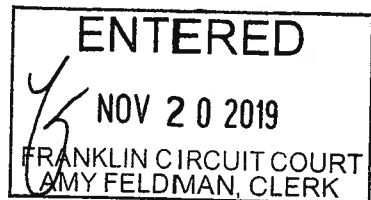


COMMONWEALTH OF KENTUCKY
48TH JUDICIAL CIRCUIT
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 18-CI-00877



MICHAEL BLASI

PETITIONER

v.

Received

KENTUCKY TOURISM, ARTS & HERITAGE CABINET,
DEPARTMENT OF PARKS, and
KENTUCKY PERSONNEL BOARD

NOV 25 2019

Personnel Board

RESPONDENTS

OPINION AND ORDER

This matter is before the Court on Petitioner's appeal from an adverse determination of the Kentucky Personnel Board ("Board") wherein Petitioner's termination was upheld. Upon review of the record, and otherwise being sufficiently advised, this Court hereby **AFFIRMS** the Board's ruling for reasons stated more fully below.

BACKGROUND

Petitioner is a former employee of the Kentucky Tourism, Arts & Heritage Cabinet ("Tourism") for which he worked as a Maintenance Superintendent I at E.P. "Tom" Sawyer State Park ("TSSP") in Louisville, Kentucky. His job duties included managing subordinates, performing duties assigned by the Park Manager, and making sure assigned tasks were thoroughly and promptly completed. Petitioner was dismissed from this position by Tourism on October 26, 2016. Petitioner then appealed his dismissal on December 14, 2016, and a hearing before the Board was conducted from June 22 to June 24, 2017.

Hearing Officer Patrick Moores conducted the hearing, at which Moores himself questioned Petitioner.

To support the decision to terminate Petitioner, Tourism produced evidence at the hearing that it believed showed that Petitioner frequently failed to carry out his job responsibilities. For instance, Tourism asserted that Petitioner did not spray landscape beds as he was directed. Rather than get a license to spray weeds or to instruct an employee to get a license, Petitioner pulled or cut the weeds and then had them covered with mulch. The weeds then regrew through the new mulch. Tourism contended that, because of the resultant appearance of TSSP that donated funds had to be used to hire an outside contractor to spray and re-mulch the park.

On another occasion, Petitioner was directed to have someone scrape and paint metal gates, to have someone mend a portion of a fence, and to replace rotten wood and paint doors himself. The task of scraping and painting the metal gates was assigned. However, the task was left undone and the doors and fence were not repaired by the time Petitioner was terminated. Petitioner had also been tasked with making sure that the park maintenance vehicles were maintained but did not do so.

Tourism also contended that Petitioner did not use park equipment safely as required. Petitioner was tasked with removing old metal soccer goals. To do so, he was instructed to use a cutting torch to cut the goals into pieces and then to recycle the segments. Instead, Petitioner had a subordinate use the park tractor to crush the soccer goals and snap them into pieces so that the goals could fit into a dumpster. In the process, a piece of a soccer goal fell out of the tractor bucket and severely damaged the tractor's pressurized hydraulic system, which cost nearly a thousand dollars to repair.

The matter was thereafter briefed and submitted to Hearing Officer Moores for a Recommended Order on August 9, 2017. However, Mr. Moores was sick and needed surgery, which prevented him from timely issuing a recommended order. He requested an extension and was granted until November 13, 2017 to issue his Recommended Order. When November 13 arrived and no Recommended Order had been issued, the Board appointed Brenda Allen as Hearing Officer to replace Moores. Appellant moved to have his appeal sustained due to the lack of a recommended order, but this motion was denied on April 18, 2018.

Allen issued her Recommended Order on June 26, 2018. Appellant points out that this Recommended Order was issued over six months after the case had been given to her, more than 60 days after his motion to sustain appeal was denied, more than one year after the hearing, and nearly two years after Appellant was terminated. On August 16, 2018, the Personnel Board adopted Allen's Recommended Order, only changing it to correct a misstated year and Petitioner's job title.

Petitioner thereafter appealed to this Court. He argues that the termination fails as a matter of law because the Recommended Order was not issued within the time limits prescribed by KRS 13B.110. Further, he argues that because Moores—who was the original hearing officer in the case—actively and affirmatively participated in the Board's initial hearing that Appellant was deprived of a fair hearing and shows that Tourism did not meet its required evidentiary burden. Finally, he argues that the Recommended Order was not based on substantial evidence. Each argument will be discussed in turn below.

STANDARD OF REVIEW

“Judicial review of an administrative agency's action is concerned with the question of arbitrariness.” *Commonwealth, Transportation Cabinet v. Cornell*, 796 S.W.2d 591, 594 (Ky. Ct. App. 1990) (quoting *Am. Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Comm'n*, 379 S.W.2d 450, 456 (Ky. 1964)). To say that an agency's action was arbitrary means that the action was “clearly erroneous, and by ‘clearly erroneous’ we mean unsupported by substantial evidence.” *Crouch v. Police Merit Board*, 773 S.W.2d 461, 464 (Ky. 1988); *See also City of Louisville by Kuster v. Milligan*, 798 S.W.2d 454, 458 (Ky. 1990). Substantial evidence is evidence of relevant consequence having the fitness “to induce conviction in the minds of reasonable men.” *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972); *Owens-Corning Fiberglass Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998).

“The trier of facts in an administrative agency may consider all the evidence and choose the evidence he believes.” *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406, 409-410 (Ky. Ct. App. 1994). In reviewing an agency decision, this Court may only overturn that decision if the agency acted arbitrarily or outside the scope of its authority, if the agency applied an incorrect rule of law, or if the decision itself is not supported by substantial evidence on the record. *Fuller*, 481 S.W.2d at 300-301. Even if the agency's factual findings are upheld under the appropriate standard of review, the reviewing court must still determine whether the agency applied the correct rule of law to its factual findings. *Department of Education v. Commonwealth*, 798 S.W.2d 464, 467 (Ky. Ct. App. 1990). When an administrative agency's findings are supported by substantial evidence, and when the agency has applied the correct rule of law, these

findings must be accepted by a reviewing court. *Kentucky Bd. of Nursing v. Ward*, 890 S.W.2d 641, 642 (Ky. Ct. App. 1994).

ANALYSIS

First, the Court cannot agree with Petitioner that the delay in decision-making entitles him to relief. “[T]he hearing officer shall complete and submit to the agency head, no later than sixty (60) days after receiving a copy of the official record of the proceeding, a written recommended order which shall include his findings of fact, conclusion of law, and recommended disposition of the hearing, including recommended penalties, if any.” KRS 13B.110(1). However, despite this sixty (60) day requirement, the hearing officer may be granted an extension of time, and “[t]he extension shall not exceed thirty (30) days from the date the extension was granted.” KRS 13B.110(3)(a).

Late administrative decisions and judgments are not automatically void because they were entered late. In *Dubick v. Dubick*, 653 S.W.2d 652 (Ky. Ct. App. 1983), the Commissioner for Domestic Relations had filed judgments more than 90 days after trial, past the applicable statutory deadline. *Dubick*, 653 S.W.2d at 653. Appellant therein contended that the entire proceeding was void because the commissioner was prohibited from filing his decision past the statutory deadline. *Id.* The Kentucky Court of Appeals analyzed similar statutes in other states and found that failure to file an agency decision within a prescribed statutory deadline does not void the decision. *Id.* at 653-54. The Court of Appeals notes that if administrative judgments were voided by being late that the resultant trial and retrial of cases would frustrate the goal of promptly disposing of litigation. *Id.* at 655. Accordingly, “any late judgment or report is not void because of tardiness.” *Id.*

This principle applies to the instant case. It would frustrate judicial economy and expediency if Petitioner could void the Board's decision simply because it was issued late. It is also apparent from the record that the delay in issuing a judgment was not due to neglect but instead due to Moores's illness. Though the deadlines found in KRS 13B.110 had passed, the Board's decision cannot be voided on lateness grounds alone.

The Court also disagrees with Petitioner that the way Moores participated in the hearing invalidates the Board's decision. Petitioner contends that Moores's participation violated KRS 13B.080. "A hearing officer shall preside over the conduct of an administrative hearing and shall regulate the course of the proceedings in a manner which will promote the orderly and prompt conduct of the hearing." KRS 13B.080(1). "When a prehearing order has been issued, the hearing officer shall regulate the hearing in conformity with the prehearing order." *Id.* Petitioner argues that it was improper for Moores to have extensively cross-examined him at the hearing and that the cross-examination was excessively hostile. However, judicial officers can and frequently do examine witnesses before them. There is nothing improper about such examination, and it is within the discretion of the hearing officer how he wants to conduct a hearing. As Tourism observes in its Brief, Petitioner did not object to the form or manner of Moores's questioning at the hearing and was even invited to object at one point. By not entering his objection, Petitioner waived his right to do so. Moreover, it is perfectly appropriate for the presiding officer to ask questions. The hearing is a search for the truth, and the hearing officer has an obligation to ensure that all relevant facts are put into evidence.

Finally, Petitioner argues that the decision of the Board was not supported by the evidence of record and therefore should be reversed. Again, this Court reviews an agency

decision to see whether the action was arbitrary, meaning not supported by substantial evidence. *Crouch*, 773 S.W.2d at 464. The Court finds that the record in this case is replete with evidence that justifies Petitioner's termination. For instance, when directed to spray herbicide at the park, Petitioner did not seek to obtain a hazardous chemical license or have a subordinate obtain their license. Rather, Petitioner pulled or cut weeds and then covered them with mulch, resulting in the weeds growing back and requiring Tourism to spend discretionary funds to hire someone else to redo the job. On another occasion, Petitioner failed to attend a required conference. Petitioner had also been instructed to repair fencing and doors but did not do so. Most telling is an instance where Petitioner instructed an employee to use a park tractor to crush old soccer goals, rather than disassemble them with a flame cutter like he was instructed. This resulted in extensive damage to the tractor that cost nearly a thousand dollars to repair. Accordingly, the decision to terminate Petitioner was supported by substantial evidence, and therefore the Court will not reverse the Board's decision.

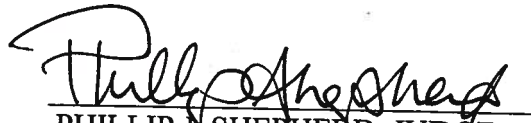
CONCLUSION

This Court finds no reason why the Board's decision should be reversed. First, though the applicable statutory deadlines had passed, this does not mean that the Board's determination must be automatically voided. Second, Moores's questioning of Petitioner at the hearing and the way Moores questioned him is also not grounds to vacate the decision, since it is not improper for a hearing officer to question witnesses. Even if the way Moores asked Petitioner questions was objectionable, Petitioner never entered an objection at the hearing. Finally, substantial evidence underlies the Board's decision, as

Tourism cited several occasions of Petitioner's deficient performance. Accordingly, the Board's decision to uphold Petitioner's termination must stand.

WHEREFORE, the Court hereby **AFFIRMS** the determination of the Board. This order is final and appealable and there is no just cause for delay.

So **ORDERED**, this 19th day of November, 2019.


PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division I

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