

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2018-187**

CHARLES BATSON

APPELLANT

**VS. FINAL ORDER SUSTAINING HEARING OFFICER'S
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER AS ALTERED**

OFFICE OF THE ATTORNEY GENERAL

APPELLEE

* * * * *

The Board, at its regular July 2021 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated May 20, 2021, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be altered as follows:

A. **Delete** Background paragraph 8, and substitute the following:

8. In its Motion to Dismiss, the Appellee argued that the written directive from Ms. McCoy-Johnson does not constitute a penalization as defined at KRS 18A.005(24). The Appellee argued that the directive letter had no disciplinary action against the Appellant and did not rise to the level of a penalization. They also pointed out that, even a written reprimand, which the directive letter was not, was not an appealable penalization.

B. **Delete** Conclusion of Law paragraph 1, and substitute the following:

1. The directive letter by Ms. McCoy-Johnson was not a disciplinary action, was not placed in his personnel file, and it is not an appealable penalization as that term is defined at KRS 18A.005(24).

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 Appellant's appeal is **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 15th day of July, 2021.

KENTUCKY PERSONNEL BOARD

A handwritten signature in blue ink, appearing to read 'Mark A. Sipek', is written over a horizontal line.

MARK A. SIPEK
SECRETARY

A copy hereof this day mailed to:

Hon. Charles English
Charles Batson
Hon. Rosemary Holbrook (Personnel Cabinet)

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2018-187**

CHARLES BATSON

APPELLANT

VS.

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

OFFICE OF ATTORNEY GENERAL

APPELLEE

** ** * * *

This matter came on for a pre-hearing conference on December 13, 2018, at 2:00 p.m., ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Charles Batson, was present and was not represented by legal counsel. The Appellee, Office of Attorney General, was present and represented by the Hon. Samuel Flynn and the Hon. J. Michael Brown.

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.

BACKGROUND

1. The Hearing Officer notes this appeal was filed with the Personnel Board on September 12, 2018, alleging age discrimination and penalization in being requested to perform manual labor outside of his duties as a Staff Attorney III.

2. At the pre-hearing conference, the Appellant stated that he was requesting that the letter from Holly McCoy Johnson be rescinded and that Attorney General's Office acknowledge that a Staff Attorney III should not be asked to do duties outside his class specification.

3. The Appellee did not believe that the Appellant had stated a penalization and believed that there was no discrimination, as all employees were treated equally.

4. The parties were not able to reach a resolution, and the Appellee filed a Motion to Dismiss.

5. In its Motion to Dismiss, the Appellee summarizes the factual background in the following three paragraphs:

Appellant Batson was employed with the Office of the Attorney General from August 16, 1994 until his retirement on December 1, 2018. Prior to his retirement, Batson was employed as a classified Staff Attorney III in the Uninsured Employer's Fund ("UEF") Division of the Office of the Attorney General. At all times relevant to this appeal Batson's workstation was in the Office of the Attorney General's East Office located at 1024 Capital Center Drive, Frankfort, Kentucky 40601 ("East Office").

In the spring and summer of 2018, East Office employees were informed on several occasions that the Office would be undergoing renovations, including painting and carpet replacement, which required all OAG employees at East Office to temporarily move to other rooms and offices in the same building. (Exhibit A, Emails.) Throughout that period, Ms. Ann Evans, an Executive Advisor with the Office of Administrative Services within the OAG, coordinated and oversaw the renovation. Mr. Batson's office was located in the UEF suite of the East Office – which was the last suite to undergo renovation.

On July 27, 2018, at approximately 11:00 AM, Ms. Evans and an inmate, who was assisting with the furniture and file moving, were in the UEF suite for planning purposes. (Exhibit B, Directive Letter at 1 (July 27, 2018)). At that time, Mr. Batson informed Ms. Evans that he refused to allow his office to be part of the renovation. (*Id.*) In an verbal exchange with Ms. Evans, Mr. Batson gruffly told her that the offices did not need any paint or carpet and that “[n]o one is doing anything to [his] office and it will remain the same until [he] retire[s]...” (*Id.*) Several OAG employees were present. (*Id.*)

6. The Appellee continued in its motion to dismiss with additional factual background, when Holly McCoy-Johnson, the designated Appointing Authority, issued a directive letter to the Appellant:

As a result of Mr. Batson’s hostility towards Ms. Evans and his indication that he would refuse to prepare his files and personal belongs to be moved, on July 28, 2018, Ms. Holly McCoy-Johnson, the designated appointing authority for the OAG sent a letter (“the directive letter”) to Mr. Batson, informing him that he was “expected to conduct [himself] with professionalism at all times...to treat [his] co-workers and all others with whom [he] came into contact with courtesy and respect.” (*Id.*) The directive letter further informed Mr. Batson that “the renovation to the office space is not optional[,]” and instructed Mr. Batson to “have [his] files, personal belongings and other items prepared and marked for movers as directed by Ms. Evans...unless otherwise notified...by the beginning of business August 9, 2019.” (*Id.*) Finally, the letter informed Mr. Batson that “[f]ailure to comply with these directives will be considered insubordination and appropriate action will be taken, up to an including dismissal.” (*Id.*)

Notably, Batson complied with Ms. McCoy-Johnson’s letter, prepared his files and personal belongs, which movers then transported to another location in the same building. At no time did Batson refuse

to comply with Ms. McCoy-Johnson's directive letter. Accordingly, the Office of the Attorney General did not issue any written reprimand nor did the Office take any disciplinary action as to Mr. Batson, and no copy of the directive letter was ever placed in his personnel file.

7. In its motion, the Appellee pointed out that, after receiving the directive letter, the Appellant filed a grievance alleging that Ms. McCoy-Johnson had provided him a letter threatening to terminate him. In his grievance, the Appellant alleged that the Agency was trying to get rid of him because of his age. The Appellant's first line supervisor had no comment on the letter because he did not issue it. The Appellant's second line supervisor reviewed the record and found:

- A. That Ms. McCoy-Johnson's letter was a directive, not a threat;
- B. That the letter was not placed in Batson's personnel file;
- C. That preparing his personal belongings and files for the movers to transport to his temporary work station is within the scope of his job description; and
- D. That Mr. Batson's failure to treat his coworkers with respect has no relationship to his age.

The Appellant's third line supervisor agreed with the second line supervisor's decision. The Appellant appealed his grievance to Deputy Attorney General, J. Michael Brown, who issued his final findings pursuant to the grievance process finding "the renovation project...was time sensitive and required your cooperation. Ms. McCoy-Johnson's letter was necessary and appropriate to ensure the project's completion and authored in her capacity as an Appointing Authority. Your age was not and never has been a factor..." Thereafter, the Appellant filed an appeal with the Personnel Board alleging age discrimination and penalization in being requested to perform manual labor outside of his duties as a Staff Attorney III. For relief, the Appellant requested that Holy McCoy-Johnson's letter be rescinded and that the Attorney General's Office acknowledge that a Staff Attorney III should not be asked to do duties outside of his class specification.

8. In its Motion to Dismiss, the Appellee argued that the written directive from Ms. McCoy-Johnson does not constitute a penalization as defined at KRA 18A.005(24). The Appellee argued that the directive letter had no disciplinary action against the Appellant and did

not rise to the level of a penalization. They also pointed out that, even a written reprimand, which the directive letter was not, was not an appealable penalization.

9. In response to Appellant's age discrimination claim, the Appellee argued that the fact that the Appellant was directed to pack up his files and personal belongs does not demonstrate disparate treatment much less any intent to discriminate against the Appellant. All employees of his division were required to report to different offices while renovations were completed. In its motion, the Appellee pointed out that the Appellant did not allege he was required physically to move any files or belongings from his office. In addition, he did not allege that he was the only person required to pack up files and personal belongings.

10. The Appellee argued that the Personnel Board lacks authority to grant the relief the Appellant has requested in this case. In addition, they alleged that the Appellant had not requested any specific remedy for any age discrimination claim.

11. Although given an opportunity to respond to the Motion to Dismiss, the Appellant filed no such response.

FINDINGS OF FACT

1. The Appellant, Charles Batson, was a Staff Attorney III with the Uninsured Employers Fund Division of the Office of the Attorney General from August 16, 1994, until his retirement on December 1, 2018.

2. In the spring and summer of 2018, East Office employees were informed that the office would be undergoing renovations including painting and carpet replacement, which required all OAG employees at the office to temporarily move to other rooms and offices in the same building.

3. On July 27, 2018, the Executive Advisor with the Office of Administrative Services within the OAG and an inmate were at the Appellant's office for planning purposes. The Appellant informed the Executive Advisor that he refused to allow his office to be part of the renovation. He stated that nothing would be done to his office until he retired.

4. The following day, July 28, 2018, the Appellant received a written directive from Ms. Holly McCoy-Johnson, the designated Appointing Authority for the OAG, informing him that he was expected to act professionally and to cooperate with the renovation of office space. Specifically, the Appellant was instructed to have his files, personal belongings, and other items prepared and marked for movers by August 9, 2019. The Appellant was informed that “failure to comply with these directives will be considered insubordination and appropriate action will be taken up to and including dismissal.”

5. The Appellant complied with the letter, prepared his files and belongings, which were moved to another location. No discipline action was taken against the Appellant and no written reprimand was issued.

6. Thereafter, the Appellant filed a grievance stating that he had been threatened with termination if he failed to perform manual labor outside his job description. He also believed the action gave the appearance of the Agency trying to get rid of him because of his age. This grievance was pursued through four levels eventually his grievance was denied by the Deputy Attorney General, the designated Appointing Authority.

7. Thereafter the Appellant filed this appeal with the Personnel Board.

CONCLUSIONS OF LAW

1. The directive letter by Ms. McCoy-John was not a disciplinary action, was not placed in his personnel file, and it is not an appealable penalization as that term is defined at KRS 18A.005(24).

2. The directive letter does not constitute a written reprimand, however, even if this was a written reprimand, a written reprimand is not appealable to the Personnel Board. KRS 18A.020 and *Perkins v. Cabinet for Health and Family Services*, No. 2005-CA-2287, 2007 WL 1893374 (Ky. App. 2007).

3. The Appellant has not alleged a claim of age discrimination because he has not alleged disparate treatment from similarly situated younger persons. The Appellant did not dispute that all employees were asked to pack their belongings and temporarily move to another office. There is no allegation in this case that the Office of the Attorney General intended to discriminate against any employee based on their age. *Hazen Paper Co. v Biggins*, 507 US 604, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993).

4. The Personnel Board may deny an appeal after a preliminary hearing if it lacks jurisdiction to grant relief. KRS 18A.095(18)(a). Because the Appellant has failed to allege a penalization for an act of age discrimination, the Personnel Board lacks jurisdiction to grant any relief in this case.

5. The Appellee's Motion to Dismiss is **GRANTED**. See also KRS 13B.090(2)

RECOMMENDED ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Kentucky Personnel Board that the appeal of **CHARLES BATSON VS. OFFICE OF ATTORNEY GENERAL (APPEAL NO. 2018-187)** 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).

[Hearing Officer Note: Any document filed with the Personnel Board shall also 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 Mark A. Sipek** this 20th day of May, 2021.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Charles English

Mr. Charles Batson

Hon. Rosemary Holbrook (Personnel Cabinet)