

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NOS. 2015-010 and 2015-032**

STEVE W. KEPLEY

APPELLANT

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

**CABINET FOR HEALTH AND FAMILY SERVICES,
J. P. HAMM, APPOINTING AUTHORITY**

APPELLEE

** ** *

These matters came on for a pre-hearing conference on March 26, 2015, 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, Steve W. Kepley, was present by telephone and was not represented by legal counsel. The Appellee, Cabinet for Health and Family Services (CHFS), was present and represented by the Hon. Luke Roberts.

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 Hearing Officer noted Appeal No. 2015-010 was filed with the Personnel Board on January 12, 2015. The Appellant was appealing a disciplinary fine, having been denied, abridged or impeded right to inspect or copy records and also was appealing Other Penalization, specifically not being allowed to receive training. In the narrative portion of his appeal, Appellant also indicated he had received a written reprimand from Charlene Oates, Nurse Manager at Central State Hospital, which he believed was retaliatory for his having cooperated with an EEOC investigation.

As to the disciplinary fine issue, Appellant indicated he had not actually received a disciplinary fine. Appellant also indicated that as to the records claim, he had, pursuant to an Open Records Request, received the records he was requesting.

Appellant also indicated that the failure to receive training claim related to shadowing the Unit Coordinator which he did not receive but three other employees did receive who were ultimately promoted to Unit Coordinator (per the Appellant, Charge Nurse).

Appeal No. 2015-032 was filed by the Appellant on February 23, 2015. Appellant indicated he was appealing his dismissal and discrimination based on disability. In the narrative portion of his appeal, Appellant indicated he filed a complaint about a situation he believed to be a violation of state and federal EEOC standards, cooperated with the investigation and was later terminated. Appellant stated there was no reason given for the termination, other than the position was being eliminated. However, shortly after he was let go, the same position was reposted by Seven County Services at Central State Hospital.

As to the claim regarding discrimination based on disability, Appellant stated he had a doctor's note which related to a medical condition which had been ongoing for a few years resulting from a car wreck. Essentially, this involved Appellant being asked to pull a double shift, and that he not be required to come in the next day and work a regular shift. Appellant stated this had not been a problem, but sometime in December 2014 or January 2015, that even if you had worked a double, you were being required to come in the next day as per usual. According to the Appellant, this was a problem, and he had a medical statement that should have excused him from reporting for work after having pulled a double shift, as the Hearing Officer understands it.

Appellant indicated he was making no other claims.

The parties complied with a briefing schedule, and these consolidated matters stand submitted to the Hearing Officer for a ruling on the Appellee's Motion to Dismiss.

BACKGROUND

1. During the relevant times, the Appellant, Steve W. Kepley, was employed by Seven Counties Services at Central State Hospital, as an inpatient registered nurse.
2. The Appellee, Cabinet for Health and Family Services, filed two Motions to Dismiss on these two appeals, which had not been consolidated until the pre-hearing conference on March 26, 2015. In both motions, the Appellee contends that the Personnel Board lacks jurisdiction to consider Appellant's complaints, as the Appellant is not a KRS 18A state employee, but rather is a contract employee with Seven Counties Services Inc.
3. These appeals were consolidated at the time of the pre-hearing conference, and a further briefing schedule was set forth.
4. Appellant filed a document entitled "Appellant's Motion to Continue," which was filed in both appeals. Appellant makes two primary arguments in his document which the Hearing Officer interprets as a response to the Motion to Dismiss. The first is that Appellant had contacted Bill Daniels, an EEO investigator with the Appellee CHFS. The Appellant contends that Cathy Cox, who the Hearing Officer understands to be the head of the EEO office at CHFS, "...insisted that her department be allowed to start the investigation. By insisting on her

department being allowed to investigate the charges, Ms. Cox assumed the liability for her department's action." Appellant is arguing that by Cathy Cox assuming responsibility for an EEO investigation into complaints apparently made by the Appellant, that this means CHFS cannot now claim that Appellant is not subject to KRS 18A protections.

5. The second argument raised by Appellant is that, "...in the court case of KRS vs. Seven Counties, Lisa Leet, Human Resource Executive and a labor lawyer, stated in her testimony that the employees contracted through Seven Counties but working at Central State Hospital and KCPC were unique in labor law because these employees were hired and fired by the Cabinet for Health and Family Services and not by Seven Counties Services." Appellant continues by stating Ms. Leet testified other employees contracted by the Commonwealth but working elsewhere doing state working (sic) were entirely under the control of Seven Counties Services. Appellant contends, based on this, that Seven Counties employees working at Central State and KCPC must therefore not be typical contract employees, as they are more under the control of CHFS, and thus, must be assumed to be other classified employees and allowed the same protection under KRS 18A.

6. Appellant continues by stating, "It cannot argue in one case that these employees are entitled to retirement benefits and protection in one court case, and then take the opposite position that these employees are contract employees in another."

7. The Appellee filed a reply to the Appellant's pleading. The Appellee contends that Appellant fails to cite any authority in support of his arguments, and again relies on KRS 18A.075(3) as being the authority for the types of employees over which the Personnel Board may hear appeals from. Counsel contends that a contract employee does not fall anywhere within that purview.

8. KRS 18A.075(3) states:

Hear appeals from applicants for positions for which examinations are being or have been conducted, from eligibles on examination registers, from unclassified employees who have been dismissed, demoted, suspended, or reduced in pay or grade for cause, and from officers or employees serving under the personnel systems created by this chapter, as provided by 1986 Acts Ch. 494.

FINDINGS OF FACT

1. During the relevant times, the Appellant, Steve W. Kepley, was employed by Seven Counties Services at Central State Hospital, as an "inpatient registered nurse."

2. The Hearing Officer finds it undisputed that Appellant was an employee of Seven Counties Services, Inc. and not the Commonwealth of Kentucky.

3. The Hearing Officer finds that contract employees are not subject to the protections of KRS 18A, whether in an unclassified or classified position.

4. The Hearing Officer finds and takes administrative notice there are other employees of state government, or quasi state governmental agencies, that while at some level are considered state employees are not in any way afforded KRS 18A protections. See *Mae Miles v. Kentucky Housing Corporation*, 2006 WL 6222809 (Ky. PB Appeal 2006-083); *Ralph Mischler v. Department of Military Affairs*, 2011 WL 2534033 (Ky. PB Appeal 2009-137).

5. The Hearing Officer finds that the Appellant is an employee of a corporation which contracts for certain services with the Commonwealth of Kentucky, and such status does not extend KRS 18A protections to his employment with that corporation.

6. The Hearing Officer further finds that Appellant's arguments that representatives of either the Cabinet or Seven Counties Services, presumably impugning liability to CHFS for Seven Counties Services' employees, does not therefore equate to extending KRS 18A protections to his employment with Seven Counties Services.

7. The Hearing Officer finds that CHFS may well wish to have the ability to investigate complaints raised by contract employees for matters under its ultimate control, and further finds that CHFS may rightfully have input into the employment of contract employees, again performing services ultimately under its control. Neither of these events would impute jurisdiction to the Personnel Board for employment decisions made regarding contract employees.

CONCLUSION OF LAW

The Hearing Officer concludes as a matter of law that the Personnel Board lacks jurisdiction to further consider this matter, and recommends, pursuant to KRS 18A.095(18)(a), this matter should be dismissed.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the consolidated appeals of **STEVE W. KEPLEY V. CABINET FOR HEALTH AND FAMILY SERVICES, (APPEAL NOS. 2015-010 and 2015-032)** 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 **Hearing Officer Boyce A. Crocker** this 15th day of May, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPER
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Luke Roberts
Mr. Steve W. Kepley