

**CERTIFICATION OF PERSONNEL BOARD RECORDS**

I certify that attached hereto is a true and correct copy of the Findings of Fact, Conclusions of Law and Recommended Order and Final Order in the case of **DONNA MCNEIL V. KENTUCKY INFRASTRUCTURE AUTHORITY (APPEAL NO. 2020-025)** as the same appears of record in the office of the Kentucky Personnel Board.

Witness my hand this 10<sup>th</sup> day of May, 2022.

  
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**MARK A. SIPEK, SECRETARY**  
**KENTUCKY PERSONNEL BOARD**

Copy to Secretary, Personnel Cabinet

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2020-025

DONNA MCNEIL

APPELLANT

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

KENTUCKY INFRASTRUCTURE AUTHORITY

APPELLEE

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The Board, at its regular May 2022 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated March 7, 2022, Appellee's Exceptions and Request for Oral Argument, oral arguments, 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 **SUSTAINED**.

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 10<sup>th</sup> day of May, 2022.

KENTUCKY PERSONNEL BOARD

  
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MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Bernard R. Mazaheri  
Hon. Matt Stephens  
Hon. Rosemary Holbrook (Personnel Cabinet)  
Dennis Keene

**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2020-025**

**DONNA MCNEIL**

**APPELLANT**

**VS.**

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

**KENTUCKY INFRASTRUCTURE AUTHORITY**

**APPELLEE**

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This matter came on for evidentiary hearing before the Kentucky Personnel Board on October 28, 2020, at 9:30 a.m. ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Mark Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A. By prior agreement of the parties, the proceedings were conducted via Amazon Chime video teleconferencing.

The Appellant, Donna McNeil, was present and represented by the Hon. Bernard R. Mazaheri. The Appellee, Kentucky Infrastructure Authority, was present and represented by the Hon. Matt Stephens. Also present as Agency representative was Dennis Keene, Commissioner for the Department for Local Government (DLG).

**BACKGROUND**

1. The Appellant filed her appeal with the Personnel Board on January 17, 2020, appealing her dismissal as an unclassified Chapter 18A employee. She alleged her dismissal was the result of political discrimination and additionally argued that she was improperly dismissed by Commissioner Dennis Keene, who lacked the legal appointing authority to dismiss her.

2. At the first pre-hearing conference, counsel for the Appellant stated that the Personnel Board had jurisdiction over this matter pursuant to KRS 18A.095(9). Counsel emphasized that the Appellant was alleging political discrimination. He specifically stated that the Appellant was fired because she did not make a campaign contribution. The Appellant noted that the person who replaced her did make a contribution. She further alleged that Commissioner Keene did not have the authority to fire her, and that she is currently still an employee of the Agency. She is requesting that she should receive back pay, recover attorney fees and costs, and that she should be reinstated to her former position.

3. Counsel for the Appellee stated at the pre-hearing conference that they would like to establish a schedule for dispositive motions.

4. The Appellee filed a motion to dismiss. The Appellant filed a response, and the Appellee filed a reply. The Hearing Officer issued an Interim Order denying the Motion to Dismiss on July 1, 2020. A copy of this Interim Order is hereby incorporated in this Recommended Order and included as **Recommended Order Attachment A**.

5. This matter was scheduled for an evidentiary hearing. The issues for the evidentiary hearing were as follows:

- a. Whether or not Commissioner Keene had appointing authority to dismiss the Appellant. The Appellee had the burden of proof on this issue, which was by a preponderance of the evidence.
- b. The Appellant's claim that she was dismissed as a result of political discrimination. The Appellant had the burden of proof on this issue, which was by a preponderance of the evidence.

6. At the evidentiary hearing, counsel for the Appellee stated during opening remarks that Commissioner Keene was the appointing authority for the Kentucky Infrastructure Authority (KIA), and there was no evidence of political discrimination in the dismissal of the Appellant.

7. During his opening statement, counsel for the Appellant stated that Commissioner Keene had no authority to dismiss the Appellant, that only the KIA itself had the authority to dismiss her, and that only the KIA Board can speak for the KIA. He stated the KIA Board had still not dismissed the Appellant. He pointed out that KIA specifically voted to appoint the Appellant and, by statute, they were the appointing authority. With respect to political discrimination, he argued that the Appellant's successor donated four thousand dollars (\$4,000) to the campaign of a candidate for Governor and that the Appellant did not donate. The Appellant believed this was the reason she was dismissed from her position.

8. The Appellee called its first witness, **Mary Elizabeth Bailey**. Bailey is the Commissioner for the Department of Human Resource Administration within the Personnel Cabinet. She oversees Human Resources throughout state government. She is familiar with the non-merit process.

9. Commissioner Bailey testified about her knowledge and involvement in routine government practices. She testified that, when a new Governor is inaugurated, it is routine for the governor to sign signature authorization forms so that normal government operations can continue while personnel changes are made during the start of an administration. She testified that it is a routine practice for the Governor to delegate appointing authority to the Secretary of the Governor's Cabinet for all of state government. This action is memorialized in a Personnel Cabinet Signature Authorization Form. Through Commissioner Bailey's testimony, the Appellee introduced into evidence **Appellee's Exhibit A**, the signature authorization form reflecting that, on December 8, 2015, Governor Matt Bevin authorized Scott W. Brinkman as an appointing authority for all of state government. The Appellee also introduced **Appellee's Exhibit B**, the

signature authorization form reflecting that, on December 10, 2019, Governor Andy Beshear authorized J. Michael Brown to act as appointing authority for all of state government.

10. Commissioner Bailey testified it was standard practice for the Secretary of the Governor's Cabinet to designate agency personnel as appointing authorities. Secretary Brinkman on December 21, 2015, designated then-Commissioner Sandra Dunahoo as appointing authority for the Department for Local Government (DLG) and KIA. (**Appellee's Exhibit C**). On December 17, 2019, Secretary Brown designated current Commissioner Dennis Keene as appointing authority for DLG and KIA (**Appellee's Exhibit D**).

11. Commissioner Bailey introduced several exhibits into evidence during her testimony. She also testified about the application of statutes to the appointment and dismissal of the Appellant.

- a. Introduced as **Appellee's Exhibit E** is a letter from Commissioner Sandra Dunahoo to then-Governor Matt Bevin requesting approval to appoint Donna McNeil to the position of Executive Director of KIA, effective February 16, 2017.
- b. KRS 12.050 was introduced into evidence as **Appellee's Exhibit F**. Commissioner Bailey testified that, as the Executive Director of KIA, the Appellant could only be appointed with written approval of the Governor.
- c. KRS 147A.003, which states that KIA is attached to DLG for administrative purposes, was introduced as **Appellee's Exhibit K**.
- d. KRS 224A.030 was introduced into evidence as **Appellee's Exhibit L**. The statute provides for the creation of KIA and its membership. KIA is an eleven (11) - member body. Six (6) members constitute a quorum.

12. Commissioner Bailey introduced into evidence **Appellee's Exhibit G**, which was a Personnel Action Notification (PAN) showing the appointment of Donna McNeil to the position of Executive Director for KIA, effective February 16, 2017.

13. Commissioner Bailey introduced into evidence **Appellee's Exhibit H**, a letter dated December 20, 2019, from Commissioner Keene to the Appellant informing her that "effective immediately, your services as an Executive Director are no longer needed." She also introduced into evidence **Appellee's Exhibit I**, which was a PAN showing that the Appellant's services were terminated on December 21, 2019.

14. Commissioner Bailey also introduced into evidence **Appellee's Exhibit J**, a letter from the Appellant, dated November 23, 2019, asking to remain the Executive Director of KIA upon the arrival of the new administration.

15. Commissioner Bailey testified that Commissioner Keene had the authority to

dismiss the Appellant because he was designated as an appointing authority by Secretary Brown and because KIA was attached to DLG for administrative purposes, pursuant to KRS 224A.030(4)(a). She testified that she was not familiar with KRS 224A.070(2), which states KIA has the authority to retain an Executive Director and other employees. She testified that, because this statute uses the term “*may*,” KIA was not deemed to be the exclusive appointing authority for the Executive Director position.

16. In response to questions from the Hearing Officer, Commissioner Bailey testified that she is unaware of any independent appointing authority Secretary Brown would have had without delegation from the Governor. Likewise, she stated she was unaware of any independent appointing authority Commissioner Keene would have had without delegation from Secretary Brown.

17. At the conclusion of Commissioner Bailey’s testimony, the Appellee rested its case.

18. The Appellant called as her first witness, Commissioner **Dennis Keene**. He has been the Commissioner of DLG since December 16, 2019. By virtue of his position, he also serves as a member of KIA. He stated he is one of the eleven (11) members of the KIA Board of Directors. Although he is not the Chairman, he testified he usually runs the KIA meetings.

19. On December 20, 2019, Commissioner Keene hand-delivered a letter to the Appellant informing her of her dismissal. He stated the Appellant was fired because he wanted to start a new team. Commissioner Keene testified that he had full authority to hire and fire without consulting the KIA Board of Directors. He asserted he had appointing authority because it was delegated to him by Secretary J. Michael Brown.

20. In January 2020, Commissioner Keene hired Edith Halbleib as Executive Director of KIA. He chose her because she was an attorney and, through her experience as a Master Commissioner for Jefferson County, had overseen foreclosure sales. He stated he was unaware of any political contributions she may have made. Commissioner Keene testified that he believed Halbleib had a good resumé, and he did not review any other resúmes before offering her the position of Executive Director.

21. The Appellant, **Donna McNeil**, testified on her own behalf. She has a Bachelor of Science degree in Civil Engineering from the University of Kentucky and at least twenty (20) years’ experience working for the Division of Water.

22. The Appellant testified she became the Executive Director of KIA, effective February 16, 2017, after she was interviewed in late January 2017. She testified that the KIA Board discussed her job offer during a closed session in February 2017. She stated she was offered the ED position by KIA following a Board vote. The KIA minutes from the February 2, 2017 meeting were introduced into evidence as **Appellant’s Exhibit 1**. This Exhibit reflects that, following a closed Executive Session to discuss personnel matters and upon a return to open session, DLG staff attorney noted that an offer of employment would be extended to Donna McNeil. Motion was made and approved unanimously.

23. The Appellant testified she was hired as Executive Director of KIA and earned ninety-nine thousand dollars (\$99,000) per year in her position. Following her dismissal, she obtained new employment on May 19, 2020, earning thirty-five dollars (\$35.00) per hour. She estimated she now makes approximately twenty thousand dollars (\$20,000) less per year at her current position.

24. On January 8, 2020, the Appellant authorized her counsel to direct a letter to the KIA Chairman. In the letter, the Appellant's counsel pointed out that Commissioner Keene did not have the authority to dismiss her from her position as Executive Director. Counsel stated this also constituted formal action by KIA without a quorum, in violation of statute. In the letter, the Appellant's counsel stated that the Appellant would like to continue in her role as Executive Director. He recommended, however, that if the KIA Board of Directors did not wish to retain her as Executive Director, the Board should properly notice that it would take action at its next available meeting or negotiate a mutually agreeable resignation date. The Appellant testified that KIA did not respond to her counsel's letter and took no formal action to terminate her employment.

25. The Appellant testified that KIA is an independent agency of state government. While she was with KIA, the hiring and firing of staff was put before the KIA Board of Directors for them to act. She testified that she made no political contributions. Based on information she reviewed, Edith Halbleib donated four thousand dollars (\$4,000) to Andy Beshear's campaign for Governor. The Appellant testified that she was far more qualified for the position of Executive Director of KIA than Halbleib. She testified that Halbleib had no infrastructure or engineering experience.

26. The Appellant testified that she believed Commissioner Keene did not review her resumé. She stated he assumed that she was associated with Governor Bevin. In response to a question from the Hearing Officer, the Appellant stated that no one asked her to make a political contribution.

27. At the conclusion of the testimony, the Hearing Officer entered an Order that included a briefing schedule for the parties. The Hearing Officer also invited the Personnel Cabinet to file a brief setting out their view on the appointing authority issue. The Hearing Officer determined that the participation of the Personnel Cabinet will assist the Hearing Officer and the Personnel Board in deciding the appointing authority issues involved in this appeal. KRS 184.075(4) and KRS 18A.030(1).

### FINDINGS OF FACT

1. The Appellant, Donna McNeil, was hired as the Executive Director for KIA on February 16, 2017. (Appellee's Exhibit G). The KIA Board met on February 2, 2017, and authorized an offer of employment to the Appellant as Executive Director (Appellant's Exhibit 1). Also on February 2, 2017, Sandra Dunahoo, Commissioner of DLG and a member of the KIA Board, requested that Governor Matt Bevin approve the appointment of Donna McNeil, effective

February 16, 2017. (Appellee's Exhibit E).

2. Following the 2019 gubernatorial election, the Appellant submitted a letter to the Governor's Transition Team requesting to retain her position as Executive Director of KIA. (Appellee's Exhibit J).

3. Shortly after Governor Andy Beshear was sworn in on December 10, 2019, he signed a Personnel Cabinet Signature Authorization Form authorizing J. Michael Brown, Secretary of the Governor's Cabinet, as appointing authority for all of state government. (Appellee's Exhibit B). On December 17, 2019, Secretary Brown signed a Personnel Cabinet Signature Authorization Form authorizing DLG Commissioner Dennis Keene as appointing authority for DLG and KIA. (Appellee's Exhibit D).

4. On December 20, 2019, Commissioner Keene signed a letter dismissing the Appellant from her position as Executive Director of KIA. (Appellee's Exhibit H). He also hand-delivered a copy of this letter to the Appellant on the same date. The Hearing Officer finds credible Commissioner Keene's testimony that he dismissed the Appellant because he wanted to start a new team. (Testimony of Commissioner Keene).

5. On January 8, 2020, the Appellant's attorney sent a letter to the Chairman of the KIA Board asserting that Commissioner Keene did not have the authority to fire the Appellant. He argued that the KIA Board should retain the Appellant as Executive Director or, if the Board wanted to ratify the termination of the Appellant, the KIA Board should take action to remove her during the February meeting. (Appellant's Exhibit 2). Importantly, the KIA Board never took any action to dismiss the Appellant (testimony of the Appellant).

6. The Hearing Officer finds that, as a non-merit employee, the Appellant had limited Chapter 18A appeal rights. See KRS 18A.095. Here, the Appellant filed an appeal with the Personnel Board on January 17, 2020, alleging political discrimination. She also alleged Commissioner Keene lacked appointing authority to fire her.

7. Given the analysis set out below, the Hearing Officer finds that Commissioner Keene lacked appointing authority to dismiss the Appellant from her position as Executive Director of KIA.

8. The record supports a determination that the Appellant was politically neutral. She did not make any political contributions. No one asked her to make a political contribution. (Testimony of the Commissioner Keene and the Appellant).

9. Commissioner Keene did not know anything about the Appellant's politics or the fact that she did not make any political contributions. (Testimony of Commissioner Keene).

10. In January 2020, Commissioner Keene hired Edith Halbleib as Executive Director of KIA. (Testimony of Commissioner Keene). Halbleib donated four thousand dollars (\$4,000) to Governor Andy Beshear's campaign. (Testimony of the Appellant).



11. The Hearing Officer finds that the Appellant was not dismissed for her political affiliations or opinions.

### CONCLUSIONS OF LAW

1. As a non-merit or unclassified employee, the Appellant had limited rights to file an appeal with the Personnel Board. The letter she received on December 20, 2019, stated she was dismissed without cause. Therefore, the Appellant could file an appeal to the Personnel Board by alleging that her dismissal was the result of illegal discrimination. KRS 18A.095(14)(a). The Appellant properly invoked the authority of the Personnel Board when she filed her appeal on January 17, 2020, and alleged political discrimination.

2. The Appellant also alleged that Commissioner Keene lacked appointing authority to dismiss her. The Personnel Board has recently held that a non-merit employee can file an appeal to challenge whether the person who fired them had proper appointing authority in the appeal of *Rhonda Kiper v. Labor Cabinet*, 2020 WL 4057445 (KY PB 2018-005).

3. Therefore, there are two (2) issues which need to be decided on this appeal. The first is whether DLG Commissioner Keene had appointing authority to dismiss the Appellant. The second is whether the Appellant's dismissal from her position as Executive Director of KIA was the result of illegal political discrimination.

4. The Hearing Officer reviewed much of the legal analysis on this issue from the *Kiper* case. This analysis was included in the Hearing Officer's Interim Order dated July 1, 2020, overruling the Appellee's Motion to Dismiss. The Hearing Officer hereby adopts and incorporates the legal analysis from the July 1, 2020 Interim Order as a part of this Recommended Order as if it were fully set out herein.

5. KRS 18A.005(1) defines appointing authority as follows:

"Appointing authority" means the agency head or any person whom he has authorized by law to designate to act on behalf of the agency with respect to employee appointments, position establishments, payroll documents, register requests, waiver requests, requests for certification, or other position actions. Such designation shall be in writing and signed by both the agency head and his designee. Prior to the exercise of appointing authority, such designation shall be filed with the secretary.

6. Pursuant to this definition, there are two (2) ways an individual may hold appointing authority: 1) an individual can be an appointing authority by virtue of their **position as an agency head**, and 2) an individual can also be an appointing authority by **delegation from the agency head**. Importantly, delegation from the agency head must follow the strict requirements contained in KRS 18A.005(1).

7. One requirement of KRS 18A.005(1) is that only an agency head can delegate appointing authority to another individual. An individual delegated appointing authority cannot then delegate appointing authority to another individual, a forbidden step also known as **redelegation**. The prohibition on redelegation is based on the language contained in KRS 18A.005(1), which specifically requires that "Such designation shall be in writing and signed by both the agency head and his designee." The prohibition on redelegation has been repeatedly affirmed by the Court of Appeals, including in *Kenneth Tramontin v. Cabinet for Health and Family Services*, 2010 WL 677203 (KY PB 2008-166), and *Deborah Pigman v. Cabinet for Health and Family Services*, 2013 WL 1003469 (2011-CA-002085-MR).

8. During the hearing, the Appellee presented evidence that Commissioner Keene acquired appointing authority over KIA from J. Michael Brown, Secretary of the Governor's Executive Cabinet. This evidence established that J. Michael Brown obtained appointing authority by virtue of a delegation from Governor Andy Beshear. The Appellee's witness, Commissioner Mary Elizabeth Bailey, testified that she was unaware of Commissioner Keene having independent or inherent appointing authority absent the delegation from Secretary Brown. She also testified that she was unaware of Secretary Brown having appointing authority over KIA without the delegation from Governor Beshear. As set out above, this redelegation is prohibited, based on the plain language contained in the definition of appointing authority at KRS 18A.005(1) and as affirmed by the reviewing appellate courts.

9. In its post hearing brief, the Appellee appears to abandon this argument and argues that Secretary Brown was the agency head for KIA and did not require delegation from Governor Beshear. The Personnel Cabinet makes a similar argument in its brief. To the extent that any of the Appellee's arguments are predicated on authority redelegated from Secretary J. Michael Brown to Commissioner Keene, such arguments must fail as a matter of law and the Hearing Officer finds that Commissioner Keene was unable to exercise any authority "passed through" on delegation from Secretary Brown.

10. Next, the Hearing Officer must make a determination as to whether or not Secretary Brown was the agency head for KIA, which would then give him the authority to delegate Commissioner Keene as an appointing authority. The Personnel Cabinet correctly points out that neither the term "agency" or "agency head" are defined in KRS Chapter 18A. Words and phrases not defined in a particular statute must be construed according to their common and approved usage of language. *Jefferson County Board of Education v. Fell*, 391 S.W.3d 713 (Ky. 2012).

11. In order to determine if Secretary Brown is an agency head for the KIA, it is necessary to examine a number of statutes.

12. The Office of the Secretary to the Governor's Executive Cabinet (hereafter "OSGEC") was created by statute by KRS 11.040. In its creation, the Legislature made it clear that OSGEC was **not** a part of the Office of the Governor, but it **did** constitute a separate agency of state government. Also, the Legislature also provided that "the secretary so appointed shall have such rights, duties and responsibilities as may be assigned by the Governor." KRS 11.040(2).

The Secretary, who is appointed by the Governor "...shall be responsible for implementing all policies of the Governor, coordinating all activities of the Governor's Executive Cabinet, and advising and consulting with the Governor on all policy matters affecting the state." KRS 11.040(3). The Secretary also has the authority to appoint principal assistants "...as may be necessary to execute the functions of the office." KRS 11.040(4).

13. Pursuant to KRS 11.065, the "Governor's Executive Cabinet" (separate from the OSGEC) is comprised of the Secretaries of the eleven (11) program Cabinets (see: KRS 12.250), the Governor's Executive Cabinet, the Chief Information Officer, the State Budget Director, the Governor's Chief of Staff, and the Lieutenant Governor. KRS 11.065(1). This Executive Cabinet is a part of the Office of the Governor and not a separate department or agency of the state. KRS 11.065(2).

14. The "Governor's General Cabinet" (separate from OSGEC and the Governor's Executive Cabinet) is comprised of "heads of the constitutional and statutory administrative departments and program cabinet secretaries enumerated in KRS 12.020." Pursuant to KRS 11.060, the General Cabinet is attached to the Office of the Governor and is not a separate department or agency of the state. KRS 11.060(1). The Secretary to the OSGEC is not mentioned in this statute, is not a member or a participant in the Governor's General Cabinet, and has no express or implied duties pursuant to this statute.

15. After reviewing the relevant statutes, the Hearing Officer concludes as a matter of law that, pursuant to KRS 11.040, the Office of the Secretary to the Governor's Executive Cabinet is an "agency" as defined by KRS 18A.005(1). The Hearing Officer finds that Secretary Brown would be the "agency head" of OSGEC and, as a result, would be an appointing authority for OSGEC. Importantly, however, being the "agency head" of OSGEC would not make him the agency head for KIA.

16. Pursuant to KRS 11.065, the Governor's Executive Cabinet is not an "agency" of state government as defined by KRS 18A.005(1). Thus, the Hearing Officer finds this statute provides no support regarding Secretary Brown being an "agency head" over the "Governor's Executive Cabinet" nor any state government agency other than OSGEC, including KIA.

17. Pursuant to KRS 11.060, the Governor's General Cabinet is not an agency of state government. Thus, the Hearing Officer finds that the statute provides no support for the argument that Secretary Brown is an "appointing authority" over the "General's General Cabinet." The Hearing Officer also finds that KRS 11.060 provides no support for the argument that Secretary Brown is an "agency head" over any particular agency, including KIA.

18. Notably, in its brief, the Personnel Cabinet relies heavily on KRS 11.060. It argues that Secretary Brown is the Secretary of the "General Government Cabinet" as defined by KRS 11.060 and both DLG and KIA are agencies within the General Government Cabinet. The Personnel Cabinet argues that Secretary Brown is the "agency head" for the "General Government Cabinet" and, thus, had the authority to delegate appointing authority over KIA to Commissioner Keene. However, this argument ignores the fact that KRS 11.060 explicitly states that the "General

Government Cabinet” is not an “agency” of state government. Therefore, if the General Government Cabinet is not an “agency,” Secretary Brown cannot be the “agency head.”

19. KIA makes a similar argument without citing KRS 11.060. Counsel for KIA argues Secretary Brown is the “agency head” for his cabinet and can delegate appointing authority to whomever he chooses. In support, counsel for KIA cites the case of *Michael Cornwall v. Cabinet for Health and Family Services*, 2010 WL 1146952 (KY PB 2009-201). The problem with this argument is the fundamental difference between the “General Government Cabinet” as defined by KRS 11.060 and a program cabinet like the Cabinet for Health and Family Services as defined by KRS 12.050. The Hearing Officer cannot ignore a statute such as KRS 11.060, which plainly states that the “General Government Cabinet” is not an “agency” of state government. Therefore, the Hearing Officer concludes that Cornwall is not applicable to this appeal.

20. Implicit in the Personnel Cabinet’s brief is the argument that the plain ordinary meaning of the term “agency” would include the General Government Cabinet. The Hearing Officer finds this to be a compelling argument; however, it ignores the clear language of KRS 11.060, which specifically states that the General Government Cabinet is not an agency of state government.

21. In her brief, the Appellant argued that the KIA Board of Directors was the “agency head” with the right to hire and fire the KIA Executive Director. In support, the Appellee relied on KRS 224A.070, which reads in pertinent part :

The authority may carry out and perform the following essential governmental functions of statewide import and concern:

(2) To retain an executive director, who shall be experienced and knowledgeable in the fields in which the authority may act, together with other employees, including for example only, engineers, accountants, and attorneys, necessary and appropriate to enable the authority to fulfill its duties, functions, and responsibilities.

22. The Appellant has maintained all along that only the KIA Board of Directors has the authority to fire her. The Personnel Cabinet and the Appellee maintain that because KRS 224A.070 uses *may* when setting out the KIA Board of Directors’ authority to hire an Executive Director, they are not the exclusive agency head or appointing authority. The parties are correct that the use of the term *shall* in a statute is mandatory and the use of *may* is permissive. KRS 446.010(26) and (39). However, the parties cite no authority for their position that the use of the term *may* is nonexclusive. This is especially true in the absence of statutory authority that someone else has the authority to hire or fire an Executive Director for KIA.

23. After review of all of the relevant statutes, including but not limited to KRS Chapter 11, 12, 18A, and 224A, the Hearing Officer concludes that the KIA Board of Directors is the appointing authority with the power to fire the Executive Director of KIA. The Appellee failed to carry its burden of proof that Commissioner Keene had appointing authority to fire the Appellant.

Further, there is no evidence of record that the KIA Board took any action to remove the Appellant from her position as Executive Director.

24. The Appellee and the Personnel Cabinet argue that if the KIA Board is the only appointing authority for KIA, then the Appellant was not properly hired and would have no right to be reinstated to her position. However, the hiring of the Appellant as Executive Director at KIA was never identified as an issue in this case and is not properly before the Hearing Officer herein. Neither party was put on notice that the hiring of the Appellant would be an issue during the evidentiary hearing and a burden of proof on the issue was not assigned to either party. Nonetheless, the parties introduced evidence regarding the hiring of the Appellant as Executive Director for KIA. There was no evidence introduced into the record that there was anything improper regarding the Appellant's hiring. Further, there was no evidence regarding the appointing authority who hired the Appellant. A PAN was introduced into the record as Appellee's Exhibit G showing the Appellant's appointment as Executive Director for KIA effective February 16, 2017. This document only shows that the Appellant's hiring was "upon the recommendation of the appointing authority." There is no basis for voiding the Appellant's appointment or preventing her reinstatement based on the evidence in this case.

25. KRS 18A.095(14)(a) reads as follows:

Any employee, applicant for employment, or eligible on a register, who believes that he has been discriminated against, may appeal to the board.

26. The Appellant properly invoked the jurisdiction of the Personnel Board when she alleged that her dismissal was the result of political discrimination.

27. The case of *Martin v. Corrections Cabinet*, 822 S.W.2d 858 (Ky. 1991) holds that even an unclassified (or non-merit) employee can appeal to the Personnel Board based on a claim of political discrimination. In the *Martin* case, the court found then Patricia Ward Martin, an unclassified prison warden, could appeal to the Personnel Board alleging that she was discriminated against for upholding the rights of the merit employees she supervised. The Kentucky Supreme Court held that the protections from discrimination provided in KRS 18A.095(14)(a) were broader than those set out in KRS 18A.095(12).

28. Although unclassified employees can appeal to the Personnel Board based on a claim of political discrimination, the rights are far more limited compared to those of classified employees. In *Martin*, the court stated, "an unclassified employee is a political employee, not a merit employee, and may be discharged for any reason, including a bad reason, no reason, for political reasons so long as there is no statutory authority for protest." In *Martin*, the court relied on KRS 18A.140, which prohibits political favoritism in the merit system.

29. In this case, the Appellant does not allege any political favoritism within the merit system. She alleges that she was dismissed from her position because she did not make a political contribution and she was replaced by an employee who did make a political contribution.

30. KRS 121.150(20) reads as follows:

No candidate, slate of candidates, or committee, nor anyone on their behalf, shall solicit a contribution of money or services from a state employee, whether or not the employee is covered by the classified service provisions of KRS Chapter 18A. However, it shall not be a violation of this subsection for a state employee to receive a solicitation directed to him as a registered voter in an identified precinct as part of an overall plan to contact voters not identified as state employees.

31. This statute provides an example of prohibited conduct that may form the basis of an appeal, even from an unclassified employee. The Appellant makes no such allegation in this case. She testified that no one ever asked her to make a political contribution. The evidence also established that, when she was dismissed by Commissioner Keene, he did not know of her political neutrality and did not know that she had not made any political contributions. The Appellant was replaced with an employee who made a political contribution; however, no evidence was introduced that she was hired because of her political contribution. The Appellee articulated a legitimate nondiscriminatory reason for dismissing the Appellant.

32. The Hearing Officer concludes that the Appellant failed to carry her burden of proof that her dismissal was the result of illegal political discrimination.

### **RECOMMENDED ORDER**

The Hearing Officer recommends to the Personnel Board that the appeal of **DONNA MCNEIL V. KENTUCKY INFRASTRUCTURE AUTHORITY (APPEAL NO. 2020-025)**, be **SUSTAINED**, that the Appellant be reinstated to her previous position of Executive Director or a position of like pay and status with back pay and benefits for the period of dismissal subject to off-sets, and that she otherwise be made whole. KRS 18A.105 and 200 KAR 12.030.

### **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 Mark A. Sipek** this 7 day of March, 2022.

**KENTUCKY PERSONNEL BOARD**

  
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**MARK A. SIPEK**  
**EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:

Hon. Bernard R. Mazaheri  
Hon. Matt Stephens  
Hon. Rosemary Holbrook (Personnel Cabinet)

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2020-025

DONNA MCNEIL

APPELLANT

V.

INTERIM ORDER

KENTUCKY INFRASTRUCTURE AUTHORITY

APPELLEE

\*\* \*\* \* \* \* \* \*

This matter is before the Hearing Officer for a ruling on the Appellee's Motion to Dismiss.

Wherefore, the Hearing Officer, having reviewed the file, including the Appellee's Motion to Dismiss, and being duly advised, **HEREBY ORDERS AS FOLLOWS:**

1. The Appellee's Motion to Dismiss is **DENIED**.
  - a. A motion to dismiss for failure to state a claim should only be granted if it appears that Appellant would not be entitled to relief under any set of facts that could be proved in support of his claim. *Pari-Mutuel Clerk's Union, Local 541 v. Kentucky Jockey Club*, 551 S.W.2d 801 (Ky. 1977). All allegations on the appeal form are accepted as true for purposes of ruling on the motion. *Pike v. George*, 434 S.W.2d 626 (Ky. 1968). The appeal form, like a complaint in a civil action, should be liberally construed in a light most favorable to Appellant. *Gall v. Scroggy*, 725 S.W.2d 867 (Ky. App. 1987).
  - b. Questions of fact remain as to whether the Appellant's dismissal was the result of illegal political discrimination. The Appellant alleges that she was dismissed because she was politically neutral or because she was aligned with former Governor Matt Bevin. The Appellee responds that neither of



these would be a sufficient basis for a finding of political discrimination for dismissing a non-merit employee. The Appellant has also alleged, however, that she was fired because she did not make a campaign donation and that the person who replaced her did. This may be sufficient basis to establish illegal political discrimination even for an unclassified employee. See *Martin v. Corrections Cabinet*, 822 S.W.2d 858 (Ky. 1991). See also KRS 121.150 (22).

- c. The Appellee in its Motion to Dismiss alleges that the Appellant was not hired by the Kentucky Infrastructure Authority and was hired by a previous Commissioner of the Department of Local Government. There is clearly a factual dispute on this issue. In the letter dated January 8, 2020, from counsel for the Appellant to the Chairmen of the Board of the Kentucky Infrastructure Authority he states, that the Appellant was hired by the KIA Board. This letter was attached to the Appellee's motion as exhibit-E.
- d. The Appellant also alleges that she was fired by the Commissioner of Local Government, who did not have the authority to dismiss her. The Personnel Board has recently held in the appeal of *Rhonda Kiper v. Labor Cabinet*, Appeal No. 2018-005, that a non-merit employee can file an appeal and challenge whether the person who fired them had proper appointing authority.
- e. Because this analysis involves the interpretation of statutes, in part, our starting point should be the language of the statutes themselves.

I. KRS 18A.005(1) states, as follows:

'Appointing authority' means the agency head or any person whom he has authorized by law to designate to act on behalf of the agency with respect to employee appointments, position establishments, payroll documents, register requests, waiver requests, requests for certification, or other position actions. Such designation shall be in writing and signed by both the

agency head and his designee. Prior to the exercise of appointing authority, such designation shall be filed with the secretary;

II. KRS 18A.095(9) states, as follows:

Any unclassified employee who is dismissed, demoted, suspended, or otherwise penalized for cause may, within thirty (30) days after the dismissal, demotion, suspension, or other form of penalization, appeal to the board for review thereof.

III. KRS 18A.095(12) states, as follows:

Any classified employee may appeal to the board an action alleged to be based on discrimination due to race, color, religion, national origin, sex, disability, or age forty (40) and above. Nothing in this section shall be construed to preclude any classified or unclassified employee from filing with the Kentucky Commission on Human Rights a complaint alleging discrimination on the basis of race, color, religion, national origin, sex, disability, or age in accordance with KRS Chapter 344.

IV. KRS 18A.095(14)(a) states, as follows:

Any employee, applicant for employment, or eligible on a register, who believes that he has been discriminated against, may appeal to the board.

- f. While statutory construction is considered to be "...something less than an exact science, the rules serve an important function in helping courts determine legislative intent...all statutes are to be liberally construed with a view to promote their objects and carry out the intent of the legislature. KRS 446.080(1). It is a basic rule of construction that 'where there is an apparent conflict between statutes or sections thereof, it is the duty of the court to try to harmonize the interpretation of the law so as to give effect to both sections or statutes if possible.'" Commonwealth v. Halsell, 934

S.W.2d 552, 555 (Ky. 1996), quoting Ledford v. Faulkner, 661 S.W.2d 475, 476 (Ky. 1983). In the same vein, “it is well settled that two or more acts dealing with the same subject matter must be construed *in pari materia*, and any apparent conflict between them must be reconciled, if possible, so as to give effect to both.” Galloway v. Fletcher, 241 S.W.3d 819, 823 (Ky. App. 2007), quoting Sumpter v. Burchett, 202 S.W.2d 735, 736 (Ky. 1947).

- g. Looking at 18A.005(1) in conjunction with KRS 18A.095(9), (12), and (14), the statute must be read “as a whole, and with other parts of the law of the Commonwealth, to ensure that our interpretation is logical in context.” (Pearce v. University of Louisville, 448 S.W.3d 746, 749 (Ky. 2014).
- h. Significantly, the statutory text of KRS 18A.005(1) contains no explicit suggestion that the protection of this statute is only available to classified employees. Had that been the original intent of the statute, that qualifying language would have been very simple for the legislature to add, as it did throughout KRS 18A.095.<sup>1</sup>
- i. Further evidence that KRS 18A.005(1) was meant to apply to the unclassified employee can be found in the administrative regulations regarding unclassified employees. 101 KAR 3:050 states: “An employee appointed to a position subject to this administrative regulation shall serve at the will of the appointing authority and shall be subject to termination without prior notice or cause.” [101 KAR 3:050, Section 1(3)] (Emphasis added.) It is logical to assume, then, that the legislature intended that the person responsible for position actions regarding the unclassified employee would have the same designation and responsibilities as authorized in KRS 18A.005(1) as it contains the sole definition of “Appointing Authority” in KRS 18A.
- j. In order to “harmonize” and “give effect” to all sections of KRS 18A, as case law discussed above instructs us to do, and to ensure a logical interpretation of the statute, the Hearing Officer finds that the Personnel

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<sup>1</sup>Numerous sections of KRS 18A.095 state explicitly the kind of employee the section applies to. For instance, the legislators used the following descriptions in the statute: the “classified employees with status” (1); “Any unclassified employees”(9); “Any employee” (14)(a); “Any applicant” (14)(b); and “Any state employee” (11).

Board has jurisdiction to decide whether the person who dismissed an unclassified employee has appointing authority to do so.

- k. A review of Personnel Board appeals tangentially related to this matter supports this conclusion. The Hearing Officer first considers the case of Martin v. Corrections Cabinet, 822 S.W. 2d 858 (Ky. 1991).
- l. Patricia Martin was the Warden of the Frankfort Career Development Center, which is a non-merit, unclassified position. She claimed she had been terminated from her position for her attempt to discipline a politically influential classified employee. She appealed her dismissal to the Personnel Board, claiming a right to a hearing pursuant to KRS 18A.095(9), which permits an unclassified employee dismissed "for cause" to file an appeal.
- m. The Personnel Board dismissed Martin's appeal, holding that she was not dismissed "for cause," and that KRS 18A.095(14)(a) did not apply to political discrimination. The Franklin Circuit Court reversed the decision of the Personnel Board, but the Kentucky Court of Appeals overturned the Circuit Court's decision and held that to give KRS 18A.095(14)(a) the broad interpretation sought by Martin would effectively eliminate the primary distinction between classified and unclassified employees.
- n. The Kentucky Supreme Court rejected the Court of Appeal's conclusion that "the purpose of KRS Chapter 18 was to 'perpetuate the distinction between classified and unclassified employees.'" The Court reasoned that "the more appropriate rule of statutory construction in this case is the rule that the courts will consider the purpose which the statute is intended to accomplish, and the reason and spirit of the statute, and the mischief intended to be remedied."
- o. The Kentucky Supreme Court ultimately found that an unclassified employee, if discharged for retaliation for enforcing legal prohibitions against political favoritism as contained in the merit law, had a right to appeal to the Personnel Board:

The purpose of the law would be seriously undermined by prohibiting appeals by unclassified or non-merit supervisors who have alleged discharge and retaliation for enforcing or applying prohibition against political interference of any kind.” (*Id.* at 861.)

- p. The Hearing Officer finds that implicit in the Martin analysis is the understanding that the party dismissing the unclassified employee actually has the authority to effectuate the termination. To hold otherwise would seriously undermine the safeguards the Kentucky legislature has put in place regarding the process by which state employees can be dismissed pursuant to the definition of “Appointing Authority” in KRS 18A.005(1), and the relevant hiring statute pertaining to the employee’s agency. This conclusion is consistent with previous decisions of the Personnel Board, specifically Tramontin v. Cabinet for Health and Family Services, and Deborah Pigman v. Health and Family Services.
- q. In Kenneth Tramontin v. Cabinet and Health and Family Services, 2010 WL 677203 (KY PB 2008-166), the Hearing Officer found that Tramontin, a classified employee, was dismissed for just cause, and that the penalty of dismissal was neither excessive nor erroneous. However, the Hearing Officer ultimately concluded that Jay Klein (the Assistant Director of the Office of Human Resource Management for the Cabinet for Health and Family Services [CHFS] who signed the dismissal letter) was not a properly designated appointing authority. In recommending that Tramontin’s appeal be sustained and that he be reinstated to his previous or similar position, the Hearing Officer noted: “*The Board has a long-standing practice of carefully reviewing allegations that the individual that signed a letter lacked the authority to take the action in question.*” (Emphasis added.) The Personnel Board sustained the Hearing Officer’s Recommended Order.
- r. In Debora Pigman v. Cabinet for Health and Family Services, 2010 WL 2547502 (KY PB 2009-243), Pigman, a classified employee, filed a motion to sustain her appeal before the Personnel Board on the grounds that the person who signed her dismissal letter (Jay Klein), lacked the authority to do so. The Board held that Pigman’s dismissal was void because Klein had

- no authorization from the appointing authority (the CHFS Secretary) to take personnel actions.
- s. A timely petition for review was filed by the Cabinet for Health and Family Services (CHFS) in the Franklin Circuit Court. The Circuit Court concluded that the Board was reasonable in its determination that KRS Chapter 18A is the applicable law and that Klein did not have the authority to sign Pigman's dismissal letter because he had not been formally delegated such authority by the Secretary on behalf of the Agency. CHFS appealed that order to the Kentucky Court of Appeals.
  - t. In affirming the decision of the Franklin Circuit Court, the Kentucky Court of Appeals agreed "with the Board and the lower court that the Secretary was clearly the appointing authority to act on behalf of the agency in light of Martin, KRS 18A.005(1), and KRS 194A.030.... We believe that such a construction of KRS 18A.005(1) and KRS 194A.030 effectuates the intention of our legislature." (p. 18.) Pigman, 2013 WL 1003469 at \*6.
  - u. Even though Tramontin and Pigman involved appeals made by classified employees, we must consider, as the Martin court instructs, "the purpose which the statute is intended to accomplish, and the reason and spirit of the statute and the mischief intended to be remedied." Martin at 861. The purpose of KRS 18A.005(1) is clearly to protect state employees from dismissal by an individual not properly designated as appointing authority.
  - v. Two previous Personnel Board appeals considered the very issue before us, and the Board (and in one case the Kentucky Court of Appeals) recognized that the Board had jurisdiction to determine whether the person who dismissed the unclassified employee had appointing authority.
  - w. In John Veitch v. Public Protection Cabinet, Kentucky Horse Racing Commission, 2013 WL 3967319 (KY PB 2011-263), the Personnel Board found that Veitch, an unclassified employee of the Kentucky Horse Racing Commission, failed to show that his termination was based on age discrimination. The Board also considered whether Robert Vance, Secretary of the Public Protection Cabinet, had the authority to dismiss

Veitch. The Board concluded as a matter of law “that the Secretary of the Public Protection Cabinet, Robert Vance, had the authority conferred by KRS 18A.005(1) and KRS 12.270(3) and (4) to make the decision to instruct Holly McCoy-Johnson to draft a letter terminating employment of John Veitch as Chief State Steward.” (*Id.* at p. 2.)

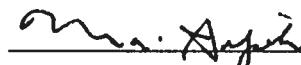
- x. The Veitch Final Order was appealed to the Kentucky Court of Appeals from a Franklin Circuit Court decision. The Court of Appeals found that Veitch was a non-merit, unclassified employee and that the Public Protection Cabinet had the appointing authority to terminate him. Commonwealth of Kentucky v. Veitch, 2016 WL 3905614 (Ky. App. 2016)
- y. In Sallie C. Bolton v. Finance and Administration Cabinet, 2017 WL 2851366 (KY PB 2016-097), the Hearing Officer concluded that Bolton, an unclassified employee employed as an Executive Secretary at the Commercial Mobile Radio Service (CMRS) Emergency Telecommunication Board, had failed to meet her burden of proof to show that she was the subject of unlawful discrimination based on political affiliation. The Hearing Officer also considered whether Troy Robinson, Executive Director of the Office of Administrative Services within the Finance and Administration Cabinet, had the legal authority to terminate Bolton. The Hearing Officer concluded that Robinson did have the authority to dismiss Bolton, and the Personnel Board sustained the Hearing Officer’s Recommended Order.
- z. In both Veitch and Bolton, the Personnel Board considered the question of whether the person dismissing the Appellants (both unclassified employees) had appointing authority. Implicit in the Board’s analysis of both appeals was the belief that the Board had jurisdiction to so. Considering those cases in light of the principle found in both Tramontin and Pigman, that the Board has a long-standing practice of carefully reviewing allegations regarding the appointing authority of a person signing a dismissal letter, leads the Hearing Officer to conclude that the Personnel Board has jurisdiction to decide if the person dismissing an unclassified employee had the authority to do so after the Appellant’s discrimination claim has been determined. This conclusion is bolstered by the holding of Martin that the court must consider the “reason

and spirit" of a statute. Martin at 861. The purpose of KRS 18A.005(1) would be seriously undermined if the Board did not have jurisdiction to hear the claim of an unclassified employee that his dismissal was done by a person not having appointing authority when the employee has also filed a claim of discrimination pursuant to KRS 18A.095(12) and (14)(a).

2. The Appellee argues in its Motion to Dismiss that the proper Appellee is the Department for Local Government and not the Kentucky Infrastructure Authority. The Appellant filed and listed the Kentucky Infrastructure Authority as the Appellee. The Personnel Board administratively listed the Department for Local Government as the Appellee in the Notice of First Pre-Hearing Conference. The Interim Order prepared following that pre-hearing conference, however, made it clear that the Appellee was the Kentucky Infrastructure Authority.

**SO ORDERED** at the direction of the Hearing Officer this 1<sup>st</sup> day of July, 2020.

**KENTUCKY PERSONNEL BOARD**



MARK A. SIPEK

EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Matt Stephens

Hon. Bernard Mazaheri