

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD

**JAMES D. WITT, JR. (APPEAL NO. 2011-197) AND
THOMAS BOONE (APPEAL No. 2012-127)**

APPELLANTS

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

**KENTUCKY AUTHORITY FOR EDUCATIONAL TELEVISION
SHAE HOPKINS, APPOINTING AUTHORITY; AND**

**KENTUCKY PERSONNEL CABINET
TIM LONGMEYER, SECRETARY**

APPELLEES

** ** * * *

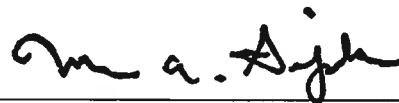
The Board at its regular May 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated February 21, 2014, having noted Appellant Witt's exceptions, Appellant Boone's exceptions, KET's exceptions, Appellant Witt's response, KET's response to Boone's exceptions, KET's response to Witt'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 Appellants' 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 14th day of May, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Clay A. Barkley
Hon. Brian Judy
Hon. Dinah Bevington
Mr. James D. Witt, Jr.

Hon. Matt James
Hon. Whitney Meagher
Hon. Robert L. Abell



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This matter came on for an evidentiary hearing on June 10, 2013, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, James D. Witt, Jr., was present at the evidentiary hearing and was not represented by legal counsel. The Appellant, Thomas Boone, was present and was represented by the Hon. Robert Abell. The Appellee Kentucky Authority for Educational Television (KET), was present and represented by the Hon. Brian Judy and the Hon. Matt James. Also present as agency representative was Ron Brown. The Appellee, Personnel Cabinet, was not present at the evidentiary hearing by prior arrangement.

The evidentiary hearing continued on June 11, 12, 13, 17 and 18, 2013.

BACKGROUND

JAMES WITT'S APPEAL

1. The Appellant, James D. Witt, Jr. (Witt), filed Appeal No. 2011-197 with the Personnel Board on September 8, 2011. He identified himself as an unclassified

employee, and appealed from his dismissal by KET on September 9, 2010. Witt stated he was dismissed without cause, although he claimed KET stated in the Lexington Herald-Leader that the dismissals were for budgetary reasons. He claimed following his termination, KET gave raises, hired more people, and spent large amounts of money which was more than KET saved by terminating a total of 13 people. Witt identified himself as 60 years old, with 41 years of working experience. He stated he had a clean personnel record and should not have been terminated. He stated there were others in his work group who did not have clean personnel records, and should have been terminated. Witt alleged he was discriminated against based on his race, color, religion, sex and age over 40, and stated he had received a right to sue letter from United States Equal Employment Opportunity Commission, and an attorney with the Civil Rights Division from the United States Attorney General's office. Appellant Witt also alleged his dismissal was in retaliation for having reported dishonesty in the workplace of stealing state equipment and falsifying timesheets. He alleged there was mismanagement of funds occurring at KET, and he was accused of carrying a gun. He stated he was relying on KRS 18A.095(29) in support of his appeal. Lastly, he stated KET terminated him, although Governor Beshear had a furlough plan in place.

2. KET filed a Motion to Dismiss, alleging Witt did not file his appeal within 30 days, as required by KRS 18A.095(9) and (18)(a). KET stated Witt was discharged from an unclassified position at KET without cause on September 9, 2010.

3. Appellant Witt responded to the Motion to Dismiss stating he was not provided with an appeal form, was confusingly told he had no right to appeal except as provided in KRS 18A.095, and that the provisions of KRS 18A.095(29) applied and allowed his appeal to be considered timely.

4. Following a pre-hearing conference on October 26, 2011, Witt filed a Motion, Amendment to Clarify Appeal. In this document, he identified himself as white and 62 years of age. He alleged that others who were younger and African-American had received favorable treatment compared to him. He also stated he was a Mormon, and alleged he had endured negative religious remarks from co-workers.

5. Hearing Officer Boyce A. Crocker entered a Recommended Order on January 20, 2012, recommending dismissal of Appellant Witt's appeal as untimely. He found the appeal should have been filed within 30 days of the dismissal pursuant to KRS 18A.095(9). He further found that although KET should have attached an appeal form to the letter of dismissal, even though the Appellant was unclassified pursuant to KRS 18A.095(16)(b), this failure is not fatal to the Appellee's action.

6. Appellant Witt filed exceptions to the Recommended Order. The Personnel Board also received a Response to Exceptions from KET, and heard oral argument from the parties.

7. On April 18, 2012, the Personnel Board entered a Remand Order, rejecting the Hearing Officer's Findings of Fact, Conclusions of Law and Recommended Order. The Board's Order is attached to this Recommended Order as **Attachment A**. The Board considered Witt (and other KET Appellants) to be unclassified employees who were dismissed without cause. The Board found KET was required to attach appeal forms to their notices of dismissal pursuant to KRS 18A.095(16)(b). The Board further found that the Appellants may appeal these actions pursuant to KRS 18A.095(14)(a). KET's Motion to Dismiss was denied, and Witt's appeal was remanded to the Hearing Officer for further action.

THOMAS BOONE'S APPEAL

8. Appellant Thomas Boone (Boone) filed Appeal 2012-127 on June 4, 2012. Boone appealed from his dismissal by KET. He identified himself as an unclassified employee, and checked the boxes on the appeal form for Dismissal, Layoff, Discrimination, and Other Penalization. He specified the Other Penalization as a Hostile Work Environment and Retaliation. Boone was terminated from his position with KET without cause on September 9, 2010.

9. KET filed a Motion to Dismiss Boone's appeal. In addition to the arguments raised with respect to Witt's appeal, KET argued Boone's appeal was untimely under the provisions of KRS 18A.095(29).

10. In an Order dated November 21, 2012, the Hearing Officer denied the Motion to Dismiss. The Hearing Officer found the provisions of KRS 18A.095(29) did not apply, because the Appellant had received written notice of his right to appeal; he just did not have an appeal form attached to his notice. The Hearing Officer further found that based on the Personnel Board's Remand Order (involving Witt and the other KET employees), failure to attach the appeal form meant the time to file an appeal never started to run. There was nothing in the record to establish Boone's appeal was untimely.

11. In an Order dated November 21, 2012, the Hearing Officer also consolidated Witt's and Boone's appeals (along with four other KET Appellants), and joined the Personnel Cabinet as a party to consider the matter at the December 2012 Personnel Board meeting. Pursuant to 101 KAR 1:365, Section 6(2), the matter was also

to be designated as an Interim Order to be reviewed by the Board. (See Attachment B to this Order.)

12. KET filed a motion with the Personnel Board, requesting all the appeals be dismissed. The Personnel Cabinet filed a Motion to Intervene, and Boone filed a response. In an Order dated January 2, 2013, the Board Denied the Motion to Alter, Amend or Vacate, and returned the appeals to the Hearing Officer. (See Attachment C to this Order.)

13. Following several pre-hearing conferences and discovery between the parties, these matters were scheduled for evidentiary hearing in June 2013. Other Appellants requested a continuance and the cases were severed to the extent that the appeals of James D. Witt, Jr. and Thomas Boone proceeded in June 2013, and the others were rescheduled to another date.

EVIDENTIARY HEARING

14. At the outset of the evidentiary hearing, it was established that Witt was asserting claims of race, color, age, religion and sex discrimination, as well as retaliation. Boone's claims were race discrimination and retaliation.

15. Prior to the start of testimony, counsel for Boone made a motion to exclude KET from presenting evidence that it fired his client based upon incompetence, weak technical ability or disruptions in the workplace. Boone argued that KET had provided supplemental answers to discovery only two working days before the evidentiary hearing, including these new reasons for dismissal. Prior to that time, he argued KET had only identified budget issues as the reason for Boone's termination. KET responded that these additional reasons for his dismissal could be inferred from documents it produced in discovery.

16. The Hearing Officer overruled Boone's motion, and stated KET could present testimony regarding the additional reasons for Boone's dismissal. Counsel for Boone was informed he could argue anything he deemed appropriate in response to these, including recent fabrication. Witt did not join in the motion.

17. While arguing this issue, counsel for KET agreed that KET considered the six employees in Master Control as similarly situated to Boone. These employees were identified as Lee Delaney, Keith Marshall, Tony Gwynne, James Witt, Thomas Boone, and Charles Lister.

18. In a brief opening statement, counsel for Boone stated that they would prove that race discrimination and retaliation were substantial factors in Boone's firing in September 2010, and in the retention of others in his work group.

19. In a brief opening statement, Witt stated he would prove that he and others were terminated based on discrimination and retaliation, and other workers who had negative information in their personnel files were not terminated.

20. KET waived an opening statement.

THOMAS BOONE'S CASE

21. By agreement of the parties, Boone presented his case first. He called as his first witness **Rick Melton**.

22. Rick Melton is retired from KET, and currently works for the Meridian Management Corporation, managing two courthouses. He was employed with KET from May 1990 through May 12, 2009. He served as the Master Control Supervisor. He also had various responsibilities at various times over studio engineering and facilities engineering.

23. As the Master Control Supervisor, Melton was the first-line supervisor for Boone and Witt. He described Master Control as the "hot seat." He stated they control what goes on the air. In addition, he supervised the Ingest area. Melton stated Ingest involved taking media from different formats and storing it to a server to be shown on the air at a later time. He stated all things are done from a computer server at the present time, and tape is only used for legacy media. He stated the Ingest employees are responsible for setting the end points so that a good product goes on the air.

24. Melton testified he hired Boone and inherited Witt from the transmitter section. He testified Boone and Witt worked third shift, and he rarely received any type of calls while they were working. He stated the discrepancy reports would show that they were involved in very few problems.

25. Starting in 2008, Melton stated they were involved in a transition to digital operation. He stated during this time the third shift would "Ingest" all night while they were working. He described Boone and Witt as dependable, employees he could count on to always be there and to cover for other employees. Melton stated that Boone arrived from the University of Kentucky television, where he served as a technician. He described Boone as trainable, and able to adapt. He stated Boone often had to "Ingest" material the entire 7 to 8 hours he was working, and have it ready for

broadcast the next morning. Melton testified that none of the employees who worked for him ever refused any type of training.

26. Melton testified that in 1998 Tony Gwynne was hired. He stated at the time the job was posted and they interviewed 8 or 9 employees. They recommended Lorendes Via, who Melton described as an Asian from Channel 27, as the best candidate. Melton described him as "smart as hell, and real good for the job he was hired." Melton cleared this with his supervisor, who told him to call Mr. Via and tell him he started in two weeks. Melton was later told to rescind the offer, because Virginia Fox, the CEO of KET at the time, wanted to hire "the black guy," referring to Tony Gwynne. Melton stated Gwynne was five down on the list. Melton informed them he had already made an offer, however, he was told to hire Gwynne. He described it as a disaster, which resulted in litigation.

27. Melton testified Gwynne was hired as a Master Control operator, and he struggled after his hire. Melton stated he thought Gwynne was not a strong candidate because of his answers to interview questions, and information from his references at Channel 18. According to Melton, Tony Gwynne's race was the only determining factor that he was selected for the position. Melton agreed with the description of Gwynne as being disinterested and disengaged with his work.

28. In contrast, Melton stated he thought the third shift (Boone and Witt) rarely needed his attention. He felt they were good at multi-tasking while running a three-channel operation.

29. Melton also identified Jerome Johnson as an African-American Ingest operator on second shift. He stated that Johnson did not prefer Master Control, however, he would perform Master Control work if requested. Melton did not recall any disciplinary action against Johnson while he was there.

30. Melton identified Charles Lister as a Master Control operator. Melton did not recall an incident where Lister left work to visit his spouse. When asked about Lister's temper, Melton stated he could get stirred up and loud. With respect to work, Melton stated that Lister was fine if everything was running smooth, however, he did not handle stress very well. Melton felt like he received unnecessary phone calls at times when Lister was working.

31. In general, Melton stated there were disagreements with the various staff in his area. He stated this was common when dealing with technical people.

32. Melton testified Witt transferred from the transmitter division and caught on fairly quickly. He stated he had no problems with Witt, and that Witt rarely called when he was working. He stated Witt was available to work holidays.

33. Melton described Master Control as the last line of defense. He stated what was seen in Master Control was what the public would see on the air. He stated that in order to work in Master Control, it was necessary to multi-task. He stated the weekends were the worst, and that some tasks involved manual operation.

34. Melton testified that Friday nights were particularly stressful, with live programs and feeds from PBS. He stated in some instances there was a very short period of time to trim programs before they went on the air. Melton stated there were problems with Charles Lister under these stressful conditions. He did not have similar problems with Witt.

35. Melton stated he had heard rumors about equipment being taken. He stated he had heard reports from several individuals, probably including Witt. He stated it could not be substantiated that equipment was taken. He did tell Witt and Boone to report if they saw anything on third shift.

36. Melton stated he recalled Witt reporting problems with Lister's temper. He stated there were occasions when Witt documented on his timesheets that his relief arrived late.

37. Melton was not aware of KET employees involved in outside businesses when they were supposed to be working. He was aware that some employees freelanced.

38. Melton recalled an incident involving John Heflin and Chuck Wiley. He stated that while Wiley was working, there were some changes to the satellite receivers. He is not sure if Heflin did anything on purpose. Melton acknowledged that Witt called Heflin on the cell phone to solve the problem. He stated he recalled a correction was made within 30 seconds of the McLaughlin Group going on the air.

39. Melton stated he had a concealed carry license. He was aware that Boone carried a gun at work. Melton did not recall anyone alleging that Witt carried a gun. He did not hear a report that Witt's briefcase was broken into.

40. Melton described the work as stressful, and at times, overwhelming.

41. Melton recalled an employee named Eli. He did not know anything about the employee's religion. He stated he was not aware of Witt's religion. Melton did not recall Lister making any religious comments.

42. Melton testified he did not know Witt's age.

43. Melton stated that other employees complained about Witt and Boone. He stated Virginia Fox was CEO at KET until 2004. She was followed by Mac Wall and Shae Hopkins. Melton resigned in May 2009.

44. Melton stated he took no steps to fire Tony Gwynne. He described him as a decent guy who lacked some technical skills, however, he did not think it was worth it to try to fire him. Melton felt like his job would have been on the line had he recommended such a firing.

45. Melton described himself as a supervisor who stood up for his employees. He gave as one example, defending the ten-hour shift for Master Control operators.

46. The next witness was **Shae Hopkins**, the Executive Director of KET. She has worked for KET for 27 years; the last three years as Executive Director. Prior to that, she served five years as Deputy Executive Director. She had a long history of involvement in development and fund raising, as well as production at KET.

47. During her tenure, Hopkins testified she was aware of two instances of falsifying timesheets or timecard fraud. Both instances resulted in suspensions. One involved Jerome Johnson, who was suspended without pay and lost comp time. Chuck Burgess, another employee, was suspended without pay for one week. She stated that she believes this particular infraction is not allowed by KET, and is considered serious by her. She stated that, depending on circumstances, this type of conduct could result in termination.

48. Hopkins testified that operating a side business using KET facilities or equipment is likewise prohibited. She stated she is aware of one instance involving a current employee, Matt Bone. She does not believe he was disciplined, however, he was counseled by his supervisor, and warned this behavior was not tolerated.

49. Hopkins stated she signed the dismissal letter for Boone on September 9, 2010. She stated the letter was prepared by Ron Brown, the Personnel Director. She stated Brown worked with the Personnel Cabinet and KET's attorneys on the language and termination process. She agreed the letter stated that the dismissal was without cause.

50. When asked to state the reason for the termination, Hopkins stated it was because of budget reductions. She stated that the sole basis for the termination was budget necessity. She added, however, that Boone's supervisor had issues with his technical abilities. This information came from Jim Rous and Fred Engle. At the time of his termination, Rous was Boone's first-line supervisor, and Engle was his second-line supervisor. Engle reported directly to Hopkins. Hopkins added that sometime before 2010, a decision was made to eliminate the third shift. She did not know the exact date of this determination.

51. Hopkins clarified that the overriding reason for the decision was the budget and the elimination of third shift. She stated other reasons included Boone's lack of technical abilities and issues with him not getting along with and intimidating co-workers. She stated she heard this from Fred Engle and Mike Brower. They reported to her Boone had made threatening comments that he had a gun at work so he didn't have to take any lip from anybody.

52. Hopkins stated KET had no written policy regarding firearms, and simply followed the state guidelines. As far as she was aware, carrying a weapon was okay at work as long as the employee had a concealed carry permit.

53. Hopkins also stated the terminations were necessary because of budget restraints, a number of retirements within KET, and the digital transition. She explained that the retirements were random throughout KET, and hit some areas harder than others. In addition, as a result of the digital transition, certain areas required more personnel than others. When asked if Boone was considered to work another shift other than third shift, Hopkins stated no.

54. Hopkins described Boone as a Master Control operator. She stated she was aware that he also performed Ingest duties, and stated this was common for the people in Boone's area.

55. Hopkins described the process for terminations as involving the senior directors who report directly to her. She stated they reviewed their staff, identified critical vacancies and positions which were less essential. She stated they were dealing with approximately 50 or more who had retired. She stated the only way to hire people to fill critical vacancies with recurring funds was to do terminations.

56. Hopkins identified Fred Engle as the Senior Director in Boone's area, which involved Master Control operations and the Program Ingesters. Two positions were eliminated in Engle's area, Boone's and Witt's. There has been an additional Master Control position eliminated since that time.

57. Hopkins stated that Boone and Witt were selected primarily because the third shift was eliminated. She stated, however, that she believed Fred Engle did some assessment of his entire staff. She stated that the process was not just about termination, and they were identifying other skills which were needed. Most of the people who remained at KET took on additional responsibilities. She agreed that, in general, they tried to retain the employees who could contribute the most to KET's efforts going forward.

58. Hopkins did not know if Boone had any disciplinary actions in his record. Hopkins was not aware of any employee who was identified as disinterested or disengaged being retained. She also was not aware any employees were retained who were described as not being able to handle problems.

59. In addition to Fred Engle, she stated Mike Brower had significant input regarding the employees in Master Control. She said Brower took over after Rick Melton resigned. Brower was one of the co-leaders of the digital transition. She described Mike Brower, Fred Engle and Jim Rous as responsible for the restructuring in the Master Control area. She didn't know of any others who contributed, however, she said there may have been other supervisors.

60. In deciding who to dismiss, Hopkins stated she did not perform any independent investigation. She stated there was no discussion, such as, why was Jerome Johnson being retained, even though he had been disciplined for timecard fraud. She stated there were no questions about this.

61. Hopkins stated she had never heard Jim Witt identified as being "trouble." She stated she was not aware of Tom Boone being described as "trouble," other than what she testified about previously.

62. Hopkins testified that Ron Brown performed an administrative role in the dismissals. She also stated she had never heard that Boone had contacted the Auditor's office about concerns at KET.

63. Hopkins identified the dismissal letter for Witt, and it was introduced into evidence as Witt Exhibit 2. She stated she had heard there were general problems with Witt not getting along with other staff. She was not aware of whom. She stated Ron Brown and Donna Verhoven spoke with the Personnel Cabinet. She stated the Authority Board agreed with the recommendations for termination. She stated there were earlier terminations in 2008, and the Authority Board did not go along with the elimination of one position.

64. Hopkins testified the senior directors group included seniority as a part of their discussion, and they were aware of the seniority of the various employees.

65. Hopkins was aware that the State Police were looking into allegations of theft at KET. The theft involved microphones belonging to Roscor, the independent contractor working on the digital transition. She stated it might have been looked at internally by Ron Brown. As far as she knew, they were not sure if these microphones were ever at KET. She was aware that Jerome Johnson was accused of this theft, however, there was no evidence to support this.

66. Hopkins had not heard allegations that Jerome Johnson or John Heflin had an outside business while at KET.

67. Hopkins knew Mike Brower met with Boone and Witt about the elimination of the third shift. She does not recall any rumor that Jim Witt had a gun. She was told Tom Boone carried a gun. She stated she was concerned that an employee would feel they needed to carry a gun at KET. She stated the gun issue was not a factor in the terminations.

68. After the terminations, Hopkins stated there were raises and promotions for employees especially who took on more responsibilities. She stated these few employees received possibly a total of \$60,000 to \$70,000 in raises. She compared this with over a \$700,000 savings to hire individuals to fill the 13 vacated positions with benefits. She stated she did not believe KET hired 13 or 14 people after the terminations. She stated KET is currently at its lowest point in staffing in 30 years.

69. During examination from KET attorneys, Hopkins identified the members of the senior directors group who met and discussed the restructuring plan. She identified these employees, their job titles and their age as follows: Donna Verhoven, Senior Director of Finance and Administration, 48; Nancy Carpenter, Senior Director of Education, 61; Craig Cornwell, Senior Director of Programming, 58; Mike Brower, Senior Director of Production, 59; Fred Engle, Senior Director of Technology, 54; Julie Schmidt, Senior Director of External Affairs, 48; Michelle Ripley, President of the Commonwealth Fund, 48; and, Tim Bishoff, Senior Director of Communications, 34. Hopkins stated she was 54 in 2010. She stated that all members of the committee were white.

70. Hopkins described the process as each Senior Director giving an assessment of their area, including the positions they felt needed to be filled, and those which were less essential. They discussed positions which could be combined. They also identified positions with duties no longer necessary as well as new duties which

needed to be performed. The Senior Directors from the other areas would also offer input.

71. Hopkins testified they identified two positions in Master Control which were non-essential. She stated that part of the discussion included the fact that they knew the third shift would be eliminated. She stated there was not a big discussion within the group about Witt or Boone. She stated the discussion was more about positions than individuals.

72. Hopkins was told that Boone made a statement such as, "If he can't work the third shift, he didn't want to work at KET." Hopkins was aware of an insubordinate e-mail Boone had sent to Fred Engle. She considered this much less serious than timecard fraud. Hopkins was not aware if there was any consideration of training Witt or Boone for other jobs.

76. **Fred Engle** was called as the next witness. He served as the Senior Director of Technology at KET starting on May 2, 2010. Prior to that, he had worked with Roscor Corporation from 2007 through 2009. This was the contractor involved with KET's digital conversion. Prior to that, he worked approximately 28 years for a television station in Chicago. He testified that when he was hired he was the second-line supervisor of the Master Control and Ingest employees. He stated Jim Rous was their first-line supervisor.

77. During the four months or so they overlapped, Engle testified he rarely saw Boone. As far as he knew, Boone performed duties to Engle's satisfaction. Mike Brower and Jim Rous had already identified Tom Boone and Jim Witt as employees to be terminated when Engle started. Engle relied on input from Brower and Rous for his recommendation to Hopkins that Witt and Boone should be terminated. Brower provided documents suggesting eliminating these positions and keeping the best seven going forward. (Boone Exhibit 1, page 96.) Relying on input from Brower and Rous, Engle made his own recommendation to the Senior Directors group that Witt's and Boone's positions be eliminated, and they be terminated.

78. Engle was aware that Jerome Johnson had been disciplined, although he was not certain what for. Engle had no knowledge of Boone contacting the Auditor's office.

79. Engle created a document which listed all the Master Control and Ingest employees as Broadcast Operations Technicians. Both Boone and Witt were included in this document. Engle stated all the employees had sufficient knowledge and skill to perform the job duties. (Boone Exhibit 1, page 102.) The staff of Master Control and Ingest was also identified as proposed KET Broadcast Operations staff. They were all

shown on the same line, with the same title. There was no distinction between those employees who were performing Ingest Operations or Master Control. Engle testified that anyone who didn't have the skills for the position would be trained.

80. In a handwritten document introduced as Witt Exhibit 1, page 90, Engle described Tony Gwynne as disengaged, not helpful. He acknowledged these were negative comments. He identified Jim Witt and Tom Boone as trouble. He added the comment "gun" next to Boone's name. Both were listed as 7:00 p.m. to 6:00 a.m.

81. When asked why he identified Boone as trouble, Engle stated there were issues with performance and the ability to get along with staff. He stated he had learned there were issues with Boone's performance from Brower and Rous, although he did not recall any details regarding Boone's poor job performance. He stated the information regarding the inability of Boone to get along with staff came from Brower and Rous. He does not remember any specific details, and does not recall any other employees who could not get along with co-workers. Engle stated he wrote down "gun" because he had heard that Boone had brought a gun to work. He was not aware of Boone violating any policy, and the gun issue did not factor into Engle's recommendation to terminate Boone.

82. The comments regarding Tony Gwynne and Charles Lister also came from Brower and Rous. Engle understood Lister could not deal with problems, although he was otherwise capable. He referred specifically to events, such as Friday evening when things were busy, he understood Lister became upset when there were problems.

83. The document which Brower created existed before Fred Engle started. Engle stated he was told that Boone and Witt were weak performers who did not understand the system. Their termination was suggested before Engle started working at KET. The same chart also referred to Tony Gwynne as a below-average performer, trainable, but with very little interest. Charles Lister was identified as having difficulty dealing with pressure. Engle testified it was his understanding that the third shift Master Control basically just plays, and there are no real issues in the overnight hours, and there was a light workload. Engle commented that the technology had progressed, and KET was overstaffed in the Master Control and Ingest area.

84. Engle testified he recommended Jim Witt's termination based upon information from Jim Rous and Mike Brower. In addition, he received communications from Charles Lister that Lister had to follow-up and take care of issues which Jim Witt had not. Engle stated he did not independently verify this, and he accepted Lister's word. Engle admitted that Keith Marshall, Tom Boone and Jerome Johnson did not

report any problems with Jim Witt's work. Engle testified he was never informed of Jim Rous' plan for work for Boone and Witt after the third shift was eliminated.

85. Engle testified he saw his job as being to select the best seven of the nine employees he had in this area. He stated he relied heavily, though not exclusively, on the recommendations of Jim Rous and Mike Brower. He was not aware of Jim Witt's religion. Engle testified that the intemperate e-mail from Boone did not contribute to his recommendation to dismiss Boone.

86. The next witness to testify was **Jim Rous**. Rous testified he worked at KET from 1986 through 2011. He identified himself as the Maintenance Supervisor. He testified that after Rick Melton left and until Fred Engle arrived, Mike Brower was the supervisor over Master Control and Ingest. He saw himself as the go-between, since those employees rarely saw Mike Brower. In addition, there was no technical supervisor. Rous functioned as a go-between for Brower and the employees because of his technical skills.

87. Rous testified he did not have a lot of contact with Boone and Witt because they were on third shift. Rous's attitude was as long as they were staying on the air, things were going fine. He testified if one employee had a problem trimming a show and someone else caught it, he considered that to be okay. He was not aware of any serious issues with Jim Witt's or Tom Boone's performance.

88. Rous identified Witt and Boone as hard-working and reliable employees. He thought they were catching on to the digital transition as well as could be expected under the circumstances. Rous testified it was difficult to get Boone and Witt the same training as the other employees because they worked on the third shift. He stated that Witt and Boone were willing to come in at different times to get training.

89. Rous denied he participated in any evaluation of the work of the individuals in Master Control or Ingest. Rous maintained that especially in respect to Witt and Boone, he did not feel he could, because he was not there on third shift when they worked. He stated that anyone who wanted to evaluate their work should carefully review the discrepancy reports and observe them as much as possible.

90. Rous identified Keith Marshall as the best of the employees in Master Control. He stated Marshall did his job and "didn't bad-mouth anyone." One problem in Master Control and Ingest was the bickering among staff, especially between shifts, according to Rous. He didn't think it amounted to much more than personality conflicts. Specifically with respect to Tom Boone, Rous testified that the guys would "ride him pretty hard." Rous was aware that Boone carried a gun, and didn't like the way the other employees treated him.

91. Rous testified he did not identify either Witt or Boone as trouble. He also did not suggest that either was a weak performer or that they did not understand the system. He did not suggest that Witt, Boone or anyone else be terminated. Rous also testified he was not aware of the terminations until Fred Engle called him at home and told him that 13 people had been terminated at KET. Rous also denied having regular meetings with Mike Brower. He said they would pass in the hall and exchange some information.

92. Rous was aware that Jerome Johnson had been disciplined for timecard fraud. Rous stated he was a witness, and he participated in reviewing security tapes to verify that there was a discrepancy between the time Johnson was listing on his timesheet and the times he was leaving KET.

93. Rous testified that Tom Boone informed him of Johnson leaving early. Three months after Johnson was suspended for timecard fraud, Rous received an e-mail from Tom Boone that Johnson had left early the night before. Rous forwarded the e-mail to Mike Brower and Ron Brown. (Boone Exhibit 4.) He did not know what happened at that point.

94. Rous and Brower met with Boone and Witt on November 24, 2009, to discuss the digital conversion project and the fact that it would most likely result in the elimination of the third shift in Master Control. Following this meeting, Witt met privately with Rous and informed Rous that Boone intended to meet with the Auditor's office about various issues at KET. Rous stated he told Witt that he didn't think it was a smart thing for Boone to go to the Auditor's office, and he advised against it. On December 2, 2009, Rous forwarded an e-mail to Brower describing what Witt had said following the November 24, 2009 meeting. (Boone Exhibit 3.) Rous testified he advised Witt because he wanted to protect Boone from any problems at KET. Rous felt that Boone needed protection because he was not a merit employee.

95. Rous testified that during this time everyone at KET was scared for their jobs. He stated that in 2008 eleven people were let go. Every time the Board met, there was fear throughout the building. Prior to the November 24, 2009 meeting, Rous had suggested to Brower that Boone and Witt be reassigned to transfer the material from the video library to the servers. He felt like Brower thought this was a decent idea, however, it never took place because of the budget situation. Rous admitted they just didn't need more people during the day.

96. With respect to Mike Brower, Rous stated he had discussions about the fact that Tom Boone had a gun. With respect to Charles Lister having problems and temper tantrums, he believed Mike Brower saw this. He said it was obvious, and these

events occurred while Brower was at work. As far as Tony Gwynne being disinterested or disengaged and not helpful, Rous did not have any discussions with Fred Engle. He stated Mike Brower could have seen this for himself, because Gwynne was on day shift.

97. Rous stated that after the fact he heard from Fred Engle that Boone and Witt were terminated because they were doing away with third shift, and because of the budget issues. He felt that the fact he wasn't given advance notice was further proof that he was not really considered their supervisor.

98. Rous testified there was a rumor that Jim Witt carried a gun, however, it was never substantiated. Witt told Rous that he didn't carry a gun.

99. Witt told Rous that Tony Gwynne was late on occasion. Witt would make a notation on his timesheet that he couldn't leave because his relief was late. On occasion, Gwynne would forget when he filled out his timesheet, but he would always change it when he was reminded.

100. Rous thought that the shifts were verbally abusive to each other. Rous stated that Heflin and Boone had problems. Rous was not aware of Witt's religion or Eli Simms' religion. He never heard any derogatory comments about religion.

101. Rous denied he had any meetings with Fred Engle regarding Witt or Boone. Before the terminations, Rous testified there was a shift change; Witt and Boone would come in the afternoon, work the night and leave around midnight.

102. Rous stated Lee Delaney was promoted to supervisor prior to the terminations. At the November 24, 2009 meeting, while they discussed the gun, Boone talked about the fact that Rick Melton had asked them to perform security functions at KET during the overnight shift. Rous stated Boone may have made the comment that he had the gun to intimidate his co-workers.

103. The next witness was **Michael Brower**, the Senior Director for Production for KET. He served in that position since 2004. He has worked a total of 17 years with KET. From May 2009 (when Melton left) until May 2010 (when Engle started), Brower had responsibility for Master Control and Ingest. He identified Jim Rous as the first-line supervisor, and he was the second-line supervisor.

104. Brower stated that while he served as second-line supervisor, he was doing an analysis of the work group at the request of Shae Hopkins. From daily consultation with Jim Rous, he determined that others were more capable than Tom Boone. Brower could not point to anything specific that Rous said, however, the general tone of the conversation was that Boone "didn't get it."

105. Brower also received input from others about problems on the third shift. Charles Lister complained he had to cover for mistakes made by Boone and Witt. Brower does not remember specific complaints from Lee Delaney. John Heflin was upset because Boone had a gun.

106. From discussions with Rous, Lister, Delaney and Heflin, Brower determined that Boone did not understand the digital conversion, and was resistant. He also felt there were ongoing problems with Boone.

107. Brower stated he put Heflin in charge of the exchange of information with the other shifts, including the third shift. He felt there were disagreements and misunderstandings between Heflin and the third shift. He specifically identified Boone as being resistant to accept the necessary changes.

108. Brower stated that in a meeting on November 24, 2009, with Rous, Witt and Boone, he informed them they were probably going to eliminate the third shift. Brower stated he heard Boone was resistant to working a shift other than third. He could not point to any particular time when Boone refused to work any shift.

109. Brower testified he was involved in the suspension of Jerome Johnson. He believed the disciplinary action of a suspension was appropriate under the circumstances. He stated the HR Department determined the punishment. Brower had a sense that Johnson improved following the suspension. He did not have any information regarding the e-mail where Boone identified Johnson leaving early three months after the suspension. He did not recall the e-mail, which was admitted as Boone Exhibit 4. He assumed someone checked Johnson's timesheet to see if there was any irregularity.

110. Brower did not recall asking Jim Rous to send him an e-mail regarding Witt's statement that Boone was going to the Auditor's office (Boone Exhibit 3.) He stated that December 2, 2009, was the first he had heard that Boone was meeting with the Auditor's office. He stated he did not talk to anyone about this in response to Rous' e-mail. He was not concerned that Boone was going to the Auditor's office.

111. Brower stated that he engaged in discussions with Fred Engle regarding the employees in Master Control and Ingest. He stated he felt that Tony Gwynne was helpful, although he did not grab on to the digital conversion. He felt that Gwynne did his job satisfactorily. Brower agreed that Charles Lister could not deal with problems, and had a hard time if something went wrong.

112. Brower agreed that he told Engle that Witt and Boone were unable to get along with co-workers, especially on other shifts, and were not keeping up with the digital conversion project. This information that Brower relayed to Fred Engle was obtained primarily from Jim Rous. Some of it came from Boone's co-workers. He stated that Boone also complained, although he did not recall any specifics.

113. Brower stated he created the chart on page 96 of Boone Exhibit 1, right after Fred Engle came on board. He identified Boone and Witt as weak performers because they didn't understand the system. Again, this was information he obtained from Jim Rous. Brower testified that Boone and Witt were recommended for termination because they were going to eliminate the third shift. Eventually he felt that Master Control would become completely unmanned, and that this was the industry trend.

114. Brower testified that at the meeting on November 24, 2009, Tom Boone stated he carried a handgun to intimidate co-workers. While Brower felt Boone had a right to carry a gun if he had a concealed carry license, he did not think he had the right to intimidate co-workers with it. He spoke to others about his concerns, including the CEO and Human Resources. This issue of intimidating co-workers with a gun contributed to Brower's feeling that Boone should be terminated.

115. When Jim Witt stated he did not carry a gun, Brower believed him. Brower stated he made it clear that no one should be carrying a gun on KET's behalf. Brower sent an e-mail to Master Control and Ingest employees on November 15, 2009, informing them they should not be engaging in any security functions on KET's behalf. He specifically informed them that there was no expectation that any KET employee should carry a weapon for security purposes for KET.

116. After being questioned extensively by Witt about concerns that Witt could not get along with other employees, Brower stated the reality was that the third shift was going away, and he had informed Witt and Boone about this in November 2009. Massive budget cuts required reorganization and there was no need for Master Control employees on the third shift. There were other positions which needed to be filled, which were not filled. When it was determined that they would need to eliminate 13 positions, the 2 Master Control operators on third shift were included in that decision. Since the time of these terminations, they have dropped the weekend shift from Master Control also. Brower stated they are headed toward an unmanned Master Control, which is the industry standard for 50% of PBS affiliates. Brower stated the elimination of the third shift was a much more important reason for Boone's and Witt's termination than any problems they had with co-workers.

117. Brower stated they never sat down and talked about the skills of various employees such as Witt or Charles Lister. He stated, however, that Witt did create a lot of problems at KET by fabricating rumors.

118. In response to questions from KET, Brower stated that the microphone which Jerome Johnson was accused of stealing never arrived at KET. There was a problem with an inventory list held by Roscor which led to the confusion. The investigation confirmed that there was no theft at KET. Brower disputed Rous' testimony that Rous did not give any input regarding the skills of the employees. Brower also stated that Master Control and Ingest were in disarray at the time Rick Melton left. Rous would come to Brower's office every morning and they would discuss the difficult situation in Master Control. Brower felt that Master Control and Ingest were separate. He felt that Boone and Witt were at the bottom of the employees at Master Control. He stated he would feel the same way if you included Ingest.

119. Brower stated he did not do anything when he heard of Tom Boone going to the Auditor's office. He felt it was just more of the "constant litany of nonsense" about employees going to see the Governor or other officials. He was not aware of Boone raising any serious concerns about operations at KET. Brower denied being involved in Jim Rous' advice that Boone should not go see the Auditor.

120. **Ron Brown** was the next witness called. He is the Human Resources Director for KET and has served in that position for almost five years.

121. Brown testified that neither Boone nor Witt was ever disciplined while they worked for KET. Brown did not play a role in deciding which employees would be terminated. Once the 13 employees were selected for termination, Brown reviewed their personnel files for any "red flags." He stated he did not find any. He drafted the dismissal letters for Witt and Boone.

122. Brown testified that Boone reported two problems to him. He stated that in late February 2010, Boone reported John Heflin was acting like a boss and was sabotaging his work. Boone reported there might be some type of conspiracy involving John Heflin and Mike Brower. Brown stated he spoke to other employees, including Lee Delaney, Jim Rous and Doug Campbell. Brown came to the conclusion that Heflin and Boone did not get along and "they were acting like kids." Brown did not take any action as he did not know how to stop grown men from such actions.

123. Brown did not find any evidence that Heflin had sabotaged Boone's work. He reviewed the matter with Lee Delaney, who told Brown he thought that Boone did not understand the new system.

124. Brown reported that after Fred Engle started, Boone came to him a second time complaining of a change of work schedule. Boone reported that Fred Engle was the worst supervisor he had ever seen; that he wouldn't be pushed around by Engle; and that Engle had better stay out of his way. Boone also discussed the fact he had a heart condition, and the law was on his side. Brown suggested Boone calm down, and that he should approach Fred Engle in a professional manner. Boone responded that Brown should tell Fred Engle what he said. Brown reported he did.

125. Brown was involved in the decision to suspend Jerome Johnson, and take 120 compensatory hours from him for falsifying his timesheet. The penalty was based on Brown's recommendation. It was approved by Ms. Hopkins. Brown stated he also consulted with Mike Brower on this matter. Brown stated they did not dismiss Jerome Johnson because of consistency. Previous cases had resulted in suspensions.

126. Brown did not recall receiving the e-mail introduced as Boone Exhibit 4, suggesting that Johnson had left early a couple of months after his suspension. Brown did not recall exactly what he did, but he was confident he took some action.

127. Brown stated Witt and Boone were the only employees who did not provide him training request documents during the digital conversion.

128. Brown identified 13 individuals who were hired by KET after the terminations. He stated he could not identify where any cost savings were from the terminations, and that he was the wrong person to ask, as he was not involved in budget issues.

129. Brown stated that he never received an EEO complaint from Witt or Boone before they were terminated.

130. Admitted into evidence during Brown's testimony was KET Exhibit 2, which was a P-1 showing Tony Gwynne's appointment per Kentucky Authority for Educational Television resolution on September 1, 1997.

131. Also admitted into evidence was KET Exhibit 3, a Kentucky Authority for Educational Television resolution appointing Boone effective September 1, 2004, under the provisions of KRS 18A.115(1)(f). Appellee's Exhibits 4 and 5 were similar resolutions with respect to Witt's appointment on August 16, 2001.

132. Under questioning from Boone's attorney, Brown admitted that while the resolution referenced the statute, it did not state that the positions were exempt. Brown stated that these resolutions were the mechanism used by the Kentucky Authority for Educational Television to exempt employees from the classified service.

133. Brown testified that two out of 123 employees for KET were merit employees. All of the other employees, including Boone and Witt, were unclassified. He stated the main difference was that the merit employees could only be dismissed for cause, while unclassified were considered "at will." Unclassified employees could be terminated for any non-discriminatory reason.

134. Brown also described an incident where Boone came into work three hours late, and indicated on his timesheet that he had worked the entire day. Apparently there was confusion regarding what time he was scheduled to start on that particular day. His supervisor, Jim Rous, would not sign the timesheet. Brown worked out a compromise where Boone could get paid by using leave time for the hours he did not work.

135. Appellant, **Tom Boone** was his own last witness. He testified he worked for KET from September 1, 2004, through September 10, 2010, as a Master Control Operator. He stated most of the time he worked the third shift, which was midnight through 6:00 a.m., although he came in late afternoon on one day to reach his 37.5 hours. He was normally scheduled to leave at 6:00 a.m., however, there were occasions when he worked past 6:00 a.m. Prior to his employment at KET, Boone worked for the University of Kentucky for 15 years as a Broadcast Engineer. He stated he was responsible for UK's own cable system, and served as its manager. He was able to repair equipment, operate a camera, and also work on audio and lighting.

136. Boone reported there were personality conflicts and what he referred to as "spats" with co-workers. He had issues with John Heflin in 2007. He described incidents where Heflin was throwing his arms around. He stated Rick Melton described Heflin as "just venting." Boone filed a complaint with the Personnel Department at KET, however, he did not hear any more about it.

137. Boone described occasions when he had gone to Heflin to ask for information about work, and Heflin responded that Boone should please go away and leave him alone.

138. In March 2010, Boone also complained to Ron Brown about Heflin.

139. Boone also stated he sent e-mails to supervisors, including Jim Rous, about Jerome Johnson leaving early.

140. Boone stated he spoke with Sally Hamilton from the Auditor's Office, hoping to see Auditor Crit Luallen. Boone had complaints about staff at KET using state equipment for personal business, and also about missing equipment. He tried to

set up a meeting, however, it never took place and he only spoke with Ms. Hamilton over the phone. At some point he learned that Sally Hamilton used to work at KET. Boone complained specifically about equipment referred to as an "editor" being taken out of the facility, and being wired at someone's home. He also stated that state laptops were used for personal business. Boone also complained about the KET parking lot being used to raise money during UK football games. He felt the Auditor should look into exactly where that money went.

141. Boone discussed the fact that he was going to the Auditor's office with Jim Witt. He did not intend for Witt to share this information with anyone. Boone intended to keep this information secret, because he was afraid it would reflect negatively on him if it became known he was going to the Auditor's office. Boone testified he is concerned that is, in fact, what has happened.

142. Boone testified he attended the November 24, 2009 meeting with Jim Witt, Mike Brower and Jim Rous. His call to Sally Hamilton at the Auditor's office took place before this meeting. Despite the fact that Brower stated the third shift would be eliminated, Boone was not concerned about his job. He stated that if KET let anyone go, he felt he had seniority over Charles Lister. Boone identified Lister as white. In addition, he felt he was more qualified than others who worked in Master Control. He specifically noted his experience with working through a digital conversion at the University of Kentucky. Boone did not believe his firing was fair.

143. Boone testified no one ever told him they thought he was having problems at KET with the digital conversion. He did not know there were plans to keep seven of the nine employees in Master Control and Ingest. Boone testified he should have been kept.

144. Boone testified he was surprised KET kept Jerome Johnson. He felt he had been suspended for timecard fraud, and could only perform Ingest duties. Boone was also surprised that KET kept Tony Gwynne, who had a history of arriving late. Boone was surprised they kept John Heflin, who Boone alleges had stated he wanted people dead.

145. Boone testified he got along with Mike Brower. He stated he only met Fred Engle three times, and the last time was when he was given his termination papers.

146. Boone stated he had planned to work until he was 70. At this point, he would like to receive his back pay. He is not interested in returning to work at KET, because he believes the atmosphere is too hostile. Introduced as Boone's Exhibit 6 was a document outlining the relief Boone requested regarding his appeal.

147. Boone testified he overlapped with Jim Witt one day per week, on Tuesday. Boone worked the first part of the week, and Witt worked the second part.

148. Boone testified Tony Gwynne was late 90% of the time. He stated that Jerome Johnson left early, and Boone would report this to Jim Rous through an e-mail or a written note. When Jerome Johnson left, Boone testified he had to do his work. He testified Johnson would leave before 11:00 p.m., and sometimes as early as 8:00 p.m.

149. Boone stated Rick Melton had security monitors installed when they stopped using security guards overnight. Boone stated that people were in and out of the building, and that one of the security doors did not properly latch all the time.

150. Boone stated he carried a gun at KET, because he was ordered to watch the monitor and patrol the building. He acknowledged he and Witt were told to monitor KET on third shift.

151. At the conclusion of his testimony, Boone rested his case. KET made a motion for directed verdict on the claims of retaliation and race discrimination. The motion was denied.

JAMES WITT'S CASE

152. Jim Witt called **Doug Campbell** as his only witness. Campbell has been employed by KET for 23 years. He served as a Production Manager for approximately 15 years, where he supervised four or five employees and six to eight interns. He has been assigned as an Ingest and Master Control Operator since December 15, 2008.

153. Campbell stated he worked with Jim Witt, and their shifts overlapped for approximately one hour. He considered Witt to be a good worker, with good aptitude and a team player. He felt that Witt had a good understanding of changes that took place at the workplace. He felt Witt was good at solving problems. He stated the discrepancy sheet would show who had problems at work. Campbell stated there were two people in Master Control during the day, and one at night.

154. Campbell described a daytime clique, including John Heflin and Charles Lister. He felt they both (at times) could be unprofessional. He recalled an occasion when Lister was singing a song at work about today being the day he would run Jim Witt out of KET. Campbell never heard any comments about Witt's religion.

155. Campbell acknowledged there were security cameras in Master Control. He stated that even with automation, certain things still needed to be reset by a person. He stated the staff in Master Control was also responsible for monitoring transmitters. If they noted a problem, their job was to contact people in the field.

156. Campbell described occasions when Charles Lister threw temper tantrums. He stated he would holler, scream, curse, and in general, act unprofessionally. Campbell described John Heflin as engaging in unprofessional behavior which he described as childish. Campbell had heard rumors of the existence of a hit list, concerning people getting fired. He was aware that there was a rumor the night shift would be eliminated.

157. Campbell stated that he spoke with Ron Brown about issues involving John Heflin and bullying in Master Control. Campbell was unable to offer an opinion if Jim Witt was treated unfairly. He stated he had no problems with Witt, and Witt did good work, however, no one asked him about Witt's work.

158. Campbell described Tom Boone as a competent, capable Master Control operator. He stated he worked with Boone for a half-hour to an hour four days per week. He was not aware of Boone having any difficulty at work. Campbell also worked with Tony Gwynne, and stated he occasionally would come in late.

159. Campbell testified that when he spoke with Ron Brown about the issues involving Tom Boone and John Heflin, he felt that Jim Witt might have exaggerated any feud which might exist. Campbell stated he later had more problems with Heflin himself, and some of the concerns made more sense.

160. Campbell testified they used to work four days per week, and since Fred Engle arrived, they have worked a five-day schedule. Campbell was not aware of a VHS and DVD player available near Master Control. Campbell stated he is 58 years old.

161. Campbell was not aware of anyone who had ever called Jim Witt or Tom Boone "trouble."

162. Campbell attended a meeting in December 2008, when Nancy Carpenter said they wanted younger people. He also stated it was clear they wanted people who would adhere to policy. In Campbell's opinion, they were looking for a smaller, more flexible KET, similar to the military, where you have a small, elite group to face challenges. At the same meeting, Campbell testified Mike Brower stated they would be happier in production, because "all the jackasses were gone."

163. At the conclusion of Doug Campbell's testimony, Witt rested his case. The Hearing Officer inquired whether Witt would offer any testimony on his own behalf. Witt declined.

164. KET offered a motion to strike the testimony of Doug Campbell regarding the statements Nancy Carpenter made at a meeting in 2008. KET stated Witt did not provide this information in response to a discovery request. The Hearing Officer overruled the motion, finding there was no indication Witt was aware Campbell would offer this testimony and that he had not withheld anything in discovery.

165. KET also made a motion for a directed decision. The Hearing Officer granted KET's motion with respect to Witt's claims of sex discrimination, religious discrimination, age discrimination and color discrimination. The motion was denied with respect to race discrimination and retaliation.

KET's CASE

166. KET called Lee Delaney as its only witness. Delaney is the Broadcast Operations Manager. He has served in that position in an acting capacity since September 1, 2010, and in an official capacity since March 2011. Delaney testified initially he became Acting Supervisor on September 1, 2009, and officially in March 2010. Later in his testimony it was determined that this was in error, as he had only been Acting Supervisor for a week or ten days prior to the dismissals in this case.

167. Delaney had been with KET for a total of 22 years, beginning as a Foundation employee for four years and nine months. He later became a state employee and worked as a Broadcast Technician and a Master Control Engineer. From 2000 through September 2010, Delaney performed the same job as Witt and Boone. Delaney worked as Master Control Engineer from 5:30 a.m. through 3:00 p.m., Sunday through Wednesday. He overlapped with Boone four days per week, and with Witt one day per week for approximately one-half hour.

168. Delaney testified that KET went through some major changes during the digital conversion project. He stated they went from a tape-based system to a server-based system with Ingest. Delaney could not speak as to how well Witt or Boone caught on to the digital conversion project. He stated employees in that area did not receive a lot of support at that time, and they were on their own. Delaney testified that they "all received the same training, or lack thereof."

169. Delaney described some problems he observed with Boone's job performance. There were occasions when Boone would work in Ingest, and a program

would not be trimmed correctly. He stated there were other occasions where a recording was not valid.

170. With respect to Witt, Delaney testified that there was an incident involving the telefund on the Kentucky channel, where they aired the same segment four times after pledge breaks, instead of new segments. Delaney was asked to come in after the fact, and to try to figure out what went wrong.

171. Delaney described another incident in the Spring of 2009 when, following a time change, the recording time was not changed to match with the time change.

172. Delaney described an incident where Boone thought he had been sabotaged by Heflin. He stated there was an auto-enabling button which was turned off. His conclusion was that there was no sabotage on this occasion. Someone had simply forgotten to turn the button back on.

173. Delaney was asked to look at the assessment of the employees on page 96 of Boone's Exhibit 1. He agreed with the assessments of Keith Marshall and Charles Lister. He felt the assessment of Tony Gwynne was a bit harsh, and that Gwynne was an average employee who wanted to do a good job. He stated he agreed, for the most part, with the assessment of Tom Boone and Jim Witt. He agreed with the assessment of John Heflin and Jerome Johnson. He stated he had never seen the document before being asked about it at the hearing.

174. Delaney testified it was common for Boone to wear a gun on his hip at work. He stated this added to a stressful situation at work. Delaney identified a television with a DVD and VHS hook-up in the workplace. When asked, he stated he never observed Boone watch a movie on that equipment. Delaney described the situation in Master Control as tense. He stated there was a lot of pressure; they had gone through a huge digital conversion project, and there were a lot of personalities which did not get along.

175. He stated the situation is better now, he believes in part, because the employees know they have a supervisor who is supporting the employees.

176. Delaney testified that in some ways he felt that Boone and Witt were more interested in what was going in the security cameras than what was going on on-the-air. When questioned how he could make this determination, if their shifts only overlapped 30 minutes per day, Delaney agreed he did not have specifics.

177. Delaney stated he was not consulted in any way regarding the terminations, and had no knowledge they were going to happen.

178. At the conclusion of all testimony, KET renewed its motion for directed decision on all remaining claims. The motion was denied and a briefing schedule was established.

FINDINGS OF FACT

1. Jim Witt was hired as a Senior KET Broadcast Technician, effective August 16, 2001. By resolution of the Kentucky Authority for Educational Television, his appointment was pursuant to the provisions of KRS 18A.115(1)(f). He was originally assigned to the Transmitter section. (KET Exhibits 4 and 5, and Testimony of Rick Melton.)

2. Effective May 1, 2004, Witt was transferred to Master Control. He retained the same class title, however, he was referred to as a Master Control Operator. While working in Master Control, Witt worked on the third shift, and usually was scheduled to until 6:00 a.m. the following morning. Witt was considered a dependable third-shift employee who was able to work his shift without much assistance from his supervisors, who were not on site at the time. (KET Exhibit 6 and Testimony of Rick Melton and Jim Rous.)

3. Tom Boone was hired as a KET Operations Technician Senior, effective September 1, 2004, by Kentucky Authority for Educational Television resolution. The resolution stated it was passed "under the provisions of KRS 18A.115(1)(f)." Boone was assigned to the third shift primarily, and worked in Master Control. (KET Exhibit 3 and Testimony of Tom Boone.)

4. Boone was viewed by his supervisors at KET as a competent and capable Master Control operator, who was dependable. (Testimony of Rick Melton and Jim Rous.)

5. From 2008 through 2010, KET was going through a digital conversion project. The employees who worked in Master Control and Ingest operations were required to receive training on working with the new equipment. As a result of the digital conversion, less manual operation was required in Master Control, and between November 2009 and September 2010, management at KET decided to eliminate the third shift in Master Control. (Testimony of Shae Hopkins, Fred Engle, Jim Rous, Mike Brower and Witt Exhibit 4.)

6. Rick Melton served as the Supervisor of Master Control until he resigned in May 2009. In this capacity, he was the first-line supervisor of both Witt and Boone.

When Melton resigned, his position was not filled. Master Control and Ingest operations were reassigned to Mike Brower's supervision as Director of Production/Operations. There was conflicting testimony as to whether or not he served as the second-line supervisor or the first-line supervisor of Witt and Boone. Brower claimed that he was the second-line supervisor, and that Jim Rous was the first-line supervisor. Shae Hopkins and other witnesses agreed with this. Jim Rous did not see himself as the first-line supervisor of either Witt or Boone. Rous described himself as a go-between between the workers and Brower. The Hearing Officer believes the distinction is not terribly significant, and in any event, Rous functioned as the first-line supervisor following the resignation of Rick Melton. Rous served in this capacity for the time period after Melton's resignation until the arrival of Fred Engle. (Testimony of Shae Hopkins, Fred Engle, Jim Rous, Mike Brower; Witt Exhibit 2 and Boone Exhibit 2.)

7. In May 2010, Fred Engle was hired at KET as the Senior Director of Technology. In this capacity, he took over the supervision of Master Control and Ingest, although Jim Rous continued to play a role in the day-to-day operations in these sections. (Testimony of Fred Engle, Jim Rous, and Mike Brower.)

8. When Fred Engle arrived, Mike Brower provided him with an assessment of the nine employees in Master Control and Ingest. Boone and Witt were in both identified as weak performers who did not understand the system, and were suggested for termination. Other employees were identified as having problems with their work, including Charles Lister, who was identified as being unable to handle pressure; Tony Gwynne, who was a below-average performer with little interest; and Jerome Johnson, who had some past performance issues. None of the other employees were recommended for termination. In addition, the same document which was prepared for Engle recommended eliminating the midnight to 6:00 a.m. shift in Master Control. (Testimony of Fred Engle and Mike Brower; and Boone Exhibit 1, page 96.)

9. Beginning in the summer 2010, KET planned a restructuring. KET had sustained a number of budget cuts, and it also lost a number of employees due to retirements. As a result of these factors, plus the digital conversion project, KET asked each of its senior directors to conduct a review of their areas of responsibility in order to identify "critical positions" and positions that were "less essential." For Master Control and Ingest, this task fell upon Fred Engle. Engle saw his task as trying to identify the best seven out of the nine employees. He recommended to the other senior directors and Hopkins that they eliminate the positions held by Boone and Witt. The other senior directors and Hopkins agreed, and Boone and Witt were recommended for termination to the Kentucky Authority for Educational Television Board. The Board approved their terminations on September 9, 2010. (Testimony of Shae Hopkins, Fred Engle, Mike Brower; KET Exhibit 1 and Boone Exhibit 1.)

10. Both Witt and Boone received termination notices dated September 9, 2010, telling them their employment was terminated effective immediately, and that the action was taken without cause. The Appellants were also informed that because their dismissals were without cause, they had no right to appeal to the Personnel Board except as provided by KRS 18A.095. (Testimony of Shae Hopkins, and Ron Brown; Witt Exhibit 2 and Boone Exhibit 2.)

11. Based upon the Kentucky Authority for Educational Television's resolutions, the testimony of the witnesses, and their dismissal letters, the Hearing Officer finds that Witt and Boone were unclassified, or non-merit, employees with KET. (Testimony of Rick Melton, Ron Brown, and Jim Rous; Witt Exhibit 2, Boone Exhibit 2 and KET Exhibits 3, 4, 5, and 6.)

12. Both Boone and Witt are white. Neither was replaced after they were dismissed.

13. Witt and Boone were similarly situated with the seven other employees in Master Control and Ingest. The Hearing Officer makes this Finding based upon the testimony of Mike Brower and Fred Engle, when they were deciding which employees to retain and which to terminate. In addition, documents prepared contemporaneously with the decision to terminate Witt and Boone show that these employees were to be cross-trained, and were all considered to be Broadcast Operations Technicians. (Testimony of Fred Engle, Mike Brower and Boone Exhibit 1, page 102.)

14. Boone and Witt were dismissed while similarly situated African-American employees Tony Gwynne and Jerome Johnson were retained.

15. Gwynne was retained despite uncontroverted evidence that he was hired solely because of his race over a more qualified Asian in 1997. Gwynne was also identified by his initial supervisor as lacking technical skills. (Testimony of Rick Melton; and KET Exhibit 2.)

16. In 2010, when Master Control and Ingest employees were being assessed, Gwynne was described as a below-average performer, who was not interested and was disengaged. (Boone Exhibit 1.)

17. Jerome Johnson was retained, despite the fact that he had been suspended for timecard fraud in 2009. In addition to the suspension, approximately 120 hours of compensatory time were taken from Johnson. After this disciplinary action, Johnson was considered to have improved his performance. (Testimony of Ron Brown, Jim Rous, and Mike Brower; and Boone Exhibits 1 and 5.)

18. Evidence was presented that Johnson continued to leave work early after his suspension, however, no misconduct was proven. There was no evidence presented that Johnson's timesheets were inaccurate after his suspension. (Testimony of Ron Brown, Tom Boone, Jim Rous, Mike Brower; and Boone Exhibit 4.)

19. The Hearing Officer finds that Boone and Witt were dismissed because they had historically been assigned to the third shift, and the third shift in Master Control was eliminated. The Hearing Officer finds the evidence in these cases is overwhelming that this was the motivating factor for the dismissals of Boone and Witt in this case. The testimony of Shae Hopkins, Fred Engle, and Mike Brower supports this reason. The evidence also demonstrates that it was known as early as November 24, 2009, that the third shift was going to be eliminated, and that Witt and Boone were notified of this fact. With the elimination of the third shift, KET had more employees than were needed in Master Control. (Testimony of Shae Hopkins, Fred Engle, Jim Rous, Mike Brower, and Tom Boone; and Witt Exhibit 4.)

20. KET also offered evidence that Witt and Boone were not considered as competent as the other Master Control and Ingest employees, and this served as an additional reason for their dismissal. The Hearing Officer finds that the evidence does not support that this was a motivating factor in the dismissal of Boone or Witt. Shae Hopkins testified that this information was provided by Fred Engle and Jim Rous. Engle stated he relied primarily on Mike Brower and Jim Rous in assessing the competence of the employees in his area. Brower stated he relied on Jim Rous. Rous testified he did not state an opinion regarding the competence of the employees in Master Control and Ingest, and did not relay any such opinion to Engle or Brower. In addition, Rous stated he did not feel qualified to render such an opinion because he did not have a chance to observe the actual work of Witt or Boone, and was not knowledgeable enough about the work they performed in Master Control. Neither Engle nor Brower could state any specific information Rous told them about Witt or Boone. The Hearing Officer also does not believe this was a reason for the terminations of Boone and Witt in this case, because both Melton and Rous expressed an opinion that Boone and Witt were competent as Master Control operators. Rous and Melton also suggested that if one were interested in how good a job someone did in Master Control, discrepancy logs would be an important tool to review. There was no evidence in this case that anyone reviewed the discrepancy logs with respect to Boone, Witt or any other employees. The Hearing Officer finds it improbable that the senior directors would have assessed the employees in Master Control and Ingest without reviewing their personnel files or some documentation in reaching these conclusions. (Testimony of Shae Hopkins, Fred Engle, Jim Rous, Mike Brower and Rick Melton.)

21. The Hearing Officer finds the testimony of Jim Rous, that he did not discuss the performance of the employees in Master Control and Ingest with Mike

Brower, to be more credible than the testimony of Brower. The Hearing Officer finds this based upon Rous's unequivocal testimony that he did not have an opinion that Boone and Witt were incompetent; that he did not convey any such opinion; and did not feel qualified to render such an opinion. In addition, Rous appeared as a disinterested witness, who no longer works for KET and who offered even-handed testimony in this matter, sometimes in favor of Witt and Boone, and sometimes in favor of KET. Brower could not provide any specific information that Rouse told him about Boone or Witt. The Hearing Officer further makes this determination in part based on the fact that Brower backed off his assessment of Tony Gwynne as a "below average performer." The Hearing Officer believes Brower gave Engle his own assessment of Master Control and Ingest employees as of May 2010. This assessment was subject to changes and was based on Brower's own limited observation of these employees. (Testimony of Jim Rous and Mike Brower; Boone Exhibit 1, page 96.)

22. The Hearing Officer also finds the evidence does not support that KET terminated Boone and Witt because they did not get along with co-workers. The evidence suggests KET did not take these matters very seriously, and left these types of issues primarily for the employees to work out among themselves. A perfect example is Ron Brown's conclusion that there was nothing they could do about Boone and Heflin acting like children. The Hearing Officer finds that while there were reports that employees did not get along and while personality conflicts existed, there did not appear to be any determination made as to who was at fault in these situations, and there does not appear to be any evidence that decisions on who to dismiss or retain were based on this issue. (Testimony of Ron Brown and Tom Boone.)

23. The Hearing Officer finds the fact that Tom Boone carried a weapon at work, and at least on one occasion indicated he might do so to intimidate his co-workers, did not play a role in his termination. The Hearing Officer so finds based on the testimony of Fred Engle, the Senior Director who recommended his dismissal. Engle unequivocally stated the fact that Boone carried a gun played no role in his recommendation of Boone for termination. Shae Hopkins agreed that this was not an issue in Boone's dismissal. In addition, the Hearing Officer finds that this issue did not play a role in Boone's termination because it was clear by November 24, 2009, that Mike Brower was aware that Boone was carrying a gun, and had expressed that he did so in order to intimidate his co-workers. The evidence is that Brower discussed this matter with Ron Brown and Shae Hopkins, and does not show that any action was taken. Boone was not counseled, reprimanded or instructed in any way to change his behavior. No action was taken when it was determined Boone and Heflin acted like children even though this was less than four months after Boone expressed to Brower that he carried a gun to intimidate his co-workers. In light of this testimony, it does not appear likely that the gun issue played any role in Boone's termination. (Testimony of Shae Hopkins, Fred Engle, Mike Brower and Ron Brown.)

24. The Hearing Officer finds that Boone and Witt failed to prove that their race was a substantial factor in their dismissals from KET. KET retained two similarly situated African-American employees, Tony Gwynne and Jerome Johnson. Nonetheless, there is no evidence that Boone and Witt were selected for termination because of their race, or that Gwynne and Johnson were selected to be retained because of their race. The Hearing Officer believes the evidence establishes that KET made these decisions primarily based on positions and not individuals, as Shae Hopkins testified. In addition, the Hearing Officer has already found that the elimination of the third shift was the reason Boone and Witt were dismissed. While it was established that Gwynne was hired because he was African-American over a more qualified Asian candidate, this event occurred over 13 years prior to the dismissals in this case, and Boone and Witt did not present sufficient facts to establish their dismissals were in any way related to race.

25. Jerome Johnson was retained despite his suspension, however the evidence reflected that the decision to suspend him and not fire him for timecard fraud was consistent with previous KET disciplinary action. The testimony established that following his suspension, Johnson's performance improved, and no credible evidence to the contrary was presented.

26. There was no evidence that Boone or Witt ever filed any type of discrimination complaint while they were employed at KET. There is no evidence in the record that either Boone or Witt assisted or participated with any discrimination complaint.

27. Prior to November 24, 2009, Tom Boone called Sally Hamilton at the Auditor's office to discuss concerns he had at KET. He expressed concerns about staff at KET using state equipment for personal benefit, and questioned who at KET benefitted from parking fees on KET property for University of Kentucky football games. Boone had planned to meet with Sally Hamilton and possibly Crit Luallen regarding these concerns, however, he did not when he learned that Hamilton used to work at KET. (Testimony of Tom Boone.)

28. Following a meeting on November 24, 2009, Jim Witt told Jim Rous of Boone's plan to meet with the Auditor. Rous told Witt that he would advise Boone not to do so. On December 2, 2009, at Mike Brower's request, Jim Rous sent Brower an e-mail summarizing the discussion he had with Witt regarding Boone's intention to contact the Auditor's office. Brower took no action, and did not tell Hopkins or anyone else about this issue. There is no evidence in the record that Boone's action in contacting the Auditor's office played any role in the decision to terminate Boone or Witt. (Testimony of Jim Rous, Mike Brower, Fred Engle, Shae Hopkins and Tom Boone; and Boone Exhibit 3.)

29. Boone brought concerns to the Human Resources Director at KET on three occasions. Once in 2007, he complained about John Heflin. In 2010, he complained to Ron Brown about John Heflin, and later in 2010, about Fred Engle. There is no evidence that Boone's activity in raising these complaints played any role in the decision to dismiss him. (Testimony of Ron Brown and Tom Boone.)

30. The testimony suggested that Boone and Witt raised other concerns about co-workers with Jim Rous and possibly others. There was no evidence that these activities played any role in the decisions to terminate them.

31. Jim Witt did not offer any evidence that he was dismissed because of his gender. All of the employees in Master Control and Ingest who were considered similarly situated to Witt were males. No evidence was presented of any gender-based discrimination at KET.

32. No evidence was presented that Witt's religion played any role in his dismissal. Melton, Rous and Engle testified specifically that they were not aware of his religion. There was no evidence that Witt's religion played any role in his dismissal or that he was discriminated against in any other way during his employment at KET based on his religion. (Testimony of Rick Melton, Fred Engle, Jim Rous and Doug Campbell.)

33. Jim Witt presented no evidence of age discrimination. There was no evidence at the hearing of Jim Witt's age. There was no evidence of the ages of the other employees in Master Control and Ingest, except for Doug Campbell. There was no testimony that the ages of the employees were considered in deciding to dismiss Witt.

34. Witt offered no evidence in support of a claim of color discrimination.

CONCLUSIONS OF LAW

1. Jim Witt and Tom Boone were unclassified employees with KET. The Hearing Officer concludes that the language contained in the resolutions to hire them ("under the provisions of KRS 18A.115(1)(f), the Kentucky Authority for Educational Television hereby resolves to appoint ...") is sufficient to establish their employment is exempt from the classified service, and thus they are unclassified, or non-merit, employees. The Hearing Officer makes this conclusion because the statute cited in the Kentucky Authority for Educational Television resolution, KRS 18A.115(1)(f), is an

exemption to the classified service. Thus the language in the resolution is sufficient to exempt Witt and Boone from the classified service.

2. As unclassified employees who were dismissed without cause, Witt and Boone could appeal to the Personnel Board based on discrimination or retaliation. The Hearing Officer so concludes based on the language contained in KRS 18A.095(14)(a), which provides that any employee who believes he has been discriminated against may appeal to the Board. The Board's jurisdiction with respect to discrimination is not limited to classified employees. *Martin v. Corrections Cabinet*, 822 S.W.2d 858 (Ky. 1991).

3. This interpretation is further supported by KRS 344.025. The statute reads as follows: "No provision in KRS Chapter 18A shall be construed to preclude any classified or unclassified state employee from appealing to the Personnel Board any action alleged to be in violation of laws prohibiting discrimination based on a person's status as a qualified individual with a disability, sex, age, religion or race or national origin, in accordance with this chapter."

4. There was no direct evidence of race discrimination against Boone or Witt in these cases.

5. Boone and Witt established *prima facie* cases of race discrimination by proving they were members of a protected class (white), they suffered an adverse employment action (they were dismissed), they were qualified for the position (they were performing to their employer's reasonable expectations), and that someone from a different race was retained while they were not (Tony Gwynne and Jerome Johnson, African-American employees in the Master Control and Ingest group were retained.) *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993).

6. KET has cited Sixth Circuit precedent, which requires a stricter test in a reverse discrimination case. The Sixth Circuit has held that where a member of a racial majority alleges racial discrimination, he "must demonstrate background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Southerland v. Michigan Department of Treasury*, 344 F.3d, 604 (6th Cir. 2003). The Hearing Officer is aware that Kentucky courts generally follow federal precedent with respect to discrimination cases. *Harker v. Federal Land Bank of Louisville*, 679 S.W.2d 266 (Ky. 1984). The Hearing Officer has found two unreported Court of Appeals cases, one which applies the higher standard (*Chapman v. Kentucky State University*, 2003 W.L. 222 72147 (Ky. App.)), and the second which does not (*Petrilli v. Silberman*, 2011 W.L. 846 520 (Ky. App.)). The *Petrilli* case was decided more recently by the Court of Appeals, and the Hearing Officer will follow that standard. This approach is also consistent with *Jefferson County v. Zaring*, 91 S.W.3d 583 (Ky. 2002). *Zaring* is not directly on point, however, because it involves a reverse race discrimination claim in the

context of an affirmation action plan. To the extent that a heightened standard is required, the Hearing Officer finds there is insufficient proof that KET is an unusual employer who discriminates against the majority. The isolated incident of the hiring of Tony Gwynne in 1997 is too remote and also only demonstrates that an African-American was favored, not that whites are disfavored.

7. Having found that Witt and Boone established a prima facie case of race discrimination, the burden shifts to KET to articulate a legitimate, non-discriminatory reason for their dismissals. *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973). KET did so, as has been established in the Findings of Fact, when it articulated that Witt and Boone were terminated because of the elimination of the third shift. KET also articulated additional reasons for the terminations, including that Witt and Boone were incompetent compared to their peers, and they could not get along with their co-workers. In addition, KET articulated that it dismissed Boone because he carried a gun at work.

8. Witt and Boone established that the allegations of incompetence and inability to get along with their co-workers were not the reason for their dismissals and were pretext. In addition, Boone established that the allegation he was dismissed for carrying a gun at KET was pretext.

9. Witt and Boone did not establish that KET's reason for termination that Boone and Witt were terminated because of the elimination of the third shift was pretext.

10. In addition, Witt and Boone have failed to establish KET's decision to dismiss them was based on race discrimination. Even proving that some of the reasons offered by KET were pretextual, the burden of proof remains on the Appellants to prove their claims of race discrimination, which they have failed to do. *Reeves v. Sanderson Plumbing Products Inc.*, 530 U.S. 133 (2000).

11. Neither Boone nor Witt claimed they were dismissed for retaliation for having filed, assisted or participated in any claim of discrimination.

12. Both Witt and Boone have made retaliation claims in this appeal. KET argues that because they have not alleged retaliation for having filed a claim of discrimination, they are alleging violation of the Whistleblower statute. KET argues that since 1997, the Personnel Board has held it lacks jurisdiction to hear claims for violations of the Whistleblower statute, citing *Combs v. Madison County PVA Office*, 96-265 (Feb. 18, 1997), 1997 W.L. 34671570 (Ky. PB) and *Noe v. Justice Cabinet, Department of Corrections*, 2002-466 (Apr. 24, 2003), 2003 W.L. 25751228 (Ky. PB). In the *Combs* case, the Personnel Board stated that it did not have jurisdiction to hear a Whistleblower case

and dismissed the Appellant's claim for failure to be filed within the statute of limitations. In the *Noe* case, an Interim Order from a Hearing Officer stated that the Personnel Board should not exercise jurisdiction over the Appellant's Whistleblower claims because he had a Whistleblower action pending in Franklin Circuit Court. In many other cases, however, the Personnel Board has adjudicated retaliation claims, citing the Whistleblower statute. *Kenneth Tramontin v. Cabinet for Health and Family Services*, 2003-372, (Jul. 19, 2005), 2005 W.L. 6154637 (Ky. PB); *Janet Bewley v. Cabinet for Families and Children*, 2001-243 and 2002-069, (Nov. 13, 2002) 2002 W.L. 34428687 (Ky. PB); *Leonard Gardenour v. Justice Cabinet, Department of Corrections*, 2001-278, (Nov. 13, 2002), 2002 W.L. 34428761 (Ky. PB); *Birchel Calvin Estep v. Transportation Cabinet*, 2009-136, (Sep. 14, 2010), 2010 W.L. 3940159 (Ky. PB); *William Rasinen v. Education and Workforce Development Cabinet*, 2009-221, (Aug. 15, 2011), 2011 W.L. 3792887 (Ky. PB); and *Sonia Diaz v. Transportation Cabinet*, 2008-055, (Apr. 21, 2009), 2009 W.L. 1176151 (Ky. PB). A more accurate statement than that put forth by KET would be that the Personnel Board has struggled to determine the extent of its jurisdiction to hear retaliation claims.

13. The Hearing Officer concludes, having read the previous Personnel Board cases, the briefs of the parties, and the statute, that the Personnel Board does not have jurisdiction to hear a Whistleblower claim brought pursuant to KRS 61.101, et seq. The Whistleblower statute sets forth a very specific statutory scheme allowing actions to be filed in Circuit Court within 90 days after the occurrence of the alleged violation. KRS 61.103(2). The Whistleblower statute also contains very specific provisions regarding the burden of proof, and burden-shifting. KRS 61.103(3).

14. The Personnel Board has exercised jurisdiction over retaliation claims. The Hearing Officer concludes that the basis for jurisdiction of these claims is KRS 18A.095(1), (9) and (14)(a). The provision which applies in this case is KRS 18A.095(14)(a), which reads as follows: "Any employee, applicant for employment, or eligible on a register, who believes he has been discriminated against, may appeal to the Board." As the Kentucky Supreme Court determined in the *Martin* case, this subsection is broader than Subsection 12 (of KRS 18A.095), and permits appeals of all forms of illegal discrimination. The Court, in *Martin*, phrased the discrimination as "this appeal is in regard to a discharge in **retaliation** for refusal to violate the prohibitions of KRS 18A.140 against political favoritism." *Martin* at 860. (Emphasis added.) Clearly the Court, in *Martin*, considered KRS 18A.095(14)(a) discrimination to include illegal retaliation.

15. The Hearing Officer concludes that Boone engaged in conduct which is protected by KRS 18A.095(14)(a) when he contacted the Auditor's office about employees using state-owned equipment for personal benefit, and his concerns about funds collected for parking in KET's lot for football games. Although Brower was

aware of Boone's contact with the Auditor's office, the Hearing Officer has already found that this information played no role in the decision to terminate Boone. Thus, the Hearing Officer concludes there is no causal connection between Boone's protected activity and the decision to terminate him, and he has not established a *prima facie* case of retaliation. In addition, KET has articulated a legitimate, non-retaliatory reason for Boone's termination, that is, the elimination of the third shift. The Hearing Officer concludes that Boone was unable to establish that his contact with the Auditor's office was a contributing factor in his dismissal, and his retaliation claim must fail. *Davidson v. Department of Military Affairs*, 152 S.W.3d, 247 (Ky. App. 2004).

16. The Hearing Officer concludes that Witt did not engage in any conduct which is protected under an illegal retaliation claim pursuant to KRS 18A.095(14)(a).

17. Jim Witt did not put on any proof of sex discrimination, and the Hearing Officer granted KET's motion for a directed decision on this claim. There is no proof there were any similarly situated females in this case or that gender played any role in Witt's termination.

18. Witt failed to put on any proof of religious discrimination, and the Hearing Officer granted KET's motion for a directed decision on this claim. Witt did not demonstrate that the decision-makers knew of his religion or that his religion played any role in the decision to dismiss him.

19. Witt failed to put on any proof of age discrimination, and the Hearing Officer granted KET's motion for directed decision on this claim. Witt failed to present any evidence of his age or the ages of the other similarly situated employees, except for Doug Campbell. He also failed to present any evidence that age was in any way a substantial motivating factor in KET's decision to dismiss him.

20. Witt failed to present any evidence of color discrimination, and the Hearing Officer granted KET's motion for directed decision on this claim.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeals of **JAMES D. WITT, JR. (APPEAL NO. 2011-197) AND THOMAS BOONE (APPEAL NO. 2012-127) V. KENTUCKY AUTHORITY FOR EDUCATIONAL TELEVISION AND KENTUCKY PERSONNEL CABINET** 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).

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 the **Hearing Officer** this 21st day of February, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Clay A. Barkley
Hon. Matt James
Hon. Brian Judy
Hon. Whitney Meagher
Hon. Dinah Bevington
Hon. Robert L. Abell
Mr. James D. Witt, Jr.

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD

JAMES D. WITT, JR. (Appeal No. 2011-197)
MARK A. HOLT (Appeal No. 2011-198)
ROBERT A. PICKERING (Appeal No. 2011-200)
PATRICK J. WISE (Appeal No. 2011-201)
and TRASIMOND SOILEAU (Appeal No. 2011-233)

APPELLANTS

V. REMAND ORDER REJECTING HEARING OFFICER'S
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER

KENTUCKY AUTHORITY FOR EDUCATIONAL TELEVISION
SHAE HOPKINS, APPOINTING AUTHORITY

APPELLEE

** ** * * *

The Board at its regular April 2012 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Orders of the Hearing Officer dated January 20, 2012, for these five appeals, having noted Appellants' Exceptions, Appellee's Responses to Exceptions, Oral Arguments, and being duly advised,

It is hereby **ORDERED** that the Recommended Order of the Hearing Officer is REJECTED, and the Personnel Board adopts its own Findings of Fact, Conclusions of Law and Remand Order as Follows:

INTRODUCTION

1. These five appeals came on for pre-hearing conference on October 26, 2011, at 10:30 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.

2. Appellants James D. Witt, Jr., Mark A. Holt, Robert A. Pickering, Patrick J. Wise, and Trasimond Soileau were all present and not represented by legal counsel. Appellee Kentucky Authority for Educational TV (KET) was present and represented by the Hon. Morgan Ransdell. Appearing as agency representative was Ron Brown.

3. The purposes of the pre-hearing conference were to determine the specific penalizations alleged by Appellants, to determine the specific section of KRS 18A which authorizes these appeals, to determine whether the appeals were timely filed as set forth in KRS

18A.095, to determine the relief sought, to define the issues, address any other matters relating to these appeals, and to discuss the option of mediation.

4. The Board notes these appeals were not consolidated, however, they will be decided on this one Order. As this case goes forward, the Board strongly recommends to the parties that these appeals be consolidated.

5. a. Appellant James D. Witt, Jr. (Appeal No. 2011-197) filed his appeal on September 8, 2011, checking the boxes for dismissal and discrimination. Appellant indicated discrimination based upon race, color, religion, sex, age over 40, and also claimed retaliation, *vis-a-vis*, the Whistleblower Act. Appellant noted in his appeal that he is over 60 years of age, with 41 years of working experience and having worked over 9 years at KET. He states the retaliation claims deal with his report of instances of employees' malfeasance.

b. Appellant Mark A. Holt (Appeal No. 2011-198) filed his appeal on September 9, 2011, and checked the boxes for dismissal and discrimination. In the narrative portion of his appeal, Appellant stated he was appealing having been terminated because of his age and in retaliation for reporting illegal activity and safety issues.

c. Appellant Robert A. Pickering (Appeal No. 2011-200) filed his appeal on September 9, 2011, stating he had worked in an atmosphere of harassment and hostility from management, and believed he was terminated in retaliation for his calling attention to safety issues, improper employee behavior, and questions imposed as to the ethics and honesty of management decisions.

d. Appellant Patrick J. Wise (Appeal No. 2011-201) filed his appeal on September 9, 2011, stating he believed he was discriminated against by his supervisor, James Rous, and indicated he was also appealing discrimination based upon race, color, sex and age over 40.

e. Appellant Trasimond Soileau (Appeal No. 2011-233) filed his appeal on October 21, 2011, alleging age discrimination in that he was 58 years old and had more experience than the 38 year-old person who replaced him. Appellant also stated he believed he may have been retaliated against under the Whistleblower Act.

BACKGROUND

1. The parties were in agreement that all five Appellants were unclassified employees with KET. Appellants Patrick Wise and Trasimond Soileau were also career employees, although neither had attained status in the classified service.

2. The Appellee filed motions to dismiss all five appeals. All Appellants responded and the Appellee filed replies.

3. The Appellee alleged that Appellants did not timely file their appeals with the Personnel Board. The Appellee alleged that as unclassified employees, the Appellants had thirty (30) days to file an appeal from their dismissal alleging discrimination, retaliation or other illegal actions with the Personnel Board. Counsel relied on KRS 18A.095(9), and KRS 18A.095(18)(a) in support of its motions to dismiss.

4. After reviewing the Motions to Dismiss, the responses and replies, the Hearing Officer entered five separate Recommended Orders, recommending that all five appeals be dismissed as untimely. The Hearing Officer found the appropriate statute of limitations was KRS 18A.095(9), which states that the parties would have thirty (30) days from the date of the underlying action to file their appeals with the Personnel Board. The Hearing Officer further found that the Appellee gave proper notice to the Appellants of their dismissal.

5. The Hearing Officer found that the Appellee failed to provide appeal forms to the Appellants with their letters of dismissal and that such was required pursuant to KRS 18A.095(16)(b). The Hearing Officer found, however, that the failure to attach the appeal form was not fatal to Appellee's dismissal actions. The Hearing Officer noted the dismissal letters made reference to KRS 18A.095 and that employees exercising due diligence could have procured appeal forms to the Personnel Board with little difficulty.

FINDINGS OF FACT

1. The Board finds that all five Appellants were unclassified employees with KET. The Board notes that Appellants Trasimond Soileau and Patrick Wise were career employees, but had not attained status in the classified service.

2. The Board finds that the Appellee dismissed Appellants James D. Witt, Jr. and Robert A. Pickering on September 9, 2010, and Appellee dismissed Appellants Mark A. Holt, Patrick J. Wise and Trasimond Soileau on September 10, 2010.

3. The Board finds that all five Appellants received similar notices indicating that their dismissal would be effective immediately on September 9 or 10, 2010. In addition, each notice contained the following paragraph: "This action is being taken without cause and for this reason, you do not have the right to appeal your dismissal to the State Personnel Board except as provided by KRS 18A.095."

4. None of the Appellants were provided with appeal forms to the Personnel Board as alleged by the Appellants, and as admitted by counsel for the Appellee at oral argument before the Personnel Board.

5. The Appellants filed their appeals with the Personnel Board on the following dates: James D. Witt, Jr., September 8, 2011; Mark A. Holt, September 9, 2011; Robert A. Pickering, September 9, 2011; Patrick J. Wise, September 9, 2011; and, Trasimond Soileau, October 21, 2011.

CONCLUSIONS OF LAW

1. The Board agrees with the Hearing Officer that the appropriate statute of limitations for unclassified employees who have been dismissed is thirty (30) days, contained at KRS 18A.095(9). The Board agrees with the Hearing Officer that the Appellees were required to attach appeal forms to the notices of dismissal pursuant to KRS 18A.095(16)(b). This subsection reads as follows:

The appeal form shall be attached to any notice, or copy of any notice, of dismissal, demotion, suspension, fine, involuntary transfer, or other penalization, reallocation, or notice of any other action an employee may appeal under the provisions of this section. The appeal form shall instruct the employee to state whether he is a classified or unclassified employee, his full name, his appointing authority, work station address and telephone number, and, if he has retained counsel at the time he files an appeal, the name, address, and telephone number of his attorney.

The Board concludes that the appeal forms were required to be attached to the dismissal notices even though the Appellants were unclassified and the dismissals were not for cause. As these appeals demonstrate, the Appellants "may appeal" these actions pursuant to KRS 18A.095(14)(a).

2. The Board disagrees, however, that the failure to attach the appeal form is not fatal to the Appellee's dismissal actions and its use of the statute of limitations defense in this case. The Board concludes that the Appellee's failure to attach the appeal forms, as admitted at Oral Argument by counsel for the Appellee, demonstrate that the notices did not comply with the provisions of KRS 18A.095 and thus, the time to file these appeals did not start to run on the date they received the notice of their dismissals.

3. The Board concludes that the Appellee's Motions to Dismiss these appeals should be **DENIED**, and these appeals should be remanded to the Hearing Officer for further action, including any necessary pre-hearing conferences or evidentiary hearings.

4. The Board recommends the parties consider consolidation of these appeals since they involve similar issues. Nonetheless, the Board recognizes that there may be different outcomes in these appeals, depending upon the individual fact situation for each Appellant.

5. On remand, the Board instructs the Hearing Officer to pay careful attention to the provisions of KRS 18A.095(29) and determine whether it applies to these fact situations and its impact on the five appeals.

ORDER REMANDING

The Personnel Board **ORDERS** that the appeals of Appellant **James D. Witt, Jr.** (Appeal No. 2011-197), Appellant **Mark A. Holt** (Appeal No. 2011-198), Appellant **Robert A. Pickering** (Appeal No. 2011-200), Appellant **Patrick J. Wise** (Appeal No. 2011-201), and Appellant **Trasimond Soileau** (Appeal No. 2011-233) vs. **Kentucky Authority for Educational Television**, be **REMANDED** to the Hearing Officer for further proceedings consistent with the Board's Findings of Fact and Conclusions of Law.

SO ORDERED this 18th day of April, 2012.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day mailed to:

Hon. Morgan Ransdell
Hon. Aaron Ament
Hon. Clay A. Barkley
Mr. James D. Witt, Jr.
Mr. Mark A. Holt
Mr. Robert A. Pickering
Mr. Patrick J. Wise
Mr. Trasimond Soileau
Board Members

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD**

JAMES D. WITT, JR.	(Appeal No. 2011-197)	
MARK A. HOLT	(Appeal No. 2011-198)	
ROBERT A. PICKERING	(Appeal No. 2011-200)	
PATRICK J. WISE	(Appeal No. 2011-201)	
TRASIMOND SOILEAU	(Appeal No. 2011-233)	
THOMAS BOONE	(Appeal No. 2012-127)	APPELLANTS

V. INTERIM ORDER

KENTUCKY AUTHORITY FOR EDUCATIONAL TELEVISION APPELLEE

The appeals of **Patrick J. Wise v. KET** (Appeal No. 2011-201) and **James D. Witt, Jr. v. KET** (Appeal No. 2011-197), came on for a pre-hearing conference on October 10, 2012, at 9:30 a.m. ET, at 28 Fountain Place, Frankfort, KY, before Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellants Patrick J. Wise and James D. Witt were present and not represented by legal counsel. Appellee KET was present and represented by the Hon. Clay Barkley and the Hon. Matt James. Also present were Trasimond Soileau and Thomas Boone.

The appeals of **Mark A. Holt v. KET** (Appeal 2011-198) and **Robert A. Pickering v. KET** (Appeal No. 2011-200) came on for a pre-hearing conference on October 26, 2012, at 9:30 a.m. ET, at 28 Fountain Place, Frankfort, KY, before Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellants Mark A. Holt and Robert A. Pickering were present and not represented by legal counsel. Appellee KET was present and represented by the Hon. Clay Barkley and the Hon. Matt James. Also present were Trasimond Soileau, Thomas Boone, Patrick Wise, and James Witt, Jr.

The purposes of the pre-hearing conferences were to discuss discovery issues, discuss the status of the appeals, discuss possible consolidation, and scheduling matters.

At these pre-hearing conferences, the parties had discussions regarding a number of issues. There were also motions pending in some of the existing appeals, and as many issues as possible will be discussed in this Order.

WHEREFORE, the Hearing Officer, having reviewed the files, having listened to the statements of the parties, and being duly advised, hereby **ORDERS**, as follows:

CONSOLIDATION AND SCHEDULED EVIDENTIARY HEARING

1. Based on the agreement of all seven parties, the following appeals are **HEREBY CONSOLIDATED**:

JAMES D. WITT, JR.	(Appeal No. 2011-197)
MARK A. HOLT	(Appeal No. 2011-198)
ROBERT A. PICKERING	(Appeal No. 2011-200)
PATRICK J. WISE	(Appeal No. 2011-201)
TRASIMOND SOILEAU	(Appeal No. 2011-233)
THOMAS BOONE	(Appeal No. 2012-127)

2. These matters are scheduled for an evidentiary hearing to be conducted on **January 28, 29, 30, 31, and February 1, 2013, at 9:30 A.M. ET, at 28 Fountain Place, Frankfort, KY.**

3. The issues shall be the Appellants' claims of discrimination and retaliation with respect to their dismissal from KET. The burden of proof shall be upon the **Appellants** and shall be by a preponderance of the evidence. As the party bearing the burden of proof, the Appellants shall proceed first in the presentation of evidence.

4. The Hearing Officer has previously listed the issue as to whether or not the Personnel Board has jurisdiction. The Hearing Officer previously phrased this issue, as follows:

An additional issue shall be the impact of KRS 18A.115(1)(f) on this appeal. The sub-issues are as follows:

- (a) Was the Appellant determined to be exempt from the classified service by KET?
- (b) If so, does the Personnel Board have jurisdiction to determine the Appellants' claims of discrimination and retaliation?
- (c) The burden of proof shall be by a preponderance of the evidence and the burden shall be on the **Appellee** for this issue.

5. At the pre-hearing conference held on October 10, 2012, counsel for the Appellee stated that the Appellee wished to preserve this issue and raise it as a precaution, but did not wish to request the Personnel Board to rule on this issue. Since the issue has been raised and may be dispositive of the case, the Hearing Officer will continue to list it as an issue. Obviously, the Appellee is not required to present evidence or further pursue this issue, if it chooses not to. Counsel for the Appellee stated that there were no factual issues, and this was strictly a legal argument and a matter of statutory construction. The Hearing Officer disagrees, and believes there are at least some basic factual questions which either could be answered by evidence or stipulation. Nonetheless the issue will continue to be listed, and it is up to the Appellee as to whether or not this issue is presented in any way. If the Appellee presents evidence or argument regarding this issue, the Appellants will have a full opportunity to respond.

6. Witness and Exhibit Lists are due **no later than January 18, 2013.**

DISCOVERY ISSUES

7. The parties engaged in a lengthy discussion regarding discovery issues at both of the above-referenced pre-hearings. At the pre-hearing conducted on **October 10, 2012**, the Hearing Officer **SUSTAINED** the Appellee's objection to Mr. Witt's Request for Discovery No. 5 regarding the two unknown men that accompanied Ron Brown and Fred Engle on the night of September 9, 2010, during the termination, and Request No. 6 from Mr. Wise regarding the same issue. The Hearing Officer determined that these requests were not relevant to the current proceedings, and it was not shown that the answer would lead to the discovery of any relevant evidence.

8. The Hearing Officer ordered the Appellee to provide a response to Mr. Witt's Request No. 33 regarding exculpatory evidence and Mr. Wise's Request No. 42 on the same subject. The Appellee stated it did not believe any exculpatory evidence existed; however, it agreed to review this matter and produce any evidence that is deemed responsive to these requests. Any such response was to be produced by **November 13, 2012.**

9. At the pre-hearing conference on **October 26, 2012**, the Hearing Officer ordered the Appellee to review Mr. Holt's Request for Discovery Nos. 5, 19, and 26, and provide the information by **November 26, 2012**, or provide a more specific objection.

10. Mr. Holt agreed to make more specific requests regarding items 3 and 8, which he provided on October 31, 2012. The Hearing Officer **ORDERS** the Appellee to respond to these matters by **November 26, 2012**, either by producing the items or presenting a specific objection.

11. With respect to Mr. Pickering's discovery request, the Appellee was **ORDERED** to review Request Nos. 16, 17, 18, 25, and 26, and provide the requested information (or a more specific objection) by **November 26, 2012.**

12. The Hearing Officer notes that Mr. Pickering was ordered to respond to KET's response for discovery by **November 13, 2012**, and he did so on November 20, 2012.

13. Mr. Pickering also indicated that he would provide a response to other written objections to his request for discovery by **November 13, 2012**, and he did so on November 20, 2012.

14. The Hearing Officer is unaware of any discovery requests being filed in Mr. Boone's or Mr. Soileau's appeals. If the parties are going to need discovery in these appeals, their discovery requests should be filed as soon as possible.

MOTION TO DISMISS

(Appeal of Thomas Boone v. KET 2012-127)

15. The Appellee's Motion to Dismiss is **DENIED**.

(a) A motion to dismiss for failure to state a claim should only be granted if it appears that Appellant would not be entitled to relief under any set of facts that could be proved in support of his claim. *Pari-Mutuel Clerk's Union, Local 541 v. Kentucky Jockey Club*, 551 S.W.2d 801 (Ky. 1977). All allegations on the appeal form are accepted as true for purposes of ruling on the motion. *Pike v. George*, 434 S.W.2d 626 (Ky. 1968). The appeal form, like a complaint in a civil action, should be liberally construed in a light most favorable to Appellant. *Gall v. Scroggy*, 725 S.W.2d 867 (Ky. App. 1987).

(b) The Personnel Board has already considered the appeals filed by five other former KET employees and determined that their appeals were not barred by the 30-day statute of limitation contained at KRS 18A.095(9) because the Appellee failed to comply with KRS 18A.095(16)(b) by not attaching an appeal form to the notice of dismissal. Those appeals were remanded by the Personnel Board, and the Hearing Officer was directed to pay careful attention to the provisions of KRS 18A.095(29) and determine whether it applies to this fact situation.

(c) KRS 18A.095(29) states, as follows:

Notwithstanding any other prescribed limitation of action, an employee that has been penalized, but has not received a written notice of his or her right to appeal as provided in this section, shall file his or her appeal with the Personnel Board within one (1) year from the date of the penalization or from the date that the employee reasonably should have known of the penalization.

(d) Although KRS 18A.095(29) has been referred to as a “catch-all” provision, it applies to very specific situations. In reviewing the facts involved with Boone’s situation, it is clear he was penalized when he was notified of his dismissal on September 9, 2010. The Hearing Officer believes the issue involved in this appeal is whether or not Mr. Boone “[h]as not received a written notice of his or her right to appeal as provided in this section.” As with the other KET employees, Mr. Boone did receive a written notice of his dismissal. Although Boone alleges it was confusing and misleading, the notice did provide him notice of his right to appeal. The notice included the sentence, “[T]his action is being taken without cause, and for this reason you do not have the right to appeal your dismissal to the State Personnel Board, except as provided by KRS 18A.095.” **Emphasis Added.** Clearly, the Appellant was provided written notice of his right to appeal to the Personnel Board. What he was not provided was an appeal form, as was required by KRS 18A.095(16)(b), which states, “[T]he appeal form shall be attached to any notice...of dismissal...an employee may appeal under the provisions of this section.”

(e) Having carefully reviewed this section, the Hearing Officer believes the provisions of KRS 18A.095(29) do not apply because the Appellant did receive written notice of his right to appeal to the Personnel Board; however, he did not receive a copy of the appeal form. the Hearing Officer believes this determination is consistent with the Court of Appeals’ instruction in Commonwealth Department of Revenue, Finance and Administration Cabinet v. McDonald, 304 S.W.3d 62 (Ky. 2009).

In McDonald, supra, the Court of Appeals, citing longstanding principles of statutory construction held, as follows:

A number of statutory construction principles bind courts. We “may not interpret a statute at variance with its stated language.” *SmithKline Beecham Corp. v. Revenue Cabinet*, 40 S.W.3d 883, 885 (Ky. App. 2001). “[S]tatutes must be given a literal interpretation unless they are ambiguous and if the words are not ambiguous, no statutory construction is required.” *Commonwealth v. Plowman*, 86 S.W.3d 47, 49 (Ky. 2002). Further, we cannot add or subtract from the language used in a statute. *Commonwealth v. Harrelson*, 14 S.W.3d 541, 546 (Ky. 2000).

Applying these principles, the Hearing Officer concludes that because Mr. Boone received a written notice of his right to appeal, the provisions of KRS 18A.095(29) do not apply.

(f) Having made this determination, the Hearing Officer will follow the determination made earlier by the Personnel Board in the other KET cases that failure to attach an appeal form, pursuant to KRS 18A.095(16)(b), means the time to file this appeal did not start to run on the date Mr. Boone received notice of his dismissal. As no party has established the Appellant has ever been provided an appeal form, there is

nothing in the record to establish the time to file an appeal has ever started to run. Therefore, there is nothing in the record to establish the appeal is untimely.

TRASIMOND SOILEAU
MOTION TO ALTER, AMEND, OR VACATE INTERIM ORDER
OF SEPTEMBER 5, 2012, FILED BY KET

16. In the appeal of **Trasimond Soileau v. KET** (Appeal No. 2011-233), the Hearing Officer issued an Interim Order on September 5, 2012, denying KET's Motion to Dismiss this appeal. KET raised the issue that the appeal was filed beyond the 1-year statute of limitations contained in KRS 18A.095(29). The Hearing Officer issued an Order similar to the Order in **Thomas Boone v. KET** (Appeal No. 2012-127). This Order is attached to this Order as **Attachment A**.

17. In addition to requesting that the Order be altered, amended, or vacated, KET asked that the Personnel Board review the appeal. KET made this request pursuant to 101 KAR 1:365, Section 6(2), which provides, "[U]nless an Interim Order provides for review by the Board prior to the conclusion of a hearing, the Board shall review an Interim Order when it considers the Recommended Order, record, and exceptions." KET has raised similar arguments in Soileau's case and Boone's case. As KET argued in its motion, the Interim Order resolved the dispositive issue concerning the application of the statute of limitations in KRS 18A.095(29). The Appellant has filed a response, and the Appellee has filed a reply. After reviewing all these documents, the Hearing Officer finds that the Appellee's motion to alter, amend, or vacate the interim order of September 5, 2012, is **DENIED**.

The request by KET to be heard by the full Personnel Board is **GRANTED TO THE EXTENT** that the Hearing Officer designates this Interim Order as an Order to be reviewed by the Personnel Board prior to the conclusion of the hearing pursuant to 101 KAR 1:365, Section 6(2).

18. This Interim Order (and the Hearing Officer's Interim Order issued September 5, 2012, in **Trasimond Soileau v. KET**) shall be placed on the agenda for the Personnel Board's December 14, 2012 meeting. The parties may file any response to the Interim Order (to be reviewed by the Personnel Board) by **November 30, 2012**. Any reply may be filed by no later than **December 6, 2012**.

MOTION TO INTERVENE
FILED BY THE
PERSONNEL CABINET

19. On September 24, 2012, the Personnel Cabinet filed a Motion to Intervene in the appeal of **Trasimond Soileau v. KET** (Appeal No. 2011-233) for the limited purpose of advising the Board on the issue of timeliness of Appellant's appeal from his dismissal from an unclassified position. The Personnel Cabinet makes arguments with respect to the Board's determination that it is necessary to attach an appeal form to the

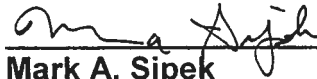
notice of dismissal. This issue has already been decided by the Personnel Board. However, the issue as to whether or not KRS 18A.095(29) applies in this situation and would make the appeal untimely has not yet been resolved by the Personnel Board. This is the issue that the Hearing Officer believed it is appropriate for the Personnel Board to review.

20. The Appellant has filed a response opposing the Motion to Intervene by the Personnel Cabinet. Having reviewed the motion and the response, the Hearing Officer **GRANTS** the motion so that the Personnel Cabinet may participate at the Board during the Board's consideration of this matter at its regularly scheduled December 14, 2012 meeting.

21. This Interim Order (and the September 5, 2012 Interim Order in **Trasimond Soileau v. KET**) are scheduled for oral argument at the regular Personnel Board meeting on **Friday, December 14, 2012, at 9:30 a.m. ET**, at 28 Fountain Place, Frankfort, KY. The issue shall be the timeliness of Soileau's appeal and whether Boone's appeal, and whether or not KRS 18A.095(29) applies. **Arguments should be limited to five to seven minutes each.** All parties are expected to be present or represented by counsel to answer any questions of the Board.

SO ORDERED at the direction of the Hearing Officer this 21st day of November, 2012.

KENTUCKY PERSONNEL BOARD



Mark A. Sipek
Executive Director

A copy hereof this day mailed to:

Hon. Clay Barkley
Hon. Matt James
Hon. Dinah Bevington
Mr. James D. Witt, Jr.
Mr. Mark A. Holt
Mr. Robert Pickering
Mr. Patrick J. Wise
Mr. Trasimond Soileau
Mr. Thomas Boone

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD

JAMES D. WITT, JR. (Appeal No. 2011-197)
MARK A. HOLT (Appeal No. 2011-198)
ROBERT A. PICKERING (Appeal No. 2011-200)
PATRICK J. WISE (Appeal No. 2011-201)
TRASIMOND SOILEAU (Appeal No. 2011-233)
And THOMAS BOONE (Appeal No. 2012-127)

APPELLANTS

V. BOARD ORDER

KENTUCKY AUTHORITY FOR EDUCATIONAL TELEVISION

And

KENTUCKY PERSONNEL CABINET

APPELLEES


** ** * * *

The Board, at its regular December 2012 meeting, having considered the Hearing Officer's Interim Orders dated September 5, 2012; November 21, 2012; and, November 29, 2012, and having considered the motion by KET to alter, amend or vacate the response by Appellant Soileau; the reply by KET; the Personnel Cabinet's Motion to Intervene; the response by Appellant Soileau; the motion to dismiss by KET; the response by Appellant Boone ("Facts and Determinations"); and the responses to the Interim Order by Appellant Soileau, KET and the Personnel Cabinet, and having listened to the Oral Arguments of the parties, and being duly advised,

IT IS HEREBY ORDERED that KET's Motion to Alter, Amend or Vacate is DENIED, and these consolidated appeals shall be returned to the Hearing Officer.

SO ORDERED this 2nd day of January, 2013.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
SECRETARY

A copy hereof this day mailed to:

Hon. Clay A. Barkley
Hon. Matt James
Hon. Whitney Meagher
Hon. Dinah Bevington
Mr. James D. Witt, Jr.
Mr. Mark A. Holt
Mr. Robert A. Pickering
Mr. Patrick J. Wise
Mr. Trasimond Soileau
Mr. Thomas Boone