

IN THE COURT OF APPEALS 04/22/97

OF THE

STATE OF MISSISSIPPI

NO. 95-CC-00487 COA

MISSISSIPPI DEPARTMENT OF WILDLIFE, FISHERIES AND PARKS

APPELLANT

v.

PERRY D. GANN

APPELLEE

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

TRIAL JUDGE: HON. BARRY W. FORD

COURT FROM WHICH APPEALED: ITAWAMBA COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

JOAN MYERS

MICHAEL C. MOORE

ATTORNEY FOR APPELLEE:

DAROLD L. RUTLAND

NATURE OF THE CASE: ADMINISTRATIVE HEARING

**TRIAL COURT DISPOSITION: REVERSED EMPLOYEES APPEALS BOARD DECISION
AND REINSTATED DECISION OF HEARING OFFICER**

BEFORE BRIDGES, C.J., DIAZ, AND KING, JJ.

DIAZ, J., FOR THE COURT:

This appeal arises pursuant to the Appellee, Perry Gann (Gann), an employee with the Department of Wildlife, Fisheries and Parks (Department) being denied two supervisory positions within the Department. Gann initially filed an appeal with the Mississippi Employee Appeals Board alleging that the Department violated State Personnel Board rules and regulations. Gann also asserted a claim pursuant to 42 U.S.C. §1983. A hearing was held where the hearing officer found that Gann's due process rights were violated both in the promotion process, as well as the subsequent grievance. He further found that the due process violations tolled 42 U.S.C. §1983. The hearing officer ordered the Department to promote Gann to one of the positions he had sought or a position of equal rank, salary and benefits. Furthermore, the hearing officer awarded reasonable attorney's fees that were to be determined in a hearing on a later date. The Department filed a request for review by the full board. Following an en banc review, the Employee Appeals Board made the following findings:

- 1) That in the filling of the vacant positions for which Gann had applied, there was no violation of any State Personnel Board rule on filling such vacancies, and there was no written agency policy in effect.
- 2) That there was no violation of Gann's due process rights in the method used by the interview team to make its recommendation for filling the two positions at issue; and
- 3) that Gann had no protected interest in the promotion that he sought.

Gann subsequently appealed to the Itawamba County Circuit Court from the decision of the Employee Appeals Board. Consequently, the circuit court entered an order reversing the findings of the Employee Appeals Board sitting en banc, and reinstating the findings of the hearing officer. The case is now before this Court on appeal from the circuit court's decision to reverse the Employee Appeals Board's findings. The Department has set forth the following issues for consideration on appeal: (1) whether the lower court erred in reversing the findings of the Employee Appeals Board; (2) whether Gann's motion for modification of the hearing officer's order nunc pro tunc was effectively denied by the Employee Appeals Board final decision; and (3) whether Gann is entitled to attorney's fees. We hold that the findings of the Employee Appeals Board were supported by substantial evidence, and therefore, should have been upheld. Accordingly, we reverse the order of the Itawamba County Circuit Court.

FACTS

On September 30, 1991, the Department of Wildlife, Fisheries and Parks announced to its employees the opening of two supervisory positions, one at the John Bell Williams Wildlife Management Area in Itawamba County, and the other at the Divide Section Wildlife Management Area in Tishomingo County. Three applicants applied for each position including Gann, who applied for both positions. Combined interviews were held for the two positions. The interview team consisted of six Department employees, and was chaired by the Chief of the Department's Game Division, Bill Thomason. During each interview, Thomason asked each applicant the same series of fourteen questions. Each member of the interview team then scored the applicants' responses to the questions

on a scale from 1 to 5, with 5 being the highest score. The score for each applicant was then totaled and averaged. The two top scorers, Walter Sellers and Douglas Epps, outscored the other candidates by a considerable margin. Sellers' and Epps' total raw scores were 304 and 300 respectively. Gann's total score was 232. Taking into consideration the interview scores, along with educational backgrounds of the applicants, previous work experience, and performance evaluations, Thomason made a recommendation to Ed Hackett, the Director of the Office of Wildlife and Fisheries, that Sellers and Epps be appointed to the two supervisor positions. Hackett accepted the recommendation and forwarded it to the Executive Director. Sellers and Epps were subsequently appointed to fill the positions.

Following the announcement that Sellers and Epps were to fill the supervisor positions, Gann filed a grievance with his supervisor, Bobby Wilson, alleging that the Department had discriminated against him "based on experiance [sic], time with the agency, education and reprisal against myself for having used the grievance procedure in the past and having current litigation pending against the agency and inconsistency concerning all phases of promotions within the agency." Gann's grievance rose through the ranks until it reached Hackett, the Director. After reviewing the grievance, Hackett believed that Gann's complaint was not an issue for which one could file a grievance based on the State Employee Handbook. In a letter to Gann, Hackett offered to meet with him to discuss the matter; however, Gann never responded to the letter. Instead, he filed an appeal with the Employee Appeals Board.

DISCUSSION

Our standard of review of administrative processes is that we may only interfere where the board or agency's decision is arbitrary and capricious, accepting in principle the notion that a decision unsupported by any evidence is by definition arbitrary and capricious. *Gill v. Miss. Dept. of Wildlife Conservation*, 574 So. 2d 586, 590 (Miss. 1991).

Gann argues that the circuit court was correct in reversing the findings of the Employee Appeals Board and, in turn, reinstating the order of the hearing officer. Gann claims that the findings of the Appeals Board were arbitrary and capricious, and not supported by substantial evidence. Furthermore, he claims that once the Department announced that the supervisory positions were open and the Department was accepting applications, the Department in fact had made the process competitive, and therefore, the Department should have committed itself to an equitable selection process. Gann further insists that he should be entitled to attorney's fees as mentioned in the hearing officer's original order.

Both Gann and the Department cite to Section 25-9-132 (2) of the Mississippi Code to support their argument. That section states:

The scope of review of the circuit court in such cases shall be limited to a review of the record made before the employee appeals board or hearing officer to determine if the action of the employee appeals board is unlawful for the reason that it was:

- (a) Not supported by any substantial evidence;
- (b) Arbitrary or capricious; or

(c) In violation of some statutory or constitutional right of the employee.

Miss. Code Ann. §25-9-132(2) (Rev. 1991). This is the familiar standard of review applicable to findings made by administrative agencies. *See Miss. State Bd. of Pub. Accountancy et al. v. Gray*, 674 So. 2d 1251, 1253 (Miss. 1996); *Sprouse v. Miss. Emp. Sec. Comm.*, 639 So. 2d 901, 902 (Miss. 1994); *Miss. Comm. Environmental Quality v. Chickasaw County Bd. of Sup.*, 621 So. 2d 1211, 1215 (Miss. 1993); *Melody Manor Convalescent Ctr. v. Miss. State Dept. of Health*, 546 So. 2d 972, 974 (Miss. 1989). A reviewing court cannot substitute its judgment for that of the agency or reweigh the facts of the case. *Gray*, 674 So. 2d at 1253. Circuit courts are held to the same standard as this Court when reviewing agency decisions. *Id.* When we find that the lower court has exceeded its authority in overturning an agency decision, we will reverse and reinstate the agency's decision. *Id.* Gann argues that because the circuit court's review is limited to the record made before the hearing officer, the findings of the hearing officer, and not the Employee Appeals Board, should be upheld unless it is unlawful for any of the reasons stated in the statute. The Department cites to *Walker Manufacturing Co. v. Cantrell* where the supreme court held that the Workers' Compensation Commission, and not the administrative judge, is the finder of facts on judicial review. *Walker*, 577 So. 2d 1243, 1245 (Miss. 1991). Therefore, it is the Commission's findings, that are subject to the normal deferential standards, notwithstanding the administrative judge's findings. *Id.* Gann attempts to distinguish the Workers' Compensation Commission from the Employee Appeals Board claiming that the en banc review procedure is merely a creature of the Employee Appeals Board, and therefore, is not the same as the Commission. Gann assumes that the Employee Appeals Board is an appellate tribunal, thereby arguing that it could not merely substitute its judgment for that of the original fact-finder, the hearing officer. The supreme court addressed this issue in *Cantrell* when it stated:

The [Workers' Compensation] Commission is not technically a court of appeal, but is basically the original fact-finding agency and while its consideration is usually upon the record as made before the administrative judge, it reviews the evidence as well as the law. The administrative judge, in this respect, is no more than a facility for conducting the business of the Commission and for all practical purposes the Commission is the actual trier of the facts.

Cantrell, 577 So. 2d at 1246. We do not see how the Employee Appeals Board is any different from any other administrative agency. Therefore, we are unpersuaded by this line of argument, and will apply the well-settled standard of review to the findings made by the Employee Appeals Board.

I. APPEALS BOARD FINDINGS

The Appeals Board found that there was no violation of any State Personnel Board Rules in the method used to fill the supervisor positions that Gann sought. Betty Dumbauld, the Department's Personnel Director testified that the supervisor positions were time-limited positions, that is, they are excluded from State Personnel authority by statute. This simply meant that the Department did not need to advertise the positions. It could have simply appointed two people to the position had it chosen to do so. The Department nevertheless advertised the vacancies to employees within the agency. Walter Sellers and Doug Epps were selected based on experience, training record, and the interview. Ms. Dumbauld testified that the Department fully complied with State Personnel Board

rules, policies, regulations and procedures in the promotion of Walter Sellers and Doug Epps to the supervisor positions. The record fully supports this finding.

The Appeals Board rejected the hearing officer's conclusion that Gann's due process rights had been violated in the selection process. The evidence supports the fact that the Department's selection process was fair and equitable. The applicants were all evaluated by the same six people on the interview team. Recommendations made were based on the interview scores, educational background, work experience, and performance evaluations. Although Gann had more formal education than Sellers and Epps, the three, who all held the same position with the Department, had about the same amount of work experience. Sellers had worked with the Department for approximately nine and a half years, Epps for eight years, and Gann for ten and a half years. Sellers and Epps performance evaluations for the prior three years, however had all been "fully successful", while Gann's evaluations reflected "minimally satisfactory" performance. The recommendations made by the interview panel were subject to approval by both the Director and the Executive Director of the Department. We find that the evidence sustains the Appeals Board's findings.

The Appeals Board concluded that Gann had no protected interest in the promotion he sought. Gann was entitled to procedural due process if his promotion constituted a property interest. *See Harrison County Brd. of Ed. v. Morreale*, 538 So. 2d 1196, 1200 (Miss. 1989). A property interest in one's continued employment exists only when the employee has "a legitimate claim of entitlement to it." *Id.* Where there is no express contract of employment, a valid claim of entitlement must be grounded in some other legal source, such as a state statute or local ordinance, or an implied contract. *Id.* Gann argues he never claimed to have a protected property right in any of the positions that he sought; however, he claims that once the Department announced the vacant positions, they made the positions competitive, and, therefore, it had committed itself to a fair and equitable selection process. As stated above, we uphold the Appeals Board findings that Gann's due process rights had not been violated in the selection process.

II. MOTION TO MODIFY HEARING OFFICER'S ORDER NUNC PRO TUNC

Gann filed a motion to modify the hearing officer's order nunc pro tunc and for attorney's fees. The Employee Appeals Board did not address this issue in its order; however, the circuit court judge, in reversing the Appeals Board, granted Gann's motion for nunc pro tunc thereby allowing retroactive benefits. Because we reverse the circuit court's findings, we need not address this issue.

III. ATTORNEY'S FEES

Because the hearing officer originally found that Gann's due process rights had been violated, he ordered an award of attorney's fees for Gann. The Employee Appeals Board did not address the issue, but the circuit court, in reinstating the hearing officer's findings, awarded Gann \$3,500.00 in reasonable attorney's fees. We find no basis for awarding attorney's fees in the present case.

In the court's discretion, reasonable attorney's fees may be awarded to the prevailing party in a proceeding to enforce a provision of 42 U.S.C. §1983. Because we find that Gann had no grievable action pursuant to 42 U.S.C. §1983, Gann is not entitled to attorney's fees pursuant to this code section. Furthermore, the supreme court has held that in the absence of contractual provisions or statutory authority, attorneys' fees may not be awarded as damages in a case unless punitive damages

are also proper. *Denson v. George*, 642 So. 2d 909, 916 (Miss. 1994) (citations omitted). We find no such authority allowing Gann attorney's fees in this instance.

We find that the Employee Appeal Board and not the hearing officer is the original trier of fact. Therefore, it is the Board's findings and not the hearing officer's that we must defer to on judicial review. Accordingly, we reverse the judgment of the circuit court and direct the Employee Appeals Board's order be reinstated.

THE JUDGMENT OF THE ITAWAMBA COUNTY CIRCUIT COURT REVERSING THE ORDER OF THE EMPLOYEE APPEALS BOARD IS REVERSED. THE ORDER OF THE EMPLOYEE APPEALS BOARD IS REINSTATED. COSTS OF THIS APPEAL ARE TAXED TO THE APPELLEE.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.

HINKEBEIN AND HERRING, JJ., NOT PARTICIPATING.