

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NOS. 2012-145 AND 2012-221

TERESA GRAY

APPELLANTS

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

JUSTICE AND PUBLIC SAFETY CABINET
DEPARTMENT OF JUVENILE JUSTICE
J. MICHAEL BROWN, APPOINTING AUTHORITY

APPELLEE

** ** *

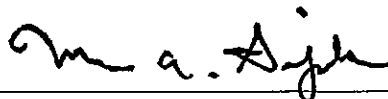
The Board at its regular April 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated March 12, 2014, and being duly advised,

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 appeals are 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 16th day of April, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Adam Adkins
Teresa Gray
Joslyn Olinger-Glover

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These matters came on for evidentiary hearing on January 17, 2014, at approximately 9:40 a.m. at 28 Fountain Place, Frankfort, Kentucky, before John C. Ryan, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by KRS Chapter 18A.

Appellant, Teresa Gray, was present and was not represented by legal counsel. The Agency, Department of Juvenile Justice, was also present and was represented by the Hon. Adam Adkins.

As will be evidenced below, the first of the two appeals was initiated before this Board on June 22, 2012, with the second coming on October 1, 2012. Commencing with the initial appeal there followed an extensive series of pre-hearing conferences, discovery proceedings, and repeated rescheduling of evidentiary hearing ranging over approximately 18 months. All pre-hearing proceedings were conducted telephonically.

BACKGROUND

1. Teresa Gray was hired into the position of Youth Worker I on October 30, 2011, assigned to the Agency's Murray Group Home. She thereupon commenced the requisite twelve-month probationary term prescribed by the relevant regulation. Although documentation is rather sparse as to her day-to-day performance, in May 2012 the superintendent of the facility depicted difficulties with her work performance in a memorandum to the Division Director and requested termination of her services. This culminated in her separation effective beginning of business on June 15, 2012 by delivery of a letter to her to that effect over the signature of Hasan Davis, Acting Commissioner. The letter cited to the appropriate statutory and regulatory provisions authorizing the action but gave no underlying details. She took initial issue with the action by appeal before this Board under the categories of "dismissal" and "discrimination – race, sex, disability and age." She briefly urged in this appeal that a double standard existed, presumably at the facility, as to race, educational levels and factors of age. She also complained that no reason was provided for her separation.

2. As matters unfolded within the initial appeal, Appellant presented a second appeal alleging “dismissal,” “applicant rejection,” “removal from register,” and “other penalization.” She alleged in this instance that “upon records request, discovery of inadequate investigation of incident for which termination was taken and resulted in application for employment not being certified.” The second appeal added the Kentucky Personnel Cabinet as a party which, following exchange of discovery and other procedural steps, was dismissed from the proceeding by order of the Hearing Officer on February 25, 2013. Although the two appeals were assigned to be heard together, they were expressly never consolidated. Appellant was assigned the burden of proof upon the issues generated by her allegations.

3. Upon convening of the evidentiary hearing, Appellant was afforded the opportunity to summarize her position, most particularly that which she seeks from the Personnel Board. Her unsworn presentation at that time was distilled to be that she seeks deletion or redaction of certain materials alleged to be in her personnel file(s). Her view is that these unfavorable items, comments, or reports as the case may be, presumably made permanent to support her separation while on probation, were causing an inability to obtain other employment. Appellant expressly asserted that she does not desire to be reinstated in the position of Youth Worker I at the Murray Group Home. She noted that she holds a Master’s degree and desires to enter the teaching profession, viewing that this derogatory material is preventing completion of a requisite internship.

4. The Agency reported in its opening that it has no authority to remove records from any file. It noted, however, that the records of which Appellant is aggrieved are not contained in the Personnel Cabinet records, but are maintained either in Agency files and/or the records at the specific facility. It explained that these records are made permanent at the Agency level for purposes of determining whether, if Appellant ever seeks another position or reinstatement within the Agency, their content may be utilized for consideration thereof. As for Appellant, she currently is ineligible for reinstatement within the Agency after being separated while on probation. It pointed out that any employee may petition the Agency head for reconsideration in his or her specific case but a new application standing alone would be automatically rejected. It further pointed out that Appellant’s status within the Agency has no legal impact upon state government registers and this proprietary information is specific only to it. As to Appellant’s circumstances, she was simply “not a good fit” for the position from which she was separated.

5. Expanding upon the foregoing summary, sworn testimony was offered by Appellant, **Teresa Gray**. She ratified the foregoing as the primary basis for her appeals and elaborated upon her difficulties in obtaining the requisite training (internship) for a teaching position. She insisted that her experience since the separation has been that she cannot obtain employment in any youth-oriented positions, surmising the reason to lie within Agency records. She pointed to allegations arising from a faulty pill count at the facility on April 24, 2012

wherein certain medication was alleged to have gone missing while under her watch, while she held the keys to the relevant storage cabinet. She viewed that the handling and eventual disposition by management of this episode, concerning which there was confusion surrounding what the exact count should have been, was the primary ground for her termination. A considerable portion of Appellant's testimony and exhibits focused upon the disposition of this episode by management including, but not limited to preliminary reports, investigatory materials, and e-mail traffic among management.

6. Appellant also tendered as part of her testimony, with concurrence therein by the Agency, a "Supervisor's Exit Interview Report" wherein the supervisor signing off reported her work performance during her 7.5 months as "inadequate," commenting that "Ms. Gray had problems following simple instructions and procedures." This report recommended against re-employing Appellant and also noted that "Ms. Gray could not account for a lost medication. The meds keys were assigned to her."

7. Appellant further tendered, during the course of her rather extensive testimony, a series of documents seeking to establish that management at the Murray Group home was biased toward her as a white female and imposed working conditions upon white staff which were more stringent than upon other races. She also sought to show that there may have been an adverse political undercurrent due to the prominence locally of her father. Further, she felt that she had been stymied in some respects in obtaining records which she sought concerning the overall management and procedures in place at the facility, undertaking to demonstrate, at least indirectly, that her efforts to rectify these procedures caused management to view her as an undesirable employee. She pointed out that upon one or more occasions, contained in the paperwork leading to her separation, allegations surfaced that she may have misappropriated the missing medication for her own use. She alluded to at least one episode of illness that she sustained during the term of her employment, urged to be still another underlying, also unstated, reason for her forced departure. She admitted that she could produce no objective proof to substantiate these concerns or that she had been singled out for more stringent treatment than her coworkers.

8. **HEARING OFFICER'S NOTE:** Appellant tendered, in the course of her testimony, a quantity of other materials. These included certain payroll information, exit interviews from other employees who were separated for a variety of reasons both voluntary and involuntary, information from Facebook from at least one former resident of Murray Group Home and two coworkers, and a Mapquest series undertaking to depict the geographical area which her father, a prominent politician, represented prior to his retirement. She also offered one or more statements from other individuals presumably addressing her circumstances. The Agency agreed in some instances to stipulate existence of the contents thereof but objecting to portions as to relevancy and to other portions both as to relevancy and matters of hearsay. The

Hearing Officer acknowledged the documentation but declined to enter it in light of the valid objections interposed.

9. Under relatively brief cross-examination, Appellant acknowledged that she was over the age of 40 when she interviewed and was hired for the position. She did endure one or more health episodes during her term of employment and was off eight days at one point and three days upon another occasion, providing the requisite medical information to substantiate the need. She did not seek a medical accommodation or any ADA intervention. She further recalled that her political registration and views were never discussed by management either at her hiring or during her service. Relative to the "missing pill" episode, Appellant did not believe any medication was ever missing, but agreed that an incident report was generated upon another occasion when she acknowledged commission of an error in either the handling or administering of medication. Two or three corrective conferences were conducted, including one involving the appropriate handling of toxic chemicals and another pertaining to use of cell phones.

10. **Jackie Padgett** was employed with the Agency for 13.5 years, having commenced at its Mayfield facility in 2003 and thereafter moving to the Murray Group Home approximately four years later. She is now retired. She ordinarily worked the midnight shift, quite often alone. She related that due to the timing of the shift she sometimes would fall asleep on duty and miss the requisite resident bed checks. There was a log for these checks, and after a time she began to observe that in many instances the logs were not completed. Basically, employees in some instances often back-filled the information and in others made no entries at all. She viewed that white personnel were either disciplined or written-up for this infraction, whereas black personnel were treated more leniently. She did not, however, have personal knowledge as to what discipline, if any, was imposed upon the black workers; her perception arose from a "feeling" as to such discriminatory treatment. She also observed or perceived that negligent handling of keys to the medical cabinet within the facility was handled differently by management as between white workers and black workers – black personnel appeared to be rarely disciplined for leaving the keys in exposed areas. The witness urged that she "knew" they were treated differently, reiterating that she was not privy to whatever discipline might have been imposed upon any other workers whether white or black. The witness discussed other errors, such as the administering of medication incorrectly, but agreed that these events occurred at the hands of most of the workers regardless of race.

11. The witness insisted that she is not racist, but conceded that upon at least one occasion a complaint was lodged and she was written up concerning asserted racial insensitivity on her part. She further recalled that her evaluations in the latter part of her employment were improving; however, when she retired her exit interview report resulted in a negative recommendation within the Agency for any rehiring purposes.

12. Under brief cross-examination, the witness acknowledged that she never worked the same shift with Appellant other than an occasional overlap of shifts when she arrived and Appellant was still completing paperwork. She never observed Appellant's job performance or any interaction between Appellant and management. She also never observed any discussions of a political nature, reiterating that her contacts with Appellant on the job were limited to encountering her at shift change. The witness ratified her lack of knowledge as to management's handling of other employees' failure to properly complete the bed-check logs, her personal awareness being only that she was written-up for it from time-to-time. She never understood the reason that her evaluations were acceptable, whereas her own exit interview was negative. In summary, she had no awareness of the treatment of Appellant by management or other workers throughout her probationary term.

13. **Shelly Bowers** is currently a student, having previously worked at the Murray Group Home for approximately eleven months commencing in October, 2011. She related that at the time she interviewed for the job she was unaware that she was pregnant, consequently did not disclose it, and discovered the condition after commencing in the position. She urged that management, upon discovery and confirmation of the pregnancy, accused her of falsifying her application and lying during the interview. The pregnancy impacted her training, since medical advice was to restrict her activities and she could not perform some of the physical requirements at the Academy in Richmond, Kentucky. In due course, during her probationary term she received a two-month leave of absence to give birth which extended the probation approximately one month past the requisite year. She recited a sequence wherein at one point she misunderstood her status and thought that she had been terminated; she then skipped one day of Academy training, but was then advised by management that she was terminated due to the absence. However, the termination was rescinded and she completed the academy. She eventually gave birth to a daughter. She viewed that she was ultimately terminated during her probationary term due to her pregnancy.

14. The witness was employed at the Murray Group Home during at least a portion of the time Appellant worked there. She recited her recollections surrounding the so-called "missing pill" episode and alteration of the log pertaining thereto. This witness was present when Appellant altered or corrected the log. She also recited instances in which toxic or cleaning materials were found outside of the proper storage when she came on-shift, noting that her shift predecessors, whom she perceived were not properly storing the chemicals, were African-American. She intimated that these black workers were never disciplined, but agreed that she was not privy to what management may have done about this loose handling of the chemicals. In summary, her observation was that the black workers were disciplined differently, if at all, than white workers. She felt intimidated about reporting incidents, concerned that she might be disciplined for "complaining" about the behavior of other workers, particularly black personnel.

15. Under cross-examination and further redirect examination, the witness recalled that she was twenty-six years of age when she commenced employment at Murray, holding at that time a high school diploma, whereas Appellant held at the time a Master's Degree. She referenced an internal investigation which occurred sometime after she departed, but concerning which she was interviewed since the incidents giving rise to the investigation apparently occurred during her time there. She acknowledged that she committed some violations of policy during her eleven-month term. She never heard any discussion of political affiliations either by or about Appellant during her time of service. She reiterated her lack of knowledge as to what discipline may have been imposed by management upon the black workers or how, if any, it compared to that assessed white workers for their mistakes.

16. **Joanna Wood** holds the position of Youth Worker II at Murray Group Home. She related her involvement in the "missing pill" episode. In summary, there was an incident report prepared concerning the confusing count and in due course she observed it bore her initials. She insisted that she had never inserted her initials thereon and was and is unaware of who might have done so. She so informed Appellant, whose shift adjoined hers, whereupon Appellant crossed out the initials and inserted her own. Pressed by the witness at the time as to the reason she had done this, Appellant simply responded, "It seemed to be the correct thing to do." Further testimony of this witness focused upon the overall administration at the facility and handling of meds, noting that both she and Appellant searched for the presumably lost pill but never located it. She explained that medication handling procedure has now been tightened surrounding the count and those involved therewith. She pointed out that this has always been policy but was previously somewhat lax in enforcement.

17. Quizzed as to her perception of treatment between black and white personnel at the facility, the witness urged that there is an undercurrent of discrepancy, in the form of more leniency toward the black workers by management. She related one or two instances wherein, in her view, this approach was demonstrated. She explained that her son suffers from a chronic medical condition requiring that she attend to his treatments, which was consuming large portions of her leave time. She elaborated, on the one hand, that she was moved to third shift which she considered to be a form of demotion, but hastened to add that it benefited her in dealing with the treatment needs of her son without consuming leave. The witness has felt harassed from time-to-time by management through various acts, but now views matters have currently improved in that regard.

18. Under cross and redirect examination, the witness acknowledged that she never worked the same shift with Appellant other than overlap of shifts and consequently has no knowledge of her work performance. She observed that in her time with her, Appellant never indicated that she had been disciplined for any infractions and assumed thereby that she was working out properly on the job. She was never present for any political discussions and did not know the political affiliations of Appellant or any other personnel.

19. The witness continued that in her experience probationary personnel at Murray routinely appear very concerned about performing the job properly and are fearful of taking leave and risking repercussions or loss of the position. She recalled that in one instance Appellant worked while ill but refused to leave stating that she feared that she would "get in trouble" if she took sick leave. Appellant was later hospitalized for several days. This witness observed that the unstated facility policy seems to be that new hires should not take time off during probation.

20. Appellant having completed her proof in chief, the Agency offered brief testimony from **Lisa Kim**, who has served as superintendent of the Murray Group Home for five years. She recalled Appellant commenced at the facility, or actually academy training, in October, 2011. She ratified that she directed a memorandum by e-mail to her immediate supervisor requesting that Appellant be separated during her probation and the Division Director approved the request. None of her reasons arose from anything to do with Appellant's age, sex or political affiliations. She was unaware of who Appellant's father is.

21. Under more extensive cross-examination, the witness ratified her handling of the memorandum requesting separation. Quizzed as to any need for grounds, the witness explained that ordinarily upper management requires a brief summary of events or behavior underlying such request in order to substantiate that no discrimination or personality conflicts entered into the decision process.

22. The witness continued that no written material generated in the course of dealing with personnel is ever destroyed. She confirmed that her memorandum and Appellant's exit interview are placed in the facility personnel file. She could not comment as to whether they are placed in any other files, but in the event the group home is cited by any employee as a reference and contact is made, the file could be accessed for discussion.

23. Appellant discussed with the witness the matters of her initial interview and the length and/or times of one-on-one contacts between this witness and Appellant, the consensus being that the total time involved approximated seventeen hours over the term Appellant was employed there. This would include approximately seven staff meetings of two hours each and conferences dealing with policy and procedures. Appellant pressed the witness concerning the number of employees interviewed and hired by her who either did or did not survive probation, but the exact number was unclear.

24. The witness confirmed her understanding that there are effectively three files maintained on behalf of any employee at this facility, specifically the facility file, an Agency file, and a Personnel Cabinet file. The sworn proof was thereupon concluded and the matter stood submitted for recommended order.

25. KRS 18A.005(19) defines "initial probation" as " . . . the period of service following initial appointment to any position under KRS 18A.010 to 18A.200 which requires special observation and evaluation of an employee's work and which must be passed successfully before status may be conferred as provided in KRS 18A.110 and by the provisions of this chapter. If the appointee is granted leave in excess of twenty (20) consecutive work days during this period, his initial probation shall be extended for the same length of time as the granted leave to cover such absence."

26. KRS 18A.111 is the statutory provision governing probationary service. The relevant provision is set forth under subsection (1) and directs that, "An employee may be separated from his position, reduced in class or rank, or replaced on the eligible list during this initial probationary period and shall not have a right to appeal, except as provided by KRS 18A.095. The employee may be placed on an eligible list but shall not be certified to the agency from which he was separated unless that agency so requests."

27. 101 KAR 1:325 is the regulation governing length of probationary service. While the standard term is defined to be six months, Section 1 of the regulation outlines a menu of positions requiring a twelve-month term. Included therein is the position of Youth Worker I.

28. KRS 18A.095(12) authorizes that:

Any classified employee may appeal to the board an action alleged to be based on discrimination due to race, color, religion, national origin, sex, disability, or age forty (40) and above.

FINDINGS OF FACT

1. On October 30, 2011 Appellant was employed into the position of Youth Worker I at the Agency's Murray Group Home facility and entered the one-year initial probationary term prescribed by the regulation. She completed the mandatory Academy training and commenced service. However, issues arose with the quality of her work and in May, 2012 her supervisor submitted a negative recommendation as to her continued employment, with separation effective June 15, 2012. Her exit interview report, completed by the facility superintendent reflected that "Ms. Gray had problems following simple instructions and procedures." As authorized by the statute, the exit report form poses the question whether, in the opinion of the supervisor, the employee might be approved for another position within the department. The supervisor recommended against this and entered a brief explanation pertaining to inability of Appellant to account for missing medication which occurred under her watch.

2. The separation letter, as is routine, affords no explanation for the failed probation. Appellant challenged the action as discriminatory, including race, sex, disability and age and, as the appeal moved forward, focused upon racial overtones and added a political possibility. Matters of her sex and age, as well as disability issues, are not borne out to be a factor in her departure.

3. The testimony of Appellant and her witnesses depicts their “feeling” that management treats white employees differently than black personnel at the facility, presented as opinion rather than fact. Whether this racial aspect is or is not a factor, Appellant candidly acknowledges that she does not seek reinstatement at the Murray Group Home. She seeks, rather, a purging or redacting of the information contained in the facility record (but presumably not in either the Agency personnel file or that of the Personnel Cabinet) supporting management’s negative recommendation.

4. The posture of the Agency is that no discrimination toward Appellant occurred in its decision process in either the hiring or firing of her, that she simply did not adapt well to instructions or policy, and that it has no authority to alter or remove information from its permanent records.

5. The Hearing Officer finds the sworn testimony of all witnesses to be credible, although in some instances in the nature of subjective and unverified opinion.

CONCLUSIONS OF LAW

1. The relevant provisions of KRS 18A.111(1) are quite clear. Any probationary employee within the classified service may be separated for virtually any reason with the exception of verifiable discrimination. There is no requirement that the impacted individual be provided an explanation, such as lack of a proper fit or whether some form of unacceptable performance or behavior caused the departure. Moreover, since the statute affords the option of whether to re-engage the individual within the department, or presumably the agency, it would follow that at least some minimal grounds will of necessity be contained within departmental records for reference in the event a new application is received. This information of necessity will be derived from the comments of the relevant supervisor(s) who observed the work performance. Some specifics will be required to confirm that no discrimination or mere personality conflicts controlled the decision.

2. Alleged discriminatory treatment as envisioned by the statute, if proved, goes more to reinstatement to the same or a similar position. However, Appellant does not seek this. Comments by supervisors, whose duty it is to observe and report, whether positive or negative, so long as they are not outright favoritism, just untrue, or out of personal vengeance toward the employee, go to the heart of the probationary process. Selective purging of such information, especially if accurate, invites abuse, and there is no statutory or regulatory authority for the removal or modification thereof after-the-fact to satisfy another purpose.

3. Appellant has not met her requisite burden of proof to establish that the treatment of her by the Department of Juvenile Justice and/or its facility management was discriminatory as compared to treatment of coworkers, or that its' processing of her separation while on probationary service violated the relevant statute or regulation.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeals of **TERESA GRAY VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF JUVENILE JUSTICE (APPEAL NOS. 2012-145 AND 2012-221)** 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 John C. Ryan** this 12th day of March, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof mailed to:

Hon. Adam Adkins
Teresa Gray