

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2022-159**

WILLIAM KIZZAR

APPELLANT

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

**JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF CORRECTIONS**

APPELLEE

*** **

The Board, at its regular November 2024 meeting, having considered the record, including the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer dated October 9, 2024, 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 **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 15th day of November, 2024.

KENTUCKY PERSONNEL BOARD



GORDON A. ROWE, JR., SECRETARY

A copy hereof this day emailed and mailed to:

William Kizzar
Hon. Mark Bizzell
Hon. Rosemary Holbrook (Personnel Cabinet)
Rodney E. Moore

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2022-159**

WILLIAM KIZZAR

APPELLANT

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

v.

**JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF CORRECTIONS**

APPELLEE

* * * * *

This order is being entered upon the appellee Justice and Public Safety Cabinet, Department of Corrections' (the "Appellee") Motion to Dismiss on grounds of lack of jurisdiction. This matter came on for a pre-hearing conference on August 26, 2024, at 11:30 a.m., ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Gordon A. Rowe, Jr., Executive Director/Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The appellant herein, William Kizzar (the "Appellant"), was present by telephone and was not represented by legal counsel. The appellee herein, the Justice and Public Safety Cabinet, Department of Corrections (the "Appellee" or the "DOC"), was present by telephone and was represented by the Hon. Mark Bizzell.

During the pre-hearing conference, the parties discussed the Appellee's motion to dismiss the appeal, which was filed on August 2, 2024, and the Appellant's response to the motion, which was submitted on August 2, 2024 as well (the Appellee also filed a reply brief on August 5, 2024). The Hearing Officer informed the parties that he was considering the motion to dismiss and the responsive filings and would render a decision prior to an evidentiary hearing. Both parties addressed arguments made in their respective filings. Counsel for the Appellee emphasized his argument that the date of the appeal filing was outside the sixty (60) day limit established by the version of KRS 18A.095 in effect at the time of Appellant's June 2022 suspension. The Appellant stated that he believed the Hearing Officer would have previously dismissed the appeal upon filing if it had been untimely, which led him to conclude it was filed timely. Notably, the Appellant did not produce or offer any facts that would show the appeal was filed on a date other than the date he signed the appeal, which was also the date it was recorded as received at the Personnel Board, November 15, 2022. Obviously, that filing date was substantially more than 60 days after the date the Appellant received notice of his suspension (June 17, 2022). The Hearing Officer stated that he would consider the parties' respective filings and the whole record in evaluating and ruling on the Appellee's motion to dismiss. The Hearing Officer also stated that the date of the evidentiary hearing may have to be briefly postponed due to the pending motion.

FINDINGS OF FACT

[It should be noted that the facts listed hereunder are undisputed in the record and there are no genuine issues of material fact in dispute relating to the issue of jurisdiction.]

1. The Appellant, William Kizziar, was a classified employee with status employed by Appellee as a Chaplain at its Green River Correctional Complex (“GRCC”) until March 17, 2023.
2. By written letter dated June 17, 2022 (the “Suspension Letter”), the Appellee informed the Appellant that, based on its authority under 101 KAR 1:345, Section 1, he was “suspended from duty and pay for a period of one (1) day” based on an incident in which he was allegedly “confrontational with the Special Management Housing Unit (SMHU)” and based on “the authority of 101 KAR 1:345”¹ [See June 17, 2022 Suspension Letter, attached to Appeal Form at p.1.].
3. The Appellee served the written Suspension Letter on the Appellant on June 17, 2022 by personal service. The Appellant signed the letter on June 17, 2022, acknowledging receipt of same [See Suspension Letter, Attachment 1.].
4. The Suspension Letter included a paragraph which plainly and unambiguously informed the Appellant that, pursuant to “KRS 18A.095, you may appeal this action to the Personnel Board within sixty (60) days after receipt of this notice” [See Suspension Letter at p.5.]. Thus, the appeal should have been filed on or before August 16, 2022.
5. The Appellant submitted an appeal of the one (1) day suspension with the Personnel Board on November 15, 2022 by filing an Appeal Form (with attachments) on that same date. The Appeal Form is stamped as being received by the Personnel Board on November 15, 2022. The Appellant signed the Appeal Form and next to his signature listed the date of filing as November 15, 2022 [See Appeal Form.].
6. The filing date of Appellant’s appeal is not in dispute. As shown above, the Appellant signed and dated it on November 15, 2022 and it was stamped as “RECEIVED” by the Personnel Board on November 15, 2022 [See Appeal Form]. At no time prior to the Appellee’s filing of its Motion to Dismiss did the Appellant ever deny that the Appeal was filed on a date other than November 15, 2022, which is more than five (5) months after the Appellant was notified of his one (1) day suspension.
7. In his Memorandum in Response to the Appellant’s [sic] Motion to Dismiss, the Appellant concedes that he “cannot, at this time, produce written evidence to rebuke this claim” that his appeal of the suspension was untimely. Instead, the only support he has for the claim that the appeal was timely filed is his inference that the Personnel Board would have rejected his appeal earlier in the case if it were filed untimely [See Response

¹The Appellant disputed the Appellee’s description of the events that led to his suspension in a statement submitted to GRCC Warden Kevin Mazza on May 24, 2024.

to Motion to Dismiss at p.1.]. The Appellant has produced absolutely no facts to support an argument that his appeal was filed on any date other than the date he clearly signed and dated the Appeal Form, November 15, 2022.

8. The version of KRS 18A.095 in effect at the time the Appellant filed his appeal stated plainly that an employee appealing a suspension must do so within sixty (60) days of the personnel action. *See* KRS 18A.095(7)(2022 version).

PROCEDURAL BACKGROUND

1. As shown by the Personnel Board docket record, the date the Appellant listed on the Appeal Form when he signed it, and the Personnel Board date stamp on the Appeal Form submitted by the Appellant, the Appellant filed his Appeal on November 15, 2022.
2. On August 2, 2024, counsel for the Appellee filed a Motion to Dismiss the Appellant's appeal of the June 2022 suspension. The Appellee argued in its motion, among other grounds,² that the appeal of the suspension should be dismissed because the filing was untimely, which means the Board does not have jurisdiction over the appeal. In support of its argument, the Appellee pointed to the undisputed filing date of November 15, 2022 and the clear and unambiguous language of KRS 18A.095 in effect at the time of disciplinary action, which stated that an employee appealing a suspension must submit their appeal to the Personnel Board "within sixty (60) days after receipt of notification" [*See* Motion to Dismiss at p.3 (quoting KRS 18A.095(7)(c).].
3. On August 2, 2024, the Appellant submitted a Memorandum in Response to Appellant's [sic] Motion to Dismiss Appeal No. 2022-159. Attempting to address the Appellee's contention that his appeal was filed untimely, the Appellant tried to infer that if the appeal was untimely, it "would have been rejected" by the Hearing Officer at the time of filing [*See* Appellant's Memorandum in Response to Appellant's [sic] Motion to Dismiss Appeal No. 2022-159 (the "Response Memo") at p.1.]. However, the Appellant also conceded in his Response Memo that "Appellant cannot, at this time, produce written evidence to rebuke this claim" and that records of communications sent from the Appellant to the Personnel Board between May 13, 2022 and November 16, 2022, will show the true filing date [*See* Response Memo at p.1.].
4. On August 5, 2024, counsel for the Appellee filed Appellee's Reply to Appellant's Response to Appellee's Motion to Dismiss (the "Reply Brief"). In its Reply Brief, the Appellee addressed the Appellant's arguments regarding timeliness of the appeal and jurisdiction in the Response Memo by reiterating the undisputed fact that the Appellant signed and dated his Appeal Form on November 15, 2022 and has produced no evidence to contradict that fact [*See* Reply Brief at p.3]. The Appellee also responded to the Appellant's argument that the appeal should have been rejected upon filing with the well-known legal principle that the issue of jurisdiction may be raised at any time [*See* Reply Brief at p.3].

²This Order does not address the Appellee's other arguments in support of dismissal because the issue of the Personnel Board's jurisdiction is purely a matter of law and is sufficient alone to merit dismissal of this case.

CONCLUSIONS OF LAW

1. The Kentucky Personnel Board was created by KRS Chapter 18A and its jurisdiction is defined thereby. KRS Chapter 18A limits the Personnel Board's jurisdiction to hear matters in terms of subject matter and timeliness of the appeal. An agency may not act outside the time limitations imposed by statute and is not empowered to add or subtract from the requirements of the statute. *Public Service Commission of Kentucky v. Attorney General of the Commonwealth*, 860 S.W.2d 296, 298 (Ky. App. 1993).
2. A reviewing body has "an affirmative obligation to ensure that it is acting within its subject matter jurisdiction" and shall dismiss a case "at any point in the litigation" if that body "determines that it lacks subject-matter jurisdiction, even if the issue is not raised by the parties." *Basin Energy Co. v. Howard*, 447 S.W.3d 179, 187 (Ky. App. 2014).
3. Pursuant to the version of KRS Chapter 18A in effect at the time the appeal was filed, the Appellant had sixty (60) days from June 17, 2022 to file an appeal of his suspension with the Personnel Board. See KRS 18A.095(7). Accordingly, Appellant's appeal should have been filed on or before August 16, 2022.
4. It is well-established that a motion to dismiss should only be granted if the moving party can show that the party who filed the claim "would not be entitled to relief under any set of facts which could be proven in support of his claim." *Morgan v. Bird*, 289 S.W.3d 222, 226 (Ky. App. 2009). The pleadings filed by the claiming party "should be liberally construed in the light most favorable to the plaintiff, all allegations being taken as true." *Pari-Mutuel Clerks' Union of Kentucky, Local 541, SEIU, AFL-CIO v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977). A court should rule on a motion to dismiss when the question issue is purely a matter of law. *James v. Wilson*, 95 S.W.3d 875, 884 (Ky. App. 2002).
5. The Appellant's November 15, 2022 appeal filing, which occurred more than five (5) months after he received written notice of his suspension, is untimely as a matter of law. There are no genuine issues of material fact on this issue.
6. As a matter of law, the Personnel Board does not have jurisdiction to hear the appeal of the Appellant's suspension because the appeal was untimely.
7. Although the issue of jurisdiction could have been raised earlier, the Appellee properly raised the issue at this stage of the case because the issue of jurisdiction may be raised at any time. *Breedlove v. State Farm Fire and Casualty Company*, 690 S.W.3d 904, 912 (Ky. App. 2024); *Basin Energy Co.*, 447 S.W.3d at 187; *Eastin v. Tourism, Arts and Heritage Cabinet, Department of Parks*, 2016 WL 3227508 at *3 (Ky PB May 19, 2016).

WHEREFORE, the Hearing Officer, after careful review and consideration of the Appellee's Motion to Dismiss, the Appellant's Memorandum in Response to Appellee's Motion to Dismiss, the Appellee's Reply Brief, the Appeal Form (with attachments, including the Suspension Letter) and the evidence of record, recommends to the Kentucky Personnel Board

that the appeal of **WILLIAM KIZZAR V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2022-159)**, be **DISMISSED**.

ADDITIONALLY, although this appeal was previously consolidated with **Appeal No. 2023-050**, after consideration of the distinct issues addressed in the Motion to Dismiss and related responsive pleadings, the appeals are **HEREBY SEPARATED and HENCEFORTH Appeal No. 2023-050 shall be considered and ruled upon separately.**

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 fifteen (15) 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).

The parties are strongly encouraged to send any exceptions and/or requests for oral argument by email to: PersonnelBoard@ky.gov

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.

SO ORDERED at the direction of the Hearing Officer this 9th day of October, 2024.

KENTUCKY PERSONNEL BOARD



GORDON A. ROWE, JR.
EXECUTIVE DIRECTOR

A copy hereof was emailed and mailed to the following persons at their respective addresses as provided to the Personnel Board on this 9th day of October, 2024:

William Kizziar, Appellant
Hon. Mark Bizzell, Counsel for Appellee
Hon. Rosemary Holbrook, Personnel Cabinet