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Commonwealth of Kentucky

Personnel Board

Court of Appeals

NOS. 2014-CA-001973-MR

COMMONWEALTH OF KENTUCKY,
PUBLIC PROTECTION CABINET;
DAVID A. DICKERSON, SECRETARY, PUBLIC
PROTECTION CABINET; KENTUCKY HORSE
RACING COMMISSION; AND MARC GUILFOIL,
EXECUTIVE DIRECTOR, KENTUCKY HORSE
RACING COMMISSION

APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 13-CI-00895

JOHN VEITCH; AND COMMONWEALTH
OF KENTUCKY PERSONNEL BOARD

APPELLEES

AND

NO. 2015-CA-000008-MR

JOHN VEITCH

CROSS-APPELLANT

CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 13-CI-00895

v.

COMMONWEALTH OF KENTUCKY,
PUBLIC PROTECTION CABINET;
DAVID A. DICKERSON, SECRETARY, PUBLIC
PROTECTION CABINET; KENTUCKY HORSE
RACING COMMISSION; MARC GUILFOIL,
EXECUTIVE DIRECTOR, KENTUCKY HORSE
RACING COMMISSION; AND COMMONWEALTH
OF KENTUCKY PERSONNEL BOARD

CROSS-APPELLEES

OPINION
AFFIRMING IN PART
AND REVERSING AND REMANDING

** ** * ** * **

BEFORE: CLAYTON, COMBS, AND MAZE, JUDGES.

CLAYTON, JUDGE: This case presents two main issues: (1) was John Veitch, who served as the Kentucky Horse Racing Commission's (hereinafter "KHRC") Chief State Steward, a merit employee?; and, (2) given that the KHRC is an agency in the Public Protection Cabinet, does the Cabinet Secretary have the authority to terminate the KHRC's Chief State Steward if he or she was a non-merit employee? The Franklin Circuit Court answered both issues in the negative. Veitch and the Public Protection Cabinet both appeal. Following a detailed factual recitation, we affirm in part and reverse and remand.

FACTS

On July 8, 2005, the then-Secretary of the Environmental and Public Protection Cabinet, LaJuana S. Wilcher, submitted a formal request to then-Governor Ernie Fletcher for approval to appoint Veitch to the position of “Chief State Stewart.”¹ Then-Governor Fletcher signed the request, as did Erwin Roberts, who was the Personnel Cabinet Secretary. Veitch received a Form No. P-1 from the Personnel Cabinet, which labeled his pay grade as “00,” his class code as “0191,” and his salary as \$7,070.04 per month. The appointing authority listed on the form was Wilcher.

When Veitch was hired as Chief State Steward, a classified (a.k.a. “merit”) job code existed for the same job title.² Its title code was “3845,” and its pay grade was a “17,” with a monthly salary range between \$3,688.28 and \$4,886.38. That job was administratively abolished in March of 2006. Veitch never held the classified job, nor did he receive the substantially lower classified salary.

¹ The formal request used the term “Stewart.” All other documents, including the parties’ briefs, use the term “Steward.” We will likewise use the term “Steward.”

² For purposes of this opinion, the terms “merit” and “classified” are used interchangeably, as are the terms “non-merit” and “unclassified.”

Veitch was Chief State Steward from July 16, 2005, until he was terminated by letter on November 28, 2011.³ The letter was signed by Holly McCoy-Johnson. McCoy-Johnson was the Executive Director for the General Administrative and Programmatic Shared Services for the Public Protection Cabinet. She had previously received a Personnel Cabinet Authorization Signature Form giving her the authority to sign notices of dismissal for the Public Protection Cabinet. The Secretary of the Public Protection Cabinet, Robert D. Vance, also had the authority to sign notices of dismissal for the Public Protection Cabinet. Robert M. Beck, Jr., the KHRC's Chairman, and Marc Guilfoil, the KHRC's Acting Executive Director, concurred with Secretary Vance's decision to terminate Veitch from his job as Chief State Steward.

Veitch appealed his employment termination to the Kentucky Personnel Board. Following an evidentiary hearing, the hearing officer issued findings of fact, conclusions of law, and a recommended order. Concerning the

³ During Veitch's final year of service, the KHRC brought an administrative action against Veitch to suspend him for violating five administrative regulations. The allegations stemmed from Veitch's handling of the 2010 Breeder's Cup World Championships at Churchill Downs. Specifically, during the Ladies' Classic, the final and biggest race of the day with a \$2,000,000 purse, the second betting favorite, Life at Ten, had some irregularities with her performance just minutes before the race. Life at Ten finished at a distant last in the race. Veitch did not have the horse examined or sampled following her performance. His failure to comply with the proper administrative regulations outlining his duties as Chief State Steward led to multiple findings of violations. On appeal, a panel of this Court affirmed in part and reversed and remanded for further proceedings finding evidence supported the KHRC's post-race findings, but not the pre-race findings. *Veitch v. Kentucky Horse Racing Com'n*, No. 2012-CA-001610-MR, 2013 WL 5765130 (Ky. App. 2013).

issues now before us, the hearing officer concluded that Veitch was a non-merit employee, and Secretary Vance did not have the authority to fire Veitch. Both Veitch and the Public Protection Cabinet filed exceptions to the hearing officer's recommended order. The Personnel Board then filed a Final Order altering the recommended order inasmuch as the Board found Secretary Vance did have the authority to fire Veitch.

Veitch then petitioned the Franklin Circuit Court for review of the Personnel Board's Final Order. The Franklin Circuit Court agreed with the Hearing Officer and the Personnel Board that Veitch was a non-merit employee. It disagreed with the Personnel Board that the Public Protection Cabinet had the authority to terminate Veitch's employment. It thus reversed and remanded for Veitch to be reinstated, with back wages, to his position as Chief State Steward. The Public Protection Cabinet timely appealed. Having been fully briefed by all parties, including the Kentucky Personnel Board, the case is now ripe for a decision.

STANDARD OF REVIEW

Appellate review of an administrative agency's decision is for arbitrariness. *Kentucky Bd. of Nursing v. Ward*, 890 S.W.2d 641, 642 (Ky. App. 1994) (citing *Commonwealth, Transportation Cabinet v. Cornell*, 796 S.W.2d 591, 594 (Ky. App. 1990)). Arbitrariness is defined as clear error, and clear error

examines whether the decision is supported by substantial evidence. *Ward*, 890 S.W.2d at 642 (citing *Crouch v. Police Merit Board*, 773 S.W.2d 461, 464 (Ky. 1988)). Three primary factors should be utilized to determine arbitrariness:

The court should first determine whether the agency acted within the constraints of its statutory powers or whether it exceeded them. Second, the court should examine the agency's procedures to see if a party to be affected by an administrative order was afforded his procedural due process. The individual must have been given an opportunity to be heard. Finally, the reviewing court must determine whether the agency's action is supported by substantial evidence. If any one of these three tests are failed, the reviewing court may find that the agency's action was arbitrary.

Commonwealth Transp. Cabinet Dept. of Vehicle Regulation v. Cornell, 796 S.W.2d 591, 594 (Ky. App. 1990) (citations omitted).

Under this standard, we now turn to the two issues raised by the parties.

ANALYSIS

Two issues are presented for our review: (1) was Veitch a merit employee; and, (2) did the Cabinet Secretary have authority to terminate Veitch?

We address each issue *in seriatim*.

I. Was Vietch a merit employee?

If you treat an employee as a non-merit employee but say that under a statute he or she should have been a merit employee, is the person a merit

employee? No. Veitch wants the best of both worlds – the salary and benefits of a non-merit employee with the protections of a merit employee. He cannot have both, as all adjudicative bodies to review Veitch’s claim have properly found. Just as “[a] horse is a horse is a horse,” a non-merit employee is a non-merit employee is a non-merit employee. *Pacheco v. Safeco Ins. Co. of America*, 780 P.2d 116, 127 (Idaho 1989) (Bistline, J., dissenting). The Franklin Circuit Court’s order is illustrative:

The Board amended the Hearing Officer’s Recommended Order to conclude that “Veitch [. . .] was appointed Chief State Steward pursuant to [Kentucky Revised Statutes (“KRS”)] 12.050. He was hired to this non-merit position [. . .] after a letter, in compliance with KRS 12.050, was signed by the Appointing Authority and approved by then Governor Fletcher.” The Court agrees with the Board that the procedures used to fill the Chief State Steward in Veitch’s case are the procedures used to hire a non-merit, unclassified employee.

The non-merit position of Chief State Steward was established June 16, 1999. Until March 16, 2006, a merit position of Chief State Steward also existed. The merit position was abolished, and there is no longer a corollary merit position of Chief State Steward. When Veitch was hired as Chief State Steward, then Governor Fletcher and the Appointing Authority signed a “12:050” letter, effective July 16, 2005, appointing him to that position. This process is never, and cannot be, utilized in the hiring of merit employees. The record reflects that Veitch’s position was characterized and coded as a non-merit position at the time he was appointed and throughout his tenure as Chief State Steward. The Court sees no reason to disturb the Board’s conclusion that Veitch’s service as

Chief State Steward was in the capacity of a non-merit, unclassified employee.

Opinion, p.4.

Veitch argues this analysis is faulty because the statutes do not list Chief State Steward as a non-merit job. Indeed, “[u]nder KRS 18A.115(1), all positions within state government are part of the classified service unless specifically excluded and are subject to personnel laws governing classified service.” *Commonwealth Educ. & Humanities Cabinet Dept. of Educ. v. Gobert*, 979 S.W.2d 922, 926 (Ky. App. 1998). And it is true that KRS 18A.115, which states classified services “shall comprise all positions in the state service now existing or hereafter established, except the following[,]” does not list Chief State Steward as an unclassified job.

However, if we were to accept Veitch’s argument, Veitch’s appointment to Chief State Steward was void *ab initio*. See *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406, 411 (Ky. App. 1994) (finding promotion that did not comply with 101 Kentucky Administrative Regulations (KAR) 1:400(1) “rendered null and void the property rights” of the employee in his or her current job). It is undisputed that Veitch was not hired pursuant to KRS 18A.010(1) (“All appointments and promotions to positions in the state classified service shall be made solely on the basis of merit and fitness, to be ascertained by competitive examination . . .”) and KRS18A.120(1) (“Except as

hereinafter provided, all hiring for the classified service shall be on the basis of competitive examinations and certification by the cabinet in accordance with the provisions of KRS 18A.005 to 18A.200.”). A register was not requested by the appointing authority, 101 KAR 2:066 Section 1, and neither was a certification of eligible applications transmitted to the appointing authority, *id.* at Section 2.

Instead, Veitch was appointed as Chief State Steward pursuant to KRS 12.050.

That statute provides:

Unless otherwise provided by law, deputy heads of departments, and directors of divisions and institutions shall be appointed by the heads of the departments and in statutory departments the appointment of deputy heads of departments, and heads of divisions shall be with the prior written approval of the Governor. In departments each division head shall report to the head of the department to which the division is assigned.

Having been appointed under this statute, Veitch was a non-merit employee. Veitch received a myriad of benefits by his non-merit status: the pay was not graded, his appointment was approved by the Governor, he did not have to compete with other applicants for the job, etc. And, more than that, Veitch was a KRS 12.050-appointed employee. He enjoyed additional benefits that non-appointed, unclassified employees did not. *See, e.g.*, 780 KAR 6:080 Section 5(1) and (2) (other unclassified employees may be transferred to another unclassified service with written notice, but appointed and unclassified employees may not be transferred).

In spite of the benefits Veitch enjoyed, Veitch now asks us to violate the “Constitutional principle that you don’t look a gift horse in the mouth[,]” *Nix v. Smith*, 540 P.2d 516, 517 (Utah 1975), and allow Veitch to enjoy the benefits of both merit and non-merit status. We will not do so. Veitch was hired as a non-merit employee and will be treated as such. This issue is one for which all reviewing bodies have unanimously agreed. It is not an arbitrary decision.

Accordingly, we affirm the Franklin Circuit Court’s order on this issue.

II. Did the Cabinet Secretary have authority to terminate Veitch?

Having determined Veitch was a non-merit employee, the question now focuses on whether the Cabinet Secretary had the authority to terminate Veitch. This issue divided the lower adjudicative bodies. The Hearing Officer and the Franklin Circuit Court found in Veitch’s favor. The Personnel Board found against Veitch. Having reviewed the record and the relevant law, we find the Personnel Board’s decision was not arbitrary, and it should control.

The final order of the Personnel Board added the following findings of fact to the Hearing Officer’s recommended order:

23. The Chairman of the KHRC, Robert M. Beck, Jr., and the then Acting Executive Director of the KHRC, Marc Guilfoil, both concurred with Secretary Vance in the decision to terminate Veitch from his non-merit employment.

24. The Board finds that Robert Vance as Secretary of the Public Protection Cabinet is the Agency head for that Cabinet and for all the agencies attached to it, including the KHRC.

25. The Board finds that Secretary Robert Vance acted in terminating the employment of John Veitch under the expressed and implicit authority set forth in KRS 18A.005(1), and the expressed and implicit authority set forth at KRS 12.270(3) and (4). The Board finds that the enumeration of duties associated with that Executive Director of the KHRC set forth in KRS 230, *et seq*, did not and does not confer sole and exclusive authority over personnel and programs in the KHRC to that Executive Director. The Board finds that a plain reading of the statutes listed *infra* clearly granted the authority to Secretary Robert Vance to terminate the employment of John Veitch as Chief State Steward.

(Final Order, p.2). It also added the following conclusions of law to the Hearing Officer's recommended order:

5. The Board concludes as a matter of law that the Secretary of the Public Protection Cabinet, Robert Vance, had the authority conferred by KRS 18A.005(1) and KRS 12.270(3) and (4) to make the decision to instruct Holly McCoy-Johnson to draft a letter terminating employment of John Veitch as Chief State Steward.

6. The Board concludes as a matter of law that the authority possessed by the Secretary of the Public Protection Cabinet, as outlined in Conclusion of Law paragraph 5 above, does not conflict with the authority granted the Executive Director of the KHRC at KRS 230.230.

7. The Board rejects the Hearing Officer's conclusions that rely on interpretations of Executive Branch Ethics Commission opinions and statutes and regulations of

other states in determining the boundaries and parameters of the Secretary's authority. The Board concludes that Kentucky Statutory law provides ample authority for the Public Protection Cabinet Secretary, as the Agency head, to exercise that authority conferred explicitly and implicitly in KRS Chapter 12 and KRS Chapter 18A to terminate a non-merit employee in an agency under his purview.

8. As a non-merit employee, the Appellant was legally dismissed without cause by Holly McCoy-Johnson at the direction of Secretary Robert Vance.

Id. at 2-3. We find no error with these findings or conclusions.

Two overarching themes guide our decision. First, Veitch was a political appointee and could be fired for any or no reason. "An unclassified employee is a political employee, not a merit employee, and may be discharged for any reason, including a bad reason, no reason or for political reasons so long as there is no statutory authority for a protest." *Martin v. Corrections Cabinet of Com.*, 822 S.W.2d 858, 860 (Ky. 1991).

Second, Veitch received his job because the then-head of the Public Protection Cabinet requested the Governor to appoint him Chief State Steward. His appointment-approval letter specifically delineated Veitch's appointment as follows:

As provided in KRS 12:050 [sic] this is to request your prior written approval of my proposed appointment of John M. Veitch to the position of Chief State Stewart [sic], Horse Racing Authority, Department of Public

Protection, in the Environmental and Public Protection
Cabinet effective July 16, 2005.

This request was made by the then-Secretary of the Environmental and Public Protection Cabinet, and it was approved by then-Governor Ernie Fletcher and then-Personnel Cabinet Secretary Erwin Roberts. During a later reorganization, the Public Protection Cabinet became its own entity, and the Kentucky Horse Racing Authority was renamed the KHRC and placed inside the Public Protection Cabinet. KRS 12.020(II)(4)(f). Thus, under the now-existing structure, Veitch obtained his non-merit job because the Public Protection Cabinet Secretary made the request and the Governor approved it.

These two themes combine to leave one question outstanding: given that Veitch was hired because the Public Protection Cabinet's appointing authority filed a KRS 12.050 request from the Governor, and the Governor approved the request, who had the authority to terminate Veitch's appointment? Veitch argues that only the KHRC's Executive Director had the authority. The Public Protection Cabinet argues that its appointing authority, in addition to the KHRC, had the right to terminate Veitch's non-merit job. An examination of the statutes reveals that the Public Protection Cabinet's statutory interpretation is correct.

As established in the statutes, the KHRC is run by an Executive Director who is appointed by the Governor. KRS 230.225, which created the KHRC, made it to be an "independent agency of state government to regulate the

conduct of horse racing and pari-mutuel wagering on horse racing, and related activities within the Commonwealth of Kentucky.” KRS 230.225(1). The statute specifically delineates that the KHRC is “attached to the Public Protection Cabinet for administrative purposes.” *Id.* KRS 230.230 further establishes that the Governor is to appoint an executive director of the KHRC “who shall serve at the pleasure of the Governor.” KRS 230.230(1). That executive director appoints all staff, KRS 230.230(1)(c), and “may employ, dismiss, or take other personnel action concerning an assistant executive director, stenographers, clerks, and other personnel as he or she may deem necessary to efficiently operate a racing commission’s general office or any branch thereof.” KRS 230.230(2). Likewise, KRS 230.240(1) gives the KHRC’s executive director authority to “employ, dismiss, or take other personnel action and determine the reasonable compensation of stewards[.]”

Accordingly, all parties agree that the KHRC’s executive director could have terminated Veitch’s appointment. But just because the executive director has authority to terminate the Chief State Steward, is that authority exclusive, especially where the KHRC is an agency within the Public Protection Cabinet? Again, we turn to the statutes.

The Public Protection Cabinet's authority over the KHRC is derived first from KRS 12.020. That statute explains general agency relationships between cabinets and departments or programs:

Every authority . . . shall be included in or attached to the department or program cabinet in which they are included or to which they are attached by statute or statutorily authorized executive order; except in the case of the Personnel Board and where the attached department or administrative body is headed by a constitutionally elected officer, the attachment shall be solely for the purpose of dissemination of information and coordination of activities and *shall not include any authority over the functions, personnel, funds, equipment, facilities, or records of the department or administrative body.*

(Emphasis added). This statute contains two independent clauses separated by a semicolon. The restrictions in the latter clause, the Public Protection Cabinet argues, apply only to the Personnel Board and departments headed by constitutionally elected officers. Veitch argues the restrictions apply to the Public Protection Cabinet. Reviewing the statute *in toto*, we agree with the Public Protection Cabinet.

KRS 12.020 establishes first and foremost the "Cabinet for General Government." KRS 12.020(I). This Cabinet includes such elected officers as the Governor, Lieutenant Governor, Attorney General, Secretary of State, Treasurer, and Commissioner of Agriculture. Undoubtedly, the Cabinet for General Government has no authority over the functions, personnel, funds, equipment,

facilities, or records of any of these elected officers' offices. Those powers are precisely what the second clause of KRS 12.020 excises from the first clause. If we were to read this exclusionary clause as applying to administrative bodies other than constitutionally elected officials, then the Cabinet for General Government could make personnel and policy decisions for the Governor. This outcome is clearly not the intent of this statute.⁴

Instead, the second clause exists to limit the first clause only when the administrative body is headed by a constitutionally elected officer, or when the administrative body is the Personnel Board. Thus, exclusions in the second clause do not apply to the Cabinets that fall under the first clause. If the KHRC is the

⁴ A previous version of KRS 12.020 used different language that also comports with our interpretation of the current statute. The statute as it read in 1990 stated:

Every authority, board, bureau, interstate compact, commission, committee, conference, council, office or any other form of organization shall be included in or attached to the department or program cabinet in which they are included or to which they are attached by statute or statutorily authorized executive order, **provided, however, in the case of the Personnel Board, and where the attached department or administrative body is headed by a constitutionally elected officer, such attachment shall be solely for the purpose of dissemination of information and coordination of activities and shall not include any authority over the functions, personnel, funds, equipment, facilities, or records of such department or administrative body.**

(Emphasis added). The phrase "provided, however, . . . such attachment shall be . . ." from the former statute and "except in the case of . . . the attachment shall be . . ." in the current statute read similarly and lead to the same conclusion that the exceptions apply only to the Personnel Board and the offices of constitutionally elected officers.

Personnel Board or is headed by a constitutionally elected officer, only then do the exclusions apply.

Here, the KHRC is an administrative body that falls underneath the Public Protection Cabinet. The KHRC is neither the Personnel Board nor is it headed by a constitutionally elected officer. Thus, none of the KRS 12.020 exclusions applies to it. Instead, KRS 12.252 and KRS 230.225(1) specifically state the KHRC is “attached to the Public Protection Cabinet for administrative purposes[.]” Reading all three statutes *in paria materia* to harmonize and give each statute effect, *Light v. City of Louisville*, 248 S.W.3d 559, 563 (Ky. 2008), the Public Protection Cabinet may perform administrative functions for the KHRC. Administrative functions may include personnel decisions. *Cf. Cornett v. Chandler*, 307 S.W.2d 918, 920 (Ky. 1957) (finding the Governor may delegate his administrative duties, including terminating the employment of peace officers).

Our interpretation of these statutes aligns perfectly with Veitch’s employment. Veitch obtained his non-merit position when the then-secretary of the Environmental and Public Protection Cabinet performed an administrative task for the KHRC – it formally requested the Governor to appoint Veitch as Chief State Steward. The Governor and the Personnel Cabinet Secretary approved. Because the Cabinet had the statutory authority to make personnel decisions, Veitch was validly employed as Chief State Steward.

Veitch's argument on appeal, however, is that the Cabinet does not have the statutory authority to make personnel decisions. His argument, then, ignores the necessary conclusion that his appointment was null and void from the beginning. If we were to find that the Public Protection Cabinet has no statutory authority over the KHRC's personnel, then it had no authority to request the Governor's approval to appoint Veitch. Even if we were to agree with Veitch's statutory interpretation, we would have to reverse and remand the Circuit Court's Order inasmuch as it ordered Veitch's employment be reinstated, as Veitch is not entitled to reinstatement to a position he never validly held.

However, we instead find that the Cabinet has statutory authority to perform administrative functions for the KHRC, which include personnel decisions. Accordingly, the Cabinet's decision to terminate Veitch's appointment was valid. We thus reverse and remand the Franklin Circuit Court's Order inasmuch as it found that the Public Protection Cabinet's appointing authority did not have the power to terminate Veitch's employment as Chief State Steward.

CONCLUSION

Veitch is not entitled to reinstatement to his non-merit position. Veitch was a non-merit employee who could be terminated at any time for no cause. The Public Protection Cabinet, who hired Veitch in the first place, had the authority to terminate Veitch. Accordingly, the Personnel Board's Final Order,

which finds the Public Protection Cabinet's appointing authority has the statutory authority to terminate a KHRC employee's non-merit job, is not erroneous. The Franklin Circuit Court's order to the contrary is reversed and remanded with instructions to find Veitch was terminated by the appropriate appointing authority.

ALL CONCUR.

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Thomas W. Miller
Elizabeth C. Woodford
Lexington, Kentucky

NOV 26 2014

Opinion and Order
13-CI-00895

Personnel Board
COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II

CIVIL ACTION No. 13-CI-00895

ENTERED
NOV 25 2014 SA
FRANKLIN CIRCUIT COURT
SALLY JUMP, CLERK

JOHN VEITCH

PETITIONER

vs.

PUBLIC PROTECTION CABINET, et al.

RESPONDENTS

OPINION AND ORDER

This matter is before the Court upon Petitioner's *Petition*. Upon review of the parties' briefs and papers, and after being sufficiently advised, this Court hereby **REVERSES** the Final Order of Respondent, Kentucky Personnel Board.

STATEMENT OF FACTS

Petitioner, John Veitch (hereinafter "Veitch"), was employed by the Kentucky Horse Racing Commission (hereinafter "KHRC") as Chief State Steward for thoroughbred races from July 1, 2005 until the date of his termination. Veitch was given notice of his termination in a letter dated November 28, 2011. The termination letter was signed by Holly McCoy-Johnson, Appointing Authority, with the consent of Secretary Robert Vance, Secretary of the Public Protection Cabinet. By Final Order dated July 16, 2013, Respondent, Kentucky Personnel Board (hereinafter "Board"), upheld Veitch's termination and overturned the Hearing Officer's Findings of Fact, Conclusions of Law and Recommended Order which ruled that Veitch's termination was void *ab initio*.

Veitch appeals to this Court, maintaining that the Final Order must be reversed for several reasons. First, reversal is warranted since Veitch's termination was by a person

other than the appointing authority. Second, reversal is mandated because Veitch was a "merit" employee, and his termination was without cause, violating proper procedure. Third, Veitch argues his termination should be reversed because such action was in retaliation for the exercise of his legal rights challenging disciplinary charges brought against him by the Kentucky Horse Racing Commission. The Court will review each argument in turn.

ANALYSIS

I. Standard of Review

In reviewing an agency decision, this Court may only overturn that decision if the agency acted arbitrarily or outside the scope of its statutory authority, if the agency applied an incorrect rule of law or if the decision itself is not supported by substantial evidence on the record. *See Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 301 (Ky. 1972); *see also Kentucky Board of Nursing v. Ward*, 890 S.W.2d 641, 642-43 (Ky. Ct. App. 1994). "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). Arbitrariness means "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). Substantial evidence is "evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable men." *Fuller*, 481 S.W.2d at 308.

If it is determined that the Board's findings are supported by substantial evidence, the next inquiry is whether the agency has correctly applied the law to the facts as found. *Kentucky Unemployment Ins. Comm'n v. Landmark Cmty. Newspapers of Kentucky, Inc.*, 91 S.W.3d 575, 578 (Ky. 2002); quoting *Southern Bell Tel. & Tel. Co. v. Kentucky Unemployment Ins. Comm'n*, 437 S.W.2d 775, 778 (Ky. 1969). Questions of law arising out of administrative proceedings are fully reviewable *de novo* by the courts. *Aubrey v. Office of Attorney General*, 994 S.W.2d 516, 519 (Ky. Ct. App. 1998). 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. *Ward*, 890 S.W.2d at 642.

II. Argument

a. Introduction

The Board issued its Final Order on July 16, 2014. In that Order, the Board altered the Recommended Order and found that Veitch was appointed Chief State Seward pursuant to KRS 12.050 as a non-merit, unclassified employee and that Veitch's termination was achieved through the appropriate appointing authority. For the reasons discussed below, the Court agrees that Veitch was appointed Chief State Seward as a non-merit, unclassified employee but disagrees with the Board's conclusion that Veitch's termination was achieved through the appropriate appointing authority. Because the termination action originated from the Public Protection Cabinet and not the Kentucky Horse Racing Commission, the improper appointing authority initiated the action, rendering Veitch's termination void.

b. Veitch Served as a Non-Merit, Unclassified Employee

The Board amended the Hearing Officer's Recommended Order to conclude that "Veitch [. . .] was appointed Chief State Steward pursuant to KRS 12.050. He was hired to this non-merit position [. . .] after a letter, in compliance with KRS 12.050, was signed by the Appointing Authority and approved by then Governor Fletcher." The Court agrees with the Board that the procedures used to fill the Chief State Steward in Veitch's case are the procedures used to hire a non-merit, unclassified employee.

The non-merit position of Chief State Steward was established June 16, 1999. Until March 16, 2006, a merit position of Chief State Steward also existed. The merit position was abolished, and there is no longer a corollary merit position of Chief State Steward. When Veitch was hired as Chief State Steward, then Governor Fletcher and the Appointing Authority signed a "12:050" letter, effective July 16, 2005, appointing him to that position. This process is never, and cannot be, utilized in the hiring of merit employees. The record reflects that Veitch's position was characterized and coded as a non-merit position at the time he was appointed and throughout his tenure as Chief State Steward. The Court sees no reason to disturb the Board's conclusion that Veitch's service as Chief State Steward was in the capacity of a non-merit, unclassified employee.

c. Appointing Authority

The question presented by the facts of this case is whether Secretary Vance has the authority as Appointing Authority to terminate employees of KHRC, which is attached to the Cabinet for administrative purposes. In Kentucky, each administrative body established by statute or statutorily authorized executive action is to be included for administrative purposes in an existing department or program cabinet. KRS 12.015.

Pursuant to KRS 12.020, the KHRC is attached to the PPC for administrative purposes only. KRS 12.020 provides that

[. . .] except in the case of the Personnel Board and where the attached department or administrative body is headed by a constitutionally elected officer, the attachment shall be solely for the purpose of dissemination of information and coordination of activities and shall not include any authority over the functions, personnel, funds, equipment, facilities, or records of the department or administrative body.

As the Hearing Officer wisely noted, there is scant case law available “to address specifically what the Kentucky Legislature meant by attaching an administrative body such as the KHRC to a program Cabinet, such as the PPC ‘for administrative purposes.’”

The term “Appointing Authority” a term of art in state personnel law. KRS 18A.005 defines “Appointing Authority” as “[meaning] the agency head or any person whom he has authorized by law to designate to act on behalf of the agency with respect to employee appointments, positions establishments [. . .], or other personnel actions.” Robert Vance, as Secretary of the Public Protection Cabinet, is the Cabinet’s Appointing Authority. His authorization signature form conferring Vance that authority was signed and dated June 16, 2008. Secretary Vance signed an authorization signature form on February 4, 2009, designating Holly McCoy-Johnson as Appointing Authority for the Cabinet. There is no question that if Secretary Vance is the KHRC Appoint Authority that Ms. McCoy-Johnson is duly designated to act in his stead.

The KHRC was created as an independent agency of state government with the purpose of regulation of the conduct of horse racing and pari-mutuel wagering on horse racing and related activities in the Commonwealth. KRS 230.230(1)(c). The Governor appoints the KHRC’s Executive Director, who serves at the pleasure of the Governor. Among the duties delegated the KHRC’s Executive Director is the duty to appoint all

staff. *Id.* The KHRC has also promulgated a regulation on point. 810 KAR 1:005, Section 2 provides that the Chief Steward shall be employed and compensated by the Commission. Moreover, Stewards are responsible only to the Commission and may be replaced by the Commission at any time for failure to perform their duties to the satisfaction of the Commonwealth.

Even though all the necessary and appropriate agency heads and authorities concurred in terminating Veitch, Secretary Vance took unilateral action in terminating Veitch. While this may be a distinction without a different result at the end of the day, this Court believes that, because the KHRC is a statutorily created independent agency of state government, Secretary Vance did not have authority to terminate Veitch. Because all personnel decisions regarding KHRC staff must come through the KHRC Executive Director, Veitch's termination was illegal. The PPC is involved in KHRC hiring and firing to the limited extent that such administrative paperwork must be processed through the Cabinet. The Hearing Officer concluded, and this Court agrees, that "[t]he statutes and regulations make it clear that such personnel actions must originate from within the KHRC." Because this termination did not originate from the KHRC, his termination was improper. The Board rejected the Hearing Officer's Conclusion to this effect, and accordingly, the Board's Final Order is erroneous. The Board's finding and conclusion that "[. . .] Robert Vance as Secretary of the Public Protection Cabinet is the Agency head for that Cabinet and for the agencies attached to it, including the KHRC[.]" is incorrect and must be reversed.

d. Veitch's Retaliation and Discrimination Claims

The Board found against Veitch on his claim of age discrimination, and Veitch did not appeal that portion of the Board's Final Order. Regarding Veitch's claim of retaliation for exercising rights in disciplinary hearing in relation to termination, the Board found against Veitch, Veitch did appeal that portion of the Final Order. Because the Court finds that Veitch's termination is void, as it was initiated and completed by the incorrect appointing authority, the Court declines to consider Veitch's claim that his termination was based in part on his exercise of his due process rights in challenging the KHRC's disciplinary action against him.

III. Conclusion

As a non-merit employee, Veitch could be terminated without cause. However, because Veitch was terminated by someone other than the appropriate appointing authority, his termination is void. Veitch is hereby reinstated, with back wages, to his position as Chief State Steward.

WHEREFORE, the Final Order of Respondent, Kentucky Personnel Board, is **REVERSED**.

This order is final and appealable and there is no just cause for delay.

SO ORDERED, this 24th day of November, 2014.



THOMAS D. WINGATE
Judge, Franklin Circuit Court

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Order was mailed, this 25th day of November, 2014, to the following:

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Sally Jump, Franklin County Circuit Court Clerk