

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2022-112

NATHANIEL SIMPSON

APPELLANT

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

TRANSPORTATION CABINET

APPELLEE

*** **

The Board, at its regular March 2023 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated February 8, 2023, 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 16th day of March, 2023.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

Copies hereof this day sent to:

Nathaniel Simpson
Hon. Edwin Logan
Hon. Rosemary Holbrook (Personnel Cabinet)
J. R. Dobner

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This matter came on for a pre-hearing conference on October 21, 2022, at 12:00 p.m., ET, at 1025 Capital Center Drive Suite 105, Frankfort Kentucky, before Hearing Officer Mark A. Sipek. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Nathaniel Simpson, was present and was not represented by legal counsel. The Appellee, Transportation Cabinet, was present and was represented by the Hon. Edwin Logan.

FINDINGS OF FACT

1. The Appellant filed his appeal with the Personnel Board on August 16, 2022, alleging discrimination. At the pre-hearing conference, the parties agreed that the Appellant was still serving his initial one (1) -year probationary period as a Highway Technician I.

2. On his appeal form, the Appellant stated his allegation as follows:

I was Discriminated Against By the old Superintendent I Felt like I was Being Belittled and talked Bad too By Him they initially Quit letting me try to take my CDL Classes Because of me Testing Positive for covid 19 and my Daughter Fell very ill and was Placed in the Hospital. They wouldnt give me Any reason or Awnser my Questions vegly aBout the situation. Also Neglected to tell me that they were going to let me go they made this Decision 4 months ago with out telling me this [sic]

3. The Appellant testified that he was discriminated against by his former supervisor. The Appellant had asked several times about taking Commercial Driver's License (CDL) classes. He stated he missed the initial CDL classes because he had COVID-19, and he had a sick child that he had to take care of. He was not allowed to study for the CDL test and was told he would have to do it at home, but then was not allowed to take the CDL material home to study it. He stated that, when he took the CDL examination, he passed the first part but missed one question too many on the Air Brakes Section.

4. The Appellant clarified that he was not alleging any type of protected class discrimination. He stated that he felt he was treated unfairly by his former supervisor. He was informed of his dismissal on July 26, 2022.

5. Counsel for the Appellee filed a “Motion To Dismiss For Lack of Subject Matter Jurisdiction.”

6. Although the Appellant alleged he was discriminated against, he did not allege that he was discriminated against based on any type of protected class discrimination. The mere fact that the Appellant felt he was treated unfairly by his former supervisor does not amount to a claim of illegal discrimination. Importantly, the Appellant did not claim disability discrimination based on his own illness (Covid-19) or his daughter’s hospitalization.

7. Although given an opportunity to file a response to the Appellee’s “Motion To Dismiss For Lack of Subject Matter Jurisdiction,” the Appellant has failed to do so.

8. The Hearing Officer finds that there are no disputed issues of material fact in this appeal and this matter can be decided as a matter of law based on the appeal form, the statements of the parties at the pre-hearing conference, and the Appellee’s “Motion To Dismiss For Lack of Subject Matter Jurisdiction.”

CONCLUSIONS OF LAW

1. As an employee serving his initial probationary period, the Appellant could have been dismissed at any time during the probationary period, pursuant to KRS 18A.111. His only right of appeal would be based on an allegation of illegal discrimination, pursuant to KRS 18A.095(12) and/or (14)(a).

2. Although the Appellant alleged that he was discriminated against, he did not allege any type of protected class discrimination as required by KRS 18A.095(12).

3. Separately, KRS 18A.095(14)(a) also prohibits discrimination and is broader than KRS 18A.095(12). See *Martin v. Corrections Cabinet of Com.*, 822 S.W.2d 858, 1991 WL 269776. Nonetheless, pursuant to KRS 18A.095(12) or (14)(a), in order for the Personnel Board to acquire jurisdiction over an appeal based on an allegation of discrimination, the alleged discrimination must be an illegal basis for dismissing an employee. Here, the fact that the Appellant’s former supervisor allegedly treated him unfairly does not constitute actionable discrimination and is not a claim over which the Personnel Board has jurisdiction.

4. There are no genuine issues of material fact, and this appeal can be dismissed as a matter of law based on the appeal form, the statements of the parties at the pre-hearing conference, and the Appellee’s “Motion To Dismiss For Lack of Subject Matter Jurisdiction.” KRS 13B.090(2) and KRS 18A.095(18)(a).

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **NATHANIEL SIMPSON VS. TRANSPORTATION CABINET (APPEAL NO. 2022-112)** 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).


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 Mark A. Sipek** this 8 day of February, 2023.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK,
EXECUTIVE DIRECTOR

A copy hereof this day emailed and mailed to:

Nathaniel Simpson
Hon. Edwin Logan
Hon. Rosemary Holbrook (Personnel Cabinet)