

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2024-053

DAVID JACKSON

APPELLANT

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

KENTUCKY DEPARTMENT OF MILITARY AFFAIRS

APPELLEE

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The Board, at its regular May 2025 meeting, having considered the record, including the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer dated April 10, 2025, 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 15th day of May, 2025.

KENTUCKY PERSONNEL BOARD



GORDON A. ROWE, JR., SECRETARY

Copies hereof this day emailed and mailed to:

David Jackson
Hon. Charla Sands
Hon. Rosemary Holbrook (Personnel Cabinet)

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2024-053

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v.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER

DEPARTMENT OF MILITARY AFFAIRS

APPELLEE

* * * * *

This matter is before the Hearing Officer on the Appellee Department of Military Affairs' Motion to Dismiss and the Appellant's response to the Motion to Dismiss.

This appeal last came on for a pre-hearing conference on June 17, 2024, at 10:30 a.m., ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Gordon A. Rowe, Jr., Executive Director/Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The appellant herein, David A. Jackson (the "Appellant"), was present by telephone and was not represented by legal counsel. The appellee herein, the Department of Military Affairs (the "Appellee" or "DMA"), was present by telephone and was represented by the Hon. Charla Sands.

The purposes of the pre-hearing conference were to discuss the jurisdiction of the Personnel Board, the dispositive motion filed by the Appellee, and next steps in the appeal. During the pre-hearing conference, the parties engaged in discussion regarding the Motion to Dismiss, and the Appellant's claims in opposition to the motion to dismiss, including his discrimination claims. The Hearing Officer noted there were jurisdictional concerns and stated that the issue of jurisdiction should be briefed by the parties.

PROCEDURAL BACKGROUND

1. The Appellant was dismissed from his employment by the Appellee by letter dated April 4, 2024. The Dismissal Letter did not cite any cause for the dismissal but stated that Appellant's "services as an Environmental Control Manager were no longer needed." [See Exhibit B to Motion to Dismiss; and see April 4, 2024 letter attached to Appeal Form.]

2. The Appellant filed an appeal with the Personnel Board on April 18, 2024, to appeal the termination of his employment by the Appellee. On his appeal form (the "Appeal Form"), the Appellant indicated he was appealing his dismissal and alleging discrimination on the basis of race and age. The Appellant also checked boxes on the Appeal Form that identified him as a veteran and a Federally Funded Time-Limited ("FFTL") employee. The Appellant did not provide any further explanation of his appeal on the Appeal Form.

3. Prior to the initial pre-hearing conference, the Appellee filed a Motion to Dismiss. In its Motion to Dismiss, the Appellee argued that this appeal was outside the jurisdiction of the Personnel Board because the Appellant was not hired by the Appellee as a KRS Chapter 18A employee and, therefore, he was not subject to the protections of KRS Chapter 18A. Instead, the Appellee argued, the Appellant was hired pursuant to KRS 36.040(1)(r), which permits DMA's Adjutant General to hire and discharge employees without regard to KRS Chapter 18A. In support of its position, DMA attached to the Motion to Dismiss a copy of the Personnel Action Notification ("PAN") under which Appellant's hiring by DMA was documented. The PAN notes, at the bottom of the form, that the Appellant was hired as "non-Chapter 18A under KRS 36.040(1)(r)."

4. On July 17, 2024, the Appellant filed his Response to Motion to Dismiss, which was filed within the time limit set for a response by the Hearing Officer in the June 17 pre-hearing conference. The Appellant argued in the Response Brief that he was hired by DMA as an unclassified, Federally Funded Time-Limited ("FFTL") employee and, consequently, he was subject to the protections of KRS Chapter 18A. The Appellant theorized in his Response Brief that he was terminated because of an investigation of his driving records. Through an Open Records request, the Appellant obtained a copy of a March 26, 2024 report which showed that on more than one occasion, the Appellant had driven a state-owned vehicle outside his assigned driving route and had exceeded the speed limit by more than 20 miles per hour on several occasions. The Appellant did not produce any evidence or point to anything in the record to show that he was being discriminated against on the basis of race or age.

STANDARD OF REVIEW

1. A motion to dismiss should only be granted when it appears the complaining party would not be entitled to relief under any set of facts that could prove his claim. *Pari-Mutuel Clerk's Union, Local 541 v. Kentucky Jockey Club*, 551 S.W.2d 801 (Ky. 1977). In examining whether it is proper to grant such a motion, the facts must be liberally construed in favor of the complaining party and the facts alleged in the complaint document must be accepted as true. *Pike v. George*, 434 S.W.2d 626 (Ky. 1968). A court should rule on a motion to dismiss when the question at issue is purely a mater of law. *James v. Wilson*, 95 S.W.3d 875 (Ky. App. 2012).

FINDINGS OF FACT

1. The Appellant is an African American male who held the job classification of Environmental Control Manager in the Department of Military Affairs prior to his termination. The Appellant was sixty-eight (68) years old at the time he filed his appeal. [See Appellant's Response to Motion to Dismiss (the Response Brief") at p. 1.] Prior to his termination, the Appellant had worked for DMA for approximately four (4) years.

2. On February 20, 2021, the Personnel Cabinet entered a Resign to Reappoint Personnel Action Notification ("PAN") regarding the Appellant's employment with the Department of Military Affairs. The PAN shows that the Appellant was hired as an Environmental Control Manager in the Department of Military Affairs and was designated at that time as a "non-

Chapter 18A" employee appointed under KRS 36.040(1)(r). [See Exhibit A to Motion to Dismiss, 2-1-20 PAN].

3. As reflected by the PAN, the Appellant was hired pursuant to KRS 36.040(1)(r) and was not subject to the provisions of KRS Chapter 18A.

4. Before accepting the job of Environmental Control Manager in the Department of Military Affairs, the Appellant submitted a resignation letter to his prior employer, the Energy and Environment Cabinet, wherein he stated that he was "resigning my merit position as a Geologist Supervisor Registered...to be reappointed to the non-merit position of Environmental Control Manager with the Department of Military Affairs." [See Exhibit A to Motion to Dismiss.] So, the Appellant recognized that, after his resignation, he would no longer be a merit employee under KRS Chapter 18A.

5. The Appellant has produced no evidence to support his contention that he was hired as a Federally Funded Time-Limited ("FFTL") employee as defined under KRS 18A.005(15), which would give him the protections of KRS Chapter 18A, or that he was hired under any other provision of KRS Chapter 18A.

6. The PAN commemorating the Appellant's dismissal states in the "Remarks" section that the Appellant's terminated employment was "non-Chapter 18A under KRS 36.040(1)(r)." [See Exhibit C to Motion to Dismiss.]

7. The Appellant has failed to produce any evidence that his employment was terminated based on race or age. The Appellant has not produced any evidence that would show how he was treated any differently than similarly situated coworkers of a different race or who were under 40 years old.

CONCLUSIONS OF LAW

1. The Personnel Board does not have authority to hear any appeal not specifically authorized by KRS Chapter 18A. In fact, the Personnel Board is **required** to dismiss any appeal in which it determines "it lacks jurisdiction to grant relief." KRS 18A.095(16)(a).

2. The issue of jurisdiction is purely a question of law in this Appeal.

3. The Personnel Board does not have jurisdiction over this appeal because the Appellant was not hired pursuant to KRS Chapter 18A.

4. The Appellant's claim that he was hired as an FFTL employee is not supported in the record. The Appellant has not pointed out any federal grants related to his employment nor has he shown that he was hired according to the hiring process required for FFTL employees.

5. The Appellant was clearly and undisputedly hired by DMA's Adjutant General and, based on the PANs relating to his hiring and dismissal, he was hired and discharged under the provisions of KRS 36.040(1)(r).

6. KRS 36.040 states unambiguously that the Adjutant General has the power to "[H]ire, discharge, and pay any personnel that the adjutant general deems necessary....without regard to KRS Chapter 18A." KRS 36.040(1)(r). Consequently, the Personnel Board has consistently held that the Adjutant General's discharge of employees hired under KRS 36.040 is not reviewable by the Board under KRS Chapter 18A and, thus, the Board does not have jurisdiction over state employees hired under KRS 36.040. *See Ralph Mischler v. Department of Military Affairs*, 2011 WL 2534033 (KY PB 2011); and *see Kemmye Graves v. Department of Military Affairs*, 2015 WL 5092110 (Ky PB 2015). In both *Mischler* and *Graves*, the Board dismissed the Appeals after determining that both employees were hired under KRS 36.040 and were not subject to the provisions of KRS Chapter 18A.

7. The Appellant's contention that, even if he was hired under KRS 36.040, his employment would still be subject to KRS Chapter 18A, is clearly erroneous as a matter of law. KRS 36.040(1)(r) gave the Adjutant General the power to discharge employees "without regard to KRS Chapter 18A," including its anti-discrimination protections. As stated above, the Board cannot impose its jurisdiction over employees hired outside of KRS Chapter 18A.

8. The Appellant may be able to seek relief in another forum for his claims of race and age discrimination but he is not entitled to avail himself of the anti-discrimination provisions of KRS 18A.095 because he was a non-Chapter KRS 18A employee.

9. Consequently, the Personnel Board does not have jurisdiction to grant the relief sought by the Appellant and this appeal should be dismissed.

RECOMMENDED ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Personnel Board that the appeal of **DAVID JACKSON V. DEPARTMENT OF MILITARY AFFAIRS (APPEAL NO. 2024-063)** 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 fifteen (15) 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

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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).

The parties are strongly encouraged to send any exceptions and/or requests for oral argument by email to: PersonnelBoard@ky.gov

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.

Any document filed with the Personnel Board shall be served on the opposing party.

SO ORDERED at the direction of the Hearing Officer this 10th day of April, 2025.

KENTUCKY PERSONNEL BOARD



GORDON A. ROWE, JR.
EXECUTIVE DIRECTOR

A copy hereof was emailed and mailed to the following persons at their respective addresses as provided to the Personnel Board on this 10th day of April, 2025:

David A. Jackson, Appellant
Hon. Charla Sands, Counsel for Appellee
Hon. Rosemary Holbrook, Personnel Cabinet