

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2013-224

WANGA COOK

APPELLANT

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

JUSTICE AND PUBLIC SAFETY CABINET
DEPARTMENT OF CORRECTIONS
J. MICHAEL BROWN, APPOINTING AUTHORITY

APPELLEE

** ** *

The Board at its regular March 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated February 18, 2014, 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 19th day of March, 2014.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Stafford Easterling
Hon. Lisa Taylor
Stephanie Appel

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2013-224**

WANGA COOK

APPELLANT

VS.

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

**JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF CORRECTIONS
J. MICHAEL BROWN, APPOINTING AUTHORITY**

APPELLEE

** ** *

This matter came on for a pre-hearing conference on November 21, 2013, at 9:30 a.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, Wanga Cook, was present by telephone and was represented by the Hon. Lisa Taylor, appearing by telephone. The Appellee, Department of Corrections, was also present and represented by the Hon. Stafford Easterling.

The purposes of the pre-hearing conference were to define the issues, address any other matters relating to this appeal and to discuss the option of mediation.

The Hearing Officer notes this appeal was filed with the Personnel Board on September 10, 2013. The Appellant was appealing her dismissal from the Department of Corrections by letter dated July 8, 2013, for allegations of misconduct. Appellant denies the misconduct, and as relief seeks to have her record expunged of the allegations, to receive her job back, and to receive any back pay she would be due.

Counsel for the Appellee stated his desire to file a Motion to Dismiss based on timeliness. After discussion, a briefing schedule was agreed on.

Appellee filed a Motion to Dismiss to which Appellant filed a timely response. This matter is now submitted to Hearing Officer Boyce A. Crocker for a ruling on Appellee's Motion to Dismiss.

BACKGROUND

1. During the relevant times, Appellant had been a classified employee with status.
2. Appellee filed a Motion to Dismiss arguing that, pursuant to KRS 18A.095, Appellant did not file a timely appeal with the Personnel Board for a review of her dismissal. Counsel contends, and it is in the record and uncontested, that Appellant was terminated or dismissed from her position by letter dated July 8, 2013, which was delivered to Appellant that same date. Appellant's appeal was filed with the Personnel Board on September 10, 2013, having been received by certified mail on that date.
3. Counsel contends that pursuant to KRS 18A.095, Appellant had sixty days from the July 8, 2013 termination to file a Personnel Board appeal which would have expired September 6, 2013. Counsel contends the matter should be dismissed.
4. Appellant filed a timely response. Counsel, in response on behalf of her client, states that Appellant was aware that the matter needed to be submitted within sixty days, that it should not be held against her that her county of appointment is some 200 miles from Frankfort. Counsel further states that, "The Appellant argues to not accept her appeal by fax and mail as submitted is an intended disadvantage to employees of the Commonwealth not residing in a central part of the Commonwealth." Counsel goes on to state that, "The Appellant states that she should be allowed the same time parameters for preparation and decision to appeal as any Executive Branch Employee and transmittal by facsimile and certified mail should be sufficient proof to proceed with this appeal."
5. KRS 18A.095(7) states:
 - (7) If the cabinet or agency head or his designee determines that the employee shall be dismissed or otherwise penalized, the employee shall be notified in writing of:
 - (a) The effective date of his dismissal or other penalization;
 - (b) The specific reason for this action, including:
 1. The statutory or regulatory violation;
 2. The specific action or activity on which the dismissal or other penalization is based;
 3. The date, time, and place of the action or activity; and
 4. The name of the parties involved; and

(c) That he may appeal the dismissal or other penalization to the board within sixty (60) days after receipt of this notification, excluding the day he receives notice.

6. 101 KAR 1:365, Section 3, states:

Section 3. Filing.

(1) An appeal or a document relating to an appeal shall be filed with the Personnel Board through the office of the executive director within the time period set forth in KRS 18A.095 after receiving notification of the penalization or after becoming aware of the penalization through the exercise of due diligence.

(2) (a) An appeal, motion, request, objection, exception, response, witness list or other document may be filed by a party with the board by means of facsimile transmission.

(b) If a party transmits a document to the board by facsimile transmission, he shall attempt to transmit the document to all parties by facsimile transmission.

(3) To be timely filed, a document transmitted by facsimile shall be received by the board within the statutory or regulatory times specified for filing and be received by the board no later than midnight on the last day for filing.

(4) The original of a facsimile transmission shall be received by the Personnel Board no later than three (3) business days after transmission or the document transmitted shall be voided unless good cause is shown.

(5) The date of filing of a document filed by facsimile transmission shall be the date the original of the document was received by the board, if the board fails to receive the facsimile transmission.

(6) A state employee shall not use state time, equipment, materials, or personnel in pursuing an appeal.

(7) An appeal shall be heard in Frankfort, Kentucky.

FINDINGS OF FACT

1. During the relevant times, Appellant had been a classified employee with status.
2. The Hearing Officer finds Appellant was dismissed from her position with the Kentucky State Penitentiary by letter dated July 8, 2013, and that letter was delivered to Appellant that same date, July 8, 2013.
3. Appellant filed her appeal with the Personnel Board on September 10, 2013. The Hearing Officer so finds, because the copy in the record is stamped September 10, 2013. The Hearing Officer finds that not counting the date the letter of dismissal was served on the Appellant (July 8, 2013) and counting forward, including holidays and weekends, until day sixty would have yielded September 6, 2013, as the date the appeal was due.
4. The Hearing Officer finds that as the appeal was not received until September 10, 2013, this was, as counsel for the Appellee put it, "several days after the deadline."
5. The Hearing Officer finds there is no provision for postmark of a mailing to substitute for filing, as counsel for the Appellant intimated. The matter must be received either by mail, in person or by facsimile on or before the due date in order to be timely filed.

CONCLUSIONS OF LAW

1. The Hearing Officer concludes as a matter of law that in accordance with the plain reading of KRS 18A.095(7), the facts found above, the appeal was not timely filed. The Hearing Officer concludes that the Personnel Board lacks jurisdiction to consider this matter pursuant to KRS 18A.095, as it was not filed within the time limitations.
2. The Hearing Officer points out that it does accept appeals filed by facsimile. There is no evidence in the record or in the file indicating such had been attempted. See 101 KAR 1:365, Section 3.

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 **WANGA COOK VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2013-224)** 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).

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 Boyce A. Crocker** this 18th day of February, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Stafford Easterling
Hon. Lisa Taylor