

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**James Wesley Ivy, Jr.,
Petitioner Below, Petitioner**

vs) No. 13-0265 (Kanawha County 12-AA-119)

**The City of Montgomery,
Respondent Below, Respondent**

FILED

November 22, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner James Wesley Ivy, Jr., by counsel Michael T. Clifford and Richelle K. Garlow, appeals the order from the Circuit Court of Kanawha County upholding the findings of the Police Hearing Board for the City of Montgomery, which resulted in the termination of petitioner's employment with the City of Montgomery. Respondent the City of Montgomery ("City"), by counsel Vaughn T. Sizemore, filed a response in support of the circuit court's order.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

Petitioner, an African American, was hired as a police officer for the City of Montgomery on or about October 1, 2008. He was later promoted to the rank of lieutenant; however, there was a dispute as to when the promotion was actually effective and when petitioner would receive a pay increase.¹ As a result of the dispute, petitioner filed a racial discrimination lawsuit against respondent, and that suit was settled in July of 2010.²

The City filed a complaint alleging wrongdoing by petitioner before the Police Hearing Board for the City of Montgomery ("Board"). In April of 2012, Petitioner was suspended from the Montgomery Police Department pending the outcome of the hearing before the Board. Following a July 28, 2012, hearing on that complaint, the Board found in favor of petitioner on

¹The City asserts that Mayor James F. Higgins, Jr. informed petitioner that he was being recommended for promotion to lieutenant and provided him with lieutenant bars, but he instructed petitioner not to wear the bars prior to the approval of City Council. However, City Council refused the mayor's recommendation for the promotion.

²Petitioner states that the settlement agreement included granting petitioner his salary increase and full back pay. Petitioner also received the promotion to lieutenant.

five of the eight counts but found wrongdoing on three counts. The Board found that petitioner fell asleep while guarding a prisoner who escaped; ignored a citizen, refused to address a situation with that citizen, and was discourteous to that citizen; and failed to provide a witness list for trial as the investigating officer, resulting in a settlement unfair to the City. As a result of the Board's findings, petitioner's employment with the City was terminated.

Petitioner appealed the Board's decision to the Circuit Court of Kanawha County alleging two errors: 1) the Board was de facto unfair, so the hearing was conducted in a clearly biased and predetermined manner; and 2) the findings of the Board were not based upon facts elicited at the hearing and were, therefore, clearly wrong and an abuse of discretion. In its February 20, 2013, "Finding of Facts and Conclusions of Law," the circuit court found that the Board was not de facto unfair and the hearing was not conducted in a clearly biased and predetermined manner. The circuit court went on to find that the Board weighed the testimony of the various witnesses and gave credibility to those it felt deserved it. The circuit court stated that it was not in a position to rule on the credibility of the witnesses. Further, the circuit court determined that petitioner presented no evidence to establish that the Board was biased or that its decision was clearly wrong. The circuit court, therefore, affirmed the Findings and Final Order of the Board.

[I]n reviewing an ALJ's decision that was affirmed by the circuit court, this Court accords deference to the findings of fact made below. This Court reviews decisions of the circuit under the same standard as that by which the circuit reviews the decision of the ALJ. We must uphold any of the ALJ's factual findings that are supported by substantial evidence, and we owe substantial deference to inferences drawn from these facts. Further, the ALJ's credibility determinations are binding unless patently without basis in the record. Nonetheless, this Court must determine whether the ALJ's findings were reasoned, *i.e.*, whether he or she considered the relevant factors and explained the facts and policy concerns on which he or she relied, and whether those facts have some basis in the record. We review *de novo* the conclusions of law and application of law to the facts.

Martin v. Randolph Cnty Bd. of Educ., 195 W.Va. 297, 304, 465 S.E.2d 399, 406 (1995). In addition, "[t]he findings of fact . . . are entitled to substantial deference unless a reviewing court believes the findings are clearly wrong." Syl. Pt. 3, in part, *Adkins v. Gatson*, 192 W.Va. 561, 453 S.E.2d 395 (1994). The clearly erroneous standard "'does not entitle a reviewing court to reverse the finder of fact simply because it may have decided the case differently.'" *Anderson v. Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518, 528 (1985)." *Board of Educ. Of Cnty of Mercer v. Wirt*, 192 W.Va. 568, 578-79, 453 S.E.2d 402, 412-13 (1994). While this matter was heard by the Board, the same analysis and standard apply in the instant matter.

In his appeal, petitioner asserts two assignments of error. Petitioner first asserts that the circuit court erred in upholding petitioner's discharge from employment because evidence showed that such termination was retaliatory, discriminatory, and motivated by petitioner's prior filing of a racial discrimination suit against the City. Petitioner argues that while he was found guilty of only three charges, those charges were unsubstantiated by the evidence presented. The

three charges for which petitioner was found guilty relate to falling asleep in a hospital which allowed a prisoner to escape; a citizen complaint related to petitioner's investigation of that citizen's report of suspected suspicious activity; and failing to prepare a witness list for a magistrate court case in Fayette County. Petitioner is critical of the testimony presented by the City's witnesses and argues that the testimony of Jackie Brown, the former chief of police for the City, supports petitioner's arguments. In its order, the Board made factual findings specific to each of the charges for which it found him guilty.

During the hearing before the Board, witnesses from the hospital testified that they could not determine whether petitioner was sleeping, but they did see him with his eyes shut; it is undisputed that the prisoner escaped from the hospital under petitioner's watch. The citizen complaint evidences the treatment of that citizen by petitioner. Finally, petitioner does not dispute that he failed to provide a witness list for a magistrate court matter or that the matter resulted in a plea agreement, rather than proceeding to trial. As we found previously, "if the lower tribunal's conclusion is plausible when viewing the evidence in its entirety, the appellate court may not reverse even if it would have weighed the evidence differently if it had been the trier of fact." *Wirt* at 579, 453 S.E.2d at 413. Our review of the record, including the transcript of the hearing before the Board, reveals sufficient testimony and evidence to support the Board's factual findings as to these issues. Therefore, we find that those findings were not clearly erroneous.

Petitioner's second assignment of error is that the circuit court erred in finding that petitioner had not presented evidence that the hearing was unfair as conducted. In support of his argument, petitioner cites two specific incidents during the hearing before the Board. One incident stemmed from petitioner's counsel's reference to a racially charged statement allegedly made by the then-mayor of the City.³ The second incident complained of relates to an exchange with a different member of the Board. During the questioning of a law enforcement witness, counsel for petitioner inquired as to the officer's opinion of the credibility of one of the City's witnesses. The Board member told counsel for petitioner that he thought the question was objectionable. When counsel for petitioner inquired whether the Board member was also representing the City, the Board member promptly apologized. Ultimately, the Board found that the testimony of the complaining witness on that count lacked credibility and ruled in petitioner's favor on that count. Based on our review of the record, we find that the circuit court did not err in upholding the findings of fact made by the Board. These factual issues raised by petitioner do not show bias on the part of the Board; the lack of bias is also evidenced by the fact that the Board found in petitioner's favor on the majority of the counts set forth in the complaint before it.

For the reasons set forth herein, based upon our review of the record in this matter, we find that the circuit court did not err in affirming the decision of the Board. The Board made credibility determinations, and we find that the contested decisions of the Board are supported by sufficient evidence.

³It appears from the transcript that one of the three members of the Board may have misunderstood the use of that comment and took offense to the same. None of the factual findings set forth in the Board's order relate specifically to the racially charged comment. In addition, there was no objection by any member of the Board when the comment was made during direct testimony.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: November 22, 2013

CONCURRED IN BY:

Justice Robin Jean Davis
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II

DISSENTING:

Chief Justice Brent D. Benjamin