

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2020-171

MARTINA KEENE

APPELLANT

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

DEPARTMENT OF AGRICULTURE

AND

PERSONNEL CABINET

APPELLEES

* * * * *

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 30, 2021, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be altered as follows:

A. **Delete** the Recommended Order and substitute the following:

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Kentucky Personnel Board that the appeal of **MARTINA KEENE VS. DEPARTMENT OF AGRICULTURE AND PERSONNEL CABINET (APPEAL NO. 2020-171)** be **DISMISSED**.


IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer, as Altered, be and they hereby are, approved,

adopted and incorporated herein by reference as a part of this Order, and the Appellant's appeal is **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 12th day of May, 2021.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
SECRETARY

A copy hereof this day mailed to:

Hon. Nicole Liberto
Hon. Catherine Stevens
Martina Keene
Mark White

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2020-171**

MARTINA KEENE

APPELLANT

VS.

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

DEPARTMENT OF AGRICULTURE

And

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**** ** * * ****

This matter came on for a pre-hearing conference on October 1, 2020, at 10:00 a.m., ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Martina Keene, was present and was not represented by legal counsel. The Appellee Department of Agriculture was present and represented by the Hon. Nicole Liberto. Also present for the Department of Agriculture was Mark White. The Appellee Personnel Cabinet was present and represented by the Hon. Catherine Stevens. All parties participated by telephone.

The purposes of the pre-hearing conference were to define the issues, to address any other matters relating to the appeal, and to discuss the option of mediation.

BACKGROUND

1. The Hearing Officer notes the Appellant filed her appeal with the Personnel Board on July 23, 2020. The Appellant stated she was appealing a penalization. She stated that in 2017 the Department of Agriculture went under a reorganization. A section was eliminated and a Branch was created. The Appellant had previously been an Administrative Section Supervisor. She stated that, with no Section, she should have had a title change. She no longer supervised any employees, and her title and pay stayed the same. In May 2019, she was told she needed to change job titles and was offered either Branch Manager or Human Resource Administrator. She chose the Branch Manager position. The Appellant stated she was reallocated to Branch Manager on June 16, 2019, with a pay raise of 5 percent. The Appellant is requesting back pay to the date of the 2017 reorganization of 5 percent. She believes she should have been moved into a Branch Manager position at the time of the reorganization.

2. The Department of Agriculture and the Appellant wished to mediate this matter. The Personnel Cabinet requested a schedule to file a Motion for Summary Judgement.

3. In its Motion for Summary Judgement, the Personnel Cabinet stated as follows:

The Personnel Board does not have jurisdiction to adjudicate this appeal, as it was not filed “within on a (1) year from the date of the penalization or from the date that the employee reasonably should have known of the penalization.” KRS 18A.095(29). Appellant, Martina Keene, claims that her position as an Administrative Section Supervisor (Grade 15) should have been classified as an Administrative Branch Manager (Grade 16) dating from the time the Kentucky Department of Agriculture (KDA) went through a reorganization on November 16, 2017. Appellant claims she is entitled to back pay between November 16, 2017 and when she was reallocated as an Administrative Branch Manager on June 16, 2019. Because Appellant’s appeal was not filed with the Personnel Board until July 23, 2020, it must be dismissed.

4. In its motion, the Personnel Cabinet pointed out that the Appellant filed her appeal one year, one month, and seven days after her reallocation to Administrative Branch Manager, and two years eight months, and seven days after the reorganization. The Personnel

Cabinet argued that this was more than one year from the date of the Appellant's penalization or the date she reasonably should have known have known of the penalization.

5. In her response to the Motion for Summary Judgement, the Appellant stated she was assured by the Department of Agriculture that they would do everything they could to make things right. When the Appellant's supervisor contacted the Personnel Cabinet about the possibility of back pay after her reallocation, she was told she would need to file an appeal to the Personnel Board. The Appellant did not understand why the Personnel Cabinet was added as a party to this appeal.

6. The Appellant stated that she and her Director, Mark White, were going through a lot of personal or family issues and she did not want to create any problems by filing a Personnel Board appeal.

7. Lastly, she questioned that, if she was late filing her appeal, why didn't the Personnel Cabinet have a time limit when it took them two years to figure out that her title was not correct following the reorganization.

8. The Department of Agriculture filed a response arguing that the Personnel Cabinet waived the affirmative defense of the statute of limitations when it advised the Appellant and her supervisor that she should file an appeal.

9. The Department of Agriculture also argued that the effect of the Coronavirus Pandemic should necessitate an exception to the statute of limitations. They argued that, although Personal Board statute of limitations are not specifically addressed in Executive Order No. 2020-215, "it is widely excepted that as state employees, our ability to meet deadlines or otherwise function in a normal manner have been substantially impeded."

10. The Department of Agriculture made clear that it wished for the appeal to proceed.

11. The Personnel Cabinet filed a reply arguing the question of timeliness of the appeal is jurisdictional and must be decided by the Board as a preliminary matter.

FINDINGS OF FACT

1. The Appellant was employed as an Administrative Section Supervisor, grade 15, with the Kentucky Department of Agriculture (KDA). KDA went through a reorganization on November 16, 2017, which eliminated the Section that the Appellant supervised.

2. It is not entirely clear when the Appellant realized she was penalized by remaining in an improper classification.

3. On June 16, 2019, the Appellant was reallocated as an Administrative Branch Manager, grade 16.

4. The Appellant questioned why she did not receive back pay to November 16, 2017, the time of the reorganization and was told she would have to file an appeal to the Personnel Board.

5. It is not in dispute that, as of at least June 16, 2019, the Appellant realized that she should not have remained an Administrative Section Supervisor following the reorganization and was possibly entitled to additional compensation.

6. For purposes of this motion, it is accepted as true that both the Appellant and her supervisor were dealing with a lot of personal and family issues.

7. It is acknowledged that many operations in state government were greatly impacted by the Coronavirus Pandemic and the state of emergency.

CONCLUSIONS OF LAW

1. The Personnel Board lacks jurisdiction to hear this appeal because the Appellant did not file the appeal within the timeframe stated in KRS 18A.095(29). By at least June 16, 2019, the Appellant was aware that she had been penalized and she did not file her appeal within one year of that date.

2. This is a statutorily imposed deadline which impacts the Personnel Board. As a result, the Board has no discretion to consider family issues of the parties or the Coronavirus Pandemic. *Commonwealth Department of Revenue, Finance and Administration Cabinet v McDonald*, 304 S.W. 3d 62 (Ky. App. 2009).

3. Executive Order No. 2020-215 does not extend the time period to file Personnel Board appeals.

RECOMMENDED ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Kentucky Personnel Board that the appeal of **MARTINA KEENE VS. TRANSPORTATION CABINET (APPEAL NO. 2009-068)** 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).


[Hearing Officer Note: Any document filed with the Personnel Board shall also 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 Mark A. Sipek** this 30th day of March, 2021.

KENTUCKY PERSONNEL BOARD



**MARK A. SIPEK
EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:

Hon. Catherine Stevens

Hon. Nicole ~~Liberto~~

Martina Keene

Hon. Rosemary Holbrook