

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2012-061**

JOHN CARTER

APPELLANT

VS.

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

**TRANSPORTATION CABINET
MIKE HANCOCK, APPOINTING AUTHORITY**

APPELLEE

** ** ** ** **

This matter came on for an evidentiary hearing on January 10, 2013, at 9:30 a.m., 28 Fountain Place, Frankfort, Kentucky, before R. Hanson Williams, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellant, John Carter, was present at the hearing, but was not represented by legal counsel. Appellee, Transportation Cabinet, was present and was represented by the Hon. William Fogle. Appearing as the Agency representative was Kathy Marshall.

BACKGROUND

1. This matter involves the appeal by the Appellant from his termination during his initial probationary period. The Appellant was employed on or about December 1, 2011, by the Agency as a Highway Equipment Operator I. He was terminated from his position by letter dated March 9, 2012. As an employee without status, the Appellant had no right to appeal except as provided in KRS 18A.095.

2. The Appellant alleged discrimination based upon his status as a veteran. The Interim Order dated August 21, 2012, stated that Executive Order 2008-473 specifically prohibited discrimination in state employment against someone based upon their status as a veteran and that the Uniform Service Employment and Reemployment Rights Act (USERRA) of 1994 (at 38 U. S. C. 4311) also prohibited discrimination against an employee because of their status as a veteran.

3. KRS 18A.095(22) provides as follows:

(22) (a) If the board finds that the action complained of was taken by the appointing authority in violation of laws prohibiting favor for, or discrimination against, or bias with respect to, his political or religious opinions or affiliations or ethnic origin, or in violation of laws prohibiting discrimination because of such individual's sex or age or disability, the appointing authority shall immediately reinstate the employee to his former position or a position of like status and pay, without loss of pay for the period of his penalization, or otherwise make the employee whole unless the order is stayed by the board or the court on appeal.

(b) If the board finds that the action complained of was taken without just cause, the board shall order the immediate reinstatement of the employee to his former position or a position of like status and pay, without loss of pay for the period of his penalization, or otherwise make the employee whole unless the order is stayed by the board or the court on appeal.

(c) If the board finds that the action taken by the appointing authority was excessive or erroneous in view of all the surrounding circumstances, the board shall direct the appointing authority to alter, modify, or rescind the disciplinary action.

(d) In all other cases, the board shall direct the appointing authority to rescind the action taken or otherwise grant specific relief or dismiss the appeal.

4. The Appellant was assigned the burden of proof by a preponderance of the evidence to prove his claims of discrimination.

5. The Appellant, **John Carter**, called himself as his first and only witness. The Appellant stated that he is currently employed with the Charles Deweese Construction Company in Glasgow, Kentucky. He testified that he was employed initially by the Commonwealth on or about December 1, 2011, as a Highway Equipment Operator I. Specifically, he was employed in the Structures Department out of the Bowling Green office in District 3. The Structures Department primarily works upon bridges. Appellant also added that he served in the United States Marine Corp. from 2004 through 2006.

6. Appellant testified that on his small structures crew that Foy Skillern was the lead of the crew, and that Floyd Watt was the Superintendent of the crew. Appellant stated in general terms that he encountered "run-ins" with one of these two men. He cited as an example that Watt regularly used vulgar language toward him and told him that District 3 had the right to hire and fire him. Appellant also added that Darren Stewart was Engineer out of District 3 and that

the Appellant regularly told him of the run-ins he had with Skillern and Watt. He stated that upon one occasion, Watt accused him of cheating on his time.

7. Appellant introduced Appellant's collective Exhibit 1, a series of character references from various Allen County officials and also pages from his personal diary on various days in January, February, and early March, 2012.

8. The Appellant pointed to a note dated January 30, 2012, in his diary, which detailed an incident in which Watt rebuked him for parking a state truck too close to a wall. The Appellant stated that he got the okay to park there from an employee named Russell.

9. Appellant also related an unknown time, where Watt told him "Because he had not served in the military for a long time, he wasn't really entitled to call himself a veteran." He also stated that another time during his employment, that Watt had called him a "snotty little punk." Appellant testified that he reported both incidents to Engineer Darren Stewart.

10. Appellant also related that after these initial run-ins with Watt, he had tried to get further instructions from either Stewart or Skillern. He was then told to stay away from the Warren County barn where Watt spent a lot of time, but testified that part of his job duties required him to be there putting on snow plow equipment.

11. Appellant also related an incident of February 10, 2012, in which he stated that Engineer Stewart had instructed him to go to Frankfort to pick up something. Appellant testified that he did this and then returned back to the Warren County barn that afternoon, where he unloaded the pallets he had picked up by himself. Afterward, he made brine from approximately 3:30 to 8:30 at the direction of Stewart. This is apparently the incident referenced previously where Watt accused him of cheating on his time by not properly recording his lunch hour.

12. The Appellant further related an incident of February 17, 2012, whereupon he met with Stewart and an employee named "Mudd." Supposedly Mudd informed him at this meeting that he liked the fact that he had gotten his CDL early on during his probationary period, but that Mudd also told him he needed to slow down and listen to instructions. Supposedly Mudd also told him at this meeting that he had gotten a bad report on the Appellant for "coming in on his own" and working on the snow and ice equipment. The Appellant apparently replied to these gentlemen that he had been called in by an employee named Brian to perform these tasks.

13. Lastly, the Appellant testified that at some unknown point, Foy Skillern had made the remark to him that "he had friends in the military and did not think that Appellant had earned veterans status, having served just two years."

14. On cross-examination, the Appellant answered that he wished to return to state employment, but to a different barn or crew. He further testified that Billy J. Stanley overheard Watt make the comments to him about not believing he had earned veterans status.

15. The Appellant also stated that he had no direct evidence that Watt had recommended that he be terminated and also added that he filed no grievance against Watt for his treatment of him.

16. At the conclusion of his testimony, the Agency moved for a directed verdict, which was **GRANTED** by the Hearing Officer.

FINDINGS OF FACT

1. The Appellant, John Carter, was initially hired on or about December 1, 2011, by the Agency as a Highway Equipment Operator I and was terminated by letter dated March 9, 2012. No cause was given. It is apparent to the Hearing Officer that the Appellant mistakenly testified that he was employed in December 2010, as the March 9, 2012 termination letter would have been long beyond the six-month initial probationary period. The Hearing Officer hereby finds that the actual initial employment date was December 2011.

2. The Hearing Officer finds that the Appellant was probably treated badly by Watt, assuming the testimony of the Appellant is true. However, Mr. Watt was not called as a witness and neither was Billy J. Stanley, who supposedly overheard the derogatory comments made by Watt. The Hearing Officer would have been in a much better position to judge the credibility of the Appellant had one or both of these witnesses been called to testify.

3. KRS 18A.095(22) does not specifically provide a cause of action of discrimination based upon the status as a veteran. Executive Order 2008-473 does specifically provide cause of action which prohibits discrimination against state employment against someone based upon their status as a veteran.

4. The Hearing Officer finds that the Appellant appears to be a conscientious and honest individual; however, without further testimony or the appearance of other witnesses, the Hearing Officer finds it impossible to judge the circumstances of the Appellant's brief employment in its totality so as to make a finding of whether discrimination occurred.

CONCLUSIONS OF LAW

1. KRS 18A.095(22) provides as follows:

(22) (a) If the board finds that the action complained of was taken by the appointing authority in violation of laws prohibiting favor for, or discrimination against, or bias with respect to, his political or religious opinions or affiliations or ethnic origin, or in violation of laws prohibiting discrimination because of such individual's sex or age or disability, the appointing authority shall immediately reinstate the employee to his former position or a position of like status and pay, without loss of pay for

the period of his penalization, or otherwise make the employee whole unless the order is stayed by the board or the court on appeal.

(b) If the board finds that the action complained of was taken without just cause, the board shall order the immediate reinstatement of the employee to his former position or a position of like status and pay, without loss of pay for the period of his penalization, or otherwise make the employee whole unless the order is stayed by the board or the court on appeal.

(c) If the board finds that the action taken by the appointing authority was excessive or erroneous in view of all the surrounding circumstances, the board shall direct the appointing authority to alter, modify, or rescind the disciplinary action.

(d) In all other cases, the board shall direct the appointing authority to rescind the action taken or otherwise grant specific relief or dismiss the appeal.

2. KRS 18A.095(22) does not in and of itself provide a basis for appeal based upon one's status as a veteran.

3. Executive Order 2008-473 does provide cause of action which prohibits discrimination against state employment against someone based upon their status as a veteran and is incorporated hereto as **Recommended Order Attachment A**.

4. The Hearing Officer concludes as a matter of law that the Appellant failed to carry his burden of proof by a preponderance of the evidence to show that he was terminated during his initial probationary period based upon his status as a veteran.

5. KRS 13B.090(7) states:

(7) In all administrative hearings, unless otherwise provided by statute or federal law, the party proposing the agency take action or grant a benefit has the burden to show the propriety of the agency action or entitlement to the benefit sought. The agency has the burden to show the propriety of a penalty imposed or the removal of a benefit previously granted. The party asserting an affirmative defense has the burden to establish that defense. The party with the burden of proof on any issue has the burden of going forward and the ultimate burden of persuasion as to that issue. The ultimate burden of persuasion in all administrative hearings is met by a preponderance of evidence in the record. Failure to meet the burden of proof is grounds for a recommended order from the hearing officer. (Emphasis added.)

RECOMMENDED ORDER

Based upon the totality of the circumstances, the Hearing Officer recommends that Appellee's Motion for Directed Verdict should be **GRANTED** and recommends to the Personnel Board that the appeal of **JOHN CARTER VS. TRANSPORTATION CABINET (APPEAL NO. 2012-061)** 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).

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 R. Hanson Williams** this 19th day of February, 2013.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof mailed this date to:

Hon. William Fogle
John Carter
Kathy Marshall

Secretary of State
Frankfort
Kentucky

2008-473

June 2, 2008

**RELATING TO EQUAL EMPLOYMENT OPPORTUNITIES
AND NON-DISCRIMINATION IN EMPLOYMENT
IN KENTUCKY STATE GOVERNMENT**

WHEREAS, the Government of the Commonwealth of Kentucky exists to serve equally all of the people of the Commonwealth; and

WHEREAS, equal employment opportunity for all persons should be an integral part of our state government employment system, affording fair treatment relating to any employment action, benefit or condition of employment; and

WHEREAS, the fair and equitable treatment of all employees of and applicants for employment with the government of the Commonwealth of Kentucky is essential to the effective operation of state government;

NOW, THEREFORE, I, Steven L. Beshear, Governor of the Commonwealth of Kentucky, by virtue of authority vested in me by Sections 81 and 69 of the Constitution of Kentucky, KRS 12.080 and the laws of Kentucky, do hereby order and direct the following:

1. This Executive Order applies to all applicants for positions within and employees of the program cabinets and the administrative bodies attached to the program cabinets or attached directly to the Governor's Office in the Executive Branch of the government of the Commonwealth of Kentucky as provided in KRS Chapter 12, et. seq.
2. It shall be the policy of the Commonwealth of Kentucky to provide equal employment opportunity to all people in all aspects of employer-employee relations without discrimination because of race, color, religion, sex, national origin, sexual orientation or gender identity, ancestry, age, disability or veteran status. Employer-employee relations shall include but not be limited to hiring, promotion, termination, tenure, recruitment and compensation.

Recommended Order Attachment A

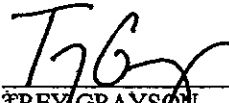
Secretary of State
Frankfort
Kentucky

2008-473

June 2, 2008

3. The affirmative action plan for Kentucky state government adopted by Executive Order 84-549 and Executive Order 96-612, which committed the state to secure for its employees equal employment opportunities and freedom from discrimination and harassment, shall be in full force and effect except as specifically modified herein. The provisions of Executive Order 2006-402 are hereby rescinded and declared to be null and void.

4. The Secretary of the Personnel Cabinet in conjunction with the Governor's Executive Cabinet shall take all steps necessary to implement this Order.


STEVEN L. BESHEAR, Governor
Commonwealth of Kentucky
TREY GRAYSON
Secretary of State