

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-257

JOHN CUMMINGS

APPELLANT

VS.

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

JUSTICE AND PUBLIC SAFETY CABINET,
OFFICE OF LEGAL SERVICES

APPELLEE

*** **

The Board, at its regular August 2018 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated June 21, 2018, Appellant's Exceptions and Request for Oral Argument, Appellee's Response to Exceptions, 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 are approved, adopted and incorporated herein by reference as a part of this Order, and the Appellant's appeal is therefore **SUSTAINED** regarding the claim that his rights to inspect or copy records were denied, abridged or impeded, but otherwise **DISMISSED** regarding the claim that he has been penalized as a result thereof.

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 16th day of August, 2018.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:
Hon. William Fogle
Hon. John Cummings
Hon. Andrew English

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-257

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V. FINDINGS OF FACT, CONCLUSIONS OF LAW
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JUSTICE AND PUBLIC SAFETY CABINET,
OFFICE OF LEGAL SERVICES

APPELLEE

** ** * * *

This matter came on for an evidentiary hearing on September 12, 2017, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Geoffrey Greenawalt, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, John Cummings, was present and was represented *pro se*. The Appellee, Justice and Public Safety Cabinet, Office of Legal Services, was present and represented by the Hon. William Fogle.

By Interim Order dated August 30, 2017, the issue for the evidentiary hearing was the Appellant's claim that his rights to inspect or copy records were denied, abridged or impeded. The Appellant had the burden of proof, which was to be by a preponderance of the evidence, to establish that he was denied the right to inspect or copy records. In addition, the Appellant was assigned the burden of proof to establish any additional claims of penalization as a result of non-production of records.

BACKGROUND

1. The Appellant, John Cummings, filed Appeal No. 2015-257 with the Personnel Board on October 1, 2017, alleging that he had been denied, abridged or impeded the right the inspect or copy records.

2. The first witness to testify at the evidentiary hearing was **Ms. Vickie Wise**. Ms. Wise is now the Executive Director of the Office of Criminal Appeals for the Attorney General. However, between July 2014 and October 2015, she was the Deputy Secretary of the Justice and Public Safety Cabinet.

3. Ms. Wise testified that during the time in question, the Appellant acted as legal counsel for the Kentucky Parole Board (Parole Board). In June 2015, she and Ms. Kara Daniel, General Counsel for the Justice and Public Safety Cabinet, interviewed the Parole Board members individually regarding the general atmosphere and working relationship with the Appellant. Approximately one week before a regularly scheduled July 20, 2015 meeting of the Parole Board, Ms. Wise and Ms. Daniel informed the Appellant that there were issues regarding his working relationship with the Parole Board which would be discussed at said meeting. She requested that the Appellant meet with her and Ms. Daniel prior to the July 20, 2015 Parole Board meeting so the particulars could be reviewed. Once so informed, the Appellant requested that he be provided with any documentation she, Ms. Daniel, or the Justice and Public Safety Cabinet had regarding the matters to be discussed with the Parole Board. According to Ms. Wise, she and Ms. Daniel met with the Appellant just prior to the meeting and told him what would be discussed.

4. Ms. Wise initially refused to provide the Appellant with the contemporaneous notes she took during her interviews with the individual Parole Board members, on the basis she had given her word to the Parole Board members that the information they provided would not be divulged. According to Ms. Wise, she made this promise so the Parole Board members could speak freely about the Appellant without fear of being sued.

5. Ms. Wise testified she and Ms. Daniel took contemporaneous notes during each interview with the Parole Board members. Rather than provide her actual notes as requested, Ms. Wise instead decided to provide the Appellant with a typed summary of the various interviews.

6. Ms. Wise testified she did not produce her notes for the Appellant to inspect and copy prior to the July 20, 2015 Parole Board meeting. The Appellant did not want a summary of her notes, so she decided to produce her notes with the names of each individual Parole Board member redacted to protect their privacy. Ms. Wise subsequently produced unredacted copies of her notes. Ms. Wise testified that at this point, all of her notes have been produced, and there are no other notes of any kind. According to Ms. Wise, her unredacted, original notes were provided to Mr. Fogle, counsel for the Justice and Public Safety Cabinet.

7. On cross-examination, Ms. Wise testified that no disciplinary action was taken against the Appellant as a result of the July 20, 2015 Parole Board meeting. However, the Appellant's office was relocated shortly thereafter.

8. Appellee's Exhibit 1 was entered into the record and is a copy of Ms. Wise's unredacted, handwritten notes from her individual meetings with Parole Board members. Ms. Wise did not know where her original notes were, but stated that Appellee's Exhibit 1 were true and accurate copies of her contemporaneous notes without any changes or redactions. There are no other documents in her possession that have not been produced or provided to Mr. Fogle and the Appellant.

9. On re-direct, Ms. Wise reiterated that Mr. Cumming's reassignment only involved moving his office back to Holmes Street.

10. The next to testify at the hearing was **Ms. Kara Daniel**. Ms. Daniel is presently the General Counsel for the Kentucky Legislative Ethics Commission. However, in 2015, she was the General Counsel for the Justice and Public Safety Cabinet, and was the Appellant's immediate supervisor.

11. Ms. Daniel testified that in June or July 2015, she and Ms. Wise conducted individual interviews with Parole Board members regarding their working relationship with the Appellant. Ms. Daniel acknowledged that prior to the July 20, 2015 Parole Board meeting, the Appellant had made a KRS 18A.020 request to copy and inspect her contemporaneous interview notes and any other documents associated with the investigation into the Appellant's working relationship with the Parole Board. Ms. Daniel testified that she and Ms. Wise met with the Appellant prior to this Parole Board meeting, and then they all attended the regular meeting.

12. Ms. Daniel testified she could not remember exactly what the Appellant had asked for, but recalled informing him they would divulge what had been said about him, without telling him who said what. This was because she and Ms. Wise had promised the individual Parole Board members they would not give out their names, so they could speak freely about the Appellant without fear of retribution. Ms. Daniel further recalled thinking about giving the Appellant a written summary of her interviews without divulging any names. However, the Appellant demanded her actual notes and not a summary. According to Ms. Daniel, she was not aware of the dictates of KRS 18A.020 until the Appellant informed her of same. Ms. Daniel believes the Appellant's written request for the information requested under KRS 18A.020 came after the July 20, 2015 Parole Board meeting.

13. On September 1, 2015, Ms. Daniel provided the Appellant with a typed summary of her interviews with individual Parole Board members. The Appellant continued to request that her actual notes be produced. However, she informed him she no longer had her handwritten notes. The Appellant subsequently accused Ms. Daniel of committing a misdemeanor by failing to provide her original notes. She was later able to find a scanned copy of her notes and eventually provided the same. According to Ms. Daniel, it was never her intention to violate anyone's right, but at the same time, she wanted to protect the individual board members and, to a certain extent, the Appellant. According to Ms. Daniel, no personnel action was ever taken against the Appellant based upon the subject interviews with the individual Parole Board members. However, the Appellant's office was physically moved to another location shortly after July 20, 2015. According to Ms. Daniel, the Appellant continued to provide legal services for the Parole Board members after being relocated.

14. Ms. Daniel testified she was not aware the Appellant was entitled to inspect and copy her handwritten notes until after she had provided him with her typed summary. Her unredacted notes were eventually given to Mr. Fogle.

15. On cross-examination, Appellee's Exhibit 2 was introduced into the record. These are copies of Ms. Daniel's unredacted notes taken from her individual meetings with Parole Board

members. According to Ms. Daniel, these are the only records stemming from her meetings with the Parole Board members, with the exception of the typed summary she provided to the Appellant.

16. The next to testify was the **Appellant, John Cummings**. Appellant's Exhibit 1 was introduced into the record and is a copy of the Appellant's email request to Kara Daniel and Vickie Wise seeking all the records and supporting documentation, including preliminary reports and documents, relating to him and their inquiries into what they have described as the general atmosphere at the Board and the working relationships between the Board members and the Appellant. The email referred to the request being made under KRS 18A.020(4). Appellant's Exhibit 2 was introduced into the record and are copies of the email responses received from Kara Daniel.

17. According to the Appellant, he had no knowledge an investigation regarding his working relationship with the Parole Board was being conducted until approximately one week before the regular Parole Board meeting scheduled for July 20, 2015. That such an investigation was being made surprised him because not only had he represented the Parole Board since 2011 but all of his performance evaluations had been very good.

18. Appellant's Exhibit 3 was marked but was not entered into the record as the Appellant failed to provide the same within the one week provided at hearing.

19. Appellant's Exhibit 4 was introduced into the record and is a copy of the disk recording of the meetings held on July 20, 2015. According to the Appellant, on this date, he reiterated he was requesting copies of Ms. Daniel's and Ms. Wise's original notes and not their written summaries.

20. According to the Appellant, Ms. Daniel told him they would provide him with a summary of their notes without mentioning specific Parole Board members. According to Ms. Daniel and Ms. Wise, it was not important who said what. Also, Ms. Daniel told him she could not make up what she did not have, so the Appellant was left with the impression no contemporaneous notes existed. Therefore, the Appellant made no further requests until after September 1, 2015, when he first realized the notes actually existed.

21. Appellant's Exhibit 5 was introduced into the record and is a copy of an email from Ms. Daniel to the Appellant, indicating individual notes did in fact still exist and providing him with a written summary of the same. According to the Appellant, this was when he first realized actual handwritten notes existed.

22. On or about September 1, 2015, the Appellant told Ms. Daniel it was illegal to destroy her notes, and informed her she may have committed a misdemeanor in so doing. According to the Appellant, Ms. Daniel told him she had promised the individual Board members that their names would not be revealed. The Appellant testified that what had been promised to the Parole Board members was not his concern and that, instead of a summary, he was interested in reviewing her actual notes.

23. Appellant's Exhibit 6 was introduced into the record and is a copy of the individual Parole Board member interview notes received from Ms. Wise. These notes were redacted.

24. Appellant's Exhibit 7 was introduced into the record and is the Appellant's letter to Ms. Wise and Ms. Daniel, informing them that the summary and the redacted copies were not sufficient, and he wanted full, unredacted copies of their individual notes.

25. Appellant's Exhibit 8 was introduced into the record and is Ms. Wise's response to the Appellant's request of September 24, 2015, marked as Appellant's Exhibit 7. Still no notes were provided.

27. Appellant's Exhibit 9 was introduced into the record and is a copy of Ms. Daniel's response to the Appellant's September 24, 2015 written request marked as Appellant's Exhibit 7. This response included a copy of her redacted notes.

28. According to the Appellant, his next move was to file the present Personnel Board appeal. According to the Appellant, shortly thereafter, Ms. Wise' and Ms. Daniel's attitude towards him changed sharply. He was suddenly hit with a written reprimand for conduct that had previously occurred, even though he had just received his September 2015 Second Interim Evaluation, which was glowing as were his previous evaluations. Further, the Appellant considers being forced to file the present Personnel Board appeal in order to enforce his statutory rights as a form of penalization. According to the Appellant, he was later prevented from attending regular Parole Board meetings and restrictions were imposed upon his discretion which rendered his relationship with the Parole Board as unworkable. This too was viewed by the Appellant as a form of penalization.

29. The Hearing Officer has considered the entire administrative record, including the testimony and the exhibits therein.

30. This matter is controlled by KRS 18A.020(4) which states as follows:

(4) Upon written request a state employee, an applicant for employment, and an eligible on a register shall have the right to inspect and to copy any record and preliminary documentation and other supporting documentation that relates to him, except that an applicant, an eligible, or a state employee shall not have the right to inspect or to copy any examination materials.

FINDINGS OF FACT

The Hearing Officer makes the following findings of fact by a preponderance of the evidence.

1. The Appellant, John Cummings, a classified employee with status, timely filed Appeal No. 2015-257 with the Personnel Board on October 1, 2015, alleging that his right to inspect and copy documentation pursuant to KRS 18A.020 had been denied, abridged, or impeded.

2. Pursuant to the Interim Order dated August 30, 2017, the issue before the Personnel Board was the Appellant's claim that his right to inspect or copy records was denied, abridged or impeded. The Appellant was assigned the burden of proof, which was to be by a preponderance of the evidence, to establish that he had been denied the right to inspect or copy records and to establish any additional claims of penalization as a result of non-production of records.

3. On or about June 2015, Vickie Wise, then the Deputy Secretary of the Justice and Public Safety Cabinet, and Kara Daniel, then the General Counsel for the Justice and Public Safety Cabinet, Office of Legal Services, held individual interviews with Kentucky Parole Board members regarding their working relationship with the Appellant, who had acted as counsel for the Kentucky Parole Board since 2011. According to the testimony, these interviews were conducted to determine the general atmosphere and current working relationship between the Parole Board members and the Appellant.

4. On or about July 14, 2015, Ms. Wise and/or Ms. Daniel informed the Appellant that his relationship with the Parole Board would be discussed at the regular Monday meeting of the Parole Board to be held July 20, 2015. The Appellant quickly requested that all records and supporting documentation, including preliminary reports and documents, relating to him and Ms. Daniel and Ms. Wise's inquiry into the general atmosphere at the Parole Board and his working relationship between the Board members be produced for inspection and copying. (See Appellant's Exhibit 1.)

5. Initially, both Ms. Wise and Ms. Daniel refused to provide their individual notes to the Appellant as requested on the basis that they had promised the individual Parole Board members that their names would not be revealed to the Appellant. There is also an indication the Appellant was led to believe that no such contemporaneous personal notes existed at least until September 1, 2015, when the Appellant received the email from Kara Daniel marked as Appellant's Exhibit 5.

6. The Appellant was subsequently provided with a written summary of Ms. Wise' and Ms. Daniel's notes, followed by redacted copies of their actual handwritten notes.

7. Throughout this process, it is clear the Appellant's request for the production and inspection of the actual, unredacted handwritten notes stemming from Ms. Daniel's and Ms. Wise's individual meetings with Parole Board members was met with resistance. Although the Appellant's request was straightforward and unwavering throughout, it was not until after the present Personnel Board appeal was undertaken that the Appellant was provided with the full, unredacted handwritten notes from both Ms. Wise and Ms. Daniel. (See Appellee's Exhibits 1 and 2.)

CONCLUSIONS OF LAW

1. The Appellant has demonstrated by a preponderance of evidence that his right to inspect or copy records regarding the general atmosphere with the Kentucky Parole Board and his working relationships with individual Parole Board members was denied, abridged, and impeded in violation of KRS 18A.020.

2. The stated purpose for Ms. Wise and Ms. Daniel withholding their unredacted notes from the Appellant was to allow the individual Parole Board members to speak freely so that an honest assessment of their working relationship with the Appellant could be obtained without fear of retribution. However noble that concern may be, KRS 18A.020 plainly requires that at all times herein mentioned, the Appellant was entitled to review and copy the complete and unredacted copies of the documents he requested.

3. As a result of the above styled appeal, the Appellant has received the full, unredacted documentation he initially requested and has otherwise been made whole. As such, the Appellant has failed to demonstrate by a preponderance of evidence that he has been penalized as a result of the Appellee's failure to immediately allow him to inspect and/or copy the documents he requested as required by KRS 18A.020.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **JOHN CUMMINGS V. JUSTICE AND PUBLIC SAFETY CABINET, OFFICE OF LEGAL SERVICES (APPEAL NO. 2015-257)** be **SUSTAINED** regarding the claim that his rights to inspect or copy records were denied, abridged or impeded, but otherwise be **DISMISSED** regarding the claim that he has been penalized as a result thereof.

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).

Any document filed with the Personnel Board shall 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 Geoffrey Greenawalt** this 21st day of June, 2018.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

- Hon. William Fogle
- Hon. John Cummings
- Hon. Andrew English