

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2016-097

SALLIE C. BOLTON

APPELLANT

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

FINANCE AND ADMINISTRATION CABINET

APPELLEE

*** **

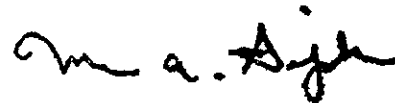
The Board, at its regular June 2017 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated April 21, 2017, Appellant's Exceptions and Objections, Appellee's Response to Appellant's Exceptions and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer 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 15th day of June, 2017.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Cary Bishop
Hon. Steven Bolton
Ms. Stacy Perry

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2016-097**

SALLIE C. BOLTON

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V.

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

FINANCE AND ADMINISTRATION CABINET

APPELLEE

This matter came on for evidentiary hearing on December 1, 2016 at 9:30 a.m. at 28 Fountain Place, Frankfort Kentucky before Brenda D. Allen, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Sallie Bolton, was present at the evidentiary hearing and was represented by the Hon. Steven G. Bolton. The Appellee, Finance and Administration Cabinet, was present and was represented by the Hon. Cary B. Bishop. Also present was Agency representative Troy Robinson, Appointing Authority.

BACKGROUND

1. The Appellant, Sallie C. Bolton filed her appeal with the Personnel Board on May 13, 2016. On the Appeal Form, she detailed that she was an unclassified employee assigned to the CMRS Board and State 911, and that she was terminated by the Appointing Authority for the Finance and Administration Cabinet. The Appellant alleged that the CMRS Board (hereinafter "the Board") had the sole authority to discharge her in accordance with KRS 65.7629(10) and that she was discharged solely because of her political affiliation.

2. A prehearing conference was held during which the parties discussed discovery, a schedule for dispositive motions and the hearing. Discovery ensued as well as the filing of Cross Motions for Summary Judgment, Responses by each party and a Reply by the Appellant. Two continuances were granted and by Interim Order of November 10, 2016, the Hearing Officer **OVERRULED** the Motions for Summary Judgment, finding the existence of genuine issues of material fact. The hearing was ultimately set for December 1, 2016. In that Interim Order, the Hearing Officer identified three issues as the subject for the evidentiary hearing.

- Whether discrimination based upon political affiliation is unlawful discrimination as outlined in KRS 18A.095(14)
- Whether Troy Robinson had the legal authority to terminate the Appellant.

- What remedy, if any, is within the purview of the Personnel board.

3. Several days prior to the hearing, the Appellee filed a Motion in Limine and the Appellant filed a Response. On the day of the hearing, the Hearing Officer allowed the parties to argue their respective positions. The Appellee sought to have the Hearing Officer rule that the Appellant would be prohibited from eliciting testimony from the Appellee regarding the specific reason for the Appellant's termination, arguing that because the Appellant was a non-merit employee dismissed without cause, pursuant to 101 KAR 3:050, Section 1(3), the regulation would be undermined by compelling a witness to provide the reasons behind a no-cause termination. In response, the Appellant argued that the basis for the termination was an issue central to her claim of discrimination and, thus, she was entitled to explore that during the course of the hearing. The Hearing Officer **OVERRULED** the motion, ruling that while the termination letter need not provide the basis for the termination, it was an issue properly before the Hearing Officer as a result the Appellant's claim that her termination was an unlawful act of discrimination. The Appellee lodged a continuing objection, which was noted for the record.

4. As it pertains to the issues before the Hearing Officer, the parties stipulated that should the Appellant prevail on her claim, the appropriate remedy was reinstatement. The other two issues remained for the Hearing Officer's consideration.

5. The parties pre-marked their respective exhibits and Appellee made a Motion for entry of Appellee's Exhibits 1 through 6 and 7(a) and 7(b), without objection. The Motion was **SUSTAINED** subject to a proper foundation being laid. The Appellant then **MOVED** Entry of Appellant's Exhibits A, B, C, D, and E. The Appellee objected to Exhibits D, and E which were "Draft" minutes of the 911 Board, but indicated it would withdraw the objection if a proper foundation were laid. The Hearing Officer **SUSTAINED** the Motion for Entry of the Exhibits into the record subject to a proper evidentiary foundation.

6. The Appellant made a Motion to call witnesses out of order. The Motion was **SUSTAINED**, without objection. **Commissioner Mary Harrod Bailey** was called as the first witness for the Appellant. Upon being sworn, she testified that she is employed as the Commissioner for Human Resources for the Executive Branch. She stated that her office processes all personnel actions for all branches of government. She testified that she has held the position for approximately 4½ years. The witness identified Appellee's Exhibit 7(a), a screen shot of a text message she received from Troy Robinson, Appointing Authority for the Finance and Administration Cabinet. She outlined that through the May 2, 2016 text message, Mr. Robinson indicated that he had been asked to dismiss three employees, one of whom was the Appellant. In responding to the text message, Ms. Bailey advised that none of the three employees he identified were "CS" (Career Service), employees so he could move forward with the dismissal. She explained that Career Service status for an employee would trigger other legal provisions, which were not at issue with the Appellant and the remaining two employees who were the subject of the text message.

7. The witness identified Appellee's Exhibit 2, as the Personnel Cabinet Signature Authorization Form by which Governor Bevin named Troy Robinson as Appointing Authority for personnel matters for a number of organizational units effective December 8, 2015. The witness then identified Appellee's Exhibit 3, an organizational chart that included the organizational units by number and name. She identified the Office of Homeland Security as an organization for which Governor Bevin named Troy Robinson Appointing Authority. In referring to the organizational chart, she testified that the Commercial Mobile Radio Service Emergency Telecommunication Board (CMRS Board) was attached to the Office of Homeland Security and as such, Mr. Robinson was the Appointing Authority for the CMRS Board, as well.

8. The witness was asked to identify Appellant's Exhibit A, which was a copy of KRS 65.7629. Upon questioning, she admitted that paragraph (1) of the statute does provide the CMRS Board with authority to employ consultants and employees, but also testified that another statute attaches the CMRS Board to the Office of Homeland Security.

9. On cross examination, Ms. Bailey testified that it was typical for an individual serving as appointing authority to contact her to inquire as to the career status of employees being considered for dismissal. She stated that she has served in her capacity of Commissioner of Human Resources under both the current Bevin Administration, as well as, the former Beshear Administration, and the manner in which this dismissal was handled was consistent with the prior administration.

10. Ms. Bailey testified that her office processed other personnel actions for the CMRS Board, and that they would not require Board action because those employees are attached administratively to the Office of Homeland Security.

11. Ms. Bailey reviewed and identified Appellee's Exhibit 1, a Request for Personnel Action Exemption Form. She advised that this is the document utilized to appoint Ms. Bolton to the position of Executive Secretary for the CMRS Board. She testified that under the section entitled "Submission and Approvals," it listed the approval of Mary Lassiter, who at that time served in Governor Beshear's Executive Cabinet. The form also bore the approval of Honor Barker, the Appointing Authority. Ms. Bailey stated that Mr. Troy Robinson now holds the position formerly held by Honor Barker. She testified that the approval of the Appointing Authority and the Governor's designee was required to effectuate Ms. Bolton's hiring.

12. On re-direct, Ms. Bailey testified that Joe Barrows, Executive Director of the CMRS Board was listed on Exhibit 1 as the individual who requested the Personnel Action, but explained that this was a section she added to the form to identify the agency contact person submitting the form. She stated that this does not have to be a person with the legal authority to hire, but rather was a person listed to contact should any questions arise relative to this appointment.

13. The next witness to testify was **Troy Robinson**. He testified that he serves as the Executive Director of the Office of Administrative Services within the Finance and Administration Cabinet. He testified that he oversees five (5) divisions and serves as the appointing authority for the thirteen General Government agencies administratively attached to the Finance Cabinet.

14. The witness reviewed Appellee's Exhibit 3, the organizational chart, and stated that the Office of Homeland Security was assigned company number 31-094 and that the CMRS Board, which is attached to it, has the same company number. Accordingly, his designation as appointing authority for the CMRS Board extends to the organizations attached to Homeland Security.

15. Mr. Robinson identified Appellee's Exhibit 4, the letter of dismissal he wrote to the Appellant. He explained that while he is within the Finance and Administration Cabinet, and the signature block of the letter identifies him as such, he also serves as the Appointing Authority for thirteen (13) boards or agencies, whose statutes administratively attach those organizational units to the General Government Cabinet.

16. Mr. Robinson testified that John Holiday, Executive Director of the Office of Homeland Security, asked him to separate the Appellant and he did so. He testified that he was not aware of any action by the CMRS Board to separate the Appellant.

17. On cross-examination, Mr. Robinson stated that his duties as Appointing Authority are concurrent duties between both the Finance and Administration Cabinet and the General Government Cabinet, the latter of which houses both Homeland Security and the CMRS Board. He stated he has served as the Appointing Authority in some capacity since March of 2005, through several administration changes and his role is to administratively carry out the personnel actions requested. He stated that this is not a change brought about by the Bevin Administration, it was an existing practice. He stated that there is no "cause" listed on the Appellant's termination letter because the Appellant was terminated as an unclassified employee without cause.

18. The witness identified Appellee's Exhibits 5, 6, 7(a) and 7(b) and testified regarding them.

19. The witness testified that as it related to Exhibit 3, the organizational chart, there are hundreds of subunits under many of the organizations listed and, accordingly, for efficiency, all are not listed, but are subsumed under the company number of the larger board or agency to which it is attached.

20. The next witness to testify was **Dale Wayne Edmonson**, Chairman of the CMRS Board, formally the 911 Board. He stated he has served in the capacity of Chairman for approximately three (3) years. He testified that the Appellant was recommended to him by the former Director of Homeland Security. Ms. Bolton had not received a position with Homeland Security, but was recommended to the CMRS Board.

21. He testified that the current Executive Director of the CMRS Board, Joe Barrows, consulted with him regarding the Appellant's hiring. He testified that as a Board, they generally only meet quarterly. He stated that personnel actions, hiring and firing are discussed with the Board, but usually after the personnel action has occurred. He stated that the Appellant was hired as Executive Secretary and her duties were receptionist and clerical in nature.

22. The witness identified Appellant's Exhibit B as the minutes at which the Appellant was introduced to the Board after her hiring. He testified that the Executive Director makes a decision to bring someone on board and he does not recall any formal action by the board to hire staff. He further testified that during his tenure on the Board he does not recall any outside entity hiring or firing a CMRS Board employee until the Appellant was fired. His impression of the Appellant's work was favorable.

23. Mr. Edmonson testified that with the change in administration, there was some bewilderment regarding Appellant's firing, but to-date he is not aware of any communication from the Bevin Administration regarding this.

24. Mr. Edmonson testified that fees attached to cell phone billing supply the funding for the CMRS Board. He stated there were no General Fund dollars obtained by the Board, so there were no fiscal issues, to his knowledge, that would have necessitated the Appellant's firing.

25. Mr. Edmonson testified that the board staff is small and, during his tenure on the board, two people left, and the Board was not involved in their dismissal. The witness reviewed Appellant's Exhibit E, draft minutes of a board meeting on March 7, 2016. He stated that, at that meeting, the Board made a "Vote of Confidence" regarding the staff to make clear to the administration that the Board was happy with its employees. With the change in administration, the Board collectively felt it was important to do so.

26. On cross examination, Mr. Edmonson testified that during his tenure, the Board has not taken action to hire or fire the staff, and that these acts are taken care of by the Executive Director. He testified that there is no vote taken, but instead there was a casual conversation of the need to fill a particular position.

27. Upon questioning by the Hearing Officer, Mr. Edmonson testified that the Board had no involvement in evaluating employees and that function was handled by the Executive Director. He also stated that the Board did not set Ms. Bolton's salary.

28. The next witness to testify was **Joe Barrows**, Executive Director of the Kentucky 911 Services Board. After being sworn, he testified on direct, cross and upon questioning by the Hearing Officer that the Board was a creation from the 1998 legislative session. He explained that phone companies are required to have 911 service available via cell phones and the fees attached to that fund his Board. He stated that fees generated are approximately \$25 million and the statute allocates what percentages of those fees can be utilized for specific programs. He stated that 2 ½ percent of the funding received is allocated for the Board's administrative function and there are no General Fund dollars received.

29. Mr. Barrows testified that he serves as the Executive Director or Administrator and his role is to manage the day-to-day operations of the office to make 911 service available. He testified that prior to serving as the Executive Director, he served in the General Assembly for 27 years and is also a lawyer.

30. Mr. Barrows stated that the Board's enabling statute is KRS 65.6729 and it details that the Board can hire consultants and staff to carry out other functions necessary. He stated that KRS 39G.040 attaches the Board to the Office of Homeland Security. He noted that the administrative attachment, by way of KRS 39G.040, details that the support provided by Homeland Security was to be "as directed by the Board."

31. He stated that prior to the Appellant's termination on May 4, 2016, Homeland Security had never initiated a personnel action. He explained that he never fully understood the process for personnel actions and when he needed to effectuate one, he would call the State Budget Director to detail the process. As it related to promotions, that approval came through the Finance and Administration Cabinet, but he assumed the Governor's Chief of Staff gave ultimate approval.

32. Mr. Barrows testified that the Board never made a formal vote to hire the Appellant. He stated that she had applied for a position with Homeland Security and was not successful, but was then recommended to the CMRS Board for hiring. He stated that he believed an informal discussion regarding the need for an Executive Secretary took place during a retreat at General Butler State Park, but that there was a formal board meeting while there. He stated that he recalled leaving the retreat with the understanding that he was to hire an executive secretary and a GIS person. He stated that once the Appellant was hired, they were satisfied with her work and there was never a vote of the Board or a request from him as the Executive Director/Administrator to terminate her. He stated that the Board had never designated Troy Robinson as Appointing Authority for the Board.

33. Mr. Barrows testified that as a result of the 2016 Legislative Session, the Board was expanded, adding five new members including Mr. John Holiday in his capacity with Homeland Security. After passage of the Legislation HB 585, he had met with him to discuss the Board and its function. He testified that Mr. Holiday eluded to the fact that he (Holiday) may be "called across the river" and asked to do some things on personnel. He said they discussed that the statute attaching the Board to Homeland Security stated that the attachment was "for

administrative purposes only,” but that neither really knew exactly what that meant. Nonetheless, they agreed to talk about it should the issue arise.

34. Mr. Barrows testified that he and the three staff members that serve the Board were all non-merit and that he had met with the three of them to discuss that it could be possible that one or all of them including Barrow, could be dismissed at some point.

35. He testified that his opinion was that either he or the Board could be considered the Appointing Authority. He felt the approval of forms was a ministerial function, but acknowledged that the hiring was not effective until approved by the Governor’s Cabinet Secretary.

36. Prior to dismissing the witness, the Hearing Officer issued a verbal order for Executive Director Barrows to provide all minutes of the Board from 2009 forward, and indicated a post hearing order would be provided.

37. The next witness was **John Holiday**, Executive Director of Homeland Security. He testified that he has held the position since February 2016. He stated he was familiar with statutes governing his office; KRS 39G.010 attaches Homeland Security to the Office of the Governor. KRS 39G.040 attaches 911 Service Board to the Office of Homeland Security. He acknowledged that the attachment was for “administrative purposes” and also acknowledged that the Board’s enabling statute gave the Board the authority to hire consultants and staff necessary to carry out its work, but believed that was “subject matter” experts and not necessarily staff. He testified that other boards and agencies are attached to Homeland Security for administrative purposes.

38. Mr. Holiday testified that shortly after assuming the position, he had met with Joe Barrows at the Board and discussed his staff and the duties they performed. He stated that around March 2016, the State Budget Office issued a memorandum detailing that agencies should develop a plan to effectuate a 9% cut that was anticipated for the 2017 fiscal year. He stated that based upon that, he decided to immediately institute an 8% cut to personnel costs in his Office and the CMRS Board. He named the three individuals that he selected from his office for termination, along with the Appellant who worked for the Board. He testified that he utilized the spreadsheet, Appellee’s Exhibit 6, to identify them. He testified that one individual in his office was selected because the salary paid for the job duties performed were out of proportion. As for the remaining three employees, including the Appellant, Mr. Holiday testified that he selected them for termination because they were the last hired.

39. Upon further questioning from Appellant, Mr. Holiday admitted that after instituting this cut of 8%, he hired two additional people, one whose salary was equal to one of the employees terminated and one who was a Deputy Director and whose salary was higher. He stated that the budget reduction was still being assessed.

40. Mr. Holiday stated that he was aware that the Board's funding was not from the General Fund, but from fees associated with telecommunication devices. He contended however, that the Board was going "bankrupt" and that HB 585 from the 2016 Legislative Session contained provisions to attempt to address the failing program, so he felt the immediate 8% cut was necessary.

41. Mr. Holiday testified that at the time he asked Mr. Robinson to terminate the Appellant, he was unaware of the Appellant's political affiliation and that he did not use that as a basis for her termination. He also denied that the Appellant was on a list of people to be terminated. He testified that there was no suggestion, directive or order from anyone in authority to him to terminate the Appellant and that the decision was made by him based on seniority and job duties. He stated that he discussed the termination with the Personnel Cabinet. In testifying, the witness discussed Appellee's Exhibit 3, the organizational chart. The Appellant objected that this exhibit did not have the affect of a statute or regulation. The objection was **OVERRULED**.

42. **Executive Director Joe Barrows** was recalled for rebuttal. Mr. Barrows denied that the Board was going bankrupt and stated that any information to that effect was erroneous. He indicated that he was unaware of a memorandum testified to by Mr. Holiday that was purportedly sent to all agencies regarding a 9% budget cut. He stated that he was never told that this was the basis for the Appellant's termination.

43. Mr. Barrows stated there would be no savings to the state budget by a 9% cut to his personnel staff because the Board receives no funding by the General Fund and, in fact, the Board is not even included in the state budget because the Board collects in excess of \$26 million yearly and the 2 ½ percent allocated for administration of the Board is sufficient, and that they routinely maintained a surplus. He stated that unused funds remain in the account from year-to-year.

44. Mr. Barrows stated that House Bill 585 addressed a faulty formula and provided more funding at the local level. He stated that the system was not bankrupt, but it was stressed at the local level. He testified that neither the system nor the Board was bankrupt, and that audits are done yearly, and annual reports showed approximately \$26 million derived annually. He offered to provide documentation of the Board's financial status, if the Hearing Officer desired.

45. **Sallie Bolton** then took the stand as the final witness for her case in chief. She testified that she was recommended to the Board by an official with Homeland Security, went through a series of interviews and was ultimately hired by the Board in September 2015. She testified that her duties including attending board meetings, compiling reports and preparing the minutes among other duties. She testified that she was introduced to the Board at their October 2015 meeting and was present for a vote of confidence by the Board in early 2016. She stated that on May 4, 2016, Mr. Holiday met with her, read to her a letter of termination and provided her a copy. She stated that she was not told the reason for her termination and no one had ever expressed dissatisfaction with her work. She testified that she is a registered Democrat. The Appellant identified Appellant's Exhibits B, C, and D, and laid proper foundation for their entry.

46. The Appellant rested.

47. The Appellee made a motion for a directed verdict on the issue of discrimination, stating that the Appellant had failed to meet her burden and had introduced no evidence that she was terminated based upon her political affiliation and assuming *arguendo* that she had such proof, it still would not be unlawful. In support the Appellee cited the Court of Appeals case of *Veitch v. Public Protection Cabinet* 2014-CA-001973-MR, and arguments relied upon in their prior Motion for Summary Judgment.

48. In response, the Appellant argued there is a protection against political discrimination and that the reasons proffered by Mr. Holiday that he had terminated the Appellant as a result of an 8% cut, were pre-textual and that Mr. Holiday was not credible.

49. The Hearing Officer reserved ruling on the motion.

50. The Appellee rested.

51. The Hearing Officer stated she would issue a Post Hearing Order directing Mr. Holiday to produce the March 2016 memo (hereinafter "the 9% Memo") that he testified informed him of an impending 9% budget cut and formed the basis for his decision to terminate the Appellant. The Hearing Officer asked the Appellee to facilitate providing that to the Personnel Board.

52. The Hearing Officer allowed for written closing and post hearing briefs to be filed no later than January 18, 2017.

53. The Appellee's Post Hearing Brief was received timely.

54. On January 20, 2017 the Appellant submitted her Brief accompanied by a Motion to File a Late Brief. With good cause having been shown, the Motion was **SUSTAINED**. Both Post hearing briefs, the 9% Memo and the Board Minutes were entered into the administrative record.

55. The Hearing Officer considered the entire administrative record.

FINDINGS OF FACT

1. The Appellant, Sallie Bolton, timely filed an appeal with the Personnel Board, alleging that she was fired from her position as Executive Secretary with the Board as a result of her political affiliation, an act of discrimination. (Appellant's Appeal Form)

2. KRS 18A.095(12) provides:

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.

3. However, KRS, 18A.095(14) refers to claims of discrimination by any employee, including unclassified, and provides only, "Any employee, applicant for employment, or eligible on a register, who believes that he has been discriminated against, may appeal to the board."

4. The Hearing Officer finds that KRS 18A.095(9) allows a right of appeal to the Personnel Board for an unclassified employee terminated for cause, but a termination not for cause may only be appealed to the Board upon the basis of discrimination as outlined in KRS 18A.095 (14), above.

5. The Appellant was approved to be hired by the Board into the non-merit position of Executive Secretary, by virtue of approval of a Request for Personnel Action Exemption. (Exhibit 1, Testimony of Barrows).

6. The Appellant had been recommended to the Board Chair by an official in the Department of Homeland Security after she was unsuccessful in obtaining a job there. Her hiring was discussed with the Board's Executive Director and after a series of interviews, Executive Director Barrows made an offer of employment to the Appellant, which she accepted. (Testimony of Edmonson, Barrow, Bolton)

7. Mr. Barrows, initiated a Request for Personnel Action on August 21, 2015 and it was approved by Honor Barker, Appointing Authority, and Mary Lassiter, Secretary of the Governor's Executive Cabinet under the Beshear Administration. (Exhibit 1, Testimony of Robinson)

8. The organizational relationship between the entities involved is important to the Hearing Officer's consideration. Accordingly, a statutory outline of the organizational chart is instructive:

KRS 12.020 provides:

Every authority, board, bureau, interstate compact, commission, committee, conference, council, office, or any other form of organization shall be included in or attached to the department or program cabinet in which they are included or to which they are attached by statute or statutorily authorized executive order; except in the case of the Personnel Board and where the attached department or administrative body is headed by a constitutionally elected officer, the attachment shall be solely for the purpose of dissemination of information and coordination of activities and shall not include any authority over the functions, personnel, funds, equipment, facilities, or records of the department or administrative body. (Emphasis added)

9. The Hearing Officer finds, the CMRS Board is an independent entity of state government attached to the Office of Homeland Security by KRS 65.7623(4) "for administrative purposes only" with Homeland Security being responsible to "provide staff services and carry out administrative duties and functions as directed by the board." The Office of Homeland Security is attached to the Office of the Governor pursuant to KRS 12.023 (11). (Appellee's Exhibit 3)

10. The Hearing Officer finds that after his election, Governor Bevin issued a Personnel Cabinet Signature authorization, designating Troy Robinson as Appointing Authority (the designation formerly held by Honor Barker who approved Appellant's hiring to the Board under the prior administration). Through the written authorization, the Governor gave Robinson written authority to sign Personnel Action Request forms and Letters of Dismissal for a large number of boards and agencies in the Finance and Administration Cabinet and the General Government Cabinet (Testimony of Robinson, Appellee's Exhibits 1,2,3)

11. The Hearing Officer finds KRS 65.7629(10) gives the CMRS Board the statutory authority "To employ consultants, engineers, and other persons and employees as may be, in the judgment of the board, essential to the board's operations, functions, and responsibilities, and to fix and pay their compensation from funds available to the board."

12. Through her Motion for Summary Judgment and in arguments throughout the proceeding, the Appellant argued that the Board's authority to hire and dismiss its staff is exclusive and that Troy Robinson had no authority to terminate the Appellant because the Board had never taken official action at a Board meeting to delegate that authority to him. The Appellant's argument continued, "Even if the board's authority could be delegated, it would have to be reflected in its official minutes. There was no such action taken or authorized by the Board." (Appellant's Motion for Summary Judgment, Paragraphs 10 and 11.)

13. KRS 18A. 005(1) defines an appointing Authority as:

[T]he agency head or any person whom he has authorized by law to designate to act on behalf of the agency with respect to employee appointments, position establishments, payroll documents, register requests, waiver requests, requests for certification, or other position actions. Such

designation shall be in writing and signed by both the agency head and his designee. Prior to the exercise of appointing authority, such designation shall be filed with the secretary.

14. The Hearing Officer finds, after reviewing the official minutes of every Board meeting of the CMRS Board from 2009 through 2016, that there was no designation by the Board for Troy Robinson to act as Appointing Authority on its behalf. However, the Hearing Officer also finds that there was no designation for the Board's Executive Director, Joe Barrows, to serve as Appointing Authority on the Board's behalf. Finally, the minutes contain no official action by the Board itself to hire an Executive Secretary in general, and no action to hire Sallie Bolton, specifically.

15. The Hearing Officer finds that a public agency speaks through its minutes, *See County Board of Education v. Durham*, 198 Ky. 732, 249 S.W. 1028 (1923). *See also, Board of Educ. v. Jones*, Ky., 823 S.W.2d 457, 459 (1992).

16. The Hearing Officer finds that the Board, through its authorizing statute, KRS 65.7629(10), has the legal authority to hire and dismiss its staff and to set their compensation. In the case of the Appellant, it did not officially act to hire the Appellant, fix her compensation or dismiss her.

17. The Hearing Officer finds that Troy Robinson, by virtue of the designation from Governor Bevin, and the authority outlined in the statutes above, had the legal authority to terminate the Appellant, just as his predecessor under the prior administration, had the legal authority to appoint Appellant—both of which were effectuated without official Board action.

Appellant's Claim of Political Discrimination

18. As for the Appellant's claim that her termination from her non-merit position was an unlawful act of political discrimination, solely based on her affiliation with the Democratic Party, the Hearing Officer finds that the Appellant was a non-merit political appointee and that her hiring was brought about by a recommendation between government officials, which was ultimately brought to fruition by the Appointing Authority for the General Government Cabinet and the Governor's Chief of Staff.

19. The Hearing Officer finds that the Appellant has failed to meet her burden of proof to show that a termination for a political reason is unlawful discrimination as outlined in KRS 18A.095(14). Case law holds that, "An unclassified employee is a political employee, not a merit employee and may be discharged for any reason, including a bad reason, no reason or for political reasons so long as there is no statutory authority for a protest" *Martin v. Corrections Cabinet of Com.*, 822 S.W.2d 858, 860 (Ky. 1991). The Appellant has likewise failed to produce evidence that her termination was based upon her political affiliation.

20. In reviewing the record and weighing the evidence and the credibility of the witnesses, it is important to note that the 9% Memo that Executive Director Holiday testified he received in March 2016, and that formed the basis for his decision to have Troy Robinson

terminate the Appellant on May 4, 2016, was actually issued by the State Budget Office and dated May 17, 2016, *two weeks after* the Appellant's termination. However, the Hearing Officer finds that this witness's lack of credibility does not cure the Appellant's lack of evidence that such an act of political discrimination occurred or that it was unlawful.

CONCLUSIONS OF LAW

1. The Hearing Officer concludes that the Appellee, Finance and Administration Cabinet, has met its burden of proof to show that Troy Robinson, Appointing Authority for the General Government Cabinet, had the legal authority to terminate the Appellant, Sallie Bolton, from her non merit position of Executive Secretary with the CMRS Board.

2. The Hearing Officer concludes that the Appellant, Sallie Bolton, has failed to meet her burden of proof to show that she was the subject of unlawful discrimination based upon her political affiliation.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the case of **SALLIE BOLTON VS. FINANCE AND ADMINISTRATION CABINET (APPEAL NO. 2016-097)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen 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 exception 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 the 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).

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 Brenda D. Allen this 21st day of April, 2017.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy this day mailed to:

Hon. Cary Bishop
Hon. Steven Bolton