

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2024-114**

JOE BROSKY

APPELLANT

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

KENTUCKY DEPARTMENT OF MILITARY AFFAIRS

APPELLEE

***** ****

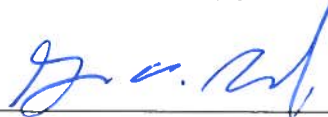
The Board, at its regular May 2025 meeting, having considered the record, including the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer dated April 10, 2025, and being duly advised,

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 May, 2025.

KENTUCKY PERSONNEL BOARD



GORDON A. ROWE, JR., SECRETARY

Copies hereof this day emailed and mailed to:

Joe Brosky
Hon. Charla Sands
Hon. Rosemary Holbrook (Personnel Cabinet)

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2024-114**

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v.

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

DEPARTMENT OF MILITARY AFFAIRS

APPELLEE

** ** *

This matter is before the Hearing Officer on the appellee Department of Military Affairs' (the "Appellee") Motion to Dismiss. The appeal last came before the Hearing Officer in a pre-hearing conference on February 4, 2025, which was held at 11:00 a.m., ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Gordon A. Rowe, Jr. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The appellant, Joe Brosky (the "Appellant"), was present by telephone at the pre-hearing conference, and was not represented by legal counsel. The Appellee, Department of Military Affairs, was present by telephone and was represented by the Hon. Charla Sands.

At issue in this appeal is the Appellant's discharge from employment as a Security Specialist employed by the Department of Military Affairs. The Appellant has alleged that he did not receive proper training and was a victim of discrimination, which led to his termination. The Appellee filed a motion to dismiss the appeal (the "Motion to Dismiss") prior to the initial pre-hearing conference, arguing that the Personnel Board lacked jurisdiction over the Appeal because the Appellant was hired under KRS 36.040 and was not subject to the protections of KRS Chapter 18A. The Appellant did not respond to the Motion to Dismiss. For the reasons set forth herein, the Hearing Officer finds the Appellee's Motion to Dismiss well-taken on the issue of jurisdiction and recommends the appeal be dismissed by the Personnel Board.

PROCEDURAL BACKGROUND

1. The Appellant was terminated from his job a Security Specialist by a letter from the Executive Director of the Department of Military Affairs (the "Termination Letter"), which was dated July 3, 2024. [See Termination Letter attached to Appeal Form.] In the Termination Letter, the Appellant was informed by the Appellee that his "services as a Security Specialist were no longer needed." [*Id.*] No other reason or cause was given for the Appellant's discharge.

2. This appeal was filed by the Appellant on August 2, 2024. In the appeal, the Appellant has alleged he was unsuccessful in his employment because he was not trained properly and was not given the right tools and because he was a victim of discrimination “due to lack of knowing the right people, age and weapons knowledge and experience.” [See Appeal Form, attached statement at p. 2.] On his Appeal Form, the Appellant checked the box for “Discrimination” as a reason for his appeal, but he never specified a category of discrimination. In his initial pre-hearing conference, the Appellant alluded to age being a reason for his discharge but never provided any supporting facts.

3. The Appellant conceded in his Appeal Form and during the initial pre-hearing conference that he had problems demonstrating his ability to qualify for the shooting requirements of the job. The Appellant stated that he “could not qualify on the shotgun.” [See Appeal Form, attached statement at p. 1.] The Appellant has also stated that he lost interest in the job after being put on night shift for about a week and communicated to his supervisors that “it was too boring and I felt like I didn’t really fit in.” [See Appeal Form, attached statement at p. 1.]

4. On August 20, 2024, prior to the initial pre-hearing conference, the Appellee filed a motion to dismiss, in which it argued that the Personnel Board does not have jurisdiction to hear the appeal because the Appellant was hired (and dismissed) under KRS 36.040 and was never a Chapter 18A employee. Therefore, the Appellee contends, the Appellant has no right to make a claim under any provision of Chapter 18A and his claims are outside the jurisdictional purview of the Personnel Board.

5. The Appellant did not file a response to the Appellee’s Motion to Dismiss.

FINDINGS OF FACT

1. The Appellant was briefly employed as a Security Specialist by the Appellee from June 1, 2024, until his dismissal on July 3, 2024.

2. The Personnel Action Notification (“PAN”) commemorating the Appellant’s hiring on June 1, 2024, indicates that he was hired under KRS 36.040(1)(r) and was not a KRS Chapter 18A employee. [See Exhibit A to Appellee’s Motion to Dismiss.] Similarly, the PAN commemorating the Appellant’s separation from employment with the Appellee indicates at the bottom of the form that the Appellant’s employment was subject to KRS 36.040 and that he was not a KRS Chapter 18A employee. [See Exhibit C to Appellee’s Motion to Dismiss.]

3. During his employment with the Appellee, the Appellant was not a classified employee with status subject to KRS Chapter 18A. The Appellant was hired under the authority of the Adjutant General of the Department of Military Affairs.

4. The Appellant has produced no evidence to show that he was hired under KRS Chapter 18A or to counter the evidence produced by the Appellee that he was hired under KRS 36.040. Thus, the Appellant was hired as a non-Chapter 18A employee and does not have the protections of KRS Chapter 18A.

5. The Appellant has not provided any facts to support his claims of age discrimination or any other discrimination which would be unlawful under state or federal statutes.

CONCLUSIONS OF LAW

1. It is well-established that a motion to dismiss should only be granted if the moving party can show that the party who filed the claim “would not be entitled to relief under any set of facts which could be proven in support of his claim.” *Morgan v. Bird*, 289 S.W.3d 222, 226 (Ky. App. 2009). The pleadings filed by the claiming party “should be liberally construed in the light most favorable to the plaintiff, all allegations being taken as true.” *Pari-Mutuel Clerks’ Union of Kentucky, Local 541, SEIU, AFL-CIO v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977). A court should rule on a motion to dismiss when the question at issue is purely a matter of law. *James v. Wilson*, 95 S.W.3d 875, 884 (Ky. App. 2002).

2. There is no genuine issue of material fact in this case. The only question before the Personnel Board is purely a question of law: whether the Board has jurisdiction over this appeal.

3. The Personnel Board does not have authority to hear any appeal not specifically authorized by KRS Chapter 18A. In fact, the Personnel Board is **required** to dismiss any appeal in which it determines “it lacks jurisdiction to grant relief.” KRS 18A.095(16)(a).

4. KRS 36.040 states unambiguously that the adjutant general has the power to “[H]ire, discharge, and pay any personnel that the adjutant general deems necessary....without regard to KRS Chapter 18A.” KRS 36.040(1)(r). Consequently, the Personnel Board has consistently held that it does not have jurisdiction over state employees hired under KRS 36.040. *See Ralph Mischler v. Department of Military Affairs*, 2011 WL 2534033 (KY PB 2011); and *see Kemmye Graves v. Department of Military Affairs*, 2015 WL 5092110 (Ky PB 2015). In both *Mischler* and *Graves*, the Board dismissed the appeals after determining that both employees were hired under KRS 36.040 and were not subject to the provisions of KRS Chapter 18A.

5. The Appellant was clearly hired by the adjutant general under the provisions of KRS 36.040 and there is no set of facts under which Appellant would be subject to KRS Chapter 18A. Consequently, the Personnel Board does not have jurisdiction to grant the relief sought by the Appellant and this appeal should be dismissed.

6. The Appellant may be able to seek relief in another forum for his claims of discrimination but he is not entitled to avail himself of the anti-discrimination provisions of KRS 18A.095 because he was a non-Chapter 18A employee.

RECOMMENDED ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Personnel Board that the appeal of **JOE BROSKY V. DEPARTMENT OF MILITARY AFFAIRS (APPEAL NO. 2024-114)** 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 fifteen (15) 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)

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).

The parties are strongly encouraged to send any exceptions and/or requests for oral argument by email to: PersonnelBoard@ky.gov

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.

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

SO ORDERED at the direction of the Hearing Officer this 10th day of April, 2025.

KENTUCKY PERSONNEL BOARD



GORDON A. ROWE, JR.
EXECUTIVE DIRECTOR

A copy hereof was emailed and mailed to the following persons at their respective addresses as provided to the Personnel Board on this 10th day of April, 2025:

Joe Brosky, Appellant
Hon. Charla Sands, Counsel for Appellee