

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2018-263

JOHNATHEN NUNEZ

APPELLANT

VS.

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

DEPARTMENT OF MILITARY AFFAIRS

APPELLEE

*** **

The Board, at its regular June 2019 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated April 18, 2019, 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 19th day of June, 2019.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Charla Sands
Mr. Johnathen Nunez

**COMMONWEALTH OF KENTUCKY
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**FINDINGS OF FACT, CONCLUSIONS OF LAW
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APPELLEE

** ** ** ** **

This matter came on for a pre-hearing conference on February 11, 2019, at 11:00 a.m., ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Johnathen Nunez, was present by telephone and was not represented by legal counsel. The Appellee, Department of Military Affairs, was present and represented by the Hon. Charla Sands.

The purposes of the pre-hearing conference were to determine the specific penalization(s) alleged by Appellant, to determine the specific section of KRS 18A which authorizes this appeal, to determine the relief sought by Appellant, to define the issues, to address any other matters relating to the appeal, and to discuss the option of mediation.

BACKGROUND

1. The Appellant, Johnathen Nunez, filed his appeal with the Personnel Board on December 28, 2018, appealing from his dismissal. He alleged he was let go because of a failed drug test. He received notice of his dismissal on November 2, 2018, and it was effective that day. The Appellant stated that he wished to get his job back.

2. With respect to the drug test, the Appellant stated that he had been tested for other purposes and had passed all of those tests. He believed he failed the drug test administered by Military Affairs because of his exposure to secondhand smoke.

3. The Agency's position was that the Appellant was not a KRS Chapter 18A employee and he received a "services are no longer needed" letter. Counsel stated that the Agency's position was they often did not give a second chance under these circumstances.

4. At the time of the pre-hearing conference, the Appellee had already filed its written Motion to Dismiss. The Hearing Officer provided the parties time for a response and a reply. Those times have now expired. The Appellant did not respond to the Motion to Dismiss.

FINDINGS OF FACT

1. The Appellant filed this appeal with the Personnel Board on December 28, 2018, appealing from his dismissal, alleging he was let go because of a failed drug test.

2. The Appellee filed a Motion to Dismiss arguing that the Appellant was not a KRS Chapter 18A employee, but was hired by the Adjutant General's authority under KRS 36.040(1)(r). In support of its Motion to Dismiss, the Appellee attached Personnel Action Notifications from the Appellant's appointment on May 1, 2017, and his separation on November 3, 2018, showing that he was "non-Chapter 18A under KRS 36.040(1)(r)." The Appellee also attached the dismissal letter, which did not reference KRS Chapter 18A in any way. It simply informed the Appellant that his services were no longer needed.

3. The Hearing Officer finds that the Appellant was hired as a non-Chapter 18A employee pursuant to the Adjunct General's authority under KRS 36.040(1)(r). He was also fired under this same authority, and had no right to appeal under KRS Chapter 18A.

4. The Hearing Officer finds there are no genuine issues of material fact and this matter can be decided as a matter of law, based on the appeal form, the statements made at the pre-hearing conference, and the Appellee's Motion to Dismiss, including attachments.

CONCLUSIONS OF LAW

1. As stated in the Findings of Fact, the Appellant was hired and fired pursuant to the authority of KRS 36.040(1)(r), which reads as follows:

36.040 Duties of adjutant general -- Authority to enter into agreements with Federal agencies.

(1) The adjutant general shall:

(r) Hire, discharge, and pay any personnel that the adjutant general deems necessary to fulfill defense contracts without regard to KRS Chapter 18A.

2. As a non-Chapter 18A employee, the Personnel Board lacks jurisdiction to hear the Appellant's appeal and this matter may be dismissed.

3. Because the Personnel Board lacks jurisdiction over this matter and there are no genuine issues of material fact, the Personnel Board can dismiss this matter after a preliminary hearing. KRS 18A.095(18)(a) and KRS 13B.090(2)

RECOMMENDED ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Kentucky Personnel Board that the appeal of **JOHNATHEN NUNEZ VS. DEPARTMENT OF MILITARY AFFAIRS (APPEAL NO. 2018-263)** 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).

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 18th day of April , 2019.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Charla Sands
Johnathen Nunez