



**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

GRAYLAND NOWDEN,

Appellant,

v.

**DIVISION OF ALCOHOL & TOBACCO
CONTROL, MISSOURI DEPARTMENT
OF PUBLIC SAFETY,**

Respondent.

WD79897

**OPINION FILED:
April 25, 2017**

**Appeal from the Circuit Court of Cole County, Missouri
The Honorable Jon E. Beetem, Judge**

**Before Division IV: Mark D. Pfeiffer, Chief Judge, and
Lisa White Hardwick and Gary D. Witt, Judges**

Mr. Grayland Nowden (“Nowden”) appeals from the Judgment entered by the Circuit Court of Cole County, Missouri (“circuit court”), granting summary judgment in favor of the Missouri Department of Public Safety’s (“Department”) Division of Alcohol and Tobacco Control (“Division”) on Nowden’s first amended petition for review under Chapter 536 on the grounds that Nowden’s failure to exhaust his administrative remedies deprived the circuit court of authority to proceed. We reverse the circuit court’s judgment and remand the cause for judicial review as a noncontested case pursuant to section 536.150.

Facts and Procedural History

Prior to October 1, 2013, Nowden was employed as a special agent with the Division. The Division conducted an investigation regarding Nowden's possible interest in a liquor establishment and possible violations of Division employee policies. After the investigation, the Division notified Nowden that he was terminated from his position as special agent effective October 1, 2013, "subject to your right to appeal as set forth in Missouri Department of Public Safety's Policy G-2," a copy of which was attached to the letter. A Notification of Disciplinary Action dated October 1, 2013, was enclosed with the letter. The Notification advised Nowden that his application for appeal must be submitted to Supervisor Lafayette Lacy by October 8, 2013, seven calendar days from receipt of the Notification. Nowden did not submit his Application for Appeal until October 10, 2013. On November 4, 2013, the Division notified Nowden that his appeal was untimely and would not be considered.

Nowden filed a complaint with the Administrative Hearing Commission ("AHC") on November 1, 2013. The AHC dismissed Nowden's appeal for lack of jurisdiction because Nowden was not a merit employee and the Department had appropriate internal appeal procedures for Division employees.

On February 21, 2014, Nowden filed a petition for review under Chapter 536.¹ The parties filed cross-motions for summary judgment. The circuit court denied Nowden's motion for summary judgment, granted the Division's motion for summary judgment, and dismissed Nowden's petition with prejudice because he failed to exhaust his administrative remedies.

¹ The circuit court granted Nowden leave to file a First Amended Petition for Review under Chapter 536, which was filed June 23, 2014. Thereafter, Nowden was granted leave to file a Second Amended Petition for Injunctive Relief and Non-Contested Case Review under Chapter 536.150, which was filed May 6, 2015. Nowden was granted leave to withdraw his Second Amended Petition, and on January 28, 2016, the circuit court ordered the cause to proceed on Nowden's First Amended Petition. The circuit court's Judgment dismissed Nowden's First Amended Petition with prejudice.

Nowden timely appealed.

Standard of Review

The Division's administrative determination was a noncontested case. "On appeal in a non-contested case, we review the judgment of the circuit court, not the decision of the administrative agency." *Sch. Dist. of Kansas City v. Mo. Bd. of Fund Comm'rs*, 384 S.W.3d 238, 264 (Mo. App. W.D. 2012) (internal quotation omitted). Therefore, our review of the circuit court's summary judgment in favor of the Division "is essentially the same as the review for a court-tried case." *Id.* In granting summary judgment in favor of the Division, the circuit court held that Nowden failed to exhaust his administrative remedies, which deprived the circuit court of authority to proceed. Therefore, we must analyze this stated basis for the Judgment to determine whether the circuit court's conclusion "rests on substantial evidence and correctly declares or applies the law." *Id.* at 265 (internal quotation omitted).

Analysis

Nowden asserts five points on appeal. In Points I and III, Nowden asserts that he was not required to exhaust administrative remedies because under Policy G-2 there was no right to a formal hearing. In Points II and IV, he contends that he had no opportunity to exhaust his administrative remedy because he was immediately terminated. And in Point V, he argues that the circuit court erred in denying his motion for summary judgment because the Division's immediate termination denied him his rights to pre-deprivation due process. The exhaustion of remedies issue must be addressed first because "if the litigant has failed to exhaust administrative remedies, the trial court is deprived of statutory authority to act other than in dismissing the petition." *Whithaus v. Curators of Univ. of Mo.*, 347 S.W.3d 102, 104-05 (Mo. App. W.D. 2011).

Missouri Constitution article V, section 18 provides that: “All final decisions, findings, rules and orders on [sic] any administrative officer or body existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law[.]” The statutory framework for judicial review of administrative decisions is found in Chapter 536.

The resolution of this appeal rests on whether the circuit court was required to treat this matter as a contested or noncontested case. In its Judgment, the circuit court did not make an express determination as to the type of case before it. Nevertheless, the circuit court dismissed Nowden’s petition with prejudice for lack of subject matter jurisdiction, concluding that Nowden failed to exhaust his administrative remedies because the Division “maintained a policy wherein a disciplined employee could seek review of the discipline decision by filing an ‘appeal’ within seven (7) days of the notice,” and Nowden “did not seek this remedy within this seven (7) days.” The circuit court determined that Nowden’s failure to exhaust his administrative remedies deprived the court of authority to proceed.

The reason it is important for the circuit court to determine the type of administrative case before it is because different standards of judicial review apply to contested and noncontested cases. “The classification of a case as ‘contested’ or ‘noncontested’ is determined as a matter of law.” *City of Valley Park v. Armstrong*, 273 S.W.3d 504, 506 (Mo. banc 2009). “The key to the classification of a case as contested or noncontested is the requirement of a hearing.” *Id.* at 507.

An administrative proceeding is a “contested case” when “legal rights, duties or privileges” are required by law to be decided after a hearing. § 536.010(4).² The term “hearing,” as used in section 536.010(4) “means a proceeding at which a measure of procedural

² All statutory references are to the REVISED STATUTES OF MISSOURI 2000, as supplemented.

formality is followed.” *Armstrong*, 273 S.W.3d at 507 (internal quotation omitted). Procedural formalities in contested cases generally include:

notice of the issues (section 536.067); oral evidence taken upon oath or affirmation and the cross-examination of witnesses (section 536.070); the making of a record (section 536.070); adherence to evidentiary rules (section 536.070); and written decisions including findings of fact and conclusions of law (section 536.090).

Id. In a contested case, administrative remedies must be exhausted prior to judicial review. § 536.100.

On the other hand, an administrative proceeding is a noncontested case “if the decision is made without any requirement of an adversarial hearing at which a measure of procedural formality is followed.” *Strozewski v. City of Springfield*, 875 S.W.2d 905, 906 (Mo. banc 1994). Decisions in noncontested cases are subject to judicial review if the decision is not subject to administrative review and determines “the legal rights, duties or privileges of any person.” § 536.150.1. “That statute has no requirement of exhaustion of administrative remedies.” *Strozewski*, 875 S.W.2d at 907. Indeed, it provides: “Nothing in this section shall be construed . . . to limit the jurisdiction of any court or the scope of any remedy available in the absence of this section.” § 536.150.3. Thus, exhaustion of administrative remedies is not a prerequisite to the circuit court’s statutory authority to review claims in noncontested cases. See *Coleman v. Mo. Sec’y of State*, 313 S.W.3d 148, 154 (Mo. App. W.D. 2010).

Nowden must first exhaust his administrative remedy before seeking judicial relief *if* he has a legal right to a hearing to challenge his termination. Under Department Policy G-2, “Disciplinary and Appeal Policy and Procedure,” when the Division Director determines that an employee should be dismissed, the Division Director makes a “written report setting out the facts and circumstances and a recommendation of action deemed appropriate by the Division

Director.” A copy of the written report is given to the employee, and the recommended disciplinary action is discussed with the employee. After being notified, the employee has two options:

A. If the employee concurs with the recommended disciplinary action and does not wish to appeal, the employee may sign a waiver of the right to appeal. The right to appeal is forfeited if management personnel does not receive the Application for Appeal within seven (7) calendar days. In either case, the recommended disciplinary action would be imposed as determined by management.

B. If the employee wishes to appeal the recommended disciplinary action, the employee shall have seven (7) calendar days from the official date on the Notification of Disciplinary Action form to submit an appeal . . . using an Application for Appeal form[.] . . . [I]f the employee has not previously submitted a written response thoroughly addressing the issues and allegations, the response will be submitted within ten (10) calendar days from the official date of the Application for Appeal form. Appeal forms and any related reports will be immediately forwarded through channels via the Division Director to the Personnel Administration of the Department of Public Safety.

After appeal documents are timely received, the Director of the Department has four options:

- Request additional information;
- If the Director feels that the recommended action is not appropriate or is excessive, resolve the issue through an *informal* hearing;
- If the Director concurs with the recommended disciplinary action (of either suspension or demotion), convey the decision in writing to the employee; this decision is final, and the employee has no further right to appeal;
- *At the Director’s discretion, a Board may be convened for a hearing, substantially following the requirements outlined in Chapter 536; technical rules of evidence will not apply; after the hearing, the Board will deliberate and present to the Director its written findings and recommendations; the Director will review the record and make the final decision.*

(Emphasis added.) While the Department’s appeal procedure provides an employee a method for contesting a disciplinary decision, “the absence of formality deprives it of the adversarial quality that is characteristic of a contested case. . . . [N]o real hearing occurs before a tribunal at

which evidence is presented, tested and refuted, and no evidentiary record is maintained for purposes of judicial review.” *Strozewski*, 875 S.W.2d at 907.³ “The . . . procedure does not provide for the kind of hearing that qualifies it as a contested case. Thus, exhaustion of the grievance procedure is not a prerequisite to judicial review.” *Id.*

Under the Department’s appeal procedure, the Director of the Department has discretion whether to convene a Board for a hearing. An employee has no right to a hearing before a Board concerning termination of employment; instead, such hearings are provided at the discretion of the Director. And, as was the case in *Sanders v. City of Columbia*, 481 S.W.3d 136, 143-44 (Mo. App. W.D. 2016), the discretionary Board hearing under Policy G-2 is merely advisory. The hearing procedure does not determine the employee’s legal rights, duties, or privileges related to continued employment; the Board is only authorized to make written recommendations to the Director when it submits the record of its proceedings for the Director to make the final decision. *See id.* at 143. As this court observed in *Sanders*:

[I]n order to achieve “contested case” status, the “hearing” portion of the grievance process must allow each party to be heard and to address the evidence of the opposing party that ultimately will be relied upon by the person or entity making the final decision. In other words, the result of the hearing must be “meaningful.” Absent a hearing that, in some real sense, confines the final decision maker, the evidentiary hearing is nothing more than “window dressing,” and any claimed due process afforded by such a hearing is fictional.

Id. at 144. Because the discretionary Board hearing would not determine Nowden’s “legal rights, duties or privileges,” this is not a contested case; and failure to exhaust administrative remedies does not preclude judicial review. *See id.*

³ The Division cites to *Hamby v. City of Liberty*, 20 S.W.3d 515 (Mo. banc 2000), but *Hamby* is inapposite to this case. In *Hamby*, unlike the present case, the aggrieved employee had a right to a formal hearing as part of the administrative appeal process and, because a formal hearing was available to the employee, the employee was required to exhaust such formal administrative remedy. *Id.* at 518. But, as the *Hamby* court pointed out, “*Strozewski* made clear, however, that the administrative remedies in that case did not have to be exhausted because the grievance procedure and other remedies available to the employee did not provide for a formal hearing, and without availability of a formal hearing, the case was properly reviewable under section 536.150 as a ‘non-contested’ case.” *Id.*

Nowden is entitled to judicial review of the termination of his employment under section 536.150 as a noncontested case. When a noncontested case is judicially reviewed:

“[t]he circuit court does not review the [agency] record for competent and substantial evidence, but instead conducts a *de novo* review in which it hears evidence on the merits, makes a record, determines the facts and decides whether the agency’s decision is unconstitutional, unlawful, unreasonable, arbitrary, capricious or otherwise involves an abuse of discretion.”

Id. at 145 n.8 (quoting *City of Valley Park v. Armstrong*, 273 S.W.3d 504, 508 (Mo. banc 2009)).

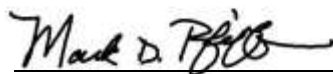
“The circuit court in a noncontested case acts to determine the evidence and give judgment from that evidence.” *Id.* (internal quotation omitted).

The circuit court erroneously declared the law in ruling that Nowden’s failure to exhaust his administrative remedies deprived the circuit court of the authority to proceed to judicially review the termination of Nowden’s employment.

Points I and III are granted.⁴

Conclusion

The circuit court’s judgment is reversed, and the cause is remanded to the circuit court to judicially review the matter as a noncontested case pursuant to section 536.150.



Mark D. Pfeiffer, Chief Judge

Lisa White Hardwick and Gary D. Witt, Judges, concur.

⁴ Given our disposition of Points I and III, we need not and do not address Nowden’s other points.