

IN THE COURT OF APPEALS OF TENNESSEE

AT KNOXVILLE

FILED

November 30, 1999

**Cecil Crowson, Jr.
Appellate Court Clerk**

JOHN CUPP, Sheriff of Hamilton)	C/A NO. 03A01-9810-CH-00320
County, and the HAMILTON COUNTY)	
SHERIFF’S DEPARTMENT,)	HAMILTON CHANCERY
)
Plaintiffs-Appellees,)	HON. HOWELL N. PEOPLES,
) CHANCELLOR
vs.)	
)
MARK KIMSEY and the HAMILTON)	
COUNTY SHERIFF’S DEPARTMENT)	
CIVIL SERVICE BOARD,)	AFFIRMED
) AS
Defendants-Appellants.)	MODIFIED

TERRY L. MCGHEHEY, Special Counsel of Hamilton County Attorney’s Office, Chattanooga, for Plaintiffs-Appellees.

W. GERALD TIDWELL, JR., Chattanooga, for Appellant, Mark Kimsey.

OPINION

Franks, J.

In this action, the Trial Judge remanded the case to the Civil Service Board to make further findings, and Officer Mark Kimsey (“appellant”) has appealed. Appellant’s supervisor disciplined appellant for insubordination, and a Disciplinary Committee of the Sheriff’s Department investigated the matter and concluded the charges

against appellant were substantiated.

Appellant requested a hearing before the Civil Service Board, and after an evidentiary hearing, a divided Board reinstated appellant to his previous rank with full back pay, and reversed a ten day suspension.

The Civil Service Board found that “the evidence submitted did not support the charge of Conduct Unbecoming An Officer in that Officer Kimsey’s actions were not in violation of policy/procedure governing performance of duty and insubordination.”

The Sheriff filed a Petition for Writ of Certiorari and Judicial Review, and the Chancellor found that he could not determine whether the Civil Service Board used the appropriate standard of review in rendering its decision, and remanded the case to the Board to determine if the Sheriff acted 1) for political reasons, 2) for personal reasons, 3) based upon improper procedure, or 4) based upon an arbitrary interpretation of cause.

The trial court reviews the Civil Service Board’s actions pursuant to the standard set forth in Tenn. Code Ann. §4-5-322 (h), which states:

The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
- (5) Unsupported by evidence which is both substantial and material in the light of the entire record.

In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

- (i) No agency decision pursuant to a hearing in a contested case shall

be reversed, remanded or modified by the reviewing court unless for errors which affect the merits of such decision.

Neither this Court nor the Trial Court can re-weigh the evidence presented to the Civil Service Board. *See Watts v. Civil Service Bd. for Columbia*, 606 S.W.2d 274 (Tenn. 1980.)

The Civil Service Board found the evidence did not support the charge against appellant, but appellant argues that the standard of review which the Trial Court ordered the Civil Service Board to apply is improper, because it is contained in the section of the Civil Service Manual entitled “Termination” and appellant was not terminated. The section which the Trial Court relied upon specifically and expressly states that “the Sheriff . . . shall not arbitrarily terminate, **suspend**, or **demote** existing employees on a permanent status for political or personal reasons,” (emphasis supplied) and then further states:

If the Civil Service Board finds that the Sheriff has not complied with procedures established herein, or if the suspension has occurred for political or personal reasons, or if the Sheriff has acted arbitrarily in the interpretation of cause, then the Board may order reinstatement with full back pay to the employee.

Based upon the wording of this section, the Trial Court found that the standard of review contained therein would apply to this case. Since the Civil Service Board’s written summary/order did not specifically find that the Sheriff had acted in violation of Section 1122, the Court found that a remand was necessary to the Board, with instructions that the Board state its reasons for the decision within the proper context of its standard of review.

The Civil Service Manual expressly deals not only with termination, but with demotion and suspension, as well, and there is no other section of the manual in the record which provides a different standard of review with regard to demotion. Thus, the Trial Court’s interpretation with respect to the standard of review contained therein was appropriate.

Appellant contends that even if the standard of review contained in this record applies, the Board’s summary finding was sufficient to show the Sheriff acted arbitrarily.

The Term “arbitrarily” is not defined in the Civil Service Manual, but the case law in Tennessee gives some guidance as to its meaning. See *State ex rel. Nixon v. McCanless*, 141 S.W.2d 885 (Tenn. 1940) (“‘arbitrarily’ means in an arbitrary manner; and . . . ‘based alone upon one’s will, and not upon any course of reasoning and exercise of judgment.’”); *Waller v. Skelton*, 211 S.W.2d 445 (Tenn. 1948) (“‘capriciously’ is synonymous with ‘arbitrarily,’ which is defined as ‘without fair, solid, and substantial cause; and without reason given; without any reasonable cause.’”); *Wright v. Tennessee Bd. of Dispensing Opticians*, 759 S.W.2d 929 (Tenn. Ct. App. 1988) (“[t]he Board’s decision, ‘willful and unreasoning action, without consideration and in disregard of the facts or circumstances of the case, or the result of an unconsidered willful and irrational choice of conduct, rather than of a sifting and winnowing (sic) process,’ is, by the very definition of the phrase, arbitrary and capricious.”).

Assuming *arguendo* without deciding that the Sheriff acted arbitrarily in the discipline which was given Kimsey, based upon the above definitions, the Board is required to specifically find such. The Board must comply with the standard of review set forth in their manual, to reach that decision. The matter is remanded to the Board to set forth its decision in accordance with the manual and state its findings in compliance therewith.

The Board is directed to proceed with its review with all reasonable dispatch, since the matter has now been pending for over four years, and it is not fair to the parties involved to further delay the resolution of this dispute. The Board is directed to set forth its findings on the transcript of evidence and resubmit its finding to the Chancellor within sixty days of the receipt of the record, in order that they may be properly reviewed by the Trial Court.

Appellees raise the issue of whether the Civil Service Board acted outside the scope of its authority in reversing appellant’s ten day suspension. It does not appear this issue was raised in the Trial Court, and we will not consider it on appeal.

The remand ordered by the Chancellor is affirmed and the Board is instructed to comply with the directives set forth in this Opinion. The cost of the appeal, in our discretion, is taxed one-half to each party.

Herschel P. Franks, J.

CONCUR:

Houston M. Goddard, P.J.

D. Michael Swiney, J.