

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2009-243**

**DEBORA PIGMAN
APPELLANT**

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

**CABINET FOR HEALTH AND FAMILY SERVICES
JOHN P. HAMM, APPOINTING AUTHORITY**

APPELLEE

* * * * *

The Board at its regular June 2010 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated April 27, 2010, having noted Appellee's Exceptions, Appellant's Response to Exceptions (returned as untimely), 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 _____ day of June, 2010.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Anne E. Burnham
Hon. C. David Emerson
John P. Hamm

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

This matter came on for a pre-hearing conference on March 16, 2010, at 10:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellant, Debora Pigman, was not present at the pre-hearing conference, but was represented by the Hon. C. David Emerson, who participated by telephone. Appellee, Cabinet for Health and Family Services, was present and was represented by the Hon. Anne Burnham.

The purposes of the pre-hearing conference were to discuss the motions filed by the parties.

The Appellee filed a Motion for Pre-Hearing Conference for the purposes of discussing the effect of the Board's recent Order in *Kenneth Tramontin v. Cabinet for Health and Family Services* (Appeal No. 2008-166). The Appellee also filed a Motion to Compel Compliance with Interim Order regarding discovery. The Appellant filed a Motion to Add Issue for Hearing Officer regarding whether or not J. Klein had the proper authority to perform the acts of the Appointing Authority.

At the pre-hearing conference, the Appellee made clear that it disagreed with the Hearing Officer and Board's determination in the *Tramontin* case, as well as other cases pending before the Board. Nonetheless, counsel felt that it was best to get a quick resolution of this case so that the Cabinet could take appropriate actions. The Appellee conceded that J. Klein conducted the pre-termination hearing and signed the dismissal letter in this case.

In response, the Appellant made an oral motion to sustain the appeal on the grounds that J. Klein lacked the authority to take this action. The Appellee conceded that paperwork was submitted on October 1, 2009, signed by Secretary Janie Miller granting appointing authority to Mr. Klein. The dismissal letter in this case was dated September 10, 2009.

This matter has been assigned to Hearing Officer Boyce A. Crocker for a ruling on Appellee's Motion to Dismiss. The matter can be decided on the basis of the record in front of the Hearing Officer.

BACKGROUND

1. During the relevant times, Appellant, Debora Pigman, was a classified employee with status. By letter dated September 10, 2009, Ms. Pigman was dismissed from her position effective September 11, 2009, as Family Services Office Supervisor in the Department for Community Based Services in the Northeast Service Region. This dismissal was for alleged unsatisfactory performance of duties as detailed in a lengthy dismissal letter. The signature line is typed "J.P. Hamm, Appointing Authority." There is a signature that appears to be that of J.P. Hamm, but there is also a diagonal line and what appears to be an initial beside that.

2. Ms. Pigman filed an appeal with the Personnel Board on September 22, 2009.

3. Coming to the crux of the matter at hand, counsel for Appellant filed a Motion to Sustain Appeal as a Matter of Law on March 16, 2010. The contention raised by counsel for the Appellant is that Howard J. Klein and not J.P. Hamm actually signed the letter of dismissal which purported to dismiss Debora Pigman from her classified position in which she had status. Counsel contends that at the pre-hearing conference held March 16, 2010, the same day in which the Motion to Sustain Appeal was filed, that counsel for the Appellee conceded that J. Klein had in fact conducted a pre-termination hearing and signed the dismissal letter for Ms. Pigman. Appellee also contended at the pre-hearing conference that paperwork was submitted presumably to the Personnel Cabinet on October 1, 2009, signed by the Secretary of the Cabinet for Health and Family Services, Janie Miller, granting appointing authority to Mr. J. Klein. As was noted, the dismissal letter was dated September 10, 2009.

4. Appellant contends that J. Klein was without authority to sign the dismissal letter as he had not been formally designated in writing by the Appointing Authority to act on behalf of the Agency.

5. Appellee filed a response to the Motion to Sustain Appeal. The primary argument to reject the Appellant's Motion to Sustain is that J.P. Hamm, the Executive Director of the Office of Human Resource Management of the Cabinet for Health and Family Services, has the sole authority to execute all personnel functions for the Cabinet pursuant to KRS 194A.030(10).

6. Appellee also makes other arguments including that KRS 18A.095 does not require the dismissal process to actually be taken by the Appointing Authority which presumably would include the signing of the dismissal letter.

7. Appellee goes on to contend that a reading of the definition of Appointing Authority at KRS 18A.005(1) to mean that the Agency head, which must mean the Secretary of the Cabinet for Health and Family Services, contravenes what is clearly stated at KRS 194A.030 in which the Executive Director of the Office of Human Resource Management is given sole authority to execute personnel functions for that Cabinet. Appellee contends that the more specific statute should take precedence over the more general statute.

8. The final argument made by Appellee for the Hearing Officer to reject the Motion to Sustain Appeal is that the sub-delegation by J.P. Hamm to J. Klein to take all personnel actions on behalf of the Cabinet was proper in that such is not restricted by any statute (i.e., presumably that KRS 194A.030(10) does not restrict J.P. Hamm from sub-delegating the authority given to him in that statute.)

FINDINGS OF FACT

1. During the relevant times, Appellant, Debora Pigman, was a classified employee with status. By letter dated September 10, 2009, Ms. Pigman was dismissed from her position on September 11, 2009, as Family Services Office Supervisor in the Department for Community Based Services in the Northeast Service Region. This dismissal was for alleged unsatisfactory performance of duties as detailed in a lengthy dismissal letter. The signature line is typed “J.P. Hamm, Appointing Authority.” There is a signature that appears to be that of J.P. Hamm, but there is also a diagonal line and what appears to be an initial beside that.

2. The Hearing Officer finds that the dismissal letter dated September 10, 2009, for Appellant, Debra Pigman, was signed by J. Klein, not J.P. Hamm.

3. The Hearing Officer finds that J.P. Hamm not J. Klein is the Executive Director of the Office of Human Resource Management and this is undisputed by the parties.

4. The Hearing Officer finds that the clear meaning of “Appointing Authority” found at KRS 18A.005(1) is that Appointing Authority when it says it means the Agency head, means the head of the functional cabinet, which in this case would be Secretary Janie Miller of the Cabinet for Health and Family Services and anyone she has designated to act as Appointing Authority. At least as of September 10, 2009, the Hearing Officer understands it is undisputed that Secretary Miller had designated J.P. Hamm to act on her behalf, but not J. Klein.

5. The Hearing Officer finds that as admitted by the Appellee at the pre-hearing conference held March 16, 2010, Secretary Janie Miller of the Cabinet for Health and Family Services, only subsequent to the firing of Appellant, Debora Pigman, took action to designate J. Klein to act on her behalf with regards to personnel actions as envisioned at KRS 18A.005(1).

6. The Hearing Officer finds, therefore, that the action purporting to fire Debora Pigman, admittedly taken by J. Klein and not J.P. Hamm nor Secretary Janie Miller, does not comply with the requirements found at KRS 18A, because J. Klein was not properly authorized to take such action.

7. The Hearing Officer finds specifically that KRS 194A.030(10), the function set forth in that statute governing the Cabinet for Health and Family Services for its Office of Human Resource Management, cannot trump the requirements found at KRS 18A as to which persons are authorized to take position actions, i.e., firing, or other disciplinary actions of persons and presumably other personnel functions as well envisioned by KRS Chapter 18A.

CONCLUSIONS OF LAW

1. The Hearing Officer appreciates the importance of this issue, i.e., whether J. Klein, pursuant to the authority presumably delegated to him by J.P. Hamm under the statute KRS 194A.030(10) can take all position actions including the ultimate sanction of firing a classified employee with status *vis-à-vis* the requirements found at KRS Chapter 18A which requires such action to be taken by a person designated by the Agency head. The Hearing Officer finds no merit to the contention that anyone other than Secretary Janie Miller is the Agency head for the Cabinet for Health and Family Services. It is a very clear requirement under KRS 18A.005(1) that the Agency head must designate in writing those persons she wishes to take personnel actions on her behalf.

2. The Hearing Officer understands the Appellee's argument that the more specific statute in view of the counsel for Appellee is KRS 194A.030(10) instead of apparently anything found at KRS 18A, which would set forth who is required to take personnel actions.

3. The Hearing Officer does understand the argument made by Appellee with regards to the authority granted at KRS 194A.030(10) to the Executive Director of the Office of Human Resource Management. However, in keeping with previous decisions rendered in *Kenneth Tramontin v. Cabinet for Health and Family Services*, and others, the Hearing Officer concludes as a matter of law that the purported dismissal of Appellant, Debora Pigman, by J. Klein prior to J. Klein having been specifically designated that authority by Agency head and Appointing Authority, Cabinet Secretary Janie Miller, did not meet the requirements of KRS Chapter 18A and this dismissal cannot stand as a matter of law.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **DEBORA PIGMAN V. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2009-243)** be **SUSTAINED** that she be reinstated to her previous position or a position of like pay and status without loss of pay and benefits for the period of her penalization, and to otherwise make the Appellant 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 _____ day of April, 2010.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof mailed this date to:

Hon. Anne Burnham
Hon. C. David Emerson