

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2013-253

WILLIAM NATHAN JONES

APPELLANT

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

**PUBLIC PROTECTION CABINET**  
**AMBROSE WILSON, IV., APPOINTING AUTHORITY**

APPELLEE

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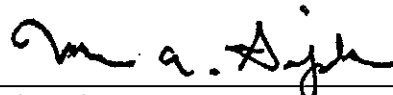
The Board at its regular November 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated September 24, 2014, and being duly advised,

**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 Appellant's appeal is therefore **DISMISSED**.

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

**SO ORDERED** this 19<sup>th</sup> day of November, 2014.

KENTUCKY PERSONNEL BOARD

  
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MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Cannon Armstrong  
William Nathan Jones  
Lynn K. Gillis  
Sherry Butler

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2013-253

WILLIAM NATHAN JONES

APPELLANT

VS.

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

PUBLIC PROTECTION CABINET  
ROBERT VANCE, APPOINTING AUTHORITY

APPELLEE

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This matter came on for an evidentiary hearing on August 4, 2014, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Roland P. Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment and authorized by virtue of KRS Chapter 18A.

Appellant, William Nathan Jones, was present and was not represented by legal counsel. Appellee, Public Protection Cabinet, was present and represented by the Hon. Cannon Armstrong. Also present as Agency representative was Mr. Frederick Higdon.

The issues in this matter pertain to the Appellant's claims that he was subject to constructive discharge, political discrimination, and was not allowed to rescind his resignation as a Staff Assistant, after submission of that resignation. The burden was on the Appellant to prove his case by a preponderance of the evidence.

The rule separating witnesses was invoked and employed throughout the course of the proceedings.

An Interim Order Containing Findings of Fact, Conclusions of Law and Recommended Order (dated February 26, 2014) is attached and incorporated herein by reference as "Recommended Order Attachment A."

**BACKGROUND**

1. The first witness for the Appellant was the Appellant, **William Nathan Jones**. Since November of 2013, Mr. Jones is and has been employed by the Legislative Research Commission. His prior six years of employment had been as a Staff Assistant in the Department of Alcoholic Beverage Control (ABC).

2. Appellant's 2012 Annual Employee Performance Evaluation was completed by his supervisor, Commissioner Tony Dehner. The interim reviews he received that year were very positive and he received positive feedback on his performance up to January 2013. He identified Appellant's Exhibit 1 as a copy of that annual evaluation in which he scored a 385: "Highly Effective."

3. He identified Appellant's Exhibit 2 as an e-mail from General Counsel, Stephen Humphress, to the general office of ABC. The subject was "Centralized Information Requests and Frequently Requested Information." Appellant alleged this e-mail from General Counsel placed additional duties on him without prior notice. General Counsel had no supervisory authority over Appellant and Commissioner Higdon had not yet assumed his position. Appellant contends such additional duties would have had to have been set out by his supervisor, Commissioner Dehner, in a Performance Plan. Appellant then described his general assigned duties.

4. Frederick Higdon was to begin duties as Commissioner of ABC in mid-March 2013. During the transition and prior to such effective date, Mr. Higdon requested from certain staff that he be kept up to speed with information pertaining to the office.

5. Mr. Jones identified Appellant's Exhibit 3 as a series of e-mails from early March 2013 involving the responsibility of answering inquiries from the public. General Counsel then forwarded a copy of same to Mr. Higdon. Mr. Higdon instructed counsel to start a file for Mr. Jones.

6. Mr. Jones identified Appellant's Exhibit 4 as an e-mail chain between he and General Counsel Humphress on March 4, 2013. Appellant requested clarification of whether he should forward all legal questions to the legal department. Counsel responded that many of the public requests for information were "not really legal questions" and that he certainly could make inquiry with counsel for information if he did not know how to respond. Appellant's Exhibit 5 is an e-mail chain of March 7, 2013. A constituent had made an inquiry for information directly to Mr. Jones. Mr. Jones forwarded the inquiry to the legal department. General Counsel forwarded the e-mail to Mr. Higdon with the comment that Appellant did not know basic information related to his job. Mr. Higdon asked that Appellant draft a reply for consideration in order to document whether he did or did not know the answer.

7. Shortly thereafter, Mr. Higdon began his duties as Commissioner of ABC on March 18, 2013. Appellant requested and received approval for future vacation time.

8. Senate Bill 13 had recently been passed and the implementation for same was soon expected. One month prior to Appellant's vacation, Commissioner Higdon asked him if he could reschedule due to the implementation of the Senate Bill. Appellant told him he could not reschedule as it had been set up around the availability of his family.

9. On May 31, 2013, Commissioner Higdon completed Appellant's first interim review meeting documentation for the period of January 1 through April 30, 2013. (Appellant's Exhibit 6.) Mr. Jones testified this interim review constituted a "rather scathing" review of his performance. He also indicated that during that time his wife had on-going medical issues which required him to take time off; this interim review was in stark contrast to the January review he had received on his annual evaluation for 2012. Furthermore, nothing in this interim review referred to anything that occurred in January or February 2013. With reference to the late response to the open records request, the response was one-day late and the request had been very complex.

10. He identified Appellant's Exhibit 7 as the written response he had tendered to his employer following receipt of the 2013 first interim review. During that time period he had completed 54 open records requests in a timely manner. The only problematic matter brought to his attention during that first interim was the single late response to the open records request. He had never been assigned a Performance Improvement Plan (PIP) in 2013. He received no feedback on this written response.

11. On June 20, 2013, Mr. Jones filed a grievance. A response to the grievance was written by Lynn Gillis, Designated Appointing Authority for the Public Protection Cabinet, dated June 28, 2013 (Appellant's Exhibit 8).

12. On July 22, 2013, Appellant met with the Commissioner as a follow-up to his interim review. The Commissioner told him he was being clocked as he was on the telephone too much and had been abusing his break time.

13. As part of his duties Appellant attended a convention in Louisville in August of 2013. He believed that convention went well and there were no tensions in the workplace. He observed that individuals were working well with him.

14. On August 23, the Commissioner requested a meeting with the Appellant. Appellant was given a ten-day suspension. He testified that in about 2008 he had received a prior written reprimand and a few years prior he had received another ten-day suspension. He also testified that the outside job in which he had been engaged at KCTC had ended in May of 2013, so he did not have such job at the time of this last suspension. The reasons for that ten-day suspension were set out in the August 23, 2013 letter signed by Lynn Gillis, Designated Appointing Authority for the PPC. (Hearing Officer Exhibit 1.)

15. Mr. Jones identified Appellant's Exhibit 9 as an e-mail chain dated June 20, 2013, between Lynn Gillis and Maurice Brown, the Human Resources employee for ABC. Appellant testified he had never been asked to sign a new form pertaining to his outside employment.

16. After he was given the latest suspension, Appellant concluded that in view of everything that had occurred since March, his employer had a goal in mind: To build up documentation to get rid of him. He discussed the situation with his wife. He could not sleep or eat. He was under a lot of stress. At that point he just wanted to separate from the employment. When he returned from his suspension, he tendered his resignation.

17. He thought again about the matter that night. Although he thought his employer was trying to get rid of him or have him quit, he had second thoughts that he should stay employed and fight the matter. He attempted to rescind the resignation through an e-mail to Ms. Gillis and Commissioner Higdon. He was told he could not rescind his resignation as it had already been processed. He then spoke with the Commissioner.

18. Following his resignation, but before his last day of employment, Commissioner Higdon generated a second interim review. (Appellant's Exhibit 11.)

19. Throughout the course of his employment Appellant was a registered Republican. At times, Administrator Danny Reed let him know during meetings that Commissioner Dehner had said, "We have to get rid of that damn Republican." Mike Razor, himself a Democrat, would make jokes about Appellant being a "filthy Republican." Appellant testified that he took Razor at face value as merely joking and that he himself could not ". . . really prove it in black and white."

20. He identified Appellant's Exhibit 10 as his own e-mail of September 12, 2013, to Commissioner Higdon confirming his viewpoint on a meeting he had that day with the Commissioner. Commissioner Higdon responded therein.

21. Mr. Jones identified Appellee's Exhibit 1 as the September 10, 2013 handwritten letter of resignation he had tendered. The letter was addressed to Commissioner Higdon advising he would resign his position on September 30, 2013.

22. Appellant left employment on September 30, 2013. He felt as if he was forced to resign. All the problems started less than a month after Commissioner Higdon began his duties. After September 30, Appellant did not have any employment. He later obtained employment with the Legislative Research Commission. In this current appeal, he is not seeking reinstatement to his position at ABC, but requests he receive pay for the thirty days of unemployment.

23. On cross-examination, Appellant confirmed that the letter of November 29, 2010 (Appellee's Exhibit 2) was a written reprimand issued to him for failure to compose and submit a monthly article for the December issue of the Kentucky Beverage Journal. Appellant testified that this written reprimand was the one he previously testified he thought he had received in 2008. Furthermore, he stated he was under no requirement to produce an article every month as not every month had publish-worthy news. Such a decision was left up to his discretion.

24. The March 24, 2011 letter (Appellee's Exhibit 3) was issuance to him of a written reprimand based on poor time and attendance, poor work performance, and poor communication. At that time, he had been issued a PIP for the period of March 24 through June 30, 2011.

25. He identified Appellee's Exhibit 4 as the Kentucky Personnel Cabinet Position Description for his position as Staff Assistant. He also confirmed that Appellee's Exhibit 5 appeared to represent a March 15, 2007 letter request to hire him as Staff Assistant. The first paragraph of the letter describes Appellant's qualifications for the position.

26. Appellant confirmed that the letter dated March 29, 2011 (Appellee's Exhibit 6) was his five-day suspension based on inappropriate behavior, aggressive workplace behavior, job duties and work performance. This five-day suspension was what he previously testified to have thought was a prior ten-day suspension.

27. Commissioner Higdon never at any time discussed with Appellant his political affiliation.

28. He identified Appellee's Exhibit 7 as the e-mail chain between he and Lynn Gillis on September 11 and 12, 2013. On September 11, Ms. Gillis confirmed receipt of Appellant's resignation effective close of business September 30, 2013, and advised Appellant the request had been processed.

29. The next day, September 12, Mr. Jones sent Gillis an e-mail stating, "I rescind my resignation." Ms. Gillis then sent these e-mails to LaTasha Buckner and Gordon Slone at the PPC.

30. At the close of Appellant's presentation of evidence, the Appellee presented a motion for directed verdict. After hearing the arguments of the parties, the Hearing Officer **OVERRULED** the motion.

31. The first witness for the Appellee was **Frederick A. Higdon**. For a period of forty years, Mr. Higdon had been a practicing attorney and CPA in private practice where he was the managing partner of his own law office. On March 18, 2013, he began his duties as Commissioner of the Department of Alcoholic Beverage Control.

32. Mr. Jones was a Staff Assistant under the Commissioner's supervision. When the Commissioner first arrived, he received and reviewed the position descriptions for all employees under his supervision. He understood Appellant's duties were generally as a Public Information Officer (PIO) who responded to inquiries from the public and the media. The Commissioner met with all individuals he was to supervise, as well as with the Department heads. He found Jones to be likeable, intelligent, and well-suited for his position.

33. Over time he observed Appellant's behavior change. There was a material difference in his work performance and the Commissioner started to receive complaints from Department managers. Appellant had been interrupting employees' work by socializing too much.

34. Senate Bill 13 was the most comprehensive law change for ABC in thirty-seven years. Appellant as PIO had an important role both before and after passage and implementation of that law.

35. On May 31, 2013, the Commissioner conducted the first interim review for 2013 (Appellant's Exhibit 6). By that time, he had observed Appellant in the performance of his duties for a period of two and a half months. Prior to performing this review, he had consulted with former Commissioner Dehner who collaborated with him on the interview and interim reviews for the employees.

36. It was not until May or June of 2013 that the Commissioner had any idea what Appellant's political affiliation was. Mr. Jones told him, "You know I'm a Republican don't you?" He asked for assurance that the Commissioner was not singling him out for that reason. The Commissioner assured him that he was not singling him out and that his affiliation did not matter; that he just wanted him to do his job.

37. The only time Appellant complained to the Commissioner about any job matters was late in the summer of 2013. Appellant complained the Commissioner and his secretary, Judy Manning, had been scrutinizing him too much. The Commissioner assured him they were not.

38. Upon questioning, the Commissioner reviewed the interim meeting evaluations conducted in April and August of 2010 (Appellee's Exhibit 8). He testified he was aware that at one time Appellant had taught at KCTC and had been working with ABC on a flex-schedule so

he could participate in the outside job. Once his KCTC job ended his flex-schedule was changed to a standard work schedule.

39. He identified Appellee's Exhibit 9 as an e-mail chain from May 28, 2013, through June 19, 2013, pertaining to the Appellant's lapse in keeping up with the open records log.

40. After Appellant tendered his resignation, the Commissioner made inquiry with Lynn Gillis of GAPS whether he was required to perform another interim review. Ms. Gillis advised that such interim review was not necessary, as Appellant had resigned. Within a few hours, Ms. Gillis called the Commissioner back to state she was wrong and Appellant was entitled to an interim review so long as he was still employed on September 30, 2013. The Commissioner then conducted the review.

41. Commissioner Higdon had not been aware Appellant had any problems or concerns with his employment prior to Appellant having filed his grievance in June 2013. Starting in June, the Commissioner met with Appellant on a monthly basis to monitor his improvement and determine if he was meeting goals and objectives.

42. Appellant's most recent suspension ended September 9, 2010. He returned to work on September 10. The Commissioner was not in the office that day. He received a telephone call from Ms. Manning advising the Appellant had submitted a written resignation. He told her to take it to Maurice Brown, Human Resources. Brown then sent the resignation to the Appointing Authority.

43. Approximately September 12, 2013, the Commissioner met with Appellant. Mr. Jones asked to rescind his resignation and had several questions about the last ten-day suspension. Commissioner Higdon directed Appellant to make those inquiries with the Appointing Authority, Lynn Gillis. Appellant asked whether he could rescind his resignation. The Commissioner told him he did not know. He testified, however, that if he had any input at all, his advice would have been not to permit rescission of the resignation.

44. He identified Appellant's Exhibit 12 as the March 27, 2013 e-mail from Mr. Jones to the Commissioner regarding FAQ documents.

45. He identified Appellant's Exhibit 13 as a May 31, 2013 e-mail from Lynn Gillis to himself, Maurice Brown and Judy Manning whereby Ms. Gillis provided policies on time and attendance for various departments, a copy of the first suspension for Mr. Jones and a suspension that involved open records requests.



46. Upon his review of Appellant's Exhibit 14 he was not aware that Mr. Jones and Jeanette Shuff had a working relationship or that they had co-authored this article, "Investigation by Numbers."

47. The next witness was **Lynn Keeling Gillis**, who for the past two years has been employed in the Labor Cabinet with the General Administration and Program Services (GAPS) as Division Director of Human Resources. She was also a designated Appointing Authority.

48. Ms. Gillis was involved in Appellant's current disciplinary matter: a ten-day suspension. She had issued the suspension letter (Hearing Officer Exhibit 1). The Agency submitted a request for discipline and a completed form. Normal procedure also would have included provision of a Performance Incident Log and any supporting documents. She thereafter worked with staff in the Legal Department to determine whether discipline was required and, if so, what level of discipline was appropriate.

49. She described the policy of progressive discipline followed by the Labor Cabinet. Appellant had received two prior written reprimands and a five-day suspension. Issuance of a ten-day suspension was in this case progressive in nature.

50. She confirmed the Appellant had filed a grievance in June 2013 and listed several issues of concern. On June 28, 2013, after having investigated the matter, Ms. Gillis issued a written response to the grievance (Appellant's Exhibit 8). She concluded she could find no evidence that Mr. Jones had been required to interpret law, had been treated unfairly, or that he had been scrutinized in an unfair or discriminatory manner.

51. Had she been aware at the time of issuance of the ten-day suspension that Appellant no longer held outside employment, such incident would not have constituted an offense. However, he would still have been issued a ten-day suspension based on the other violations, because such discipline was progressive. The Cabinet always progresses from a five-day suspension to a ten-day suspension. At issuance of the August 23, 2013 suspension, she had not asked anyone whether Appellant held outside employment.

52. It was Maurice Brown, the HR liaison, who had informed her of Appellant's resignation. She entered the resignation into the Kentucky Human Resource Information System (KHRIS). The information then flowed to the Personnel Cabinet which approved the resignation that same day. She sent an e-mail to Mr. Jones to advise she had received and processed his resignation.

53. Consideration of rescission of a resignation is within Ms. Gillis' discretion. The Agency has no say in the matter. She did not feel that rescission of the resignation was in the Agency's best interest. "I just chose not to rescind it." Appellant had given his resignation in good faith and it had "already moved through." Only in rare cases would a resignation be rescinded.

### **FINDINGS OF FACTS**

1. William Nathan Jones, at the time of his employment as a Staff Assistant with the Department of Alcoholic Beverage Control (ABC), Public Protection Cabinet, was a classified employee with status. He had timely filed this appeal with the Kentucky Personnel Board on October 24, 2013. In the appeal, Appellant claimed that he was subject to constructive discharge, political discrimination and was not allowed to rescind his resignation. The burden was on the Appellant to prove his case by a preponderance of the evidence.

2. According to the Kentucky Personnel Cabinet Position Description, Appellant's duties were primarily to serve as Chief Administrative Support to the Executive Director of the Office of Alcoholic Beverage Control in the analysis and formulation of policy planning and management policies, as well as "other duties as required." He was also to act as liaison between the Department and other agencies and organizations; research and respond to information requested from the public and the media; represent the Agency as the media contact; develop and maintain the Agency website; and interpret departmental policy to agency employees and the public (Appellee's Exhibit 4). Appellant was aware of such duties in early 2012 when he and Commissioner Dehner reviewed the Performance Planning on January 31, 2012. The duties set out therein were consistent with the Position Description. (Appellant's Exhibit 1.)

3. During his six years of employment at ABC, through 2012, Appellant received "Highly Effective" ratings on all his Annual Employee Performance Evaluations with the exception of one "Good" rating. (Appellant's Exhibit 1.)

4. On March 6, 2013, General Counsel Stephen Humphress advised ABC Department staff that there existed a communication problem with too many employees providing information for and speaking on behalf of the Department. (Appellant's Exhibit 2.)<sup>1</sup> He directed preparation of a Frequently Asked Questions (FAQ's) section for the website, with Appellant to be in charge of the project, and that all general information questions be directed to Appellant as "PIO" (Public Information Officer). There is nothing described in this e-mail that is inconsistent with the above described duties of the Appellant as a Staff Assistant.

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<sup>1</sup> It is unclear to the Hearing Officer from the evidence presented, why or if the General Counsel had the administrative authority to issue such directive.

5. Frederick Higdon assumed his duties as Commissioner of ABC on March 18, 2013. In order to prepare for his own duties, Mr. Higdon kept in communication with ABC staff, including General Counsel, prior to March 18. Soon after his arrival, Commissioner Higdon reviewed the Position Description for all employees under his supervision and met with all department heads and employees he supervised.

6. On May 31, 2013, Commissioner Higdon completed the first interim review for Mr. Jones (Appellant's Exhibit 6). He had consulted with former Commissioner Dehner on all such interim reviews he completed at that time, and collaborated with him in the employee interviews. The Commissioner noted on the interim review that Appellant had some performance problems. The Appellant responded to the interim review in writing (Appellant's Exhibit 7).

7. It was not until May or June of 2013 that Commissioner Higdon was advised of Appellant's political affiliation. Such information came from Appellant himself who asked the Commissioner, "You know I'm a Republican, don't you?"

8. Appellant filed a grievance on June 20, 2013. Lynn Gillis, designated Appointing Authority, for the Public Protection Cabinet, investigated and responded to the grievance by her letter of June 28, 2013 (Appellant's Exhibit 8). She did not find evidence Appellant had been required to interpret law, was treated unfairly, or had been scrutinized in an unfair or discriminatory manner.

9. Beginning in June 2013, Commissioner Higdon met with Appellant on a monthly basis to monitor his improvement and determine if he was meeting goals and objectives. As a follow-up to the first interim review, the Commissioner met with the Appellant on July 22, 2013. Appellant was told he had spent too much time on the telephone and had been abusing his break time.

10. On August 23, 2013, Appellant was issued a ten-day suspension for one incident of failure to comply with the Open Records law, failure to submit off-duty employment verification, and the use of state equipment and resources for private benefits/economic interest. (Hearing Officer Exhibit 1)<sup>2</sup> He returned to work on September 10, 2013, following this suspension.

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<sup>2</sup> Although evidence was presented surrounding the circumstances of this ten-day suspension, and Appellant's disagreement with the grounds for same, this suspension was **not** before this Hearing Officer. See: Recommended Order Attachment A.

11. Appellant tendered his written resignation on September 10, 2013 (Appellee Exhibit 1). The letter was addressed to Frederick Higdon and notified the Commissioner of Appellant's resignation effective September 30, 2013. Commissioner Higdon, although not in the office that day, was advised of the resignation by his secretary, Judy Manning. He directed Ms. Manning to deliver the resignation to Maurice Brown in Human Resources.

12. Maurice Brown informed Lynn Gillis of Appellant's resignation. She entered the resignation into the Kentucky Human Resource Information System. The Personnel Cabinet then processed and approved the resignation that same day. She sent an e-mail to Mr. Jones on September 11, 2013, confirming receipt of the resignation and advising it had been processed. (Appellee's Exhibit 7.)

13. Appellant had second thoughts overnight about having tendered his resignation. On September 12, 2013, he met with Commissioner Higdon to inquire whether he could rescind his resignation. The Commissioner directed him to make such inquiry with Lynn Gillis.

14. At 8:46 a.m. that day, he sent an e-mail to Lynn Gillis with the message "I rescind my resignation." (Appellee's Exhibit 7.)

15. It was Lynn Gillis, who as Appointing Authority, had discretion to decide whether or not to rescind Appellant's resignation. She chose not to rescind the resignation. Appellant's employment as Staff Assistant ended close of business September 30, 2013.

### **CONCLUSIONS OF LAW**

1. Appellant has failed to show by a preponderance of the evidence that he was subject to political discrimination. While the facts are clear that all during the course of his employment, Mr. Jones was registered as a "Republican," and that those who worked around him particularly in a supervisory capacity were registered "Democrats," the evidence does not support Appellant's allegation.

2. While Appellant testified that Administrator Danny Reed told him that Commissioner Dehner had made certain derogatory remarks about him as a Republican, and that Appellant viewed the comments of Mike Razor to have been made in a joking manner, he also testified, and the evidence showed, that up through his 2012 Annual Employee Performance Evaluation, all such evaluations rated him as "Highly Effective" with the exception of a single "Good" rating.

3. Commissioner Higdon did not learn about Appellant's political affiliation until May or June of 2013 when Appellant himself so advised the Commissioner. By Appellant's own admission, Commissioner Higdon never at anytime discussed with him his political affiliation.

4. Appellant failed to show by a preponderance of the evidence that conditions existed to the extent that his leaving employment was the result of a constructive discharge. While General Counsel Humphress had issued a clarification about directing centralized questions to the Appellant in his capacity as Staff Assistant, and establishing a frequently asked questions section on the Department's website, such matters were not outside the scope of the Appellant's described duties. The evidence does not show that clarification of these duties constituted placing an additional burden on the Appellant. Nor was such act intended to burden the Appellant.

5. "A finding of constructive discharge requires an inquiry into both the objective feelings of an employee, and the intent of the employer." *Ford v. General Motors Corp.*, 305 F.3d. at 554 (6<sup>th</sup> Cir. 2002). The latter requires a party to show "that the employer intended and could reasonably have foreseen the impact of its conduct on the employee." *Id.*

6. There is nothing in the evidence to show that a hostile work environment was created either before or after Commissioner Higdon's assumption of duties. The ten-day suspension issued by Commissioner Higdon must be accepted by the Hearing Officer as valid in this instance.<sup>3</sup>

7. Appellant failed to show by a preponderance of the evidence that there was any violation of regulation or law by the Appellee having failed to rescind Appellant's resignation from employment.

8. It is clear from the document and the Appellant's testimony that the resignation had been tendered, unconditionally.

9. Under Kentucky law, when a public employee's resignation is once made and accepted by the Appointing Authority, it may not be withdrawn by the employee who made it, unless his resignation was conditional so as to make it voidable if the condition was not performed. *Hogg v. Miller*, 298 Ky. 128, 182 S.W.2d 242 (Ky. App. 1944), as cited in *James Robinson v. Department of Military Affairs, Personnel Board, Commonwealth of Kentucky*, 2010 WL 2936005. Once the resignation of an employee is accepted, effective at a future date, it may not be withdrawn after its acceptance. *Redmon v. McDaniel*, 540 S.W.2d. 870 (Ky. 1976).

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<sup>3</sup> Prior to this evidentiary hearing, the Hearing Officer was advised that Appellant had untimely filed the appeal of the ten-day suspension and that issue was not before this Hearing Officer.

10. The facts and documentary evidence show, without dispute, that Mr. Jones made an unconditional resignation, effective September 30, 2013. It was submitted in writing, accepted, processed and approved by the Appointing Authority, and acted upon thereafter by the Public Protection Cabinet. Therefore, there is no other conclusion to be drawn, but that the Appointing Authority acted within its authority to deny Jones' request to rescind his resignation.

**RECOMMENDED ORDER**

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Personnel Board that the appeal of **WILLIAM NATHAN JONES VS. PUBLIC PROTECTION CABINET (APPEAL NO. 2013-253)** be **DISMISSED**.

**NOTICE OF EXCEPTION AND APPEAL RIGHTS**

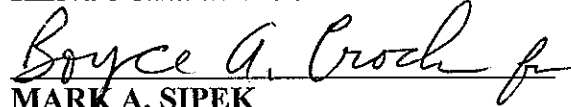
Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal, a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

Each Party has thirty (30) days after the date the Personnel Board issues a Final Order in which to appeal to the Franklin Circuit Court pursuant to KRS 13B.140 and KRS 18A.100.

**ISSUED** at the direction of **Hearing Officer Roland P. Merkel** this 24<sup>th</sup> day of September, 2014.

**KENTUCKY PERSONNEL BOARD**

  
**MARK A. SIPEK**

**EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:

Hon. Cannon Armstrong  
William Nathan Jones

**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2013-253**

**WILLIAM NATHAN JONES**

**APPELLANT**

**VS.**

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

**PUBLIC PROTECTION CABINET,  
ROBERT VANCE, APPOINTING AUTHORITY**

**APPELLEE**

\* \* \* \* \*

This matter came on for a pre-hearing conference on November 22, 2013, at 10:00 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.

At the pre-hearing conference, the Appellant, William Nathan Jones, was present by telephone and was not represented by legal counsel. The Appellee, Public Protection Cabinet, was present and represented by the Hon. Cannon Armstrong. Also appearing as agency representative were the Hon. Latasha Buckner and Ms. Lynn Keeling-Gillis.

The purposes of the pre-hearing conference were to determine the specific penalizations alleged by Appellant, the specific section of KRS 18A which authorizes this Appeal, to determine the relief sought by the Appellant, to define the issues, address any other matters relating to this Appeal and to discuss the option of mediation.

The Hearing Officer notes this Appeal was filed with the Personnel Board on October 24, 2013. The Appellant was appealing a ten-day suspension without pay he received by letter dated August 23, 2013, for allegations as stated in that letter. Also in the Appeal, Appellant claimed discrimination based on political affiliation and claimed he had suffered a constructive discharge and was not allowed to rescind his resignation.

As relief, Appellant seeks to have the ten days' pay restored to him and the matter expunged from his record, and to also have back pay for the time after he had resigned (his last day of work being September 30, 2013) until he begun new employment on November 4, 2013.

As to the claim of political discrimination, Appellant stated he is registered as a Republican, and his duties were being taken from him and given to a non-merit employee who was a Democrat. Appellant believed this was being done due to his political affiliation.

As to the constructive discharge/rescission of resignation claim, Appellant stated he had given notice of his resignation on or about September 11, 2013, and his actual last day of work was September 30, 2013. However, Appellant was not seeking to have his job restored to him, but rather to have the back pay issued to him from after his resignation date of September 30, 2013, until he begun new employment on November 4, 2013.

In accordance with the briefing schedule set forth in the Interim Order entered November 26, 2013, Appellee filed a timely motion to dismiss. Though given time in which to file a response, Appellant did not do so.

### **BACKGROUND**

1. During the relevant times, Appellant, William Nathan Jones, was a classified employee with status.

2. Appellant was suspended for ten days without pay by letter dated August 23, 2013. According to the document filed with the Motion to Dismiss, and also, as admitted to by Appellant in the filing of the Appeal with the Personnel Board, he received this letter on that same date, August 23, 2013.

3. Counsel for the Appellee contends that the appeal filed with the Personnel Board (on October 24, 2013) was untimely, as it was filed beyond the statute of limitations set forth in KRS 18A.095(8).

4. KRS 18A.095(8) states as follows:

A classified employee with status who is demoted, suspended, or otherwise penalized shall be notified in writing of:

- (a) The demotion, suspension, or other penalization;
- (b) The effective date of the demotion, suspension, or other penalization;
- (c) The specific reason for the action including:



1. The statutory or regulatory violation;
2. The specific action or activity on which the demotion, suspension, or other penalization is based;
3. The date, time, and place of the action or activity; and
4. The name of the parties involved; and

(d) That he or she has the right to appeal to the board within sixty (60) days, excluding the day that he or she received notification of the personnel action.

5. In its motion, counsel sets forth in detail why the Appeal regarding the suspension would be untimely.

6. As to the remainder of Appellant's Appeal, which dealt with claims of constructive discharge and discrimination based on political affiliation, the Appellee contends that Appellant submitted a resignation on or about September 10, 2013, and such was not done under any apparent duress. The resignation was to be effective September 30, 2013. Counsel contends Appellant's resignation was tendered without duress, and as such, Appellant waived his rights to administrative and procedural due process by resigning voluntarily.

7. To the best of the Hearing Officer's understanding, counsel does not address Appellant's claim of political discrimination.

8. As noted above, though given ample time in which to do so, Appellant did not file a response.

### FINDINGS OF FACT

1. During the relevant times, Appellant, William Nathan Jones, was a classified employee with status.

2. The Hearing Officer finds that Appellant was suspended for ten days without pay by letter dated August 23, 2013, and such was received by Appellant on August 23, 2013.

3. The Hearing Officer finds that Appellant's Appeal with the Personnel Board, of which the Appeal of the suspension was a part, was filed with the Personnel Board on October 24, 2013.

4. The Hearing Officer finds that pursuant to KRS 18A.095(8), Appellant had sixty (60) days to file his Appeal with the Personnel Board, not counting the day he was actually served with a copy of the suspension letter. This time period would run and would include weekends and holiday, except that the sixtieth day, if it would fall on a non-workday, would continue until the next business day.

5. The Hearing Officer finds October 24, 2013, was a Thursday, that the Personnel Board was open for business and it was not a holiday.

6. The Hearing Officer finds that Appellant's Appeal as to the suspension was untimely.

7. The Hearing Officer finds that Appellant did submit a resignation from his job on September 10, 2013, and attempted to rescind that resignation on or about September 12, 2013. This is based on unrefuted documentary evidence of record.

8. The Hearing Officer also finds that Appellant, at the pre-hearing conference held in this matter on November 22, 2013, was only interested in recovering back pay for the time he would have been working, but for what he termed the "constructive discharge" from October 1, 2013, until on or about November 4, 2013. Appellant's last day had been September 30, 2013, and according to Appellant, he found new employment on or about November 4, 2013.

9. 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).

10. In considering contested issues, the Hearing Officer must resolve any contested matters in favor of the non-moving party, in this case, the Appellant. That being so, the Hearing Officer **OVERRULES** Appellee's Motion to Dismiss as it relates to the claim of constructive discharge. Though the Appellee did not raise or discuss the claim of political discrimination, the Hearing Officer notes Appellant, in his Appeal form, tied the political discrimination claim into the suspension. The suspension claim will not be allowed to proceed to evidentiary hearing, due to being untimely filed. It is not clear whether the political discrimination claim relates only to the suspension, or whether it is also related to the claim of constructive discharge.

11. In any event, the Hearing Officer does not agree that Appellant's constructive discharge claim must fail without evidentiary hearing. Counsel did cite

the case of *Robinson v. Department of Military Affairs* (Personnel Board Appeal No. 2010-026). One difference is that case proceeded to evidentiary hearing, and it appears to the Hearing Officer that the safer course of action here would be for this matter to also proceed to evidentiary hearing.

### CONCLUSIONS OF LAW

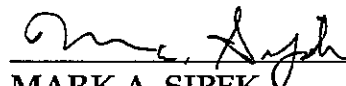
1. The Hearing Officer concludes as a matter of law that Appellant's claim regarding his ten-day suspension must be dismissed as untimely filed.

2. The Hearing Officer concludes as a matter of law that Appellee's Motion to Dismiss regarding Appellant's other claims, especially regarding the constructive discharge, attempted rescission of resignation, and possibly the political discrimination claim based on political affiliation is **OVERRULED**.

**WHEREAS**, this matter is now returned to the Scheduling Clerk to set for another pre-hearing conference regarding Appellant's claims which were not recommended to be dismissed.

**SO ORDERED** at the direction of the Hearing Officer this 26<sup>th</sup> day of February, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK  
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Cannon Armstrong  
Mr. William Nathan Jones