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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000287-MR

PAUL BARTH — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 15-CI-00950

KENTUCKY RETIREMENT SYSTEMS;
AND BOARD OF TRUSTEES OF
THE KENTUCKY RETIREMENT
SYSTEMS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CALDWELL, DIXON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Paul Barth brings this appeal from a December 21, 2017, Order of the Franklin Circuit Court affirming a Final Order of the Kentucky Retirement Systems Board of Trustees (Board) voiding his retirement benefits. We affirm.

Barth was employed by the McMahan Fire Protection District (McMahan) from 1983 to 2007, including serving as fire chief. Barth was a member of the County Employee Retirement System, a component of the Kentucky Employee Retirement Systems (KERS), which is administered by the Board. Kentucky Revised Statutes (KRS) 61.645(9)(g)[1] directs the Board to maintain KERS favorable federal tax status, including the promulgation of any necessary administrative regulations.[2]

Under the version of KRS 61.637(10) in effect from 2002 to 2008, a retired member's retirement would be "voided" and the member would be required to repay "all benefits received" upon being "employed within one (1) month of the member's initial retirement date in a position that is required to participate in the same retirement system from which the member retired . . . ." In May 2007, the IRS implemented a "*bona fide* separation" test which generally provided that a prearranged agreement for an employee to retire and be rehired would not qualify as a *bona fide* separation for retirement benefit purposes.

[1] This is the version of Kentucky Revised Statutes (KRS) 61.645(9)(g) as it existed in 2007. This section is now found in KRS 61.645(9)(e).

[2] The Kentucky Employee Retirement Systems (KERS) is a tax-exempt qualified pension plan under 26 United States Code (U.S.C.) § 401(a). The stated legislative intent in KRS 61.645(9)(g) is for KERS to conform with applicable federal statutes and regulations to meet the qualification requirements of 26 U.S.C. § 401(a).

Meanwhile, in April 2007, Barth had entered into a prearranged agreement whereby he would retire but later return to work for McMahan. Barth met with three retirement counselors in 2007 but apparently did not fully inform them of his prearrangement. Barth contends the counselors told him that volunteering for a month for McMahan would satisfy the one-month separation requirement.

On June 20, 2007, Barth signed a notification of retirement form, listing his retirement date as August 1, 2007. On June 29, 2007, KERS issued a memorandum to its members which stated that the IRS had ruled that "qualified pension plans cannot make a distribution without a bona fide separation from service" and "[i]n order to have a bona fide separation from service under federal law, an employee and employer cannot have a prearranged agreement prior to separation for that employee to return to employment with the same employer at any time in the future after retirement." Admin. Record at 97. The memorandum advised members that a conforming administrative regulation was being formulated. Additionally, the memorandum plainly states that the new federal rule would be implemented for any KERS member retiring effective June 1, 2007, to retain the pension plan's qualified tax status. A member of the McMahan Board of Trustees advised Barth of the memorandum in a July 2007 email.

Barth retired on August 1, 2007, and immediately began to "volunteer" as a fire chief for McMahan for one month, after which he became an independent contractor working for McMahan for about ten months. Thereafter, he became an employee until he retired again on January 21, 2012. The parties dispute whether McMahan was truly a volunteer or independent contractor upon his return to work and whether his 2007 retirement was a *bona fide* separation from his employment.

Meanwhile, on August 15, 2007, the Board promulgated an emergency administrative regulation, 105 Kentucky Administrative Regulations (KAR) 1:390E. The necessity, function and conformity section of that regulation stated that it was "intended to maintain the tax qualified status" of KERS. Section 2 of the regulation provided that "[f]or purposes of commencing a retirement benefit, a member shall terminate employment with the participating employer and shall have a Bona Fide Separation from service," which was defined by Section 1 as "a cessation of the employment relationship between the member and the member's employer without a prearranged agreement between the participating employer and the member at the time of retirement to return to work for the participating employer after retirement in any capacity . . . ."

In September 2010, KERS sent Barth a letter stating in relevant part that his retirement had been voided due to the discovery of his prearrangement

with McMahan. At Barth's request, an administrative hearing was held over six days between October 2012 and February 2014. In May 2015, a hearing officer issued a lengthy recommendation adverse to Barth, which the Board adopted in August 2015. Barth then filed a petition for review in the Franklin Circuit Court. On December 21, 2017, the circuit court entered an order affirming the Board. Thereafter, by order entered January 26, 2018, the court denied Barth's motion to alter, amend or vacate. This appeal followed.

The ultimate issue in this appeal is whether the Board properly determined that Barth was reemployed by McMahan after his retirement in violation of KRS 61.637 and/or 105 KAR 1:390E, which voided his retirement.[3] Barth's brief sets forth seven related or restated issues. Slightly reframed, they are: (1) the *bona fide* separation policy is unenforceable; (2) 105 KAR 1:390E applies to retirement, not reemployment; (3) the Board retroactively applied 105 KAR 1:390E; (4) 105 KAR 1:390E violates the inviolable contract of state retirees; (5) 105 KAR 1:390E violates the Contract Clauses of the Kentucky and United States Constitutions; (6) there is not substantial evidence to support the Board's conclusion that Barth did not have the requisite break in service; and (7) there was no need to enact 105 KAR 1:390E on an emergency basis.

[3] The voiding of Paul Barth's retirement only affected those benefits he had received since his retirement on August 1, 2007. His retirement was not forfeited nor his right to receive future retirement benefits. He was only required to repay those benefits improperly received.

Before we address Barth's arguments, we note that there is an extensive administrative record in this appeal totaling over four thousand pages, including 69 exhibits. And, the circuit court record is over 500 pages. This compels the court to address Barth's failure to comply with Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(v) by not providing this Court with a statement showing how each issue he has raised on appeal was properly preserved for review and in what manner. The rules of appellate procedure are "critical" to effective appellate review and substantial compliance is mandatory. *Oakley v. Oakley*, 391 S.W.3d 377, 380-81 (Ky. App. 2012). And, it is not this Court's duty to scour the record on appeal to ensure that issues have been properly preserved for our review. *Koester v. Koester*, 569 S.W.3d 412, 414-15 (Ky. App. 2019). Compliance with CR 76.12(4)(c)(v) is a substantial requirement of appellate practice in Kentucky. *Elwell v. Stone*, 799 S.W.2d 46, 47 (Ky. App. 1990).

This Court has three options when a party fails to comply with the substantial requirements of CR 76.12: ignore the deficiency, strike the brief in whole or part, or review only for manifest injustice. *Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010). Given the voluminous record on appeal, we decline to ignore the deficiency. Likewise, we will not impute counsel's errors directly to Barth, and given the importance of this appeal to Barth, we decline to strike his brief. Thus, we shall conduct our review and grant relief from the order below

only upon a showing of manifest injustice. CR 61.02. This means our review looks only to palpable errors committed by the circuit court and the Board which resulted in manifest injustice to Barth. *Id.*

STANDARD OF REVIEW

Notwithstanding that our review in this case will look to palpable errors by the circuit court and the Board, the framework for our review is nonetheless set out in KRS 13B.150 as follows:

> (2) 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;
>
> (c) Without support of substantial evidence on the whole record;
>
> (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.

Our review proceeds accordingly.

ANALYSIS

Barth first argues the IRS *bona fide* separation requirement should not have applied to him because 105 KAR 1:390E did not become effective until after he retired. He further argues that the June 2007 memorandum, issued prior to his retirement, lacked the force of law and violated KRS 13A.100. As the Board notes, however, Barth did not identify this argument in his prehearing statement. CR 76.03(8) states that "[a] party shall be limited on appeal to issues in the prehearing statement except that when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion." Barth admits in his reply that he did not "explicitly" raise the issue in his prehearing statement but believes it is encompassed by his argument that the circuit court erred "when it did not find that the Board's Final Order was arbitrary and erroneous." Barth's Reply Brief at 1.

More importantly, Barth has not cited to the record where and how any issues regarding KRS 13A.100 and KRS 13A.130 were presented to either the Board or the circuit court for consideration. We are without authority to review issues not presented to or decided by the circuit court. *Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705, 734 (Ky. 2009). This same rule applies to issues not

properly raised before an administrative body. *Urella v. Ky. Bd. of Med. Licensure*, 939 S.W.2d 869, 873 (Ky. 1997). Based on this longstanding rule, along with CR 76.03(8) and CR 76.12(4)(c)(v), we decline review of this issue.

However, we observe that this issue is effectively mooted by the circuit court's ruling that substantial evidence supported the Board's holding that Barth was actually an employee of McMahan in August of 2007. This constituted a violation of KRS 61.637(10) by finding that Barth was employed by McMahan within one month of his retirement date. And, we conclude there was no palpable error by the Board or circuit court in their rulings on this issue as addressed more fully in this Opinion.

The next two issues raised by Barth are related. He contends 105 KAR 1:390E applies to retirement, not his reemployment, so the regulation could not apply to him since it was not effective on his retirement date. Thus, the Board improperly applied the regulation retroactively. Particularly, Barth cites a clause from one sentence of Section 2 of the emergency regulation which stated that "[*f*]*or purposes of commencing a retirement benefit*, a member shall terminate employment with the participating employer and shall have a Bona Fide Separation from Service." Barth's Brief at 15 (emphasis added).

We agree with the Board that a person must retire to receive retirement benefits so the language at issue logically means only that an employee

must terminate his employment with his/her employer to receive retirement benefits and also must have a *bona fide* separation. That conclusion is buttressed by the fact that KRS 61.637(10) has long provided that a retired employee's retirement would be voided without a one-month break in service. Thus, the regulation's *bona fide* separation requirement concerns the administration of KRS 61.637 as required by KRS 61.645(9)(g) to comply with the IRS' *bona fide* separation requirement and, as such, has "the force and effect of law[.]" *Centre College v. Trzop*, 127 S.W.3d 562, 566 (Ky. 2003). And, we must again emphasize that Barth had knowledge of the IRS ruling and the Board's intent to implement the regulation to preserve the plan's qualified federal tax status prior to Barth's retirement. We find no palpable errors regarding the Board's ruling on these issues.

Next, Barth asserts that the voiding of his retirement violated the inviolable contract provisions of KRS 78.852(1) because it impaired his right to reemployment. KRS 78.852(1) provides that in consideration of the contributions from members of the county retirement system, the provisions of KRS 78.510 to 78.852 "shall constitute an inviolable contract of the Commonwealth" and the benefits therein may "not be subject to reduction or impairment." Barth's Brief at 18. Barth also contends the *bona fide* separation requirement violates the Contract Clauses of the Kentucky and United States Constitutions.

The Board argues in response that Barth failed to raise these issues below, nor identified them in his prehearing statement. Indeed, the circuit court held Barth had not preserved these issues at the administrative level and thus was barred from raising them before the circuit court. We must agree with the circuit court and again find no palpable error in the court's ruling. Likewise, we can find no published authority in Kentucky that supports Barth's argument, nor is there any legal basis in Barth's claim that he had a right to be reemployed upon retirement.

Barth next argues there was a lack of substantial evidence to show he did not have the requisite one month break in service after his retirement before being reemployed by McMahan in compliance with KRS 61.637(10). Yet Barth admits he had a prearrangement to return to work with McMahan, which he did not share fully with KERS prior to retiring. The circuit court analyzed the issue as follows:

> First, substantial evidence supports the Board's determination that Barth had a prearranged agreement to return to employment at McMahan after his retirement and that he actively took steps to conceal the existence of the prearranged agreement. On February 14, 2007, Barth sent a response to an emailed question from a McMahan Board of Trustees member about who would run the fire department during Barth's thirty day leave period until he returned. In the email Barth stated that he was "committed to staying on as a 'volunteer' Fire Chief for that thirty days, and doing everything that I do right now. . ." During the July 31, 2007[,] McMahan Board of

Trustees meeting, Barth was given responsibilities by the trustees, clearly demonstrating an understanding by the McMahan Board of Trustees that Barth was in fact going to continue as Fire Chief. Subsequently, the McMahan Board of Trustees did not follow its normal procedure for resignation of employment and filling Barth's vacant position, which supports the Board's finding that there was a prearranged agreement for Barth to continue employment after retiring. On July 8, 2007, Barth emailed Deputy Fire Chief Joseph Johnson and admitted to deleting any mention of the independent contractor agreement from the McMahan Board of Trustee June 2007 meeting minutes to evade the restrictions.

Substantial evidence supports the Board's decision that Barth was aware of the prohibition of prearranged agreements to return to employment. Prior to his retirement on July 31, 2007, Barth met with retirement advisors and was informed numerous times about the requirement of a bona fide separation in service and prearranged agreements. Barth was told that before any reemployment or interest in working as an independent contractor he needed to contact the Kentucky Retirement Systems to determine the potential impact on his retirement benefits, which he failed to do. Likewise, Barth was informed about the federal regulations issued by the IRS governing reemployment after retirement through the June 29, 2007[,] Memorandum issued by the Kentucky Retirement Systems, in an email from McMahan trustee Scott Marshall on July 1, 2007, and the Fall 2007 Newsletter issued by the Kentucky Retirement Systems.

The Board's holding that Barth did not have a bona fide separation of employment is supported by substantial evidence. There is compelling evidence that Barth did not serve as a true volunteer during August 2007. First, in an email dated August 27, 2007, to an employee of the Fern Creek Fire Department, Barth admitted that he is one of the two salaried employees at

> McMahan and did not mention that he was retired and was acting as a volunteer with plans to become an independent contractor. Throughout his "volunteer" period in August 2007, Barth continued to perform the duties consistent with his job duties as Fire Chief of McMahan. During August 2007, Barth performed the additional work duties assigned to him by the trustees during the July 31, 2007[,] McMahan Board of Trustees meeting, issued paychecks to employees, dealt with personnel disciplinary matters, and continued to work on insurance issues. Evidence in the administrative record shows that Barth was paid for his work in August 2007. For the month of July 2007, Barth should have been paid approximately $7,418.40, instead he received an additional $7,073.26. Moreover, the August 28, 2007[,] McMahan Board of Trustees meeting minutes continuously reference Barth as "Fire Chief."

December 21, 2017, Order at 6-8.

Again, we find no palpable error in the circuit court's ruling. There was substantial evidence presented to the Board that Barth was an employee of McMahan in August of 2007. Thus, Barth failed to have the one month break in service with McMahan after his retirement as required by state law to qualify for retirement benefits. In Kentucky, if there is substantial evidence in the record to support an agency's findings, those findings will be upheld, notwithstanding that there may be conflicting evidence of record. *Ky. Comm'n on Human Rights v. Fraser*, 625 S.W.2d 852, 856 (Ky. 1981). And, this Court may not substitute its judgment for that of the Board as to the evidence on questions of fact. KRS 13B.150(2).

Finally, Barth presents a terse, two-paragraph argument that there was no necessity for the Board to promulgate 105 KAR 1:390E on an emergency basis. He argues there was no emergency since the Treasury Department was permitting retirement plans until January 1, 2009, to comply with the new IRS regulations. The Board contends Barth did not timely raise this challenge at the administrative level. Barth's initial brief contains no preservation statement and he only states in his reply brief that he "identified the matter in filing exceptions to the hearing officer's recommended order." Barth's Reply Brief at 2. Again, Barth has failed to cite where in the 4,000+ page administrative record his exceptions on this issue were presented to the Board. Regardless, the regulation on its face adequately explains why it was enacted on an emergency basis and Barth cites no authority which required KERS to delay compliance with the Treasury Department's May 2007 directives. In order to protect the retirement system's tax status, which was beneficial to all members, including Barth, the Board promptly complied with federal law. In short, we find no palpable error on this issue, or any other issue presented by Barth in this appeal.

For the foregoing reasons, the December 21, 2017, Order of the Franklin Circuit Court affirming the Final Order of the Kentucky Retirement Systems Board of Trustees is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEES:
David N. Ward Louisville, Kentucky	Robert W. Kellerman Frankfort, Kentucky