COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-335

JASON SUTHERLAND **APPELLANT**

VS.

FINAL ORDER
SUSTAINING HEARING OFFICER'S
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER

JUSTICE AND PUBLIC SAFETY CABINET
DEPARTMENT OF CORRECTIONS
J. MICHAEL BROWN, APPOINTING AUTHORITY

AND

PERSONNEL CABINET
TIM LONGMEYER, SECRETARY **APPELLEES**

** ** ** ** **

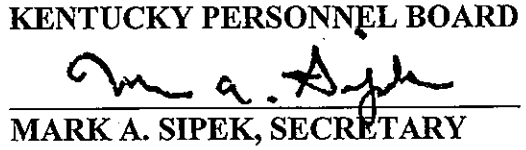
The Board at its regular June 2015 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated May 19, 2015, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be, and they hereby are approved, adopted and incorporated herein by reference as a part of this Order, and the Appellant's appeal is therefore **DISMISSED.**

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this 24th day of June, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:
Hon. Angela Cordery
Hon. Dinah Bevington
Jason Sutherland
Bobbie Underwood

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-335

JASON M. SUTHERLAND APPELLANT

V. FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER

JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF CORRECTIONS,
J. MICHAEL BROWN, APPOINTING AUTHORITY

and

PERSONNEL CABINET,
TIM LONGMEYER, SECRETARY APPELLEES

** ** ** ** **

This matter came on for a pre-hearing conference on March 2, 2015, at 10:00 a.m., ET, at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Boyce A. Crocker, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Jason M. Sutherland, was present by telephone and was not represented by legal counsel. The Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Angela Cordery and the Hon. Catherine Stevens. The Appellee, Personnel Cabinet, was present and represented by the Hon. Whitney Meagher, appearing by telephone.

The purposes of the pre-hearing conference were to determine the specific penalization(s) alleged by Appellant, to determine the specific section of KRS 18A which authorizes this appeal, to determine the relief sought by Appellant, to define the issues, to address any other matters relating to the appeal, and to discuss the option of mediation.

The Hearing Officer noted this appeal was filed with the Personnel Board on December 30, 2014. The Appellant was appealing removal from register and also being denied, abridged or impeded right to inspect or copy records. The Appellant stated the following in the narrative portion of his appeal, "Released from work and made ineligible to remain on register. Also denied right to my records which would show no

previous disciplinary action. Just want the opportunity to continue a career in corrections at another institution."

Prior to the pre-hearing conference, Counsel for the Appellee Personnel Cabinet filed a motion to dismiss.

At the pre-hearing conference, Counsel for the Appellee Dept. of Corrections indicated a desire to file a motion to dismiss. The Hearing Officer informed Appellant that he would be given a chance to respond to both motions to dismiss, and a deadline by which to do so.

Appellant indicated his primary interest is being allowed to continue a career in Corrections. To that end, it was suggested that Appellant contact, or attempt to contact, the Warden for the Kentucky Correctional Institution for Woman or the Deputy Commissioner for the Department of Corrections to determine if they would be amenable to allowing his name to be placed on registers.

Submitted for consideration by the Hearing Officer were the Appellee Personnel Cabinet's Motion to Dismiss, and also the Appellee Department of Corrections' Motion to Dismiss. As noted in the Interim Order following the pre-hearing conference, Appellant was given more than ample time in which to file responses, but has not done so. The matter is submitted for a ruling on the Appellees' Motions to Dismiss.

BACKGROUND

1. During the relevant times, the Appellant, Jason M. Sutherland, was a classified employee serving a period of initial probation as a Correctional Officer with the Department of Corrections employee at the Kentucky Correctional Institution for Women (KCIW).

2. In its Motion to Dismiss, the Appellee Personnel Cabinet noted Appellant was separated from his position as Correctional Officer prior to completion of the period of initial probation. The Personnel Cabinet also noted that having been separated from his position during the period of initial probation, he is ineligible pursuant to KRS 18A.111(1) to be certified on registers to the agency that separated him unless that agency requests it.

3. The Appellee Department of Corrections filed a timely Motion to Dismiss. The Appellee also notes that Appellant was separated from his position as Correctional Officer prior to having successfully completed the period of initial probation. Counsel for the Appellee notes in the pleading that Appellant was notified he would not be certified on future employment registers with the Department of Corrections unless the Department so requested, and was also notified he could appeal to the Personnel Board

on a limited basis, i.e., making a claim of discrimination. The Appellee also addressed Appellant's claim he had been denied records, noting he had been provided with a complete copy of his institutional personnel records, and that such claim was moot.

4. The Appellee Department of Corrections also noted that Appellant, neither on the appeal form or at the pre-hearing conference made any claim of protected class discrimination.

5. As noted, though given ample time, the Appellant did not file a response to either of the Appellees' Motions to Dismiss.

6. KRS 18A.111(1) states:

18A.111 Probationary periods for classified service -- Initial and promotional.

(1) Except when appointed to a job classification with an initial probationary period in excess of six (6) months, and except as provided in KRS 18A.005 and this section, an employee shall serve a six (6) months probationary period when he is initially appointed to the classified service. An employee may be separated from his position, reduced in class or rank, or replaced on the ligible list during this initial probationary period and shall not have a right to appeal, except as provided by KRS 18A.095. The employee may be placed on an eligible list but shall not be certified to the agency from which he was separated unless that agency so requests. Unless the appointing authority notifies the employee prior to the end of the initial probationary period that he is separated, the employee shall be deemed to have served satisfactorily and shall acquire status in the classified service.

7. KRS 18A.095(18)(a) states:

18A.095 Rights of executive branch employees.

(18)(a) The board may deny a hearing to an employee who has failed to file an appeal within the time prescribed by this section; and to an unclassified employee who has failed to state the reasons for the appeal and the cause for which he has been dismissed. The board may deny any appeal after a preliminary hearing if it lacks jurisdiction to grant relief. The board shall notify the employee of its denial in writing and shall inform the employee of his right to appeal the denial under the provisions of KRS 18A.100.

FINDINGS OF FACT

1. During the relevant times, the Appellant, Jason M. Sutherland, was a classified employee serving a period of initial probation as a Correctional Officer with the Department of Corrections employee at the Kentucky Correctional Institution for Women (KCIW).

2. The Hearing Officer finds that the Appellant was separated from his position as Correctional Officer prior to having completed his period of initial probation.

3. The Hearing Officer finds that the Appellant did not make any claim of discrimination over which the Personnel Board would have jurisdiction.

4. The Hearing Officer also finds that the Appellee Personnel Cabinet correctly has refused to certify the Appellant to any registers for the Department of Corrections unless the Department of Corrections would so request, pursuant to KRS 18A.111(1).

5. The Hearing Officer finds that Appellant has not stated a cognizable claim regarding having been denied, abridged or impeded his right to inspect or copy records as the Appellee stated he has received his institutional file from KCIW. The Hearing Officer also notes the Appellant did not file any response to either Motion to Dismiss disputing any of these claims.

6. The Hearing Officer finds that the Personnel Board lacks jurisdiction to consider Appellant's appeal further, as he has not stated a claim over which the Personnel Board would have jurisdiction or could grant relief.

CONCLUSION OF LAW

The Hearing Officer concludes as a matter of law that pursuant to KRS 18A.095(18)(a), the Personnel Board lacks jurisdiction to consider any claims raised by the Appellant, as he has not stated any cognizable claim over which the Personnel Board has any jurisdiction or the ability to grant relief.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **JASON M. SUTHERLAND V. PERSONNEL CABINET AND JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS, (APPEAL NO. 2014-335)** be **DISMISSED.**

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

Any document filed with the Personnel Board shall be served on the opposing party.

The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

Each party has thirty (30) days after the date the Personnel Board issues a Final Order in which to appeal to the Franklin Circuit Court pursuant to KRS 13B.140 and KRS 18A.100.

ISSUED at the direction of **Hearing Officer Boyce A. Crocker** this 19th day of May, 2015.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Angela Cordery
Hon. Whitney Meagher
Mr. Jason M. Sutherland