IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

HAROLD OWENBY,	)	C/A NO. 03A01-9512-CH-00458
	)	
Petitioner-Appellant,	)	KNOX CHANCERY
	)	
v.	)	HON. FREDERICK D. McDONALD,
	)	CHANCELLOR
CITY OF KNOXVILLE and CIVIL	)	
SERVICE MERIT BOARD OF	)	
KNOXVILLE,	)	AFFIRMED
	)	AND
Respondents-Appellees.	)	REMANDED

ANN C. SHORT, Knoxville, for Petitioner-Appellant.

GORDON D. FOSTER, LACY & WINCHESTER, P.C., Knoxville, and BRIAN T. BABB, CITY OF KNOXVILLE LAW DEPARTMENT, Knoxville, for Respondents-Appellees.

OPINION

Franks. J.

Petitioner's petition for judicial review filed on March 11, 1991 in Chancery Court, essentially charged that the Civil Service Merit Board had administered a civil service test of 120 multiple choice questions for the position of Fire Assistant Chief, and after the test had been scored, 12 of the questions were ?thrown out? and the test papers regraded all to

the detriment of petitioner. He asked that respondents ?make available to him the 17 bad/difficult or dual answer questions, his answers to those questions and the keyed or correct answers.?

On June 28 1991, the Chancellor in response to petitioner's complaint, ordered a partial remand to the agency to permit additional evidence to be entered. Upon remand, the hearing officer admitted into the record three exhibits, but reaffirmed his decision that the agency had acted properly. There is no indication in the record that petitioner offered any further proof at the hearing.

On December 17, 1992, the Chancellor filed a memorandum opinion wherein he gave the background of the case as follows:

> Following a department posting of notice of openings for 8 positions as Assistant Fire Chief Petitioner and other applicants took a 120 question multiple choice promotion examination. Petitioner was one of 13 of the applicants who passed the examination. Thereafter, the Board reviewed the examination: the Board threw out 12 of the questions, and ruled that 5 had dual answers. The effect of these post examination changes was than an additional 14 applicants, upon being re-scored, passed the examination, increasing the pool of applicants for the positions to 27. 8 of the applicants, not including Petitioner, were promoted into the position openings. Some of the 8 who were promoted had not passed the promotion examination prior to the change in scoring.
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> . . .
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> The problem at this point is that Petitioner has not been permitted to see or have identified, the questions which were thrown out or declared dual.
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> . . .
>
> The positions of the parties are not necessarily as conflicting as might seem. Petitioner, as he requests, is entitled to examine the 17 examination questions at issue.

> . . .
>
> An appropriate order providing for discovery of the 17 questions may be entered; it shall provide that the disclosure of the 17 question [sic] is only for the purposes of this proceeding, and that they shall remain and be kept confidential. . . .

The Court then entered an order permitting the discovery outlined in his opinion, and an order of dismissal was entered by the Court on August 25, 1995.

The issue on appeal as framed by petitioner's attorney is ?whether a remand to the Chancery Court is necessary to resolve unsettled factual issues regarding the testing examination, the permanent promotion of all 8 employees who were previously promoted on a temporary basis, and to clarify the record on what information ultimately was made available to appellant Owenby.? Petitioner in his brief after acknowledging that the Chancellor's order gave him the right to discover the 17 questions at issue observes:

> For reasons not appearing in the record, several more months elapsed with apparently no action on the Chancellor's earlier rulings.

The brief then states:

> Nothing in the record verifies whether the preliminary review was conducted.
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> . . .
>
> Again, several months passed with no verification in the record of what transpired. . . .

Plaintiff's brief then states:

> Nothing in this record documents exactly what information or when any information was actually made available to Captain Owenby or his counsel. A transcript of an August 7, 1996 hearing before the Chancellor shows that Captain Owenby's new counsel refers to having an expert go over the ?written test? and not having evidence that what was done with the test was not within the acceptable standards.

The record contains no evidence that the Board acted arbitrarily, capriciously or illegally. The record further establishes that petitioner was accorded the opportunity to discover and evaluate the questions deleted from the test, and the record does establish that petitioner, his counsel and an ?expert? did ?go over it?, those questions, and it was conceded he could not show that what was done violated ?generally accepted standards for giving these tests?.

There is simply no basis in this record to find that petitioner was denied the opportunity to put further evidence in the record before the Chancellor.

We find no basis for a remand. The petitioner had the burden to demonstrate before the Trial Court that the Board's action was either arbitrary, illegal or capricious, and he has offered no evidence that the Board acted improperly. Nor doe he tell us on appeal what evidence he would present if a remand for further hearing occurred. Moreover, we will not reverse the action of a Trial Court where an appellant is responsible for any errors in the record or who failed to take reasonable action to prevent errors. *See* T.R.A.P. Rule 36(a).

We affirm the judgment of the Trial Court and remand at appellant's cost.

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Herschel P. Franks, J.

CONCUR:

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Houston M. Goddard, P.J.

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Don T. McMurray, J.