

**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2016-042**

**MONIQUE RODRIGUEZ**

**APPELLANT**

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

**CABINET FOR HEALTH AND FAMILY SERVICES**

**APPELLEE**

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The Board, at its regular September 2016 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated July 22, 2016, 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 **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 13<sup>th</sup> day of September, 2016.

**KENTUCKY PERSONNEL BOARD**

  
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**MARK A. SIPEK, SECRETARY**

A copy hereof this day sent to:

Hon. Mona Womack  
Ms. Monique Rodriguez  
Mr. Jay Klein

**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2016-042**

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**FINDINGS OF FACT, CONCLUSIONS OF LAW  
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**CABINET FOR HEALTH AND FAMILY SERVICES**

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This matter came on for evidentiary hearing on June 7, 2016, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. John C. Ryan, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by KRS Chapter 18A.

Appellant, Monique Rodriguez, was present and was not represented by legal counsel. Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Mona Womack.

This matter was the subject of at least two pre-hearing conferences, at which the issues were defined, matters of discovery dealt with, and the specific relief sought by Appellant determined.

**BACKGROUND**

1. Until February 26, 2016, Monique Rodriguez was serving an initial probationary period in the position of Family Support Specialist I within the Department of Community Based Services, Cabinet for Health and Family Services. By relatively brief letter of February 25, 2016 over the signature of Tresa S. Straw, Appointing Authority, she was terminated. The letter, a true copy of which is attached hereto as "**Recommended Order Attachment A**," informed her that as a probationary employee without status she was not afforded any right of appeal of the action other than if she felt that she was a victim of discrimination under the relevant statute. The mailing contained a standard Kentucky Personnel Board appeal form.

2. Appellant rather promptly took issue with the action by appeal filed on February 29, 2016, under the category of "dismissal" but without, at that time, citing the "discrimination" category provided for upon the face of the appeal form. She also wrote in support of her position:

During my initial probation period, I was advised by my supervisor that principles would be reading my cases on a monthly basis and giving me feedback and coaching with my errors. This never happened, I received

excuse after excuse as to why my cases were not being read. I inquired on a weekly basis for my monthly rates and always received the same answer, "They haven't been read". Around December to January I received very few of the cases I read from October, once again I had to ask for my rate and was told it was 33%. I asked a few weeks later and was told it was 13% and to read whatever corrections I receive and remember to apply them. I was advised not to worry, the monthly reads were to ensure my successful completion of probation. Two days before my probation would have ended and while I was approved for and attending SNAP training, I was terminated. Had the cabinet kept their implied covenant of "good faith and fair dealing" this would not have happened. The cabinet's policies are inconsistent when it comes to certain groups of people. (sic)

In addition to the forgoing, Appellant submitted a three-page document "To whom it may concern" undertaking to further summarize her perception of failure of management to afford proper training for the position of Family Support Specialist.

3. Upon convening the evidentiary hearing, under standard operating procedure, Appellant was assigned the initial burden of proof to establish that her failure to attain classified status arose due to discrimination toward her by the agency. She sought testimony from **Tah Holland**, who is a Family Support Specialist III in the Fayette County office of the Department of Community Based Services. This member of management was the individual initially assigned to "read" (review) Appellant's case workups as a new hire, preparing food stamp and health benefits cases of eligible clientele. **[HEARING OFFICER NOTE: The entirety of testimony of this witness under examination by Appellant consisted of extensive and detailed debate between Appellant and the witness concerning asserted training, procedures, meetings, discussions, and interaction between manager-employee during the September through February timeframe when Appellant was employed. The issue of discrimination was not raised therein.]**

4. To distill, Appellant repeatedly pressed the witness to explain the procedures employed in the training and coaching of new personnel to aid them in reducing their so-called error rate of case workups. She debated with the witness whether all available resources were engaged that would have aided Appellant in reducing a 25% error rate in her cases to an acceptable rate of 10%, which would have enabled her to succeed in attaining classified status. However, the core of the testimony presented by this witness urged that Appellant either never clearly conveyed to management that she was not adequately grasping the concepts as required, or simply was not an appropriate fit for the duties assigned her and consequently deemed unacceptable for the position for which she was hired.

5. Under cross-examination, the agency established that this witness has served with the agency for three years and includes among her primary duties the providing of assistance to the departmental supervisor in the training of staff, including the reading/review of case workups prepared by new, probationary personnel. She explained that the primary function of this particular office is the intake and preparation of food stamp applications and adult medical applications including long term medical care needs. She pointed out that the office receives a massive volume of clientele, requiring in excess of 100 workers to obtain the requisite information by phone and/or face-to-face conferences with the clients.

6. The witness explained that Appellant and others were hired to interview applicants and prepare workups of these new cases. The new hires undergo specified training to enable them to correctly seek and analyze information relative to requested benefits. In the particular timeframe under scrutiny, Appellant and two other individuals entered probationary training at approximately the same time, i.e. September 2015. The two other workers, one of whom is African American, successfully completed probation, having obtained an acceptable error rate approaching 10%, whereas Appellant did not. The witness emphasized the importance of the error rate aspect – this program, administered by the Commonwealth of Kentucky under federal standards, requires an overall average error rate of 10% or less and if this amount is exceeded severe fines, she urged, are levied. Accordingly, Appellant's 25% error rate was deemed too excessive, particularly due to lack of improvement thereon during the probationary period, to support retention of her services.

7. Further addressing the question of the so-called error rate, the witness introduced a chart entitled "Non-Case Decision Summary for Worker Code", which reflects the totals for the three probationary personnel, including Appellant, previously referenced. This chart references the case workups during the timeframe from October 1, 2015 through February 29, 2016. According to the summary, as ratified by the witness, one coworker reflected an error rate of 11.86%, another with a rate of 14.42%, and Appellant at 25.19%. The witness explained that, although the other two personnel exceeded the requisite 10%, their rates were steadily improving throughout the term whereas that of Appellant was not, but was in fact worsening. Based upon this and a perceived lack of initiative to improve, the witness, together with other members of management having input within the office, recommended that Appellant not be retained.

8. The witness continued that the error rate, in addition to the forgoing, is closely scrutinized because it can result in circumstances wherein clients receive either less or more benefits than entitled. If less, and it is not discovered promptly, the clients are penalized unfairly and deprived of benefits which they should have been receiving. If the mistake allocates more to them than their circumstances dictate, the agency is required to undertake to reclaim any excess benefits, thereby working a hardship upon the client, particularly if the benefits range over a lengthy term. In light of the large volume, she emphasized, the case workups must be as

accurate as possible from the outset, since insufficient staff exists to be constantly reviewing case histories supposedly already completed, looking for mistakes.

9. Pressed concerning whether Appellant's ethnic origin, which is Puerto Rican, entered into any consideration as to either retain or not retain her within the classified service, the witness insisted that neither she nor any other individual within the office, to her knowledge, was aware of Appellant's origin and actually perceived her to be African American until informed in the immediate appeal.

10. **Bailee Mayfield** is a Family Support Specialist III in the agency's Fayette County office. She is also a principal within the management structure. Appellant pressed her as to the frequency and nature of inquiries which Appellant made of her while employed there concerning the proper preparation of cases. The witness initially recalled "three or four" such questions, viewing that the contact "wasn't very frequently." She thereafter remembered that Appellant did inquire several times concerning error rates and their impact upon the rating of her overall performance. Appellant produced a series of emails between herself and the witness, including approximately 13 exchanges upon a single date in November apparently concerning the procedure to be utilized in case workups. She acknowledged that Appellant posed specific questions in the particular email, including one or another inquiry in the nature of "How am I doing?". She agreed that such inquiries could demonstrate that Appellant was not absorbing the gist of the program required to perform the tasks.

11. Under relatively brief cross-examination, the witness ratified that she has been employed with the agency for approximately three years and includes among her duties the review and correction of case workups as needed, responding to staff and client questions as presented, and in general providing assistance to the office supervisor. This witness was the principal reader/reviewer for another employee also on probation during the relevant timeframe, which individual attained classified status. She recalled that she only sporadically read Appellant's case workups, noting that principal Tah Holland was assigned as Appellant's reader.

12. This witness was not involved in the decision to separate Appellant, but supported the decision based upon her knowledge of her error rates. She pointed out that her own review of Appellant's work reflected that she appeared to make the same mistakes repeatedly, most notably relative to client income and its requisite documentation. This witness was unaware of Appellant's ethnic origin throughout her probation and recalled no reference thereto by office staff at any time.

13. **Samya Quabili** is a Family Support Specialist III and a principal reader similar to the prior witnesses. She has served the agency in the Fayette County office for approximately three years. **[HEARING OFFICER NOTE: This witness was subpoenaed only by the agency, but called by Appellant in the course of presenting her proof and testified without**

**objection by the agency.]** This witness had only limited contact with Appellant but did receive questions from her from time-to-time, sometimes relating to error rates. She did not recall any regular communications with her but, under examination by the agency, noted that although new hires are assigned to a specific reader/principal, all management personnel are available to answer and resolve questions from staff. She ratified that Appellant was one of three probationary personnel seeking permanent status at the time, with two having achieved permanent employment and Appellant terminated. She supported the decision, being aware of the error rate issue and viewing it as critical in the determination.

14. This witness was unaware of Appellant's ethnic origin throughout her term in the Fayette County office. She noted that staff there comes from a quite broad spectrum of ethnic origins and no bias exists among these divergent cultures to her knowledge.

15. **Robert Back** is a Family Support Specialist V in the agency Fayette County office. He supervises the three principal readers who have previously testified. Appellant quizzed him concerning the protocol for feedback provided through staff personnel that would enable them to improve their work product, such as error rates. He explained that for probationary personnel the performance is ordinarily reviewed monthly, with principals being always available to respond to any inquiry concerning the case work or any aspect thereof. He confirmed that Appellant made inquiries of him "probably three or four times" concerning her progress and her error rates. He ratified that the chart previously introduced, reflecting the respective rates of the three probationary personnel, was his work, noting that Appellant's 25% level as denoted thereon was unacceptable to support that she be hired permanently.

16. Under examination by the agency, the witness pointed out that, of necessity, he ordinarily delegates production matters to the principals under his supervision, but added that he also monitors error rates for the reasons already summarized by other witnesses. He confirmed that he followed this procedure concerning Appellant's work and was involved in the decision to terminate her. He ordinarily obtains the input of the principal reader assigned to the employee and did so in this instance. He ratified that he prepared and submitted a memorandum to upper management by date of February 24, 2016, wherein he blueprinted Appellant's monthly progress, culminating in a summary for the month of February 2016, and expressing the view that, despite Appellant's "positive attitude," she has been unable to "... produce the results necessary regardless of our help." He pointed to the excessive error rate and concluded his summary by recommending that she be separated prior to the end of her probation.

17. The witness expanded that personnel are expected to attain case decision status within a reasonable time, usually six months, and that they must be able to function without close supervision. He intimated that in the case of Appellant, in addition to the fact that she did not appear to ask relevant questions that were germane to her time spent on the job that would

demonstrate adequate knowledge of the duties, it was evident that close supervision by management would be required well beyond the probationary term.

18. Appellant, **Monique Rodriguez**, presented her own testimony. She is employed but not with the Commonwealth of Kentucky. She summarized her position to be essentially that in her view the training supplied her during her probation was inconsistent with the duties; her perception was that the trainers were not “hands-on” or actually familiar with the day-to-day duties. She insisted that she made various inquiries as to her progress, and, more specifically the status of her error rate in her case workups, but her requests were either ignored or deflected. She also viewed that the input that she did receive was inconsistent as among the principals/readers and her confusion in that regard was never dealt with. She felt that many times management simply postponed responding and promised feedback which never came.

19. Appellant continued that she made notes as she worked the cases assigned her and, where errors were pointed out by the readers, she consulted her notes to avoid repeating the mistake. However, she insisted, lengthy lags occurred between submission of her cases and feedback, so that some mistakes became chronic because she did not hear about them promptly. Appellant repeatedly urged in her testimony that the on-going status of her error rate remained unexplained and unclear to her.

20. Pressed by the Hearing Officer as to what she seeks in this appeal, Appellant indicated that she desires any back pay to which she might be entitled and the opportunity to apply for another position with the Commonwealth of Kentucky, i.e. presumably placement upon the appropriate register. The agency conducted no examination of Appellant.

21. The testimony of **Howard Jay Klein** was presented by the agency. He is the Division Director of the Division of Employee Management in the Office of Human Resources within the agency. It is he who, by designation, engages the protocol for the separation of personnel. He presented as part of his testimony Appellant’s February 25, 2016 separation letter, and identified and confirmed the materials submitted to him resulting in issuance of the letter. He described the process ordinarily engaged in such circumstance, noting that same was followed in the immediate instance; specifically, the memoranda from Principal Holland to supervisor Back, that from Back to his office requesting separation of Appellant. He pointed out that in such circumstance no reason for the separation is required to be presented in the termination letter. He viewed the materials from the division personnel to have been sufficiently supported of the requested action. Following closing summary by the agency, the matter stood submitted for recommended order.

22. KRS 18A.111(1) is the provision providing for a probationary period preparatory to entering classified service in the Commonwealth. It states:

Except when appointed to a job classification with an initial probationary period in excess of six (6) months, and except as provided in KRS 18A.005 and this section, an employee shall serve a six (6) months probationary period when he is initially appointed to the classified service. An employee may be separated from his position, reduced in class or rank, or replaced on the eligible list during this initial probationary period and shall not have a right to appeal, except as provided by KRS 18A.095. The employee may be placed on an eligible list but shall not be certified to the agency from which he was separated unless that agency so requests. 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.

23. KRS 18A.005(19) defines "Initial probation" as:  
The period of service following initial appointment to any position under KRS 18A.010 to 18A.200 which requires special observation and evaluation of an employee's work and which must be passed successfully before status may be conferred as provided in KRS 18A.110 and by the provisions of this chapter. If the appointee is granted leave in excess of twenty (20) consecutive work days during this period, his initial probation shall be extended for the same length of time as the granted leave to cover such absence;
24. KRS 18A.140(1) is the provision against discrimination within the classified service. It requires that:  
No person shall be appointed or promoted to, or demoted or dismissed from, any position in the classified service, or in any way favored or discriminated against with respect to employment in the classified services because of his political or religious opinions, affiliations, ethnic origin, sex, race or disability. No person over the age of forty (40) shall be discriminated against because of age.
25. KRS 18A.095(12) affords any person a right of appeal to the Personnel Board if claiming to have been discriminated against due to "...race, color, religion, national origin, sex, disability, or age 40 and above".

### **FINDINGS OF FACT**

The Hearing Officer makes the following findings by preponderance of the evidence:



1. On or about September 1, 2015, Monique Rodriguez was employed by the Cabinet for Health and Family Services within its Department for Community Based Services to fill a position of Family Support Specialist I. She routinely commenced under standard probationary terms, with certain training supplied to her and with monitoring and mentoring of her work and progress by an assigned management person, a designated reader of her casework. The proof is that the duties would include screening applicants for eligibility for food stamps and certain medical benefits, involving review of their income status and other relevant information obtained from them.

2. One critical quality required of new hires and trainees is, ultimately, accuracy in the workup of the cases, in order to avoid federal penalties and the penalizing of clients by affording them less benefits than entitled or excessive benefits which must be reclaimed and somehow paid back. This measure is designated the error rate and a 10% or less level is deemed acceptable. Rates in excess of 10% could generate certain ripple effects such as fines or other sanctions and accordingly it is monitored closely.

3. By all accounts, and actually not disputed by Appellant, she was never able to consistently achieve an error rate at the 10% or less level throughout her probation, ranging more in the area of 25% even after five months on the job. Members of management charged with her training and monitoring unanimously agreed that, for whatever reason, Appellant was not grasping the requirements of the job. Seen as not a good fit for the position, the statutory right to terminate her prior to completing her probation was exercised.

4. This particular department employs a sizable number of personnel from a variety of ethnic and racial backgrounds. Appellant is Puerto Rican, but by all accounts this was unknown to either management or coworkers at the job station throughout her time there, having only come to light during the course of her appeal to the Personnel Board. Her ethnicity had no bearing upon either her hiring, treatment on the job, or disposition of her employment status.

5. The Hearing Officer finds the testimony of all witnesses, including Appellant, to be credible.

### **CONCLUSIONS OF LAW**

1. As abundantly indicated above and clearly defined by statute, most notably KRS 18A.111, probationary employees serve at the pleasure of management. The reasons for this are clear; if the new hire is unable to perform the tasks assigned, or is simply deemed not a good fit for the intended position, it is in the best interests of employer and of employee that they not be permanently inserted into the job.

2. Probationary personnel do not enjoy the same appeal rights as members holding status within the classified service. To successfully challenge any failure to survive probationary status, the employee must both claim and prove, by a preponderance of the evidence, that their rights under KRS 18A.140(1) were violated and that they are therefore before the Personnel Board under KRS 18A.095(12). Appellant herein did not directly allege discrimination toward her by either management or coworkers while serving her probationary term. Her proof tends to demonstrate a perception on her part only that she should have received more "hands-on" training and attention than was provided to her, or to any other trainee for that matter. Missing from the proof, including her own testimony, is that any treatment of her included any of the elements prescribed under KRS 18A.140(1).

3. Appellant has not met her burden of proof to establish that her failure to complete probation came about due to any illegal or prohibited action toward her on the part of the agency.

### **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 **MONIQUE RODRIGUEZ VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2016-042)** be **DISMISSED**.

### **NOTICE OF EXCEPTION AND APPEAL RIGHTS**

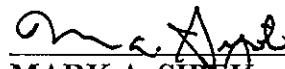
Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are 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 John C. Ryan this 22<sup>nd</sup> day of July,  
2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPER  
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Mona Womack  
Ms. Monique Rodriguez



CABINET FOR HEALTH AND FAMILY SERVICES

Matthew G. Bevin  
Governor

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Vickie Yates Brown Glisson  
Secretary

February 25, 2016

Monique Rodriquez

PERNR:

Re: Separation

Dear Ms. Rodriquez:

Pursuant to KRS 18A.111, you are advised that you will be terminated from your position as a Family Support Specialist I, in the Department for Community Based Services (DCBS), South Central Service Region, effective February 26, 2016. Your last working day will be February 25, 2016. You shall not be certified on future registers for employment within DCBS unless DCBS so requests.

As an employee serving an initial probationary period as provided by KRS 18A.111, you do not have the right to appeal this action to the Kentucky Personnel Board. However, KRS 18A.095 provides that you may file a claim of discrimination with the Kentucky Personnel Board if you believe the action was based on unlawful discrimination. In accordance with KRS 18A.095, any claim of discrimination must be filed within thirty (30) days, excluding the date notification is sent. Such appeal must be filed in writing using the attached appeal form and in the manner prescribed on the form.

Sincerely,

Tresa S. Straw  
Appointing Authority

TSS: arc

Attachment: Appeal Form

c: Secretary Thomas Stephens, Personnel Cabinet  
Executive Director Mark Sipek, Personnel Board  
Commissioner Adria Johnson, Department for Community Based Services  
Service Region Administrator Jeff North, South Central Service Region  
Cabinet Personnel File

Recommended Order  
Attachment A

APPELLEE'S  
EXHIBIT

# 3