by writing Hamm's name, followed by a diagonal slash and his own initials to indicate he signed the letters on behalf of Hamm. Klein signed Puckett's dismissal letter using this process.

Puckett appealed his dismissal to the Board as he was the only employee ever terminated for improper e-mail usage. The hearing officer held the hearing and recommended reducing the penalty to a thirty-day suspension. Puckett

believed the hearing officer's penalty was just and did not file any exceptions. CHFS, on the other hand, did file exceptions.

On June 17, 2010, the Board affirmed Puckett's dismissal and altered the hearing officer's recommended order. The Board rejected several findings of fact and conclusions of law. Instead, the Board found that Puckett's argument "comparing other employee's punishments for email misuse with his own [was] unpersuasive. The record [did not] reflect that any other employees had a multi-year history of sending hundreds of non-work-related emails, many of which were objectively offensive and derogatory." The Board's order further stated that Puckett's "email usage . . . is not the type of conduct that must be tolerated by any employer, especially not from an employee with many years of experience and who is in a position to train and mentor subordinate employees." Puckett's "highly offensive" misconduct "was of such nature that, even despite [his] previous good work record, the action of [CHFS] in dismissing [Puckett] from his employment was taken with just cause and was neither excessive nor erroneous."

Puckett appealed to the Franklin Circuit Court and included a claim that the Board rejected the hearing officer's recommended order because of Puckett's sexual orientation. Coincidentally, at about this time, Puckett discovered from a newspaper article and a parallel case, *Stroder v. Ky. Cabinet for Health & Family Servs.*, No. 09-CV-947-H, 2010 WL 2464913 (W.D. Ky. June 14, 2010),

that Klein lacked authority to sign his dismissal letter. The article discussed several Board cases in which Klein signed termination letters. The Board found Klein did not possess the requisite appointing authority to effect a termination and overturned each of the dismissals. Upon discovering Klein's lack of authority, Puckett successfully sought leave to amend his complaint to include the signature issue.

The circuit court remanded the case to the Board and ordered Puckett to seek a ruling determining the validity of his discharge. The circuit court said, "this Court will not punish Petitioner for failing to address the issue relating to his potentially unauthorized termination before the Personnel Board when he has shown he lacked knowledge of it at the time." However, CHFS filed an interlocutory appeal and a petition for writ of mandamus claiming the signature issue was barred based on sovereign immunity. *Cabinet for Health & Family Servs. v. Puckett*, No. 2012-CA-002165-MR, 2014 WL 689094 (Ky. App. Feb. 21, 2014); *Ky. Cabinet for Health & Family Servs. v. Puckett*, No. 2012-CA-002195-OA (Ky. App. June 10, 2013). Both efforts were unsuccessful and the hearing on remand from Franklin Circuit Court proceeded before the Board.

The Board concluded in accordance with KRS[1] 13B.150 that review was limited to the underlying record. Part of that record included the parties'

[1] Kentucky Revised Statutes.

stipulation to "two important facts": (1) Klein signed the dismissal letter; and (2) he did so acting under purported appointing authority delegated to him by Hamm, and not by the Secretary of CHFS. The hearing officer determined that KRS 13B.150 prevented him from rejecting those stipulations absent fraud or misconduct. Finding no such evidence, the hearing officer concluded "there is no authority which allows the Personnel Board, once it entered a Final Order in a matter, to then take evidence and enter an order [regarding a topic] which had not been raised or preserved before the Board previously." Puckett filed his exceptions to the recommended decision, and the Board adopted the hearing officer's decision in its entirety, dismissing the claim.

Following dismissal by the Board, Puckett moved successfully for the circuit court to re-activate the case and for leave to file another amended complaint to include a review of this most recent order from the Board. The circuit court entered an order reversing the Board's original 2010 decision that reinstated Puckett's termination. The circuit court found the Board's decision was not based on substantial evidence and was arbitrary.

The circuit court's order held that the Board's hearing officer, as the true "finder of fact," correctly concluded that CHFS arbitrarily changed its "method of discipline for email misconduct . . . without reason or explanation" when it dismissed Puckett. Prior to discovery of Puckett's workplace offenses,

CHFS only issued short suspensions for e-mail misconduct. The Board tried to distinguish prior cases but did not persuade the circuit court. The circuit court found the Board erred when, "without reason or explanation, the Board refused to accept the hearing officer's factual findings and legal conclusions [and ruled that] in deviating from the [2010 order] the Personnel Board failed to support its decision to terminate Mr. Puckett with substantial evidence." The circuit court denied CHFS's motion to alter, amend, or vacate and these appeals followed.

STANDARD OF REVIEW

When reviewing an administrative decision, the court must determine whether the agency's decision was based upon substantial evidence. *Runner v. Commonwealth*, 323 S.W.3d 7, 10 (Ky. App. 2010). Substantial evidence is that which "has sufficient probative value to induce conviction in the minds of reasonable men." *Id*. (citation omitted). The court's role is not to reinterpret or reconsider the merits of the claim. *Id*. If the record contains substantial evidence supporting the agency's decision, the court must defer to that decision even if conflicting evidence is present. *Id*. This Court must also review whether the administrative decision is arbitrary. *Kaelin v. City of Louisville,* 643 S.W.2d 590, 591 (Ky. 1982).

"[I]n its role as a finder of fact, an administrative agency is afforded great latitude in its evaluation of the evidence heard and the credibility of

witnesses[.]" *Parrish v. Commonwealth*, 464 S.W. 3d 505, 510 (Ky. App. 2015) (citation and internal quotation marks omitted).

ANALYSIS

Puckett argues his discharge is void because Klein lacked appointing authority to sign his dismissal letter. We need not address this question because Puckett did not properly preserve the signature issue for appeal, nor did CHFS commit fraud or misconduct.

Under KRS Chapter 13B, the "filing of exceptions provides the means for preserving and identifying issues for review[.]" *Rapier v. Philpot*, 130 S.W.3d 560, 563 (Ky. 2004). "Thus, when a party fails to file exceptions, the issues the party can raise on judicial review under KRS 13B.140 are limited to those findings and conclusions contained in the agency head's final order that differ from those contained in the hearing officer's recommended order." *Id*. at 564.

Here, Puckett failed to preserve the signature issue because he did not file exceptions regarding the signature issue. In fact, at the hearing both parties stipulated that: (1) Klein signed the dismissal letter; and (2) he acted under purported appointing authority delegated to him by Hamm, and not by the Secretary of CHFS. Puckett never raised the signature authority claim during the underlying administrative appeal.

The only concession to preserving issues by filing exceptions is outlined in KRS 13B.150, which provides, "[r]eview of a final order shall be conducted by the court without a jury and shall be confined to the record, unless there is fraud or misconduct involving a party engaged in administration of this chapter." Because Puckett failed to file exceptions, he must prove that CHFS engaged in fraud or misconduct.

The hearing officer found in the 2015 recommended order that CHFS committed "simple error" when Klein signed Hamm's name and his own initials to employee disciplinary letters, *not* fraud or misconduct. Puckett does not dispute this point, nor does he make any arguments stating that CHFS committed fraud or misconduct. Puckett simply contends that Klein lacked the authority to sign the dismissal letter.

We sympathize with Puckett's plight because he lacked knowledge regarding the appointing authority during the administrative hearing. But it is well-settled that failure to raise an issue before an administrative body precludes assertion of that issue in an action for judicial review. *Urella v. Ky. Bd. of Medical Licensure*, 939 S.W. 2d 869, 873 (Ky. 1997). A party must raise exceptions or prove fraud or misconduct. Puckett failed to do either. Therefore, the courts may not review this issue on appeal. The circuit court may only remand when the party previously preserves the issue. The Board properly ruled.

CHFS next takes claims the circuit court substituted its own judgment for that of the Board. CHFS asserts substantial evidence supported Puckett's termination because he sent hundreds of repugnant e-mails to his subordinates. Nevertheless, the circuit court concluded that no substantial evidence supports Puckett's termination. This Court finds that conclusion erroneous.

As with all administrative agency decisions, the agency decisions in this case are entitled to deference. Courts afford an agency great latitude in its evaluation of the evidence heard and the credibility of witnesses appearing before it. *Parrish,* 464 S.W.3d at 510. Although a reviewing court might have arrived at a different conclusion than the agency acting as trier of fact, that does not mean the agency's decision was not supported by substantial evidence. *Id*. "If the findings of fact are supported by substantial evidence of probative value, then they must be accepted as binding and it must then be determined whether or not the administrative agency has applied the correct rule of law to the facts so found." *500 Associates, Inc. v. Nat'l Resources and Envtl. Prot. Cabinet*, 204 S.W.3d 121, 132 (Ky. App. 2006) (citation and internal quotation marks omitted).

KRS 13B.150 outlines the role of the court in conducting judicial review of an administrative order. It states:

> The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the final order or it may reverse the final order, in whole or in part, and remand

> the case for further proceedings if it finds the agency's final order is:
>
> (a) In violation of constitutional or statutory provisions;
>
> (b) In excess of the statutory authority of the agency;
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> (c) Without support of substantial evidence on the whole record;
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> (d) Arbitrary, capricious, or characterized by abuse of discretion;
>
> (e) Based on an ex parte communication which substantially prejudiced the rights of any party and likely affected the outcome of the hearing;
>
> (f) Prejudiced by a failure of the person conducting a proceeding to be disqualified pursuant to KRS 13B.040(2); or
>
> (g) Deficient as otherwise provided by law.

KRS 13B.150(2).

The circuit court's order does not abide by KRS 13B.150, as it rendered its own judgment without finding a pertinent factor from the statute to justify remanding the case. There is nothing in the order giving deference to the Board's findings. In fact, the order reflects the circuit court's own judgment, stating "the Personnel Board argues that these [prior cases of e-mail abuse in the agency] are not persuasive because the cases involved employees and not a supervisor like Mr. Puckett. This Court is not so convinced." It is not the circuit

court's responsibility to be the fact-finder. The circuit court must give deference to the agency decision.

The circuit court was persuaded by Puckett's argument that the Board improperly disregarded factual support favoring suspension instead of termination. But, that is not for the circuit court to decide. So long as the administrative agency finds substantial evidence to warrant termination, courts must give deference to its decision. Puckett argues that the Board's upholding of his termination is arbitrary. He contends the record contains no evidence that the e-mails had any negative impact on his job. Puckett also believes that because the Board deleted specific findings from the hearing officer's recommended order, it proves there was a lack of substantial evidence and, therefore, an error. We disagree.

The Board found unpersuasive Puckett's argument comparing the punishment of other employees for e-mail misuse he argued was similar. But the Board determined "the record does not reflect any other employees had a multi-year history of sending hundreds of non-work-related emails, many of which were objectively offensive and derogatory." We see the record in a similar light. Finally, the Board emphasized that "the emails were highly offensive in nature, [and] not the type of conduct that must be tolerated by any employer, especially not from an employee with many years of experience and who is in a position to

train and mentor subordinate employees." These findings sufficiently establish that substantial evidence supported the Board's decision.

Next, to uphold CHFS's termination of Puckett, the Board must find the termination reasonable. The Board heard testimony and read the e-mails exchanged between Puckett and his colleagues. By doing so, the Board found substantial evidence that supported the reasonableness of Puckett's termination. To begin with, the Board found Puckett's former trainee, Neil Brittain, was an unpersuasive witness because he was not a CHFS supervisor and had no personal knowledge of any of the e-mails at issue. Next, the Board found Puckett's argument comparing other employees' punishments with his own unconvincing. The Board found no other employee with a multi-year history of sending non-work-related e-mails that were "objectively offensive and derogatory." And lastly, the Board had substantial evidence concluding that Puckett's likelihood of recidivism is irrelevant. Over the course of several years, Puckett abused his position of authority by sending hundreds of distasteful emails, only stopping the sanctionable conduct after he was caught.

Puckett also argues that the hearing officer's fact-finding may not be rejected if based on substantial evidence. He cites *Faust v. Commonwealth*, 142 S.W.3d 89 (Ky. 2004) as holding that a hearing officer's findings can only be

rejected when its findings are not supported by substantial evidence. Puckett misunderstands the law in this regard.

KRS 13B.120(3) provides that "[i]f the final order differs from the recommended order, it shall include separate statements of findings of fact and conclusions of law." In *Faust*, even though substantial evidence supported the hearing officer's findings, the personnel board changed them but with no explanation for the change. In fact, there were no written findings by the Board. By contrast here, the Board in Puckett's case prepared and substituted its own findings and conclusions that were independently supported by substantial evidence in the record. The fact that the Board's findings and conclusions differed from those of the hearing officer does not undermine them, nor does it change our responsibilities on review. The only requirement is that the Board make specific findings and conclusions supported by substantial evidence. We find the Board complied with all statutory requirements and based its ruling on substantial evidence. The Board's decision, therefore, was not arbitrary. *Alliance for Kentucky's Future, Inc. v. Envtl. and Public Prot. Cabinet*, 310 S.W.3d 681, 689 (Ky. App. 2008) (agency "decision . . . was not arbitrary because it was based on substantial evidence").

Puckett argues on cross-appeal that the circuit court erred by dismissing Count II of his complaint claiming discrimination. That count asserted

that the Board's motivation for reversing the hearing officer's decision was its opposition to Puckett's sexual orientation. The circuit court tied this count to Puckett's demand for an injunction to require the Board to accept the hearing officer's suspension decision.

In dismissing this count, the circuit court first found the issue barred under the doctrine of governmental immunity. We agree with that determination. "There is no doubt that the state agencies are entitled to governmental immunity." *Hamblen ex rel. Byars v. Kentucky Cabinet for Health and Family Services*, 322 S.W.3d 511, 515 (Ky. App. 2010) (citation and internal quotation marks omitted).[2]

We further agree with the circuit court's conclusion that Puckett failed to properly avail himself of the exception to immunity found in *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Pursuant to *Ex parte Young*, a claimant may "bring within the scope of judicial review alleged unconstitutional actions of state officials which might otherwise escape such review" because of the government entity's claim of immunity. *Bd. of Trustees of University of Kentucky v. Hayse*, 782 S.W.2d 609, 616 (Ky. 1989), *overruled on other grounds by Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001). The scope of the rule is clear:

> To trigger the *Ex parte Young* exception, a party must name a state officer and must seek prospective injunctive

[2] The correct term here is "governmental immunity." Courts often use "sovereign immunity" interchangeably. Although they are not the same, the former derives from the latter and, in this case at least, their underlying common attributes that apply.

> relief against said officer for compliance with federal law or a federal constitutional provision. The *Ex parte Young* exception does not permit an action directly against the state or state agency but only against a state officer. And, the *Ex parte Young* exception cannot be utilized to compel a state officer to comply with state law.

Hamblen, 322 S.W.3d at 516.

The circuit court determined *Ex parte Young* did not apply "because [Puckett's] claim of equitable relief is not from an ongoing violation of federal law . . . [o]nly provisions of the Kentucky Constitution are cited." Furthermore, "he failed to name the officers responsible for such violation. . . . Only the Personnel Board and Cabinet for Health and Family Services were named as Respondents/Defendants."[3] The circuit court correctly applied *Ex parte Young* to dismiss this count of Puckett's complaint.

Puckett next argues that the circuit court erred in dismissing his motion to amend his complaint. Puckett asked to amend his complaint to name the individual officers *and to include the federal constitutional violation*. This amendment did not seek only to name a misidentified party; it presumed to assert a

[3] The circuit court allowed Puckett's demand for an injunction to compel the Board to accept the hearing officer's recommended order as satisfying the *Ex parte Young* requirement that one "*must seek prospective injunctive relief* against said officer *for compliance with federal law* or a federal constitutional provision . . . ." *Hamblen*, 322 S.W.3d at 516 (emphasis added). Our agreement with the circuit court that other elements are not satisfied makes review of this generous but questionable decision unnecessary.

new *federal* claim. The circuit court denied Puckett's motion because a one-year limitations statute applies to claims brought under 42 U.S.C.[4] §1983.

Puckett believes this holding is erroneous. He contends his claim did not accrue when CHFS terminated him, but rather when the Board rejected the hearing officer's recommendations.

Presuming we accepted Puckett's view (which we do not), the limitations statute would still prevent assertion of the claim more than a year after the Board's final order. That order was entered June 17, 2010. It was not until February 16, 2011, that Puckett moved to amend his complaint to assert this new federal claim.

CR[5] 15.01 provides that leave to amend "shall be freely given when justice so requires." As such, the decision to grant or deny leave to amend is ultimately left to the discretion of the trial court, which will not be disturbed absent an abuse of that discretion. *Kenney v. Hanger Prosthetics & Orthotics, Inc.*, 269 S.W.3d 866, 869-70 (Ky. App. 2007).

We find no abuse of discretion here. Puckett sought to assert a new federal claim well more than a year after it accrued, no matter how liberally we calculate that date. Granting the motion to amend would have resulted, inevitably,

[4] United States Code.

[5] Kentucky Rules of Civil Procedure.

in a subsequent dismissal of the new claim based on the limitations statute, 42 U.S.C. § 1983.

CONCLUSION

For the foregoing reasons, this Court affirms the Franklin Circuit Court's dismissal of Count II of Puckett's complaint which claims violation of the Kentucky Constitution. Otherwise, the circuit court's October 4, 2012 Opinion and Order is reversed and the Kentucky Personnel Board's Final Order of June 17, 2010, is reinstated.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT/CROSS-APPELLEE:

Jennifer Wolsing
Frankfort, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE KENTUCKY PERSONNEL BOARD:

Stafford Easterling
Frankfort, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE/CROSS-APPELLANT PERRY PUCKETT:

David Leightty
Louisville, Kentucky