STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: June 26, 2015)

ROBIN J. WATTERS	:	
	:	
V.	:	**C.A. No. PC-2014-4314**
	:	
DEPARTMENT OF ADMINISTRATION, PERSONNEL APPEAL BOARD AND COMMUNITY COLLEGE OF RHODE ISLAND	:	

DECISION

CARNES, J. Before this Court is the appeal of Robin J. Watters (Ms. Watters or Petitioner) from a decision of the Department of Administration, Personnel Appeal Board (PAB). In that decision, the PAB found that Ms. Watters' appeal regarding her termination of employment by Community College of Rhode Island (CCRI or Respondent) was untimely filed. Jurisdiction is pursuant to G.L. 1956 § 42-35-15 of the Administrative Procedures Act.

I

Facts and Travel

Ms. Watters began working for CCRI in August of 2010 as a temporary employee, and in May of 2013 she became a full-time Senior Teller at CCRI's Providence campus. (Compl. ¶¶ 4, 5.) From May 5, 2013 until her termination, Ms. Watters was placed on probationary status. Id. ¶ 5. In a letter dated October 16, 2013, CCRI's Director of Human Resources, Sheri L. Norton (Ms. Norton), informed Ms. Watters in writing that her employment with CCRI was terminated effective November 1, 2013. Id. ¶ 6; see Bd. R., Ex. 18, State Ex. 1, Oct. 16, 2013 Letter. The reason given for Ms. Watters' termination was a purported failure to properly handle and

safeguard cash deposits. (Bd. R., Ex. 18, State Ex. 1, Oct. 11, 2013 Memo.) A memorandum from Ms. Watters' supervisor further outlining the issues with her job performance was attached to the termination letter. Id. The termination letter explained that Ms. Watters would remain on Administrative Leave with Pay until the date of her termination; she was told to contact Human Resources should she have any questions. Id. Additionally, Ms. Watters was informed that she could contact her union representative. Id. The October 16, 2013 termination letter made no mention of Ms. Watters' right to appeal the termination to the PAB. Id.; see also Hr'g Tr. at 7:20-23.

On November 1, 2013, Ms. Norton sent a letter to Petitioner's counsel in response to a request for Petitioner's personnel file; however, Ms. Norton indicated in this letter that Ms. Watters' termination document had not yet been completed. (Bd. R., Ex. 18, State's Ex. 4, Nov. 1, 2013 Letter.) On December 9, 2013, Ms. Watters received her Termination Action form, also known as a CS-5, (Termination Action form). (Hr'g Tr. at 14:11-13; see Bd. R., Ex. 18, State Ex. 2, Termination Action form.) The Termination Action form notified Ms. Watters of her right to appeal to the PAB within thirty days.[1] (Bd. R., Ex. 18, State Ex. 2, Termination Action form; see also Hr'g Tr. at 14:11-13.)

Subsequently, Ms. Watters filed an appeal of her termination to the PAB on January 7, 2014, which fell within thirty days of the mailing of the Termination Action form. (Bd. R., Ex.1, Jan. 7, 2014 Letter of Appeal.) On June 6, 2014, the PAB conducted a jurisdictional hearing to determine the timeliness of Ms. Watters' appeal.

[1] The language included on the Termination Action form is, "Any person with provisional, probationary or permanent status, who has been demoted, suspended, laid off or dismissed, may within thirty (30) calendar days of the mailing of such action, appeal in writing to the Personnel Appeal Board for a review or public hearing." (Pet'r's Br., Ex. D, Termination Action form; G.L. 1956 § 36-4-42.)

Ms. Watters testified at the hearing that she learned of her termination on October 17, 2013. (Hr'g Tr. at 30:6-12.) The president of her union called her to inform her about the termination action, and that same day she received the termination letter dated October 16, 2013. Id. Ms. Watters testified that she understood the October 16 letter "was notification [she] was terminated, but no notification that [she] could file an appeal, that [she] had a right to file an appeal." Id. at 14:8-11. It was the Termination Action form she received on December 9, 2013 that "was the first notification [she] had that [she] could file an appeal." Id. at 16:4-5. Ms. Watters also testified as to her confusion about her status as a member of the union; she believed she was paying dues and was a member, but the union informed her they would not represent her in an appeal of her termination because she was a probationary employee. Id. at 19:21-20:6. Ms. Watters testified that she sought representation to appeal her termination when she spoke to the union on October 17, 2013 and, when the union explained they could not represent her, she proceeded to hire a private attorney. Id. at 31:9-18.

Ms. Watters also addressed the jurisdictional questionnaire that the PAB sent to her, and she explained that she filled out some of the answers but that her lawyer filled out others. Id. at 32:6-19. In the questionnaire, Ms. Watters responded that the adverse action was mailed to her on December 9, 2013, which would mean that she considered the Termination Action form to be the adverse action. (Bd. R, Ex. 4, Jurisdictional Questionnaire.) The underlying appeal issue, as set forth in the questionnaire, alleged that there was an insufficient basis for Ms. Watters' termination by CCRI. Id. There was some discussion throughout the hearing about why Ms. Watters was terminated, and CCRI was very clear that Ms. Watters was not being accused of, nor was she terminated for, stealing funds. (Hr'g Tr. at 54:11-20.) Rather, the concern was the mishandling and failure to account for funds. Id. However, the PAB was very cognizant of the

fact that the hearing was jurisdictional and that the underlying reasons for termination and appeal were not before it. Id. at 54:21-23.

Ms. Norton testified at the jurisdictional hearing as well, regarding the time discrepancy between the October 16, 2013 termination letter and the Termination Action form; she explained that her office does draft the Termination Action form at the same time as the termination letter, but that the Termination Action form may be delayed because "it cannot get sent down to the State until we have the balances from the payroll office." Id. at 43:7-14. Ms. Norton testified that, in her experience, a Termination Action form is "processed subsequent to the termination letter" in order to allow for the necessary vacation time and other such payroll calculations. Id. at 44:9-10. Ms. Norton also agreed with Ms. Watters that there was nothing in the October 16, 2013 termination letter that notified Ms. Watters of her right to appeal. Id. at 48:11-18. Ms. Norton herself never informed Ms. Watters of that right prior to the mailing of the Termination Action form. Id. The Collective Bargaining Agreement that covers CCRI employees, however, is available online, and it explains the grievance process via the union; the CCRI employee handbooks are also available online. Id. at 50:4-24. The PAB clarified that Ms. Watters' appeal action was based on the Collective Bargaining Agreement. Id. at 83:16-20.

Ms. Norton further discussed the process leading up to the termination of a probationary employee. She testified that there may be counseling for an employee, explaining the issues with performance that may lead to discharge, but Ms. Watters did not have any such counseling. Id. at 51:9-22. In the case of Ms. Watters, Ms. Norton testified that she "believe[d] [Ms. Watters'] supervisor felt that what had happened was serious. It was a serious breach of protocol. There are certain situations . . . that it's felt that counseling isn't going to be a value." Id. at 52:1-7. The PAB also heard argument and testimony regarding whether Ms. Watters was improperly

denied a Loudermill[2] letter or hearing. However, a Loudermill letter or hearing applies only to employees who are classified, and because Ms. Watters was a probationary employee, CCRI was not required to take any pretermination action. See Kenyon v. Town of Westerly, 694 A.2d 1196, 1200 (R.I. 1997). Furthermore, according to Ms. Norton, Ms. Watters did have an opportunity to explain her actions during an investigatory hearing. (Hr'g Tr. at 68:1-9.) Ms. Watters, however, testified that she never had the opportunity to speak at an investigatory hearing. Id. at 76:8-14.

The PAB provided opportunity for extensive argument from the attorneys at the hearing as well. Significantly, Ms. Watters' attorney was unable to identify any statutory language requiring a termination letter to include notification of the right to appeal to the PAB. Id. at 85-86. The attorney for CCRI explained that the Termination Action form is not mailed simultaneously with the termination letter because the Termination Action form is contingent on resolving any payroll issues. He elaborated that the forms can "take an awfully long time" to reach the employee, and that if this form is the only way to terminate someone, then "people are going to be in limbo for months or weeks waiting" for the Termination Action form. Id. at 80:10- 81:4.

In a decision dated August 15, 2014, the PAB determined that Petitioner's appeal was untimely filed. (Resp't's Br., Ex. A, PAB Decision.) The PAB found that Ms. Watters received notice of her termination via the October 16, 2013 termination letter and that the thirty-day appeal period began running from that date. Id. Ms. Watters proceeded to timely file an appeal to this Court.

[2] Established by Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546, 547 (1985), a Loudermill letter or hearing provides an employee "a pretermination opportunity to respond" with "reasons . . . why proposed [termination] action should not be taken. . . ." (Internal citations omitted.)

II

Standard of Review

This Court's review of the PAB's decision is governed by chapter 35 of title 42, entitled the Administrative Procedures Act. See Town of Burrillville v. R.I. State Labor Relations Bd., 921 A.2d 113, 118 (R.I. 2007). Section 42-35-15(g) provides:

> "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant 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) Affected by other error or law;
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

When reviewing a decision under the Administrative Procedures Act, this Court may not substitute its judgment for that of the agency on questions of fact. Johnston Ambulatory Surgical Assocs., Ltd. v. Nolan, 755 A.2d 799, 805 (R.I. 2000). The Court is limited to "an examination of the certified record to determine if there is any legally competent evidence therein to support the agency's decision." Barrington Sch. Comm. v. R.I. State Labor Relations Bd., 608 A.2d 1126, 1138 (R.I. 1992).

However, "[q]uestions of law determined by the administrative agency are not binding upon [the Court] and may be freely reviewed to determine the relevant law and its applicability to the facts presented in the record." Dep't. of Envtl. Mgmt. v. State Labor Relations Bd., 799 A.2d 274, 277 (R.I. 2002) (citing Carmody v. R.I. Conflict of Interest Comm'n., 509 A.2d 453, 458 (R.I. 1986)). Thus, '"[a]lthough this Court affords the factual findings of an administrative

agency great deference, questions of law—including statutory interpretation—are reviewed de novo.'" Heritage Healthcare Servs., Inc. v. Marques, 14 A.3d 932, 936 (R.I. 2011) (quoting Iselin v. Ret. Bd. of the Emps.' Ret. Sys. of R.I., 943 A.2d 1045, 1049 (R.I. 2008)).

III

Analysis

The Petitioner argues that it was the mailing of the Termination Action form that triggered the running of the thirty-day appeal period, which would mean her January 7, 2014 appeal to the PAB was timely. Alternatively, Petitioner contends that even if her appeal was not timely, the Court should apply the doctrine of equitable tolling because it was the Termination Action form that informed her of her right to appeal, and that she relied on representations made by CCRI regarding her termination in waiting to appeal to the PAB.

CCRI maintains that Ms. Watters' appeal to the PAB was untimely because she received notice of her termination via the October 16, 2013 letter, and that it was this letter that triggered the thirty-day appeal period. CCRI argues that the Termination Action form's inclusion of the notice of the right to appeal does not alter the appeal period. Additionally, CCRI argues that equitable tolling does not apply to the instant matter because the Rhode Island Supreme Court established in Rivera v. Emps.' Ret. Sys. of R.I., 70 A.3d 905 (R.I. 2013) that the appeal period commences upon mailing, and that in this case, unlike as in Rivera, CCRI made no explicit statements to confuse Ms. Watters regarding the right to appeal. Furthermore, CCRI contends that Ms. Watters knew she was terminated effective November 1, 2013 and did not report to work after that date. Thus, CCRI suggests it would be illogical to construe the receipt of the Termination Action form, well over a month after Ms. Watters' termination date, as the notice that triggered the running of the thirty-day appeal period.

In reviewing the transcript from the PAB's jurisdiction hearing, it is evident that no one mentions "equitable tolling" as an argument for why Ms. Watters' appeal should be found timely. It is clear, however, after a spirited hearing, complete with extensive testimony and argument, that the issue before the PAB was when the thirty-day appeal period began to run for Ms. Watters and which communication, the October 16, 2013 letter or the Termination Action form, was the triggering communication. It is troubling to this Court that by the time Ms. Watters received the Termination Action form, which included notice of her right to appeal, the thirty-day appeal period that commenced upon the mailing of her termination letter had ended. However, there is no requirement that notice of the appeal be included with notice of termination.

Section 36-4-42, Appeal from appointing authority to appeal board, states that:

> "Any state employee with provisional, probationary, or permanent status who feels aggrieved by an action of an appointing authority resulting in a . . . dismissal . . . may, within thirty (30) calendar days of the mailing of the notice of that action, appeal in writing to the personnel appeal board for a review or public hearing."

There is no language in this statute that requires an employer such as CCRI to ensure that notice of the right to appeal is included with notice of the termination. Furthermore, it is a well-established principle that knowledge of the law is assumed. See Salter v. Rhode Island Co., 27 R.I. 27, 60 A. 588, 589 (1905) ("As ignorance of the law excuses no one, all persons . . . are presumed to know the law.").

In this case, it is undisputed by both parties that Ms. Watters received notice of her termination on October 17, 2013. The letter she received included information regarding the date of her termination, her status until that time, as well as the fact that she should contact Human Resources or her union should she have questions. (Bd. R., Ex. 18, State Ex. 1, Oct. 16,

2013 Letter.) Any mention of the right to appeal is noticeably absent. Notice of the right to appeal was made known to Ms. Watters in December of 2013 when she received the Termination Action form. (Bd. R., Ex. 18, State Ex. 2, Termination Action form.) The Termination Action form does indicate that Ms. Watters was given written notice of the termination action on October 16, 2013, and that the effective date of her termination was November 1, 2013. Id.

At the jurisdictional hearing before the PAB, Ms. Norton explained that the Termination Action form is not sent out at the same time as the termination letter because it cannot be completed "until we have the balances from the payroll office," including actual balances for vacation leave and retirement. (Hr'g Tr. at 43:11-14.) Ms. Norton testified that the Termination Action form "is used . . . for the purposes of any refunds and payroll issues," and that such forms "are also processed subsequent to the termination letter." Id. at 44:1-10. Thus, while the inclusion of the appeal language in the Termination Action form may be confusing, CCRI successfully argued that it was the October 16, 2013 termination letter that constituted notice of Ms. Watters' termination, and this Court cannot find that such determination was an abuse of discretion or in violation of statutory provisions on the part of the PAB.

Ms. Watters was unable, after being given an opportunity,[3] to provide the PAB with any statutory language indicating that the notice of the right to appeal must be included with the notice of termination.

[3] At the jurisdictional hearing, the Chairman of the PAB and Ms. Watters' attorney had a colloquy on this issue:

> "Chairman Lynch: Can you tell me then for your argument where the notice - - where the requirement of Appellant notice is required?
> "Ms. Langmead: Uh-huh
> "Chairman Lynch: Because your client agreed that she was terminated through the correspondence of October 16th.
> "Ms. Langmead: Yes

While this Court might have decided the matter differently, deference to an agency interpreting its governing statute is mandatory when this Court reviews an agency's decision. Furthermore, the Rhode Island Supreme Court held in Rivera, 70 A.3d at 911, that the language "mailing notice" is an unambiguous phrase and that "the thirty-day period for filing a complaint in the Superior Court begins to run the day after the notice is mailed." (Emphasis in original.) Although here, the appeal is to the PAB, not to Superior Court, the principle remains the same, and the language in the two statutes is almost identical, suggesting that this same strict interpretation of "mailing notice" and appeal periods applies.

On appeal, this Court is limited to "an examination of the certified record to determine if there is any legally competent evidence therein to support the agency's decision." Barrington Sch. Comm., 608 A.2d at 1138. Here, the Court is presented with a hearing transcript which shows that the PAB considered the matter carefully after receiving extensive testimony, exhibits, and argument, and that given the nuances on both sides of the argument, the PAB made a determination supported by law and facts. Although Ms. Watters' situation and the timing of the notice of appeal are concerning, our Supreme Court has held it to be reversible error when a trial justice finds that "the administrative agency did not err in any way," but then chooses to vacate

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> . . .
> "Chairman Lynch: So where is the requirement of Appellant notification, where she had already been to your office within weeks, in any event?
> "Ms. Langmead: When she received this, the CS5; that's when she knew she had the appeal. . . ."
> "Chairman Lynch: Okay, so even though she acknowledged that she couldn't go into work after - - on November 1 or thereafter - -
> "Ms. Langmead: Yes
> "Chairman Lynch: - - and didn't get this [CS5] until about December 10th . . . . if the CS5 had been even further along the road, that her appellate rights didn't run - - begin to run until she received the CS5?
> "Ms. Langmead: Yes." (Hr'g Tr. at 85:6-86:15.)

the decision based upon "inherent equitable authority." Nickerson v. Reitsma, 853 A.2d 1202, 1206 (R.I. 2004). Because there is no legal requirement that notice of the right to appeal be included with notice of termination, and, while equitable tolling may be considered in the realm of the Administrative Procedures Act following the Rhode Island Supreme Court's holding in Rivera, equitable tolling was not raised before the PAB in the instant matter, the PAB's decision was lawful. It is evident to this Court that the PAB wrestled with the question of when the appeal period began to run, and that it carefully considered all the evidence and testimony before it. Thus, its decision was not an abuse of discretion and must be upheld.

IV

Conclusion

After reviewing the entire record, this Court finds that the PAB's decision finding that Ms. Watters' appeal of her termination by CCRI was untimely filed was not in violation of constitutional or statutory provisions; in excess of the PAB's statutory authority; affected by error of law; made upon unlawful procedure; clearly erroneous in view of the reliable, probative, and substantial evidence; or arbitrary or capricious. The substantial rights of the Petitioner have not been prejudiced. Accordingly, the PAB's decision is affirmed. Counsel shall prepare the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Watters v. Department of Administration, Personnel Appeal Board, et al.**
CASE NO:	**PC-2014-4314**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**June 26, 2015**
JUSTICE/MAGISTRATE:	**Carnes, J.**
ATTORNEYS:	
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