

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-040

KEMMYE S. GRAVES

APPELLANT

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

DEPARTMENT OF MILITARY AFFAIRS
MAJOR GENERAL ED TONINI, APPOINTING AUTHORITY

APPELLEE

** ** *

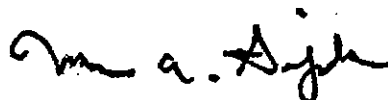
The Board at its regular August 2015 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated July 22, 2015, Appellant's exceptions, oral arguments, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer 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 20th day of August, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Michael Van Leuven
Hon. Paul Fauri

**COMMONWEALTH OF KENTUCKY
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This matter came on for a pre-hearing conference on April 28, 2015, at approximately 10:00 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, Kemmye S. Graves, was present and not represented by legal counsel. The Appellee, Department of Military Affairs, was present and represented by the Hon. Michael Van Leuven.

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

The Hearing Officer notes this appeal was filed with the Personnel Board on March 4, 2015. The Appellant was appealing dismissal. She also indicated she was seeking legal counsel, and had filed the appeal in order to not miss any deadlines. Appellant stated she had been terminated from her position as Policy Analyst II on February 3, 2015. As relief, Appellant seeks to be placed back in her position.

Counsel for the Appellee, Department of Military Affairs, made a motion to dismiss this case for lack of jurisdiction by the Personnel Board. This matter was discussed and a briefing schedule was set.

In accordance with the briefing schedule, Appellee timely filed a Motion to Dismiss. Appellant, by counsel retained after the pre-hearing conference, timely filed a Response to Motion to Dismiss. This matter is submitted for a ruling.

BACKGROUND

1. During the relevant time, Appellant, Kemmye S. Graves, was an employee of the Department of Military Affairs.

2. The Appellee, Department of Military Affairs, challenges the jurisdiction of the Personnel Board to consider this matter contending that the Appellant was not employed pursuant to KRS 18A, but was instead hired pursuant to the Adjutant General's authority under KRS 36.040(1)(r).

3. In support of this contention, counsel for the Appellee notes that Appellant at the time of her firing received the "standard form dismissal letter for Non-Chapter 18A employee" which informed Appellant that her services were no longer required.

4. Counsel goes on to cite KRS 36.040(1)(r), which holds as follows:

...

(r) Hire, discharge, and pay any personnel that the adjutant general deems necessary to fulfill defense contracts without regard to KRS Chapter 18A.

5. Counsel points out that Appellant was neither hired nor discharged under the provisions of KRS 18A.005 to KRS 18A.200, but was properly hired and fired pursuant to KRS 36.040(1)(r). In support of his motion, counsel attached an affidavit from Teresa King Lee, the Human Resources Administrator for the Department of Military Affairs, and also various other documents that reflect the hiring and firing of Appellant. Counsel contends that the clear legislative intent was to allow the Adjutant General, pursuant to KRS 36.040, to hire and fire certain employees without regard to KRS 18A. Counsel also cites the Personnel Board case of *Ralph Mischler, Jr. v. Department of Military Affairs*, Appeal No. 2009-137, and the Final Order adopted by the Personnel Board in June 2011 as support for the contention that Appellant was not a KRS 18A employee and that the Personnel Board has no jurisdiction herein.

6. Appellant, by counsel, timely filed a response to Appellee's Motion to Dismiss. Appellant makes several arguments. The first argument is that Appellant was classified as an Internal Policy Analyst II and was clearly not military personnel. Second, Appellant states that the statutory provision cited at KRS 36.040(1)(r) makes reference to the Adjutant General hiring personnel to "fulfill defense contracts without regard to KRS Chapter 18A." Further, that the Bluegrass Challenge Academy, where Appellant was employed, "in and of itself, is for the purpose of giving education opportunities for employment to at-risk youth."

7. Appellant also notes that KRS 36.040(2) references the various types of contracts, grants, etc. that the Adjutant General may enter into. Appellant states that "it is believed" that the Bluegrass Challenge Academy Program is funded by state matching funds to a federal/state cooperative agreement and that such would not constitute a "defense contract" pursuant to KRS 36.040(1)(r). Appellant goes on to argue that even if there is a contract, this program is not related to or considered a defense contract and would not exempt the Department of Military Affairs from the requirements of KRS Chapter 18A or KRS 18A.115.

8. Counsel continues that the Adjutant General did not actually sign the termination letter, but rather Michael A. Jones, Executive Director of the Office of Management & Administration. Counsel notes that the duties enumerated at KRS 36.040 begin with "The Adjutant General shall." Counsel further contends that the cited statute at KRS 36.040(1) does not authorize KRS Chapter 18A to not be followed except for certain narrow circumstances.

9. KRS 18A.115(1) states:

The classified service to which KRS 18A.005 to 18A.200 shall apply shall comprise all positions in the state service now existing or hereafter established, . . .

10. KRS 18A.095(18)(a) states:

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.

FINDINGS OF FACTS

1. During the relevant time, Appellant, Kemmye S. Graves, was an employee of the Department of Military Affairs.

2. The Hearing Officer finds that Appellant was, at the time of her hiring, hired as a Non Chapter 18A employee and was not hired pursuant to the statutes and regulations governing the state merit system.

3. The Hearing Officer finds further that the Appellant clearly was terminated as a Non Chapter 18A employee and that such was noted on the Personnel Action Notification from the Personnel Cabinet to the Appellant.

CONCLUSIONS OF LAW

1. The Hearing Officer concludes as a matter of law that while the Appellant, through Counsel, has raised several issues challenging whether KRS 36.040(1)(r) would apply to persons employed at the Bluegrass Challenge Academy, it is clear that the Appellant was not hired as a KRS Chapter 18A employee and was terminated as a Non Chapter 18A employee. The Hearing Officer concludes that Appellant's arguments missed the point that it is not the Personnel Board's responsibility to determine whether or not the Adjutant General is properly following the mandates of KRS 36.040, but whether the Appellant in this case was an employee subject to the jurisdiction of the Personnel Board for personnel actions taken by her employing Agency.

2. The Hearing Officer, having reviewed the documents attached to the Appellee's Memorandum in Support of its Motion to Dismiss and also taking notice of the *Ralph Mischler* case cited above, concludes that the Personnel Board does not have jurisdiction to consider the appeal of Kemmye Graves as she was not at anytime a state merit employee pursuant to KRS 18A. Appellant may have relief elsewhere, but the Personnel Board does not have jurisdiction to consider this appeal of her termination.

RECOMMENDED ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Personnel Board that the appeal of **KEMMYE S. GRAVES VS. DEPARTMENT OF MILITARY AFFAIRS (APPEAL NO. 2015-040)** 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).

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 22nd day of July, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Michael Van Leuven
Hon. Paul Fauri