



**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2019-316**

**TERESA FOLEY**

**APPELLANT**

**V. FINDINGS OF FACT, CONCLUSION OF LAW  
AND RECOMMENDED ORDER**

**JUSTICE AND PUBLIC SAFETY CABINET,  
DEPARTMENT OF CORRECTIONS**

**APPELLEE**

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This matter came on for an evidentiary hearing using Amazon Chime video teleconferencing software on October 22, 2020, at approximately 9:30 a.m., EDT, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Stafford Easterling, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Teresa Foley, was present by Amazon Chime and was represented by the Hon. Ned Pillersdorf. The Agency/Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Ed Baylous, who also appeared by Amazon Chime.

At issue in the evidentiary hearing was the following:

- a. Whether the notice the Appellee provided the Appellant, a classified employee with status, of her deemed resignation was in compliance with KRS 18A.095.
- b. Whether the Appellant filed her appeal within the time limitations set forth in KRS 18A.095.
- c. Whether the Appellee deemed the Appellant resigned for just cause.
- d. Whether the Appellee deemed resignation was the result of age or disability discrimination.

The Appellee had the burden of proof on issues "a" and "c." The Appellant had the burden of proof on issues "b" and "d." All burdens of proof were by a preponderance of the evidence.

**BACKGROUND AND FINDINGS OF FACT**

1. As was essentially agreed to by the parties, while serving as a Probation and Parole Officer I, the Appellant suffered a series of injuries over a two-year period from 2016 to 2018. As set out by her testimony and as alleged by the appeal form, in 2016, she tripped over a milk crate in a walkway, falling into a metal door, and sustaining a 4" gash in her hand, which resulted in 13 stitches. In 2017, 1) she was on a home visit and was bitten by a dog, which resulted in 3 stitches; and 2) she was on a home visit and was injured in a multiple-officer attempt to physically subdue a fleeing subject that involved firearms. In 2018, she fell while at a courthouse and injured her knee, which led to her doctor issuing medical restrictions that caused the Appellant to be on unpaid sick leave for over one year, following the exhaustion of her paid sick leave.

2. Following the presentation of an opening statement by the Appellant, the Agency called **Erica Hargis** as its first witness and she appeared by telephone. Hargis is currently employed as the Director of the Division of Probation and Parole (P & P) within the Justice and Public Safety Cabinet, Department of Corrections, a position she has held, first in an interim basis and now permanently, for approximately two years. She also was the appointing authority in the decisions underlying this appeal.

3. By agreement of the parties, the 200 pages of Bates-stamped documents previously submitted by the Agency were entered into the record in their entirety as **Appellee's Exhibit 1**. Directed to pg. 192, a September 25, 2019 letter, the witness detailed the underlying controversy that led to this appeal. As stated by the letter:

Pursuant to 101 KAR 3:015, Section 2, you are formally requested to return to work and resume your duties by beginning of business Friday October 4, 2019. As of that date, you have exhausted your unpaid sick leave by personnel action entitlement of one (1) calendar year.

You are required to provide a medical statement certifying your ability to perform the essential functions of your position with or without reasonable accommodation. If you are unable to return to your former position, you will be given priority consideration for any vacant, budgeted position within your employing agency for which you are qualified and capable of performing the essential functions with or without reasonable accommodation.

If you are unable to return to your former position and no reasonable alternative is available, you shall be deemed resigned from your employment pursuant to 101 KAR 3:015, Section 2. You may request to appear before the appointing authority, personally or with counsel if you have retained counsel, to reply to Department of Corrections, with respect to this notice and to propose alternative accommodations. Such request

must be made within five (5) working days, excluding the day you receive this notice.

4. The Agency included a "Fitness for Duty" form with the September 25, 2019 letter. The Appellant returned that form, found at pgs. 188-189, on October 3, 2019. Importantly, the Appellant's "Fitness for Duty" form, submitted by the medical professional of her choice, indicated that she was not able to engage in law enforcement functions to include potential use of force and, further, could not drive a vehicle.

5. After receiving the Appellant's "Fitness for Duty" form with restrictions, on October 8, 2019, the Agency issued the Appellant a letter providing in pertinent part:

Pursuant to 101 KAR 2:102, Section 2, you have exhausted your one (1) calendar year entitlement to unpaid sick leave by personnel action. Previously, you were formally requested to return to work and resume duties by beginning of business Friday October 4, 2019. As of that date, you were unable to return to your former position. Further, no vacant, budgeted position for which you are qualified and capable of performing the essential functions exists within your employing agency. As a result, effective October 5, 2019, you are officially deemed resigned from your position.

**[Hearing Officer Note: The September 25, 2019 letter incorrectly cited a regulation (101 KAR 3:015) that applies to unclassified employees, important because the Appellant is a classified employee. The October 8, 2019 letter correctly cited the substantially similar regulation that applies to classified employees. The parties did not argue that the incorrect citation in the September 25, 2019 letter had any impact on this case and the Hearing Officer finds no fundamental prejudice to the incorrect citation, so the Hearing Officer declines to make any findings on the issue.]**

6. The Appellant responded by sending the Agency a letter inquiring about purchasing her service weapon and about other positions within the Division of Probation and Parole that she believed she qualified for, including a Probation and Parole Investigator. The Agency sent the Appellant a letter on October 16, 2019, restating that because she was not "medically cleared to perform the responsibilities associated with a Probation and Parole Officer,"... "we simply do not have any suitable accommodations available to offer you at this time." In addition, the letter denied her request to purchase her service weapon.

7. The witness noted that a P & P Officer is required to carry a firearm and that a medical condition that prevented an employee from driving a vehicle would also prohibit them from carrying a firearm. The witness testified that her determination that the Appellant could not perform the essential duties of a P & P Officer had nothing to do with the Appellant's age and that she was unaware of the Appellant's age.

8. On cross-examination, the witness acknowledged that she was not “well-versed” on the law pertaining to reasonable accommodations. She agreed that the only reason the Appellant was separated from state service was that the Appellant was unable to perform the essential functions of a P & P Officer, including the ability to drive a vehicle and/or carry a firearm. She also agreed that she authorized reasonable accommodations for other employees under her supervision, including pregnancy and other time-limited medical conditions, but asserts those other situations were distinguishable from the Appellant’s because those other employees could still perform the essential functions of their jobs.

9. The witness further explained the difference between a P & P Officer I, the Appellant’s job classification before her injuries and a Grade 12 position, and a P & P Investigator, another Grade 12 position and the job classification to which the Appellant proposed she be moved. The witness noted that she had previously held both positions personally, so felt very comfortable setting out the differences between those positions. She testified that a P & P Investigator is primarily responsible for preparing Pre-sentence Investigations (PSIs) for a court who is considering granting probation or parole to an offender. The Investigator’s time is almost exclusively spent in an office preparing PSIs and gathering the information that allows them to prepare a PSI, which means an Investigator is a non-hazardous position. A P & P Officer may assist with preparing PSIs depending on the needs of an individual P & P office, but is primarily responsible for ensuring offenders comply with the conditions of their probation/parole, which requires them to perform home visits, transport offenders, perform drug tests on the offenders, testify about an offender’s compliance, and deal directly with offenders, all while carrying a firearm, which makes a P & P Officer a hazardous duty position. The witness acknowledged that there are currently less P & P Investigators than there used to be as a result of a strategic decision made by a former Director of Probation and Parole, largely because there was no clear promotional opportunities for those employees in the Investigator classification. As a result of the decision to phase out the Investigator position, at the time the Appellant’s request was made, the Division of Probation and Parole had over 600 P & P Officers and only 18 Investigators statewide.

10. The witness next addressed the options available to the Agency when dealing with an injured employee, including placement on light duty. While the witness declined to speak in generalities, saying that every situation, every injury, and every request for accommodation is unique, she noted that most options, including light duty, are temporary in nature and did not apply to the Appellant’s injury. The witness also noted that the Appellant did not make a formal request for accommodation at any point and, instead, made a verbal request to focus on completing PSIs, a request that was denied. Further, the witness noted that Agency supervisors worked with the Appellant to try to find a position that honored the Appellant’s medical limitation and also served a business need for the Agency, but the parties were unable to find a viable position that met everyone’s needs.

11. The Agency’s next witness was **Rodney Moore**. He is currently the Director of Employee Management at the Justice and Public Safety Cabinet. He was also the Director of Human Resources for the Department of Corrections and assisted Erica Hargis, the appointing authority, in determining how to process the Appellant’s situation. He began by noting that the

Department of Corrections never received a formal written request for accommodation from the Appellant. He then detailed the institutional history behind the Agency's movement away from P & P Investigators, verifying the lack of promotional opportunities for employees in the Investigator series, and explaining the value to the organization in classifying an employee as a P & P Officer instead of a P & P Investigator. He also explained that an assignment to light duty is limited to thirty (30) days and that the Appellant's medical condition would not be appropriate for a temporary assignment to light duty. Finally, the witness confirmed the Agency would have considered and responded to an informal request for accommodation, if the Appellant's request was "reasonable," and that the Agency went through a process of considering possible accommodations for the Appellant when it received the statements from her medical provider(s), but could not manage to create accommodations that would allow the Appellant to perform the essential functions of her job while still maintaining the restrictions necessitated by her medical condition.

12. The Agency's last witness was the Appellant, **Teresa Foley**. The Appellant acknowledged receiving the September 25, 2019 letter from Erica Hargis that required her to submit a "Fitness for Duty" form to the Agency. She acknowledged taking the "Fitness for Duty" form to her doctor, having her doctor fill out the form, and returning the form back to the Agency. The Appellant confirmed that the "Fitness for Duty" form she submitted indicated that she was not able to engage in law enforcement activities as a result of her medical condition, including a prohibition on her driving a vehicle. She acknowledged receiving a letter from the Agency on October 8, 2019, that informed the Appellant that the Agency officially deemed her resigned from her position because she could not return to perform the essential functions of her job. She also acknowledged sending the Agency a response asking if she could return to work and only perform Pre-sentence Investigation reports (PSIs). The Appellant acknowledged receiving a response from Erica Hargis, dated October 16, 2019, denying the Appellant's request to just work on PSIs, restating the Agency's position that because the Appellant was not "medically cleared to perform the responsibilities associated with a Probation and Parole Officer," ... "we simply do not have any suitable accommodations available to offer you at this time." Lastly, the Appellant acknowledged that she was formerly employed as a P & P Investigator, voluntarily transferred into a P & P Officer position, and is asking to be permitted to temporarily operate as a P & P Investigator as an accommodation.

13. Critically, the Appellant also acknowledged that, sometime around October 16, 2019, she knew that she had been terminated from her position as a P & P Officer. However, the record is clear that the Appellant did not file her appeal with the Personnel Board until December 31, 2019.

14. Upon direct questioning from her counsel as if in her case-in-chief, the Appellant established that she is 63 years old and was 62 at the time of her separation from state service after five (5) years of working for the Division of Probation and Parole. She provided additional context to the injury that so severely impacted her ability to perform her essential job duties. She testified that she was on sick leave from January 5, 2017 until her separation from state service until October

3, 2019 because of the knee injury sustained in the line of duty. Before her injury, she had good performance evaluations and a clear disciplinary history.

15. On October 3, 2019, the Appellant sent her supervisor, Erica Hargis, a letter requesting a return to work. In her letter, the Appellant conceded that she could not perform the essential job duties of a P & P Officer, but she requested accommodations that would allow her to return to work in some form. Specifically, she requested an assignment completing PSIs until medical restrictions on her driving a vehicle and performing law enforcement activities are lifted. She concedes that it had been over a year since she had been permitted to drive and/or perform law enforcement activities and also concedes that she does not have any sense of how much longer she will be unable to perform such tasks, but she insists that she can return to work if she were granted reasonable accommodations. However, she is in the process of working with her medical provider to reduce the pain medication she is taking, which directly led to the restrictions on her driving a vehicle and performing law enforcement activities. She is optimistic that the restrictions will be lifted in early 2021.

16. At the conclusion of the Appellant's testimony, the Agency rested its case-in-chief. The Appellant then indicated that she also rested her case-in-chief. With the parties indicating that they rested their cases, the Agency then moved to dismiss the appeal on the grounds that the Appellant failed to file her appeal within the statute of limitations set forth in KRS 18A.095 and that the Personnel Board thus lacks jurisdiction over this appeal. The Agency correctly argued that, during her testimony, the Appellant acknowledged that by October 16, 2019, she knew she was being separated from her position in the state service because she had exhausted her one (1) calendar year entitlement to unpaid sick leave, pursuant to 101 KAR 2:102, Section 2. The Appellant conceded to receiving the termination letter, which gave her sixty (60) calendar days to file an appeal with the Personnel Board, yet her appeal was not received by the Board until December 31, 2019. Specifically, the Appellant's appeal form in the "official file" was faxed to the Personnel Board at 10:45 a.m. on December 31, 2019.

17. Given an opportunity to provide additional context, the Appellant answered questions from the parties and the Hearing Officer about her actions in attempting to file her appeal. Although her statements were made in the middle of "free-for-all" questioning, the Hearing Officer accepts all of the Appellant's statements as testimony and will consider her statements as part of the administrative record.

18. The Appellant began by asserting that she mailed an appeal form to the Personnel Board on November 20, 2019. She then had not heard anything back from "either Personnel person," so she then faxed a copy of her appeal form to the Board on December 31, 2019 to "make sure you got it." After hearing the Appellant explain her steps, the Agency argued that the context clues in the Appellant's statement actually indicated that she sent her appeal form to the Justice and Public Safety Cabinet's HR Department in November of 2019, instead of the Personnel Board. The Appellant then stated that "I sent it both places." Upon further questioning, it became clear she sent documentation to "Holmes Street" (Justice and Public Safety Cabinet's HR Department) and "the CHR building" (the main office of the Department of Corrections); however, the

Appellant was insistent that she also sent documentation to the Personnel Board in late November 2019 “at whatever address was in the letter.”

19. Given the importance of establishing the filing date in affording the Personnel Board jurisdiction over this appeal, the Hearing Officer then stopped the proceedings for a twenty-minute break to allow the Appellant an opportunity to search her records for any documentation that would establish that she filed her appeal with the Personnel Board at any point before the December 31, 2019 fax in the “official file.” After the break, the Appellant indicated that she had additional documentation at home that would establish the actual filing date and requested an opportunity to submit those documents. The parties were in agreement that they did not intend to put on any additional evidence, though the Agency reserved the right to respond to any supplemental documentation submitted by the Appellant. By agreement, the Appellant was given several days, until October 26, 2020, to submit additional documentation that would establish a file date other than December 31, 2019.

20. The Appellant did not submit any additional documentation.

21. The Hearing Officer finds the Appellant knew about her separation from state service on or about October 16, 2019 and did not file her appeal with the Personnel Board until December 31, 2019.

22. The Hearing Officer finds that the Appellant did not file her appeal within the time limitations set forth in KRS 18A.095. As a result, the Appellant failed to properly invoke the jurisdiction of the Personnel Board and the Board does not have jurisdiction over this appeal.

#### CONCLUSION OF LAW

Pursuant to KRS 18A.095(18)(a), the Personnel Board, subsequent to a pre-hearing conference, may, on the recommendation of the Hearing Officer, dismiss or deny an appeal if it lacks jurisdiction to grant relief. The Hearing Officer concludes that the Board lacks jurisdiction to grant relief in this appeal, as the Appellant failed to file her appeal within the time limitations set forth in KRS Chapter 18A. Because the Appellant knew about her separation from state service on or about October 16, 2019, she would have had until approximately December 16, 2019, to file her appeal with the Personnel Board. The Appellant did not do so, instead filing her appeal with the Board on December 31, 2019. As a result, the Appellant has not properly invoked the jurisdiction of the Personnel Board and has not stated a claim under law whereby the Board could grant any meaningful relief to the Appellant. Accordingly, the instant appeal must fail as a matter of law.

#### RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **TERESA FOLEY V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2019-316)** 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).

**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 Stafford Easterling** this 19<sup>th</sup> day of April, 2021.

**KENTUCKY PERSONNEL BOARD**

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

A copy hereof this day mailed to:

Hon. Edward Baylous  
Hon. Ned Pillersdorf  
Hon. Rosemary Holbrook (Personnel Cabinet)