

COMMONWEALTH OF KENTUCKY
SUPREME COURT
FILE NO. 2011-SC-00095-D

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SUPREME COURT

DEPARTMENT OF REVENUE,
FINANCE AND ADMINISTRATION CABINET,
JONATHAN MILLER, APPOINTING AUTHORITY

APPELLANT

V. ON REVIEW FROM THE KENTUCKY
COURT OF APPEALS
CASE NO. 2008-CA-001822-MR

WANDA FAYE WADE and
PERSONNEL BOARD, COMMONWEALTH OF KENTUCKY

APPELLEES

** ** * * * * *
BRIEF OF APPELLEE, WANDA FAYE WADE
** ** * * * * *

Respectfully submitted,



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Certificate of Service

I hereby certify that a copy of the Brief for Appellee, Wanda Faye Wade has been mailed to the Hon. Samuel P. Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; the Hon. Thomas Wingate, Judge, Franklin Circuit Court, Division II, Franklin County Judicial Center, 669 Chamberlin Avenue, Frankfort, KY 40601; the Hon. Travis Powell, Hon. E. Jeffrey Mosley, Finance and Administration Cabinet, 392 Capitol Annex, 702 Capitol Avenue, Frankfort, KY 40601; and to the Hon. Mark Sipek, Kentucky Personnel Board, 28 Fountain Place, Frankfort, KY 40601, this 12th day of April, 2012.



PAUL F. FAURI

STATEMENT CONCERNING ORAL ARGUMENT

Since this case involves the review of an administrative decision which was affirmed by the Franklin Circuit Court and the Kentucky Court of Appeals, Appellee does not believe oral argument would be helpful to understand the issues raised in this appeal.

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COUNTERSTATEMENT OF THE CASE

Appellee Wade believes that the statement of the case by the Appellant fails to focus on the true facts of this case.

This is an appeal from the decision of the Kentucky Court of Appeals on the consolidated appeals of the Appellant and Appellee from final orders of the Personnel Board. (Record on Appeal ("RA"), Franklin Circuit Court, Case No. 06-CI-821, p.62-71) The Personnel Board's decisions have set forth the facts and conclusions of law, which Appellee contends are supported by substantial evidence of record in this case.

This case involves three separate appeals to the Franklin Circuit Court from two final orders of the Personnel Board. The first two appeals, Civil Action No. 06-CI-821 by the Appellant and Civil Action No. 06-CI-870 by the Appellee, were from the Personnel Board's final order in Appeal No. 2005-120. The Appellant also appealed the second order of the Personnel Board in Civil Action 07-CI-24 from the Board's final order in Appeal No. 2006-128.

In Appeal No. 2005-120, the Hearing Officer's interim order was entered on November 4, 2005. (RA, Case No. 06-CI-821, p.15-19) A second Hearing Officer's order was entered on February 27, 2006. (RA, Case No. 06-CI-821,

p.10-14) The Board's final order in Appeal No. 2005-120 adopted both Hearing Officer's Findings of Fact, Conclusions of Law and Orders. The final order was entered on May 23, 2006. (RA, Case No. 06-CI-821, p.8-9) The Board's final order in Appeal No. 2006-128 was entered on December 19, 2006, and it adopted the Hearing Officer's Findings of Fact, Conclusions of Law and Recommended Order of October 4, 2006. (RA, Case No. 07-CI-24, p.23-28)

The final order of the Personnel Board in Appeal No. 2005-120 adopted the interim order of November 4, 2005 that Ms. Wade was not given a pre-termination hearing and, therefore, her dismissal by letter dated March 10, 2005 was improper. The Board found that she had not waived her merit system and constitutional right to a pre-termination hearing. (RA, Case No. 06-CI-821, p.17) Because Ms. Wade had been terminated in violation of law, i.e. without just cause, a second hearing was ordered to determine what relief she was entitled to. (RA, Case No. 06-CI-821, p.19)

After the second hearing, the Board concluded that, while Appellee was entitled to back pay, it was not to include back pay for the period of March 10, 2005 through June 8, 2005 because she was disabled and not able to work during these three months. The Board then concluded that

she was entitled to receive her pay through January 11, 2006. (RA, Case No. 06-CI-821, p.12-14)

The Board's final order of May 23, 2006 was appealed to the Franklin Circuit Court by both Ms. Wade and the Department of Revenue. Ms. Wade's appeal claimed the Board erred by not granting her full back pay for the period of March 10, 2005 to January 11, 2006. (RA, Case No. 06-CI-870, p.8) The Cabinet contended that the Board's order was incorrect as to Ms. Wade's pre-termination hearing and the dismissal was proper and she was not entitled to back pay. (RA, Case No. 06-CI-821, p.5)

In Personnel Board Appeal No. 2006-128, Ms. Wade was challenging her purported reinstatement to her position by letter of January 6, 2006. (Personnel Board Record, p.308) She also was appealing her termination thereafter. Her appeal was filed on March 23, 2006. (Personnel Board Record, p.301-317) As set forth in her appeal, she also received two letters from the Appellant, both dated January 27, 2006. One asserted that Ms. Wade was deemed to have resigned her position by not reporting to work. (Personnel Board Record, p.306-307) The other was a dismissal for cause which was basically the same as the March 10, 2005 termination letter. (Personnel Board Record, p.309-317) The appeal further set forth that the termination was void

because she could not be reinstated to her position unless there is a final order from the Board as required by KRS 18A.005(33). She also set forth that the attempt at reinstatement was solely so Appellant could re-fire her as evidenced by the termination for cause letter. This letter was basically identical to the March 10, 2005 letter that she had challenged in the first appeal (2005-120) and which was still pending a final ruling from the Board as of January 27, 2006. The final order of the Personnel Board in the first appeal was not entered until May 23, 2006.

The second Personnel Board appeal (2006-128) was ruled upon by the Board's Hearing Officer based on motions as a matter of law. (RA, Case No. 07-CI-24, p.25) The Hearing Officer issued Findings of Fact, Conclusions of Law and a Recommended Order on October 4, 2006, which sustained Ms. Wade's motion as a matter of law. (RA, Case No. 07-CI-24, p.28) Thereafter, the Board entered its final order on December 19, 2006 holding that the attempt to reinstate Ms. Wade was void and that Ms. Wade was entitled to back pay from the date of the purported reinstatement of January 11, 2006.¹ (RA, Case No. 07-CI-24, p.23-28) The Board's final order contained a procedural history, noting the Appeal No.

¹ The first Personnel Board back pay order went to January 11, 2006 because the Cabinet had attempted to reinstate Appellee on that date. The reinstatement issue was outside the issue of damages before the Hearing Officer. (RA, Case No. 06-CI-870, p.16)

2005-120 and summarized the Board's order of back pay from June 9, 2005 to January 11, 2006, and that Appellee had been improperly terminated because she had not waived a pre-termination hearing. The Board also noted that the Cabinet unilaterally attempted to reinstate Ms. Wade on January 11, 2006. (RA, Case No. 07-CI-24, pp.24-25) The Board made specific findings of fact noting that the first appeal paid back pay through January 11, 2006, the date of the attempted reinstatement; that the Appellant Cabinet never rescinded its earlier disciplinary action (March 10, 2005 termination); and concluded that the attempt at reinstatement of a terminated employee was void on its face in violation of KRS 18A.005(33) when the first termination had not been rescinded. (RA, Case No. 07-CI-24, p.26-27)

The Franklin Circuit Court entered a decision on the consolidated appeals by an Opinion and Order dated August 12, 2008. (RA, Case No. 06-CI-821, p.62-71) The Court addressed the three issues, which had been ruled upon by the Board in its respective orders. The Court determined that there was substantial evidence in the record and the Board had correctly applied the law as to the denial by the Cabinet of Ms. Wade's pre-termination hearing. The Court agreed with the Board that there had been no waiver of a pre-termination hearing. (RA, Case No. 06-CI-821, p.68)

The Court also ruled that Ms. Wade's back pay was correctly determined by the Personnel Board and denied Ms. Wade's request for back pay as of March 10, 2005 through June 8, 2005. (RA, Case No. 06-CI-821, p.69) The Court further agreed with the Personnel Board on the issue of reinstatement, noting that the Board's order was supported by the record and it applied the correct rule of law that Ms. Wade could not be reinstated to her position pursuant to KRS 18A.005(33) while the original dismissal remained active. Thus, the reinstatement and subsequent termination were void. (RA, Case No. 06-CI-821, p.70)

Due to the error in the Court's order as to the time that Ms. Wade was determined to be disabled from working by the Board, she filed a motion to alter and amend the judgment. (RA, Case No. 06-CI-821, p.72-74) By order of August 29, 2008, the Court noted that there was a clerical error and corrected the order as follows:

Therefore, it is HEREBY ORDERED that Ms. Wade is entitled to a pre-termination hearing. In addition the Personnel Board has correctly concluded that Ms. Wade is entitled to back pay, limited to the time of her disability from March 10, 2005 until June 8, 2005. The Department of Revenue's attempt to reinstate Ms. Wade on January 11, 2006 and her subsequent termination are void.

(RA, Case No. 06-CI-821, p.81)

Appellant appealed the Franklin Circuit Court's decision to the Court of Appeals on September 26, 2008. (RA, Case No. 06-CI-821, p.83-84) The Court of Appeals issued its opinion affirming the Franklin Circuit Court's decision on January 14, 2011. The Court held that there was substantial evidence to support the Board's finding that Ms. Wade did not waive her right to a pre-termination hearing and, further, that there was no authority for the Appellant to attempt to reinstate Ms. Wade without an order from the Personnel Board and no authority had been cited by the Appellant. The Court determined that the Board's final order was correct and the findings and conclusions were properly supported by the evidence and the Board correctly applied the law.

ARGUMENTS

- I. THE PERSONNEL BOARD, THE FRANKLIN CIRCUIT COURT AND THE KENTUCKY COURT OF APPEALS CORRECTLY RULED AS TO THE DENIAL OF MS. WADE'S PRE-TERMINATION HEARING AND THE PERSONNEL BOARD'S DECISION IS SUPPORTED BY SUBSTANTIAL EVIDENCE OF THE RECORD AND THE LAW HAS BEEN CORRECTLY APPLIED TO THE FACTS.

The Personnel Board's decision rendered by final order of May 23, 2006 (Appeal No. 2005-120) made the specific finding after the evidentiary hearing that the Appellee did not waive her rights to a pre-termination hearing:

. . . There was no knowing and intelligent waiver of Wade's constitutional right to a pre-termination hearing. (RA, Case No. 06-CI-870, p.20; Finding of Fact No. 4)

The Board made this finding after considering the testimony of former counsel for the Appellant, Celia Dunlap, and former counsel for Ms. Wade, David Emerson, as to the March 9, 2005 telephone call. The Board also found that Ms. Wade did not intend to waive the pre-termination hearing. (RA, Case No. 06-CI-870, p.20)

The Franklin Circuit Court, in its decision, discussed the pre-termination hearing issue and the waiver issue basically the same as was set forth by the Personnel Board. After this discussion, the Court set forth the following:

. . . The record is clear and the board's findings of fact are clearly supported by substantial evidence in the record. Further, the board has correctly applied the law and there was no waiver by Ms. Wade. The court's review of the Personnel Board's decision is to determine whether or not there is substantial evidence to support the findings of fact, which is clear in this case. Because the findings are supported by substantial evidence, the court must then determine whether or not the Personnel Board correctly applied the law to the facts. This is precisely what happened in this case. The Board's decision must be affirmed. H&S Hardware v. Cecil, 655 S.W.2d 38 (Ky. App. 1983); Bowling v. Natural Resources and Environmental Protection Cabinet, 891 S.W.2d 406 (Ky. App. 1994). (RA, Case No. 06-CI-821, p.68)

Appellant then appealed to the Court of Appeals which reviewed the Franklin Circuit Court's decision and noted

that the Court's review of an administrative decision is to determine if there is substantial evidence in the record to support the agency's findings and the findings will be upheld even though there may be conflicting evidence in the record. (Court of Appeals Decision, p.5) The Court, as the Franklin Circuit Court did, discussed the pre-termination hearing issue and the waiver issue, and stated as follows:

Although the Cabinet disputes the judgment of the Board regarding the credibility of the evidence, there is substantial evidence to support the Board's finding that Wade did not waive her right to a pre-termination hearing. While the Cabinet characterizes Wade's attempt at postponing the hearing as improper, the Cabinet was without authority to dispense with the "minimal requirement" of a hearing in the interest of "convenience or expediency, or because of a nature desire to be rid of harassing delay[.]" *Id.* at 305. We are mindful that the pre-termination hearing "need not be elaborate" to satisfy due process. *Loudermill*, 470 U.S. at 545. However, in the case at bar, the Cabinet's action deprived Wade of a fundamental right "[t]he opportunity to present reasons, either in person or in writing, why proposed action should not be taken. . . ." *Id.* at 546. After careful review, we conclude that substantial evidence supported the Board's findings, and the Board correctly applied the law.

Court of Appeals Decision, p.7.

In the order that relates specifically to the issue concerning Ms. Wade not waiving her pre-termination hearing, the Personnel Board set forth the requirement for determining waiver. The Board, in the conclusions of law,

discussed the knowing and intelligent waiver requirement if a person is to waive their constitutional rights, and then noted how the United States Supreme Court set forth that the standard for waiver of property rights is the same for that in criminal proceedings, citing to the case of D.H. Overmyer v. Fricke Company, 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 124 (1972). It is also brought to the Court's attention that Justice Douglas, with whom Justice Marshall concurred, stated:

I agree that the heavy burden against the waiver of constitutional rights, which applies even in civil matters, Ohio Bell Tel. Co. v. Public Utilities Comm'n, 301 U.S. 292, 307, 57 S.Ct. 724, 731, 81 L.Ed., 1093 (1937); Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393, 57 S.Ct. 809, 811, 81 L.Ed. 1177 (1937), has been effectively rebutted by the evidence presented in this record. At p.188. [Emphasis supplied]

The Board correctly held that, for a waiver of a pre-termination hearing, it must be knowing and intelligent and Ms. Wade, therefore, did not waive her pre-termination hearing.

The Personnel Board's ruling in this case properly applies the law to the facts found.

The Appellant is requesting this Court to substitute its judgment for that of the Board. KRS 13B.150 sets forth:

- (1) Review of a final order shall be conducted by the court without a jury and shall be confined to the record, unless there is fraud or misconduct involving a party engaged in administration of this chapter. ...
- (2) The Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. ...
[Emphasis supplied]

The case law for the review by the Court of an administrative agency's decision is clear. When the findings of fact are supported by substantial evidence based on a review of the record, the Court is bound by said findings. Commonwealth Department of Education v. Commonwealth of Kentucky Unemployment Insurance Commission, et al., 798 S.W.2d 464 (Ky. App. 1999). The Court is not to reinterpret the evidence but to review the record to determine if there is substantial evidence to support the decision, Kentucky Unemployment Insurance Commission v. King, 657 S.W.2d 250 (Ky. App. 1983). When the Board's findings are supported by the evidence in the record, the Court's review is limited to whether or not the correct rule of law was applied to the factual findings. H&S Hardware v. Cecil, 655 S.W.2d 38 (Ky. App. 1983). This is precisely what the Court did in this case. The Court's decision is not erroneous. The Appellant's argument to the contrary must fail even if a different conclusion could be made.

Regardless of the fact that this Court might have reached a contrary result if it were hearing this case *de novo*, it is required on the basis of its posture as a reviewing body to affirm the administrative determination. For it must be borne in mind that it is the exclusive province of the administrative trier of fact to pass upon the credibility of witnesses and the weight of the evidence. Kentucky State Racing Commission v. Fuller, 481 S.W.2d 298, 308 (Ky. 1972).

Furthermore, the Board's Conclusion of Law No. 4 from the November 4, 2005 decision (RA, Case No. 06-CI-870, p.21) clearly sets forth how the Personnel Board follows the law when it stated:

. . . The Kentucky Personnel Board should "indulge in every presumption against waiver of the constitutional right" to a pre-termination hearing and employers should not "presume acquiescence in the loss of a fundamental right."

The conclusion of law continues with what should have happened; that is, the Cabinet had the ability to schedule the pre-termination hearing prior to issuing the termination letter, but obviously it chose not to do so. It is clear that the agency simply jumped to a unilateral conclusion which was completely erroneous as determined by the Board in its Finding of Fact No. 4. The March 10, 2005 letter clearly misstates what transpired between the previous counsel during the March 9, 2005 telephone conversation when it states:

Having not heard from you or your attorney to request a pre-termination hearing by close of

business March 9, 2005, the Cabinet has concluded that you have waived your right to a pre-termination hearing. (March 10, 2005 letter, Appendix 9 of Appellant's Brief)

There was a conversation on March 9, 2005 and, as the Board's Finding of Fact No. 4 shows, the conversation between counsel was not a knowing or intelligent waiver of Wade's constitutional right to a pre-termination hearing. (RA, Case No. 06-CI-870, p.20) The Court of Appeals, the Franklin Circuit Court and the Kentucky Personnel Board correctly ruled on the issue of waiver of pre-termination hearing. Ms. Wade did not waive the pre-termination hearing and, accordingly, she was improperly terminated, i.e. her property interest was denied without due process of law. She was terminated without just cause.

The Court of Appeals properly reviewed the decision as to the issue of waiver, as well as the other issues in this case. The standard of review has been set forth succinctly by the Kentucky Supreme Court in the case of Commonwealth of Kentucky, Cabinet for Human Resources v. Bridewell, 62 S.W.3d 370 (Ky. 2001):

It is the function of this Court to ensure that the decision of an administrative agency is supported by substantial evidence. We are not permitted to retry the case or to review the evidence *de novo*. *Kentucky State Racing Comm'n v. Fuller*, Ky., 481 S.W.2d 298 (1972). *Bowling v. Natural Resources and Environmental Protection Cab.*, Ky.App., 891 S.W.2d 406 (1994), states that

the test for substantial evidence is whether, when taken alone or in light of all the evidence, it has sufficient probative value to induce conviction in the minds of reasonable men. If the court finds the correct rule of law was applied to facts supported by substantial evidence, the final order of the agency must be affirmed. *Commonwealth, Dept. of Education v. Commonwealth*, Ky.App., 798 S.W.2d 464 (1990). At 373.

Here, it is clear that the final order of the Personnel Board was supported by substantial evidence and correctly applied the law to the facts.

Despite the fact that the Personnel Board's decision is supported by substantial evidence, the Appellant attempts to argue the reinterpretation of the factual matters and even makes a statement that is simply contrary to what the Appellant did in this matter. At page 10 in its brief, it states:

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.

What this statement neglects is the plain and simple fact that the pre-termination hearing could have been scheduled by the agency rather than assuming that the Appellee had waived the right to a pre-termination hearing. Certainly, this would have complied with the requirements set forth in KRS 18A.095(5). The agency clearly should have scheduled

another pre-termination hearing after the attorneys' conversation on March 9, 2005 rather than assuming that Ms. Wade had waived her right to a pre-termination hearing. The Appellant assumes too much under the circumstances when the fact of the matter is that the pre-termination hearing should have been scheduled as the Board concluded in Conclusion of Law No. 4. Clearly, Ms. Wade's statutory and constitutional rights were violated by the Appellant not scheduling the pre-termination hearing.

Finally, it must be pointed out that the Appellant has misstated what has happened in this case when it states:

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. [Emphasis supplied]
Appellant's Brief, p.15-16.

Of course, the multiple attempts to afford her those rights is incorrect and unfounded because there were no multiple attempts. The Appellant just failed to schedule the pre-termination hearing, which it had every right to do when Ms. Dunlap and Mr. Emerson had their telephone conversation on March 9, 2005. Clearly, the agency made a unilateral determination which was in violation of both the

Constitution and KRS 18A.095. There was no waiver of the pre-termination hearing.

II. THE PERSONNEL BOARD, THE FRANKLIN CIRCUIT COURT, AND THE COURT OF APPEALS CORRECTLY RULED THAT MS. WADE'S PURPORTED REINSTATEMENT WAS VOID ON ITS FACE.

The Appellant attempts to claim that the Court of Appeals erred when it agreed with the Personnel Board's conclusion as to the improper reinstatement of Ms. Wade on January 11, 2006. The Court of Appeals, in reviewing the Appellant's claim that its unilateral reinstatement of Ms. Wade was proper, stated as follows:

On appeal, the Cabinet asserts that it properly reinstated Wade's employment in order to mitigate its damages and carry out the implicit mandate of the Board's interim order that found the March 2005 termination improper. We disagree.

KRS 18A.095(22) delineates the remedies available to the Board upon the resolution of an appeal, and the statute provides for the Board to order reinstatement of employment if appropriate. KRS 18A.095(22)(b). That this is an accurate assessment of the law is evidenced by the fact that the Cabinet initially, though unsuccessfully, moved the Board to order Wade's reinstatement in December 2005. Indeed, the Cabinet has not cited any law granting it the authority to ultimately reinstate a terminated employee during the appeal process.

After careful review we agree with the Board's conclusion that the Cabinet simply did not have the authority to reinstate Wade's employment without an order from the Board. As the Board's findings and conclusions were properly supported by the evidence, we find no error in the Board's decision. (Court of Appeals Decision, p.8 and 9)

The Personnel Board made findings of fact on this issue, which are supported by the record. (RA, Case No. 07-CI-24, p.26-27) Second, the Franklin Circuit Court determined that the findings of fact were supported by the record and that the Personnel Board applied the correct rule of law. (RA, Case No. 06-CI-821, p.69-70) The Court of Appeals concurred in its review. This is precisely the review the Court is to make. KRS 13B.150 and Commonwealth of Kentucky, Cabinet for Human Resources v. Bridewell, Id.

The Cabinet again argues, as it did before the Personnel Board, that it had authority to reinstate Ms. Wade even though there had been no order entered at the time of the attempted reinstatement. The Appellant cites no authority except the definition of reinstatement set forth in KRS 18A.005(33):²

"Reinstatement" shall mean 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.

[Emphasis supplied]

The Board and the Court of Appeals correctly applied this statute. At the time of the attempted reinstatement, there was no order of the Board to reinstate Ms. Wade. The Board's final order in Appeal No. 2005-120 was entered on

²The definition currently is set forth in KRS 18A.005(34).

May 23, 2006. (RA, Case No. 06-CI-870, p.10-12) The agency's attempted reinstatement of Ms. Wade occurred on January 11, 2006, prior to the final order in Appeal No. 2005-120. Therefore, there was absolutely no authority for the reinstatement as has been determined by the Board and affirmed by the Court of Appeals. The reinstatement action and subsequent termination were void on its face.

The Cabinet claims it wanted to mitigate damages but all it had to do was to rescind its termination letter, which was determined to be void because there was no pre-termination hearing, and pay Ms. Wade her back pay. She would then be reinstated by the Appellant's action. This would have mitigated its damages.

Prior to the illegal reinstatement, the Appellant was informed by the Personnel Cabinet that it had to have an order before it could reinstate. The Appellant filed a Motion to Issue Order on December 2, 2005. (Personnel Board Record, p.81-82) (Copy attached as Appendix 1)

In the motion, Appellant admits the Personnel Cabinet advised that it could not authorize Ms. Wade's reinstatement until there was an order from the Appellee Board:

Counsel for the Appellee [Department of Revenue] recently attempted to reinstate the Appellant [Ms. Wade] in order to comply with the Interim

Order and in an attempt to control the Finance Cabinet's potential liability. The Personnel Cabinet refused to allow the Finance Cabinet to reinstate Appellant. The Personnel Cabinet advised the Finance Cabinet that without a Personnel Board Order reinstating the Appellant [Ms. Wade], it could not authorize the reinstatement of the Appellant [Ms. Wade].

(Personnel Board Record, p.81)

Ms. Wade responded to the motion and the Board entered an order on December 22, 2005 denying the motion until after the second hearing. (RA, Case No. 06-CI-870, p.36) By letter of January 6, 2006, Ms. Wade was given notice of her unilateral reinstatement by the Cabinet effective January 11, 2006. Obviously, the attempt at reinstatement on January 11, 2006 was contrary to the Personnel Cabinet's directive, which is admitted to above. Of course, it also was clearly in violation of KRS 18A.005(33).

The record and law are clear. Reinstatement can only be done if the employee has resigned in good standing or has been ordered back to work by the Board or Court. The action of the Appellant herein was prior to any order ordering her back to work and, obviously, Ms. Wade had not resigned in good standing. The agency compounded its previous error by illegally reinstating Ms. Wade. In its brief at page 18, the Cabinet states, "It is unconceivable to the Cabinet that its decision to reinstate Ms. Wade could be considered inappropriate." However, the statute

is very clear and Appellant acted outside the statutory authority for reinstatement. The only reason that the Appellant wanted to reinstate Ms. Wade was to terminate her again, which it did by the two January 27, 2006 letters, which are the bases for Ms. Wade's second Personnel Board Appeal No. 2006-128. However, as the Board determined, the only way to do this would be to rescind the first action and pay her the back wages to make her whole, and then bring her back to work and take whatever action it so desired at that time.

The Personnel Board's Findings of Fact and Conclusions of Law are supported by substantial evidence in this record, and the decision is supported by the law. The Franklin Circuit Court and the Court of Appeals, after reviewing the Board's order in Appeal No. 2006-128, agreed.

III. THE PERSONNEL BOARD'S CONCLUSION REGARDING MS. WADE'S INABILITY TO WORK FROM MARCH 9, 2005 TO JUNE 9, 2005 RESULTED IN MS. WADE NOT RECEIVING BACK PAY FOR THAT PERIOD OF TIME.

The Appellant again argues the Personnel Board's ruling as to the back pay issue for Ms. Wade. First, it must be pointed out that, in the motion for discretionary review, the Appellant Cabinet did not set forth this as an issue presented. Furthermore, the Court of Appeals, in its decision, addressed the issue as follows:

Finally, the Cabinet raises a third argument relating to the sufficiency of the evidence regarding Wade's physical condition. Because we believe the Board's findings were supported by substantial evidence, we decline to address this argument.

(Court of Appeals Decision, p.9)

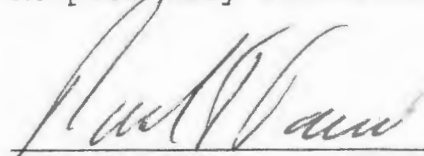
The Court of Appeals correctly ruled on this issue. However, it is unclear to the Appellee why the Appellant is arguing this due to the fact that it reduced the back pay that Ms. Wade was entitled to. Of course, as evidenced by the Cabinet's March 10, 2005 letter to Ms. Wade, which is Appendix 9 to Appellant's Brief, Ms. Wade was approved by the Appellant for Family Medical Leave as of March 9, 2005, but the next day a letter of correction denying the approval of her request for Family Medical Leave was issued because she had been given an intent to dismiss letter and, of course, was terminated on that date. If the Appellant Cabinet is correct in its argument, then Ms. Wade would be entitled to back pay for this time period.

CONCLUSION

The decision of the Personnel Board is supported by substantial evidence and the law. The Franklin Circuit Court and the Court of Appeals properly reviewed the administrative decision and correctly affirmed the decision of the Personnel Board. The Appellee respectfully requests

that this Court affirm the decision and order the Appellant to comply with the Personnel Board's final order.

Respectfully submitted,



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