

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2017-150

DONALD KROEGER

APPELLANT

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

TOURISM, ARTS & HERITAGE CABINET
DEPARTMENT OF PARKS

APPELLEE

*** **

The Board at its regular June 2018 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated April 27, 2018, Appellee's Exceptions to One Finding (only), 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** Finding of Fact paragraph 10 and substitute the following:

10. In place of the rescinded suspension, by the same February 16, 2018 letter, the Agency issued the Appellant a written reprimand for the allegations underlying the previous two-day suspension.

B. **Delete** Conclusions of Law paragraph 2 and substitute the following:

2. Following the Agency rescinding the two-day suspension underlying this appeal, the Hearing Officer concludes as a matter of law that, pursuant to KRS 18A.005(24), the Appellant has failed to state a penalization that would entitle him to any further consideration of the matters raised in his appeal. A written reprimand is not defined as a "penalization" under the statute.

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 13th day of June, 2018.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day mailed to:

Hon. Evan Jones
Donald Kroeger
Misty Judy

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2017-150**

DONALD KROEGER

APPELLANT

V.

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

**TOURISM, ARTS & HERITAGE CABINET
DEPARTMENT OF PARKS**

APPELLEE

** ** * * *

This matter came on for a pre-hearing conference on March 20, 2018, at 11:00 a.m. EST, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Stafford Easterling, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Donald Kroeger, was present by telephone and not represented by legal counsel. The Appellee/Agency, Tourism, Arts and Heritage Cabinet, Department of Parks, was present and represented by the Hon. Evan Jones.

This matter is before Hearing Officer Stafford Easterling for a ruling on the Agency's Motion to Dismiss as Moot, filed with the Personnel Board on March 5, 2018. At issue is the Appellant's claim that he improperly received a two-day suspension, based on the false allegations of a now-removed Park Manager. The Agency's Motion to Dismiss as Moot argues that the Appellant has failed to articulate an actionable penalization because the two-day suspension has been rescinded and the Agency has already remitted the applicable back pay and retirement benefits. The Appellant was given an opportunity to file a response to the Agency's Motion to Dismiss and has done so, arguing that substituting a written reprimand and Performance Improvement Plan for the two-day suspension is still a penalization. This matter now stands submitted to the Hearing Officer for a ruling on the Agency's Motion to Dismiss as Moot.

BACKGROUND

1. During the pendency of this appeal, Appellant, Donald Kroeger, was a classified employee with status with the Tourism, Arts and Heritage Cabinet, Department of Parks.

2. The Appellant was and is employed by the Department of Parks as a Maintenance Supervisor for Taylorsville Lake State Park.

3. On June 1, 2017, a new Park Manager began his employment with Taylorsville Lake State Park. The Agency alleged that the Appellant acted inappropriately on that day by using inappropriate language towards his second-line supervisor and refusing to demonstrate how to use Park equipment to the new Park Manager.

4. The Appellant disputed the allegations against him and filed the instant Personnel Board appeal on July 14, 2017.

5. The Personnel Board conducted an initial pre-hearing conference on September 26, 2017. During the pre-hearing conference, the Appellant stated that he disagreed with the two-day suspension and wanted it removed from his record. Further, both parties expressed an interest in mediation.

6. Thereafter, on October 4, 2017, the Board directed the parties to mediation.

7. Mediation was conducted by the Kentucky Employees Mediation Program on November 7, 2017. The parties were unable to reach an agreement.

8. On December 19, 2017, the Board conducted another pre-hearing conference and set this matter for a March 20, 2018 evidentiary hearing.

9. Then, on or about February 16, 2018, the Agency unilaterally rescinded the challenged two-day suspension, removed all documentation relating to the suspension from the Appellant's personnel file, and issued the Appellant compensation for the two days of withheld pay.

10. In place of the rescinded suspension, by the same February 16, 2018 letter, the Agency issued the Appellant a written reprimand and Performance Improvement Plan (PIP) for the allegations underlying the previous two-day suspension.

11. Then, on March 2, 2018, the Agency submitted the Motion to Dismiss as Moot currently at issue herein.

12. On March 8, 2018, the Appellant filed a response to the Agency's Motion to Dismiss as Moot stating, in pertinent part:

I am writing this letter to say that I want my record cleared that means the Written Reprimand and the PIP both go away and are removed from my record so that my work record is entirely clean or I want my day in court. Parks tried this nonsense of offering to give me back my days but that I would have to keep a written reprimand from a proven liar. I did not take their offer then and I do not take their offer now.

* * * * *

I want my ENTIRE record clear including PIP and Written Reprimand or I want my day in court so that I can publicly prove how people in Parks have lied on me. If I do not get my day in court or my record cleared then I will have no choice but to file a Whistleblower Appeal.

13. KRS 18A.095(18)(a) provides, in pertinent part:

The board may deny any appeal after a preliminary hearing if it lacks jurisdiction to grant relief. The board shall notify the employee of its denial in writing and shall inform the employee of his right to appeal the denial under the provisions of KRS 18A.100.

14. KRS 18A.005(24) provides:

‘Penalization’ means demotion, dismissal, suspension, fines, and other disciplinary actions; involuntary transfers; salary adjustments; any action that increases or diminishes the level, rank, discretion, or responsibility of an employee without proper cause or authority, including a reclassification or reallocation to a lower grade or rate of pay; and the abridgment or denial of other rights granted to state employees.

FINDINGS OF FACT

1. During the pendency of the appeal, the Appellant, Donald Kroeger, was a classified employee with status.
2. From a review of the appeal form underlying this appeal, the Hearing Officer finds that the only penalization challenged herein was the Agency’s issuance of a two-day suspension.
3. The Hearing Officer finds that when the Agency issued its February 16, 2018 letter rescinding the Appellant’s two day suspension and issuing him two days of back pay, the penalization underlying this appeal became moot.
4. The Hearing Officer further finds that the Agency issuing the Appellant a written reprimand and/or a Performance Improvement Plan might constitute a separate appealable penalization if authorized by KRS Chapter 18A and not contrary to the Personnel Board’s prior opinion in Fritsch v. Attorney General, 1994 WL 16775638 (1994).

5. As the Appellant has already “won” his appeal, the Hearing Officer finds that the Personnel Board lacks jurisdiction to consider this appeal pursuant to the language set forth in KRS 18A.095(18)(a) and that there is no relief that can be afforded the Appellant.

CONCLUSIONS OF LAW

1. The Hearing Officer concludes as a matter of law that, pursuant to KRS 18A.095(18)(a), the Personnel Board lacks jurisdiction to further consider this appeal as the Board lacks the ability to grant relief based on the claim stated by the Appellant.

2. Following the Agency rescinding the two-day suspension underlying this appeal, the Hearing Officer concludes as a matter of law that, pursuant to KRS 18A.005(24), the Appellant has failed to state a penalization that would entitle him to any further consideration of the matters raised in his appeal.

3. The Hearing Officer concludes this appeal must fail as a matter of law.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **DONALD KROEGER V. TOURISM, ARTS & HERITAGE CABINET, DEPARTMENT OF PARKS (2017-150)** 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 Stafford Easterling this 27th day of April, 2018.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Evan Jones
Donald Kroeger