

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2020-096**

AARON SMITH

APPELLANT

VS.

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER**

**JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF CORRECTIONS**

APPELLEE

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This matter came on for a pre-hearing conference on July 30, 2020, at 11:00 a.m. EST, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Stafford Easterling, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Aaron Smith, was not present, but was represented by the Hon. Andrew Epstein, who appeared by telephone. The Agency/Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Ed Baylous, who also appeared by telephone.

The purposes of the pre-hearing conference were to determine the specific penalization(s) alleged by the Appellant, the specific section of KRS Chapter 18A that authorizes this appeal, to determine the relief sought by the Appellant, to define the issues, to address any other matters relating to this appeal, and to discuss the option of mediation.

BACKGROUND

1. The Hearing Officer notes this appeal was filed with the Personnel Board on March 23, 2020 the appeal form and during the pre-hearing conference, the Appellant, an unclassified employee without status, indicated he was appealing his dismissal. The Appellant further explained his claims in the narrative portion of the appeal form wherein he states, in pertinent part:

I received a termination letter from Secretary John Tilley on April 5, 2019, stating that I was fired without cause. Therefore, I did not appeal at that time. However, I learned that on February 25, 2020, Justice and Public Safety Cabinet Human Resources Officer Michelle Barnes testified in a sworn deposition that I was fired for cause - for failure to control the institution. Not only is this allegation baseless, Ms. Barnes testified that Secretary Tilley directed her to falsely state in his

termination letter that the termination was "without cause." The first I learned of the true reason I was fired, which was a "for cause" reason, was 2/25/20. Therefore, I am filing my appeal within 30 days of learning I was terminated "for cause."

2. Following discussion, the parties were in agreement that this appeal revolves around three primarily legal issues: 1) does the Personnel Board currently have jurisdiction over this appeal, 2) does Michelle Barnes' testimony in a separate proceeding operate to convert the Appellant's "not-for-cause" termination into a "for-cause" termination, and 3) is the Appellant's appeal timely filed? The Appellee believes these issues should be resolved in its favor and requested an opportunity to file a dispositive motion.

3. The parties filed motions, responses, and replies. This case is now assigned to Hearing Officer Mark A. Sipek for a ruling on the Appellee's Motion to Dismiss.

FINDINGS OF FACT

1. The Appellant, Aaron Smith, was serving as the Division Director for Kentucky Correctional Industries within the Justice and Public Safety Cabinet. In this position, he was an unclassified employee.

2. On April 5, 2019, Appellant was dismissed by Justice and Public Safety Cabinet Secretary, John C. Tilley. In his letter of dismissal, Appellant was informed that his services as Division Director were no longer needed. Appellant was also informed that this action was "being taken without cause."

3. Initially the Appellant did not file an appeal.

4. The Appellant learned, on February 25, 2020, that Justice and Public Safety Cabinet Human Resource Officer Michelle Barnes testified in a sworn deposition that Secretary Tilley instructed her to fire the Appellant without cause, because when he was Warden of the Kentucky State Reformatory he did not have control of the institution.

5. The Appellant alleged that this disclosure by Barnes converted his dismissal to a "for-cause" action and he filed an appeal with the Personnel Board on March 23, 2020.

6. The Appellee filed a Motion to Dismiss arguing that the Appellant was dismissed without cause, and he had not alleged he was dismissed for any illegal reason.

7. In its response to the Motion to Dismiss, the Appellant, in addition to arguing that Barnes testimony converted his dismissal to a "for-cause" dismissal, argued that he was dismissed in violation of the Whistleblower Statute specifically the Appellant was entitled to protection under the Whistleblower Statute because he was dismissed for his support of Commissioner James Irwin, who refused to dismiss two (2) Kentucky State Reformatory employees. The Appellant's Whistleblower claim is also the subject in a separate lawsuit that he filed in Franklin

Circuit Court against the Appellee. This civil action was dismissed by Judge Phillip Shepherd on November 17, 2020 (see *Aaron Smith v. Justice and Public Safety Cabinet*, Franklin Circuit Court, Civil Action No. 20-CI-00300). The Appellant did not appeal this ruling from the Franklin Circuit Court.

CONCLUSIONS OF LAW

1. As an unclassified employee, the Appellant could be dismissed without cause and have a limited right of appeal to the Personnel Board.

2. Based on the Findings of Fact, it is undisputed that the Appellant was dismissed without cause.

3. The limited right to appeal for unclassified employees is best described in the Kentucky Supreme Court case of *Martin v. Corrections Cabinet of Commonwealth*, 822 S.W.2d 858 (Ky.1991). In *Martin* the court held, "if the employer has discharged such an employee without revealing the basis for its action, the employee retains the right of appeal to the Board but is required to plead and prove an illegal cause for the termination."

4. In this case, the Appellant alleged that Barnes' testimony in a deposition in separate litigation converted his dismissal to "for cause." The Appellant is incorrect and confuses the fact that the Appellee having a reason or basis for his termination with dismissing him "for-cause."

5. More importantly, the basis for Appellant's dismissal revealed by Barnes' deposition testimony was that he allegedly had lost control of the Kentucky State Reformatory while he was serving as Warden. The Appellant disputes this allegation. At this stage of the litigation with the Appellee making a Motion to Dismiss, the Hearing Officer assumes that the Appellant could prevail and establish that he did not lose control of the institution. The problem for the Appellant, however, is that this basis for his dismissal does not constitute an illegal reason. As an unclassified employee, the Appellant could be dismissed for any reason, no reason, for a bad reason, as long as it was not an illegal reason. The Appellant did not allege an illegal reason.

6. Arguably in his response to the Motion to Dismiss, the Appellant did allege the illegal reason when he identified himself as a Whistleblower. The problem with this claim is that the Appellant has already litigated this claim in the Franklin Circuit Court. He lost and has not appealed the ruling of the Franklin Circuit Court. This ruling is binding on the Personnel Board, and the Appellant has not alleged an illegal reason for his termination.

7. The Appellant has also alleged that the Appellee committed fraud when it gave him a dismissal letter that stated he was dismissed without cause when, in fact, they dismissed him for losing control of the Kentucky State reformatory. This allegation does not constitute fraud as a matter of law. It is assumed that in most cases where employees are dismissed without cause, the employer has a reason. That reason has just not been stated publicly.

8. The Appellant has not alleged an illegal reason for his dismissal and the Appellee

is entitled to prevail on its Motion to Dismiss.

9. There are no material issues of fact and the Appellee is entitled to judgment as a matter of law. This matter can be decided based on the appeal form, the statements of the parties at the pre-hearing conference, as well as Appellee's Motion to Dismiss, the response and reply. KRS 18A.095(18)(a) and 13B.090(2).

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **AARON SMITH VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2020-096)** 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 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 Mark A. Sipek** this 10 day of September, 2021.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Edward Baylous

Hon. Andrew Epstein

Hon. Rosemary Holbrook (Personnel Cabinet)