

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO 2020-157

MARK STREVELS

APPELLANT

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

FINANCE AND ADMINISTRATION CABINET

APPELLEE

** ** * * *

This matter came on for a pre-hearing conference on August 9, 2021, at 11:00 a.m., at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, 40601 before Stafford Easterling, Hearing Officer. The proceedings were recorded by audio video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Mark Strevels, was present by telephone and was not represented by legal counsel. The Appellee, Finance and Administration Cabinet, was present and represented by the Hon. Robert Long, who also appeared by telephone.

The purposes of the pre-hearing conference were to discuss the status of the appeal and to schedule an evidentiary hearing, if appropriate.

The parties discussed the posture of this case at length, including significant discussion of the Board's prior February 4, 2021 ruling on the Agency's Motion to Dismiss. Specifically, the February 4, 2021 Interim Order noted that there remained outstanding questions of fact about the timing of the Appellant's receipt of the Notice of Dismissal sent by certified letter, which prevented the Board from ruling on the Appellee's Motion at that time. However, during the August 9, 2021 pre-hearing conference, the parties made certain factual stipulations about the underlying fact pattern that would now allow the Board to fully rule on the merits of Agency's timeliness argument. Following the stipulations made at the August 9, 2021 pre-hearing conference, the Board issued an Interim Order containing Findings of Fact on September 15, 2021. The September 15, 2021 Interim Order memorializing the parties' stipulations of fact is hereby attached and incorporated into this document as **Recommended Order Attachment A**.

Accordingly, after incorporating the parties' factual stipulations into the Board's prior February 4, 2021 Interim Order, this matter has, by agreement of the parties, been resubmitted to Hearing Officer Stafford Easterling for a ruling on the Agency's Renewed Motion to Dismiss, tendered on October 27, 2021. The Appellant filed his response to the Agency's Renewed Motion to Dismiss on January 3, 2022. This matter now stands submitted to the Hearing Officer for a ruling on the Agency's Renewed Motion to Dismiss.

BACKGROUND/ FINDINGS OF FACT

1. The Hearing Officer notes the facts underlying the instant appeal were largely agreed to by the parties. Accordingly, the Hearing Officer largely adopts the facts as articulated by the parties in their respective submissions and as established by the documents submitted with the underlying appeal.

2. The Appellant, Mark Strevels, was a classified employee with status formerly employed by the Finance and Administration Cabinet. By letter dated April 29, 2020, the Agency informed the Appellant that “you are officially dismissed from your position of Engineering Technical Associate within the Mechanical/Electrical Engineering Branch, Division of Engineering and Contract Administration, Office of Facility Development and Efficiency, Department for Facilities and Support Services effective close of business May 1, 2020.” The dismissal letter sets out specific grounds for the disciplinary action taken, but, for the purposes of this analysis, the grounds for the Appellant’s termination are irrelevant.

3. On July 2, 2020, the Appellant, *pro se*, filed the instant appeal challenging his dismissal, alleging:

All letters sent to me concerning this issue contain false claims.

4. On the appeal form, the Appellant also indicated “Mr. [Thomas] Clay is currently in quarantine for Covid-19 and may be contacted to confirm representation.”

5. After an initial pre-hearing conference that set this matter for an evidentiary hearing on the substance of termination underlying this appeal, the Agency filed a Motion to Dismiss Pending Appeal, asserting that the Personnel Board does not have jurisdiction to hear this appeal because the Appellant untimely filed his appeal. The Agency noted that the dismissal letter was dated April 29, 2020, and was sent to the Appellant via certified mail. The termination letter correctly informed the Appellant that, pursuant to KRS 18A.095, he “may appeal this action to the Personnel Board within sixty (60) days after receipt of this notice, excluding the date notification is received.”

6. The certified mail receipt returned to the Agency and attached to the Agency’s Motion to Dismiss indicated that the certified letter was delivered to the Appellant on April 30, 2020. The Agency correctly notes that the Appellant’s appeal was received by the Personnel Board on July 2, 2020, sixty-three (63) days after the certified letter indicated the Appellant received delivery of his termination.

7. In response to the Agency’s Motion to Dismiss, the Appellant filed a “Motion to Continue Pending Appeal” arguing, in pertinent part, “I was not in receipt of the Dismissal Letter dated April 29, 2020 on April 30, 2020 as claimed. I was not aware of that letter until returning home from Danville, KY on the evening of May 4, 2020.” The response goes on to argue that:

The Return Receipt for that Certified letter does not bear my printed name or my signature. The Recipient Box B line shows COV19-C8, which was written by a United States Postal Service (USPS) Employee. Having inquired within the USPS I was informed that USPS Carriers have been issued a modified delivery protocol due to the on-going Covid-19 pandemic. The intent is to minimize contact between USPS Carriers and the citizenry in order to prevent exposure and transmittal of the Covid-19 virus.

Therefore the claim that my submittal of the appeal document to the Personnel [Board] was untimely is not correct. The appeal request was received in the offices of the Personnel [Board] on July 2, 2020. That date is within the allotted 60-day time frame from May 4, 2020 for timely receipt.

The intent of certified mail delivery is to show evidence of receipt, which is not the case in this particular instance. The [Return Receipt] only establishes that the delivery was made to my residence on April 30, 2020. Delivery to my residence does not establish, nor meet the definition of, my personal receipt as intended by the Finance and Administration Cabinet.

8. By Interim Order dated February 4, 2021, the Board denied the Agency's Motion to Dismiss finding "[i]t is clear this appeal was filed on July 2, 2020. It is not clear what date the Appellant received notice of his dismissal and of his right to appeal. A genuine issue of fact exists as to whether or not this appeal is timely."

9. After the denial of the Agency's Motion, this matter was set for a pre-hearing conference on August 9, 2021. As noted above, during the August 9 pre-hearing conference, the parties agreed to a set of two (2) stipulations of fact about how the Appellant received notice of his dismissal. Those stipulations were reduced to Findings of Fact in order to streamline the process for an unrepresented Appellant.

10 The first stipulation was that, based on the evidence of record, including, but not limited to, documentation associated with the delivery of the certified letter and the Appellant's recorded admission during the pre-hearing conference conducted on August 9, 2021, the Hearing Officer found that the Post Office delivered to the Appellant, by certified letter, the Appellee's Notice of Dismissal on April 30, 2020. The Hearing Officer further found that the "green card" associated with delivery of the certified letter was signed by a USPS employee in accordance with the United States Postal Services' COVID-19 protocol, on or about April 30, 2020, and then placed into the Appellant's mailbox at the appropriate address of record on April 30, 2020.

11. The second stipulation was that "the Hearing Officer [] accepts as true the Appellant's statement that he did not actually go to his mailbox to put his hands on the Notice of Dismissal until May 4, 2020 – and accepts the Agency's concession that they would be unable to

produce any evidence that would contradict the Appellant's assertion that he did not actually view the Notice of Dismissal until May 4, 2020.

12. Thus, the procedural issue to be resolved in this appeal is, when notice is provided by certified mail, whether KRS 18A.095's sixty (60) – day statute of limitations runs from the date the certified mail is delivered or from when an Appellant receives actual notice of discipline.

13. KRS 18A.095(7) provides, in full:

If the cabinet or agency head or his designee determines that the employee shall be dismissed or otherwise penalized, the employee shall be notified in writing of:

- (a) The effective date of his dismissal or other penalization;
- (b) The specific reason for this action, including:
 - 1. The statutory or regulatory violation;
 - 2. The specific action or activity on which the dismissal or other penalization is based;
 - 3. The date, time, and place of the action or activity; and
 - 4. The name of the parties involved; and
- (c) That he may appeal the dismissal or other penalization to the board within sixty (60) days after receipt of this notification, excluding the day he receives notice.

14. KRS 18A.095(18)(a) provides, in pertinent part:

The board may deny any appeal after a preliminary hearing if it lacks jurisdiction to grant relief. The board shall notify the employee of its denial in writing and shall inform the employee of his right to appeal the denial under the provisions of KRS 18A.100.

CONCLUSIONS OF LAW

1. To begin, the Hearing Officer would note that Finance and Administration Cabinet attached a number of documents, which the Hearing Officer did not exclude and upon which the Appellant relied. It is well-settled law that "reliance on matters outside the pleadings by the court effectively converts a motion to dismiss into a motion for summary judgment pursuant to CR 56 and CR 12.02." McCray v. City of Lake Louisville, 332 S.W.2d 837 (Ky. Ct. App. 1960). Accordingly, in this matter, the issues before the Hearing Officer are more properly decided under the Motion for Summary Judgment standard of review. It is also well-settled that a Motion for

Summary Judgment shall be granted when there is no genuine issue as to material fact, and the moving party is entitled to a judgment as a matter of law (CR 56.03).

2. Here, there are no issues of material fact which remain outstanding and, accordingly, this appeal can be decided as a matter of law. The timeliness of the Appellant's appeal – and, thus, the Personnel Board's jurisdiction over this appeal – turns upon what meaning the Personnel Board gives the phrase “after receipt of this notification” as is used in KRS 18A.095(7)(c). While there have been several cases resolved through application of KRS 18A.095(7)(c), there has not yet been a Personnel Board appeal that resolved how the phrase “sixty (60) days after receipt of this notification” should be interpreted and/or whether that provision requires the establishment of actual receipt of notification to start the sixty (60) -day clock imposed by the statute of limitations. See John Price v. TAH, 2018 WL 4037963 (KY PB 2017-202); Desiree Peyton v. DJJ, 2013 WL 5833324 (KY PB 2013-113); Kevin Brodie v. DOC, 2014 WL 7531509 (KY PB 2014-126); Jamaal Whitehurst v. CHFS, 2017 WL 1857020 (KY PB 2016-250); Jennifer Goins, 2014 WL 2191025 (KY PB 2013-209); Lori Bachman v. CHFS, 2022 WL 1080747 (KY PB 2021-027).

3. In assessing the possible meanings of the phrase “after receipt of this notification,” the Hearing Officer determines that there are only two ways this phrase can be interpreted: 1) KRS 18A.095(7)(c) requires the establishment of **actual receipt** of a disciplinary action by the Appellant or 2) KRS 18A.095(7)(c) requires the establishment of **constructive receipt**. In resolving which of these meanings are intended by statute, the Hearing Officer notes these delivery rules would apply to every method by which an appeal may be submitted to the Personnel Board, including fax, email, and US mail. The Hearing Officer would also note the Personnel Board has historically deemed notification effective as of the date established by record; that is to say, for example, if a document were received via email on date certain, the Personnel Board has not traditionally relied upon statements like “I did not open the email until a week later.” Accordingly, the Hearing Officer determines that KRS 18A.095(7)(c) does not require actual notice to a potential Appellant and, instead, requires merely constructive notice. As a result, here, the Agency was merely required to deliver notice of the disciplinary action to the Appellant via a method authorized by law (email, fax, mail, certified mail, hand-delivery, etc.), but KRS 18A.095(7)(c) does not require the Agency to ensure that the Appellant actually consumed the information/notification the day notification is delivered, a la Stanley Kubrick's *A Clockwork Orange*. Determining when actual notice attached to analyze the timeliness of every Personnel Board appeal would be almost impossibly burdensome for the parties and for the Personnel Board process itself. Thus, here, for the purposes of determining the timeliness of this appeal, the Hearing Officer finds that the Appellant received notice of his termination on April 30, 2020.

4. Accordingly, the Hearing Officer finds, because the Appellant received his termination letter on April 30, 2020, that he would have had up to and including June 30, 2020, in which to file his appeal. This is calculated by counting sixty (60) calendar days from May 1, 2020, (the day after Appellant received his suspension letter), which results in June 30, 2020, being the due date.

4. The Hearing Officer finds: 1) the Appellant exceeded the sixty (60) - day time limit for having filed his appeal from the time he received the letter of dismissal, 2) that such facts are not in dispute, and 3) as a result of a plain reading of KRS 18A.095(7)(c) that Appellant's appeal is time-barred.

5. The Hearing Officer concludes as a matter of law that actual notice of the dismissal was not required, and the Appellant's appeal is time-barred based on the date when the Appellant's letter of dismissal was delivered via certified mail to the Appellant's address of record/the address where the Appellant acknowledged that he resided. The Hearing Officer also concludes that the Appellant's appeal must be dismissed for failure to timely file the appeal.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **MARK STREVELS V. FINANCE AND ADMINISTRATION CABINET (APPEAL NO. 2020-157)** 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 Stafford Easterling this 12 day of
September, 2022.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day emailed and mailed to:

Mark Strevels
Hon. Robert Long
Hon. Rosemary Holbrook (Personnel Cabinet)

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO 2020-157

MARK STREVELS

APPELLANT

VS.

INTERIM ORDER CONTAINING FINDINGS OF FACT

FINANCE AND ADMINISTRATION CABINET

APPELLEE

**** * * * * *

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The purposes of the pre-hearing conference were to discuss the status of the appeal and to schedule an evidentiary hearing, if appropriate.

The parties discussed the posture of this case at length, including significant discussion of the Board's prior February 4, 2021 ruling on the Agency's Motion to Dismiss. Specifically, the February 4, 2021 Interim Order noted that there remained outstanding questions of fact about the timing of the Appellant's receipt of the Notice of Dismissal sent by certified letter, which prevented the Board from ruling on the Appellee's Motion at that time. However, during the August 9, 2021 pre-hearing conference, the parties made certain factual stipulations about the underlying fact pattern that would now allow the Board to fully rule on the merits of Agency's timeliness argument.

Wherefore, the Hearing Officer, having reviewed the file and being duly advised, **HEREBY ORDERS**, as follows:

FINDINGS OF FACT

1. Based on the evidence of record, including, but not limited to, documentation associated with the delivery of the certified letter and the Appellant's recorded admission during the pre-hearing conference conducted on August 9, 2021, the Hearing Officer finds that the Post Office delivered to the Appellant, by certified letter, the Appellee's Notice of Dismissal on April 30, 2020. The Hearing Officer further finds that the "green card" associated with delivery of the

certified letter was signed by a Post Office employee in accordance with the United States Postal Services' COVID-19 protocol, on or about April 30, 2020, and then placed into the Appellant's mailbox at the appropriate address of record on April 30, 2020.

2. The Hearing Officer also accepts as true the Appellant's statement that he did not actually go to his mailbox to put his hands on the Notice of Dismissal until May 4, 2020 – and accepts the Agency's concession that they would be unable to produce any evidence that would contradict the Appellant's assertion that he did not actually view the Notice of Dismissal until May 4, 2020.

ORDER

1. The parties shall have fifteen (15) days from the issuance of this Interim Order to file exceptions to the Findings of Fact set out above. The Appellant carries the burden of persuasion to establish that the Notice of Dismissal was served, as that term is defined by law, on a date other than April 30, 2020. If the parties do not file exceptions to the Findings of Fact set out above, the Board and the parties shall deem the facts found above to be established in the evidentiary record.

2. If the Findings of Facts are established in the evidentiary record by the process set out above, the Appellee, Finance and Administration Cabinet, shall then have thirty (30) days to file a Supplemental Motion to Dismiss.

3. The Appellant shall then have thirty (30) days from the Agency's submission of a Supplemental Motion to Dismiss to file a response.

4. The Agency shall then have ten (10) days from the receipt of the response, if any, to file a reply. At that time, this matter shall stand submitted to the Hearing Officer for a ruling on the dispositive motions.

SO ORDERED at the direction of the Hearing Officer this 16th day of September, 2021.

KENTUCKY PERSONNEL BOARD


Mark A. Sipek
Executive Director

A copy hereof this day mailed to:

Hon. Robert Long
Mark Strevels