IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ALPHONSO R. LEE,	)	**No. 28701-7-III**
Appellant,	)	
v.	)	**Division Three**
YAKIMA VALLEY COMMUNITY COLLEGE,	)	
Respondent.	)	**UNPUBLISHED OPINION**

Siddoway, J. — Alphonso R. Lee appeals the superior court's order affirming a final order of the Yakima Valley Community College board of trustees dismissing Mr. Lee from his tenured employment at the college. Mr. Lee alleges numerous injuries and civil rights violations; asks that he be reinstated; and seeks at least $300,000 for back pay and damages, together with prejudgment interest. Because Mr. Lee has demonstrated no basis for reversing the board of trustees' final order, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Alphonso Lee became employed by Yakima Valley Community College in 1989

and became a tenured faculty member in or around 1993. He was dismissed from his employment by the board of trustees of the college on February 7, 2008. At the time of his dismissal he held a full-time faculty position as a counselor and also served as an adjunct faculty member in the speech department.

Mr. Lee's employment relationship with the college has been subject to a series of collective bargaining agreements. The agreement in effect at the time of his dismissal (hereafter the CBA) covered the period July 1, 2006 through June 30, 2009. The CBA provided, "Discipline shall be only for just cause and shall be progressive as applied to the specific facts of the case involved." Administrative Proceeding Exhibit (AP Ex.) 4, § 9.5. It provided that an academic employee holding a faculty appointment may be dismissed only for "sufficient cause" and itemized some, but not all, types of conduct that could constitute "sufficient cause." AP Ex. 4, § 9.7.

Dismissal proceedings were initiated by written notice in the form of a February 9, 2007, letter from college president Linda J. Kaminski, Ed.D., to Mr. Lee. Under the CBA, Mr. Lee was entitled to written notice including a specification of the grounds constituting sufficient cause for dismissal. AP Ex. 4, § 9.9. Dr. Kaminski's notice of the proposed dismissal of Mr. Lee incorporated by reference a January 10, 2007, report she had received from Tomas Ybarra, an interim vice-president for instruction and student services, which she had earlier shared with Mr. Lee and to which she had allowed him to

respond. AP Ex. 44, at 1. Among the categories of conduct identified as justifying Mr. Lee's dismissal were willful neglect of duty, gross misconduct, and willful violation of published district rules and regulations and/or state or federal law. The notice also included Dr. Kaminski's finding that Mr. Lee had violated "Board Policy No. 1.05, Standards of Ethical Conduct," in failing to:

> 1. Protect the integrity of the college by being independent and impartial in the exercise of [his] duties, avoiding the use of [his] position for personal gain or private advantage.
> 2. Promote an environment free from fraud, abuse of authority, and misuse of public property.
> 3. Create a . . . work environment that is free from all forms of unlawful discrimination and harassment.
> 4. Treat members of the campus community and the community at large with respect, concern, courtesy and responsiveness.

AP Ex. 44, at 4.

Mr. Lee had a right to request a hearing, and did. Under the CBA, the hearing was conducted by a hearing officer, required to be an attorney in good standing, who prepared proposed findings of fact and conclusions of law and a recommended decision for presentation to the college president and board of trustees, among others. AP Ex. 4, § 9.11. A hearing committee comprising three faculty, an administrator, and a student was also appointed to attend the hearing and make its own recommendations regarding dismissal. AP Ex. 4, §§ 9.12, 9.13.

Hearings were held before Hearing Officer Jeanie Tolcacher over nine days in

August 2007. Posthearing briefing was allowed and considered. On December 17, 2007, Ms. Tolcacher issued her proposed findings of fact, conclusions of law, and recommendation of hearing officer, recommending that Mr. Lee be dismissed. The hearing committee met and joined in the recommendation of dismissal. Thereafter the college's board of trustees reviewed the hearing officer's findings, conclusions, and recommendation and the recommendation of the hearing committee, and on February 7, 2008, the board issued its own findings of fact, conclusions of law, and final order and dismissed Mr. Lee from employment.

Mr. Lee timely appealed the board of trustees' order to the Yakima County Superior Court. The trial court engaged in a record review and on January 15, 2010, issued its findings of fact, conclusions of law, and judgment in accordance with RCW 34.05.574, affirming the board's order. The court pointed out in its written findings and conclusions that because Mr. Lee did not challenge the board of trustees' findings of fact, those findings were verities on appeal. Clerk's Papers (CP) at 18-19 (Finding of Fact 1.3, Conclusion of Law 2.9). It therefore adopted the board's findings of fact and conclusions of law. CP at 18-19 (Finding of Fact 1.2, Conclusion of Law 2.10).

Mr. Lee timely appealed the decision of the superior court.

ANALYSIS

In reviewing an administrative action, we sit in the same position as the superior

court and apply the Washington Administrative Procedure Act (APA), chapter 34.05 RCW, directly to the agency's administrative record. *Granton v. Wash. State Lottery Comm'n*, 143 Wn. App. 225, 231, 177 P.3d 745, *review denied*, 164 Wn.2d 1018 (2008). The burden of demonstrating the invalidity of agency action is on the party asserting invalidity, in this case, Mr. Lee. RCW 34.05.570(1)(a). We may grant relief from an agency order if, among other reasons, we determine that the agency has engaged in an unlawful procedure or decision-making process, substantial evidence does not support the agency order, or the agency has not decided all issues requiring resolution by the agency. RCW 34.05.570(3)(c), (e), (f).

When determining whether substantial evidence exists, we view the evidence in the light most favorable to the party that prevailed before the highest tribunal with fact-finding authority, in this case, the board of trustees. *Schofield v. Spokane Cnty.*, 96 Wn. App. 581, 586, 980 P.2d 277 (1999). Substantial evidence is evidence that is sufficient to persuade a fair-minded person of the truth or correctness of the matter. *Dep't of Ecology v. Douma*, 147 Wn. App. 143, 151, 193 P.3d 1102 (2008).

The board's findings of fact, conclusions of law, and final order before us for review incorporates 54 findings of fact from the hearing officer's proposed findings of fact and includes 7 additional findings, for a total of 61 factual findings.

Although Mr. Lee was aware from his experience in the superior court that

unchallenged findings of fact are treated as verities on appeal, *see, e.g.*, *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992), the 20 pages of his brief devoted to assignments of error do not identify any finding of fact to which he assigns error. Also, and although some of his assignments of error are to procedural error alleged to have occurred during the hearing, he does not direct us to the portions of the record where those errors can be found. The 9-volume transcript of proceedings before the hearing officer is over 2,500 pages long and 267 exhibits were offered by the parties and admitted.

RAP 10.3(a)(4) provides that an appellant's brief should include a separate concise statement of each error a party contends was made by the trial court, together with issues pertaining to the assignments of error. RAP 10.3(g) requires that a separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. It provides that the appellate court will only review a claimed error that is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

We may excuse a party's failure to assign error where the briefing makes the nature of the challenge clear and the challenged finding is argued in the text of the brief. *Noble v. Lubrin*, 114 Wn. App. 812, 817, 60 P.3d 1224 (2003). That is not the case here. Indeed, Mr. Lee's assignments of error are, for the most part, not assignments of error at

all, but vague allegations of procedural unfairness at undisclosed times, most outside the hearing process, and argument why the hearing officer and later the board of trustees should have accepted his evidence rather than the evidence offered by the college.

We limit our review to those asserted errors we have been able to glean from Mr. Lee's briefing.

I

Mr. Lee challenges the sufficiency of the evidence to support the "sufficient cause" standard required for his dismissal under RCW 28B.50.861. He argues that substantial evidence establishes that he was dismissed, instead, for one of three unpermitted reasons: (1) racial discrimination; (2) because of his mandated report of suspected abuse by a colleague against a former student, Paul Luckett; or (3) in violation of public policy, because of complaints he filed with the United States Equal Employment Opportunity Commission (EEOC).

Unchallenged findings of fact establish that problems between Mr. Lee and his peers began when Mr. Lee was transferred to the college's Grandview campus in the spring of 2000. He did not accept the college's explanation that his transfer was one of a number of changes instituted because of budget cuts, and maintained that the transfer was instead retaliatory and motivated by racial animus. He filed multiple charges and grievances against college faculty and staff, including assault charges with the Yakima

Police Department against the college's director of human resources, a sexual harassment and discrimination complaint against the college president, a complaint of hostile work environment (sexual harassment) against his assigned office assistant, and a complaint of hostile work environment (racial discrimination) against another counselor serving as an adjunct in the speech department. The college hired Seattle attorney Sheryl Willert to investigate the complaints made by Mr. Lee, and Ms. Willert found that all of his allegations were baseless. She also concluded that the only person who engaged in conduct that could create a hostile work environment was Mr. Lee. By year-end 2000, Mr. Lee was issued a formal written warning to cease unprofessional actions, or suffer immediate progressive and escalating disciplinary action. Certified Record of Administrative Proceeding (AP) at 148-49 (§ B, pt. 1, Findings of Fact 1-4).

In late 2004, Mr. Lee again filed discrimination and hostile work environment complaints against two colleagues in the speech department, reasserting claims that had been raised, investigated, and disposed of by the college and the state Human Rights Commission. The allegations were repeated in a formal complaint filed by Mr. Lee with the EEOC in early 2005; a complaint that the EEOC dismissed in June 2005. Throughout 2005, Mr. Lee continued to attack the qualifications of his colleagues and allege discrimination, including at meetings of the board of trustees; through further complaints, letters, and e-mails to third parties, which included threats of litigation; and by picketing

outside a colleague's classroom, claiming racial bias in the assignment of instructors. When one of the colleagues under attack by Mr. Lee lodged his own complaint against Mr. Lee, Mr. Lee made multiple requests for records from the colleague's personnel file. An investigation into the colleague's complaint against Mr. Lee resulted in findings by the director of human resources adverse to Mr. Lee, including that

> "Lee demonstrates a pattern of increasingly aggressive threats that he will file grievances and/or file charges of discrimination and/or publicly accuse individuals of discrimination, alternating the basis of his claim between racial motivations and challenging the qualifications of other faculty members in order to promote preferential assignment of instructional assignments for himself. In doing so, Lee re-raises the issues despite both internal and external decisions to the contrary. . . .
>
> In this case [of the complaint by Lee's colleague] there does not appear to be discrimination based on any specific category, but there does appear to be a pattern of Lee using intimidating and harassing tactics to interfere with the rights of other faculty members.
>
> This divisive situation must stop before the faculty, staff and students of [Yakima Valley Community College] become unfairly labeled as racist."

AP at 153 (§ B, pt. 2, Finding of Fact 18). In response to the investigative report, Mr. Lee's supervising dean concluded that Mr. Lee's conduct toward his colleagues violated the standard of ethical conduct reflected in board policies and recommended to Dr. Kaminski that he receive a three-day paid suspension. AP at 149-54 (§ B, pt. 2, Findings of Fact 1-21). Dr. Kaminski accepted the recommendation and imposed the suspension, stating in a letter to Mr. Lee that "'I find that you ignored repeated warnings that you not

make knowingly false accusations against other faculty members.'" AP at 154 (§ B, pt. 2, Finding of Fact 22).

The three-day suspension did not bring an end to Mr. Lee's allegations and complaints against his colleagues. In 2006, Mr. Lee continued to request information about the credentials and background of his colleagues. He filed two complaints against one colleague over her licensure by the Department of Health, alleging she lacked credentials to teach assigned courses; the complaints were dismissed for lack of jurisdiction. When the colleague subjected to the licensing complaint retained legal counsel to assist her in her dealings with Mr. Lee, Mr. Lee filed a complaint with the bar association against her lawyer. Mr. Lee filed a complaint with the college alleging that another colleague had, years prior, assaulted a black student, Paul Luckett; the college later learned from Mr. Luckett that Mr. Lee had assisted him in filing a complaint about the incident with the State Board for Community and Technical Colleges, something Mr. Lee later admitted. In November 2006, after Mr. Lee challenged the credentials of yet another colleague and renewed other allegations, the college's human resources director filed his own complaint against Mr. Lee with Mr. Lee's supervisor, alleging a continuing pattern of Mr. Lee's intimidating and harassing coworkers. Investigation of this complaint led Mr. Lee's supervisor to conclude that "'it is evident that Lee continues to exhibit the behaviors he has been warned against previously. The disciplinary steps

administered to this point have not deterred Lee from his actions. Therefore, it is my recommendation that the next step in progressive discipline be implemented.'" AP at 158-59 (§ B, pt. 3, Finding of Fact 16). In response to this recommendation, Mr. Ybarra prepared his January 10, 2007, letter to Dr. Kaminski recommending that dismissal proceedings be commenced against Mr. Lee. AP at 154-60 (§ B, pt. 3, Findings of Fact 1-18).

The hearing officer's unchallenged finding 19 states:

> Overwhelming evidence exists to support the allegations outlined against Mr. Lee in the February 9, 2007 Notice of Dismissal. Mr. Lee ignored the repeated warnings and discipline implemented against him and he continued to engage in a pattern of harassment and intimidation against his colleagues. Mr. Lee clearly used the complaint process to coerce, intimidate, or retaliate against individuals for things other than the discrimination he was asserting. Although Mr. Lee contended that he was subjected to repeated acts of discrimination and retaliation based upon race, he presented no credible evidence in this case that the College Administration, or other faculty members, were motivated by racial or ethnic animus, or that they engaged in any conspiracy against him, retaliatory, racial or otherwise. He also failed to present any significant evidence that his actions were reasonable and not motivated by his own self-interest.

AP at 159-60 (§ B, pt. 3, Finding of Fact 19). The hearing examiner found that testimony from Nick Esparza, Mr. Lee's witness in support of his claim that he was terminated in retaliation for his mandatory reporting of the alleged assault against Mr. Luckett, was "not credible," was "evasive at best," and "bordered on pure fabrication." AP at 160

(§ C, Finding of Fact 2). She found substantial evidence that Mr. Lee encouraged the assault complaint against his colleague by Mr. Luckett to advance Mr. Lee's own personal gain. AP at 160 (§ C, Finding of Fact 1).

Mr. Lee has failed to meet his burden of establishing a lack of substantial evidence supporting "substantial cause" for his dismissal within the meaning of RCW 28B.50.861 and the CBA. He has failed to demonstrate any substantial evidence that he was dismissed for one or more of the unpermitted reasons alleged in his appellate brief.

II

Mr. Lee also alleges several procedural irregularities.

He assigns error to the hearing officer's failure to properly consider motions raised by him during the course of the hearing. He provides us with no record citation to testimony or documentary evidence supporting this contention. The college directs us to the record of the final day of the administrative hearing, at which point the hearing officer suggested "[making] sure we have in our record everything that's been done," and recapped rulings she had made on a number of motions made by Mr. Lee. Report of Proceedings, Administrative Hearing (Aug. 31, 2007) at 12. At the conclusion of her recap, she inquired, "Any other motions, Mr. Lee, that you're aware of that I have not made some kind of ruling on?" to which Mr. Lee responded, "I don't think so." *Id.* at 28. Mr. Lee has not established any error.

Mr. Lee asserts that the Attorney General charged Lee an excessive amount ($13,169.41) for the administrative record. RCW 34.05.566(3) establishes that an agency may charge a nonindigent petitioner with the reasonable costs of preparing any necessary copies and transcripts for transmittal to the court. This case being reviewed pursuant to the APA, the cost of preparing the transcript is borne by the appellant. *McKinlay v. Dep't of Soc. & Health Servs.*, 51 Wn. App. 491, 495, 754 P.2d 143 (1988) (citing *Portage Bay-Roanoke Park Cmty. Council v. Shorelines Hearings Bd.*, 92 Wn.2d 1, 8-9, 593 P.2d 151 (1979)). As previously discussed, the record of this nine-day proceeding is voluminous. Mr. Lee provides no support in the record for his contention that he was overcharged.

Finally, Mr. Lee argues for the first time on appeal that he was not given the entire administrative record. RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). The college responds that Mr. Lee *was* provided with the entire record, citing to the index of the certified record of administrative proceeding that was filed with the superior court on September 22, 2008. Br. of Resp't at 36. It is too late for Mr. Lee to raise this argument for the first time, and without any support in the record.

We affirm.

A majority of the panel has determined that this opinion will not be printed in the

Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Siddoway, J.

WE CONCUR:

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Kulik, C.J.

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Korsmo, J.