

CERTIFICATION OF PERSONNEL BOARD RECORDS

I certify that attached hereto is a true and correct copy of the Findings of Fact, Conclusions of Law and Recommended Order and Final Order in the case of **ARTHUR JOHNSON V. JUSTICE AND PUBLIC SAFETY CABINET, KENTUCKY STATE POLICE (APPEAL NO. 2020-089)** as the same appears of record in the office of the Kentucky Personnel Board.

Witness my hand this 12th day of May, 2021.



**MARK A. SIPEK, SECRETARY
KENTUCKY PERSONNEL BOARD**

Copy to Secretary, Personnel Cabinet

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2020-089

ARTHUR JOHNSON

APPELLANT

VS.

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

JUSTICE AND PUBLIC SAFETY CABINET,
KENTUCKY STATE POLICE

APPELLEE

*** **


The Board, at its regular May 2021 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated March 16, 2021, Appellee's Exceptions and Request for Oral Argument, Appellant's response, Appellee's Motion to Continue (withdrawn), oral arguments, and being duly advised,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 are approved, adopted and incorporated herein by reference as a part of this Order, and the Appellant's appeal is therefore **SUSTAINED to the extent** therein.

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 12th day of May, 2021.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Samantha Bevins
Arthur Johnson
Lt. Col. Chad White

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2020-089**

ARTHUR JOHNSON

APPELLANT

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

**JUSTICE AND PUBLIC SAFETY CABINET,
KENTUCKY STATE POLICE**

APPELLEE

* * * * *

This matter came on for evidentiary hearing on November 4, 2020, at 9:30 a.m., ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Geoffrey Greenawalt, Hearing Officer. The evidentiary hearing was conducted by video teleconference using Amazon Chime. The proceedings were recorded by audio/video equipment and were authorized by KRS Chapter 18A.

The Appellant, Arthur Johnson, was present at the evidentiary hearing and was not represented by legal counsel. The Appellee, Justice and Public Safety Cabinet, Kentucky State Police, was present and was represented by the Hon. Samantha Bevins.

By Interim Order dated August 25, 2020, at issue in the evidentiary hearing was whether or not there was just cause for the dismissal of the Appellant and whether that penalty was excessive or erroneous under the circumstances. Also at issue was the Appellant's allegation of disability discrimination. The Appellee was assigned the burden of proof on the issue of dismissal, which was to be by a preponderance of the evidence. The Appellant was assigned the burden of proof on the issue of disability discrimination, which was also to be by a preponderance of the evidence.

BACKGROUND

1. The Appellant, Arthur Johnson, filed his appeal with the Personnel Board on March 13, 2020, appealing his dismissal from his position as an Administrative Specialist I with the Kentucky State Police (KSP), Criminal Identification and Records Branch. He also alleged disability discrimination.

2. The first to testify at the evidentiary hearing was **Lieutenant Howard Paul Blanton**. Lt. Blanton has overseen the Criminal Identification and Records Branch for approximately five years. He has been employed by the KSP for approximately sixteen years, some of which as a road Trooper.

3. Lt. Blanton testified that the Appellant worked in the Sex Offender Registry Section at the KSP and that he (Blanton) was one of his (Appellant's) supervisors, although not on a daily basis.

4. On September 23, 2019, at approximately 9:30 a.m., Lt. Blanton ran into the Appellant in the hallway while at work. The Appellant appeared agitated and "worked-up" and was complaining that the workload assigned to him was more than any one person could handle. According to Lt. Blanton, something was off. The Appellant's speech was choppy, and his eyes were bloodshot and watery. At that time, the Appellant told him he was upset and had been crying. Lt. Blanton advised the Appellant that he thought he had something in him that was causing him to act odd. The Appellant told him that he had taken a Sudafed the day before due to allergies. According to Lt. Blanton, that explanation did not make much sense, based on his training and experience.

5. Lt. Blanton then called the Electronic Crimes Branch to see if there was a drug recognition expert available to assess the Appellant and determine whether he was under the influence of an illegal substance. Unfortunately, no one was available, so, being at a loss, all Lt. Blanton could do was perform a sobriety test on the Appellant.

6. Lt. Blanton took the Appellant into a room and performed a sobriety test. Lt. Blanton stated this is when the Appellant told him he was addicted to methamphetamines. Lt. Blanton told the Appellant that this was his opportunity to get help. The results of the sobriety test were not mentioned at the hearing. However, Lt. Blanton testified that, all the while, the Appellant's eyes were bloodshot, and his speech was disorganized and jittery.

7. Lt. Blanton contacted his supervisor, a Lt. Colonel of unknown name, and explained the situation. The Lt. Colonel told him to get the Appellant blood tested and offer him assistance with the Angel Initiative referral program, a substance abuse program. The Appellant told Lt. Blanton he did not want a blood test or assistance with the Angel program because he had a dog at home and no one to take care of him. Since Lt. Blanton could not force the Appellant to take a blood test, he instead drove the Appellant directly to his house and left the Appellant's car at the office. Lt. Blanton told the Appellant his next contact would be from the KSP.

8. Next to testify at the hearing was **Brandy Kelly**, who has been with the KSP since May 2020. Prior to that, Ms. Kelly was the Branch Manager for Human Resources at the Energy and Environment Cabinet. She also had several years' experience working in state government. At the time of the evidentiary hearing, Ms. Kelly was the Branch Manager for Human Resources with the KSP and was in charge of all employee personnel matters. She testified that she was familiar with the Appellant and his personnel file.

9. Appellee's Exhibit 1 was introduced into the record through Ms. Kelly and is a copy of an Intent to Dismiss letter, dated August 13, 2018, against the Appellant for a situation that occurred in late July 2018. Appellee's Exhibit 2 was introduced into the record and is a copy of an extension of the August 13, 2018 letter of Intent to Dismiss. Appellee's Exhibit 3 was introduced into the record and is a copy of another extension of the August 13, 2018 Intent to

Dismiss letter. Appellee's Exhibit 4 was introduced into the record and is a copy of the Intent to Dismiss letter dated December 2, 2019. Within such letter (Appellee's Exhibit 4), the Appellant was requested to provide a Fitness for Duty Health Evaluation. Appellee's Exhibit 5 was introduced into the record and was the Notice of Dismissal letter dated January 10, 2020. This letter followed the pre-termination hearing held on December 31, 2019.

10. According to Ms. Kelly, during the pre-termination hearing, the Appellant admitted telling Lt. Blanton that he was an addict but only with regards to marijuana and not methamphetamines.

11. Ms. Kelly's testimony marked the end of the Appellee's case-in-chief.

12. The **Appellant, Arthur Johnson**, then testified on his own behalf. Appellant's Exhibit 1 was introduced into the record and is an immediate follow-up letter from the Human Resources Department placing the Appellant on Agency Directed Sick Leave effective the beginning of business September 24, 2019. A certified Medical Fitness Certificate for fitness to return to duty request was made within this letter. The Appellant noted that there was no mention in the letter, marked as Appellant's Exhibit 1, about him being under the influence of any substances while on duty but, oddly enough, the same allegation was mentioned prominently in the Intent to Dismiss letter marked as Appellee's Exhibit 4.

13. Appellant's Exhibit 2 was introduced into the record and is the Appellant's handwritten statement that he also attached to his Personnel Board Appeal form. Within Appellant's Exhibit 2, the Appellant notes that he was terminated for being under the influence of drugs while on duty but points out that not only was he not under the influence of anything while at work, he also never admitted to being as such to anyone at any time.

14. The Appellant also testified that Lt. Blanton never administered a sobriety test. He also noted that he stutters, a speech impediment he has had his entire life. He argued that such difficulty does not equate with him being under the influence of anything on the day and time in question.

15. On cross-examination, Mr. Johnson admitted he never provided Human Resources with any evidence of his speech impediment or requested accommodations for the stuttering under the ADA. However, the Appellant noted that his supervisor was well aware of his stuttering as anyone would be following the shortest of conversations with the Appellant.

16. Finally, the Appellant admitted he had smoked marijuana three or four times per week, but never while on duty. He also attempted to clarify more than once that he told or meant to tell Lt. Blanton that he was addicted to marijuana and not methamphetamines.

17. Following the rebuttal testimony of **Brandy Kelly**, the evidentiary record was closed.

18. The Hearing Officer has considered the entire administrative record, including the testimony and exhibits therein.

FINDINGS OF FACT

The Hearing Officer makes the following Findings of Fact by a preponderance of the evidence.

1. The Appellant, Arthur Johnson, a classified employee with status, timely filed his appeal with the Personnel Board on March 13, 2020, alleging disability discrimination and appealing from his dismissal as an Administrative Specialist I with the Criminal Identification and Records Branch, Kentucky State Police, effective January 13, 2020.

2. Pursuant to an Interim Order dated August 25, 2020, the issues before the Personnel Board were the dismissal of the Appellant and whether the same was taken with just cause and was neither excessive nor erroneous under the circumstances as well as the Appellant's claim of disability discrimination.

3. On September 23, 2019, at approximately 9:30 a.m., the Appellant crossed paths with Lt. Howard Paul Blanton in the hallway at his workplace. According to Lt. Blanton, the Appellant's eyes were bloodshot and watery, and his speech was choppy and jittery. Lt. Blanton suspected the Appellant was under the influence of some type of medication. The Appellant indicated he had been upset and crying and admitted to having taken a Sudafed the previous day for allergies.

4. Lt. Blanton attempted to procure a drug recognition expert to ascertain whether the Appellant was under the influence of any illicit drugs on the day and time in question. Since an expert was not available, Lt. Blanton testified he performed a sobriety test on the Appellant. The Appellant disputes this and testified that a sobriety test was never administered. In either event, the results of the alleged sobriety test were not revealed at the hearing. In addition, it is undisputed that Lt. Blanton is not a trained expert on drug recognition and could not have determined with any certainty whether the Appellant was under the influence of drugs on the day and time in question. Finally, the Appellant declined to take a blood test or be directed to the Angel Initiative referral program.

5. Importantly, according to the dismissal letter marked as Appellee's Exhibit 5, the Appellant was terminated: (1) for exhibiting signs of intoxication while at work, (2) for admitting to being under the influence of illicit drugs while on duty, and (3) for admitting to being addicted to methamphetamines.

6. The Appellant's undisputed testimony regarding the day and time in question was that he was upset and had been crying. In addition, it was made plain at the hearing that the Appellant suffers from a speech impediment and his employer would naturally have been aware of the same. The notion that the Appellant admitted to being under the influence of illicit drugs

while on duty is not supported by testimony or evidence of record. Although the Appellant may have stated to Lt. Blanton that he was addicted to methamphetamines, there is no evidence supporting the notion he was under the influence of the same on the day and time in question. Further, the Appellant attempted to clarify with the Appellee that it was marijuana he believed he was addicted to and not methamphetamines. Also, the scant evidence of record indicates the Appellant may have used methamphetamines anywhere between zero and four times during 2019, a number which hardly supports the notion that he was addicted to them.

7. As indicated previously, it is quite apparent the Appellant has a speech impediment. However, the record is devoid of evidence demonstrating the Appellee failed to make reasonable accommodations based on such disability or that the Appellant was in any way discriminated against due to the same. In addition, having worked for the Appellee for approximately eighteen years, it is apparent that any disability suffered by the Appellant did not interfere with his ability to perform his job duties.

8. The only reliable evidence of record that the Appellant may have been under the influence of illicit drugs while on duty is Lt. Blanton's testimony that the Appellant's eyes were bloodshot, and his speech was jittery. However, given (1) that the Appellant was upset and had been crying on the morning in question and (2) the Appellant's obvious speech impediment, these conditions may be easily explained. Other than Lt. Blanton's statement, the Appellee's decision to terminate the Appellant is based on no evidence found in the record. We are left with – and the decision to terminate the Appellant was based on - no blood test, no expert testimony, and only questionable admissions relating to the Appellant's addiction to drugs. Further, even reviewing Lt. Blanton's testimony generously, no evidence is found in the record that the Appellant actually admitted to being intoxicated or under the influence while on duty on September 23, 2019. As such, the record does not support a finding that the Appellant was under the influence of illicit drugs while at work or in direct violation of the Drug Free Workplace policies of the Personnel Cabinet. The Appellee failed in their burden to establish by a preponderance of the evidence that the Appellant (1) exhibited signs of intoxication while at work, (2) admitted to being under the influence of illicit drugs while on duty, and (3) admitted to being addicted to methamphetamines.

CONCLUSIONS OF LAW

1. The Appellee has failed to demonstrate by a preponderance of the evidence that the termination of the Appellant was neither excessive nor erroneous and was taken with just cause.

2. The Appellant has failed to demonstrate by a preponderance of the evidence that, as a result of his alleged disability, he was discriminated against by the Appellee.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **ARTHUR JOHNSON V. JUSTICE AND PUBLIC SAFETY CABINET, KENTUCKY STATE POLICE (APPEAL NO. 2020-089)** be **SUSTAINED to the extent** that the dismissal of the Appellant is set aside, that he be returned to his position or a position of like pay and authority, that he receive any back pay and benefits due, and otherwise be made whole. The Appellant's claim of disability discrimination is **DISMISSED**. (KRS 18A.105 and 200 KAR 12.030.).

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 **Hearing Officer Geoffrey Greenawalt** this 16th day of March, 2021.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Samantha Bevins
Mr. Arthur Johnson
Hon. Rosemary Holbrook (Personnel Cabinet)