19-CI-00718

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II

CIVIL ACTION NO. 19-CI-00718[1]

PAULA WADE **PETITIONER**

v.

EDUCATION AND WORKFORCE DEVELOPMENT CABINET **RESPONDENT**

ORDER

This matter is before the Court on Petitioner's *Petition for Judicial Review*. Upon review of the parties' briefs and papers, and otherwise being sufficiently advised, the Court hereby **AFFIRMS** the June 19, 2019, Final Order of the Kentucky Personnel Board.

BACKGROUND

Petitioner is a Workforce Development Facilitator at the Workforce Development Cabinet (the "Cabinet"). In this position, Petitioner is responsible for investigating disputed insurance claims, determining employee eligibility, and applying federal laws and regulations to unemployment decisions. On February 9, 2018, Petitioner went to the cubicle of a coworker named Kelly Vance ("Vance"). Petitioner said to Vance "hey, don't you look pretty, looks like someone's getting lei'd tonight," in an apparent pun referencing the Hawaiian lei that Vance was wearing. Petitioner then told Vance that she had heard a rumor from a "very reliable source" that Vance and a branch manager named Brian Gustafson

[1] This matter was transferred from Division I to Division II on September 3, 2021, after it was submitted for a decision. On May 25, 2022, this Court was made aware that this action was transferred and had been submitted for a decision and therefore prioritized issuing this Order.

("Gustafson") had been "making out" in a car in the parking lot. Vance tried to get Petitioner to tell her the source of the rumor, but Petitioner refused. Vance was upset by Petitioner's comments and went home from work early.

Petitioner was then disciplined pursuant to 101 KAR 1:345 § 1 and the Cabinet's Anti-Harassment Policy. Petitioner was initially given a written reprimand for the comments. However, Petitioner's discipline was enhanced to a one (1) day suspension due to a previous verbal reprimand and three previous written reprimands. In a letter of suspension sent to Petitioner on February 22, 2018, the Cabinet stated that her actions constituted "abusive verbal language" and "vulgar and indecent jokes" which were "inappropriate, disruptive to the workplace and in violation of the Cabinet's Anti-Harassment Policy Statement you signed as received and understood most recently on November 15, 2017." The letter also stated that Petitioner's actions constituted "a lack of good behavior for which you may be disciplined pursuant to 101 KAR 1:345, Section 1."

Petitioner thereafter filed an appeal with the Kentucky Personnel Board ("the Board"). An administrative hearing was held on December 10 and 11, 2018. On March 12, 2019, the Hearing Officer issued his proposed Findings of Fact, Conclusions of Law, and a Recommended Order. In the Hearing Officer's findings, he noted that Petitioner suffers from Gulf War Syndrome, bi-polar disorder, and obsessive-compulsive disorder. Petitioner's Gulf War Syndrome resulted in fatigue, headaches, and memory problems. She is considered eighty percent (80%) disabled by the Veterans Administration. The combination of her conditions causes her anxiety and difficulty in arriving at work on time, focusing, and following instructions. These conditions began impacting her work in 2015. In December 2016, accommodations such as over-the-ear noise canceling headphones, a

privacy screen in her cubicle, frequent breaks, and a more flexible work schedule were suggested by the Office of Vocational Rehabilitation.

Ultimately, the Hearing Officer recommended that the disciplinary action be sustained but modified. In his Conclusions of Law, the Hearing Officer determined that while Petitioner's conduct did not implicate either Title VII of the Civil Rights Act or KRS Chapter 344, her conduct did constitute a violation of the Cabinet's Anti-Harassment Policy banning sexually indecent jokes. As such, the Hearing Officer found that Petitioner's one (1) day suspension was "excessive and erroneous in view of all the surrounding circumstances" and recommended that the suspension be overturned pursuant to KRS 18A.095(22)(c). He found that the Cabinet has a duty to accommodate Petitioner's disability, a duty to take her disability into account in instances where Petitioner is alleged to have misbehaved in the workplace, and a duty to consider her disability when determining the severity of discipline. He found that the severity of the discipline administered to Petitioner reflected a failure by the Cabinet in performing these duties. He recommended that a written reprimand replace the suspension.

On June 19, 2019, the Board entered a Final Order which altered the Hearing Officer's proposed findings. The Board determined that Petitioner had committed the conduct that was alleged in the suspension letter and that the one-day suspension was an appropriate disciplinary action. While the Board agreed that Petitioner's conduct did not rise to a level that would implicate Title VII of the Civil Rights Act or KRS Chapter 344, it found that such conduct can still constitute misconduct under 101 KAR 1:345. The Board found that because her actions constituted 101 KAR 1:345 misconduct and because of her record of performance that the one (1) day suspension "was taken with just cause and is

neither excessive nor erroneous in light of all the surrounding circumstances," even in light of her mental illness and requests for accommodation.

Petitioner then filed her present Petition with this Court, seeking judicial review pursuant to KRS 13B.140 and KRS 18A.100. Petitioner argues that the Board improperly upheld a one (1) day suspension by failing to consider Petitioner's Gulf War Syndrome as the partial cause of her behavior. Moreover, she asserts that evidence beyond the administrative record was considered in deciding to grant her suspension and that the decision to suspend her was not supported by substantial evidence. The Cabinet contends that the Final Order was supported by substantial evidence and because Petitioner's sexual joke constituted sufficient misconduct to uphold her suspension.

STANDARD OF REVIEW

"Any final order of the board either upholding or invalidating the dismissal, demotion, suspension, or other penalization of a classified or an unclassified employee may be appealed either by the employee or by the appointing authority." KRS 18A.100(1). "The party aggrieved may appeal a final order by filing a petition with the clerk of the Franklin Circuit Court in accordance with KRS Chapter 13B." KRS 18A.100(2). Pursuant to KRS 13B.150(2), a reviewing court:

> shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the final order or it may reverse the final order, in whole or in part, and remand the case for further proceedings if it finds the agency's final order is:
>
> (a) In violation of constitutional or statutory provisions;
> (b) In excess of the statutory authority of the agency;
> (c) Without support of substantial evidence on the whole record;
> (d) Arbitrary, capricious, or characterized by abuse of discretion;
> (e) Based on an ex parte communication which substantially prejudiced the rights of any party and likely affected the outcome of the hearing;

> (f) Prejudiced by a failure of the person conducting a proceeding to be disqualified pursuant to KRS 13B.040(2); or
> (g) Deficient as otherwise provided by law.

KRS 13B.150(2). "[R]eview of a final order shall be conducted by the court without a jury and confined to the record, unless there is fraud or misconduct involving a party engaged in administration of this chapter." KRS 13B.150(1).

When reviewing an agency's final order, the Court may 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 consequences, having the fitness to induce conviction in the minds of reasonable men." *Fuller*, 481 S.W.2d at 308. Where the finding of an administrative decision is adverse to a petitioner, the Court asks on review whether the evidence in the applicant's favor was so overwhelming as to compel a finding in his favor. *Bourbon County Bd. of Adjustment v. Currans*, 873 S.W.2d 836 (Ky. Ct. App. 1994).

If the Court determines that substantial evidence supports the agency's findings, the Court must next decide if the law was correctly applied 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). Because an agency's conclusions of law are reviewed *de novo*, courts are not bound by erroneous administrative interpretations or misapplications of the law. *Freeman v. St. Andrew Orthodox Church, Inc.*, 294 S.W.3d 425, 428 (Ky. 2009); *Aubrey v. Office of Attorney General*, 994 S.W.2d 516, 519 (Ky. Ct. App. 1998). Therefore, if substantial evidence supports an administrative agency's findings, and if the agency applied the correct rule of law, the Court accepts the agency's findings. *Kentucky Bd. of Nursing v. Ward*, 890 S.W.2d 641, 642 (Ky. Ct. App. 1994).

ANALYSIS

In the case at bar, the Court agrees with the Board that Petitioner's one (1) day suspension is supported by substantial evidence of record and therefore the Court is required to defer to the Board's determination. 101 KAR Chapter 1 governs actions taken by the Board. The chapter provides that "[a]ppointing authorities may discipline employees for lack of good behavior or the unsatisfactory performance of duties." 101 KAR 1:345 § 1. The Cabinet's Anti-Harassment Policy prohibits sexually indecent jokes in the workplace. It is the case that the Anti-Harassment Policy and the prohibitions therein are not itself binding authority upon the Board since they are not an administrative regulation. *See* KRS 13A.010(2)(a). However, the Board is permitted to consider internal policies when determining what sort of behavior constitutes misbehavior in different work environments.

The Court finds that the Board properly considered the Cabinet's Anti-Harassment Policy and its prohibition against sexually indecent jokes when determining what constitutes misbehavior under 101 KAR 1:345. Additionally, evidence of record supports the Board's finding that Petitioner engaged in the charged conduct. Vance testified at the administrative hearing that Petitioner stated to her that it "looks like someone is getting lei'd tonight." Vance also testified that Petitioner told her about a rumor going around that Vance had "made out" with Gustafson. Vance testified that the conversation upset her to the point that she took the rest of the day off. Workforce Operations Manager Jamie Keith also testified that she heard Petitioner make a comment about "getting 'laid'" to Vance. This evidence is sufficiently substantial to uphold the determination of the Board.

The Court notes that Petitioner's testimony at the evidentiary hearing deviated from the testimony of Vance and Keith. However, the Court's function in cases such as these is to review administrative decisions to ensure that substantial evidence supports them and that applicable law has been applied correctly; the Court's role is not to reweigh evidence already considered by the trier of fact. "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, 410 (Ky. Ct. App. 1994). A reviewing court must follow the principle that the "trier of facts is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses appearing before [it]." *Fuller*, 481 S.W.2d at 308. As long as substantial evidence supports the agency's findings, the Court must defer to the agency, even if conflicting evidence exists. *Kentucky Comm'n on Human Rights v. Fraser*, 625 S.W.2d 852, 856 (Ky. 1981).

While Petitioner testified at the administrative hearing that Vance was not offended by the comment and that the conversation between Petitioner and Vance was a typical humorous conversation between the two, there has also been evidence presented to the contrary. Vance herself testified that she was upset by the conversation and that she took the rest of the workday off as a result. The agency, which serves as factfinder in administrative hearings, was tasked with weighing the evidence and concluded that the comments made to Vance were violative of the Anti-Harassment Policy as having a sexual connotation; by extension, the violation of the policy informed the determination that Petitioner had engaged in misconduct violative of 101 KAR 1:345. The Court does not reweigh evidence already weighed at the administrative hearing, and therefore the mere fact of conflicting testimony is not enough to overturn the result upon this Court's review.

CONCLUSION

In sum, substantial evidence supports the finding that Petitioner made a sexually charged comment to a fellow coworker in violation of the Cabinet's Anti-Harassment Policy. This violation informed the finding that Petitioner engaged in 101 KAR 1:345 misconduct. Although Petitioner's testimony conflicted with the testimony of others regarding the nature of the exchange, the Court does not reweigh evidence upon review of an administrative decision. However, Petitioner does not deny making the comment either, and regardless of context the statement to Vance would hold a sexual connotation. Further, the one (1) day suspension was not excessive and was appropriate. The decision was made in light of all applicable circumstances, including Petitioner's Gulf War Syndrome. Because substantial evidence supports the action of the Board, and the Final Order is neither arbitrary nor capricious, the Court will not disturb the result on review.

WHEREFORE, the June 19, 2019, Final Order of the Kentucky Personnel Board is **AFFIRMED**.

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

So **ORDERED** this 31st day of May, 2022.

/s/ HON. THOMAS DAWSON WINGATE
electronically signed
5/31/2022 3:59:49 PM ET

THOMAS D. WINGATE
Judge, Franklin Circuit Court

CERTIFICATE OF SERVICE

31st I hereby certify that a true and correct copy of the foregoing Order was mailed, this day of May, 2022, to the following:

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Amy Feldman - KBM

Amy Feldman, Franklin County Circuit Court Clerk

Entered 19-CI-00718 06/01/2022 Amy Feldman, Franklin Circuit Clerk