IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-CC-00437 COA

MISSISSIPPI DEPARTMENT OF PUBLIC SAFETY **APPELLANT**

v.

CECILIA KAZERY **APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	3/11/96
TRIAL JUDGE:	HON. L. BRELAND HILBURN, JR.
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	JAMES E. YOUNGER JR.
ATTORNEY FOR APPELLEE:	MICHAEL BOLAND
NATURE OF THE CASE:	CIVIL - STATE BOARDS AND AGENCIES
TRIAL COURT DISPOSITION:	REVERSED EAB ORDER SUSPENDING KAZERY WITHOUT PAY FOR 5 DAYS
DISPOSITION:	REVERSED - 12/16/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/4/98

BEFORE THOMAS, P.J., HERRING, AND HINKEBEIN, JJ.

HINKEBEIN, J., FOR THE COURT:

During October of 1992, Cecilia Kazery, a trooper with the Mississippi Highway Safety Patrol, was suspended for five days without pay for her confessed on-duty sexual liaisons with a fellow trooper holding a position supervisory to her own. Following the Department of Public Safety (DPS) Personnel Review Board's finding that the charges against her were founded, Kazery appealed the action to the Mississippi Employee Appeals Board (EAB), as provided by Section 25-9-131 of the Mississippi Code (Rev. 1991). Thereafter, EAB Chief Hearing Officer William H. Smith, III opined that Kazery had failed to meet her burden to show that the suspension was extreme or without merit. From this opinion and order, Kazery requested a review of her case by the full EAB. The full Board granted Kazery's request for review but found that the order entered by Officer Smith was proper. Subsequently, Kazery petitioned the Circuit Court of Hinds County for judicial review of the order of the EAB.

Initially, the circuit court remanded for "specific" factual findings illustrating the basis upon which Kazery was disciplined. The EAB responded by characterizing Kazery's conduct as a "clear violation, " finding "her admitted actions to be not only a breach of conduct, but also a possible risk to the persons and property she is duty bound to serve and protect." Finally, on March 11, 1996, the Honorable L. Breland Hilburn, Jr. reversed, finding an insufficient "factual basis within the record" to support the disciplinary action taken against Kazery. Feeling aggrieved by this decision, DPS raises the following issue on appeal:

I. WHETHER THE EAB'S DECISION TO UPHOLD THE FIVE DAY SUSPENSION OF KAZERY IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Finding merit in DPS's assertion, we reverse.

FACTS

During September 1992, Kazery sought assistance from her immediate supervisor with what she viewed to be a potentially dangerous situation. As she explained, she had been engaged in an intimate relationship with a fellow trooper, (then) Captain Jimmy Dees, for some two and one-half years. While the pairing had initially been consensual, matters had deteriorated in recent months after Kazery attempted to end the relationship, citing Dees refusal to leave his wife. Despite her protests, Dees continued to visit and telephone in an effort to win back her affection.

With time, his advances became more frightening for Kazery. His uninvited appearances at her home were marked by physical violence and his intrusive calls contained threats to take his own life as well as hers. Moreover, he frequently warned Kazery against endangering her career by angering a well-connected, ranking officer in a supervisory position such as himself. Upon hearing her concerns, Kazery's supervisor sympathetically assured her that he would assist by bringing Dees' behavior to the attention of the department's Internal Affairs Division.

However, when the two subsequently discussed the matter with an Internal Affairs officer, Kazery divulged additional details of the formerly consensual liaisons that brought into question her own professional judgment. According to the officer's later testimony before the EAB, "She said, 'Well, what will happen to me? I know I've done wrong. I've been with him on duty.'" As Kazery herself subsequently confirmed before the board, to avoid alerting Dees' wife, the two would frequently meet in secret along the less traveled portions of Jackson-area highways and either return together to her home or have sexual relations in one of their official vehicles. Most disturbingly, the activity took place while both were on duty, with the radio dispatcher unaware of their whereabouts in the event of an emergency.

Despite her supervisor's professed satisfaction with Kazery's professional performance, DPS accused her of violating its personnel regulations. Specifically, Kazery was charged under General Order 23/01,III,B,3,k which prohibits "acts of conduct occurring on or off the job which are plainly related to job performance and are of such nature that to continue the employee in the assigned position could constitute negligence in regard to the agency's duties to the public or to other state employees." Pursuant to that allegation, Kazery was disciplined as previously described.

I. WHETHER THE EAB'S DECISION TO UPHOLD THE FIVE DAY SUSPENSION OF KAZERY IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

DPS first alleges that a review of the record reveals error in the circuit court's expressed determination. Specifically, DPS contends that, contrary to the circuit court's decision, the EAB's final order clearly sets forth the factual basis for its finding Kazery's conduct to be in violation of the rule. The department then continues, arguing that had the desired "specific finding" not been included within the EAB's opinion, the circuit court employed an incorrect standard of review in arriving at its decision to reverse. In response, Kazery claims that because neither the enumerated provision nor any other rule applies directly to the facts of the case, she was not afforded constitutionally required meaningful notice. We agree with DPS.

With regard to questions of fact, there is a rebuttable presumption in favor of an administrative agency's finding. ***Board of Law Enforcement Officers Standards and Training v. Butler*, 672 So. 2d 1196, 1199 (Miss. 1996)** (citations omitted). Appellate review is not an appropriate forum for determining whether the action of the agency is best fitted to the situation at hand. ***Id.*** (citing *Miss. Comm'n on Entl. Quality v. Chicksaw County Bd. of Supervisors*, 621 So. 2d 1211, 1215 (Miss. 1993); ***California Co. v. State Oil & Gas Board*, 200 Miss. 824, 27 So. 2d 120 (1946).** Therefore, the decision of an administrative agency is not to be disturbed unless the agency order was unsupported by substantial evidence, was arbitrary or capricious, was beyond the agency's scope or powers, or violated the constitutional or statutory rights of the aggrieved party. ***Id.;*** **Mississippi Code Annotated § 25-9-132 (Rev. 1991).**

As the final EAB order indicates, Kazery confessed to wilfully participating in these on-duty liaisons. The Board characterized Kazery's conduct as a "clear violation" in that she "admittedly engaged in an intimate relationship with a co-worker . . . on numerous occasions . . . [while] being paid by the State of Mississippi to perform her duties as a uniformed officer of the Mississippi Department of Public Safety." Additionally, the EAB hearing transcripts reviewed by the circuit court disclose that rather than denying the behavior, Kazery attempted to excuse it by boasting of her ability to nonetheless perform her duties satisfactorily. From the beginning, Kazery has contended that since she and Dees generally remained within earshot of a radio and thus were never late in arriving on the scene of an accident, her actions were not "related to job performance" as required by the General Order. On the whole, the record enumerates the undisputed factual basis for the disciplinary action as candidly as might reasonably be expected. No fair minded person reviewing it could evaluate these factual findings as being unsupported by substantial evidence. As such, the circuit court's inability to locate a sufficient "factual basis within the record" to support the measures must be taken as a determination that an error of law effected the EAB proceedings.

Review of questions of law is de novo. ***Harrison County v. City of Gulfport*, 557 So.2d 780, 784 (Miss.1990).** Therefore, if erroneous interpretation or application of the law exists, reversal is proper. ***Id.*** However, despite our ordinary review of such questions, we bear some obligation to respect an administrative agency's interpretation concerning administration of laws under which it operates or carries the responsibility of administering. ***Gill v. Miss. Dep't of Wildlife Conservation*,574 So. 2d**

586, 593 (Miss. 1990). We are thus in our familiar posture of reviewing the agency's action for indications of an arbitrary and capricious decision or the violation of a vested constitutional right. ***Id.***

By finding that Kazery's acts were not of the type mentioned within General Order 23/01,III,B, 3, k, the circuit court essentially adopted her argument that DPS took disciplinary action against her for what might have but, in fact, did not happen. Though we too appreciate Kazery's position, we do not find the agency's decision to suspend her to have been either arbitrary or capricious. While she might not have completely disregarded her professional duties, it would have been impossible for her to conscientiously guard the lives and property of the citizens of this State while repeatedly engaging in this type of conduct. The fact that the potential for catastrophe was never realized, negates neither its existence nor the appropriateness of corrective measures.

As for her related claim that the department "made up" the charge, thereby failing to afford her meaningful notice as to the impermissibility of her actions, Kazery relies exclusively on ***Eidt v. City of Natchez,* 421 So. 2d 1225 (Miss. 1982).** In *Eidt,* an improperly dismissed fire fighter was not informed that certain data would be considered during a Civil Service Commission hearing for determining the level of income he reasonably should have earned while discharged. ***Id.* at 1231.**Because the trial court took judicial notice of particular facts contained therein, the fire fighter was precluded from challenging the data's accuracy, questioning its relevance, and showing that his situation sufficiently differed from the "average" figures so as to render them inapplicable. ***Id.*** Our supreme court held that these actions impinged upon traditional requirements of due process and fairness. ***Id.***

In contrast, Kazery's argument focuses on the regulation's lack of specificity rather than her undisputed awareness as to the planned scope of the Personnel Review Board's hearing and accompanying opportunity to respond. Because she contends that General Order 23.01,III,B,3,k both failed to provide her with a reasonable opportunity to know that her behavior was prohibited and encouraged arbitrary and discriminatory enforcement, Kazery's claim is close akin to one of vagueness. ***Grayned v. City of Rockford,* 408 U.S. 104, 108-109 (1972).**

"[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process." ***Meeks v. Tallahatchie County,* 513 So.2d 563, 566 (Miss. 1987)** (quoting *Connally v. General Construction Co.*, 269 U.S. 385, 391-92 (1926)). Generally speaking, the applicable test is "whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." ***Cassibry v. State,* 404 So.2d 1360, 1367-68 (Miss. 1981)** (quoting *Jordan v. DeGeorge,* 341 U.S. 223, 231-32 (1951)). ***See also Reining v. State,* 606 So.2d 1098, 1103 (Miss. 1992).**

We suspect that Kazery is correct in her assertion that upon finding no specific prohibition against inter-departmental fraternization, DPS opted instead to charge her under the only general clause that reasonably seemed to fit the situation. The language, "acts of conduct occurring on or off the job which are plainly related to job performance . . ." is indicative of a residual, catch-all provision. However, this Court would expect reasonable adults to read the language as a proscription against on-duty sexual relations with one's superior while leaving unattended a sworn duty to protect and serve the citizens of this State. Moreover, the record illustrates that this was in fact Kazery's

understanding of the regulation. Prior to any indication that the department would pursue the charges, she stated, "I know I've done wrong. I've been with him on duty." Clearly, Kazery was afforded meaningful notice as to the impermissibility of her actions.

Because the record contains sufficient credible evidence to support a finding that Kazery's admitted behavior fell within the purview of General Order 23/01,III,B,2,k, the judgment of the trial court is reversed, and judgment is rendered here in favor of the Mississippi Department of Public Safety reinstating its order suspending Kazery without pay for a period of five days.

THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT IS REVERSED AND THE DECISION OF THE MISSISSIPPI EMPLOYEE APPEALS BOARD IS REINSTATED. COSTS ARE ASSESSED AGAINST THE APPELLEE.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, KING, AND SOUTHWICK, JJ., CONCUR. PAYNE, J., SPECIALLY CONCURS WITH SEPARATE WRITTEN OPINION.