

RENDERED: JULY 15, 2016; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

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.

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

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.”

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

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 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

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).

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.

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 Veitch 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.

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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 KRS 18A.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 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

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.

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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