

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;
VS. FRANKLIN CIRCUIT COURT, DIVISION I
CASE NOS. 06-CI-821, 06-CI-870, 07-CI-24

WANDA FAYE WADE AND
PERSONNEL BOARD

APPELLEES

REPLY BRIEF OF APPELLANT,
FINANCE AND ADMINISTRATION CABINET
COMMONWEALTH OF KENTUCKY

Submitted by:

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CERTIFICATE OF SERVICE

This is to certify that the Reply Brief of Appellant, Finance and Administration Cabinet was served by hand delivery, on this 27th day of April, 2012, to the following: Hon. Paul Fauri, 232 St. Clair Street, P.O. Box 1304, Frankfort, Ky 40601; 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.



ATTORNEY FOR APPELLANT
FINANCE AND ADMINISTRATION CABINET

PURPOSE

The purpose of this brief is to address the points raised in the Appellees' briefs, particularly the appropriate standard of review and the claims of the Cabinet's misstatements of pertinent facts.

ARGUMENT

I. Standards of review for issues on appeal.

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 conclusions 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 duty of the Court is to determine whether the agency misapplied the correct rule of law to the facts as found." Kosmos Cement Co., Inc. v. Haney, 698 S.W.2d 819, 820 (Ky. 1985).

The Cabinet makes several claims of legal error in its Brief that Ms. Wade waived her right to a pre-termination hearing which require de novo review. 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. In addition, the Cabinet's Argument details how the legal effect of the facts of this case were clearly

misapplied by the Board. In particular, 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 a 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. "It is the universally declared rule that what facts are necessary to create a waiver is a question of law..." Thomas Jefferson Fire Ins. Co. of Louisville v. Barker, 251 S.W.2d 862, 864 (Ky. 1952) citing Aetna Ins. Co. v. Weekley, 24 S.W.2d 292, 293 (Ky. App. 1930).

In addition, contrary to the claim made by Appellee in her brief, the law is not clear that the waiver standard for property rights is the same as that in criminal proceedings. The U.S. Supreme Court in D.H. Overmyer v. Frick Co., 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 124 (1972) stated the following:

Even if, for present purposes, we assume that the standard for waiver in a corporate-property-right case of this kind is the same standard applicable to waiver in a criminal proceeding, that is, that it be voluntary, knowing, and intelligently made... and even if, as the Court has said in the civil area, '(w)e do not presume acquiescence in the loss of fundamental rights,' Ohio Bell Telephone v. Public Utilities Commission, 301 U.S. 292, 307, 57 S.Ct. 724, 731, 81 L.Ed. 1093 (1937) that standard was fully satisfied here. Id. at 185-186.

The U.S. Supreme Court found that both the criminal and civil waiver standards were satisfied in Overmyer without finding specifically that one or the other applied. However, in Ohio Bell the U.S. 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.

While the Cabinet contends that Ms. Wade waived her right to a pre-termination hearing under either standard, the U.S. Supreme Court has not held that the same waiver standard applies in property rights and criminal cases. If the only standard that clearly applies under U.S. Supreme Court precedence is “no presumed acquiescence,” a different analysis of the facts should occur. This is a lesser standard than “voluntary, knowing, and intelligently made” and one of which that is easily satisfied by actions of Ms. Wade and her attorney.

Furthermore, the Cabinet analyzes U.S. Supreme Court cases regarding due process and pre-termination hearings in an effort to show that Ms. Wade’s due process concerns were met by the Cabinet considering her actions. The Loudermill case was also analyzed to show that the right to a pre-termination hearing arose from the considerations of an employee not attempting to avoid her rights balanced against the governmental interest of moving on with its business. These are also legal issues to be reviewed de novo.

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.” An 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 in detail in the Cabinet’s Brief. 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, and 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 and the multiple attempts by the Cabinet to afford her those rights.

II. The Cabinet made no misstatements as to the facts of this case in its Brief.

Despite the claims made in Ms. Wade's brief, there were, in fact, multiple attempts to schedule a pre-termination hearing and afford her that constitutionally granted due process right. A pre-termination hearing was both set and cancelled twice before the Cabinet's Counsel agreed to postpone and reschedule the pre-termination hearing, on the condition that contact was made no later than March 9, 2005 to set a new date. Unfortunately, Ms. Wade attempted to use Family Medical Leave as a shield to prolong her employment with her attorney indicating that a pre-termination hearing could not be rescheduled during the requested leave period, which would last three additional months. The entire factual scenario is outlined in detail in the Cabinet's Statement of the Case with appropriate citations to the record.

In their respective briefs, both Appellees suggest that the Cabinet should have scheduled the hearing after the March 9, 2005 conversation with her attorney to satisfy the requirements of KRS 18A.095(5). If scheduling a hearing is all that is required by law, then the Cabinet met that requirement twice over. The purpose of a pre-termination hearing is to allow the employee an opportunity to address the issues set forth in the Intent to Dismiss letter before he or she is terminated. Once it was clear that Ms. Wade had no interest in being heard, the Cabinet should have been permitted to move forward with termination. An agency should not be encouraged to act disingenuously and schedule a hearing at a "reasonable time" when the employee is attempting to avoid the hearing and advises that she will not attend.

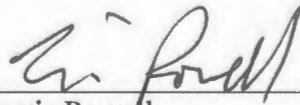
III. Ms. Wade's reinstatement was proper.

Ms. Wade and the Board argue that the Cabinet could have rescinded the termination, paid Ms. Wade back pay, and then returned her back to work instead of reinstating her pursuant to KRS 18A.005(33). While this was certainly an option for the Cabinet, it would have required it to give up its right to appeal what it felt was an erroneous decision regarding Ms. Wade's waiver of a pre-termination hearing. A reinstated employee has no apparent right to back pay during the pendency of appeal pursuant to KRS 18A.095(26). In attempting to mitigate its damages, the Cabinet should not have been required to pay out any.

CONCLUSION

De novo review is required by this Court for the Cabinet's numerous claims that the law was not correctly applied in this case. Most of these arguments are not even addressed by either Appellee in their respective briefs. Furthermore, the decision of the Board that Ms. Wade somehow did not waive her pre-termination hearing rights through her actions was not supported by substantial evidence.

Respectfully submitted,



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