KENTUCKY PERSONNEL BOARD
MINUTES OF AUGUST 13, 2010

1. The regular monthly meeting of the Kentucky Personnel Board was called to order by Chairman Cecil F. Dunn on August 13, 2010, at approximately 9:30 a.m., 28 Fountain Place, Frankfort, Kentucky.

Board Personnel Present:

Cecil F. Dunn, Chairman
M. Suzanne Cassidy, Vice Chair
Larry B. Gillis, Member
David B. Stevens, Member
Wayne "Doug" Sapp, Member
David Hutcheson, Member
Susan Gardner, Member
Mark A. Sipek, Executive Director and Secretary
Boyce A. Crocker, General Counsel
Linda R. Morris, Administrative Section Supervisor
Cynthia Perkins, Administrative Specialist

2. **READING OF THE MINUTES OF REGULAR MEETING HELD JULY 9, 2010**

The minutes of the last Board meeting had been previously circulated among the members. Chairman Dunn asked for additions or corrections. Ms. Cassidy moved to approve the minutes, as submitted. Mr. Hutcheson seconded, and the motion carried 7-0. The Board members signed the minutes.

3. **EXECUTIVE DIRECTOR'S REPORT**

Mr. Sipek stated that seven appeals from the June Board meeting were filed in the Franklin Circuit Court, including one from both sides.

Mr. Sipek informed the Board of the following cases:

James Carreer v. Cabinet for Health and Family Services, 2009-CA-000155-MR, the Court of Appeals rendered an Opinion Affirming the decision of the Franklin Circuit Court.

This opinion will be published. This is a unique case involving reorganization, claims of penalization and constructive discharge.

Lois Sutton v. Justice and Public Safety Cabinet, 04-CI-01121, the Franklin Circuit Court's Opinion and Order entered July 20, 2010, upheld the decision of the Personnel Board. This was a case involving a promotion.

Mr. Sipek advised that the Court of Appeals criticized the Personnel Board concerning the certification of the record in the *Wanda Faye Wade v. Finance* appeal and asked the Board to recertify it. The Court also noted that there were duplicate copies of documents. Mr. Sipek stated that this would occur when a party would fax a copy to the Board and follow up with the original within three days. Mr. Sipek stated that Ms. Perkins recertified the record after contacting the staff at the Court of Appeals and other agencies for guidance. Mr. Sipek stated that the Board will certify future records by taking out duplicates and providing a list of documents, thereby providing a cleaner record to the courts.

At the conclusion of Mr. Sipek's report, Chairman Dunn called for the Personnel Cabinet's report.

4. PERSONNEL CABINET'S REPORT

The Hon. Dinah Bevington, General Counsel, for the Personnel Cabinet, came forward to present the Cabinet's report. Specifically, Ms. Bevington stated that the Personnel Cabinet made technical revisions to clarify the Furlough Regulation; including adding the dates or months of the six designated furlough days. Ms. Bevington stated that the pending litigation filed by AFSCME will have no bearing on the regulations being re-filed.

Technical revisions to the Furlough Regulation
--101 KAR 5:015E

Dr. Stevens moved to approve the Personnel Cabinet's revisions to the emergency regulation. Mr. Sapp seconded and the motion carried 6-0, with Mr. Gillis recusing.

5. **ORAL ARGUMENTS**

A. Gregory Fuchs v. Office of the Attorney General and Robert Long, Jr.

Present were the Appellant, Gregory Fuchs; counsel for Appellee, the Hon. Lisa Lang; and the Intervenor, Robert Long, Jr., for oral argument. The parties answered questions from the Board.

B. Seth Leland v. Cabinet for Health and Family Services

Present were the Appellant, Seth Leland, and counsel for Appellee, the Hon. Muriel Varhely, for oral argument. The parties answered questions from the Board.

C. Eva Stevens v. Justice and Public Safety Cabinet

Present were counsel for Appellant, the Hon. Paul Fauri, and counsel for Appellee, the Hon. Tyra Redus, for oral argument. The parties answered questions from the Board.

D. Leah Brooke Wilcoxson v. Auditor of Public Accounts and Elizabeth Rebecca Walsh

Present were the Appellant, Leah Brooke Wilcoxson; counsel for Appellee, the Hon. Bob McBeath; and the Intervenor, Elizabeth Walsh, for oral argument. The parties answered questions from the Board.

6. **INVESTIGATIONS**

A. "Non P-1" positions in Department of Military Affairs
--Request by Amy Mischler
--Response by Department Military Affairs (Hon. Michael Van Leuven)

Ms. Amy Mischler was present to request an investigation into "Non-P-1" positions in the Department of Military Affairs. The Hon. Michael Van Leuven did not appear, but did provide a response.

Chairman Dunn asked Ms. Mischler to specify exactly what she wanted the Personnel Board to investigate. Ms. Mischler stated that it is unknown how many employees are affected. Chairman Dunn stated that the number of "Non P-1"

employees is not important; it is the issue that is important. Ms. Mischler stated that the Board needs to find out first how many employees are affected and then evaluate the "Non P-1" employee positions, to see which ones could be classified as merit. Ms. Mischler stated that the Board needed to investigate the constitutionality of the "Non P-1" positions. "Non P-1s" are not protected by the Board, and can be hired, fired, promoted or demoted "at will." Ms. Mischler stated that women, minorities and disabled were more likely to be classified as a "Non P-1" and were more subject to be in hostile environments, with no rights. Chairman Dunn asked if the "Non P-1" was set up by statute. Ms. Mischler stated that there are no statutes or regulations.

Mr. Sapp asked Mr. Gillis to help the Board members understand what a "Non P-1" employee is. Mr. Gillis, who works in the state payroll area, explained that "Non P-1" employees are people in state government in the payroll system only, not in classified positions. Mr. Gillis stated that the Personnel Cabinet knows how many "Non P-1" positions there are. Mr. Gillis stated that one example of a "Non P-1" would be a personal service contract. Mr. Gillis stated that merit employees come into state government through a competitive process (register, interview, etc.), and "Non P-1" employees do not go through that process and are considered "at will" employees. Military Affairs, by statute, can hire "Non P-1" employees outside the KRS Chapter 18A process. Mr. Gillis further stated that not all agencies have that authorization.

Ms. Mischler stated that "Non P-1" employees have not been addressed under KRS Chapter 18A. That this process under HB 727 in 1998 "flew under the radar" and was not brought properly before the Personnel Board. Ms. Mischler stated that the Personnel Board was specifically set up to protect state employees.

Mr. Sipek stated that Ms. Mischler's brother, Ralph Mischler, was a "Non P-1" employee with Military Affairs, who was dismissed from his position. Mr. Sipek stated that this appeal is pending a decision on whether or not the Board has jurisdiction. Mr. Sipek stated that during the course of discussion, it was brought up that this matter might be more appropriate for an investigation by the Board, which was the initial position of Military Affairs. Ms. Mischler made an official request for investigation, and now Military Affairs indicated they are no longer interested. Mr. Sipek, as Executive Director and as a Hearing Officer, stated that it is his opinion it would be a matter more appropriate for an investigation. The investigation will not do away with the appeal, but it would get to the issues and revisit them in the appeal. Mr. Sipek stated that Mr. Mischler has an alleged learning disability and is not represented by counsel. Mr. Mischler has been accompanied by Ms. Mischler, who went to law school, but is not an attorney who can practice before the Board. In an investigation, as a practical matter, the Board can hear from or talk to anyone that is not represented by counsel.

Further, this is an issue of first impression. Mr. Sipek is not aware of the Board ever having addressed the issue of whether or not there is jurisdiction for these "Non P-1" employees to come before the Board. Mr. Sipek stated that he did not agree with Ms. Mischler that there was an obligation in 1998 to come before the Board when the statute was proposed. There is KRS Chapter 36 which gives the Adjutant General the right to hire and fire these individuals and a separate statute, KRS 18A.115, which states classified service shall comprise all positions and lists the exceptions. "Non P-1" employees are not excluded.

Chairman Dunn asked what is the Personnel Board's authority to declare a statute unconstitutional. Mr. Crocker advised that the Board does not have that authority, but the Board can determine what its own jurisdiction is.

Ms. Cassidy stated that the Board could look at the issue narrowly, specifically, how Chapter 36 relates to KRS 18A.115 without getting into the constitutionality of either one.

Mr. Sapp asked about the Personnel Cabinet's interpretation of employees under Chapter 36 and whether these employees are under the jurisdiction of the Personnel Board.

Mr. Crocker stated that the Personnel Cabinet has a way to track "Non P-1" employees, but he was not aware of it until Mr. Mischler filed an appeal.

To clear up some confusion, Mr. Gillis stated that the Division of Forestry, as another example, will pull people off the streets during fire season as a "Non P-1" employee to help put out fires because they do not have enough personnel. Personnel and payroll are two separate systems. "Non P-1s" are only on the payroll system side, to provide a way to pay them.

Ms. Cassidy suggested that the Board's investigation be limited to Military Affairs as to whether "Non P-1s" have a right to file an appeal. Mr. Crocker stated that Military Affairs does not believe "Non P-1s" have a right to appeal.

Ms. Mischler stated that the Board may not be able to declare a statute unconstitutional, but could issue an opinion which could be persuasive as to the vagueness of the statute.

Mr. Gillis advised that the Board should wrap-up prior investigations, which are now five years old, before taking on any new investigations. Mr. Sapp stated that more information was needed on the issue before he can determine whether there should be an investigation. Mr. Gillis advised that Chapter 36 states that "Non P-1" employees are not included under Chapter 18A.

Ms. Cassidy moved to defer this matter to the September Board meeting; and that Mr. Sipek draft a statement of the specific issues to be investigated for the Board to consider and address what the scope of the investigation would be, with input from the parties. Dr. Stevens seconded and the motion carried 7-0.

Ms. Gardner asked if the "Non P-1" employees at Military Affairs were permanent full-time or temporary. Mr. Crocker stated that they are permanent, full-time employees. Mr. Sapp asked how they were paid. Mr. Crocker said by defense department contract, but he really did not know enough about it.

Chairman Dunn also asked Mr. Crocker for a statutory interpretation of the Board's jurisdiction. Chairman Dunn stated that "Non P-1" employees have an adequate remedy of law through the Franklin Circuit Court. Mr. Sapp asked that any information be provided before the September meeting. Chairman Dunn stated that any information should be provided to the Board members at least seven days prior to the meeting.

7. CLOSED SESSION

Mr. Sapp moved that the Board go into Executive Session for the purposes of discussing complaints, proposed or pending litigation, and deliberations regarding individual adjudications; Mr. Hutcheson seconded. Chairman Dunn stated that the motion had been made and seconded for the Personnel Board to retire into closed Executive Session, passed by a majority vote of the members present, with enough members present to form a quorum. Pursuant to KRS 61.810(1) (c), (f), and (j), the Kentucky Open Meetings Act, the Board will now retire into closed Executive Session. Specific justification under the Kentucky Open Meetings Act for this action are as follows, because there will be discussion of proposed or pending litigation against or on behalf of the Board; and deliberations regarding individual adjudication. The motion carried 7-0. (11:35 a.m.)

Mr. Stevens moved to return to open session. Mr. Hutcheson seconded and the motion carried 7-0. (1:00 p.m.)

8. **CASES TO BE DECIDED**

The Board reviewed the following cases. At that time, the Board considered the record including the Hearing Officers' findings of fact, conclusions of law and recommendations, any exceptions and responses which had been filed, and oral arguments where applicable.

A. Gregory Fuchs v. Office of the Attorney General and Robert Long, Jr.

Dr. Stevens moved to note Appellants' exceptions, Appellee's response and oral arguments, and to accept the recommended order dismissing the appeal. Mr. Hutcheson seconded and the motion carried 7-0.

B. Seth Leland v. Cabinet for Health and Family Services

Ms. Cassidy moved to note Appellants' request and oral arguments, and to accept the recommended order dismissing the appeal. Dr. Stevens seconded and the motion carried 7-0.

C. Eva Stevens v. Justice and Public Safety Cabinet – (2 appeals)

Dr. Stevens moved to note Appellant's exceptions, Appellee's response and oral arguments and to defer this matter to the next Board meeting. Ms. Gardner seconded and the motion carried 7-0.

D. Leah Brooke Wilcoxson v. Auditor of Public Accounts and Elizabeth Rebecca Walsh

Ms. Cassidy moved to note Appellee's exceptions, Appellant's response and oral arguments and to defer this matter to the October Board meeting, with direction that the parties mediate this dispute. Mr. Sapp seconded and the motion carried 6-1, with Mr. Gillis opposing.

E. Stephanie Marshall v. Justice and Public Safety Cabinet

Mr. Hutcheson moved to alter the recommended order in accordance with the Final Order attached to these minutes dismissing the appeal. Dr. Stevens seconded and the motion carried 7-0.

F. Michael Case v. Cabinet for Health and Family Services

Ms. Cassidy moved to accept the recommended order dismissing the appeal. Mr. Sapp seconded and the motion carried 7-0.

G. Robert Kinslow v. Energy and Environment Cabinet

Mr. Gillis moved to accept the recommended order dismissing the appeal. Mr. Hutcheson seconded and the motion carried 7-0.

H. Wade Maggard v. Energy and Environment Cabinet and Joshua George

Ms. Cassidy moved to accept the recommended order dismissing the appeal. Dr. Stevens seconded and the motion carried 7-0.

I. Joey Pratt v. Department of Veterans Affairs

Mr. Sapp moved to accept the recommended order dismissing the appeal. Ms. Gardner seconded and the motion carried 7-0.

J. Gregory Wilson v. Personnel Cabinet

Mr. Hutcheson moved to accept the recommended order dismissing the appeal. Ms. Cassidy seconded and the motion carried 7-0.

Show Cause Order – Appeal Dismissed - Response Filed

The following case had a show cause order entered by the hearing officer recommending that the appeal be dismissed for failure to timely prosecute unless a statement was filed by the Appellant stating sufficient cause to excuse their failure to appear at the scheduled hearing. The Appellant filed a response.

K. Beverly Adams v. Cabinet for Health and Family Services
--Response by Appellant
--Appellee's Response to Exceptions

Ms. Gardner moved to return this matter to the active docket. Dr. Stevens seconded and the motion carried 7-0.

Show Cause Order – Appeal Dismissed - No Response Filed

The following case had a show cause order entered by the hearing officer recommending that the appeal be dismissed for failure to timely prosecute unless a statement was filed by the Appellant stating sufficient cause to excuse their failure to appear at the scheduled hearing. There was no response submitted by the Appellant to the show cause order.

L. Angel Adams v. Department of Veterans Affairs

Mr. Hutcheson moved to find that the Appellant had not responded to the show cause order and that the recommended order be accepted dismissing the appeal for failure to timely prosecute the appeal. Dr. Stevens seconded and the motion carried 7-0.

9. **WITHDRAWALS**

Dr. Stevens moved to consider the following withdrawals of appeals *en bloc* and to accept the withdrawals and dismiss the appeals. Mr. Sapp seconded and the motion carried 7-0.

A. Clyde Adams v. Tourism, Arts and Heritage Cabinet
B. Richard Brown v. Justice and Public Safety Cabinet (3 appeals)
C. Terry Hunter v. Cabinet for Health and Family Services
D. Victor Morris v. Justice and Public Safety Cabinet
E. Jenia Murray v. Justice and Public Safety Cabinet
F. Kimberlee Ratzlaff v. Personnel Cabinet
G. Christina Riddle v. Cabinet for Health and Family Services (2 appeals)
H. Lindy Bridwell v. Justice and Public Safety Cabinet
I. Sally Blair v. Energy and Environment Cabinet
J. Deborah K. Crump v. Cabinet for Health and Family Services
K. David Eubank v. Public Protection Cabinet
L. Melinda Freeze v. Personnel Cabinet
M. Scherry Griffin v. Personnel Cabinet
N. Ronald T. Wilson v. Transportation Cabinet

10. **SETTLEMENTS**

Ms. Cassidy moved to consider the following settlement and to accept the settlement as submitted by the parties sustaining the appeal to the extent set forth in the settlement. Mr. Sapp seconded and the motion carried 6-0, with Ms. Gardner recusing.

A. Susan Gardner v. Public Protection Cabinet

Dr. Stevens moved to consider the following settlements *en bloc* and to accept the settlements as submitted by the parties sustaining the appeal to the extent set forth in the settlement. Mr. Gillis seconded and the motion carried 6-0, with Chairman Dunn abstaining.

B. Penny Lawson v. Department of Veterans Affairs (mediated)
C. Cary Lyle v. Tourism, Arts & Heritage Cabinet
D. Julie Badgett v. Tourism, Arts & Heritage Cabinet (on remand from circuit court)
E. Jared Shaw v. Transportation Cabinet
F. Dianna Wood v. Labor Cabinet

11. **OTHER**

A. November meeting date.

Due to a scheduled furlough date falling on the same day as the November 12, 2010 Board meeting, the Board agreed to move the meeting to Monday, November 15, 2010.

B. Update Authorized Signature/Appointing Authority

Mr. Sapp moved to approve both the Executive Director and the General Counsel as authorized appointing authorities. Ms. Cassidy seconded and the motion carried 7-0.

There being no further business, Mr. Sapp moved to adjourn. Mr. Hutcheson seconded and the motion carried 7-0. (1:10 p.m.)

Cecil F. Dunn, Chairman	M. Suzanne Cassidy, Vice Chair
Larry B. Gillis, Member	David B. Stevens, Member
Wayne D. Sapp, Member	David Hutcheson, Member
Susan Gardner, Member	