

**IT IS FURTHER ORDERED** that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer as altered 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 16<sup>th</sup> day of October, 2013.

KENTUCKY PERSONNEL BOARD

  
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MARK A. SIPEK, SECRETARY

A copy hereof this day mailed to:

Hon. Dan Egbers  
Hon. Nicole Liberto  
Hon. Sheilah Galves Kurtz

**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2012-162**

**STEVE ALVEY**

**APPELLANT**

**VS.**

**FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND RECOMMENDED ORDER**

**DEPARTMENT OF AGRICULTURE  
JAMES R. COMER, APPOINTING AUTHORITY**

**APPELLEE**

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This matter came on for pre-hearing conference on September 12, 2012, at 11:00 a.m. at 28 Fountain Place, Frankfort, KY, before the Hon. Boyce A. Crocker, Hearing Officer. The proceedings were recorded by audio/video equipment pursuant to the authority found at KRS Chapter 18A.

Appellant, Steve Alvey, was present and not represented by legal counsel. Appellee, Department of Agriculture, was present and represented by the Hon. Nicole Liberto.

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, whether the appeal was filed within the time limitation set forth in KRS 18A.095, to determine the relief sought, to define the issues, and address any other matters relating to this appeal.

The Hearing Officer notes this matter was filed on July 23, 2012. Appellant stated he was appealing his dismissal.

At the outset of the pre-hearing, the Hearing Officer expressed his memory of the previous disposition of Mr. Alvey's firing. The Hearing Officer, Steve Bolton, had recommended the Personnel Board uphold the dismissal of Mr. Alvey, and the Personnel Board agreed. The matter then wound its way through the courts, ultimately ending at the Kentucky Supreme Court when that court refused discretionary review.

During the course of the pre-hearing conference, Appellant recounted some matters that had occurred which he believed might have bolstered his cause, but which were not brought forth at the time of his earlier appeal due to (in Appellant's words) his attorney wanting to focus on responding to the dismissal letter and not get into other issues.

It appears to the Hearing Officer that Appellant seeks essentially to be allowed to attain 20 years of service towards retirement from state government; Appellant currently has 18-plus years. Appellant did state he had to cash out approximately three years of purchased retirement in order to defend against his dismissal.

Counsel for the Appellee requested this matter be “rolled into” the Personnel Board’s ongoing investigation of the Department of Agriculture. Mr. Alvey had no objection to this. The Hearing Officer indicated he would relay this to the Personnel Board’s Executive Director, and that ultimately the decision on how to proceed would rest with the Board.

This matter came on for another pre-hearing conference on January 18, 2013. The purposes of the pre-hearing conference were to discuss the status of the appeal. Counsel for the Appellee expressed her desire to file a dispositive motion, stating that the doctrine of *res judicata* forecloses this appeal by Appellant. After discussion, a briefing scheduled was agreed upon.

This matter is now before the Hearing Officer for a ruling on Appellee’s Motion to Dismiss, which was submitted by the Hon. Nicole Liberto. Since the time of that motion to dismiss, Appellant obtained counsel, the Hon. Sheilah Galves Kurtz. Counsel for Appellant filed a Verified Response and Objection to the Motion to Dismiss. At that time the Hon. Daniel Egbers made his appearance and filed a reply to which counsel for Appellant filed a response, which ended with Mr. Egbers’ last reply.

### **BACKGROUND**

1. Appellant, Steve Alvey, had been a classified employee with status employed by the Department of Agriculture until his dismissal in 2005 for allegations of misconduct.
2. Appellant had appealed that dismissal to the Personnel Board in 2005 (Appeal No. 2005-303) with an evidentiary hearing being held at the Personnel Board in January 2006. Appellant was represented by the Hon. David Emerson.
3. Subsequent to that two-day evidentiary hearing, the hearing officer recommended dismissal of Appellant’s appeal to the Personnel Board. Appellant through counsel filed exceptions to the recommended order of the hearing officer and the Personnel Board concurred with the hearing officer and issued a Final Order dismissing the Appellant’s appeal on June 20, 2006. Appellant also had oral argument in front of the full Personnel Board at its June 2006 meeting.
4. Subsequent to the Personnel Board’s dismissal of Appellant’s appeal, Appellant filed action in the Franklin Circuit Court challenging the Personnel Board’s decision. The Franklin Circuit Court, and then the Kentucky Court of Appeals, both concurred with the Personnel Board’s decision dismissing Appellant’s appeal. Appellant was represented by counsel at these stages of appeal.

5. Finally, Appellant sought discretionary review from the Kentucky Supreme Court which was denied by order dated August 19, 2009.

6. Appellant filed this appeal with the Personnel Board on July 23, 2012, challenging the fairness of his dismissal, especially in light of the Auditor of Public Accounts' (APA) investigation into the Department of Agriculture under former Commissioner Richie Farmer. As noted above, initially this went to the Personnel Board as a request to make Appellant's claims part of an on-going Personnel Board investigation into certain practices of the Department of Agriculture under Commissioner Farmer. Appellant's request was heard at the October 2012 regular meeting of the Personnel Board and was rejected.

7. The matter was then returned to the Hearing Officer which led to the Appellee filing a Motion to Dismiss and the responses and replies mentioned above.

8. In its Motion to Dismiss, the Appellee contends that Appellant cannot challenge his 2005 dismissal for cause based on the doctrine of *res judicata*. Appellee contends that the doctrine of *res judicata* holds judgment on merits in prior suits involving the same parties bar subsequent suit based upon the same cause of action.

9. Appellant, through counsel, filed a Verified Response and Objection to Motion to Dismiss. Counsel for Appellant contends that, "The doctrine of *res judicata*, concededly a rule of law applicable in administrative proceedings, does not shield willful political patronage dismissals perpetrated by an elected official and his political appointees upon merit and tenured stated employees." Counsel is contending that there is new evidence purposely suppressed and concealed during the tenure of Commissioner Farmer that, "... bore a critical relationship to his dismissal in 2005." Counsel is arguing that an exception to the application of the doctrine of *res judicata* should apply when considering the public policy against political patronage. Counsel contends that one exception to the doctrine of *res judicata* would be that it does not apply to facts that subsequently arise.

10. Counsel refers to the audit of the Department of Agriculture conducted by Auditor of Public Accounts Adam Edelen. Counsel specifically refers to Findings 20, 22 and 24 of the Auditor's Report. The Hearing Officer notes those findings were referred to the Personnel Board by the Auditor. Counsel argues that personnel abuses were found during the Auditor's review. Counsel also cites the federal indictment of former Commissioner Farmer, charging him in part with creating several non-merit jobs as proof of improprieties. Counsel states that, "These new and subsequent facts, uncovered at the investigation of Mr. Farmer's leadership from January 1, 2004 to December 31, 2011 provide Appellant's basis for seeking a second review of his unjustified and politically motivated dismissal."

11. Appellee filed a reply to the Appellant's response. Counsel for Appellee points out the Hearing Officer's Conclusion of Law contained in the Recommended Order that some of the serious allegations against Appellant in the letter of dismissal of 2005 were "essentially uncontested by the Appellant." Counsel terms this as a "... rather transparent attempt to profit from various investigations and accusations that have been leveled against the former Commissioner of Agriculture ..." Counsel contends Appellant preserved nothing in the original proceeding regarding his dismissal that would argue against application of *res judicata* here, and also does not demonstrate in what way, if any, the investigations into Commissioner Farmer would have made any difference as to the allegations against Appellant. Counsel further states that in order to overcome the doctrine of *res judicata*, the Appellant must demonstrate that he has identified relevant, admissible and pertinent evidence having bearing on the essential issues of the case. Counsel for Appellee argues this was not done.

12. Finally, counsel for Appellee argues that the Personnel Board has no statutory or regulatory mechanism to hear this complaint as it is clearly untimely and states that "This Board does not have the authority to hear any complaint any time it is presented."

13. Appellant filed a Supplemental Response. Appellant claims that the Personnel Board would not abuse its authority, nor act beyond its statutory authority by hearing and considering this second appeal. Counsel cites KRS 18A.075(2), delineating certain powers of the Personnel Board as follows:

Make investigations, either on petition of a citizen, taxpayer, interested party, or on its own motion, concerning the enforcement and effect of KRS 18A.005 to 18A.200, and to require observance of its provisions and the administrative regulations promulgated pursuant to the provisions of this chapter and KRS Chapter 13A; and to make such investigation as may be requested by the General Assembly or the Governor and to report thereon.

14. Counsel for Appellant also cites the case of *State v. Greenwell*, 795 S.W.2d 381 (Ky. 1990). Essentially the statute and case cited by Appellant stand for the proposition that the Personnel Board has broad investigative powers conferred by KRS Chapter 18A. Appellant states that, "The State Auditor's disclosure changes the complexion of the proceedings initiated and pursued by Mr. Farmer's Personnel and Budget Director that culminated in Appellant's termination in 2005." Counsel then argues that the sexual harassment charges from Ms. Redding "arguably tipped the scale in the Appellant's termination proceeding" be re-examined.

15. Later counsel points to Appellant having identified for Commissioner Farmer the risks and dangers his new "special assistants" or "appointees" might expose Commissioner Farmer to, so that Appellant had to be removed quickly.

16. Appellee filed a Reply to Appellant's Supplemental Response. Counsel for the Appellee contends that citing by the Appellant of the Auditor's Report into Commissioner Farmer's tenure should not be allowed, as such would be inadmissible hearsay in a proceeding. Counsel further argues that Appellant has not made any credible claim that evidence was withheld from him or that the Department was guilty of something comparable to prosecutorial misconduct.

### **FINDINGS OF FACT**

1. Appellant, Steve Alvey, had been a classified employee with status employed by the Department of Agriculture until his dismissal in 2005 for allegations of misconduct.

2. The Hearing Officer finds Appellant previously had been dismissed from his classified position with the Department of Agriculture in 2005. The Hearing Officer finds Alvey had properly appealed this dismissal to the Personnel Board. Appellant Alvey was represented by the Hon. David Emerson and litigated the matter to completion, with the Personnel Board ultimately upholding Appellant Alvey's dismissal by Final Order in June 2006.

3. The Hearing Officer finds that Appellant challenged the Personnel Board's decision in the Franklin Circuit Court which affirmed the Personnel Board's decision and then the Kentucky Court of Appeals which affirmed the Franklin Circuit Court. The matter was ultimately refused discretionary review by the Kentucky Supreme Court in 2009.

4. The Hearing Officer finds that this appeal now in front of the Personnel Board (Appeal No. 2012-162) was filed July 23, 2012, and that Appellant indicated that he was appealing his dismissal.

5. The Hearing Officer finds that Appellant stated on his Appeal Form, "I am asking the Personnel Board (sic) to review the decision you made in 2005 to uphold the decision the Department of Agriculture made to terminate me."

6. The Hearing Officer finds that at a pre-hearing conference held in September 2012, Appellant wanted the Personnel Board to investigate this matter, and that counsel for the Department of Agriculture, the Hon. Nicole Liberto, had no objection to Appellant's request being considered part of the Personnel Board's on-going investigation into matters referred to it by the Auditor of Public Accounts regarding the Department of Agriculture.

7. The Hearing Officer finds that at its October 2012 meeting the Personnel Board declined to investigate Appellant's allegations relative to his 2005 dismissal.

8. This matter was then returned to the Hearing Officer where subsequent pre-hearing conferences were held and ultimately, as noted above, the Appellee made a Motion to Dismiss and the matter was fully briefed.

9. The Hearing Officer finds that Appellant is essentially trying to re-litigate his dismissal, which the Hearing Officer finds was earlier fully contested. Even though Appellant fully contested his dismissal and was represented by able counsel, the Personnel Board and reviewing Courts upheld his dismissal.

10. The Hearing Officer finds the only possible mechanism whereby the Personnel Board could review its decision upholding Appellant's dismissal would be for the Board to exercise its broad authority under KRS 18A.075(2) to "investigate" Appellant's allegations. However, the Personnel Board declined to do so in October 2012. The Hearing Officer finds that there is certainly no mechanism by which the Personnel Board can somehow, in the guise of Appellant's new appeal of his dismissal from 2005, re-litigate the matter outside of an investigation which flows from different statutory authority.

### **CONCLUSIONS OF LAW**

1. The Hearing Officer concludes as a matter of law that the Personnel Board, having already declined to investigate Appellant's claims regarding his 2005 dismissal from the Department of Agriculture, has no other possible grant of authority under which it could re-open Appellant's case and ultimately give him the relief he seeks.

2. The Hearing Officer further concludes that the doctrine of *res judicata* would apply to bar any attempt by the Appellant to seek to have the Personnel Board re-open his appeal or for the Board to actually re-open his appeal. This matter was fully litigated and, as counsel for the Appellee has stated, at some point litigation must end.

### **RECOMMENDED ORDER**

The Hearing Officer recommends to the Personnel Board that the appeal of **STEVE ALVEY VS. DEPARTMENT OF AGRICULTURE (APPEAL NO. 2012-162)** 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.

**SO ORDERED** at the direction of **Hearing Officer Boyce A. Crocker** this 30<sup>th</sup> day of July, 2013.

**KENTUCKY PERSONNEL BOARD**

  
**MARK A. SIPEK**  
**EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:

Hon. Sheilah Galves Kurtz  
Hon. Dan Egbers  
Hon. Nicole Liberto