

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NOS. 2016-226 and 2017-093

TRACY SHIPLEY

APPELLANT

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

PUBLIC PROTECTION CABINET

and

PERSONNEL CABINET

APPELLEES

*** **

The Board, at its regular August 2023 meeting, having considered the record, including the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer dated July 7, 2023, Appellant's exceptions and request for oral argument, Appellees' joint response to exceptions, oral arguments, 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 appeals are 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 August, 2023.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

Copies hereof this day sent to:
Tracy Shipley
Hon. Jacob Walbourn
Hon. Benjamin Siegel
Hon. Rosemary Holbrook
Sabrina Sandoval

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NOs. 2016-226 & 2017-093

TRACY SHIPLEY

APPELLANT

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

PUBLIC PROTECTION CABINET

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** ** ** ** **

This matter came on for a pre-hearing conference on April 29, 2019, 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, Tracy Shipley, was present and was not represented by legal counsel, although she is herself an attorney. She indicated that her former counsel, the Hon. Robert Fredric Smith, was no longer representing her. The Appellee Public Protection Cabinet was present and represented by the Hon. Carmine Iaccarino. The Appellee Personnel Cabinet was present and represented by the Hon. Rosemary Holbrook. At the time of this Recommended Order, the Appellee Public Protection Cabinet is being represented by Hon. Elizabeth Davis Stone.

BACKGROUND

1. The Hearing Officer notes that Appeal No. 2016-226 was filed with the Personnel Board on August 17, 2016. The Appellant was appealing her termination alleging disability discrimination and alleging she had been denied the right to inspect or copy records. With respect to her termination, the Appellant stated that she was terminated from her employment on June 13, 2011. She states that an appeal form was not attached to the letter in violation of KRS 18A.095(16)(b). She believed that her termination might have been the result of an action based on disability or perceived disability. She also noted that she had requested a copy of certain records, including her personnel file, and, after review of the documents produced, asserts that she did not receive copies of her request for approval to obtain secondary employment in a legal practice and a doctor's note she had submitted after a medical emergency.

2. At the pre-hearing conference, counsel for the Appellant stated she would also be alleging lack of effective notice of the Appellant's appeal rights. The Appellees indicated that they would challenge the timeliness of the Appellant's appeal.

3. The Hearing Officer notes that Appeal No. 2017-093 was filed with the Personnel Board on April 20, 2017. All parties agreed that it should be consolidated with Appeal No. 2016-226.

4. In Appeal No. 2017-093, the Appellant alleged that her pay was inaccurately calculated when she previously worked with the Public Protection Cabinet. She specifically mentioned three (3) paychecks. At the pre-hearing conference, she stated that the figures quoted on her Appeal Form have been updated in a reply she filed in Appeal No. 2016-226. The Appellees stated that they would look into checking the calculations of her pay regarding these paychecks. The Appellant alleged that she was underpaid and that not only impacted her compensation, but also her retirement calculations. She believed that these actions were the result of discrimination and retaliation.

5. The Appellees filed a "Joint Motion to Dismiss Appeals." The Hearing Officer ruled on that motion in an Interim Order dated October 12, 2017, which is attached and incorporated as **Recommended Order Attachment A**. The Joint Motion to Dismiss Appeals was **GRANTED** with respect to the Appellant's claims that she was not properly compensated during her employment. The Joint Motion to Dismiss was also granted with respect to the Appellant's claim that she was denied the right to inspect or copy records. The Joint Motion to Dismiss was **DENIED** with respect to Appellant's appeal from her dismissal, which alleged disability discrimination.

6. In the Interim Order of October 12, 2017, the Hearing Officer also **DENIED** the Appellant's "Motion for Equitable Estoppel of the Appeal Period and in the Alternative Motion for Equitable Tolling."

7. This matter is now before the Hearing Officer for a ruling on the Appellee's Renewed Joint Motion to Dismiss. The issue to be resolved is whether the appeals were timely filed.

FINDINGS OF FACT

1. The Appellant, Tracy Shipley, was previously employed as an attorney with the Appellee, Public Protection Cabinet, Department of Housing, Buildings, and Construction.

2. The Appellant was dismissed from her position on June 13, 2011, while serving her initial probationary period.

3. The Appellant received written notice of her dismissal but did not receive a Personnel Board Appeal Form. The Appellant's dismissal letter is attached and incorporated to this Order as **Recommended Order Attachment B**.

4. The Appellant filed Appeal No. 2016-226 with the Personnel Board on August 16, 2016. The Appellant appealed her 2011 termination alleging disability discrimination.

5. The Appellant's appeal was filed with the Personnel Board more than one (1) - year after she received notice of her dismissal.

6. Additional claims raised by the Appellant in Appeal No. 2016-226 and Appeal No 2017-093 have previously been recommended for dismissal in **Recommended Order Attachment A**, the October 12, 2017 Interim Order.

7. There are no material issues of fact and Appeal No. 2016-226 and Appeal No 2017-093 can be decided as a matter of law based on the entire administrative record.

CONCLUSIONS OF LAW

1. As an employee serving their initial probationary period, the Appellant could be dismissed at any time pursuant to KRS 18A.111. The Appellant's only right of appeal would be an allegation of illegal discrimination, pursuant to KRS 18A.095(12) and (14)(a).

2. It is clear that the Appellant should have received a Personnel Board Appeal Form with her written notice of dismissal, pursuant to KRS 18A.095(16)(b).

3. The Personnel Board has previously held that when an employee did not receive an Appeal Form with their notice of dismissal, the time to file their appeal never starts to run. The Board reached this decision in the case of James D. Witt, Mark A. Holt, Robert A. Pickering, Patrick J. Wise and Trasimond Soileau v. Kentucky Authority for Educational Television and Personnel Cabinet, 2016 WL 4072526 (KY PB). That case was appealed to the Franklin Circuit Court, which did not adopt this statute of limitations analysis. In the case of Kentucky Authority for Educational Television v. The Estate of Patrick Wise, et al, No. 16-CI-00857, in an Opinion and Order issued March 7, 2018, the Franklin

Circuit Court held that the one (1) - year statute of limitations provided by KRS 18.095(29) applies when an employee does not receive a Personnel Board Appeal Form upon termination. The *Wise* case was subsequently appealed to the Court of Appeals and ultimately settled at the Kentucky Supreme Court. However, no appellate ruling disturbed the Franklin Circuit Court statute of limitations analysis.

4. Here, because the Appellant did not receive a Personnel Board Appeal Form with her notice of dismissal, she had one (1) year to file her appeal with the Personnel Board pursuant to KRS 18A.095(29). However, the Appellant did not file either of her appeals within one (1) year, instead filing them several years later. Based on the Franklin Circuit Court's analysis in *Wise*, the Hearing Officer finds that the Appellant's appeals were untimely and should be dismissed.

5. Because both of the Appellant's appeals are untimely, the Personnel Board lacks jurisdiction over these matters and her appeals must be dismissed as a matter of law.

6. This Order incorporates the Hearing Officer's previous Interim Order dated October 12, 2017. As a result, all claims raised in Appeal Nos. 2016-226 and 2017-093 are recommended for dismissal. The parties may file exceptions regarding any issues raised in these consolidated appeals.

7. There are no genuine issues of material fact and these appeals can be dismissed as a matter of law based on the entire administrative record. KRS 13B.090(2) and KRS 18A.095(18)(a).

8. Because all of the events underlying these appeals occurred before the effective date of Senate Bill 153, all references to KRS Chapter 18A are to the sections in effect at the time of the events associated with these appeals.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeals of **TRACY SHIPLEY V. PUBLIC PROTECTION CABINET AND PERSONNEL CABINET (Appeal Nos. 2016-226 and 2017-093) 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 fifteen (15) 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.

SO ORDERED at the direction of the Hearing Officer this 7 day of July, 2023.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day emailed and mailed to:

Tracy Shipley
Hon. Elizabeth Davis Stone
Hon. Rosemary Holbrook

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NOs. 2016-226 and 2017-093

TRACY SHIPLEY

APPELLANT

V. INTERIM ORDER

PUBLIC PROTECTION CABINET

and

PERSONNEL CABINET

APPELLEES

** ** * * * * *

This matter is before Mark A. Sipek, Hearing Officer, for a ruling on various motions. These motions include the Appellant's Motion to Proceed Under a Pseudonym/Motion to Seal; the Appellee's Joint Motion to Dismiss; the Appellant's Motion for Equitable Estoppel of the Appeal Period and in the Alternative Motion for Equitable Tolling; and the Appellant's Motion for Summary Judgment.

The Hearing Officer, having reviewed the file, including the motions, the responses, replies, supplements and amendments thereto, having listened to the statements of the parties, and being duly advised, **HEREBY ORDERS AS FOLLOWS:**

1. The Appellant's Motion to Proceed Under a Pseudonym/Motion to Seal is **DENIED**. The Appellant has not shown a reason to proceed under a pseudonym or to seal the entire record. Specific documents may be sealed by making a request to the Hearing Officer. In reaching this decision, the Hearing Officer is mindful of the provisions of KRS 18A.095(27) and KRS 13B.080(8).

2. The Appellee's Joint Motion to Dismiss is **DENIED** in part and **GRANTED** in part, as follows:

a. The Appellee's Joint Motion to Dismiss Appellant's appeal from her dismissal alleging disability discrimination is **DENIED in part**. There is a genuine issue of material fact as to whether or not the appeal is timely or not. This determination may depend on whether or not the Appellant was provided an appeal form with her Notice of Dismissal. The Personnel Board has held that if an employee is not provided an appeal form with their Notice of Dismissal, the time to file his or her appeal never starts to run. See KRS 18A.095(16)(b) and the Board's decision in *Mark Holt, Robert Pickering, Patrick J. Wise and Trasimond Soileau v.*

Kentucky Authority for Educational Television and Personnel Cabinet, 2016 WL 4072526 (KY PB). In the KET cases, the Board found that if an appeal form was not attached to a Notice of Dismissal, the notice did not comply with the provisions of KRS 18A.095 and, thus, the time to file these appeals did not start to run on the date they were received. In this case, there is a genuine issue of material fact as to whether or not the Appellant received her notice, thus, evidence will have to be taken as to whether or not this appeal is timely.

b. The Appellee's Joint Motion to Dismiss is **GRANTED** with respect to the Appellant's claim she was denied the right to inspect or copy records. This claim is barred by KRS 18A.095(29), which reads as follows:

Notwithstanding any other prescribed limitation of action, an employee that has been penalized, but has not received a written notice of his or her right to appeal as provided in this section, shall file his or her appeal with the Personnel Board within one (1) year from the date of the penalization or from the date that the employee reasonably should have known of the penalization.

When the Appellant received a response to her request for records, she knew or should have known that she had been penalized, and she should have filed an appeal within one (1) year of that date.

c. The Appellee's Motion to Dismiss is **GRANTED** with respect to the Appellant's claims that she was not properly compensated. These provisions are also barred by KRS 18A.095(29). When the Appellant received her paychecks, including her final paycheck, during her employment, she knew or should have known that she had been penalized and should have filed an appeal within one year, pursuant to KRS 18A.095(29).

3. The Appellant's Motion for Equitable Estoppel of the Appeal Period and in the Alternative Motion for Equitable Tolling is **DENIED** for the same reasons stated in paragraph 2 of this Interim Order.

4. The Appellant's Motion for Summary Judgment is **DENIED**. Genuine issues of material fact exist as to the timeliness of the appeal, as well as any claims for discrimination.

5. This matter shall proceed to evidentiary hearing on the claim as to whether or not the Appellant was dismissed based on disability discrimination. The burden of proof on all issues shall be upon the Appellant, including timeliness.

6. This matter remains scheduled for evidentiary hearing on **October 25 and 26, 2017**, pursuant to the Interim Order entered June 21, 2017. If any party wishes to request a continuance, such request should be made as soon as possible.

SO ORDERED at the direction of the Hearing Officer this 12th day of October, 2017.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Kate Bennett
Hon. Rosemary Holbrook
Hon. Clayton B. Patrick
Hon. Tracy Shipley



PUBLIC PROTECTION CABINET

Capital Plaza Tower
500 Mero Street, 5th Floor
Frankfort, KY 40601
Phone: (502) 664-7760
Fax: (502) 664-3969
www.ppc.ky.gov

June 13, 2011

Tracy Shipley
191419



58675 30047118
6/14/11

Robert D. Vance
Secretary

Steven L. Beshear
Governor

Tracy Shipley
P O Box 4157
Louisville, KY 40204

RE: Personnel # 00191419
Position Number 30047118

Dear Ms. Shipley:

Pursuant to KRS 18A.111, you are advised you will be terminated from the position of Staff Attorney III, (Position Number 30047118), effective close of business today, June 13, 2011.

As an employee serving an initial probationary period as provided by KRS 18A.111, you do not have the right to appeal this action except as provided by KRS 18A.095.

Sincerely,

Holly McCoy-Johnson
Appointing Authority

cc: Secretary, Personnel Cabinet
Personnel File

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Recommended Order Attachment B