Case No. 07-99754-A

IN THE COURT OF APPEALS
OF THE
STATE OF KANSAS

WILLIAM DEL GAUDIO, SR.,
Plaintiff/Appellant,

-vs-

KANSAS DEPARTMENT OF CORRECTIONS
Defendant/Appellee,

AMENDED BRIEF OF APPELLANT

Appeal from the District Court of Sedgwick County, Kansas
The Honorable James R. Fleetwood
Judge of the District Court
District Court Case No. 07 CV 1356

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TABLE OF CONTENTS
AND
INDEX OF AUTHORITIES

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I.

NATURE OF THE ACTION

This is a direct appeal to the Kansas Court of Appeals following the denial of Mr. Del Gaudio's appeal to the district court of the findings affirming the findings of the Kansas Civil Service Board approving the termination of Mr. Del Gaudio from his position with the Kansas Department of Corrections.

II.

ISSUES ON APPEAL

A. The findings of the Kansas Civil Service Board require the reinstatement of Mr.

Del Gaudio to his position with the Kansas Department of Corrections with an assessment of back pay and benefits.

B. The finding of the Board requires that Mr. Del Gaudio be reinstated to his position in that K.S.A. 75-2949(e) requires that an employee to have been counseled prior to his termination.

C. Based upon the facts alone, no basis existed for Mr. Del Gaudio's termination.

III.

FACTS OF THE CASE

At the time of his dismissal in April, 2006, Lieutenant Del Gaudio was a permanent employee in the classified service under the Kansas Civil Service Act and was employed as Correctional Specialist II (CS II) with the Wichita Work Release Facility (WWRF). Lt. Del Gaudio had been employed with WWRF since November 2006. (R. II, 16; R. I, 17).

On March 26, 2006, Mr. Del Gaudio was on duty supervising the 6 a.m. to 2 p.m. shift at WWRF. Around 10:00 a.m. that day, Correctional Officer I (COI) Perrigo found inmate McCullough in his living quarters complaining of pain in his shoulder and requesting help. Mr. Perrigo contacted Lt. Del Gaudio and informed him of the situation. (R. III, 220).

Lt. Del Gaudio, pursuant to facility protocol, contacted Ms. Jackie Arndt, a registered nurse at the Winfield Correctional Facility. (R. II, 28-29). Nurse Arndt informed Lt. Del Gaudio that her computers were down and that she was unable to review inmate McCullough's medical records.

At Nurse Arndt's request, Lt. Del Gaudio had Mr. McCullough come to the office so that Lt. Del Gaudio could describe inmate McCullough's symptoms directly to Nurse Arndt so that she could make an assessment regarding how to proceed with inmate McCullough's treatment and whether emergency medical care was necessary. (R. II, 68-69).

Inmate McCullough had described his condition to COII Cottman as having shoulder pain and feeling dehydrated. Inmate McCullough had been receiving treatment for on-going shoulder pain due to a prior gunshot wound. (R. II, 58).

Inmate McCullough reported to the office. Inmate McCullough was groaning, breathing heavily and holding his right arm. Inmate McCullough was ambulatory and had walked on his own to the office from his quarters on the second floor of the facility.

Lt. Del Gaudio asked inmate McCullough what his symptoms were and inmate McCullough stated his lips were dry and his shoulder was causing him pain. Inmate McCullough told Lt. Del Gaudio that he had seen the nurse two days prior. Lt. Del Gaudio asked inmate McCullough whether he was experiencing chest pain or if he has having trouble breathing. Inmate McCullough denied both issues.

Mr. Del Gaudio contacted Nurse Arndt again. Lt. Del Gaudio informed Nurse Arndt that inmate McCullough was experiencing shoulder pain from an old gunshot wound and had stated he felt dehydrated. Nurse Arndt instructed Lt. Del Gaudio to give inmate McCullough his prescribed pain medication and muscle relaxant. Inmate McCullough was given his medications and water by Lt. Del Gaudio. Nurse Arndt asked questions of inmate McCullough through Mr. Del Gaudio and established that McCullough was not dehydrated and that there was no need for an emergency room visit. (R. II, 69-72). Lt. Del Gaudio also instructed COII Cotman to get an ice pack and take it to McCullough for additional pain relief. McCullough was to see the doctor the next morning. (R. II, 76-78).

Inmate McCullough returned to his quarters without assistance. Id.

Around 11:15 a.m., Nurse Harman arrived at the facility to do additional TB tests for inmates that were unavailable during the week due to their work schedule. Lt. Del Gaudio spoke to Nurse Harman and told her the situation with McCullough. Nurse Harman was familiar with inmate McCullough as he had been treated for chronic pain with his shoulder and also for hepatitis C. Lt. Del Gaudio asked Nurse Harman to check on inmate McCullough and asked CO II Cotman to escort her. (R. II, 79, 142).

Nurse Harman went to McCullough's quarters and checked on him around 11:35 a.m. At that time, she found McCullough to be resting quietly, with slow and regular respirations. She asked

McCullough about his pain and he told her that it was just his shoulder that was hurting. Nurse Harman told Mr. McCullough to continue with the ice packs and to see the doctor first thing in the morning. (R. II, 172-173).

Nurse Harman then reported to Lt. Del Gaudio that Mr. McCullough was getting relief from the pain medication, that there was no emergency situation and that Mr. McCullough would see the doctor in the morning. (R. II, 176).

Nurse Harman also told COI Perrigo that Mr. McCullough was responding to the medication and that there was no need for Mr. McCullough to go to the emergency room. Nurse Harman then called Nurse Arndt and informed her that there was no need to worry and that Mr. McCullough was doing well. (R. II, 177-179).

An hour later, Nurse Harman called Nurse Arndt again and told her that McCullough was being dramatic and was upsetting the other inmates. Nurse Arndt stated that if it was that bad to have him taken to the emergency room. Nurse Harman said the cost would be prohibitive and they would not be able to recoup the expenses prior to McCullough's release. Nurse Arndt said who cares, send him. (R. II, 177-178).

It is also significant, yet not noted by the Board in their findings, that Mr. McCullough had a similar incident with the same complaints and drama the week before. (R. II, 180).

Nurse Harman contacted the nursing supervisor at home. Nurse Harman was told that pain in the shoulder and angry inmates were not a reason for transport to the emergency room. (R. II, 180-181).

At approximately 12:30 p.m., COI Perrigo told Lt. Del Gaudio that McCullough seemed to be getting worse and was upsetting the other inmates and he should go to the emergency room. Lt. Del Gaudio, having already been advised by three medical personnel, told Mr. Perrigo that McCullough was not going to the emergency room. (R. III, 227).

Mr. Perrigo documented that he believed McCullough was getting worse in the log book and

that McCullough was yelling in pain and testified that he had notified Lt. Del Gaudio about the situation. (R. III, 237).

At 2:00 p.m., Lt. Del Gaudio was relieved from his shift by Correction Specialist (CSI) Shallue. Lt. Del Gaudio briefed Mr. Shallue about the situation with inmate McCullough and advised that McCullough had been seen by the nurse and would see the doctor in the morning. (R. III, 333).

At approximately 2:15 p.m., Mr. Shallue spoke to Nurse Harman regarding Mr. McCullough. She informed Mr. Shallue that she had seen inmate McCullough, he was having shoulder pain and would see the doctor in the morning and that there was no need for an emergency room visit. (R. III, 336).

At approximately 3:15 p.m. inmate McCullough stopped breathing and appeared to be dead. Inmate McCullough apparently died of advanced cirrhosis of the liver, a complication related to hepatitis C. (R. III, 372).

By letter, Lt. Del Gaudio was informed by letter from Warden Conover that he would be terminated from his employment with KDOC. In her letter, Warden Connover found that Lt. Del Gaudio was being terminated pursuant to K.S.A. 75-2949f(a), gross misconduct unbecoming a state officer or employee; K.S.A. 75-2949f(f), participation in any action that would in any way seriously disrupt or disturb the normal operation of the agency, institution, department or any other segment of state government; K.S.A. 75-2949f(I), willful endangerment of the lives or property of others or both; K.S.A. 75-2949f(p), exhibiting other personal conduct detrimental to state service which could cause undue disruption of work or endanger the safety of person or property of others, as may be determined by the appointing authority; K.S.A. 75-2949f(q), gross carelessness or gross negligence. The letter also referenced a violation of K.S.A. 75-2949f(k), but did not give a supporting reason or explanation of this citation. (R. I, 15).

Lt. Del Gaudio timely and properly appealed the agency action to the Kansas Civil Service Board. (R. I, 29).

Following an evidentiary hearing. The Civil Service Board (the Board) found that Lt. Del Gaudio's termination was proper because the performance of his duties on March 26, 2006 constituted negligence in the performance of his duties in violation of K.S.A. K.S.A. 75-2949e(2). (R. I, 30). The Board found that Lt. Del Gaudio failed to take proper action to secure medical treatment for inmate McCullough, despite the fact that Mr. Del Gaudio contacted two separate nurses, one who even consulted with her supervisor at her home, and told Mr. Del Gaudio that there was no need for an emergency room visit. Also that Nurse Harman, the only medical person on sight and who had examined inmate McCullough was still advising Mr. Shallue, *after* Lt. Del Gaudio had left for his shift, that there was no need for an emergency room visit for inmate McCullough. (R. III, 340).

It should further be noted that Mr. Shallue, who took over for Lt. Del Gaudio and was the actual shift supervisor from 2:00 p.m. on, was not terminated from his position and received a 10 day suspension. (R. III, 336).

Lt. Del Gaudio timely and properly filed a Petition for Judicial Review. (R. I, 10). The district court found that the conduct and final rulings of the Kansas Civil Service Board were not arbitrary or capricious and that the Board's decision that the termination of Lt. Del Gaudio was supported by substantial and competent evidence. (R. I, 102).

A timely Notice of Appeal was filed and this brief follows.

A. The findings of the Kansas Civil Service Board require the reinstatement of Mr. Del Gaudio to his position with the Kansas Department of Corrections with an assessment of back pay and benefits because the findings of the Board did not reflect the basis for termination given by KDOC.

1. Standard of review.

"When an administrative agency action is appealed to the district court pursuant to the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions (KJRA), K.S.A. 77-601 *et seq.,* and

then appealed from the district court to this court, we review the agency's decision as though the appeal had been made directly to this court, and we are subject to the same limitations of review as the district court." In re Doe, 277 Kan. 795, Syl. ¶ 1, 90 P.3d 940 (2004).

The party asserting an agency's action is invalid bears the burden of proving the invalidity. Fisher v. Kansas Crime Victims Compensation Bd., 280 Kan. 601, 605-606, 124 P.3d 74, 78 - 79 (2005).

K.S.A. 77-621(c) provides: The court shall grant relief only if it determines any one or more of the following:

> (1) The agency action, or the statute or rule and regulation on which the agency action is based, is unconstitutional on its face or as applied;
> (2) the agency has acted beyond the jurisdiction conferred by any provision of law;
> (3) the agency has not decided an issue requiring resolution;
> (4) the agency has erroneously interpreted or applied the law;
> (5) the agency has engaged in an unlawful procedure or has failed to follow prescribed procedure;
> (6) the persons taking the agency action were improperly constituted as a decision-making body or subject to disqualification;
> (7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act; or
> (8) the agency action is otherwise unreasonable, arbitrary or capricious.

2. The findings of the Civil Service Review Board support the fact that Lt. Del Guaudio was wrongfully terminated.

Mr. Del Guadio was terminated from his position with KDOC based on findings by the warden that Mr. Del Guadio violated K.S.A. 75-2949(f) which states:

> Grounds for dismissal, demotion or suspension of a permanent employee for personal conduct detrimental to the state service include, but are not limited to, the following:
> (a) Gross misconduct or conduct grossly unbecoming a state officer or employee;
> (b) conviction of a criminal act;
> ©) immoral conduct;
> (d) willful abuse or misappropriation of state funds, materials, property or equipment;
> (e) making a false statement of material fact in the employee's application for employment or position description;
> (f) participation in any action that would in any way seriously disrupt or disturb the normal operation of the agency, institution, department or any other segment of state

government;
(g) trespassing on the property of any state official or employee for the purpose of harassing or forcing dialogue or discussion from the occupants or owners of such property;
(h) willful damage to or destruction of state property;
(I) willful endangerment of the lives or property of others, or both;
(j) possession of unauthorized firearms or other lethal weapons while on the job;
(k) performing duties in a brutal manner, or mistreating, neglecting or abusing a patient or resident or other person in the employee's care;
(l) refusal to accept a reasonable and proper assignment from an authorized supervisor (insubordination);
(m) being under the influence of alcohol or drugs while on the job;
(n) knowingly releasing confidential information from official records;
(o) use of the employee's state position, use of the employee's time on the state job or use of state property or facilities by the employee in connection with a political campaign;
(p) exhibiting other personal conduct detrimental to state service which could cause undue disruption of work or endanger the safety of persons or property of others, as may be determined by the appointing authority;
(q) gross carelessness or gross negligence;
®) grossly improper use of state property; and
(s) sexual harassment arising out of or in connection with employment.

Specifically, Warden Conover terminated Mr. Del Gaudio's employment based on K.S.A. 75-2949f(a), (f), (I), (k), (p) and (q). (R. I, 15).

"K.S.A. 75-2949f was added after this court's decision in Swezey v. State Department of Social & Rehabilitation Services, 1 Kan.App.2d 94, 562 P.2d 117 (1977). In Swezey, this court held: 'Legal cause for dismissal exists if the facts disclose the employee's conduct is of a substantial nature and directly impairs the efficiency of the public service, but there must be a real and substantial relation between the employee's conduct and the efficient operation of the public service; otherwise, legal cause is not present.' 1 Kan.App.2d at 100, 562 P.2d 117. By thereafter enacting K.S.A. 75-2949f, this court subsequently concluded the legislature intended to establish a category of conduct that is per se cause for discipline, obviating the need for the Board to make a case-by-case determination whether there was direct impairment of the public service." Sanstra v. Kansas Highway Patrol, 15 Kan.App.2d 148, 151, 804 P.2d 1009, *rev. denied* 248 Kan. 996 (1991).

However, the Board found that Mr. Del Gaudio's termination was proper pursuant to K.S.A. 75-

2949e(a)(2), which states: (a) Grounds for dismissal, demotion or suspension of a permanent employee for deficiencies in work performance include, but are not limited to, the following: ...(2) negligence in the performance of duties."

K.S.A. 75-2949e (b) states: "Unless the appointing authority determines that the good of the service will best be served by proceeding directly to the procedure prescribed in K.S.A. 75-2949 and amendments thereto, the appointing authority may propose dismissal, demotion or suspension of a permanent employee for deficiencies in work performance only after the employee has received two performance evaluations in the 180 calendar days immediately preceding the effective date of the proposed dismissal, demotion or suspension. These performance evaluations shall be spaced at least 30 calendar days apart."

K.S.A. 75-2949e©) states: "If the appointing authority proposes to dismiss, demote or suspend a permanent employee for deficiencies in work performance without the two evaluations described by subsection (b) and if the employee appeals the action to the state civil service board, the board shall require the appointing authority to show that the employee was adequately counseled concerning the nature of the deficiencies in work performance and concerning what was expected of the employee in correcting the deficiencies."

K.S.A. 75-2949f requires a finding that the complained of actions of the employee amounted to personal conduct detrimental to the state service and, further, the agency must show that the specific reasons for the termination were valid.

The Board did <u>not</u> find that Mr. Del Gaudio's service was detrimental to the state service and found that his conduct was not grossly negligent nor any of the other allegations proffered by Warden Conover in her termination letter. Since the Board found that Mr. Del Gaudio's conduct was violative of K.S.A. 75-2949e, it tacitly found that Mr. Del Gaudio's conduct did was not detrimental to the state service and that the termination by KDOC pursuant to K.S.A. 75-2949f was unsupported by the evidence presented.

Thus, the Board found that the reason's and basis given by the agency for Mr. Del Gaudio's termination were invalid and were thereby arbitrary and capricious. As such, the Board's finding supports the reinstatement of Mr. Del Gaudio to his permanent position.

Previous decisions of the Kansas Supreme Court have defined "arbitrary and capricious" as follows: An agency's action is arbitrary and capricious if it is unreasonable or without foundation in fact. Zinke & Trumbo, Ltd. v. Kansas Corporation Comm'n, 242 Kan. 470, 474-75, 749 P.2d 21 (1988). The arbitrary and capricious test relates to whether that particular action should have been taken or is justified, such as the reasonableness of the agency's exercise of discretion in reaching the determination, or whether the agency's action was without foundation in fact. Kansas Racing Management, Inc. v. Kansas Racing Comm'n, 244 Kan. 343, 365, 770 P.2d 423 (1989).

Since the Board made no finding that Mr. Del Gaudio's conduct was detrimental to state service and since there was no evidence to support the specific allegations proffered in the dismissal letter for Mr. Del Gaudio's termination, then the Board's findings were that the actions of the agency terminating Mr. Del Gaudio was not supported by the facts and wrongful.

3. The burden was on KDOC to show that Mr. Del Gaudio's termination was valid on the reasons presented in his termination letter and KDOC failed to meet their burden.

> "Where a statute sets forth the procedure for dismissal and requires that the cause of dismissal be stated in writing, the written statement so made is conclusive of the cause of removal. People v. Martin, 19 Colo. 565, 36 P. 543 (1894). Our Supreme Court has not construed that portion of K.S.A. 1976 Supp. 75-2949 which reads, 'for the good of the service.' The general principle is found in 15A Am.Jur.2d, Civil Service ss 61, 63, wherein it states: 'A statutory requirement that dismissal from the classified service be for 'the good of the service' has the effect of limiting the valid exercise of the power of dismissal for cause.' (p. 87.) 'Legal cause for disciplinary action exists if the facts found by the commission disclose that the employee's conduct impairs the efficiency of the public service, but there must be a real and substantial relation between the employee's conduct and the efficient operation of the public service; otherwise, legal cause is not present.' (p. 90.) And, in 63 Am.Jur.2d, Public Officers & Employees s 202, wherein it states: 'Instead of enumerating particular causes for the removal of public officers, their superiors in authority may be empowered to remove them for 'cause.' The phrase 'for cause' in this connection means for reasons which the law and sound public policy recognize as sufficient warrant for removal, that is, legal cause, and not merely cause which the appointing power in the exercise of discretion may deem sufficient. It has been implied that officers may not be removed at the mere will of those vested with the

> power of removal, or without any cause. Moreover, the cause must relate to and affect the administration of the office, and must be restricted to something of a substantial nature directly affecting the rights and interests of the public.' (p. 752.) 15A Am.Jur.2d, Civil Service s 61, p. 86, states: '(T)he dismissal of a civil service employee for minor offenses is not favored.' In order to affirm the dismissal of a classified civil service employee, a legal cause must exist; and where no legal cause exists, the dismissal will be held to be arbitrary and capricious." Swezey v. State Dept. of Social and Rehabilitation Services of Kansas, 1 Kan.App.2d 94, 98-99, 562 P.2d 117, 120 - 121 (1977).
>
> "Legal cause for dismissal exists if the facts disclose the employee's conduct is of a substantial nature and directly impairs the efficiency of the public service, but there must be a real and substantial relation between the employee's conduct and the efficient operation of the public service; otherwise, legal cause is not present. Nothing in the record indicates this incident was of a substantial nature directly affecting the rights and interests of the public. Nor do we find that Swezey's conduct impaired the efficiency of the Topeka State Hospital. Legal cause for Swezey's dismissal is not found on the issue of public circulation of the record, and was not 'for the good of the service' as required by K.S.A. 1976 Supp. 75-2949; nor is there evidence substantially supporting the administrative order." Swezey v. State Dept. of Social and Rehabilitation Services of Kansas, 1 Kan.App.2d 94, 100, 562 P.2d 117, 122 (1977).

The Swezey case is illustrative of two points directly related to Mr. Del Gaudio's case. First, that the reasons given for dismissal in the required statement are conclusive as to the basis for removal. As such, the agency finding that Mr. Del Gaudio was being removed for violation of K.S.A. 75-2949f defined the sole basis for Mr. Del Gaudio's termination. Since the Board did not find, and there was no presented evidence, to show that Mr. Del Gaudio's conduct interfered with the operation of the agency nor that any of the other allegations made in the dismissal letter existed, then the agency's action was arbitrary and capricious for the failure to show such interference.

The fact that the lone basis for which Mr. Del Gaudio could be terminated for a finding under K.S.A. 2949f was enumerated in Swezey and was reaffirmed in a later case. "Newell erroneously asserts that SRS chose to initiate the dismissal process under K.S.A. 75-2949e(b) and limited its written letter of dismissal to that procedure. Newell would arguably be correct if SRS had limited its proposed dismissal to subsection (b)." Newell v. Kansas Dept. of Social and Rehabilitation Services, 22 Kan.App.2d 514, 518 (1996).

Thus, the finding of the Board was arbitrary and capricious because KDOC chose to initiate its dismissal proceedings pursuant to K.S.A. 75-2949f. The Board made no findings based upon the written instrument. "Where a statute sets forth the procedure for dismissal and requires that the cause of dismissal be stated in writing, the written statement so made is conclusive of the cause of removal. People v. Martin, 19 Colo. 565, 36 P. 543 (1894)." Swezey v. State Dept. of Social and Rehabilitation Services of Kansas, 1 Kan.App.2d 94, 98, 562 P.2d 117, 120 - 121 (1977).

Further, the Board acted improperly pursuant to K.S.A. 77-621(c)(2) in that "the agency has acted beyond the jurisdiction conferred by any provision of law." Since the termination of Mr. Del Gaudio was specifically spelled out as being under the dismissal process of K.S.A. 75-2949f, the Board made findings beyond their jurisdiction by finding that Mr. Del Gaudio's termination was valid under K.S.A. 75-2949e.

The Board's finding was also violative of K.S.A. 77-621(c)(4) in that the agency has erroneously interpreted or applied the law since the Board could not legally make a finding of termination of Mr. Del Gaudio under K.S.A. 75-2949e based upon KDOC's termination letter.

As such, the Board's determination was also violative of K.S.A. 77-621(c)(8) in that the agency action was otherwise unreasonable, arbitrary or capricious.

Second, because the agency reason for removal was at odds with the legal basis for removal by the Board, as the Board found Mr. Del Gaudio in violation of K.S.A. 75-2949(e), then the findings of the Board for termination of Mr. Del Gaudio were also invalid.

Based on the hearing and the evidence presented to the Board, the action of KDOC was arbitrary and capricious in that there was no evidence that Mr. Del Gaudio's conduct was detrimental to either the agency nor the public and such was found by the Board. As such, Mr. Del Gaudio should be reinstated with back pay.

B. The finding of the Board requires that Mr. Del Gaudio be reinstated to his position in that K.S.A. 75-2949(e) requires that an employee to have been counseled prior to his termination.

1. Standard of Review.

"The interpretation of a statute by an administrative agency charged with the responsibility of enforcing a statute is entitled to judicial deference and is called the doctrine of operative construction. Deference to an agency's interpretation is particularly appropriate when the agency is one of special competence and experience. Although an appellate court gives deference to the agency's interpretation of a statute, the final construction of a statute lies with the appellate court, and the agency's interpretation, while persuasive, is not binding on the court. Interpretation of a statute is a question of law over which an appellate court's review is unlimited. [Citation omitted.]" In re Appeal of United Teleservices, Inc., 267 Kan. 570, 572, 983 P.2d 250 (1999).

This Court must interpret K.S.A. 75-2949(e) and its application due to the findings of the Board in Mr. Del Gaudio's case.

2. Mr. Del Gaudio could not be terminated based upon the findings of the Review Board.

The Board found that Mr. Del Gaudio violated K.S.A. 75-2949e and that he had committed gross negligence. The Board then used that finding to determine that Mr. Del Gaudio was properly terminated based upon that statute.

> K.S.A. 75-21949e states: (a) Grounds for dismissal, demotion or suspension of a permanent employee for deficiencies in work performance include, but are not limited to, the following:
> (1) Inefficiency or incompetency in the performance of duties, or inability to perform the duties;
> (2) negligence in the performance of duties;
> (3) careless, negligent or improper use of state property;
> (4) failure to maintain satisfactory and harmonious relationships with the public and fellow employees;
> (5) habitual or flagrantly improper use of leave privileges;
> (6) a habitual pattern of failure to report for duty at the assigned time and place or to

> remain on duty; and
> (7) failure to obtain or maintain a current license or certificate or other authorization required to practice a trade, conduct a business or practice a profession.
> (b) Unless the appointing authority determines that the good of the service will best be served by proceeding directly to the procedure prescribed in K.S.A. 75-2949 and amendments thereto, the appointing authority may propose dismissal, demotion or suspension of a permanent employee for deficiencies in work performance only after the employee has received two performance evaluations in the 180 calendar days immediately preceding the effective date of the proposed dismissal, demotion or suspension. These performance evaluations shall be spaced at least 30 calendar days apart.
> ©) If the appointing authority proposes to dismiss, demote or suspend a permanent employee for deficiencies in work performance without the two evaluations described by subsection (b) and if the employee appeals the action to the state civil service board, the board shall require the appointing authority to show that the employee was adequately counseled concerning the nature of the deficiencies in work performance and concerning what was expected of the employee in correcting the deficiencies.
> (d) The provisions of subsections (b) and ©) shall not apply to demotions, suspensions or dismissals for the reasons described in subsection (a)(7).

Since the Board found that Mr. Del Gaudio's conduct was violative of 75-2949e, there was a statutory requirement that the appointing agency, KDOC, prove that Mr. Del Gaudio had twice received deficient performance evaluations in the previous 180 days regarding his work performance. This did not occur.

> "An appointing authority has presumptive justification for the dismissal of an employee who has had two unsatisfactory performance evaluations within the 180-day period immediately preceding the dismissal. "If the employee has not received two unsatisfactory performance evaluations in the 180-day period immediately preceding the date of dismissal, *and* the employee appeals the dismissal, the appointing authority is required to establish that the employee was adequately counseled concerning the nature of the deficiencies in his or her work performance and what was expected of the employee to correct the deficiencies. K.S.A. 75-2949e(c). In essence, the interplay between subsections (b) and ©) of K.S.A. 75-2949e merely establishes which party will carry the burden of persuasion during the appeal process. An unsatisfactory performance evaluation carries with it a presumption that the employee was apprised of the deficiencies in his or her performance and was advised of what measures needed to be taken to improve. If the appointing authority can establish that the employee has been independently advised as to his or her deficiencies in performance and has been counseled on how to improve, the statutory requirement has been met." Newell v. Kansas Dept. of Social and Rehabilitation Services, 22 Kan.App.2d 514, 517-518, 917 P.2d 1357, 1361 (1996).

Since there was no evidence presented that Mr. Del Gaudio was ever counseled regarding his

performance, the finding of the Board was arbitrary and capricious and Mr. Del Gaudio must be reinstated.

Further, if the agency wished to proceed with termination under 75-2949e and without proof of the prior performance evaluations, then the agency must show that Mr. Del Gaudio was at least counseled regarding his work performance and what was expected in correcting the deficiencies. This also did not occur.

"This court's review is limited to whether there is evidence to support the fact that Newell's job performance had been unsatisfactory and whether Newell was advised of the measures that needed to be taken to improve her performance. Appellate courts are not to reweigh the testimony or pass on the credibility of witnesses. McKissick v. Frye, 255 Kan. 566, Syl. ¶ 8, 876 P.2d 1371 (1994)." Id. at 519.

Thus, based upon the finding of the Civil Service Board, termination of Mr. Del Gaudio based upon 75-2949e is not possible because Mr. Del Gaudio was terminated based upon an agency finding of a violation of K.S.A. 75-2949f.

Thus, based upon the finding of the Civil Service Board, termination of Mr. Del Gaudio based upon 75-2949e is not possible because Mr. Del Gaudio was terminated based upon the fact that there was no evidence that Mr. Del Gaudio had been counseled regarding his job performance twice in the preceding 180 days.

Thus, based upon the finding of the Civil Service Board, termination of Mr. Del Gaudio based upon 75-2949e is not possible because there was no request and no evidence that Mr. Del Gaudio had been counseled regarding his job performance and advised at how to improve his duties.

Thus, Mr. Del Gaudio must be reinstated to his position with back pay.

Further, since the agency's basis for firing was based upon 75-2949f, the finding of the Board that Mr. Del Gaudio violated 75-2949e was invalid standing on its own.

Thus, the findings of the board were beyond the jurisdiction of the Board, were an erroneous interpretation of the law and were otherwise arbitrary and capricious in violation of 77-621(c)(2)(4) and (8).

C. Based upon the facts alone, no basis existed for Mr. Del Gaudio's termination.

1. Standard of review.

> "The review of the decision of the Board is controlled by the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions (KJRA), K.S.A. 77-601 *et seq.* See Kansas Dept. of Transportation v. Humphreys, 266 Kan. 179, 181, 967 P.2d 759 (1998). In reviewing a district court's decision this court makes the same review of the administrative agency's actions as did the district court. Connelly v. Kansas Highway Patrol, 271 Kan. 944, 964, 26 P.3d 1246 (2001), *cert. denied* 534 U.S. 1081 (2002). A rebuttable presumption of validity attaches to all actions of an administrative agency, and the burden of proving arbitrary and capricious conduct lies with the party challenging the agency's decision. 271 Kan. at 965. When a party challenges an agency's fact findings the appellate court is limited to ascertaining from the record whether determinations of fact are supported by evidence that is substantial when viewed in light of the record as a whole. K.S.A. 77-621(b)(7). Substantial evidence is evidence which possesses both relevance and substance and which furnishes a substantial basis of fact from which the issues can reasonably be resolved." Newell v. Kansas Dept. of SRS, 22 Kan.App.2d 514, 519, 917 P.2d 1357, *rev. denied* 260 Kan. 994 (1996).

2. There was not substantial evidence to support a finding that Mr. Del Gaudio's conduct was violative of K.S.A. 75-2949e.

The appointing agency's only charge of negligence against Mr. Del Gaudio was that he did not go to the second floor and visit personally with Mr. McCullough in the one hour and fifteen minute period between the time when Nurse Harman told him Mr. McCullough was doing well and the time Mr. Del Gaudio left the facility when his shift was done.

There was no evidence presented at the hearing that Mr. Del Gaudio failed to follow any procedure or departmental policy.

Mr. Del Gaudio was informed that Mr. McCullough was ill. In compliance with policy, Mr. Del Gaudio contacted Nurse Arndt at Winfield Correctional Facility. Nurse Arndt needed more information

than Mr. Del Guaudio could give without Mr. McCullough being present. Mr. Del Gaudio, in compliance with Nurse Arndt's request, had Mr. McCullough come to the office and describe his symptoms. Mr. Del Gaudio asked Mr. McCullough whether he was having chest pain or trouble breathing and Mr. McCullough said no. He stated he felt dehydrated and his shoulder hurt. Nurse Arndt told Mr. Del Gaudio to give Mr. McCullough his medication. Mr. Del Gaudio did so. Nurse Arndt told Mr. Del Gaudio that there was no need for an emergency room visit. (R. II, 69-72)

Mr. McCullough returned to his unit under his own power. Mr. Del Gaudio had COII Cotman take an icepack to Mr. McCullough to aid in his comfort. (R. II, 69-72)

Nurse Harman came by the facility to do some testing on inmates. At Mr. Del Gaudio's request, she visited and examined Mr. McCullough around 11:35. At that time, Nurse Harman found Mr. McCullough resting quietly and breathing normally. Mr. McCullough was complaining only about shoulder pain. She reported back to Mr. Del Gaudio that there was no need for an emergency room visit and that Mr. McCullough was getting relief from his medications (R. II, 176).

Nurse Harman spoke to COI Perrigo and informed him that Mr. McCullough was doing fine and did not need to go to the emergency room. Nurse Harman even contacted Nurse Arndt to inform her she had seen Mr. McCullough and he was doing fine. (R. II, 177-178). Nurse Harman contacted Nurse Arndt again and got the number for the nursing supervisor, Nurse Strubel. Nurse Harman told Nurse Struble that there did not appear to be a basis for an emergency room visit. (R. II, 180-181). The Board found that Nurse Harman did not relate to Nurse Strubel that Mr. McCullough was having trouble breathing and yelling from the pain. (R. I, 25). The Board, however, ignored the fact that Nurse Harman did not observe Mr. McCullough with labored breathing nor suffering extreme pain. The nursing supervisor did not authorize an emergency room trip.

It is also significant, yet not noted by the Board in their findings, that Mr. McCullough had a similar incident with the same complaints and drama the week before. (R. II, 180).

Mr. Perrigo, around 12:30 p.m. advised Mr. Del Gaudio that Mr. McCullough seemed worse. Mr. Del Gaudio, having been advised by three different medical staff, stated Mr. McCullough had been examined and did not need a trip to the emergency room. (R. III, 227).

There was no evidence that Mr. McCullough suffered labored breathing until a logbook notation made by Mr. Perrigo at 1:50 p.m. Mr. Perrigo did not inform Mr. Del Gaudio of this information.

At the end of his shift, at 2:00 p.m., Mr. Del Gaudio informed the incoming shift supervisor, CSI Shallue, and advised him of the situation with Mr. McCullough. The Board found that Mr. Del Guadio did not advise Mr. Shallue about Mr. McCullough "groaning, had difficulty walking up and down stairs, had pain in his arm, had been lying on the floor in pain, had difficulty breathing, had slurred speech, was gray in color and had a bloated stomach." (R. I, 27). The Board supplied facts that did not exist. Mr. Del Gaudio did not observe any problems with Mr. McCullough having difficulty with the stairs. Mr. Del Gaudio did not see, nor did Nurse Harman, Mr. McCullough having a gray pallor, a distended stomach nor slurred speech and there was no evidence that either of them had been informed of such conditions. Further, there was no evidence of additional pain in Mr. McCullough's arm. The Board's factual finding on this issue was specious at best.

Mr. Del Guadio left the facility shortly after 2:00 p.m. Mr. Shallue spoke to Nurse Harman who told him that she had seen Mr. McCullough and that he would see the doctor in the morning and that he did not need to go to the emergency room. (R. III, 336).

Mr. McCullough died of cirrhosis of the liver approximately an hour and a half after Mr. Del Gaudio had left the facility.

Based on these "facts", the Board found that Mr. Del Gaudio was negligent in his duties for failing to secure medical treatment for Mr. McCullough. Despite the fact that Mr. Del Gaudio met with Mr. McCullough personally, contacted Nurse Arndt, sent an icepack for Mr. McCullough's comfort, requested Nurse Harman to examine Mr. McCullough, received a recommendation from the medical

professional Nurse Harman that no emergency room visit was necessary (both before and after Nurse Harman had contacted both Nurse Arndt and the nursing supervisor), the Board found Mr. Del Gaudio negligent for not personally going up to the second floor in the last hour of his shift. Mr. Cotman and Mr. Perrigo were on the second floor and were able to observe Mr. McCullough and did not request emergency services, even though it was their prerogative to do so. Mr. Del Gaudio was never advised of Mr. McCullough's pallor, breathing difficulties, or pain beyond the complained of shoulder pain.

The Board found Mr. Del Gaudio did not give Nurse Arndt an accurate picture of Mr. McCullough's condition. However, Mr. Del Gaudio asked Mr. McCullough about how he felt and relayed that information to the nurse. Mr. Del Gaudio also got answers to all of Nurse Arndt's questions and relayed the information to her from Mr. McCullough. Further, Nurse Harman, who was present on site and personally observed Mr. McCullough and his complaints and agreed with the over the phone assessment from Nurse Arndt.

The Board, in its Conclusions of Law, found that Nurse Harman advised Mr. Del Gaudio around 11:00 a.m. that Mr. McCullough did not need to go to the emergency room. (R. I, 31). However, Nurse Harman did not arrive at the facility until after 11:15 a.m. and did not go to see Mr. McCullough until 11:35 a.m. (R. I, 24). The Boards facts supporting the conclusions of law do not even match up with their findings of fact in the same report.

The Board found that Mr. Del Gaudio should have been aware that Mr. McCullough was "suffering from a serious and worsening medical condition." Mr. Del Gaudio was a shift supervisor at a work release facility. He was not a medical officer. Nurse Harman, the trained medical person that was on site and observed Mr. McCullough personally was still saying at 2:15 p.m. that Mr. McCullough was fine and did not need to go to the hospital. (R. III, 336; R. I, 28).

There are no allegations that Mr. Del Gaudio violated any rules, regulations or departmental directives or protocols in his management of Mr. McCullough's situation. In fact, Warden Conover

testified that it appeared all procedures and protocols had been followed. (R. III, 362). Warden Conover stated that Mr. Del Gaudio had performed his duties consistently. (R. III, 362).

Mr. Del Gaudio was told by responsible medical personnel that there was no need for an emergency room visit. How could Mr. Del Gaudio, a medical layman, be held to a higher standard than that of a trained medical professional? There was also no evidence as to how Mr. Del Gaudio's failure to visit with Mr. McCullough made any difference at all in how Mr. McCullough was treated or how it would have saved Mr. McCullough's life.

Further, the evidence showed that Mr. McCullough died an hour and a half after Mr. Del Gaudio left the facility. The evidence also showed that the shift supervisor that was present when Mr. McCullough's condition worsened and he eventually died, was not terminated. ®. III, 340). The evidence also showed that in the event of the need for emergency medical treatment, any officer present in the facility had the ability to make the call for an ambulance. And yet, no one, besides Mr. Shallue, was disciplined.

The factual findings of the Board and the evidence presented to the Board were not substantial enough to support their finding of negligence by Mr. Del Gaudio in the performance of his duties and did not support termination from employment under any standard.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that two true and correct copies of the above and foregoing brief was placed in the U.S. Mails, postage prepaid to the following:

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this _____ day of September, 2008.

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Michael P. Whalen