

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-002**

ANNE MARIE BISARD

APPELLANT

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

**CABINET FOR HEALTH AND FAMILY SERVICES,
J. P. HAMM, APPOINTING AUTHORITY**

APPELLEE

** ** *

This matter comes before the Hearing Officer upon Appellee's Motion to Dismiss.

This matter previously came on for a pre-hearing conference on February 21, 2014, at 10:30 a.m., ET, at 28 Fountain Place, Frankfort, Kentucky, before Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Anne Marie Bisard, was present by telephone and not represented by legal counsel. The Appellee, Cabinet for Health and Family Services, was also present and represented by the Hon. Rebecca Wooldridge.

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

The Appellant filed her appeal with the Personnel Board on January 3, 2014. She stated she was appealing from her dismissal. She stated she had not been told of any reason why she was dismissed, however, in a letter to unemployment, she was informed she was dismissed for failure to perform work to the employer's satisfaction.

The Appellant was employed as a Family Support Specialist I, beginning July 1, 2013. She was dismissed while serving her initial probationary period.

The Appellant stated she was a good employee; that she was on time, professional and did a great job for the Cabinet. The Appellant stated she believed she had been discriminated against. The attachment to her appeal form included the following: "discrimination is the behavior or action, usually negative, towards an individual or group of people, especially on the basis of sex, race, and social class." The Appellant denied she was alleging discrimination based

on sex or race. She stated she believed the Cabinet discriminated against her. She claimed it was "discrimination of self."

The Appellant also described instances where her supervisors felt that she was taking too long to work with particular clients. In addition, she believed they were asking her to falsify documents by putting in information which had not been provided by clients. She stated the purpose of the request to put in this information was so that the application for benefits would "pend."

Counsel for the Cabinet stated she would like to file a motion to dismiss. She believed the Appellant's appeal was untimely, and she had not stated a claim of discrimination. She stated there is no such thing as discrimination against an individual, and she had not identified a protected class.

The Appellee filed a timely Motion to Dismiss. The Appellant, though given time in which to file a response, filed a document with the Board prior to the Appellee having filed the motion. The matter stands submitted to Hearing Officer Boyce A. Crocker for a ruling on the Appellee's Motion to Dismiss.

BACKGROUND

1. During the relevant times, the Appellant, Anne Marie Bisard, was a classified employee who had not yet completed her initial probationary period before being terminated.

2. In its Motion to Dismiss, counsel for Appellee contends that Appellant's appeal was untimely.

3. Appellant had been terminated from her position with the Cabinet for Health and Family Services by letter dated December 3, 2013. That was a termination letter advising the Appellant she was being terminated without cause, as she was serving an initial probationary period and not yet completed same. The file reveals the appeal was filed with the Personnel Board on January 3, 2014. Counsel states that the law allows only 30 days for an employee serving an initial probationary period to file such an appeal. The Appellee also cites the notice provided which informs the Appellant she has 30 days to file the appeal.

4. Counsel for the Appellee contends that the Appellant failed to allege protected class discrimination pursuant to KRS 18A.095(12) or (14), and as such, the matter must fail.

5. As noted, the Appellant filed a document subsequent to the pre-hearing conference, but before the Appellee filed its Motion to Dismiss. It does not appear to the Hearing Officer the document filed addressed these two issues.

6. KRS 18A.095 states, in pertinent part, as follows:

(11) Any state employee, applicant for employment, or eligible on a register may appeal to the board on the grounds that his right to inspect or copy records, including

preliminary and other supporting documentation, relating to him has been denied, abridged, or impeded by a public agency. The board shall conduct a hearing to determine whether the records related to the employee, applicant, or eligible, and whether his right to inspect or copy these records was denied, abridged, or impeded. If the board determines that the records related to the employee and that the right to inspect or copy these records has been denied, abridged, or impeded, the board shall order the public agency to make them available for inspection and copying and shall charge the cost of the hearing to the public agency. A state employee, an applicant for employment, and an eligible on a register shall not have the right to inspect or to copy any examination materials.

(12) Any classified employee may appeal to the board an action alleged to be based on discrimination due to race, color, religion, national origin, sex, disability, or age forty (40) and above. Nothing in this section shall be construed to preclude any classified or unclassified employee from filing with the Kentucky Commission on Human Rights a complaint alleging discrimination on the basis of race, color, religion, national origin, sex, disability, or age in accordance with KRS Chapter 344.

(14) (a) Any employee, applicant for employment, or eligible on a register, who believes that he has been discriminated against, may appeal to the board.

(b) Any applicant whose application for admission to an open-competitive examination has been rejected shall be notified of this rejection and the reasons therefore and may appeal to the board for reconsideration of his qualifications and for admission to the examination. Applicants may be conditionally admitted to an examination by the secretary pending reconsideration by the board.

(c) Any applicant who has taken an examination may appeal to the board for a review of his rating in any part of the examination to assure that uniform rating procedures have been applied equally and fairly.

(d) An appeal to the board by applicants or eligibles under subsections (11) and (13) of this section and under this subsection shall be filed in writing with the executive director not later than thirty (30) calendar days after the notification of the action in question was mailed.

(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.

7. KRS 18A.111(1) states, as follows:

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 eligible 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.

FINDINGS OF FACT

1. During the relevant times, the Appellant, Anne Marie Bisard, was a classified employee who had not yet completed her initial probationary period before being terminated.

2. The Hearing Officer finds that Appellant, though claiming at the pre-hearing conference "discrimination of self," has not made a claim that she was discriminated against based on any of the protected classes enunciated at KRS 18A.095(12) or any other form of discrimination recognized by KRS 18A.

3. The Hearing Officer finds that lacking such claim, the appeal must fail.

4. The Hearing Officer finds the timeliness argument advanced by counsel, relying on KRS 18A.095(14), not on point. Applicants and eligibles are clearly limited to 30 days for appeals of any sort. An employee alleging discrimination would not be, the Hearing Officer finds, at least not under KRS 18A.095(14)(d), which the Hearing Officer finds applies to applicants and eligibles. Such is moot here as the appeal is being dismissed for other reasons.

CONCLUSION OF LAW

Based on the Findings of Fact, the Hearing Officer concludes that as a matter of law, that pursuant to KRS 18A.095(18)(a), subsequent to the pre-hearing conference and motion practice, the Personnel Board lacks subject matter and jurisdiction to consider this appeal, and further and thus the matter must be dismissed.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of ANNE MARIE BISARD V. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2014-002) 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 14th day of June, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Rebecca Wooldridge
Ms. Anne Marie Bisard