

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2015-112

JAMES T. CHEATHAM

APPELLANT

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

KENTUCKY TRANSPORTATION CABINET

APPELLEE

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The Board at its regular April 2016 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated January 27, 2016, and having considered Appellant's exceptions, Appellee's response, oral arguments, 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 20<sup>th</sup> day of April, 2016.

KENTUCKY PERSONNEL BOARD

  
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MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. William Fogle  
Hon. Elmer George  
Mr. J. R. Dobner

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2015-112

JAMES T. CHEATHAM

APPELLANT

**CORRECTED**  
**VS.                    FINDINGS OF FACT, CONCLUSIONS OF LAW**  
**AND RECOMMENDED ORDER**

TRANSPORTATION CABINET

APPELLEE

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This matter came on for evidentiary hearing on September 8, 2015, at approximately 1:15 p.m., ET, at 28 Fountain Place, Frankfort, Kentucky, before the Hon. John C. Ryan, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by KRS Chapter 18A.

Appellant, James T. Cheatham, was present and was represented by the Hon. Elmer George. Appellee, Transportation Cabinet, was present and represented by the Hon. William Fogle.

The matter was the subject of at least one previous pre-hearing conference at which the issues were defined. At the evidentiary hearing, preparatory to and in lieu of formal taking of proof, the parties conferred and, through counsel, entered into certain stipulations of fact which they urged will suffice as substitute for the sworn testimony. These stipulations were supplemented by joint exhibits which were made part of the record. The matter was thereupon placed under Scheduling Order by the Hearing Officer for simultaneous presentation of memoranda by the parties, due on or before December 1, 2015, together with other dispositive deadlines. The agency timely presented its closing memorandum on November 30, 2015, and Appellant filed his opposing memorandum on December 18, 2015.

**BACKGROUND AND FINDINGS OF FACT**

1.     Until May 18, 2015, James T. Cheatham held the position of Administrative Specialist III within the Kentucky Transportation Cabinet. By letter of May 8, 2015, over the signature of Carol Beth Martin, Appointing Authority, he was dismissed. A true copy of the letter is attached as “**Recommended Order Attachment A**,” and its contents quite abundantly and thoroughly blueprint both the procedure employed in the termination of Mr. Cheatham together with the grounds. Basically, the agency alleges that on March 24, 2015, he formally pled guilty to knowingly possessing child pornography “that had been transported by interstate

commerce, by any means, including computer, in violation of Title 18, United States Code, Sections 2252A(a)(5)(B) and 2252A(b)(2)” in U. S. District Court. The appointing authority asserts that the plea is tantamount to a conviction as defined within the relevant statute and constitutes grounds for automatic and immediate termination.

2. By timely appeal submitted on June 11, 2015, Mr. Cheatham, through counsel, exercised his statutory right to challenge this action under the appropriate category of “dismissal,” but did not offer any further basis to support his position at that time.

3. Subsequent filings and statements presented of record reveal that the plea agreement submitted by Appellant at Bowling Green, Kentucky, before the U. S. District Court on or about March 24, 2015, was rejected by the Court at that time. Final disposition of that aspect was pending when this appeal came on for evidentiary hearing on September 8, 2015, whereupon, as noted above, the parties acknowledged and addressed the status, further jointly urging that the factual sequence is not in dispute and essentially agreeing that Appellant’s termination with the agency is inevitable. They strongly disagreed, however, as to the exact date when his termination should be deemed effective. The matter was thereupon placed in abeyance as referenced above, pending ultimate resolution of Appellant’s circumstances before the U. S. District Court.

4. On June 24, 2015, the District Court entered an order addressing its initial objection to the proposed plea agreement tendered on March 24, 2015, simply stating that “as advised at the change of plea hearing, upon rejection of the plea agreement, the defendant has an opportunity to withdraw the plea of guilty and proceed with the defense in this case.” The Court thereupon afforded the parties the opportunity to develop their respective positions in anticipation of a possible trial. However, the plea was not withdrawn, and on November 10, 2015, the Court accepted the plea agreement and entered a formal judgment of conviction, now also filed of record in the appeal before this Board.

5. As noted, Appellant did not undertake to either withdraw his guilty plea or alter same. The issue presented, as since stipulated by the parties, is the exact date that Appellant should be considered dismissed from his Administrative Specialist position and no longer entitled to salary and benefits under the classified system. The Agency urges that his guilty plea of March 24, 2015, wherein he agreed, in writing, to the commission of one or more felonies, was tantamount to a conviction under KRS Chapter 18A. Appellant argues that his “conviction” occurred when the court entered its judgment on November 10, 2015, and it follows, he claims, that he remained on salary until that date.

6. KRS 18A.095(1) requires that “a classified employee with status shall not be dismissed, demoted, suspended, or otherwise penalized except for cause.” Subsequent provisions of this section outline the requirements be followed by the appointing authority to terminate a member of the classified service. Appellant has not challenged the procedure utilized except its timing, as aforesaid.

7. KRS 18A.032 empowers the secretary (appointing authority) to remove or terminate a member of the classified service under certain conditions. These include, under subsection (1)(i), if an employee has “... been convicted of a felony within the preceding five years and his civil rights have not been restored or he has not been pardoned by the Governor.”

8. KRS 18A.146(2) provides that “subject to the provisions of KRS 18A.095, any state employee who is convicted of a felony may be subject to any disciplinary action deemed necessary, including dismissal from the state service.”

### CONCLUSIONS OF LAW

1. As abundantly noted, Appellant makes no claim he was illegally terminated from his Agency position, nor does he contest the grounds. His position is, rather, that he is entitled to ongoing salary, and presumably related benefits, through the date that the Federal Court officially accepted his March 24, 2015 plea of guilty to the felony charge or charges, specifically the time window between that date and November 10, 2015.

2. As the parties correctly urge, disposition of this appeal turns upon the definition of “convicted” and its usage or application within the framework of KRS Chapter 18A. Neither party apparently locates or supplies any statutory definition and they have accordingly turned to court precedent seeking to define the term. The Supreme Court of Kentucky has pointed out variously that the words “convicted” or “conviction” are equivocal and the meaning may vary according to their use in a particular statute. *Thomas v Commonwealth of Kentucky*, 95 S.W.3d 828, 829 (2003), citing *Commonwealth v Reynolds*, 365 S.W.2d 853, 854 (KY 1963). In the *Thomas* case, the defendant pled guilty to a felony drug charge and requested consideration for the local drug court program. While the request was pending, he was charged with possession of a firearm by a convicted felon. He urged that he did not yet meet the definition for the reason that his drug court request was still pending and not ruled upon. The trial court, affirmed by the Kentucky Supreme Court, ruled that his pending guilty plea to the drug charge equated to a

conviction and the firearm charge was upheld. Quoting from the 1963 *Reynolds* opinion, the Supreme Court wrote that:

The word generally means the ascertainment of defendant's guilt by some legal mode and the adjudication that the accused is guilty. This may be accomplished by a confession by the accused in open court, a plea of guilty or a verdict which ascertains and publishes the fact of guilt. We believe ... in the majority of jurisdictions...the word 'conviction' is not limited to final judgement. 95 S.W.3d at 829.

Notably, the Court utilizes the conjunctive "or," rather than "and," a critical distinction.

3. Applying the forgoing to the context of Chapter 18A and the classified service, it would seem clear that management must be afforded some latitude in interpreting and applying the statutory provisions which govern the status of the rights of its personnel who admit felonious behavior. A voluntary plea, as a formal admission of guilt, should be sufficient to support disciplinary action regardless of when or how the relevant court accepts or disposes of the case. While final disposition within the court framework might well be judicial acceptance of a plea, management should not be bound to the court's calendar in its analysis of what is in the best interest of the agency.

4. Determination by the agency that Appellant stood in violation of KRS 18A.146 as of the date he entered a plea of guilty to a felony in the United States District Court for the Western District of Kentucky, and thereupon subject to dismissal at its discretion, was neither excessive nor erroneous in light of the overall circumstances.

### **RECOMMENDED ORDER**

The Hearing Officer recommends to the Personnel Board that the appeal of **JAMES CHEATHAM V. TRANSPORTATION CABINET, (APPEAL NO. 2015-112)** 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 John Ryan** this 27<sup>th</sup> day of January, 2016.

**KENTUCKY PERSONNEL BOARD**



**MARK A. SIPEK**  
**EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:

Hon. Elmer George  
Hon. William Fogle



Received

MAY 22 2015

Steven L. Beshear  
Governor

TRANSPORTATION CABINET  
Frankfort, Kentucky 40622  
[www.transportation.ky.gov/](http://www.transportation.ky.gov/)

Personnel Board  
Michael W. Hancock, P.E.  
Secretary

May 8, 2015

James T. Cheatham

PERNR:

Re: Dismissal

Dear Mr. Cheatham:

On March 30, 2015, you received an intent to dismiss letter, and on April 6, 2015, you hand-delivered your request for a pre-termination hearing to J.R. Dobner, Policy Advisor. Dobner called your attorney, Elmer George, on April 7, 2015 and left a message. George returned the call at approximately 12:30 p.m. on April 8, 2015 and left a message on Dobner's voicemail. Dobner called George at 1:00 p.m. that same day and left a message, but George did not return the call. On April 13, 2015, Kathy Marshall, Human Resource Branch Manager, spoke with George. During the conversation, George admitted that you would likely be going to prison in June 2015 and stated that he would not be available for a pre-termination hearing until sometime in May 2015.

On April 14, 2015, I sent a letter to you and George informing both of you that the pre-termination hearing was scheduled for April 23, 2015. You appeared at the pre-termination hearing on April 23, 2015, but George did not. You stated that George was unavailable and you were directed to reschedule the pre-termination hearing. At that time, Dobner and I informed you that we would be willing to allow George to attend the pre-termination hearing by telephone and that we would stay after normal business hours in order to have the pre-termination hearing at a time convenient to George. Dobner then called George's office on April 27, 2015 and April 28, 2015 and left a message that we would be willing to hold the pre-termination hearing after-hours in order to do it as soon as possible.

On April 29, 2015, Will Fogle, Deputy Executive Director of the Office of Legal Services, sent a letter to your attorney informing him that he may attend the pre-termination hearing by telephone, and that we were willing to conduct the hearing



An Equal Opportunity Employer M/F/D

Recommended Order  
Attachment A

after normal business hours if necessary. The letter also informed George that if the hearing did not take place by the close of business on May 8, 2015, then you would be dismissed from your position. George never contacted Fogle or my office. After repeated attempts to schedule your pre-termination hearing that have spanned over one month, I am proceeding with your dismissal. This letter serves as notification that you are officially dismissed from your position as an Administrative Specialist III with the Kentucky Transportation Cabinet (KYTC), Department of Vehicle Regulation, Division of Motor Carriers effective the close of business Friday, May 8, 2015.

In accordance with KRS 18A.095 and 101 KAR 1:345, cause exists for your dismissal based on the following specific reason:

On April 17, 2013, an Indictment was filed in United States District Court, Western District of Kentucky, and Count 2 of the Indictment included the following:

On or about January 31, 2012, in the Western District of Kentucky, Washington County, Kentucky, the defendant, JAMES T. CHEATHAM, knowingly possessed, child pornography, as that term is defined in 18 U.S.C. 2256(8)(A), that had been transported in interstate commerce by any means, including computer, in violation of Title 18, United States Code, Sections 2252A(a)(5)(B) and 2252A(b)(2).

On March 24, 2015, you signed a plea agreement. In the agreement, you acknowledged the Indictment, fully understood the charges in the Indictment, and voluntarily entered a plea of guilty to Count 2 in the Indictment. You further agreed that you understood that the charge to which you plead guilty carries a maximum term of imprisonment of 10 years (which is a felony), a maximum fine of \$250,000, and supervised release of at least 5 years and up to any number of years, including life, which the court may specify.

You are being dismissed from your position because your guilty plea amounts to a felony conviction, and pursuant to KRS 18A.032(1)(i), the Personnel Cabinet secretary "may consult with the appointing authority in taking steps to remove such person already appointed if...he has been convicted of a felony within the preceding five (5) years and his civil rights have not been restored or he has not been pardoned by the Governor." Furthermore, according to KRS 18A.146, any state employee who is convicted



of a felony may be subject to any disciplinary action deemed appropriate, including dismissal from the state service.

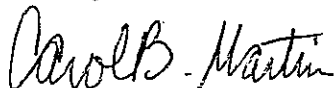
You previously received the following disciplinary actions:

<u>DATE</u>	<u>ACTION</u>	<u>REASON</u>
May 14, 2012	Written Reprimand	Misuse of the Internet

Pursuant to KRS 18A.032, you will not be certified on future registers for employment within the KYTC unless the KYTC so requests.

As you are an employee with status, you may appeal this action to the Personnel Board within sixty (60) days after receipt of this notice, excluding the day of receipt. To appeal, you must complete the attached form and direct it to the address indicated on the form. Copies of KRS 18A.095 and 101 KAR 1:365 concerning appeal and hearing procedures are also attached.

Sincerely,



Carol Beth Martin  
Appointing Authority

CBM/jrd

Attachments

cc: Personnel Board  
Personnel Cabinet  
Rodney Kuhl, Commissioner  
Martin Mathews, Division Director  
Agency Personnel File