

CERTIFICATION OF PERSONNEL BOARD RECORDS

I certify that the attached is a true and correct copy of the Findings of Fact, Conclusions of Law, Recommended Order and Final Order in the case of **NATASHA MURRAY VS. EDUCATION AND WORKFORCE DEVELOPMENT CABINET, DEPARTMENT OF EDUCATION (APPEAL NO. 2015-015)** as the same appears of record in the office of the Kentucky Personnel Board.

Witness my hand this 20th day of May, 2015.



MARK A. SIPEK, SECRETARY
KENTUCKY PERSONNEL BOARD

Copy to Secretary, Personnel Cabinet

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-015**

NATASHA MURRAY

APPELLANT

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

**EDUCATION AND WORKFORCE DEVELOPMENT CABINET
DEPARTMENT OF EDUCATION
TERRY HOLLIDAY, APPOINTING AUTHORITY**

APPELLEE

** ** *

The Board at its regular May 2015 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated March 30, 2015, and being duly advised,

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 **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 20th day of May, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Paul Fauri
Hon. Todd Allen

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-015**

NATASHA L. MURRAY

APPELLANT

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

**KENTUCKY DEPARTMENT OF EDUCATION,
THOMAS O. ZAWACKI, APPOINTING AUTHORITY**

APPELLEE

* * * * *

This matter came on for a pre-hearing conference on February 10, 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, Natasha L. Murray, was not present, however, she was represented by the Hon. Paul Fauri. The Appellee, Kentucky Department of Education, was present and represented by the Hon. Lisa Lang. Appearing as agency representative was Ms. Rebecca Ogden.

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

The Hearing Officer noted this appeal was filed with the Personnel Board on January 15, 2015. The Appellant had been dismissed from her position with the Department of Education by letter dated December 22, 2014, for various allegations as stated in the letter. As relief, Appellant seeks restoration to her job duties or a similar position, with any back pay and to otherwise be made whole. Counsel indicated there are no other claims to be made at this time.

Prior to the pre-hearing conference, Counsel for the Appellant filed a Motion to Sustain the Appeal as a Matter of Law. After discussion, a further briefing schedule was set.

The parties complied with the briefing schedule, and this matter stands ready for a ruling on the Appellant's Motion to Sustain the Appeal as a Matter of Law.

BACKGROUND

1. During the relevant times, the Appellant, Natasha L. Murray, was a classified employee with status.

2. As noted, Counsel for the Appellant filed a Motion to Sustain the Appeal as a Matter of Law. The specific basis for the motion is that, in counsel's eyes, the Appellee failed to comply with KRS 18A.095(2) and (7).

3. As to the claim regarding the Notice of Intent to Dismiss dated November 19, 2014, the following pertinent paragraphs are reprinted:

Pursuant to 101 KAR 1:345, Section 1 and 101 KAR 2:095, Section 2, and based upon review of your employment record and the recommendation of the Office of Next Generation Schools and Districts, I find probable cause to believe that your dismissal is justified based upon the following specific reasons:

Unsatisfactory behavior and insubordination, specifically the misrepresentation of time worked to your supervisor and failure to follow proper procedures.

During the pay period November 1st – 15th you attended or participated in events held outside of your regular work location and work schedule. Discussion was held with you regarding your participation and attendance in these activities and the time you intended to claim for regular hours worked as well as compensatory hours above and beyond your regular work schedule. Documentation was requested to support your claims of the time worked; however, no information has been provided. You then chose to submit a timesheet that did not reflect the time you claimed to have worked in lieu of providing documentation to support your claims. Your failure to accurately report your work time on your timesheet has affected your credibility pertaining to your participation and attendance in these events. As there is no supporting evidence to support your claims, it has been determined that you misrepresented your activities during this pay period to your supervisor.

As an employee of state government for over eight years, you knew or should have known that you should properly request and report to your supervisor the work you have completed for the agency. You knew or should have known the regulations and processes pertaining to claiming compensatory time worked and what time should be appropriately considered time worked.

4. Appellant's specific contentions with the Notice of Intent to Dismiss (partially reprinted above) is that the letter is not specific as to dates and times, or names of the parties involved, or as to the alleged misrepresentation of time worked and the procedures that were not followed.

5. The Hearing Officer notes there are two letters of dismissal dated December 22, 2014, with one containing an amended effective date. From review, it appears that the substantive portions of the letters are similar.

6. The dismissal letters state:

Having now considered all the statements made by you and on your behalf as well as other documents now within KDE's possession, I have determined that dismissal from your position of Education Administration Program Consultant II with this agency is appropriate pursuant to 101 KAR 1:345, Section 1 for "a lack of good behavior." Specifically, you are being dismissed for violation of 101 KAR 1:345, Section 1 and 101 KAR 2:095, Section 2 for violations of KRS 11A, 9 KAR 1:050 (1)(1.) and KDE policy.

During your pre-termination hearing you shared information with us regarding your activities before and after the National Dropout Prevention Conference held in Louisville, Kentucky November 2 – 5, 2014. Based on a review of information now in the KDE's possession, it is clear that you not only misrepresented the nature of your activities on November 6, 2014, but you have been engaging in various activities during your employment with the KDE that violate the provisions of the Executive Branch Code of Ethics set forth in KRS 11A as well as 9 KAR 1:050(1)(1.) and KDE policy.

Specifically, you have engaged in the following misconduct:

- * You misrepresented to your supervisors and the KDE the nature of the activities you were engaged in on November 6, 2014.
- * You misrepresented the nature of your working relationship with the Bethune Institute during your tenure with the KDE.
- * You violated the provisions of the Executive Branch Ethics Code when you accepted employment with the Bethune Institute, a business under contract with the Kentucky Department of Education.
- * You violated the Executive Branch Ethics Code and KDE policy when you accepted compensation for consultative work for an entity regulated by the KDE.
- * You violated the Executive Branch Ethics Code and KDE policy when you obtained outside employment during your tenure with the KDE without obtaining the required approval of the appointing authority.
- * You violated the Executive Branch Ethics Code and KDE policy when you used state time, equipment, personnel, facilities and/or other state resources to complete your doctoral thesis.
- * You violated the Executive Branch Ethics Code and KDE policy when you used state time, equipment, personnel, facilities and/or other state resources for your political campaign for Fayette County School Board.

As an Executive Branch employee, you are responsible for complying with the Executive Branch Code of Ethics under Kentucky Revised Statutes (KRS) Chapter 11A. The Executive Branch Code of Ethics contains provisions to ensure ethical conduct and

prevent conflicts of interest in the Executive Branch of state government. To maintain public confidence in a democratic government, certain restrictions are placed upon your conduct. Not only were you given information regarding your obligations under the Executive Branch Code of Ethics when you were hired, you were given information regarding your obligations under the law on how to conduct yourself as an Executive Branch employee during your campaign to win a seat on the Fayette County School Board.

7. Counsel for the Appellant contends the letter of dismissal also fails to meet the requirements of KRS 18A.095(7), as again it does not set forth the specific actions or activities on which the dismissal is based, including the dates, times and places of the actions or activities. Counsel states that while there are dates stated in the letter specifically, the November 2 – 5, 2014, and the November 6, 2014 dates, those dates were not specifically referenced to the Notice of Intent to Dismiss, and are not specific to any action or activity. Counsel notes that names of persons involved in this are also not mentioned in the dismissal letter, and also makes reference to information in the possession of the Kentucky Department of Education which was not mentioned in the Notice of Intent to Dismiss.

8. Counsel for the Appellant continues by noting that the activities relating to November 6, 2014, were not explicitly part of the Intent to Dismiss letter, and that numerous allegations made by the Appellee as to Appellant's violation of the Executive Branch Code of Ethics set forth in the dismissal letter were not mentioned at all in the Notice of Intent to Dismiss.

9. As to the allegations Appellant violated the Executive Branch Code of Ethics, Counsel contends the Personnel Board does not have jurisdiction to adjudicate allegations of violations of the Executive Branch Code of Ethics, and cites recent Personnel Board cases to support that. Likewise, Counsel notes that no specificity at all was included in those allegations of violations of the Executive Branch Code of Ethics. Counsel contends that the failure of the Appellee to comply with the provisions of KRS 18A.095(2) and (7) with regards to the Notice of Intent to Dismiss and the dismissal letter, respectively, make both actions void *ab initio*.

10. As an additional complaint, Counsel contends that the Notice of Intent to Dismiss letter denied her opportunity to respond to the charges, as the termination letter was not based on information set forth for the pre-termination hearing. Counsel continues that, in his view, the Appellee violated Section 2 of the Kentucky Constitution as well.

11. In closing his motion, Counsel contends the seminal case of *Goss v. Personnel Board*, which requires specificity in charges, was not followed. See *Goss v. Personnel Board*, 456 S.W. 2d 819 (Ky. 1970).

12. As relief, Appellant seeks to have the letters of Notice of Intent to Dismiss and dismissal voided *ab initio*, and Appellant to be ordered reinstated to her position with all back pay and other benefits.

13. Counsel for the Appellee, in response, contends the Appellee did comply with the requirements of KRS 18A.095 with the Notice of Intent to Dismiss letter and the dismissal letter containing “sufficiently detailed descriptions of the basis for dismissal and provided her with fair and meaningful opportunity to reply to the allegations therein.” Counsel continues by noting the section of the Notice of Intent to Dismiss letter that constitutes the notice, and then, by bullet point, listed information that was not included in the Notice of Intent to Dismiss letter, which gives further detail.

14. Counsel then states that the requirements of KRS 18A.095(2) (relating to the Notice of Intent to Dismiss) and KRS 18A.095(7) (the dismissal letter) were met.

15. Counsel cites *Wade v. Commonwealth of Kentucky, Department of Treasury*, 840 S.W. 2d 215, 218 (Ky. App. 1992) as support for the proposition that notice requirements are deemed met as long as the agency has provided the employee with enough information to allow that employee “sufficient opportunity to reply to the charges.”

16. Counsel again contends that the agency provided sufficient notice in both the Notice of Intent to Dismiss and the dismissal letter.

17. As to the Notice of Intent to Dismiss, Counsel expands on the language actually included in the Notice of Intent to Dismiss by giving additional detail, including Appellant’s response to inquiries made by Appellee. Counsel states that the description contained within the Notice of Intent to Dismiss was sufficient because the Appellant came to the pre-termination hearing prepared to refute the allegations contained in the Notice of Intent to Dismiss, and even prepared a written timeline she shared with the Appointing Authority during the pre-termination hearing. Counsel claims further that the dismissal letter also provided sufficient notice to the Appellant. Counsel defends the citation of allegations of violations of the Executive Branch Code of Ethics in the dismissal letter, though those were not mentioned at all in the Notice of Intent to Dismiss.

18. Responding to Appellant’s contention that the Personnel Board does not have the authority to adjudicate allegations of the Executive Branch Code of Ethics, Counsel cites the Court of Appeals opinion in *Huffman v. Executive Branch Ethics Commission*, 2010 WL 1508188, that “...both the Personnel Board and the Ethics Commission [have] authority to regulate certain conduct of classified state merit employees.” Counsel then argues that to the extent Appellant’s conduct could be considered a violation of the Executive Branch Code of Ethics under the jurisdiction of the Executive Branch Ethics Commission, Appellant’s conduct would also constitute a violation of state law for which the Personnel Board has concurrent jurisdiction.

19. Counsel for the Appellant filed a reply. Counsel disputes that proper notice was ever supplied. In citing parts of the dismissal letter, Counsel for the Appellant points to that section which discusses purported violations of the Executive Branch Code of Ethics for which no specifics were given. Counsel points out that the allegations make reference to November 6, 2014, but do not set forth what the misrepresentations were and who were the supervisors mentioned. Counsel contends the dismissal letter differs significantly from the Notice of Intent

to Dismiss, and that it primarily sets forth allegations of violations of Executive Branch Code of Ethics (KRS Chapter 11A), that were not mentioned at all in the Notice of Intent to Dismiss. Counsel takes issue with the recitation of facts made by Counsel for the Appellee in her response that were not mentioned at all in the Notice of Intent to Dismiss or the dismissal letter. Counsel again contends the Personnel Board does not have jurisdiction to consider violations of KRS Chapter 11A, arguing that the Executive Branch Ethics Commission enforces and adjudicates allegations of KRS Chapter 11A, and the Personnel Board decides allegations of violations of KRS Chapter 18A.

20. KRS 18A.095(2) states:

Prior to dismissal, a classified employee with status shall be notified in writing of the intent to dismiss him. The notice shall also state:

(a) The specific reasons for dismissal including:

1. The statutory or regulatory violation;
2. The specific action or activity on which the intent to dismiss is based;
3. The date, time, and place of such action or activity; and
4. The name of the parties involved;

(b) That the employee has the right to appear personally, or with counsel if he has retained counsel, to reply to the head of the cabinet or agency or his designee; and

(c) Whether the employee is placed on administrative leave by the appointing authority with pay upon receiving the intent to dismiss letter prior to the agency's final action.

21. KRS 18A.095(7) states:

If the cabinet or agency head or his designee determines that the employee shall be dismissed or otherwise penalized, the employee shall be notified in writing of:

(a) The effective date of his dismissal or other penalization;

(b) The specific reason for this action, including:

1. The statutory or regulatory violation;
2. The specific action or activity on which the dismissal or other penalization is based;
3. The date, time, and place of the action or activity; and

4. The name of the parties involved; and

(c) That he may appeal the dismissal or other penalization to the board within sixty (60) days after receipt of this notification, excluding the day he receives notice.

FINDINGS OF FACT

1. During the relevant times, the Appellant, Natasha L. Murray, was a classified employee with status.

2. The Hearing Officer incorporates by reference herein and attaches as exhibits hereto the Notice of Intent to Dismiss and the dismissal letter as Recommended Order Attachments A and B to this Recommended Order.

3. The Hearing Officer finds that the Notice of Intent to Dismiss does not comply with KRS 18A.095(2) in that it does not provide the required specificity mandated by law. The Notice of Intent to Dismiss makes a general reference to matters that occurred during the pay period November 1st – 15th, gives no specifics as to where the events were that were held outside the regular work location, what the regular work schedule was, who held discussions with the Appellant, or any other specifics which would comply with the statute. The Hearing Officer finds that Counsel for the Appellee's recitation of additional facts that were not contained in the Notice of Intent to Dismiss supports this finding. In fact, this Hearing Officer believes those facts cited by Counsel for the Appellee in the response should have been put into the Notice of Intent to Dismiss, and had they been included in the notice, may have complied with the requirements of KRS 18A.095(2).

4. While the Hearing Officer has found the Notice of Intent to Dismiss does not comply with the requirements of KRS 18A.095(2), it was not all that far from compliance. However, the dismissal letter, in this Hearing Officer's opinion, falls woefully short of the requirements of KRS 18A.095(7) and *Goss v. Personnel Board*, supra. The dismissal letter, as Counsel for the Appellant points out, differs significantly from the Notice of Intent to Dismiss. One example is in the paragraph that deals with the Appellant's attendance at the National Dropout Prevention Conference held in Louisville, Kentucky November 2 – 5, 2014, and allegations regarding Appellant's activities of November 6, 2014. While that time period was generally mentioned in the Notice of Intent to Dismiss, the specifics which were given in the dismissal letter again do not give the specifics of what Appellant is alleged to have done in "engaging in various activities," and why that would have been a violation of statute, regulation or policy. More disturbing though, is the bulk of the dismissal letter which deals with allegations of violations of the Executive Branch Code of Ethics that were certainly not mentioned in the Notice of Intent to Dismiss. These allegations also lack any form of specificity, and in fact, appear to cover matters that extend over the course of Appellant's employment, again not mentioned at all in the Notice of Intent to Dismiss.

5. The Hearing Officer finds that in order to cite conduct that would be a violation of the Executive Branch Code of Ethics, and to pursue such claims against an employee at the Personnel Board, the employee would, like for every other allegation of misconduct, have to be put on specific notice as to what the misconduct was. Merely reciting references of misconduct of what, in the eyes of the Appellee would violate the Executive Branch Code of Ethics, does not constitute notice of misconduct punishable under KRS Chapter 18A.

6. The Hearing Officer also finds that if an agency believes there are violations of the Executive Branch Code of Ethics and wants an adjudication of same, the violations need to be referred to the Executive Branch Ethics Commission. The Hearing Officer believes Counsel for the Appellee misapprehends the thrust of the *Huffman* case. The Court of Appeals was responding to Huffman's argument that questions regarding use of sick leave, and whether such violated the Executive Branch Ethics Code, would really be disciplinary matters more properly before the Personnel Board. That is not to say that the Personnel Board has the jurisdiction to adjudicate allegations of violations of KRS Chapter 11A, the Executive Branch Code of Ethics, or that the Executive Branch Ethics Commission could adjudicate allegations of violations of KRS Chapter 18A. It does mean that the underlying conduct could be pursued in both places with each agency responsible for making findings as to the allegations of violations of its own code.

7. Regardless, even if the Personnel Board had the authority to adjudicate allegations of violations of the Executive Branch Code of Ethics, the bare bones information provided in the dismissal letter provided to Appellant does not comply with the notice requirements of KRS 18A.095(7).

CONCLUSIONS OF LAW

1. The Hearing Officer concludes as a matter of law that the Appellee has failed to comply with the notice requirements set forth both in KRS 18A.095(2) as relates to the Notice of Intent to Dismiss and KRS 18A.095(7) as relates to the notice of dismissal.

2. The Hearing Officer concludes that the *Wade* case cited by Appellee is distinguishable, and it appears *Wade*, while given notice that does not provide specifics of misconduct, was provided notice that apparently he could not perform the functions of his job, which gave him some ability to reply to those allegations. Here, Appellant was given general notice of violations of policy relating to a certain time period, both the Notice of Intent to Dismiss and the dismissal letter gave no indication as to what policies were violated or what the specific dates mentioned in the Notice of Intent to Dismiss related to. Likewise, the dismissal letter allegations regarding violations of the Executive Branch Code of Ethics provided no meaningful opportunity for the Appellant to reply at all. In addition, those allegations had not been mentioned in the Notice of Intent to Dismiss and at all.

3. Having concluded that the Notice of Intent to Dismiss and the dismissal letter both fail to comply with KRS 18A.095, the Hearing Officer concludes as a matter of law that this matter must be sustained.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **NATASHA L. MURRAY V. KENTUCKY DEPARTMENT OF EDUCATION, (APPEAL NO. 2015-015)** be **SUSTAINED**. The Appellant should be reinstated to her previous position or a position of like pay and status with back pay and other benefits and 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 Boyce A. Crocker** this 30th day of March, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Lisa Lang
Hon. Paul Fauri