

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-121

LEE A. KARSNER

APPELLANT

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

JUSTICE AND PUBLIC SAFETY CABINET
DEPARTMENT OF CORRECTIONS
J. MICHAEL BROWN, APPOINTING AUTHORITY

APPELLEE

** ** *

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 October 20, 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 **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 19th day of November, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Stafford Easterling
Lee A. Karsner
Bobbie Underwood

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
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**V. FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND RECOMMENDED ORDER**

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DEPARTMENT OF CORRECTIONS,
J. MICHAEL BROWN, APPOINTING AUTHORITY**

APPELLEE

** ** *

This matter came on for a pre-hearing conference on July 21, 2014, 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.

The Appellant, Lee A. Karsner, was present, and was not represented by legal counsel. The Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Stafford Easterling.

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

The Appellant filed his appeal with the Personnel Board on June 4, 2014. Appellant is appealing having filed a grievance which had not been responded to for over a month.

At the time of the pre-hearing conference, Appellant affirmed that the grievance he had filed on March 7, 2014, had not been responded to by the third-level supervisor (Deputy Commissioner Kimberly Potter-Blair) within the required timeframe as set forth at 101 KAR 1:375. The reason for the grievance dealt with Appellant's request to have 121.5 hours of sick leave restored to him as a result of his having been required to obtain a "fit for duty" form, which Appellant admits was in 2010.

Appellant stated that when a new director took over the Division of Training and he was required to obtain another "fit for duty" form, he was not required to take off, and wondered at the inconsistency. Thus, he filed a grievance seeking to have the sick time for 2010 restored to him. As relief, Appellant seeks to have the 121.5 hours sick time restored to him.

The Hearing Officer informed Appellant that his appeal is about the grievance not being responded to in a timely fashion, and not the 121.5 hours of sick leave he seeks to have restored to him. Appellant agreed he would want that to also be an issue of the appeal.

Counsel for the Appellee requested time to file a motion to dismiss as regards to Appellant seeking to have the sick leave he was required to use in 2010 restored to him. Counsel also stated he did not believe Appellant could obtain relief as to the sick leave balance by having filed a grievance in 2014 regarding events that occurred in 2010. Counsel stated he would need time to inquire why the grievance had not been responded to in a timely fashion. The Hearing Officer encouraged counsel for the Appellee to discover the reasons for the possible untimeliness of grievance response in this matter, and also to discover whether there is anything to be done to resolve Appellant's underlying complaint.

The parties filed timely motions and responses, and the matter is submitted to the Hearing Officer for a ruling.

BACKGROUND

1. During the relevant times, the Appellant, Lee A. Karsner, was and is a classified employee with status.

2. In its Motion to Dismiss, the Appellee appears to admit that the grievance response from Appellant's third-line supervisor was not issued in a timely manner, but has now been responded to on or about July 28, 2014. As the Hearing Officer understands it, the subject matter of the grievance was the same as raised in this appeal; that is, Appellant had 121.5 hours of sick leave he believes should be restored to him that he was required to use in 2010. Appellant states this because Appellant stated at the pre-hearing conference, as was noted above, that when a new Director took over the Division of Training he was required to obtain a fit-for-duty form, and he was not required to take off sick leave, and he wondered at the inconsistency.

3. Counsel contends that Appellant has not suffered a penalization, inasmuch as the grievance has now been responded to, albeit untimely. The Hearing Officer notes counsel stated at the pre-hearing conference that Appellant would not be able to gain relief for events which occurred in 2010 by filing a grievance or appeal in 2014.

4. The Appellant filed a timely response, noting he had received (again, untimely) response from the third-line supervisor on his grievance. Appellant contends that the 121.5 hours sick leave he had used in 2010 should not have been taken from him, because he believes the prior Director may have been targeting him, based on a statement made to Appellant by his branch manager.

5. 101 KAR 1:375, Section 4(1-5) states:

Section 4. Grievance Levels.

(1) Except as provided by Section 3(1) of this administrative regulation, the immediate supervisor shall, upon investigation, issue findings and a decision in writing to the employee within ten (10) work days after receipt of the grievance. If the responding supervisor is unable to resolve the complaint to the satisfaction of the employee, the employee may request review of the grievance within five (5) work days of receipt of the decision by the next appropriate level.

(2) The next line supervisors shall each have five (5) work days to respond to the grievance. The employee shall have five (5) work days after each intermediate supervisory review to decide to appeal the grievance to the next level.

(3) If the line supervisors are unable to resolve the grievance to the satisfaction of the employee, the employee may request review of the grievance within five (5) work days of receipt of the decision of the final line supervisor by the appointing authority for a final determination. The appointing authority, upon investigation, shall issue findings and a final determination in writing to the employee within twenty (20) work days.

(4) Unless the time limits have been extended by agreement of the parties, failure of supervisory or management personnel to respond within prescribed time limits shall automatically advance the grievance to the next review level.

(5) An intermediate grievance level may be waived by written agreement of the parties.

6. KRS 18A.095(29) states:

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.

FINDINGS OF FACT

1. During the relevant times, the Appellant, Lee A. Karsner, was and is a classified employee with status.

2. The Hearing Officer finds that Appellant's grievance was not responded to in a timely fashion as required by 101 KAR 1:375.

3. The Hearing Officer also finds that the grievance, having finally been responded to, moots any relief the Personnel Board would be able to grant on this issue.

4. The Hearing Officer finds that any claim Appellant may have had regarding sick leave he presumably should not have had to use in 2010, when being required to obtain a "Fit for Duty" form is untimely filed.

5. The Hearing Officer finds that KRS 18A.095(29) would be controlling in this circumstance.

CONCLUSION OF LAW

1. The Appellee failed to comply with the provisions of 101 KAR 1:375, Section 4, when the Appellant's third-line supervisor did not respond to his grievance in a timely manner.

2. The Appellee has now responded to the Appellant's grievance and there is no additional relief to grant the Appellant.

3. The Appellant's claim for 121.5 hours of sick time to be restored to him is untimely. KRS 18A.095(29).

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **LEE A. KARSNER V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2014-121)**, be

1. **SUSTAINED** to the Extent that the Appellee did not comply with the provisions of 101 KAR 1:375, Section 4, when it failed to timely respond to Appellant's grievance; in the future, the Appellee shall comply with all the provisions of 101 KAR 1:375; and

2. **DISMISSED** as the Appellant's claims to restore sick leave as untimely appealed.

3. Further, **IT IS ORDERED** that the Appellee shall reimburse Appellant for any leave time used attending the pre-hearing conference. KRS 18A.095(25).

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 Boyce A. Crocker** this 20th day of October, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Stafford Easterling
Mr. Lee A. Karsner