

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2020-083

NICHOLAS BUSH

APPELLANT

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

TRANSPORTATION CABINET

APPELLEE

* * * * *

The Board, at its regular April 2021 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated March 24, 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 5 and substitute the following:

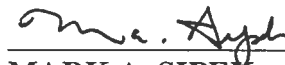
5. In its Motion, the Appellee stated that the Appellant was alleging that the failure to schedule his training session was an oversight on the part of the Cabinet. The Appellee argued that even if this was an oversight, he had no right to appeal being reverted during his promotional probationary period without a claim of discrimination pursuant to KRS 18A.111.

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 the 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 14th day of April, 2021.

KENTUCKY PERSONNEL BOARD



**MARK A. SIPEK
SECRETARY**

A copy hereof this day mailed to:

Hon. William Fogle
Nicholas Bush
J. R. Dobner

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2020-083

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VS.

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

TRANSPORTATION CABINET

APPELLEE

** **

This matter came on for a pre-hearing conference on May 14, 2020, at 10:00 a.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, Nicholas Bush, was present and was not represented by legal counsel. The Appellee, Transportation Cabinet, was present and represented by the Hon. Will Fogle. Both parties appeared 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 Chapter 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 the Appellant filed his appeal with the Personnel Board on March 10, 2020, alleging demotion, reclassification, and discrimination. At the pre-hearing conference, it was determined that the Appellant was reverted from his position of Highway Technician II to his former position as a Highway Technician I. The Appellant stated that he was serving his one-year probationary period and was reverted for his failure to complete a training class. He stated he did not complete the class because he was not scheduled to take it

until after the completion of his probationary period. The Appellant also stated that it was not in his control to schedule the class, as those classes were scheduled for him by other staff members.

2. The Appellant stated he believed this was discrimination. He did not think it was intentional, he thought it was a simple oversight. However, other individuals were allowed to take and complete this class. The Appellant believes he should be allowed to return to his position as a Highway Technician II with an opportunity to take this class. He stated that if he passes the class, he believes he should retain the position; if he fails, he is fine with being reverted.

3. Counsel for the Appellee stated that he did not believe that the Personnel Board had jurisdiction over this matter. He asked the Appellant if he was alleging any type of protected class discrimination such as race, sex, age, or politics. The Appellant denied that he was making any of these allegations. Counsel for the Appellee requested time to file a Motion to Dismiss.

4. In its Motion to Dismiss, the Appellee stated that the Appellant was reverted to his former position of Highway Technician I after failing to complete his promotional probationary period in the position of Highway Technician II. The Appellant was not given a reason in his reversion letter. The Appellant alleged that he was reverted because he failed to take all of the necessary training classes to be eligible for the position of Highway Technician II. The Appellee did not dispute this assertion.

5. In its Motion, the Appellee stated that the Appellant was alleging that the failure to schedule his training session was an oversight on the part of the Cabinet. The Appellee argued that even if this was an oversight, he had no right to appeal being reverted during his promotional probationary period pursuant to KRS 18A.111 without a claim of discrimination.

6. The Appellee argued that, despite being questioned at length during the pre-hearing conference as to whether or not he was making a protected class discrimination claim, the Appellant denied any such claim.

7. In response to the Motion to Dismiss, the Appellant discussed the hardship of being reverted to his old position and salary. He reiterated he had no control over class scheduling and that this was the reason he did not successfully complete his probation. The Appellant stated that scheduled following his reversion were canceled due to the pandemic. The

Appellant alleged he was the victim of discrimination based on being reverted for not competing the class, which was not his fault.

FINDINGS OF FACT

1. The Appellant, Nicholas Bush, was reverted to his position as a Highway Technician I for failure to complete his promotional probationary period as a Highway Technician II. The Appellant is a merit employee with status.

2. It is not disputed that the Appellant was reverted for failure to complete a training class. The Appellant was not in control of scheduling the training classes and he was not scheduled to take his class until after he had already been reverted.

3. Although questioned at length as to whether or not he was making any claims of protected class discrimination, the Appellant denied any such claim.

4. This appeal can be decided based on the undisputed facts in the record.

CONCLUSIONS OF LAW

1. The Personnel Board lacks jurisdiction to hear the Appellant's appeal. The Appellant is appealing being reverted from promotional probation. Although he alleges discrimination, it is clear from his appeal form, his statements at the pre-hearing conference, and his response to the Appellee's Motion to Dismiss that he is not alleging any type of protected class discrimination.

2. KRS 18A.005(35) defines reversion as follows:

"Reversion" means either the returning of a status employee to his or her last position held in the classified service, if vacant, or the returning of a status employee to a vacant position in the same or similar job classification as his or her last position held in the classified service. Reversion occurs after a career employee is terminated other than for cause from the unclassified service or after a status employee fails to successfully complete promotional

probation. Reversion after unsuccessful completion of promotional probation, or in the case of a career employee after termination from the unclassified service, may only be appealed to the Personnel Board under KRS 18A.095(12);

3. KRS 19A.095(12) reads as follows:

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.

4. KRS 18A.111(4) describes promotional probation as follows;

An employee with status, who has been promoted, shall serve a promotional probationary period of six (6) months, except for those employees granted leave in excess of twenty (20) consecutive work days during this period. Such probationary periods shall be extended as prescribed in KRS 18A.005. During this period, he shall retain the rights and privileges granted by the provisions of this chapter to status employees.

Because the Personnel Board lacks jurisdiction to grant relief to the Appellant, this appeal may be dismissed following a preliminary hearing pursuant to KRS 18A.095(18)(a).

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 **NICHOLAS BUSH VS. TRANSPORTATION CABINET (APPEAL NO. 2020-083)** 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).

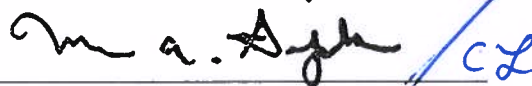
[Hearing Officer Note: Any document filed with the Personnel Board shall also be served on the opposing party.]

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 24th day of March, 2021.

KENTUCKY PERSONNEL BOARD



**MARK A. SIPEK
EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:

Hon. William Fogle
Mr. Nicholas Bush
J.R. Dobner
Hon. Rosemary Holbrook (Per. Cabinet)