

JAMES HADDIX

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

APPELLEE

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**.

SO ORDERED this 16th day of October, 2013.

KENTUCKY PERSONNEL BOARD

Mark A. Sipek
MARK A. SIPEK, SECRETARY

Hon. Dennis Shepherd
Hon. Christina Edmonds-Noble

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2012-120**

JAMES HADDIX

APPELLANT

VS.

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

**DEPARTMENT OF VETERANS AFFAIRS
GILDA HILL, APPOINTING AUTHORITY**

APPELLEE

** ** *

This matter came on for evidentiary hearing on July 29, 2013, at 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, James Haddix, was present and was represented by the Hon. Christina Edmonds-Noble. The Agency, Department of Veterans Affairs, was also present and was represented by the Hon. Dennis Shepherd.

This matter was the subject of at least three pre-hearing conferences conducted on July 17, 2012, December 18, 2012, and July 3, 2013. The series of conferences were intended to more fully define the issues and to deal with procedural matters occurring during the pendency hereof.

BACKGROUND

1. James Haddix, a military veteran, was hired as Safety Security Officer at Paul E. Patton Eastern Kentucky Veterans Center on March 1, 2012, and thereupon commenced the mandatory probationary term. However, by letter of May 21, 2012 over the signature of Gilda Hill, Executive Director of the Office of Kentucky Veterans Centers, he was informed that he would be terminated from that position effective that date. No grounds were recited in the termination other than to inform him that as a probationary employee he had no right of appeal "...except as provided by KRS 18A.095." Mr. Haddix took issue with the action by appeal filed on May 29, 2012 and therein wrote:

I obtained employment as a security officer at EKVC on 03-01-12. During my employment, I received only one evaluation, which was not negative. I arrived to work on 05-21-12 to find my name had been taken off the schedule. After being at work approximately two hours I was called into the office by Assistant Administrators, Judy Branham and Wade Lindon and told I was terminated from employment effective close of business that date. I asked why I was being terminated and was told by Ms. Branham that they didn't have to give me a

reason. I can provide documentation that I was doing the job I was hired to do. I feel my employment was terminated unfairly without good cause.

2. Upon convening the evidentiary hearing, following summary of the respective positions Appellant, **James Haddix**, being assigned the burden of proof, offered his own testimony. He is married and a resident of Breathitt County, Kentucky. Upon being hired at the Center (EKVC) the first of March, 2012 he commenced performing the assigned duties, which included grounds maintenance, compliance with and enforcement of regulations, transportation chores, and general participation in whatever was needed. He did not view that a defined priority was assigned to any particular duty. Two other coworkers performed the same chores, with one employee to each shift. His shift ended at 2:30 a.m. Throughout his time at the Center he received no reprimands nor, in his view, negative reviews.

3. His first probationary review meeting occurred on April 3, 2012. The written summary contained a series of "bullet" items and he viewed that the only negative comment thereon pertained to having clocked in early upon one or more occasions. He explained that under his military training arriving early became a habit, but it was explained to him by management that this created overtime costs, which was prohibited. Among the requirements of the job was maintenance of a duty log, which the write-up depicted as being done "fairly well" but which, in the workup, continued with a menu of duties outlined in some detail to be timely performed. A copy of the summary was introduced as part of his testimony.

4. Directed to discuss the sequence of events on the day he was terminated, he recalled that he arrived for his shift and was told by another security officer not to clock in. He disputed this, urging that he was still an employee and must do so. He thereupon waited for approximately four hours for management to conclude a meeting and was then handed a letter terminating him, containing no reasons or grounds. He noted that approximately two weeks prior, he had inquired about the leave policy since, being a new employee he did not want to risk abusing it. He and his wife were expecting a new baby at the time and he anticipated the need for some time off when the child arrived. A coworker advised him not to be concerned about it; if necessary, the coworker or others could donate accumulated leave if and when needed. Appellant has since surmised the possibility that his termination, particularly its timing, was somehow connected to the potential leave aspect, which he viewed as a form of discrimination.

5. Directed again to the daily time logs, Appellant introduced a set thereof commencing on April 4, 2012 and ending May 20, 2012. He urged that the logs demonstrated that he maintained adequate records and performed the chores assigned in accordance with his understanding of the requirements. The notes from the April 3 Probationary Review Meeting detailed the regular cleaning and washing of the Center vehicles, which he insisted he had performed as directed. He noted that in times of rain, the vehicles were not washed, but instead taken for maintenance, all of which he undertook to log properly. He discussed a set of

photographs, which he also introduced, depicting trash containers throughout the Center premises partially or fully filled, urging that in those cases where the 55 gallon bags inserted in the bins were not full he had so noted. He pointed out that the photographs, apparently utilized to support his termination, were noted as taken on May 18, 2012 at 10:15 a.m., whereas his shift ended that day at 2:30 a.m., some eight hours prior. He intimated that they could have been filled after he left.

6. Appellant also addressed the content of an e-mail exchange of May 17, 2012 between the Administrator of the facility and Maintenance Branch Manager Greg Hall essentially urging that the vehicle washing, trash can assignment, and related documentation were lacking, suggesting further surveillance and improvement reminders to the evening shift, i.e. Appellant. He expressed lack of awareness that there was concern relative to his performance upon these aspects and insisted that no one ever advised him that improvement was needed. In summary, given the circumstances wherein the termination letter gave no reasons, no one ever approached him about improving, and his inquiry pertaining to leave due to the pending family pregnancy, he viewed that the pregnancy aspect, with its probable time off, was the true reason he was terminated.

7. Under cross-examination, Appellant was directed to the contents of the April 3 Probationary Review Meeting summary. He perceived that the only negative therein was having clocked in early before being advised not to do so. He conceded, however, that the remainder of the so-called "bullet" items in the report may have been reminders or suggestions to improve in those areas, given that they were detailed in the workup. He confirmed that his shift consisted of eight hours and described the duties and procedures in which he ordinarily engaged during work time. He recalled that a portion thereof required monitoring video surveillance equipment at the main doors of the facility, primarily for control of potential drug trafficking as well as patients wandering off. This mandated sitting at one location for varying periods of time. Appellant agreed that no residents would be upon the outside grounds between 2:30 a.m., when his shift ended, and 6:00 a.m. when the next shift came on and accordingly would not be using the trash cans. He also conceded that no one in management ever made any negative reference to the family pregnancy, either during his time there or upon the date he was terminated.

8. Appellant having concluded his proof in chief, motions by each party for a ruling in its or his behalf was taken under advisement. The Agency thereupon offered the testimony of **Greg Hall**, Maintenance Branch Manager at EKV. He has held that position approximately eleven years. He is in charge of all security and housekeeping and as such was Appellant's direct supervisor.

9. This witness was involved with Appellant's interviews and hiring and was anxious for him to succeed. While not on hand for day-to-day observation, he was fully aware that Appellant would require on-the-job-training and experience, and he was placed with a veteran employee to get him acclimated to facility requirements, transportation of residents, and the other duties required by his position. He recalled that Appellant "fell in" rather well initially and progressed satisfactorily. One or more meetings were conducted as observations required.

10. The witness addressed and explained the workup from the April 3 Probationary Review Meeting. He confirmed that he prepared the written report, indicating that it was intended to be areas of concern requiring improvement. He briefly explained the details thereof for the record, noting that portions of the comments reference routine maintenance more fully explained in the daily log, such as trash collection. He pointed out that the entries were intended to prod Appellant to perform his chores more thoroughly and efficiently than had been observed, and perceived at the time that Appellant understood this.

11. The witness reiterated that he was present for Appellant's initial interview, who disclosed at the outset that he was the father of four daughters with a son on the way. All present were happy for him and this circumstance was not an issue. He recalled that Appellant was a military veteran, having served in two branches, and his service record was viewed as a positive in his behalf.

12. Directed to explain the photographs of trash bins previously addressed in the testimony, Hall confirmed that he took them and entered the date and time. The reason for this was to verify that the containers were not emptied and were left over from Appellant's shift, whereas the completed duty logs for the day reflect that the chore was taken care of. He urged that most or all the eleven containers placed around the facility were nearly or completely full with four or five of them overflowing, which was unacceptable. He noted nuisance and health with this issue, particularly in hot weather.

13. The witness insisted that neither Appellant nor any other employee would ever be terminated due to a family pregnancy. He recalled several instances wherein various staff became new parents, with a few cases more than once, all requiring leave. This included one employee whose family endured complications and that individual was off approximately three months without penalty.

14. Under cross-examination, the witness confirmed that he was not constantly on hand to observe all of Appellant's activities due to differing work schedules, although there was overlap. Accordingly, some of his information came from others in a position to observe and follow-up. He ratified that the report from the April 3 Probationary Review Meeting is actually a call for improvement by Appellant rather than merely a recitation of duties. Ordinarily meetings are conducted every thirty days with a probationary employee and another was planned at the

time Appellant was terminated. He pointed out that little improvement was seen in performance of his duties after this meeting, and the performance was spotty. He viewed that some of the tasks were elementary and should not require constant reminders. An example was the emptying of the trash; he acknowledged that this chore is not expressly detailed in the meeting notes but, rather, cited to the requirements set forth in the duty logs. He recalled that verbal reminders were issued to Appellant upon nearly a daily basis and a veteran coworker also spoke with him "several times."

15. Directed to matters of leave, the witness noted that Appellant would have accumulated his eligible sick and annual leave hours, but would have possessed very little due to his short stay in the position. Once the leave was entirely consumed, he would have been off thereafter without pay, also of no concern to management if occurring, and leave sharing from other staff was also a possibility.

16. The manager reiterated that he variously called Appellant in for verbal conferences and essentially urged him to "get this done" rather than issue written directives or place negative reports in his employment record. Management wanted him to succeed and did not view that either management or Appellant would be benefited by a series of negative writings. He reiterated that Appellant's shift partner also spoke with him and undertook to work with him, but no noteworthy improvement was observed.

17. **Wade Lindon** is Assistant Administrator at EKVC and also signed off on the Probationary Review Meeting report of April 3. He accordingly was involved in the review and approved it. He confirmed that Appellant's termination had nothing to do with the pregnancy of his wife. He reported that during his tenure to date at the facility, at least six males and twenty-two females were previously off for childbirth purposes, including one member of the security staff who had fathered three children with resultant time off in each instance. He urged that facility accommodated all of those personnel without question.

18. Under brief cross-examination, the witness reiterated that he was familiar with Appellant during the time he was employed and did not anticipate that any concern would be generated if and when the time came for him to be off for the birth of his child.

19. **Gilda Hill** is Executive Director of the Office of Kentucky Veterans Centers. She oversees three separate facilities and, in her capacity, signed the termination letter issued to Appellant. She noted that delegated authority to the Facility Administrators is limited to providing counseling and issuance of reprimands with further discipline, such as suspensions or terminations required to come from her office. The Agency has implemented strict requirements to prevent discrimination and none was practiced in the handling of Appellant's termination. She was not aware of his family pregnancy when he was released. Sometime afterward, a member of his family, whom she did not recall, telephoned her, intimating that the pregnancy

was a factor in his departure. She produced and made part of her testimony the Kentucky Department of Veterans Affairs Equal Employment Opportunity and a Discrimination-Free Workplace Policy Directive 5, which blueprints requirements for the prevention of discrimination within the Agency. She urged that it is strictly followed. She noted that throughout her time with the Agency there has never been presented, until this case, any claim of discrimination due to potential pregnancy leave.

20. Under brief cross-examination, the witness confirmed that she participated in the decision to terminate Appellant. She undertakes to visit each of the three facilities under her supervision at least once every month. She never met Appellant until appearing for this hearing and does not know him. She noted that meetings with probationary personnel by staff are standard to both aid and monitor them in their progress and all reprimands issued by the facility administrators are ultimately brought to her attention. She pointed out that with approximately 800 employees, pregnancies among staff are quite routine and expected.

21. There was thereupon concluded the sworn testimony and, following summary of his position by Appellant, the Agency having waived closing, the matter stood submitted for recommended order.

22. KRS 18A.095 is the statutory provision blueprinting rights of executive branch employees. Appellant, a probationary employee, did not attain or enjoy all the rights provided thereunder, and grounds for challenge of his termination are limited to those set forth in KRS 18A.095(12), which provides:

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. Nothing in this section shall be construed to preclude any classified or unclassified employee from filing with the Kentucky Commission on Human Rights a complaint alleging discrimination on the basis of race, color, religion, national origin, sex, disability, or age in accordance with KRS Chapter 344.

This provision is essentially expanded under KRS 18A.095(14)(a) which simply provides that:

Any employee, applicant for employment, or eligible on a register, who believes that he has been discriminated against, may appeal to the board.

23. 101 KAR 1:325 is the regulation implementing probationary periods. Section 1 thereof denotes that the position held by Appellant shall be six months.

24. KRS 18A.095(22)(a) blueprints the steps to be taken if the Board determines that discrimination was practiced by the Agency against any employee or applicant.

FINDINGS OF FACT

1. James Haddix, an honorably discharged military veteran, was hired as a Safety Security Officer at Paul E. Patton Eastern Kentucky Veterans Center effective March 1, 2012 and commenced his probationary term and training for the position. He was assigned what amounted to an apprenticeship under a seasoned employee and received instructions, education, and direction relative to the proper performance of the duties. He did not completely absorb the requirements of his assignments, requiring extra conferences with management and one or more coworkers seeking to enhance his orientation for what was expected. Management had high hopes for him and wanted him to succeed.

2. An initial probationary review was conducted on April 3, 2012, approximately five weeks into his term, and the expectations reduced to writing. This was supplied to Appellant. The testimony indicates that Appellant misunderstood the thrust of the workup and its content. Management undertook thereby to signal to him that certain deficiencies and shortcomings were being observed in his performance which needed immediate improvement, whereas Appellant viewed the instructions as merely a recitation or confirmation of the duties. The outcome was that he continued to perform as he had previously, resulting in a leveling off or perhaps deterioration of the quality of his services.

3. Upper management saw no improvement and documented specific examples of the failures, culminating in a unanimous management decision that he would not be an appropriate fit for the position and he was released on May 21, 2012, well within the six-month probationary term.

4. Interviewers were well aware from the outset of Appellant's pending family pregnancy, a routine event among the 800 or more personnel employed by the Agency throughout its territory, and this prospect, with its probable upcoming leave time, had no bearing upon the decision to release him. For that matter, the Agency has in place strict and well documented requirements prohibiting any form of discrimination in either the hiring or treatment of its personnel. As a corollary, Appellant did not assert any claim of discrimination in his initial appeal, only citing the fact that the dismissal letter does not provide a reason for his termination. Both the existence of the then-family pregnancy and that potential issue were developed in the course of pre-hearing arguments and the sworn testimony.

CONCLUSIONS OF LAW

1. Appellant entered the classified system upon his hiring but, as a probationary employee without status, he served at the pleasure of the Agency. The protective provisions of KRS Chapter 18A do not apply in such circumstance other than the very narrow (and proper) provisions applicable to discriminatory treatment. The Agency is not required by the statute or the relevant regulations to provide written reasons when terminating a probationary employee, and any employee in that circumstance is required to demonstrate one or another form of discrimination to successfully challenge the action.

2. The proof in this matter indicates that Appellant either misunderstood or did not absorb the expectations of him, abundantly supplied both verbally and in writing. Management made repeated efforts to convey to him the quantity and quality of performance required to become a permanent employee, and after a reasonable term of observation concluded, as was its right, that the risk of permanent problems with the performance was too great to place Appellant upon status.

3. Given that neither the statute nor applicable regulations require documented grounds for a probationary termination, Appellant's permanent record, possibly to his future benefit, will presumably not reflect the shortcomings resulting in his departure from the position.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **JAMES HADDIX VS. DEPARTMENT OF VETERANS AFFAIRS (APPEAL NO. 2012-120)** 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 17th day of September, 2013.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof mailed to:

Hon. Dennis Shepherd
Hon. Christina Edmonds-Noble