IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Alan R. Gilbert, Petitioner	:	
v.	:	No. 861 C.D. 2010
	:	Submitted: October 22, 2010
State Civil Service Commission (Department of Labor and Industry), Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN FILED: December 17, 2010

Alan R. Gilbert petitions for review of the April 13, 2010, adjudication and order of the State Civil Service Commission (Commission), dismissing Gilbert's appeals from the Department of Labor and Industry's (Department) imposition of alternative discipline in lieu of suspension (ADLS) and subsequent removal of Gilbert from his position as a workers' compensation judge (WCJ) under the Civil Service Act (Act).[1] We affirm.

Gilbert was employed by the Department as a WCJ from May 13, 1996, until his discharge on March 3, 2009. (Findings of Fact, No. 8.) Gilbert worked in the Department's Spring Garden office in Philadelphia. In 1988, the Department entered into a settlement agreement in the case of *Eck v. Wofford*, Civil Action No.

[1] Act of August 5, 1941, P.L. 752, *as amended*, 71 P.S. §§741.1-741.1005.

86-1780 (M.D. Pa. filed April 8, 1988), commonly referred to as the "Eck and Heck Settlement." (Findings of Fact, No. 9.) Throughout Gilbert's employment with the Department, WCJs have been required to comply with the terms of the Eck and Heck Settlement, which mandates that a WCJ circulate a decision in a case within ninety days after the close of the record. (Findings of Fact, No. 10; *see* Eck and Heck Settlement, ¶ 4.1.) Consequently, a case is deemed to be in "Eck and Heck" (E & H) status when a decision has not been issued within ninety days. (Findings of Fact, No. 10.) Gilbert was aware of the ninety-day requirement. (Findings of Fact, No. 11.)

Beginning in January 2007, the Department imposed a series of disciplinary actions against Gilbert due to his continued E & H backlog.[2] (Findings of Fact, Nos. 11-12.) Following each disciplinary action, Gilbert's then-supervisor, Karen Wertheimer, offered Gilbert assistance in reducing his backlog. However, Gilbert's E & H total was never zero for any month from January 2007 until the date of his termination. (Findings of Fact, No. 14.)

In June 2008, Gilbert received an annual performance review, which rated his overall job performance as "unsatisfactory." (Findings of Fact, No. 15.) Thereafter, Wertheimer worked hand-in-hand with Gilbert to help improve his procedures for writing decisions and encouraged him to use decision drafters. (Findings of Fact, Nos. 16-17.)

[2] By January 31, 2007, Gilbert had twenty-five cases in E & H status, for which he received an oral reprimand. By June 29, 2007, Gilbert had fifteen cases in E & H status, for which he received a written reprimand. By September 28, 2007, Gilbert had fifteen cases in E & H status, for which he received a level-one ADLS (equivalent to a one-day suspension). By February 29, 2008, Gilbert had sixty-three cases in E & H status, for which he received a level-two ADLS (equivalent to a three-day suspension). (Findings of Fact, Nos. 11-12.)

By the end of July 2008, Gilbert had forty-one cases in E & H status. In August 2008, Gilbert was assigned fifty-six new petitions; by the end of that month, he had forty-two E & H cases. (Findings of Fact, No. 18.) In September 2008, Wertheimer met with Gilbert and gave him the opportunity to explain the reason for the continued E & H backlog. (Findings of Fact, No. 19 & n.5.)

By letter dated October 7, 2008, the Department imposed on Gilbert a level-two ADLS, which had the effect of a five-day suspension without pay. (Findings of Fact, No. 1.) The Department explained:

> [Y]ou failed to provide complete and timely decisions as required of a [WCJ]. Although on July 24, 2008 your manager specifically instructed you reduce your [E & H] caseload by at least 10 cases per month, at the end of August there was no reduction in your [E & H] caseload. During the September 4, 2008 fact-finding regarding your unsatisfactory work performance, you indicated that you understand the expectations, and provided no reasonable explanation for your failure to meet the expectations.

(Findings of Fact, No. 2 (quoting Commission Ex. A).)

By memorandum dated October 16, 2008, Gilbert's immediate supervisor, Peter Perry,[3] directed that Gilbert reduce his E & H inventory by at least ten petitions per month. (Findings of Fact, No. 21.) In the following months, Gilbert's E & H caseload was as follows: fifty-nine E & H cases at the end of

[3] Perry replaced Wertheimer as Gilbert's supervisor in August 2008. (Findings of Fact, No. 20 n.6.)

December 2008; sixty E & H cases at the end of January 2009; and sixty-six E & H cases at the end of February 2009. (Findings of Fact, Nos. 22-23.)

By letter dated March 4, 2009, the Department informed Gilbert that he had been removed from his position as a regular-status WCJ effective March 3, 2009. (Findings of Fact, Nos. 5, 24.) The letter stated the following reasons for removal:

> You have been instructed on numerous occasions to reduce your [E & H] caseload, yet your backlog continues to increase. During the February 19, 2009 fact-finding meeting, you indicated that you were aware of the expectations yet provided no reasonable explanation for your failure to meet the expectations.

(Findings of Fact, No. 6 (quoting Commission Ex. E).)

Gilbert timely appealed to the Commission, challenging both the imposition of the level-two ADLS and his subsequent termination.[4] The Commission held evidentiary hearings on June 29 and July 22, 2009. The Department presented the testimony of four witnesses: Wertheimer; Perry; Amy Tirpak, Human Resource Analyst; and Elizabeth Crum, Deputy Secretary for Compensation and Insurance. Gilbert testified on his own behalf and also presented the testimony of fellow WCJ Todd Seelig.

Gilbert testified that the most common cases assigned to him were petitions filed by claimants alleging a new injury. (N.T., 7/22/09, at 341-42.)

[4] The Commission consolidated the appeals at the Department's request. (Findings of Fact, No. 7.)

Gilbert testified that fifteen WCJs worked in the Spring Garden office, which also employed two experienced law clerks with a third in training. (*Id.* at 355-56.) According to Gilbert, he was "never told when [the law clerks] would come and when they would go." (*Id.* at 357.) Gilbert also testified that he often worked extra hours and that he had ongoing problems with his support staff, which hampered his ability to reduce his caseload and circulate decisions on time. (*Id.* at 358-63, 369-70.) Gilbert further testified that, after his brother's hospitalization in January 2009, he assumed caretaking responsibility for both his mother and his brother. (*Id.* at 371.) Gilbert took two days off from work in January 2009 to help find a rehabilitation facility for his brother; these were Gilbert's only full days off, other than court holidays, after July 5, 2008. (*Id.* at 371-73.)

On cross-examination, Gilbert testified that his E & H numbers went up and down throughout 2007 and 2008, but he also admitted that, during the relevant period, he never had an E & H total of zero. (*Id.* at 397.)

Seelig testified that a large number of cases handled by the Spring Garden office involved employers such as the City of Philadelphia and Southeastern Transportation Authority, which rarely settle claims. As a result, WCJs in the Spring Garden office typically write more decisions on fully contested cases than WCJs in other offices. (*Id.* at 322-25.)

On April 13, 2010, the Commission dismissed Gilbert's appeals and upheld the actions of the Department. The Commission concluded that: (1) the Department presented sufficient credible evidence to establish that ADLS was

imposed for good cause under section 803 of the Act;[5] (2) the Department presented sufficient credible evidence to establish that Gilbert was removed for just cause under section 807 of the Act;[6] and (3) Gilbert failed to establish that his removal was the result of age discrimination in violation of section 905.1 of the Act.[7] Gilbert now petitions for review of that decision.[8]

1. ADLS

Gilbert argues that the Commission's finding of good cause for the imposition of ADLS was unsupported by substantial evidence. Although the Act itself does not define "good cause," the term "has been interpreted as merit-related and touching upon the employee's competency and ability to do the job in some

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[5] Section 803 of the Act provides that "[a]n appointing authority may for good cause suspend without pay for disciplinary purposes an employe holding a position in the classified service." 71 P.S. §741.803.

[6] Section 807 of the Act provides that "[n]o regular employe in the classified service shall be removed except for just cause." 71 P.S. §741.807.

[7] Section 905.1 of the Act, added by Section 25 of the Act of August 27, 1963, P.L. 1257, provides:

> No officer or employe of the Commonwealth shall discriminate against any person in recruitment, examination, appointment, training, promotion, retention or any other personnel action with respect to the classified service . . . because of race, national origin or other non-merit factors.

71 P.S. §741.905a.

[8] Our review of the Commission's decision is limited to determining whether constitutional rights were violated, an error of law was committed, or findings of fact were unsupported by substantial evidence. *Moore v. State Civil Service Commission (Department of Corrections)*, 922 A.2d 80, 84 n.3 (Pa. Cmwlth. 2007). In civil service matters, the Commission is the sole factfinder and has exclusive authority to assess witness credibility and resolve evidentiary conflicts. *Id.*

rational and logical manner." *Hargrove v. Pennsylvania State Civil Service Commission*, 851 A.2d 257, 260 (Pa. Cmwlth. 2004). An employee's failure to properly execute his duties, or hampering the execution of his duties, constitutes good cause for suspension. *Id.*

First, Gilbert asserts that there was no evidence that he ever filed an incomplete decision as stated in the October 7, 2008, ADLS letter. However, ADLS was imposed because of Gilbert's failure to: (1) issue complete *and timely* decisions; and (2) reduce his E & H backlog after being directed to do so by his supervisor. The October 7, 2008, letter stated:

> Although on July 24, 2008 your manager specifically instructed you reduce your [E & H] caseload by at least 10 cases per month, at the end of August there was no reduction in your [E & H] caseload.

(Findings of Fact, No. 2.) There was substantial evidence in the record that Gilbert failed to file timely decisions for more than one year prior to the imposition of ADLS, even after repeated disciplinary measures.

Second, Gilbert argues that the evidence showed that there had been a reduction in his E & H caseload at the time ADLS was imposed. Specifically, Gilbert cites the decrease from forty-six E & H cases to forty E & H cases between the months of June and August 2008. While there may have some improvement in Gilbert's numbers during the relevant period, the unrefuted evidence established that:

> [Gilbert] has, **each month since at least January 2007**, had double-digit numbers of late cases; no other judge assigned to the Spring Garden office had a similarly[] perpetual record of E&H cases.

(Commission's Adjudication at 24 (emphasis in original).) Therefore, we agree with the Commission that the Department established good cause for the imposition of ADLS.

2. Removal

Preliminarily, Gilbert claims that the "just cause" provision in section 807 of the Act is inapplicable to him because it conflicts with section 1406 of the Workers' Compensation Act (WCA), Act of June 2, 1915, P.L. 736, *as amended*, added by Section 29 of the Act of June 24, 1996, P.L. 350, 77 P.S. §2506.[9] In particular, he asserts that because he was not accused of violating a provision of the WCA, he should continue to serve as a WCJ as a matter of law. The Commission properly rejected this claim.

Section 807 of the Civil Service Act permits the removal of *any* classified service employee for just cause. *See* 71 P.S. §741.807.[10] Section 1406 of the WCA provides that "[i]ndividuals who are currently serving as workers'

[9] Section 1406 of the WCA provides that "[i]ndividuals who are currently serving as workers' compensation judges shall continue to serve as workers' compensation judges, subject to sections 1401(c) and 1404." 77 P.S. §2506. Section 1401(c) of the WCA, added by Section 29 of the Act of June 24, 1996, P.L. 350, states that WCJs shall not engage in any unapproved activities during normal working hours. 77 P.S. §2501(c). Section 1404(b) of the WCA, added by Section 29 of the Act of June 24, 1996, P.L. 350, states that any WCJ who violates the code of ethics enumerated therein shall be removed from office in accordance with the provisions of the Civil Service Act. 77 P.S. §2504(b).

[10] Section 3(d)(2) of the Act defines "classified service" as including all positions in the Department charged with the administration of the WCA, including workers' compensation referees. 71 P.S. §741.3(d)(2). Gilbert does not dispute that he was a classified service employee under the Act.

compensation judges shall continue to serve as workers' compensation judges, subject to sections 1401(c) and 1404 [of the WCA]." 77 P.S. §2506. Contrary to Gilbert's assertion, nothing in section 1406 of the WCA suggests that sections 1401(c) and 1404 are the *only* bases upon which a WCJ may be removed from office, nor does section 1406 exempt WCJs from the requirements of the Civil Service Act. In fact, section 1401(d) of the WCA provides that WCJs "shall be afforded employment security" under the Civil Service Act. 77 P.S. §2501(d). Likewise, section 1401(b) of the WCA states that any WCJ who violates the code of ethics shall be removed "in accordance with the provisions of the [Civil Service Act]." 77 P.S. §2504(b). Accordingly, Gilbert's claim lacks merit.

Next, Gilbert argues that, even if the "just cause" provision of the Act applied to him, the Department failed to satisfy its burden. To establish "just cause" for removal, the Department must show "that the actions resulting in the removal are related to [the] employee's job performance and touch in some rational and logical manner upon the employee's competence and ability." *Pennsylvania Board of Probation and Parole v. State Civil Service Commission*, 4 A.3d 1106, 1112 (Pa. Cmwlth. 2010). What constitutes just cause "is largely a matter of discretion on the part of the head of the department." *Id*. Such "cause should be personal to the employee and . . . render the employee unfit for his or her position, thus making dismissal justifiable and for the good of the service." *Id.*

Gilbert claims that it was "manifestly unjust" for the Department to terminate him because of his E & H caseload when the Department was required to reassign those cases to other judges in accordance with the Eck and Heck Settlement.

(Gilbert's Brief at 12.) The Eck and Heck Settlement, however, does not mandate re-assignment; rather, it gives the Department the discretion to either reassign the cases "or otherwise provide for expedited decision." (Eck and Heck Settlement, ¶ 4.4.) Here, both Wertheimer and Perry testified that they made numerous attempts to help Gilbert expedite his decision-writing and encouraged him to delegate cases to law clerks or other judges. As the Commission aptly noted:

> [T]here is nothing in the [Eck and Heck Settlement] which would require that [Gilbert], based upon a demonstrated inability or reluctance to perform his duties, be retained and allowed to continue to have his work redistributed to his co-workers who have successfully performed their duties.

(Commission's Adjudication at 29.)

Gilbert further claims that the Commission capriciously disregarded several mitigating circumstances that justified his continued E & H backlog. However, as the Commission correctly found, most of the conditions that Gilbert identified as mitigating were shared by *all* WCJs in the Spring Garden office.[11] Even considering the alleged mitigating conditions that would have affected only Gilbert, such as difficulties with his secretary and family illnesses, such conditions fail to justify Gilbert's two-plus years of double-digit E & H backlog, which amounted to "a substantially higher number of cases in E&H status than all of the other judges assigned to the same office combined." (Commission's Adjudication at 13.) The credible evidence established that, despite intensive mentoring and colleague

[11] The alleged mitigating conditions that affected all WCJs in the Spring Garden office included: the higher percentage of matters assigned to the Spring Garden office that do not settle; the mandatory mediation program; and the November-December 2008 office relocation. (Commission's Adjudication at 27 n.12.)

assistance, Gilbert was unable to satisfactorily perform his duties as a WCJ. Therefore, the Department established just cause for removal.

3. Age Discrimination

Finally, Gilbert asserts that his removal was the result of age discrimination. We disagree.

An employee claiming discrimination has the burden of producing sufficient evidence that, if believed and otherwise unexplained, indicates it was more likely than not that discrimination occurred. *Martin v. State Civil Service Commission (Department of Community and Economic Development)*, 741 A.2d 226, 233 (Pa. Cmwlth. 1999). When claiming disparate treatment, the employee must demonstrate that he or she was treated differently than other employees similarly situated. *Bruggeman v. State Civil Service Commission (Department of Corrections SCI-Huntingdon)*, 769 A.2d 549, 553 (Pa. Cmwlth. 2001).

Here, Gilbert presented evidence that, in 2001, when he was fifty-two years old, he received only a reprimand for having a backlog of eighty-six E & H cases, and the Department re-assigned those cases to other WCJs. Thus, Gilbert claims that his removal in 2009, when he was sixty years old and had only sixty-six E & H cases, was the result of age discrimination. The Commission was unpersuaded by this argument, as are we.

The mere fact that the discipline imposed against Gilbert in 2001 differed from that imposed in 2009 does not prove discrimination. The Department's

credible evidence established that the 2009 removal "was imposed at the conclusion of a two-year period during which [Gilbert], **each month**, posted an E&H caseload larger than that of all of his Spring Garden co-workers combined." (Commission's Adjudication at 29 (emphasis in original).) Moreover, the removal was "the culmination of a series of increasingly severe disciplinary actions imposed during the noted period based upon [Gilbert's] continuing E&H caseload." (*Id.* at 13.) We find no error in this determination.

Furthermore, Gilbert presented no evidence demonstrating unfairness in the Department's distribution of cases to WCJs. The Commission specifically disbelieved Gilbert's claim that he was being "singled out" by his superiors because he was receiving a higher number of assignments than other WCJs. The Commission reviewed the documentary evidence and found that Gilbert had the highest number of assignments only twice during the relevant period; on neither occasion was the number of cases assigned to Gilbert substantially greater than that assigned to other WCJs. (Commission's Adjudication at 24-25.)

Accordingly, because we agree with the Commission that Gilbert's failure to meet performance expectations for more than two years constituted both good cause for his suspension and just cause for his removal, we affirm.

ROCHELLE S. FRIEDMAN, Senior Judge

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v.	:	No. 861 C.D. 2010
State Civil Service Commission (Department of Labor and Industry), Respondent	:	

O R D E R

AND NOW, this 17th day of December, 2010, we hereby affirm the April 13, 2010, adjudication and order of the State Civil Service Commission.

ROCHELLE S. FRIEDMAN, Senior Judge