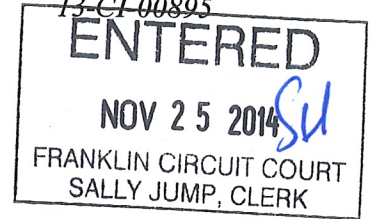


COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II

CIVIL ACTION No. 13-CI-00895

Opinion and Order

13-CI-00895



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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