

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2018-160

WILLIAM GRAYSON

APPELLANT

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

**TOURISM, ARTS AND HERITAGE CABINET,
DEPARTMENT OF FISH AND WILDLIFE RESOURCES**

APPELLEE

*** **

The Board, at its regular October 2019 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated September 24, 2019, 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 16th day of October, 2019.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Jean Bird
Hon. Steve Wolnitzek
Ms. Misty Judy

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2018-160

WILLIAM GRAYSON

APPELLANT

V. FINDING OF FACT, CONCLUSION OF LAW
AND RECOMMENDED ORDER

TOURISM, ARTS & HERITAGE CABINET,
DEPARTMENT OF FISH AND WILDLIFE RESOURCES

APPELLEE

** ** * ** *

This matter came on for a pre-hearing conference on May 13, 2019, at 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, William Grayson, was not present but was represented the Hon. Steve Wolnitzek, who appeared by telephone. The Agency/Appellee, Tourism, Arts & Heritage Cabinet, Department of Fish and Wildlife Resources, was present and represented by the Hon. Jean Bird.

This matter is before Hearing Officer Stafford Easterling for a ruling on the Agency's Second Motion to Dismiss, filed with the Personnel Board on May 29, 2019. In their Motion, the Agency argues that the Appellant has failed to invoke the Personnel Board's jurisdiction. The Appellant has had an opportunity to file a response but has failed to do so. This matter now stands submitted to the Hearing Officer for a ruling on the Agency's Second Motion to Dismiss.

BACKGROUND

1. The Appellant, William Grayson, was formerly a classified employee with status with the Department of Fish and Wildlife Resources, within the Tourism, Arts & Heritage Cabinet.

2. This appeal was subject to a previous round of dispositive motions, resulting in the issuance of the March 29, 2019 Interim Order containing Findings of Facts and Conclusions of Law. The March 29, 2019 Interim Order is hereby incorporated in this document as if it were fully set out herein, (attached hereto as **Recommended Order Attachment A**).

3. As found in the March 29, 2019 Interim Order, on or about May 31, 2018, the Agency advised the Appellant, in writing, that he was "being temporarily assigned from your position as Conservation Officer Captain with the District Eight Branch, assigned to Carter County[,] to the Law Enforcement Division Director's office[,] effective beginning of business Monday, June 4, 2018." The reassignment letter informed the Appellant that the change in

workstation would remain in effect for no longer than sixty (60) calendar days and that he would be paid any authorized mileage reimbursement in accordance with 200 KAR 2:006.

4. The Appellant then filed the instant appeal alleging 1) the Agency failed to process his internal grievance properly, 2) the Agency failed to follow the applicable regulation regarding involuntary transfer, and 3) the Agency improperly issued him a written reprimand.

5. In the previous round of dispositive motions, the Agency filed its Motion to Dismiss with the Personnel Board on November 2, 2018, arguing the Personnel Board lacks jurisdiction over this appeal, pursuant to KRS 18A.020(2) and prior Board precedent. The Agency also argues the Appellant has not been the subject of a penalization as defined by KRS Chapter 18A or KAR Title 101. However, the Appellant's Motion to Dismiss focused solely on the written reprimand claim and failed to address the other allegations.

6. The Appellant filed a response to the Agency's Motion to Dismiss on November 30, 2018, conceding the Board does not have jurisdiction over the written reprimand claims but arguing the workstation change, which he deems an involuntary transfer, amounts to a penalization and should be allowed to proceed. The Appellant also failed to address the claim regarding the Agency's alleged failure to process his internal grievance properly.

7. The March 29, 2019 Interim Order disposed of the written reprimand claim, but allowed the Appellant's other claims to proceed, pending further development of the evidentiary record.

8. Since the issuance of the March 29, 2019 Interim Order, as established during the May 13, 2019 pre-hearing conference, the parties now largely agree that 1) the Agency did not involuntarily transfer the Appellant, instead temporarily transferring his workstation in accordance with 101 KAR 2:095 §4(3) and 2) the Agency did, in fact, receive and respond to the Appellant's internal grievance.

9. 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.

FINDING OF FACT

The Hearing Officer finds the Personnel Board lacks jurisdiction over the instant appeal as the Appellant has failed to articulate a penalization as defined by KRS 18A.095(1). The Personnel Board does not have jurisdiction over a temporary assignment absent an actionable claim of

discrimination and the Appellant has failed to establish any penalization in the handling of his internal grievance.

CONCLUSION OF LAW

The Hearing Officer concludes, having found that the Appellant has failed to articulate a penalization as defined by KRS 18A.095(1), that the Personnel Board lacks jurisdiction to further consider the instant appeal.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **WILLIAM GRAYSON V. TOURISM, ARTS & HERITAGE CABINET, DEPARTMENT OF FISH AND WILDLIFE RESOURCES (APPEAL NO. 2018-160)** 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 Rapiere 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 24th day of September, 2019.

KENTUCKY PERSONNEL BOARD



Mark A. Sipek
Executive Director

A copy hereof this day mailed to:

Hon. Steve Wolnitzek
Hon. Jean Bird

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2018-160**

WILLIAM GRAYSON

APPELLANT

**V. INTERIM ORDER CONTAINING FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

**TOURISM, ARTS & HERITAGE CABINET,
DEPARTMENT OF FISH AND WILDLIFE RESOURCES**

APPELLEE

** ** * * **

This matter last came on for a pre-hearing conference on October 10, 2018, at 10:00 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, William Grayson, was not present but was represented the Hon. Stephen Wolnitzek, who appeared by telephone. The Agency/Appellee, Tourism, Arts & Heritage Cabinet, Department of Fish and Wildlife Resources, was present and represented by the Hon. Amber Arnett. Since the last pre-hearing conference, the Hon. Jean Bird has entered a Notice of Substitution of Counsel and now represents the Agency.

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 and to discuss the option of mediation.

This matter is before Hearing Officer Stafford Easterling for a ruling on the Agency's Motion to Dismiss filed with the Personnel Board on November 2, 2018. At issue is the Appellant's claim that he has been penalized through the Agency's issuance of a written reprimand in addition to moving the Appellant's workstation to a location approximately 2.5 hours away from his former workstation. The Appellant argues both the written reprimand and the workstation reassignment did not comply with the applicable statutes and regulations. The Agency's Motion to Dismiss argues that the Personnel Board lacks jurisdiction over the Appellant's written reprimand claims and cites Board precedent wherein the Board has determined it lacks jurisdiction over written reprimands. The Appellant was given an opportunity to file a response to the Agency's Motion to Dismiss and has done so, acknowledging that the Personnel Board lacks jurisdiction over his written reprimand claims but arguing the facts and circumstances surrounding the Appellant's workstation relocation amount

to a penalization over which the Board has jurisdiction and, as such, should proceed to hearing. This matter now stands submitted to the Hearing Officer for a ruling on the Agency's Motion to Dismiss.

BACKGROUND/ FINDINGS OF FACT

1. The Hearing Officer notes the facts underlying the instant appeal were largely agreed to by the parties during the pre-hearing conference, the dispositive motion, and the response thereto. Accordingly, the Hearing Officer largely adopts the facts as articulated by the parties in their respective submissions and as established by the documents submitted with the underlying appeal.
2. Prior to the submission of this appeal, the Appellant, William Grayson, was a classified employee with status, employed by the Tourism, Arts & Heritage Cabinet, Department of Fish & Wildlife Resources, as a Conservation Officer Captain.
3. On or about May 31, 2018, the Agency advised the Appellant, in writing, that he was "being temporarily assigned from your position as Conservation Officer Captain with the District Eight Branch, assigned to Carter County[,] to the Law Enforcement Division Director's office[,] effective beginning of business Monday, June 4, 2018." The reassignment letter informed the Appellant that the change in workstation would remain in effect for no longer than sixty (60) calendar days and that he would be paid any authorized mileage reimbursement in accordance with 200 KAR 2:006.
4. Shortly thereafter, on June 6, 2018, the Agency also issued the Appellant a written reprimand, citing the Appellant's alleged rudeness to the Agency's Commissioner in addition to identifying a Facebook post where the Appellant posted an altered Kentucky State Police Trooper patch that was altered to include the phrase "Wildlife Trooper."
5. The Appellant then filed the instant appeal alleging 1) the Agency failed to process his internal grievance properly, 2) the Agency failed to follow the applicable regulation regarding involuntary transfer, and 3) the Agency improperly issued him a written reprimand.
6. As noted above, the Agency filed its Motion to Dismiss with the Personnel Board on November 2, 2018, arguing the Personnel Board lacks jurisdiction over this appeal, pursuant to KRS 18A.020(2) and prior Board precedent. The Agency also argues the Appellant has not been the subject of a penalization as defined by KRS Chapter 18A or KAR Title 101. However, the Appellant's Motion to Dismiss focuses solely on the written reprimand claim and wholly fails to address the other allegations.
7. The Appellant filed a response to the Agency's Motion to Dismiss on November 30, 2018, conceding the Board does not have jurisdiction over the written reprimand claims but arguing the workstation change, which he deems an involuntary transfer, amounts to a

penalization and should be allowed to proceed. The Appellant also failed to address the claim regarding the Agency's alleged failure to process his internal grievance properly.

8. KRS 18A.095(18)(a) provides, in pertinent part:

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.

9. KRS 18A.005(24) provides:

'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.

CONCLUSIONS OF LAW

1. The Hearing Officer concludes, as a matter of law, that the Appellant's challenge to the written reprimand issued June 6, 2018, must fail. That is because, as Personnel Board precedent provides, "KRS 18A.020(2)(c) provides for the sole means of handling an employee's claim that a written reprimand is not warranted and as long as the procedures outlined in KRS 18A.020(2)(c) are followed, no further appeal rights regarding a reprimand are given to employees." Ramey v. Cabinet for Health Services, 2003 WL 25749476 at * 2 (KY PB). Accordingly, pursuant to KRS 18A.095(18)(a), dismissal of this claim is appropriate because the Personnel Board lacks jurisdiction to consider this appeal.

2. However, because the Agency failed to address the remainder of the Appellant's claims, dismissal of the entirety of this appeal appears premature. It appears to the Hearing Officer that there are genuine issues of material fact outstanding in this appeal including, but not limited to, the exact nature of the Appellant's workstation change. A May 31, 2018 letter submitted with this appeal seems to indicate that the Appellant was temporarily reassigned to the Law Enforcement Division Director's Office in Frankfort, KY for a period not to exceed sixty (60) days. Yet, the Appellant, through counsel, alleges such workstation change constituted an involuntary transfer, an entirely different mechanism for effectuating a workstation change that is unquestionably a penalization, pursuant to KRS 18A.005(24). The Appellant should have the

chance to make a record as to his claims. For now, until further development of the factual record, the Hearing Officer makes no finding as to the legal question as to whether the Appellant was temporarily reassigned to Frankfort or was involuntarily transferred. Additionally, the Appellant's allegations regarding the Agency's failure to properly process his internal grievance properly are unaddressed by either party. As a result, this appeal must be allowed to proceed.

WHEREFORE, the Hearing Officer having listened to the statement of the parties, having reviewed the file and being duly advised, **HEREBY ORDERS** as follows:

1. The parties are instructed to contact the Board to facilitate scheduling a follow-up pre-hearing conference. The Appellant may appear by telephone by providing a telephone number where he can be reached.

2. The purpose of the pre-hearing conference will be to discuss the status of the appeal, to determine whether the parties need to conduct additional discovery on the discrimination claims, and to schedule an evidentiary hearing, if appropriate.

3. Any exceptions to this order may be filed when a Recommended Order is presented to the Personnel Board.

SO ORDERED at the direction of Hearing Officer Stafford Easterling this 29th day of March, 2019.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Jean Bird
Hon. Stephen Wolnitzek