RENDERED: MARCH 27, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000880-MR

KENTUCKY PERSONNEL BOARD AND
DERRICK HERON — APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 15-CI-01338

JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF CORRECTIONS, JOHN
TILLEY, APPOINTING AUTHORITY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, KRAMER, AND TAYLOR, JUDGES.

ACREE, JUDGE: Derrick Heron, then a correctional officer within the Justice and Public Safety Cabinet's Department of Corrections ("Corrections"), was suspended three days by Warden Aaron Smith for possessing his personal cell phone while supervising an inmate at a hospital. Heron appealed to the Kentucky Personnel

Board (the Board), which reversed the suspension due to lack of proper evidence. Corrections appealed to the Franklin Circuit Court, which reversed. The Board then filed this appeal. After considering the record and applicable law, we agree with the Board that its decision should be reinstated.[1]

In a handwritten, *pro se* appeal form to the Board, Heron stated: "I am appealing this suspension because of [the] cell phone I brought to the hospital. It should of [sic] been a written reprimand because it was a 1st offense." (Record (R.) at 9). At a subsequent hearing under oath, Heron read aloud that written statement but then repeatedly insisted he had possessed an authorized "state" phone, not his personal phone. (Video, 9/16/15 at 9:47:38). When asked why he wrote that he should have been given a written reprimand for possessing an authorized device, Heron awkwardly seemed to indicate a belief that he could have been "written up" for possessing either a state or personal phone. (*Id.* at 9:47:12).

Warden Smith was then called as the second, and final, witness. Smith explained that Heron would not have been disciplined for possessing a state phone. (*Id.* at 9:56:10). Smith also testified that an external operations supervisor, Lieutenant Tingle, saw Heron with his personal phone. Tingle reported his

[1] The Court elected not to publish this opinion. Either party may, by filing a timely petition for rehearing or modification under Kentucky Rules of Civil Procedure (CR) 76.32(1)(a), move the Court of Appeals to publish the opinion notwithstanding the Court's designation, "Not To Be Published." *Commonwealth v. Crider and Rogers, Inc.*, 929 S.W.2d 179, 180 (Ky. 1996). The petition should state the reasons for urging publication.

observation to the senior captain, Mazza, who, along with a deputy warden, interviewed Heron. Heron purportedly admitted having possessed his personal phone at the hospital. Only then was the matter brought to Smith's attention. (*Id.* at 10:02:10). Because Smith learned about the incident from others after it occurred and consequently did not have first-hand knowledge of the facts, it is uncontested that his testimony was hearsay.[2]

A hearing officer recommended Heron's suspension be overturned because "the only testimony offered to support the suspension was that of Warden Aaron Smith" whose "testimony consisted entirely of hearsay . . . ." (R. at 13). Citing Kentucky Revised Statutes (KRS) 13B.090(1),[3] the hearing officer concluded that Smith's hearsay testimony was not sufficient by itself to support the suspension because it would not be admissible over objections in a civil action. Despite it being the subject of discussion at the hearing, the hearing officer did not discuss the statement in Heron's handwritten appeal form.

[2] "Hearsay" is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Kentucky Rules of Evidence (KRE) 801(c).

[3] KRS 13B.090(1) provides in relevant part that "[i]n an administrative hearing, findings of fact shall be based exclusively on the evidence on the record. . . . Hearsay evidence may be admissible, if it is the type of evidence that reasonable and prudent persons would rely on in their daily affairs, but it shall not be sufficient in itself to support an agency's findings of facts unless it would be admissible over objections in civil actions."

Corrections filed exceptions, arguing that Heron's appeal form was an admission to possessing his personal phone. The exceptions did not address the admissibility of Smith's hearsay testimony. The Board summarily adopted the hearing officer's recommendation, after which Corrections appealed to the Franklin Circuit Court, which reversed the Board. The court's decision was primarily based on its agreement with Corrections that the statement in Heron's appeal form was "an admission under KRE 801A[,]" so that, "as a matter of law[,]" Heron had "admitted the underlying violation . . . ."[4] (R. at 40). The Board then filed this appeal.

Before we address the merits of the suspension, we must address Corrections' contention that the Board lacks the jurisdictional authority to file this appeal. The statute governing appeals to this Court from circuit court judgments reviewing administrative agency actions is KRS 13B.160, which states that "[a]ny aggrieved party may appeal any final judgment of the Circuit Court under this chapter to the Court of Appeals in accordance with the Kentucky Rules of Civil Procedure." The question we must answer is whether the Board is an "aggrieved party."

[4] Presumably the trial court meant, mores specifically, KRE 801A(b), which provides in relevant part that "[a] statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the statement is offered against a party and is . . . [t]he party's own statement[.]"

There is scant authority interpreting that portion of KRS 13B.160. However, Kentucky courts have interpreted the term "aggrieved party" in other contexts. "The expression 'person aggrieved' or 'party aggrieved' has no technical meaning. What it means depends on the circumstances involved . . . . One may be aggrieved within the meaning of the various statutes authorizing appeals when he is affected only in a representative capacity." *Kentucky State Racing Com'n v. Fuller*, 481 S.W.2d 298, 301 (Ky. 1972) (quotation marks and citation omitted). Quoting a Minnesota opinion, *Fuller* held that the determination of whether an administrative agency is an aggrieved party depends on "whether it is essentially an administrative agency of the state empowered to initiate proceedings within the sphere of its jurisdiction and to establish and implement policy on behalf of the state, or whether its functions are limited to resolving disputes . . . ." *Id.* at 302 (quotation marks and citation omitted); *see also Department of Labor v. Morel Const. Co., Inc.*, 359 S.W.3d 438, 442 (Ky. App. 2011).

The Board does resolve certain types of employment disputes, such as the one now before the Court. *See* KRS 18A.075(3). However, the Board also has a panoply of non-adjudicatory duties, such as: investigating the enforcement of statutes governing state employees; "promot[ing] public understanding of merit principles in government service"; advising the Governor "with respect to the administration of the personnel system"; and "[r]epresent[ing] the public interest in

the improvement of personnel administration in the state service . . . ." KRS 18A.075. Therefore, the Board "performs important functions of carrying out legislative policy and protecting the public interest." *Boyd & Usher Transport v. Southern Tank Lines, Inc.*, 320 S.W.2d 120, 123 (Ky. 1959).

In *Boyd*, the court quoted with approval authority from outside Kentucky holding that the public has an interest in upholding a valid order of an administrative agency, and the agency itself is the "proper party to represent this public interest where its order is under review." *Id.* at 122 (citations and quotation marks omitted). In fact, "[t]he recognized standing of administrative entities to challenge decisions contrary to its own is not novel in this Commonwealth." *Chandler v. Bullitt County Joint Planning Comm'n*, 125 S.W.3d 851, 853 (Ky. App. 2002); *accord Dept. of Labor v. Morel Const. Co., Inc.*, 359 S.W.3d 438, 438 n.1 (Ky. App. 2011) ("However, this Commonwealth has long recognized standing of administrative entities to challenge decisions contrary to its own."). Indeed, the Board itself has been an appellant in this Court. *See, e.g.*, *McKissic v. Com. Transp. Cabinet*, 334 S.W.3d 885 (Ky. App. 2010), *superseded by statute as stated in Owen v. University of Kentucky*, 486 S.W.3d 266 (Ky. 2016); *Personnel Bd. v. Heck*, 725 S.W.2d 13 (Ky. App. 1986). Simply put, the Board is an aggrieved party entitled to file this appeal.

When an "aggrieved party" appeals a circuit court's final judgment to this Court "we must be ever mindful of our limited role. If the agency's decision is supported by substantial evidence, we must uphold that decision, *even if there is conflicting evidence in the record and even if we might have reached a different conclusion*." *Parrish v. Commonwealth*, 464 S.W.3d 505, 509 (Ky. App. 2015) (emphasis added). We must afford the administrative agency "great latitude in its evaluation of the evidence heard and the credibility of witnesses" and, so, we "may not reinterpret or reconsider the merits of the claim, nor can we substitute our judgment for that of the agency as to the weight of the evidence." *Id.* at 510 (quotation marks and citation omitted).

The chief reason the circuit court reversed the Board is because the court believed Heron's appeal form statement was so clear and conclusive as to be a judicial admission of wrongdoing. We disagree.

"A judicial admission is a formal statement concerning a disputed fact, made by a party during a judicial proceeding, that is adverse to that party, and that is deliberate, clear, and uncontradicted." *Zapp v. CSX Transp., Inc.*, 300 S.W.3d 219, 223 (Ky. App. 2009). A judicial admission is "conclusive, in that it removes the proposition in question from the field of disputed issue, and . . . waives or dispenses with the necessity of producing evidence by the opponent and bars the party himself from disputing it . . . ." *Sutherland v. Davis*, 286 Ky. 743,

151 S.W.2d 1021, 1024 (1941). A court must proceed "with caution" before deeming a statement to be a judicial admission "because of the variable nature of testimony and because of the ever-present possibility of honest mistake." *Bell v. Harmon*, 284 S.W.2d 812, 815 (Ky. 1955). Determining whether a statement constitutes a judicial admission "is a question of law, which is reviewed *de novo*, without deference to the interpretation afforded by the circuit court." *Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440, 448 (Ky. App. 2006) (quotation marks and citation omitted).

Heron's statement does not contain a modifier like "personal" or "private" immediately before the word "phone," and Heron adamantly denied at the hearing having brought his private phone to the hospital. Thus, the statement is not facially an unequivocal, uncontradicted acknowledgement that Heron possessed his personal phone. A reasonable inference could be made that Heron was referring to having brought his personal phone, but a judicial admission must be an unambiguous statement whose meaning is immediately plain. After all, based upon his testimony at the hearing it could be inferred that Heron meant he brought his state phone to the hospital because he (mistakenly) believed even that could have subjected him to discipline.[5] In other words, a true judicial admission

[5] Using an authorized communication device in an unauthorized manner (such as by letting an inmate use a state phone or looking at prohibited websites on a state phone) also could subject a correctional official to discipline.

is so clear that it does not admit of multiple feasible versions or require interpretation by inference or by judicially grafting language onto the statement (such as the word "personal" or "my" to Heron's statement about possessing a phone). In short, the circuit court erred by declaring the ambiguous appeal form to be a judicial admission. Because it is not an admission, the Board was entitled to give it whatever weight it deemed appropriate, which in this case seems to be no weight at all. Even if we would perhaps have assessed the statement's value differently, we cannot substitute our judgment for the Board's. *Parrish*, 464 S.W.3d at 509.

We now analyze the remaining evidence. Heron adamantly denied having brought his personal phone to the hospital. The only other witness was Smith – who had no personal knowledge of the underlying facts.

Hearsay "may be admissible" in administrative hearings, provided it "is the type of evidence that reasonable and prudent persons would rely on in their daily affairs . . . ." KRS 13B.090(1). We agree with the trial court that the information relayed to Smith by Mazza and/or Tingle is the type of hearsay that reasonable, prudent persons would rely upon in their daily affairs. However, that is not the end of the inquiry.

Admissible hearsay "shall not be sufficient in itself to support an agency's findings of fact unless it would be admissible over objections in civil

actions." *Id.* In other words, an administrative agency may accept hearsay evidence, but its final conclusion must be based upon some admissible evidence. KRS 13B.090(1). As this Court said in *Drummond v. Todd County Board of Education*:

> In presiding over an administrative proceeding, the hearing officer is permitted to accept hearsay evidence which is reliable, but which would not be admissible in court. *See* KRS 13B.090(1). However, when the time comes to make a factual determination, the residuum rule requires the fact-finder to base a decision on only the competent evidence: "When the evidence is all in, it must be sifted and assorted. The competent separated from the incompetent, and out of the testimony there must come some reliable and substantial evidence, as understood by the common-law rules of evidence upon which a verdict must rest." *Cabe v. City of Campbellsville*, 385 S.W.2d 51, 54 (Ky. 1964) (quoting *Valentine v. Weaver*, 191 Ky. 37, 228 S.W. 1036, 1038 (1921)). That means we will affirm a finding of fact only if the competent evidence before the tribunal constitutes *substantial* evidence.

349 S.W.3d 316, 321 (Ky. App. 2011) (emphasis in original).

The crux of the case is whether Smith's hearsay would be admissible over objection in a civil action. Unfortunately, our review is hampered by the fact that Corrections has consistently relied upon the judicial admission theory and so it has not addressed this issue in significant detail.

Smith's hearsay consisted of both "regular" hearsay (what Tingle told Smith that Tingle observed) and double hearsay (what Mazza or the deputy warden

told Smith what Heron had told them). For double hearsay (*i.e.*, hearsay within hearsay) to be admissible "each part of the combined statements [must] conform[] with an exception" to the general prohibition of hearsay. KRE 805.

As to the double hearsay, the requirements for admissibility have not been met. Arguably, Heron's alleged admission to Mazza and the deputy warden that he (Heron) had his personal phone would have been admissible as an admission by a party under KRE 801A(b) through the testimony of Mazza or the deputy warden. But neither of them testified. Corrections has not cited, nor have we independently located, an exception which permits Smith to testify about what Mazza and the deputy warden told Smith about what Heron had told them. Thus, Smith's recitation of Heron's admission to Mazza and the deputy warden is inadmissible. Similarly, Tingle could likely have testified about having observed Heron possessing his personal phone, but Corrections has not cited an exception that would have permitted Smith to offer Tingle's observations second hand.

In sum, we conclude that the Board is properly before this Court as an appellant and Corrections offered only inadmissible hearsay to support Heron's suspension. The circuit court erred by reweighing the evidence and making conclusions to the contrary. We therefore reverse and remand with instructions to reinstate the final order of the Board.

ALL CONCUR.

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