

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2020-094

BENNETT FULNER

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

APPELLEE

*** **

The Board, at its regular April 2021 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated March 15, 2021, 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 **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 14th day of April, 2021.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Erik Carlsen-Landy
Bennett Fulner
Rodney Moore

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2020-094**

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

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

APPELLEE

**** ** * * ***

This matter came on for a pre-hearing conference on October 23, 2020, at 11:30 a.m. EST, 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, Bennett Fulner, was present by telephone and was not represented by legal counsel. The Agency/Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Erik Carlsen-Landy, who also appeared by telephone.

The purposes of the pre-hearing conference were to determine the specific penalization(s) alleged by the Appellant, the specific section of KRS 18A which authorizes this appeal, to determine the relief sought by the Appellant, to define the issues, to address any other matters relating to this appeal, to discuss the pending motions, and to discuss the option of mediation.

This matter is now assigned to Hearing Officer Mark A. Sipek for a ruling on the Appellee's Motion to Dismiss.

BACKGROUND

1. The Hearing Officer notes this appeal was filed with the Personnel Board on March 23, 2020. On the appeal form and during the pre-hearing conference, the Appellant, a classified employee with status, indicated he was issued a written reprimand. The Appellant further explained his claims in an attachment to the narrative portion of the appeal form wherein he states, in pertinent part:

In my more than 7 years as a Kentucky Department of Corrections employee, I have never been verbally counselled in regards to improper placement of restraints. So I feel it is improper to ignore the verbal reprimand and proceed to the written reprimand in this regard.

2. Following discussion, the Appellant made clear that he was arguing that he should have been issued a verbal reprimand instead of a written reprimand given the facts underlying this appeal. The Agency requested an opportunity to file a dispositive motion as to the Appellant's claims arguing that the Board does not have jurisdiction over challenges to written reprimands absent a claim of discrimination. The parties then agreed to a briefing schedule.

3. The Appellee filed a Motion to Dismiss arguing that a written reprimand was not an appealable penalization. As such, the Appellee argued that the Personnel Board lacked jurisdiction to hear this appeal and cited long-standing Personnel Board precedent.

4. Although given an opportunity to respond to the Motion to Dismiss, the Appellant did not respond. The Appellant did respond to an email from Appellee's counsel asking if he had filed a response to the motion, the Appellant replied as follows:

- No, I did not.
- My purpose was to update the report, as it was incomplete, leaving out the fact that the supervisor did not properly apply the handcuffs, despite saying that I had not. Given that she was the one making the report, I question whether or not she was accurate in her assessment. She no longer works for the department.
- Thank you

FINDINGS OF FACT

The Hearing Officer makes the following findings by preponderance of the evidence:

1. The Appellant, Bennett Fulner, a merit employee with status, received a written reprimand dated January 30, 2020. He filed an appeal from this matter on March 23, 2020. The Appellant was reprimanded for failing to follow Corrections policy, procedure, and office procedure when he arrested an offender.
2. The Appellant alleged he had never been counseled about the improper placement of restraints and should have received a verbal reprimand instead of a written one. He also alleged that the report regarding this incident was not complete.
3. A copy of the Appellant's narrative statement, in support of his appeal, is attached to this Recommended Order as **Recommend Order Attachment A**.
4. The Appellee filed a Motion to Dismiss the appeal, alleging that the written reprimand is not an appealable penalization and the Personnel Board lacks jurisdiction to hear this appeal.
5. Although given the chance to respond to the Motion to Dismiss, the Appellant failed to do so.
6. The Appellant made no claim of illegal discrimination or retaliation.
7. There is no material issue of fact and the Hearing Officer can issue a ruling based on the appeal form, statements of the parties at the pre-hearing conference, and the Motion to Dismiss.

CONCLUSIONS OF LAW

1. The Appellant's reprimand is not an appealable penalization pursuant to KRS 18A.005 (24), which defines penalizations as follows:

"Penalization" means demotion, dismissal, suspension, fines, and other disciplinary actions; involuntary transfers; salary adjustments; any action that increases or diminishes the level, rank, discretion, or responsibility of an employee without proper cause or authority, including a reclassification or reallocation to a lower grade or rate of pay; and the abridgment or denial of other rights granted to state employees;

2. Because the written reprimand is not an appealable penalization, the Personnel Board lacks jurisdiction to hear this appeal. KRS 18A.095(1) and (8) and Pamela Perkins vs Cabinet for Health and Family Services, 2007-CA-002287-MR, 2007 WL 1893374, (Ky. Ct. App., June 29, 2007).

3. Pursuant to KRS 18A.095(18)(a) the Board may dismiss an appeal after a preliminary hearing if it lacks jurisdiction to grant relief.

4. Pursuant to KRS 13B.090(2) the Hearing Officer may make a Recommended Order if there are no genuine issues of material fact in dispute, and the judgment is appropriate as a matter of law.

5. The Appellee's Motion to Dismiss is **GRANTED**.

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 **BENNETT FULNER VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2020-094)** 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

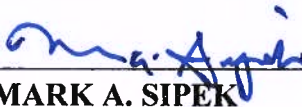
the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions 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 Mark A. Sipek** this 15th day of March, 2021.

KENTUCKY PERSONNEL BOARD



**MARK A. SIPEK
EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:

Hon. Erik Carlsen-Landy
Hon. Rosemary Holbrook (Personnel Cabinet)
Bennett Fulner

(F) 502-564-6686
Erik.carlsenlandy@ky.gov

From: Fulner, Bennett C (DOC) <Bennett.Fulner@ky.gov>
Sent: Friday, February 12, 2021 7:50 AM
To: Carlsen-Landy, Erik M (Justice) <erik.carlsenlandy@ky.gov>
Cc: Smith, Deanna (Justice) <Deanna.Smith@ky.gov>
Subject: RE: Personnel Board Appeals - Fulner 2020-094

No, I did not.

My Purpose was to update the report, as it was incomplete, leaving out the fact that the supervisor did not properly apply the handcuffs, despite saying that I had not. Given that she was the one making the report, I question whether or not she was accurate in her assessment. She no longer works for the department.

Thank you

From: Carlsen-Landy, Erik M (Justice) <erik.carlsenlandy@ky.gov>
Sent: Thursday, February 11, 2021 3:30 PM
To: Fulner, Bennett C (DOC) <Bennett.Fulner@ky.gov>
Cc: Smith, Deanna (Justice) <Deanna.Smith@ky.gov>
Subject: Personnel Board Appeals - Fulner 2020-094

Good afternoon, Mr. Fulner:

I'm reaching out regarding your personnel board appeal of a written reprimand you received. If you'll recall, I filed a Motion to Dismiss your personnel board appeal back in December of 2020. You had until last Friday, February 5, 2021, to file a response to that motion. I have not received a response and it does not appear the Personnel Board has either.

Did you file a response to that Motion?

Thanks,
Erik Carlsen-Landy

Erik Carlsen-Landy

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