

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-043**

LEROY BURGESS

APPELLANT

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

**DEPARTMENT OF MILITARY AFFAIRS
MAJOR GENERAL ED TONINI, APPOINTING AUTHORITY**

APPELLEE

**** ** ***

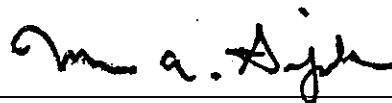
The Board at its regular August 2015 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated July 22, 2015, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer 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 20th day of August, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Michael Van Leuven
Leroy Burgess

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-043**

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VS.

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

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APPELLEE

** ** *

This matter came on for a pre-hearing conference on April 28, 2015, at 3:00 p.m., ET, at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Boyce A. Crocker, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Leroy Burgess, was present by telephone and was not represented by legal counsel. The Appellee, Department of Military Affairs, was present and represented by the Hon. Michael Van Leuven, appearing by telephone.

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.

The Hearing Officer notes this appeal was filed with the Personnel Board on March 9, 2015. The Appellant was appealing his dismissal, and stated, "After more than 16 years of service with the State, I was dismissed without having an opportunity to prove my innocence. I have followed the SOP based on training I have received while working for Dept. of Military Affairs (Bluegrass Challenge Academy)."

As relief, Appellant seeks to be reimbursed for his expenses, to have his name cleared and to be reinstated to his position.

Counsel for the Appellee countered he believed the Personnel Board lacked jurisdiction to consider this appeal, and asked that the matter be dismissed.

In accordance with long-standing Personnel Board policy, the Hearing Officer required Counsel for the Appellee to reduce this oral motion to one in writing. The Hearing Officer

discussed this with both parties and set schedules for both parties to file their respective pleadings.

Counsel for the Appellee, Department of Military Affairs, made a motion to dismiss this case for lack of jurisdiction by the Personnel Board. This matter was discussed and a briefing schedule was set.

In accordance with the briefing schedule, Appellee timely filed a Motion to Dismiss. Although given time to do so, Appellant did not file a Response to Appellee's Motion to Dismiss. This matter is now submitted for a ruling.

BACKGROUND

1. During the relevant time, Appellant, Leroy Burgess, was an employee of the Department of Military Affairs.

2. The Appellee, Department of Military Affairs, challenges the jurisdiction of the Personnel Board to consider this matter contending that the Appellant was not employed pursuant to KRS 18A, but was instead hired pursuant to the Adjutant General's authority under KRS 36.040(1)(r).

3. In support of this contention, counsel for Appellee notes that Appellant at the time of his firing received the "standard form dismissal letter for Non-Chapter 18A employee" which informed Appellant that his services were no longer required.

4. Counsel goes on to cite KRS 36.040(1)(r), which holds as follows:

...

(r) Hire, discharge, and pay any personnel that the adjutant general deems necessary to fulfill defense contracts without regard to KRS Chapter 18A.

5. Counsel points out that Appellant was neither hired nor discharged under the provisions of KRS 18A.005 to KRS 18A.200, but was properly hired and fired pursuant to KRS 36.040(1)(r). In support of his motion, counsel attached an affidavit from Teresa King Lee, the Human Resources Administrator for the Department of Military Affairs, and also various other documents that reflect the hiring and firing of Appellant. Counsel contends that the clear legislative intent was to allow the Adjutant General pursuant to KRS 36.040 to hire and fire certain employees without regard to KRS 18A. Counsel also cites the Personnel Board case of *Ralph Mischler, Jr. v. Department of Military Affairs*, Appeal No. 2009-137, and the Final Order adopted by the Personnel Board in June 2011 as support for the contention that Appellant was not a KRS 18A employee and that the Personnel Board has no jurisdiction herein.

6. Although given time to do so, Appellant filed no response to Appellee's Motion to Dismiss.

7. KRS 18A.115(1) states:

The classified service to which KRS 18A.005 to 18A.200 shall apply shall comprise all positions in the state service now existing or hereafter established, . . .

8. KRS 18A.095(18)(a) states:

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.

FINDINGS OF FACTS

1. During the relevant time, Appellant, Leroy Burgess, was an employee of the Department of Military Affairs.

2. The Hearing Officer finds that Appellant was, at the time of his hiring, hired as a Non Chapter 18A employee and was not hired pursuant to the statutes and regulations governing the state merit system.

3. The Hearing Officer finds further that the Appellant clearly was terminated as a Non Chapter 18A employee and that such was noted on the Personnel Action Notification from the Personnel Cabinet to the Appellant.

CONCLUSIONS OF LAW

1. The Hearing Officer concludes as a matter of law it is clear that the Appellant was not hired as a KRS Chapter 18A employee and was terminated as a Non Chapter 18A employee.

2. The Hearing Officer, having reviewed the documents attached to the Appellee's Memorandum in Support of its Motion to Dismiss and also taking notice of the *Ralph Mischler* case cited above, concludes that the Personnel Board does not have jurisdiction to consider the appeal of Leroy Burgess as he was not at anytime a state merit employee pursuant to KRS 18A. Appellant may have relief elsewhere, but the Personnel Board does not have jurisdiction to consider this appeal of his termination.

RECOMMENDED ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Personnel Board that the appeal of **LEROY BURGESS VS. DEPARTMENT OF MILITARY AFFAIRS (APPEAL NO. 2015-043)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

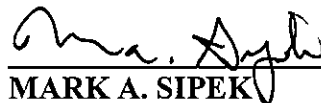
Pursuant to KRS 13.B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that 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).

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 22nd day of July, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Michael Van Leuven
Leroy Burgess