

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000406-MR

JEFFERSON COUNTY SHERIFF'S OFFICE

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 16-CI-00886

KENTUCKY RETIREMENT
SYSTEMS

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: MAZE, NICKELL AND K. THOMPSON, JUDGES.

NICKELL, JUDGE: This matter began with KRS¹ Chapter 13B review of a Kentucky Retirement Systems' ("Systems") decision requiring the Jefferson County Sheriff's Office ("JCSO") to pay \$2,951.40 in additional actuarial costs to

¹ Kentucky Revised Statutes.

offset a greater than ten percent increase—called a pension spike—in the creditable compensation paid to Jerry Duncan, a career deputy sheriff who retired on October 1, 2014. Following administrative review, JCSO sought judicial review in the Franklin Circuit Court which affirmed Systems’ final order. JCSO has now appealed to this Court. After review of the record, briefs and law we affirm.

This appeal concerns KRS 61.598.² The version of the statute in effect in late 2014, when actions underlying this appeal occurred, read in relevant part:

(1) For purposes of this section, “bona fide promotion or career advancement”:

(a) Means a professional advancement in substantially the same line of work held by the employee in the four (4) years immediately prior to the final five (5) fiscal years preceding retirement or a change in employment position based on the training, skills, education, or expertise of the employee that imposes a significant change in job duties and responsibilities to clearly justify the increased compensation to the member;

...

(2) For employees retiring on or after January 1, 2014, the last participating employer shall be required to pay for any additional actuarial costs resulting

² Originally enacted in 2013, KRS 61.598 was revised in 2017 and again in 2018. Changes made in 2017 resolve the issue raised in this appeal but are beyond our consideration as we are construing only the language in effect at the time in question.

from annual increases in an employee's creditable compensation greater than ten percent (10%) over the employee's last five (5) fiscal years of employment that are not the direct result of a bona fide promotion or career advancement. The cost shall be determined by the retirement systems and the system may promulgate administrative regulations in accordance with KRS Chapter 13A to administer this section.

(3) (a) The Kentucky Retirement Systems shall determine whether increases in creditable compensation during the last five (5) fiscal years of employment prior to retirement constitute a bona fide promotion or career advancement.

(b) Lump-sum payments for compensatory time paid to an employee upon termination of employment shall be exempt from the provisions of this section.

...

(5) Any employer who disagrees with a determination made by the system in accordance with this section may request a hearing and appeal the decision in accordance with subsection (16) of Section 65 of this Act. The systems shall not charge interest, or consider the costs due under this section as delinquent contributions, during the pendency of the hearing process and appeal.

(Emphasis added).

FACTS AND PROCEDURAL BACKGROUND

The facts are undisputed. JCSO is a participating agency in the County Employees Retirement System (CERS). Until retiring on October 1, 2014, Duncan served as a full-time deputy sheriff in Jefferson County, Kentucky. As a JCSO employee, Duncan drew hazardous duty pay and was covered by CERS.

As required by KRS 61.598 and 105 KAR³ 1:140 Section 8, when Duncan retired, Systems reviewed his last five years of employment for increases in creditable compensation greater than ten percent. In fiscal year 2012-2013, Duncan received gross compensation of \$38,086.98; the next year he received gross compensation of \$44,056.18, an increase of 15.67 percent.

Noticing an increase in Duncan's creditable compensation of more than ten percent, Systems notified JCSO of the pension spike and inquired whether the increase resulted from a bona fide promotion or career advancement—the only exemptions insulating an employer from paying additional actuarial costs. KRS 61.598(2). If the increase was attributable to any other reason, JCSO—Duncan's last participating employer—would be responsible for paying additional actuarial costs associated with the creditable compensation he received above ten percent.

In response, JCSO submitted Form 6481, Employer Request for Post-Determination of Bona Fide Promotion or Career Advancement, confirming there had been no promotion or advancement and attributing the change to Duncan's use of approved unpaid medical leave—documented by doctor's releases—for an extended period of time. While Duncan's rate of pay never changed, his pay was docked a total of \$5,396.94 during four pay periods while he was off work and

³ Kentucky Administrative Regulations.

without accumulated sick leave. In fiscal year 2013-2014, when Duncan worked all hours assigned, his creditable compensation jumped by 15.67 percent to \$44,056.18. Because the jump was not attributable to promotion or advancement, and KRS 61.598(1) contained no exception for situations involving leave without pay or unpaid medical leave, Systems demanded JCSO pay \$2,951.40.

JCSO pursued a timely administrative appeal. Following a prehearing conference call, the hearing officer entered an order stating in part:

[JCSO] has the burden of establishing by a preponderance of the evidence that the Systems did not properly determine that the increase in Jerry Duncan's creditable compensation greater than 10 percent was not due to a bona fide promotion or career advancement pursuant to KRS 61.598.

JCSO did not contest allocation of the burden before or during the hearing.

The purpose of the hearing was limited to whether Systems correctly determined the jump in Duncan's pay did not result from promotion or advancement. 105 KAR 1:140 Section 7⁴(9). JCSO called a single witness; Systems called no one. JCSO's human resources supervisor verified Duncan's creditable compensation for his last five years of work and testified his increased pay between fiscal year 2012-2013 and fiscal year 2013-2014 did not result from a

⁴ Identified by the hearing officer, circuit court, and Cabinet as 105 KAR 1:140 Section 8(9).

bona fide promotion or career advancement, nor had Duncan experienced a change in job duties or responsibilities due to training, skills, education or expertise.

As reflected in the recommendation dated June 13, 2016, the hearing officer found Duncan's gross compensation rose more than ten percent between fiscal year 2012-2013 and fiscal year 2013-2014 but not as a result of promotion or advancement so as to exempt JCSO from paying additional actuarial costs. Noting JCSO had raised numerous issues beyond the hearing officer's authority,⁵ he recommended Systems' demand for payment from JCSO be affirmed.

The hearing officer further wrote:

[t]he Systems has the burden of establishing by a preponderance of the evidence the propriety of the penalty imposed by establishing that the increase in the member's creditable compensation greater than 10 percent was not due to a bona fide promotion or career advancement pursuant to KRS 61.598. The Systems has met this burden of proof.

The foregoing language was inconsistent with the hearing officer's prior allocation of the burden of proof to JCSO in the order issued after the prehearing conference, and the earlier statement in the findings of fact, conclusions of law and recommendation that:

⁵ JCSO alleged KRS 61.598 is unconstitutionally overbroad and impairs its ability to contract with its employees. JCSO notified the Office of the Attorney General of the challenge, but the Attorney General chose not to respond. As noted by the hearing officer, administrative agencies do not decide constitutional issues. *Commonwealth v. DLX, Inc.*, 42 S.W.3d 624, 626 (Ky. 2001) (citing *Goodwin v. City of Louisville*, 309 Ky. 11, 14, 215 S.W.2d 557, 559 (1948)).

[t]he Employer has the burden of establishing that the Systems incorrectly determined that the annual increases in the member's creditable compensation greater than 10% over the last five fiscal years of employment prior to retirement was not due to a bona fide promotion or career advancement pursuant to KRS 61.598, therefore requiring rescission of the assessment of additional actuarial costs.

Both parties filed exceptions. Systems' only substantive request was clarification of JCSO bearing the burden of proof. Systems' Administrative Appeals Committee made the requested correction—the only change made to the recommendation—before issuing its final order on July 18, 2016, stating:

[t]he increase in creditable compensation greater than ten percent (10%) at issue was not the direct result of a bona fide promotion or career advancement pursuant to KRS 61.598. The Jefferson County Sheriff shall be required to pay for the additional actuarial costs assessed at \$2,951.40.

JCSO timely sought judicial review in Franklin Circuit Court. After setting out each argument advanced by JCSO and Systems' response thereto, and citing *Aubrey v. Office of the Attorney General*, 994 S.W.2d 516, 519 (Ky. App. 1998), the circuit court entered an order on January 8, 2018, concluding Systems' demand for payment was supported by substantial evidence, was not arbitrary, and was binding on the court. The circuit court discussed the following points. First, when adopted in 2013, KRS 61.598 contained no exception for compensation increases resulting from use of extended leave without pay. Second, citing *Vision*

Mining, Inc. v. Gardner, 364 S.W.3d 455, 466 (Ky. 2011), KRS 61.598 is not unconstitutionally overbroad and is “rationally related to [the General Assembly’s] legitimate state interest” of apportioning additional actuarial costs of compensation spikes to the last participating employer. Third, KRS 61.598 has not been “retrospectively” applied to JCSO—the statute specifically applies to employees retiring on or after January 1, 2014, and requires review of every compensation spike greater than ten percent in any of each retiree’s last five years of employment. Finally, citing KRS 13B.090(7), the burden of proof was properly allocated to JCSO. Systems was neither imposing a penalty nor removing a previously granted benefit, therefore JCSO—as the party proposing Systems retract its mandatory demand for additional actuarial costs—bore the onus of demonstrating such action was proper but failed to make a persuasive showing. It is from this opinion and order that JCSO now appeals and we affirm.

ANALYSIS

The standard of review, when addressing an appeal from an administrative decision, “is limited to determining whether the decision was erroneous as a matter of law.” *McNutt Construction v. Scott*, 40 S.W.3d 854, 861 (Ky. 2001). Kentucky Courts have long held that “judicial review of administrative action is concerned with the question of *arbitrariness* Unless action taken by an administrative agency is supported by substantial evidence it is arbitrary.” *American Beauty Homes Corp. v. Louisville*

and Jefferson County Planning and Zoning Commission, 379 S.W.2d 450, 456 (Ky. 1964) (emphasis in original).

Bd. of Comm'rs of City of Danville v. Davis, 238 S.W.3d 132, 135 (Ky. App. 2007). Arbitrariness arises when an agency: (1) exceeds granted powers, (2) fails to afford procedural due process, or, (3) makes a determination unsupported by substantial evidence. *Hilltop Basic Resources, Inc. v. County of Boone*, 180 S.W.3d 464, 467 (Ky. 2005) (citing *American Beauty Homes*, 379 S.W.2d at 456).

A reviewing court may not substitute its own judgment on a factual issue “unless the agency’s decision is arbitrary and capricious.” *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454, 458 (Ky. App. 2003). Once a reviewing court has determined an agency’s decision is supported by substantial evidence, the court must then determine if the agency applied the correct rule of law to the factual findings in making its determination. If so, the agency’s final order is upheld. *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406, 410 (Ky. App. 1994). However, matters of statutory construction and interpretation are matters of law subject to *de novo* review. *Halls Hardwood Floor Co. v. Stapleton*, 16 S.W.3d 327, 330 (Ky. App. 2000).

Wasson v. Kentucky State Police, 542 S.W.3d 300, 302-03 (Ky. App. 2018).

Our review begins with KRS 61.598 itself. We are limited to the words the legislature adopted.

Statutes express the General Assembly’s intent. *Gateway Const. Co. v. Wallbaum*, 356 S.W.2d 247, 248 (Ky. 1962). To determine its intent, we must examine the precise language used in the statute without reading into it words that are not there, *Bohannon v. City of*

Louisville, 193 Ky. 276, 235 S.W. 750, 752 (1921), or guessing what the General Assembly might have intended to say but did not. *Lewis v. Creasey Corporation*, 198 Ky. 409, 248 S.W. 1046, 1048 (1923).

Commonwealth, Finance and Administration Cabinet, Dept. of Revenue v. Saint Joseph Health System, Inc., 398 S.W.3d 446, 453 (Ky. App. 2013).

KRS 61.598 recognizes additional actuarial costs result from increases in creditable compensation. The General Assembly determined when a spike in creditable compensation of more than ten percent occurs during an employee's last five years of service, the last participating employer will be responsible for those costs unless the increase resulted from a bona fide promotion or career advancement. In Fiscal Year 2013-2014, Duncan returned to work at his previous rate of pay after being on extended unpaid medical leave; his creditable compensation spiked 15.67 percent. When JCSO could offer no proof Duncan had experienced a bona fide promotion or career advancement, and could not prove his employment position changed due to training, skills, education or expertise causing significant change in his job duties and responsibilities, Systems demanded payment.

The statutory language is clear and precise. While the General Assembly *could have* exempted pay increases resulting from extended use of unpaid sick leave in 2013, it did not, and we cannot add such language on our own. *Saint Joseph Health System*, 398 S.W.3d at 453. Additionally, the legislature gave

Systems wide latitude to draft the administrative regulations needed to implement the directive, full authority to define “bona fide promotion and career advancement” and total responsibility for calculating the amount of “additional actuarial costs” owed in the wake of a pension spike.

JCSO seeks a different outcome, but we cannot oblige. Systems has followed KRS 61.598 and 105 KAR 1:140 Section 8. There has been no arbitrary action requiring reversal. *Wasson*, 542 S.W.3d at 302. For the foregoing reasons, the opinion and order of the Franklin Circuit Court is AFFIRMED.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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