

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II

CIVIL ACTION No. 17-CI-00521¹

ENTERED
SEP 30 2021
FRANKLIN CIRCUIT COURT
AMY FELDMAN, CLERK

TAMARA SAPP

PLAINTIFF

vs.

RECEIVED

PUBLIC PROTECTION CABINET
DEPARTMENT OF CHARITABLE GAMING;

OCT 04 2021

and

Personnel Board

KENTUCKY PERSONNEL BOARD

DEFENDANTS

OPINION AND ORDER

This matter is before the Court upon Petitioner's, Tamara Sapp, *Petition on Appeal*. Upon review of the parties' briefs and papers, and after being sufficiently advised, the Court hereby **AFFIRMS** the Final Order of Defendant, Kentucky Personnel Board.

STATEMENT OF FACTS

Petitioner, Tamara Sapp, was employed as an Auditor II by Defendant, Public Protection Cabinet, Department of Charitable Gaming. Petitioner began employment in 1994. Petitioner's job duties included performing audits of financial records, reports, and statements of entities licensed by the Department of Charitable Gaming. Specifically, Petitioner was to review records of those entities, both on site and at the Department of Charitable Gaming, prepare documents regarding the audits, provide the necessary training and assistance to those entities, and work with law enforcement. Petitioner's performance evaluation for the year 2015 yielded a score of 155.

¹ Consolidated with Franklin Circuit Court Case No. 18-CI-00366.

Petitioner appealed that score to the Kentucky Personnel Board, which upheld the score of 155. The next year, Petitioner received an Unacceptable score of 132. As a result of the Unacceptable score of 132, Petitioner was terminated from her position. Again, Petitioner appealed to the Kentucky Personnel Board. The Kentucky Personnel Board upheld Petitioner's Unacceptable score of 149 as it was supported by substantial evidence. This suit followed. Petitioner's argument on appeal is that her evaluation score was unfair, as she was scored for work not assigned to her.

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)). 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); *See also City of Louisville by Kuster v. Milligan*, 798 S.W.2d 454, 458 (Ky. 1990). Substantial evidence is evidence of substance and 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

Petitioner argues that her evaluation was not fairly scored due to her supervisor's "personal animosity" towards her and subjective opinion that Petitioner could not perform certain work. As a result, Petitioner received deficient scores in categories that she claims no work was assigned to her. Petitioner asserts that this was arbitrary and capricious, and the Kentucky Personnel Board's Final Order is without the support of substantial evidence. Additionally, Petitioner avers that the Department of Charitable Gaming did not consider demoting her to the Auditor I position when it was available, asking the Court to remand the matter to the Kentucky Personnel Board so that may be considered.

Defendants contend that there is ample evidence in the record that demonstrates Petitioner did not meet the expectations of her employment and supports an Unacceptable score. For instance, Defendants direct the Court to testimony before the Kentucky Personnel Board that Petitioner was provided with constant feedback and teaching from her supervisors as well as a performance improvement plan, concluding with Petitioner showing no improvement and a lack of ability to perform her job duties. Reviews of Petitioner's audit work, according to Defendants, evidence glaring errors in Petitioner's work.

For the following reasons, the Court agrees with Defendants and will affirm the Final Order

of the Kentucky Personnel Board. There is substantial evidence in the record supporting the Final Order of the Kentucky Personnel Board, beginning with the testimony of Petitioner's supervisor, Charles Brock. Mr. Brock testified that he gave Petitioner numerous opportunities to correct her work performance, including constant coaching, feedback, and a performance improvement plan. Petitioner did not follow the performance improvement plan, nor did her job performance improve after assistance from Mr. Brock. During the course of her employment, the record reflects that Petitioner engaged in a pattern of addressing her supervisors insubordinately and refused to consider corrections to her audit work. Further, Robin Birdsell, Auditor IV, performed reviews of Petitioner's audit work. At the hearing, those reviews were introduced into the record and demonstrate that Petitioner's audits were disorganized, erred grammatically and mathematically, and omitted monetary deposit values. Taken together, this evidence is substantial evidence in support of the Kentucky Personnel Board's Final Order affirming Petitioner's dismissal and Unacceptable evaluation score of 132. The Kentucky Personnel Board also applied the correct rule of law to the facts by placing the burden on the agency to prove, by a preponderance of the evidence, the propriety of the termination and concluding that the agency had shown by a preponderance of the evidence that there was just cause for dismissal of Petitioner and it was neither excessive or erroneous. *See* KRS § 18A.095(1); KRS § 13B.090(7). As the Final Order was supported by substantial evidence and the correct rule of law was applied to the facts, the Final Order must be affirmed. *Ward*, 890 S.W.2d at 642.

Finally, Petitioner's contention that the Department of Charitable Gaming acted arbitrarily in terminating her instead of demoting her is without merit. 101 KAR 2:180 § 8 provides: "If an employee receives an overall rating of unacceptable, the agency shall: (1) Demote the employee to a position commensurate with the employee's skills and abilities; or (2) Terminate the

employee.” Thus, after Petitioner received the Unacceptable score, the Department of Charitable Gaming had two options: demote or terminate Petitioner. There is nothing in 101 KAR 2:180 § 8 that requires demotion of an employee that receives an Unacceptable evaluation score. Rather, it is within the agency’s discretion in choosing between demotion or termination. In the present case, the Department of Charitable Gaming chose to terminate Petitioner, an action within its discretion according to the regulation. The Department of Charitable Gaming, therefore, did not act arbitrarily in terminating Petitioner instead of demoting her to a position commensurate with her skills and abilities.

WHEREFORE, the Final Order of the Kentucky Personnel Board is hereby **AFFIRMED**.

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

SO ORDERED, this 24th day of September, 2021.



THOMAS D. WINGATE
Judge, Franklin Circuit Court

CERTIFICATE OF SERVICE

30th hereby certify that a true and correct copy of the foregoing Order was mailed, this day of September, 2021, to the following:

Hon. Mark Sipek
Executive Director
Kentucky Personnel Board
1025 Capital Center Drive, Suite 105
Frankfort, Kentucky 40601

Hon. Elmer George
105 West Main Street
Lebanon, Kentucky 40033

Hon. Jennifer Wolsing
Kentucky Public Protection Cabinet
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Amy Feldman, Franklin County Circuit Court Clerk