

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2013-209

JENNIFER GOINS

APPELLANT

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

CABINET FOR HEALTH AND FAMILY SERVICES
J. P. HAMM, APPOINTING AUTHORITY

APPELLEE

** ** *

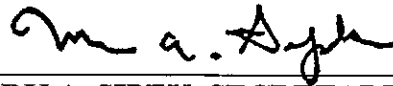
The Board at its regular May 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated March 24, 2014, having noted Appellant's exceptions, Appellee's response, oral arguments, and being duly advised,

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 14th day of May, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Carrie Cotton
Hon. Kyle Hall
J. P. Hamm

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
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VS.

**FINDINGS OF FACT, CONCLUSION OF LAW
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This bifurcated matter came on for evidentiary hearing on February 11, 2014, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before Roland P. Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Jennifer Goins, was not present. However, for purposes of this hearing her attorney, the Hon. Kyle S. Hall, was present via telephone. The Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Carrie Cotton.

The issue in the matter is whether the Appellant had filed her appeal with the Kentucky Personnel Board in a timely manner. Appellant had been dismissed from her position as a Family Support Specialist II, with the Department for Community Based Services, Eastern Mountain Service Region, effective February 21, 2013, with a last working day of February 20, 2013.

The burden was on the Appellant to prove her case by a preponderance of the evidence. The rule separating witnesses was invoked and employed throughout the course of the proceedings. The parties had previously agreed that Mr. Hall may offer testimony via telephone and that he could conduct representation of the Appellant for this hearing by such means. Therefore, the requirements of KRS 13B.080(7) have been fulfilled. Appellant waived making an opening statement. Appellee presented an opening statement on behalf of the Cabinet.

The parties then entered into certain stipulations of fact which are set out in more detail below.

BACKGROUND

1. The first witness for the Appellant was the **Hon. Kyle S. Hall**, attorney for the Appellant. Mr. Hall is employed with the Appalachian Research and Defense Fund of Kentucky, Inc. He is the attorney of record for Jennifer Goins in this appeal before the Kentucky Personnel Board.

2. On April 16, 2013, Ms. Jennifer Goins came to Mr. Hall's office in Hazard, Kentucky. They spoke about two matters: Appellant's Unemployment Insurance Benefits Application and a possible appeal to the Kentucky Personnel Board. Ms. Goins related she had been terminated by the Cabinet for Health and Family Services in Hazard, Kentucky, and as of the date of their meeting, she had already filed her application for unemployment benefits. Mr. Hall agreed to represent the Appellant in both matters.

3. That same day, Appellant had provided to counsel all the paperwork for her Personnel Board appeal including Appeal Form #18. Mr. Hall asked Appellant to fill out the form and advised her he would file it for her. Ms. Goins filled out the form. Mr. Hall then faxed it to the telephone number available for the Kentucky Personnel Board. His fax contained a fax cover sheet, the completed Appeal Form (which he and Ms. Goins signed), and a copy of the dismissal letter of February 20, 2013. Mr. Hall faxed the documents himself. His fax machine thereafter generated a "completion notification" indicating where the fax had been sent, the time it had been sent, and that the fax had been sent through properly. He knew on that date that there was not enough time for Ms. Goins to return to his office at a later date to complete and file this appeal.

4. A period of time passed and Hall had not heard anything from the Kentucky Personnel Board. On August 26, 2013, he telephoned the Board and believes he spoke to Linda Morris. He inquired about the status of a hearing. Ms. Morris replied the Personnel Board had no active appeal in the name of Ms. Goins. Morris advised him to send a fax of the Appeal Form and a copy of the facsimile receipt to show it had originally been sent to the Personnel Board on April 16, 2013.

5. As Mr. Hall was away from the office during that telephone conversation, he faxed those documents the next day when he returned to his office on August 27, 2013. The fax went through to the Personnel Board and the matter was placed on the Personnel Board's schedule.

6. He identified Appellant's Exhibit 1 as the packet of documents he had faxed to the Kentucky Personnel Board on April 16, 2013. That packet had contained a copy of the original Appeal Form, the fax cover sheet he used on April 16, and a copy of the dismissal letter. While Appellant's Exhibit 1 also contains a copy of the transmission receipt for April 16, 2013, showing the document had been transmitted at 15:44, Mr. Hall testified this document was not part of the original fax sent to the Board on April 16.

7. He identified Appellant's Exhibit 2 as the packet he had faxed to the Kentucky Personnel Board on August 27, 2013. This packet contained a copy of the cover sheet, a copy of the April 16 cover sheet, a copy of the April 16 Appeal Form, as well as a copy of the transmission receipt of April 16. This packet also contained a copy of the transmission receipt for August 27, 2013, which receipt was not part of the documents sent to the Personnel Board on August 27.

8. He identified Appellee's Exhibit 1 as a copy of the February 20, 2013 dismissal letter sent by the Cabinet for Health and Family Services to the Appellant.

9. He identified Appellee's Exhibit 2 as a copy of KRS 18A.095, Rights of Executive Branch Employees.

10. He identified Appellee's Exhibit 3 as a copy of 101 KAR 1:365, Appeal and Hearing Procedures.

11. Mr. Hall had never sent in or delivered to the Personnel Board a hardcopy of the Appeal Form and materials that he had originally faxed on April 16, 2013. He believed that in this case, as in most cases, a facsimile sufficed for the original.

12. On April 16, 2013, he was aware that the Cabinet for Health and Family Services was a party to the proceeding. He did not transmit a copy of the original appeal to that Cabinet. He did not mail the original Appeal Form to the Personnel Board within three business days of April 16, 2013. He did not telephone the Personnel Board before the end of April to inquire or confirm whether the appeal request had been received. The first time he called the Personnel Board was August 26, 2013.

13. The next witness for the Appellant was **Linda Morris**. For the past seven years, Ms. Morris has served as the Administrative Section Supervisor for the Personnel Board and as its Scheduling Clerk. She has been an employee with the Personnel Board for the past fourteen and a half years.

14. The facsimile machine for the Personnel Board is located in the file room. Any Personnel Board employee discovering a fax in the machine can recover it and properly stamp the document as filed. The Personnel Board is a physically small office with five employees.

15. As soon as an appeal is received in the office, no matter by what means, it is stamped with the date of receipt and put in a specific place to be processed. Once a week all such received appeals are processed. If an appeal has been faxed, the Personnel Board makes it a practice to ask the Appellant to send in the hardcopy as required by regulation. The Personnel Board, however, treats the faxed document as the filed copy when received.

16. In August of 2013, Ms. Morris spoke with Mr. Hall. Mr. Hall had telephoned the Personnel Board and asked if the appeal had been received for Jennifer Goins. Ms. Morris examined the files and ledger and told Mr. Hall the Personnel Board had not received such appeal. She may have then told Hall to go ahead and file the appeal and they would let the Hearing Officer sort it out.

17. She had no reason to believe the fax machine was broken or inoperative during April of 2013 or that Appellant's fax had been received and disposed of. At today's hearing, she examined the official Personnel Board file in this case and testified that the Personnel Board had never received the original hardcopy of the appeal.

18. The fax machine that the Personnel Board used in April 2013 is no longer available and has, since that time, been replaced.

19. The Personnel Board considers an appeal to be filed once it is received by the Personnel Board and stamped in. According to the Personnel Board records, the appeal in this case was received and stamped in and, therefore, filed on August 27, 2013.

20. The Personnel Board does not enforce the regulation that requires a hardcopy to be sent following receipt by the Board of a facsimile. The quality of fax machines has improved to the point that the Personnel Board considers receipt of a fax to be the filing of such appeal. Upon receipt of an appeal, the Personnel Board sends a copy to the appropriate Cabinet. In this matter a copy was sent on September 5, 2013, to the Cabinet for Health and Family Services and to the Personnel Cabinet.

21. There were no further witnesses for the Appellant. The Appellee called no witnesses. Appellee presented a Motion for Summary Judgment. The Hearing Officer advised he would take such motion under consideration in rendering his Recommended Order. The parties were directed, by separate order, to file simultaneous briefs setting out their respective closing arguments and positions.

FINDINGS OF FACT

1. The parties stipulated to the following facts:
 - Jennifer Goins was a classified employee with status when she was terminated effective February 21, 2013.
 - Jennifer Goins had been dismissed from her position as a Family Support Specialist II, with the Department for Community Based Services, Eastern Mountain Service Region, effective February 21, 2013, with a last working day of February 20, 2013.
 - The Cabinet for Health and Family Services, in its dismissal letter dated February 20, 2013, had complied with the notice requirements set out in KRS 18A.095(7).
 - The telephone number utilized by the Kentucky Personnel Board for receipt of facsimiles and, in this case a facsimile appeal, is and has been 502-564-1693.
2. Ms. Goins was required to file her appeal with the Personnel Board “. . . within sixty (60) days after receipt of the notification, excluding the day [s]he received notice.” [KRS 18A.095.] By the Hearing Officer’s calculation, that meant no later than April 22, 2013.
3. On April 16, 2013, Jennifer Goins retained the services of the Hon. Kyle S. Hall, of the Appalachian Research and Defense Fund of Kentucky, Inc., to represent her in an appeal of her termination before the Kentucky Personnel Board.
4. When Mr. Hall was retained by the Appellant, he had the Appellant gather and complete all the paperwork for this appeal, including Appeal Form #18.
5. On April 16, 2013, Mr. Hall placed in his office fax machine a facsimile transmission cover sheet, Appeal Form #18, a copy of the February 20, 2013 notice of termination letter, all consisting of ten pages (a part of Appellant’s Exhibit 1). Mr. Hall attempted to send the faxed documents to the Kentucky Personnel Board at the telephone number of 502-564-1693.
6. On April 16, 2013, at approximately 15:44 (3:44 p.m. ET), Mr. Hall’s fax machine generated a fax TX Report indicating “transmission ok” of ten pages to the destination telephone number of 1-502-564-1693. (See Appellee’s Exhibits 1 and 2.)

7. Having not received communication from the Kentucky Personnel Board, Mr. Hall, on August 26, 2013, telephoned the Board and spoke to Linda Morris, Administrative Section Supervisor and Scheduling Clerk. Upon inquiry he learned from Ms. Morris that the Personnel Board had no active appeal in the name of Ms. Goins, nor had it received any documents in the matter by facsimile or other means. Morris requested that Hall send a fax of the Appeal Form and copy of the facsimile receipt to show the original transmission to the Board in April. Mr. Hall complied with that request on August 27, 2013. His reply was sent to the same facsimile telephone number he had entered on his machine in April. According to the Personnel Board records, the appeal in this case was received and stamped in on August 27, 2013.

8. The Kentucky Personnel Board considers an appeal to have been filed on the date of receipt in the Frankfort, Kentucky, office of the Board. When appeals have been faxed, the faxed document is retrieved the same day and stamped with that date as the date of receipt.

9. There is no evidence to show the fax machine used by the Kentucky Personnel Board during April of 2013 was broken, malfunctioning or inoperative at the time. That fax machine is no longer available or in use as it has been replaced since that date.

10. The Kentucky Personnel Board does not enforce the regulation [101 KAR 1:365, Section 3. Filing. (4)] that requires a hardcopy of an appeal to be sent following receipt by the Board of a facsimile. Likewise, the Kentucky Personnel Board does not enforce the regulation that requires a party to send a copy of the appeal to all other parties [101 KAR 1:365, Section 3. Filing. (2)(b)].

11. Jennifer Goins was required to file her appeal with the Kentucky Personnel Board within sixty days of February 20, 2013. KRS 18A.095(7)(c); 101 KAR 1:365, Section 3. While an appeal may be filed by means of facsimile transmission, 101 KAR 1:365, Section 3. Filing. (3) and (5), states:

(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.

..

(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.* [Emphasis added.]

12. KRS 18A.095(18)(a) provides:

The board may deny a hearing to an employee who has failed to file an appeal within the time prescribed by this section; and to an unclassified employee who has failed to state the reasons for the appeal and the cause for which he has been dismissed. The board may deny any appeal after a preliminary hearing if it lacks jurisdiction to grant relief. The board shall notify the employee of its denial in writing and shall inform the employee of his right to appeal the denial under the provisions of KRS 18A.100.

13. The Kentucky Personnel Board did not receive the April 16, 2013 facsimile transmission of the appeal of Jennifer Goins, or any other documents pertinent to this appeal, on or before to April 22, 2013.

14. The “original” of the document attempted to have been sent by facsimile on April 16, 2013, had never been sent to or received by the Kentucky Personnel Board.

15. Appellant, through counsel, sent by facsimile transmission on August 27, 2013, the documents for which an attempt to fax had previously been made. Upon receipt of these documents, the Kentucky Personnel Board stamped the appeal as having been “RECEIVED AUG 27 2013.” The Kentucky Personnel Board considers this appeal to have been filed on August 27, 2013.

CONCLUSIONS OF LAW

1. Jennifer Goins, who had been a classified employee with status, received notice on February 20, 2013, that she had been terminated from her employment position effective February 21, 2013. The notice she received fully complied with the notice requirements set out in KRS 18A.095(7).

2. Ms. Goins, in filing an appeal with the Kentucky Personnel Board, was required to file such appeal within sixty days after receipt of the notification, excluding the day she received notice [KRS 18A.095]. Such appeal was required to have been filed no later than April 22, 2013.

3. An appeal is filed with the Personnel Board when such document is **received** at the offices of the Personnel Board, and not by the attempted facsimile transmission of the documents. Although Appellant attempted to file the appeal by attempted transmission of the documents on April 16, 2013, the evidence is clear that such documents were not received, stamped in, or recorded on that date by the Kentucky Personnel Board. Appellant must be held responsible for the date the appeal actually reached the offices of the Personnel Board. The

statute in this matter does not allow the Hearing Officer any discretion in adjusting the timeframe for filing an appeal with the Personnel Board to render Appellant's appeal in this matter timely filed even though it was not received at the Personnel Board until well after the filing deadline had passed. The Hearing Officer must apply the law strictly when dealing with the timeframes allowed for filing an appeal before this administrative board.

4. The Board may deny a hearing to an employee who has failed to file an appeal within the time prescribed by this section, or may deny any appeal after a preliminary hearing if it lacks jurisdiction to grant relief. KRS 18A.095(18)(a). The Hearing Officer concludes that the appeal was not timely filed and, therefore, the Kentucky Personnel Board lacks jurisdiction to consider this appeal.

5. Appellant has made the alternative argument that 101 KAR 1:365 is unconstitutional in its application. (See: *Appellant's Brief Containing Closing Arguments and Statement of Position*.) The Kentucky Personnel Board possesses no discretionary power to waive appeal filing deadlines set out by the Kentucky Revised Statutes. While in this case the Board did not require strict adherence by the Appellant to those parts of the Administrative Regulation that required sending the original of the documents to the Board following facsimile transmission, and sending a copy of same to all parties known to the Appellant, there is no leeway to be granted for the time by which an appeal must be filed.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **JENNIFER GOINS VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2013-209)** 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 Roland P. Merkel** this 24th day of March, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Carrie Cotton
Hon. Kyle S. Hall