

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2020-114

BERNARD RAPP

APPELLANT

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

PUBLIC PROTECTION CABINET

APPELLEE

*** **

The Board, at its regular December 2021 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated November 19, 2021, 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 17th day of December, 2021.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Elizabeth Davis Stone
Bernard Rapp
Hon. Rosemary Holbrook (Personnel Cabinet)
Sabrina Sandoval

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**FINDINGS OF FACT, CONCLUSIONS OF LAW
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** ** * * **

This matter came on for a pre-hearing conference on November 17, 2020, at 10:00 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, Bernard Rapp, was present and was not represented by legal counsel. The Appellee, Public Protection Cabinet, was present and represented by the Hon. David Trimble. Both parties appeared by telephone.

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 Hearing Officer notes the Appellant filed his appeal with the Personnel Board on April 9, 2020, appealing his dismissal. The Appellant was employed as a Plumbing Inspector I, serving a probationary period of six months. He started work on August 16, 2019, and was dismissed on February 13, 2020. He stated he did not receive any letter.

2. On the date he was dismissed, the Appellant stated he met with the acting Assisting Director who told him he did not make his probation. He was not given any reason.

3. The Appellant stated he doubted it was age discrimination; he said he is 62 years of age and they have a lot of older people who work there. He was diagnosed by his physician with congestive heart failure and renal failure. This impacted his work in October, November, December 2019, and January 2020. The Appellant did not believe he was dismissed because of discrimination, and specifically said it was not age or political discrimination that he knows of.

4. Counsel for the Appellee stated the Appellant was dismissed because a false number had been placed on a set of plans he had turned over to his previous employer and prior to the Appellant's employment with the Appellee. There were also other litigation matters involving Appellant's prior employment, which were going to cause issues. He stated that the Appellant was let go because they were concerned about his trustworthiness. He stated that the Appellant's period of illness and his age had nothing to do with his dismissal.

FINDINGS OF FACT

1. The Appellee submitted a Motion to Dismiss, which was denied in the Interim Order dated March 15, 2021. The Hearing Officer found the Appellee had made a strong argument. The Appellant was dismissed during his initial probationary period, but did not allege any type of discrimination. The Appellant alleged, however, that he did not receive a dismissal letter. At the time, neither party had submitted the dismissal letter. The Hearing Officer found there remains an issue of fact as to whether or not the Appellant was properly dismissed pursuant to KRS 18A.111(1) which reads in part, "unless the Appointing Authority notifies the employee prior to the end of the initial probationary period that he is separated, the employee shall be deemed to have served satisfactorily and shall acquire status in the classified service."

2. The Appellee submitted a Motion to Reconsider Denial of Appellee's Motion to Dismiss. The Appellee argued the Appellant's claim that he did not receive a letter of dismissal was not accurate. Attached to the Appellee's Motion as an Exhibit was a letter dated February 13, 2020, in which the Appellant was notified he was terminated from the Plumbing Inspector I position. On the following page of the Exhibit, the Appellant signed his acknowledgment of receipt of this letter, which was also signed by two witnesses on the same date.

3. Although given an opportunity to respond to the motion, the Appellant failed to do so.

4. The Appellant was dismissed during his initial probationary period and he has not alleged any form of illegal discrimination.

CONCLUSIONS OF LAW

1. As a classified employee serving his initial probationary period, the Appellant could be dismissed without cause. His only right of appeal would be based on a claim of discrimination pursuant to KRS 18A.4095(12) and (14)(a).

2. Based on the Finding of Facts, the Appellant has not made a claim of discrimination and the Personnel Board lacks jurisdiction to hear his appeal.

3. It is undisputed that the Appellant received notice of his dismissal on February 13, 2020.

4. There are no material issues of fact and this appeal may be decided as a matter of law based on the appeal form, the statements of the parties at the pre-hearing conference, the Appellees Motion to Dismiss, the Appellee's renewed Motion to Dismiss and attachments, 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 **BERNARD RAPP VS. PUBLIC PROTECTION CABINET (APPEAL NO. 2020-114)** 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).

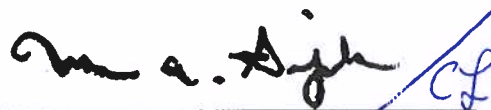
[Hearing Officer Note: Any document filed with the Personnel Board shall also be served on the opposing party.]

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 KfRS 13B.140 and KRS 18A.100.

ISSUED at the direction of **Hearing Officer Mark A. Sipek** this 19th day of November, 2021.

KENTUCKY PERSONNEL BOARD

Handwritten signature of Mark A. Sipek in black ink, with a blue checkmark to the right of the signature.

MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. David Trimble
Bernard Rapp
Hon. Rosemary Holbrook (Personnel Cabinet)