

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2018-161

CHARLES PHILLIPS

APPELLANT

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

TOURISM, ARTS AND HERITAGE CABINET,
DEPARTMENT OF FISH AND WILDLIFE RESOURCES

APPELLEE

*** **

The Board, at its regular May 2019 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated April 9, 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 7th day of May, 2019.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Jean Bird
Hon. Stephen Wolnitzek
Ms. Misty Judy

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

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DEPARTMENT OF FISH AND WILDLIFE RESOURCES**

APPELLEE

** ** * * **

This matter last came on for a pre-hearing conference on October 10, 2018, at 10:30 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, Charles Phillips, was not present but was represented by the Hon. Stephen Wolnitzek, who appeared by telephone. The Agency/Appellee, Tourism, Arts & Heritage Cabinet, Department of Fish and Wildlife Resources, was present and represented by the Hon. Jean Bird.

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

This matter is before Hearing Officer Stafford Easterling for a ruling on the Agency's Motion to Dismiss and the Appellant's Motion to Sustain Appeal, both filed with the Personnel Board on November 16, 2018. As set out in his Motion to Sustain Appeal, at issue is the Appellant's claims that he has been penalized because he was issued a written reprimand and the process by which the written reprimand was issued violated the requirements of Kentucky Fish and Wildlife Resources ("KDFWR") Policy 2.20. The Appellant concedes the Personnel Board does not have jurisdiction over written reprimand but argues the alleged procedural violations convey jurisdiction over this matter to the Board. The Agency's Motion to Dismiss argues that the Personnel Board lacks jurisdiction over the Appellant's written reprimand claims and cites Board precedent wherein the Board has determined it lacks jurisdiction over written reprimands. The parties were given an opportunity to file a response to each other's motions and have done so. This matter now stands submitted to the Hearing Officer for a ruling on the Agency's Motion to Dismiss and the Appellant's Motion to Sustain Appeal.

BACKGROUND/ FINDINGS OF FACT

1. The Hearing Officer notes the facts underlying the instant appeal were largely agreed to by the parties during the pre-hearing conference, the dispositive motions, and the responses thereto. Accordingly, the Hearing Officer largely adopts the facts as articulated by the parties in their respective submissions and as established by the documents submitted with the underlying appeal.

2. Prior to the submission of this appeal, the Appellant, Charles Phillips, was a classified employee with status, employed by the Tourism, Arts & Heritage Cabinet, Department of Fish & Wildlife Resources as a Conservation Officer Captain.

3. On or about February 20, 2018, the Agency advised the Appellant, in writing, that he was being placed on investigative leave with pay, so the Agency could pursue allegations that the Appellant directed subordinate employees to work “off the clock” and not claim compensation for the time they were working.

4. Thereafter, on May 23, 2018, the Agency issued a letter returning the Appellant to work from investigative leave, but also noting the investigation substantiated some of the allegations that underlie the placement on investigative leave. Accordingly, on May 29, the Agency issued the Appellant a written reprimand, advising him that he is not permitted to work hours “off the clock” and instructing him that he is expected to communicate to his subordinates that they are not permitted to work hours “off the clock.”

5. The Appellant then filed the instant appeal alleging 1) the Agency failed to provide him a copy of the documentation in support of the written reprimand when he received it and 2) the investigation leading to the written reprimand violated KDFWR Policy 2.20. KDFWR Policy 2.20 is titled “Administrative Investigations,” specifically references 101 KAR 1:345 and KRS Chapter 18A, and was distributed to law enforcement personnel. In its general statement of policy, KDFWR Policy 2.20 states that “101 KAR 1:345(1) mandates that any KRS Chapter 18A employee who is faced with disciplinary action may be charged with either **Lack of Good Behavior** or **Unsatisfactory Performance of Duties** as it relates to their employment with KDFWR. This policy sets forth procedures to be followed while conducting an administrative investigation.” The policy does not state whether it governs complaints made by the general public against KDFWR law enforcement personnel in the performance of their job duties or whether it establishes the procedures by which the Agency, as an employer, must abide by when conducting an administrative investigation against one of its law enforcement employees. Stated differently, it is unclear whether the policy applies when considering the Agency operating as a sovereign (“public context”) or whether it applies when the Agency is operating as an employer (“employment context”). What is clear, however, is that KDFWR Policy 2.20 provides a set of additional due process rights above and beyond that which is required by KRS Chapter 18A, including, but not limited to, 1) the right to have a complaint

investigated by an officer of a higher rank, 2) the right to receive written notice about any complaint received, and 3) the right to rely upon the general rule that verbal and unsigned complaints will not be investigated.

6. As noted above, the Agency filed its Motion to Dismiss with the Personnel Board on November 16, 2018, arguing the Personnel Board lacks jurisdiction over this appeal, pursuant to KRS 18A.020(2) and prior Board precedent. On the same date, the Appellant filed a Motion to Sustain Appeal, arguing the Agency clearly failed to provide the additional due process requirements set out in KDFWR Policy 2.20 and, thus, she should win the appeal. Although there is some discussion about the scope of the documentation provided with the written reprimand, the primary document sought by the Appellant and not provided is the written complaint that resulted in the Appellant's placement on investigative leave. The Agency responds that there is no "written complaint" and the only documentation relied on was an interview form and an audio recording of an exit interview with an officer who alleges the Appellant told him to work "off the clock," both of which were provided to the Appellant. After reviewing the case file, the Hearing Officer finds, pursuant to KRS 18A.020, that the Agency provided the Appellant with all of the appropriate documentation when it issued the Appellant a written reprimand.

7. Accordingly, the only issues left to resolve are: 1) whether KDFWR Policy 2.20 applies to the Appellant in the employment context, 2) whether, in that employment context, KDFWR Policy 2.20 operates to create additional due process rights beyond those provided by KRS Chapter 18A, and 3) whether potential violation of those KDFWR Policy 2.20 rights would convey jurisdiction to the Board over a written reprimand.

8. 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.

9. 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.

10. KRS 18A.020(2)(c) provides:

Whenever an employee is reprimanded for misconduct, other infraction, or failure to perform his duties in a proper or adequate manner, the supervising employee taking such action shall document such action in detail, and shall provide the employee with a copy of such documentation. The supervising employee shall inform the employee that he has the right to prepare a written response to the action taken after he has reviewed the written documentation prepared by the supervising employee. Such response shall be attached to the documentation prepared by the supervising employee. The supervising employee shall place a copy of the documentation and response provided for herein in the employee's personnel file and shall transmit a copy to the cabinet to be placed in the official personnel file of the employee. The supervising employee shall notify the employee that copies of the documentation and the response provided for herein have been placed in his personnel files.

11. KRS 13A.130 provides:

(1) An administrative body shall not by internal policy, memorandum, or other form of action:

(a) Modify a statute or administrative regulation;

(b) Expand upon or limit a statute or administrative regulation; or

(c) Except as authorized by the Constitution of the United States, the Constitution of Kentucky, or a statute, expand or limit a right guaranteed by the Constitution of the United States, the Constitution of Kentucky, a statute, or an administrative regulation.

(2) Any administrative body memorandum, internal policy, or other form of action violative of this section or the spirit thereof is null, void, and unenforceable.

(3) This section shall not be construed to prohibit an administrative body issuing an opinion or administrative decision that is authorized by statute.

12. KRS 18A.0751 provides, in pertinent part:

(1) The board shall promulgate comprehensive administrative regulations for the classified service governing:

(a) Appeals by state employees;

(b) Demotion;

(c) Dismissal;

(d) Fines, suspensions, and other disciplinary measures;

(e) Probation, provided that the board may not require an initial probationary period in excess of six (6) months except as provided in subsection (4)(e) of this section and KRS 18A.005;

(f) Promotion;

(g) Reinstatement;

(h) Transfer; and

(i) Employee grievances and complaints.

(2) (a) These administrative regulations shall comply with the provisions of this chapter and KRS Chapter 13A, and shall have the force and effect of law, when approved by the board, after compliance with the provisions of KRS Chapters 13A and 18A and the procedures adopted thereunder;

(b) Administrative regulations promulgated by the board shall not expand or restrict rights granted to, or duties imposed upon, employees and administrative bodies by the provisions of this chapter; and

(c) No administrative body, other than the personnel board, shall promulgate administrative regulations governing the subject matters specified in this section.

CONCLUSIONS OF LAW

1. The Hearing Officer concludes, as a matter of law, that, to the extent it is an issue herein, any direct challenge to the written reprimand issued May 29, 2018, must fail. That is because, as Personnel Board precedent provides, “KRS 18A.020(2)(c) provides for the sole means of handling an employee’s claim that a written reprimand is not warranted and as long as the procedures outlined in KRS 18A.020(2)(c) are followed, no further appeal rights regarding a reprimand are given to employees.” Ramey v. Cabinet for Health Services, 2003 WL 25749476 at *2 (KY PB). Accordingly, pursuant to KRS 18A.095(18)(a), dismissal of this claim is appropriate because the Personnel Board lacks jurisdiction to consider a direct challenge to the Appellant’s written reprimand.

2. Moreover, any claim that the provisions of KRS 18A.020(2)(c) were not followed must also fail. The Appellant’s allegations of KRS 18A.020 violations are based on the Agency failing to provide the Appellant with certain investigative records supporting the Agency’s issuance of a written reprimand. However, as it applies to the instant appeal, the Hearing Officer concludes that the term “such documentation” contained in KRS 18A.020(2)(c) refers to a document memorializing the behavior warranting a reprimand and does not operate to convey a right to an employee for access to the same documentation reviewed by/supplied to the Agency. Stated differently, in order to issue a reprimand to an employee, the provisions of KRS 18A.020(2)(c) require the Agency to 1) document, in detail, the reason(s) for issuing the reprimand, 2) provide a copy of the reason for the reprimand to the employee, 3) inform the employee that they have the right to prepare a written response to the reprimand, 4) attach any written response to the issued reprimand, 5) place the reprimand and any written response thereto into the employee’s official Agency personnel file, 6) place the reprimand and any written response thereto into the employee’s official Personnel Cabinet personnel file, and 7) notify the employee that the reprimand and any written response have been placed in their personnel files. KRS 18A.020(2)(c) does not require the Agency to provide an employee with all of the documentation supplied to the Agency and does not require the Agency to provide an employee with all of the documentation developed during an investigation of misconduct. Therefore, pursuant to KRS 18A.095(18)(a), dismissal of this claim is appropriate because the Appellant cannot identify any penalization arising from the provisions of KRS 18A.020(2)(c).

3. The Appellant also argues KDFWR Policy 2.20 applies to the Appellant in an employment context, operates to create additional due process rights beyond those provided by KRS Chapter 18A, and violation of those KDFWR Policy 2.20 rights would convey jurisdiction to the Board over a written reprimand. However, KDFWR Policy 2.20 cannot create additional due process rights beyond those provided by KRS Chapter 18A, as a matter of law. First, it is clear that KDFWR Policy 2.20 is an “internal policy” as the term is used in KRS Chapter 13A as the policy concerns only the internal management of the Kentucky Department of Fish and

Wildlife Resources, does not affect the private rights or procedures available to the public, and only applies to employees of the Kentucky Department of Fish and Wildlife Resources. KRS 13A.130 provides that an internal policy cannot 1) modify a statute or administrative regulation, 2) expand upon or limit a statute or administrative regulation, or 3) except as authorized by the Constitution of the United States, the Constitution of Kentucky, or a statute, expand or limit a right guaranteed by the Constitution of the United States, the Constitution of Kentucky, a statute, or an administrative regulation. In other words, to greatly simplify the analysis, an administrative agency is authorized to promulgate an internal policy as long as the internal policy does not modify, expand, or limit a statute or administrative regulation or any right guaranteed by a statute or administrative regulation.

4. Here, as to the written reprimand, the Appellant argues that KDFWR Policy 2.20 affords him additional due process rights beyond those afforded to other employees employed under KRS Chapter 18A. He specifically claims that Policy 2.20 entitles him to, amongst other rights, 1) the right to have a complaint investigated by an officer of a higher rank, 2) the right to receive written notice about any complaint received, and 3) the right to rely upon the general rule that verbal and unsigned complaints will not be investigated. It is clear such rights are not amongst the panoply of rights enshrined by KRS Chapter 18A. KDFWR Policy 2.20, if it applies in an employment context, would require a process beyond that which is mandated by KRS Chapter 18A.

5. Accordingly, for the limited purpose of addressing the pending motions, the Hearing Officer finds that KDFWR Policy 2.20 does, in fact, apply to the Agency operating as an employer ("the employment context"). However, because Policy 2.20 modifies and/or expands the rights afforded to KRS 18A employees in the reprimand process established by KRS 18A.020(2)(c), the Hearing Officer finds, in the employment context, that KDFWR Policy 2.20 addresses matters prohibited as the subject of internal policy and, thus, violates the clear provisions of KRS 13A.130. Internal policy cannot modify, expand, or limit any right guaranteed by a statute or administrative regulation. Here, KDFWR Policy 2.20 grants KDFWR employees additional procedural rights not mandated by KRS Chapter 18A or the administrative regulations promulgated thereto. Granting KDFWR employees these additional due process rights expands or modifies the rights guaranteed by KRS 18A and the applicable administrative regulations.

6. KRS 13A.130(2) mandates that any internal policy "violative of this section or the spirit thereof is null, void, and unenforceable." Because the Hearing Officer has determined that KDFWR Policy 2.20 applies to the employment context and operates to expand or modify the rights guaranteed by KRS 18A, the Hearing Officer must also conclude that KDFWR Policy 2.20 be declared null, void, and unenforceable to the extent that it applies to the Agency when operating as an employer. While administrative agencies are permitted to promulgate internal policies to define how broad concepts apply to their particular workplace, administrative agencies are not permitted to promulgate internal policies that modify, expand, or limit any right guaranteed by a statute or administrative regulation. For example, 101 KAR 1:345 authorizes an administrative agency to discipline an employee for lack of good behavior; however, that

regulation does not define the term “lack of good behavior” and cannot. That is because what amounts to lack of good behavior for a state employee working in a correctional facility is vastly different than what lack of good behavior would mean for a state employee working in a coal mine for the Energy and Environment Cabinet’s Division of Mine Reclamation and Enforcement. The Personnel Board shall consider the internal policy and its definition of misconduct. The Board may then elect to apply the applicable internal policy to assist the Board in determining what constitutes misconduct in a particular work environment. Internal policy is persuasive authority and is not binding on the Board. Such policies merely serve to aid the Board in performing their duty to ensure the provisions of KRS Chapter 18A are being followed. In the example set out above, both the Department of Corrections and the Energy and Environment Cabinet would be entitled to promulgate internal policies defining what the phrase “lack of good behavior” means in their unique circumstances. However, neither the Department of Corrections nor the Energy and Environment Cabinet would be authorized to promulgate internal policies that say, for instance, that their merit employees can only be disciplined in the month of September or can be chosen for layoff on the basis of their religious affiliation. Thus, because KDFWR Policy 2.20 modifies or expands the process due to KDFWR law enforcement personnel, the policy must be declared null, void, and unenforceable to the extent that it applies to the Agency when operating as an employer.

7. The conclusion that KDFWR Policy 2.20 is null, void, and unenforceable in the employment context is also bolstered by KRS Chapter 18A. KRS 18A.0751 requires the Personnel Board to promulgate administrative regulations for the merit system governing matters including, but not limited to, administrative appeals, promotions, demotions, probation, and employee discipline. Although not specifically enumerated in KRS 18A.0751, the Hearing Officer concludes the Personnel Board has been entrusted with the responsibility to promulgate administrative regulations pertaining to written reprimands as well. The Personnel Board has, in fact, promulgated administrative regulations governing written reprimands. See 101 KAR 1:335, Section 6. KRS 18A.0751(2)(c) provides that “[n]o administrative body, other than the personnel board, shall promulgate administrative regulations governing the subject matters specified in this section.” Although KDFWR Policy 2.20 is an internal policy, not an administrative regulation, the Hearing Officer also concludes that KDFWR Policy 2.20 violates KRS 18A.0751(2)(c) in the employment context as it is a policy attempting to govern subject matters entrusted to the Personnel Board by statute.

8. Stated simply, KRS Chapter 18A and the administrative regulations promulgated thereby establish the substantive rights of classified state employees and codify the process due to those employees. Any administrative regulation or internal policy that attempts to modify, expand, or limit the rights guaranteed or the process due as a result of KRS Chapter 18A is null, void, and unenforceable. As the Appellant’s Personnel Board claims are based on an alleged entitlement to the internal policy that has been deemed null, void, and unenforceable, the Appellant’s claims must fail as a matter of law.

9. The parties are in agreement that this matter can be resolved through the submission of legal arguments without the benefit of discovery or an evidentiary hearing. The

parties submitted dispositive motions setting out their legal arguments. For the reasons set out above, the Hearing Officer concludes the Appellant's Motion to Sustain Appeal must be **DENIED** and the Agency's Motion to Dismiss must be **GRANTED**. Further, the Hearing Officer concludes 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 claims stated by the Appellant. Accordingly, the instant appeal must fail as a matter of law.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeals of **CHARLES PHILLIPS V. TOURISM, ARTS & HERITAGE CABINET, DEPARTMENT OF FISH AND WILDLIFE RESOURCES (APPEAL NO. 2018-161)** 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 9th day of April, 2019.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Jean Bird
Hon. Stephen Wolnitzek