

COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
NO. 2011-SC-0095-D

FINANCE AND ADMINISTRATION CABINET

APPELLANT

APPEAL FROM  
COURT OF APPEALS, NO. 2008-CA-001822-MR;  
FRANKLIN CIRCUIT COURT, DIVISION I  
CASE NOS. 06-CI-821, 06-CI-870, 07-CI-24

VS.

WANDA FAYE WADE AND  
PERSONNEL BOARD

APPELLEES

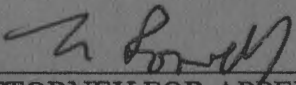
BRIEF OF APPELLANT,  
FINANCE AND ADMINISTRATION CABINET  
COMMONWEALTH OF KENTUCKY

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CERTIFICATE OF SERVICE

This is to certify that the Brief of Appellant, Finance and Administration Cabinet was served by hand delivery, on this 13<sup>th</sup> day of February, 2012, to the following: Hon. Paul Fauri, 232 St. Clair Street, P.O. Box 1304, Frankfort, Ky 40601; and the Hon. Mark Sipek, Executive Director, Personnel Board, 28 Fountain Place, Frankfort, Ky 40601; and Hon. Thomas Wingate, Judge, Franklin Circuit Court, Division II, 669 Chamberlin Ave, P.O. Box 678, Frankfort, KY 40602-0678.

  
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FINANCE AND ADMINISTRATION CABINET

## **INTRODUCTION**

This is an appeal that originated at the Personnel Board resulting from the dismissal of a merit employee by the Cabinet. The Personnel Board set aside the dismissal on procedural grounds. The decision was appealed to the Franklin Circuit Court and then to the Court of Appeals. Both courts affirmed the respective decisions of the lower tribunals in their entirety.

The issues in this appeal are all of first impression. The primary issue is whether an employee's actions can be deemed to have resulted in a waiver of her right to a pre-termination hearing. A secondary issue is whether the agency was authorized to reinstate the employee pending a final order from the Personnel Board addressing back pay.

## **STATEMENT CONCERNING ORAL ARGUMENT**

Appellant, Finance and Administration Cabinet, believes that an oral argument may be helpful to the understanding of the issues raised in this appeal.

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## STATEMENT OF THE CASE

Ms. Wade had been an employee of the Commonwealth for 37 years at the time of her dismissal from employment with the Finance and Administration Cabinet, Department of Revenue (Cabinet). Certified Record on Appeal (ROA), Certified Record from Personnel Board, (VR, Evidentiary Hearing 2/16/06; 1:56:15). Ms. Wade was notified of the Cabinet's intent to dismiss her in a letter dated February 14, 2005. ROA, Franklin Circuit Court Case Number 06-CI-821, p. 15. Pursuant to the requirement of KRS 18A.095, attached to the letter was a form advising Ms. Wade that she had five (5) days from the date the letter was received to request a pre-termination hearing. ROA, Certified Record from Personnel Board, p. 328. Ms. Wade's attorney, Mr. David Emerson contacted the Cabinet in a timely manner and the pre-termination hearing was scheduled for February 23, 2005. ROA, 06-CI-821, p 15. Before the pre-termination hearing was to take place, Mr. Emerson requested the Cabinet's Counsel by fax to postpone the pre-termination hearing. ROA, Certified Record from Personnel Board, p. 321.

Mr. Emerson advised Cabinet's Counsel that Ms. Wade could not attend the scheduled hearing because of her health. Id. Ms. Wade had also advised the Cabinet on February 16, 2005 that she had been injured and could not work. ROA, Certified Record from Personnel Board, (VR, Evidentiary Hearing 9/19/05; 9:44:30). However, on February 18, 2005 Ms. Wade walked to the Office of the Secretary for the Cabinet, demanding to see the Cabinet's deputy secretary. ROA, Case Number 06-CI-821, p. 16. The Cabinet's Counsel was advised of her presence and escorted Ms. Wade to her to office and called Mr. Emerson. (ROA), Certified Record from Personnel Board, (VR,

Evidentiary Hearing 9/19/05; 9:47:00). Mr. Emerson advised Ms. Wade to leave the premises. Id. at 9:47:17

A second pre-termination hearing was scheduled for February 28, 2005. ROA, Certified Record from Personnel Board, p. 319. On February 25, 2005, Mr. Emerson faxed a letter to Cabinet's counsel asking to postpone the hearing once again. Id. Included in the fax was a letter from Dr. Welling dated February 21, 2005 asking that Ms. Wade be excused from work or a hearing from February 16, 2005 to March 9, 2005. Id. During a conversation with Cabinet's counsel, Mr. Emerson explained that Ms. Wade was scheduled to visit her specialist and after that visit, he would be in a better position to determine when the pre-termination hearing could be rescheduled. ROA, Case Number 06-CI-821, p. 16. The Cabinet's Counsel agreed to postpone and reschedule the pre-termination hearing, on the condition that Mr. Emerson contact her no later than March 9, 2005 to set a new date. Id.

Having received no call from Mr. Emerson on the afternoon of March 9, 2005, Cabinet's Counsel called Mr. Emerson to discuss rescheduling Ms. Wade's pre-termination hearing. Id. Mr. Emerson advised Cabinet's Counsel that he had faxed a document that she needed to review. Id. Cabinet's Counsel retrieved a fax from Ms. Wade, requesting ninety days of Family Medical Leave, claiming that she was too physically ill to attend a pre-termination hearing. ROA, Certified Record from Personnel Board, p. 322-326. It was Mr. Emerson's understanding that Ms. Wade could not have a pre-termination hearing until after the time period for which her physician said she could be off, June 9, 2005. ROA, Certified Record from Personnel Board, (VR, Evidentiary Hearing 9/19/05; 10:37:56).

Cabinet's Counsel immediately called Mr. Emerson and advised him that Family Medical Leave was not going to be approved and that if he was not going to reschedule the pre-termination hearing, she would have no choice but to issue a termination letter. ROA, 06-CI-821, p. 16. Mr. Emerson's response to Cabinet's Counsel was "Do what you have to do." Id.

The Cabinet issued notice of termination to Ms. Wade the following day, effective close of business March 10, 2005. ROA, Certified Record from Personnel Board, p. 257-266. In that notice of termination, Ms. Wade was advised that based upon her actions the Cabinet considered her to have waived her right to a pre-termination hearing. Id.

On March 30, 2005, Ms. Wade filed a timely appeal to the Personnel Board, asserting that she had been improperly terminated. ROA, Certified Record from Personnel Board, p. 255-256. In her appeal, Ms. Wade claimed that her "civil rights were abused, "trumped up" charges (work issue); "singled out" (Time issue), harassment; age discrimination; and detriment of character." Id. On April 8, 2005, Ms. Wade's current counsel, Hon. Paul F. Fauri, filed his Entry of Appearance on her behalf. ROA, Certified Record from Personnel Board, p. 254. On May 4, 2005, Ms. Wade amended her appeal and claimed that she had not be given the opportunity for a pre-termination hearing as required in KRS 18A.095, and as a matter of law, her appeal should be sustained and her dismissal set aside. ROA, Certified Record from Personnel Board, p.250.

An evidentiary hearing on the issue of waiver of Ms. Wade's right to a pre-termination hearing was held before a Hearing Officer of the Personnel Board on September 19, 2005. ROA, 06-CI-821, p. 15. In an Interim Order dated, November 4, 2005, the Hearing Officer concluded that Ms. Wade had not waived her right to a pre-

termination hearing. ROA, 06-CI-821, p. 18. However the Hearing Officer reserved the issue of back pay, pending another hearing on that issue. Id.

The Cabinet filed a motion with the Personnel Board requesting that it issue an order reinstating Ms. Wade pending a hearing on back pay. ROA, Certified Record from Personnel Board, p. 81-82. In an order dated, December 22, 2005, the Personnel Board refused to issue such an order reinstating Ms. Wade. ROA, Certified Record from Personnel Board, p. 72.

Absent an Order, in order to mitigate its damages the Cabinet advised Ms. Wade in a letter dated January 6, 2006, that she was being reinstated and was to report to work on January 11, 2006. ROA, Certified Record from Personnel Board, p. 308. On January 11, 2006, the Cabinet reissued the intent to dismiss letter to Ms. Wade. Id., p. 309. As with the first notice, Ms. Wade was advised of her right to a pre-termination hearing. Id.

Upon being reinstated effective January 11, 2006, Ms. Wade failed to report to work or to call to advise her supervisor that she would not be reporting to work for a period of for ten consecutive work days. Id., p. 306-307. As a result, the Cabinet considered her to have abandoned her position and resigned pursuant to the provisions of 101 KAR 2:102, Section 9(3). Id. Ms. Wade was advised of this action in writing on January 27, 2006. Id.

The Cabinet also, not having received a request for a pre-termination hearing, reissued the dismissal letter dated, effective January 27, 2006, finding that there was sufficient cause to support Ms. Wade's dismissal. Id., p. 309-317.

On February 27, 2006, the Hearing Officer ruled on the back pay issue. ROA, 06-CI-821, p. 10. He concluded that because of Ms. Wade's actions, she was not entitled to



full back pay. Id. at p.13. He reasoned that since Ms. Wade had advised the Cabinet in her Family Medical Leave application that she was not physically able to work for ninety (90) days, she was not entitled to back pay for that ninety (90) day period of March 10, 2005 through June 8, 2005. Id. He ordered back pay to be paid to Ms. Wade from June 9, 2005, through January 10, 2006. Id. at p. 14. This Recommended Order was adopted in its entirety with two minor alterations and a final order was issued on May 23, 2006. Id. at p. 8.

On March 23, 2006, Ms. Wade appealed her reinstatement and subsequent second termination to the Personnel Board. ROA, Certified Record from Personnel Board, p. 301-317.

The Cabinet appealed the Personnel Board's decision to the Franklin Circuit Court asserting that Ms. Wade had waived her right to a pre-termination hearing. ROA, 06-CI-821, p. 1. Ms. Wade appealed the same Personnel Board decision to the Franklin Circuit Court arguing that she was entitled to full back pay, regardless of her request for Family Medical Leave. ROA, 06-CI-870, p. 1.

On October 19, 2006, the Hearing Officer ruled in Ms. Wade's second appeal to the Personnel Board that the Cabinet did not have the authority to reinstate Ms. Wade on January 11, 2006, and ordered her reinstated with back pay from January 11, 2006. ROA, 07-CI-24, p. 27-28. The Recommended Order was approved in its entirety by the Personnel Board on December 19, 2006. Id. at p. 23.

The Cabinet appealed the December 19, 2006, Final Order issued by the Personnel Board to the Franklin Circuit Court, on January 5, 2007 asserting that Ms. Wade had resigned her position on January 27, 2006 as a result of her failure to report to

work from January 11, 2006 to that date. ROA, 07-CI-24, p. 6. The Cabinet also asserted that Ms. Wade had failed to take advantage of her right to a pre-termination hearing and therefore waived this right. Id. at p. 6-7.

Pursuant to KRS 18A.095(26), Ms. Wade as the prevailing party before the Personnel Board had a right to be reinstated pending appeal of the dismissal action by the appointing authority to the Franklin Circuit Court. The provisions of KRS 18A.095(26) provide that a prevailing party be reinstated to a similar position with like pay pending appeal. Ms. Wade was advised in a letter dated February 27, 2007, that she was being reinstated effective March 16, 2007 and that she was to report to the File Room, Department of Revenue. ROA, 07-CI-24, p. 35. Ms. Wade's attorney advised the Cabinet that she would not be returning to work unless she was reinstated to her prior position as an Administrative Staff Specialist II in the Property Tax Division, Department of Revenue on March 16, 2007. Id., p. 29. Ms. Wade's attorney advised the Cabinet that because of physical problems she was experiencing, she could not perform the duties she was being assigned to perform in the File Room. Id. The Cabinet advised Ms. Wade's attorney that it would provide any reasonable accommodations that she might need, however, Ms. Wade first needed to have her treating physician review her job description and advise the Cabinet of any suggested accommodations. Id.

Instead of reporting to work and requesting an accommodation, as would have been the case for any other similarly situated employee, Ms. Wade filed a motion with the Franklin Circuit Court requesting that an order be issued placing her in the same Administrative position she had held prior to being dismissed. Id. at p. 16. After reviewing the matter, the Franklin Circuit Court entered an order dated March 27, 2007

which consolidated the three appeals and stayed Ms. Wade's reinstatement for a period of sixty (60) days, the period of time the court contemplated necessary to issue a decision in the consolidated appeals. Supplemental ROA, 06-CI-870, p. 1-2.

The Franklin Circuit Court issued its opinion on August 12, 2008. ROA, 06-CI-821, p. 62. In that opinion the Court affirmed the various rulings issued by the Personnel Board, with the exception of denying Ms. Wade back pay for the period March 10, 2005 through January 11, 2006. *Id.* at p. 70.

Ms. Wade filed a Motion to Alter and Amend the Judgment on August 20, 2008, requesting that the Court revise its opinion and order full back pay. *Id.* at p.72. The Franklin Circuit Court issued a second opinion on August 29, 2008, awarding Ms. Wade back pay for the period with the exception of the period March 10, 2005 through June 8, 2005, the time for which she was approved for FMLA. *Id.* at p. 80. With this second opinion, the Franklin Circuit Court decision mirrored the various decisions issued by the Personnel Board.

The Cabinet timely appealed the Franklin Circuit Court's decision to the Court of Appeals. *Id.* at p. 83. The Court of Appeals affirmed the judgment of the Franklin Circuit Court finding that the Personnel Board's decision was supported by substantial evidence.

The Cabinet petitioned this Court for discretionary review and that petition was granted on December 14, 2011.

## ARGUMENT

- I. **Ms. Wade was provided with an opportunity to participate in a pre-termination hearing but effectively waived that right.**

[This issue was preserved through the filing of Exceptions and Response at the Personnel Board and has been fully briefed at all levels of appeal. ROA, Certified Record from Personnel Board, p. 18-30]

There is no disagreement that as a matter of law, due process requires that Ms. Wade be given an *opportunity* for a hearing before being terminated. See, Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) (emphasis added). A classified state employee in Kentucky “is entitled to...notice of the charges against him, an explanation of the employer’s evidence, and an *opportunity* to present his side of the story. Id. at 546 (emphasis added). The informal hearing is a procedural due process “fairness” requirement codified in KRS 18A.095(5), and is designed to provide an employee the opportunity to be heard before he or she is terminated in order to avoid the risk of administrative error.

It is also undisputed that a court should not “presume acquiescence in the loss of fundamental rights” and that generally, a waiver of a constitutional right should be voluntary, knowing, and intelligently made. D.H. Overmyer v. Frickle Co., 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 124 (1972) and Ohio Bell Telephone v. Public Utilities Commission, 301 U.S. 292, 307, 57 S.Ct. 724, 81 L.Ed. 1093 (1937).<sup>1</sup>

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<sup>1</sup> The “voluntary, knowing, and intelligently made” standard of waiver described in Overmyer was borrowed from the standard used for waiver of constitutional rights in a criminal proceeding. The Supreme Court in Overmyer only makes the assumption that the above stated standard is the same for property right cases when finding that a property interest was indeed waived. However, in Ohio Bell the Supreme Court was specifically dealing with a civil matter and loss of a property interest. Therefore the Ohio Bell standard is the only one that is clearly applicable. However, applying either standard, the actions of Ms. Wade and her attorney clearly constitute a waiver.

While these rules of law have been generally stated correctly by all the lower tribunals in this case, they were not properly applied as the underlying due process requirements for which they stand were not analyzed. Treating the requirement of a pre-termination hearing as an absolute, unwaivable, categorical imperative, has led to an untenable result in this case.

The Supreme Court in Loudermill specifically identified an employee's right to a pre-termination hearing under due process as an "opportunity" to participate in such a hearing. Loudermill, 470 U.S. at 564. Ms. Wade was provided with this opportunity multiple times. As stated in the Statement of Facts above, the Cabinet scheduled the hearing twice with a deadline to schedule the hearing a third time. Despite the Cabinet's diligence in affording Ms. Wade her constitutional right, she effectively waived that right by stalling in order to prolong her tenure.

The Court of Appeals, in citing the Franklin Circuit Court's recitation of the facts in its Opinion, chose to ignore the undisputed fact that Ms. Wade was not physically incapacitated during the period of time that the pre-termination hearing was initially scheduled. It failed to acknowledge the undisputed fact that Ms. Wade, despite making the representations that she was too ill to attend the pre-termination hearing scheduled for February 23, 2005 and providing a doctor's statement excusing her from work from February 16, 2005 to March 9, 2005, appeared at the Cabinet's Office of the Secretary on February 18, 2005, attempting to see the Cabinet Secretary in an effort to dissuade the Cabinet from dismissing her. ROA, Certified Record from Personnel Board, p. 318-321 and 85. The Court also ignored the undisputed fact that Ms. Wade's attorney refused to

reschedule the pre-termination hearing as he had agreed to do after Ms. Wade had visited her doctor. ROA, 06-CI-821, p. 16

Furthermore, the lower tribunals erred by mischaracterizing a clear and simple exchange between two attorneys. After an Intent to Dismiss has been issued and after several attempts to schedule a hearing, in no way could the statement “you leave me no choice to proceed with termination” mean anything other than a pre-termination hearing will not be held and your client will be dismissed. Id., 17. Mr. Emerson may not have intended to waive Ms. Wade’s right to a pre-termination hearing by telling counsel for the Cabinet “do what you have to do” since his client’s intent was to delay the process and avoid termination, but the effect has to be the same. Id., 16 and 17.

In addition, the Court of Appeals ignored the fact that the Personnel Board concluded in its findings that Ms. Wade attempted to delay her pre-termination hearing (and, by implication, her termination) as long as she could by using the Family and Medical Leave Act as a shield. Id., p. 17. The Board also affirmatively found that counsel for the Cabinet concluded in good faith that Ms. Wade had waived her opportunity to participate in a pre-termination hearing. Id. If an employer is acting in good faith and using its best efforts to afford an employee its constitutional due process rights, the employee waives that right when he or she uses the employer’s diligence against it to prolong his or her employment.

Ms. Wade knowingly, voluntarily, and intelligently waived her right to a pre-termination hearing as a result of her actions and those of her attorney. Finding that she waived her right to a pre-termination does not require the Court to presume Ms. Wade’s acquiescence of that right. Avoiding the proceedings must be considered a knowing

waiver of her opportunity to participate in a pre-termination hearing to not produce an illogical result. In active attempts to avoid a pre-termination hearing, Ms. Wade and her attorney must have understood that she might lose her opportunity to be heard before her termination. In other words, if an employee, especially when acting through an attorney, has the wherewithal to know that avoiding the pre-termination hearing could prolong his or her employment, then those actions must be a knowing and intelligent decision to take the risk that the state may be forced to move forward with termination. In fact, Ms. Wade's initial appeal filed with the Personnel Board indicates an understanding of this as it made no claim of not being afforded a right to a pre-termination hearing. ROA, Certified Record from Personnel Board, p. 255-256. Only after she hired her current attorney, an individual not involved with her earlier actions, was her complaint amended to add this claim. *Id.*, p. 250.

In addition, the provisions of KRS 18A.095(5) must be interpreted to require a pre-termination hearing to be held within a reasonable time. With regard to pre-termination hearings, KRS 18A.095(5) states that "unless waived by the employee, the appearance shall be scheduled within six (6) working days after receipt of an employee's request to appear before the head of the cabinet or agency or his designee, excluding the day his request is received." Just as with the analysis of Ms. Wade's constitutional due process rights, the provisions of KRS 18A.095(5) cannot be interpreted to allow the employee to control when and under what conditions a pre-termination hearing is to be held. Allowing an employee to indefinitely postpone a pre-termination hearing is unconscionable. The provisions of KRS 18A.095(5) cannot be interpreted to reach an absurd result. George v. Alcoholic Beverage Control Bd., 421 S.W.2d 569 (Ky. 1967).

The policy and purpose of the statute will be considered in determining the meaning of the words used. Kentucky Region Eight v. Com. 507 S.W.2d 489 (Ky. 1974).

The Court of Appeals cites Ohio Bell for the proposition that “the Cabinet was without authority to dispense with the “minimal requirement” of a hearing in the interest of “convenience or expediency, or because of natural desire to be rid of harassing delay[.]” Court of Appeals Opinion, p. 7. However, in that citation, the court fails to include the crux of this sentence which has seemingly been disregarded throughout this entire case. The Cabinet cannot dispense with the minimal requirement of a pre-termination hearing out of convenience “*when that minimal requirement has been neglected or ignored.*” Id. at 305 (emphasis added). In no way can it be said that the Cabinet “neglected or ignored” Ms. Wade’s right to a pre-termination hearing considering all its efforts to provide her with one.

The Constitutional right of due process gave rise to the right an opportunity for an informal hearing before deprivation of merit based public employment. And due process is not analyzed in a vacuum. The Supreme Court found that due process “is not a technical conception with a fixed content unrelated to time, place, and circumstances.” Gilbert v. Homar, 520 U.S. 924, 930, 117 S.Ct. 1807, 138 L.Ed.2d 120 (1997) citing Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961). As such, the Court has specifically “rejected the proposition that [due process] always requires the State to provide a hearing prior to the initial deprivation of property.” Gilbert, 520 U.S. at 930 citing Parrat v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981).



Furthermore, the Supreme Court in Gilbert recognized that on many occasions when the deprivation of property interests is at stake, when a State must act quickly or where it would be impractical to provide pre-deprivation process, post-deprivation process satisfies for due process. Gilbert, 520 U.S. at 930. After avoiding her pre-termination hearing, Ms. Wade still had the ability to obtain due process through an appeal to the Personnel Board and protect her interest in continued employment with the potential to be made whole if she prevailed.

And Ms. Wade absolutely took full advantage of her post deprivation due process rights. While doing her best to avoid a pre-termination hearing, she had no trouble filing her appeal at the Personnel Board 20 days after her termination and appearing at her pre-hearing conference on May 18, 2005, a time during which both her FMLA paperwork purported her to be unable to work. ROA, Certified Record from Personnel Board, p. 248-249 and 323. Medical issues did not keep Ms. Wade from participating in any proceedings after her termination.

The Supreme Court in Loudermill conducted an analysis on the need for some form of pre-termination hearing by balancing the competing interests at stake which it identified as “the private interests in retaining employment, the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination.” Loudermill, 470 U.S. at 542-543. This logical and well reasoned analysis demands a pre-termination hearing when applied to an employee who is interested in refuting the reasons for his or her intended termination in an attempt to keep his or her job. This protection was not provided for

those, like Ms. Wade, who are attempting to avoid the hearing for as long as possible to evade what she likely perceived to be inevitable termination.

When analyzing the governmental interest, the Supreme Court states that “affording the employee an opportunity to respond prior to termination would impose neither a significant burden nor intolerable delays.” Loudermill, 470 U.S. at 545. Providing the “opportunity” certainly does not impose a burden or delay, but allowing Ms. Wade to avoid her pre-termination hearing repeatedly for months on end most certainly does. Her actions must be considered a waiver of this right.

Furthermore, the initial risk of erroneous termination must be considered extremely low in this case. After being fully advised of the claims against her in an extensive dismissal letter, Ms. Wade came to the offices of her employer to meet with the Deputy Secretary during a time which she claimed to be too ill to attend the pre-termination hearing. After repeatedly rescheduling the pre-termination hearing, she attempted to use Family Medical Leave as a shield from her termination. When an employee goes to great lengths to avoid giving the reasons she should not be terminated, an employer should be able to reach some level of comfort that they have acted appropriately.

Finally, the Court of Appeals did not properly analyze the issues of law raised above. This court must determine issues of fact made by administrative agencies on the basis of whether or not the decision by the administrative agency is supported by substantial evidence. Aubrey v. Office of Attorney General, 994 S.W.2d 516 (Ky. App.1998). “Substantial evidence is defined as evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable persons.”

Id. at 519. However, this Court is authorized to review issues of law on a de novo basis.

Id. Furthermore, “where an administrative body has misapplied the legal effect of the facts, courts are not bound to accept the legal conclusions of the administrative body.”

Epsilon Trading Co. v. Revenue Cabinet, 775 S.W.2d 937, 940 (Ky. App. 1989).

The Cabinet makes several claims of legal error in its argument that Ms. Wade waived her right to a pre-termination hearing. The Cabinet claims that both the Board and the Franklin Circuit Court incorrectly applied the law pertaining to due process and pre-termination hearings and the waiver of those rights. These issues clearly receive de novo review. In addition, the arguments set forth by the Cabinet details how the legal effect of the facts of this case were clearly misapplied by the Board. In particular and as stated above, the Board found that Ms. Wade attempted to avoid her pre-termination hearing for as long as she could by using the Family Medical Leave Act as shield, but somehow that action did not waive her pre-termination hearing rights. ROA, 06-CI-821, p. 17. Therefore, under Epsilon Trading Co. this court is not bound to accept the legal conclusion that Ms. Wade did not waive her right to a pre-termination hearing.

Notwithstanding, a review of the facts as applied to the law set forth by the Board show that its decision was not supported by “substantial evidence.” A detailed explanation of how Ms. Wade’s actions constituted a knowing and intelligent waiver of her right to a pre-termination hearing are set forth above. The substantial evidence standard should not be used as a rubber stamp for appellate courts to uphold an administrative decision. When considering due process, pre-termination hearing, waiver jurisprudence and how the standards for these were derived, reasonable minds could only determine that due process was provided to Ms. Wade when considering her actions, the

multiple attempts by the Cabinet to afford her those rights, and the access to a post-termination hearing.

For these reasons, the Court of Appeals' decision should be reversed and a finding be issued that Ms. Wade had no basis upon which to argue that she was denied a pre-termination hearing.

**II. Ms. Wade was properly reinstated on January 11, 2006 and resigned her position effective January 27, 2006.**

[This issue was preserved through the filing of Exceptions and Response at the Personnel Board and has been fully briefed at all levels of appeal. ROA, Certified Record from Personnel Board, p. 272-277]

Court of Appeals erred when it agreed with the Personnel Board's conclusion that the Cabinet did not have the authority to reinstate Ms. Wade on January 11, 2006 without an order from the Personnel Board. When the Personnel Board issued its Findings of Fact issued on October 4, 2005, and ordered that another hearing be set to resolve the back pay issue, the Cabinet requested that the Personnel Board issue an Interim Order reinstating Ms. Wade. ROA, Certified Record from Personnel Board, p. 81-82. That request was denied. *Id.*, p. 72. However, in order to protect the Cabinet's interests, Ms. Wade was notified by letter to report to work January 11, 2006. ROA, Certified Record from Personnel Board, p. 308. Ms. Wade did not report to work on January 11, 2006 or thereafter. *Id.*, p. 306-307.

The Personnel Board concluded in its Recommended Findings of Fact and Conclusions of Law that the provisions of KRS 18A.005(33) only allowed for the reinstatement of Ms. Wade if the Cabinet rescinded its original dismissal. ROA, 07-CI-24, p. 27. The provisions of KRS 18A.005(33) define reinstatement as:

... the restoration of an employee who has resigned in good standing, or who has been ordered reinstated by the board or a court to a position in his former class, or to a position of like status and pay[.]

It is the position of the Cabinet that the provisions of this statute did not prohibit the Cabinet from reinstating Ms. Wade during the pendency of her appeal. Further, in reinstating Ms. Wade, the Cabinet was attempting to abide by the Personnel Board's Interim Order, and at the same time mitigate its damages.<sup>2</sup> Rescinding the dismissal at that time would have rendered the Cabinet's appeal of the Board's decision that Ms. Wade did not waive her right to a pre-termination hearing moot. The Cabinet should not be penalized for its efforts to preserve its rights.

It is obvious, from a reading of the Personnel Board's Interim Order, dated November 4, 2005, that the intent of the Personnel Board was to reinstate Ms. Wade. The Personnel Board did just that approximately four months later in its Recommended Order and Conclusions of Law, Findings of Fact, dated February 27, 2006.

The Personnel Board has advocated inconsistent positions on the reinstatement issue. In the first appeal the Personnel Board did not order Ms. Wade reinstated even after it had ruled on the back pay issue. The Personnel Board did not reinstate her because by that time, she had already been reinstated by the Cabinet, effective January 11, 2006. Obviously, the Board at that point in time considered the Cabinet's action appropriate by providing her damages until January 11, 2006, "when she was given an opportunity to return to work." ROA, 06-CI-821, p. 13. Further the Cabinet's actions

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<sup>2</sup> Ms. Wade suggests that the only way in which she could have been reinstated was for the Cabinet to agree to settlement of the pending appeal and reinstate her as if she had never been dismissed. The Cabinet disagrees in that the issue of back pay had been reserved by the Personnel Board, there was no right to back pay at the time Ms. Wade was reinstated, that being January 11, 2006.

resulted in the same course of action that the Personnel Board ultimately ordered. It is unconceivable to the Cabinet that its decision to reinstate Ms. Wade could be considered inappropriate. This is simply further evidence that Ms. Wade would do everything in her power to avoid returning to work.

Finally, as referenced above, the objective of Chapter KRS 18A. is to reinstate the employee who has been determined by the Personnel Board to have been improperly dismissed. This intent is to minimize the financial burden that results from having lost one's income. However, even when an employee is reinstated pending an appeal, there is no absolute right to back pay.<sup>3</sup>

An employee who fails to report to work and fails to notify the supervisor for a period of ten (10) consecutive scheduled work days is considered to have resigned employment. 101 KAR 2:102 Section 9(3). The facts are not disputed that that when notified of her duty to return to work, Ms. Wade failed to report. Failing to report to work, Ms. Wade was considered to have resigned her position.

The Personnel Board erred when it failed to acknowledge Ms. Wade's legal responsibility to report to work, once she was officially reinstated by the Personnel Cabinet.

**III. The Personnel Board's conclusions regarding Ms. Wade's disability are not supported by the record.**

[This issue was preserved through the filing of Exceptions and Response at the Personnel Board and has been fully briefed at all levels of appeal. ROA, Certified Record from Personnel Board, p. 18-30.]

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<sup>3</sup> Interestingly in this case no back pay was ordered paid by the Cabinet when the Franklin Circuit Court issued a stay preventing the Cabinet from reinstating Ms. Wade.

Ms. Wade was temporarily placed in the Department of Revenue's File Room from the period she was notified of the intent to dismiss on February 14, 2005 until a final decision could be made on her termination. ROA, 06-CI-821, p. 10. Despite the fact that there was no testimony offered by either party asserting a disability, the Personnel Board concluded that Ms. Wade was temporarily totally disabled from March 9, 2005 through June 9, 2005. Id., p. 12. It also concluded that working in the File Room of the Department of Revenue effective February 16, 2006, until her termination, required her to perform demanding physical activities she was unable to perform. Id. at p. 12-13.

Ms. Wade did not appear for work on February 15, 2005 but called in the next day and advised the Cabinet that she had been injured and would not be able to report for work. ROA, Certified Record from Personnel Board, (VR, Evidentiary Hearing 9/19/05; 9:44:30). She also submitted a physician's statement advising stating the same. Id. Because she failed to report to work, she never knew what her job duties would be. It was presumptuous of Ms. Wade to conclude that she could not perform the duties associated with her temporary position with or without a reasonable accommodation. There was no testimony offered at the hearing to establish that she was ever advised of, nor did she ever ask, what her job duties would include. Additionally, Ms. Wade submitted a physician's certification in conjunction with her Family Medical Leave request stating that she was unable to report to work for at least a ninety (90) day period of time. ROA, Record from Personnel Board, p. 323. There is nothing in this document that states any restrictions as to Ms. Wade's job duties. Id.

Had Ms. Wade requested an accommodation, she would have needed a detailed job description to submit to her treating physician so the physician could identify which

job duties she could not perform and if they could be performed with a reasonable accommodation, and to recommend a particular type of accommodation. Ms. Wade never asked for a job description and never reported for work. As a result she had no idea what her job duties would be. Had Ms. Wade followed the established procedure and submitted a list of reasonable accommodations, the Cabinet could have modified her job duties accordingly.

Having failed to follow the necessary procedures, Ms. Wade should not have been allowed to attempt to establish a reason for failing to report to work, nor should the Hearing Officer reached the conclusions he did about her alleged physical issues.

### CONCLUSION

It is an accepted principle of personnel law that a pre-termination hearing must be provided to a classified employee. However when an employee fails to deal with the employer in good faith and misrepresents the facts in such a way to prevent this event from occurring, the law cannot be read to protect the employee.

Ms. Wade was afforded the opportunity to participate in a pre-termination hearing. Ms. Wade's attorney requested and was provided a date for that pre-termination hearing. It was Ms. Wade and her counsel that chose to cancel that date and request it be rescheduled. The Cabinet agreed to reschedule based upon the representation made by her attorney that Ms. Wade was physically unable to be present on the initial date the pre-termination hearing was scheduled. It was also conditioned upon her attorney rescheduling the pre-termination hearing by a certain specific date. As was subsequently discovered, the Cabinet was misled by Ms. Wade as she was physically capable of attending the pre-termination hearing as originally scheduled.



The record reflecting the actions of Ms. Wade and her attorney clearly supports a finding that Ms. Wade waived her right to a pre-termination hearing. Ms. Wade should not be able to use the Cabinet's diligence in providing her with due process as a shield from termination, then cry foul when it decides to move forward. Further, the Cabinet acted appropriately when the Board in an Interim Order concluded that Ms. Wade was improperly terminated. The appropriate and only course of action pending such a finding was reinstatement.

The Cabinet was acting in a responsible manner by reinstating Ms. Wade as of January 11, 2006. Almost one year had passed since Ms. Wade had been officially terminated. Additionally, there was no way to gauge what period of time would pass before the Hearing Officer would issue a recommended order on the remaining back pay issue that he had reserved for a future hearing. To mitigate the Cabinet's damages, it was determined to be in the best interests of the Cabinet, to reinstate Ms. Wade pending the issuance of a final order by the Personnel Board, and ultimately a probable appeal of that decision to the Circuit Court.

Since Ms. Wade was appealing to regain employment with the Cabinet, it is incredulous to believe she would not accept the offer of reinstatement. Regardless, it was well within the authority of the Cabinet to request that the Personnel Cabinet process the request to reinstate Ms. Wade on January 11, 2006.

Finally, as there was no legal basis upon which to conclude that Ms. Wade could not be reinstated on January 11, 2006. Ms. Wade's failure to report to work or to call in for a period of ten days properly resulted in her resigning her position with the Cabinet.

Ms. Wade was dismissed from employment with the Cabinet as a result of her refusal to abide by accepted guidelines regarding behavior and job performance. Ms. Wade has continued to exhibit the practice of refusing to abide by the rules. She refused to follow the statutory mandates regarding pre-termination hearings. She refused to report to work when she was reinstated. For the reasons set forth above, it is respectfully requested that the Opinion issued by the Court of Appeals affirming the Orders issued by the Franklin Circuit Court on August 29, 2008 and August 12, 2008 which affirmed the Final Orders Issued by the Board on May 23, 2006 and December 19, 2006, be reversed in their entirety and conclusions be reached that Ms. Wade waived her right to a pre-termination hearing, and in the alternative, that she was properly reinstated and subsequently considered to have resigned her position effective January 27, 2007.

Respectfully submitted,



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