

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2016-036

DIANE H. TRAYLOR

APPELLANT

VS. **FINAL ORDER
SUSTAINING HEARING OFFICER'S
RECOMMENDED ORDER OF DISMISSAL**

PUBLIC PROTECTION CABINET

APPELLEE

*** **

The Board, at its regular October 2016 meeting, having considered the Recommended Order of Dismissal of the Hearing Officer dated August 29, 2016, and being duly advised,

IT IS HEREBY ORDERED that the Recommended Order of Dismissal of the Hearing Officer be, and it hereby is, 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 3rd day of November, 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Kate Bennett
Hon. Carmine G. Iaccarino
Ms. Diane H. Traylor
Ms. Sherry Butler
Ms. Lynn Gillis

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
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V. RECOMMENDED ORDER OF DISMISSAL

PUBLIC PROTECTION CABINET

APPELLEE

** ** *

This matter came on for a pre-hearing conference on June 30, 2016, at 9:30 a.m., ET, at 28 Fountain Place, Frankfort, Kentucky, before the Hon. R. Hanson Williams, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Diane Traylor, was present and was not represented by legal counsel. The Appellee, Public Protection Cabinet, was present and represented by the Hon. Kate Bennett. Also appearing for the Agency were Deputy Executive Director, Carmine G. Iaccarino, and Agency Representative, Sherri Butler.

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

The Hearing Officer notes this appeal was filed with the Personnel Board on February 19, 2016, checking the box "Other Penalization" alleging, more specifically, a "Failure to comply with Personnel Cabinet Job Class criteria."

Following discussions, it became evident that the Appellant is an employee with the Kentucky Department of Insurance. She applied in early 2016 for an Insurance Program Manager position-emphasis on surplus lines. Her appeal states the following:

Was accepted & approved by the Personnel Cabinet, but I was passed over for an interview regardless of my qualifications & tenure due to "Interview Panel" changing the criteria making me no longer eligible for the position by their standards. I feel this is

due to previous grievances I have filed and the Department's retaliation for that. (sic)

The Appellee was given to and including July 27, 2016, in which to file any appropriate motions. The Appellant was given to and including August 11, 2016, to respond to any such filed motions. The Appellee has since filed a Motion to Dismiss, to which the Appellant filed no response.

STATEMENT OF FACTS

Ms. Traylor, a Policy Specialist II at the Department of Insurance ("Department"), applied for the Insurance Program Manager position within the Department's Property and Casualty Division. Although the position was initially advertised and interviews occurred, the Cabinet ultimately decided not to hire any individuals for the position. Instead, the register expired with no selection being made, and the duties of the Insurance Program Manager were reclassified into those of another employee who was already performing those duties. At the pre-hearing conference in this matter, Ms. Traylor admitted that she had no objection to the reclassification that occurred.

STANDARD

KRS 13B.090 provides, "[t]he hearing officer may make a recommended order in an administrative hearing submitted in written form if the hearing officer determines there are no genuine issues of material fact in dispute and judgment is appropriate as a matter of law." KRS 18A.09(22)(d) further permits that "[i]n all other cases, the board shall direct the appointing authority to rescind the action taken or otherwise grant specific relief or dismiss the appeal."

ANALYSIS

Ms. Traylor brings her appeal to challenge the Cabinet's "[f]ailure to comply with Personnel Cabinet Job Class criteria." See Traylor Appeal Form, attached as Exhibit 3. To have standing to bring an appeal over which the Personnel Board has jurisdiction, Ms. Traylor must have been dismissed, suspended, or otherwise penalized. KRS 18A.100(A).

KRS 18A.005(24) defines "penalization" as:

demotion, dismissal, suspension, fines, and other disciplinary actions;
involuntary transfers; salary adjustments; any action that increases or

diminishes the level, rank, discretion, or responsibility of an employee without proper cause or authority, including a reclassification or reallocation to a lower grade or rate of pay; and the abridgment or denial of other rights granted to state employees.

Traylor was not "penalized" within the meaning of KRS 18A.005(24). Traylor has not been demoted, dismissed, suspended, fined or otherwise disciplined. Neither has she been transferred nor had her salary adjusted. The Cabinet has not increased or diminished her level, rank, discretion, or responsibility without proper cause or authority.

Instead, the Cabinet declined to hire any applicants from the register. The register was allowed to expire, no appointment was made, and the duties of the Insurance Program Manager were reclassified into those of another, current employee already performing those duties.

Even assuming, for the sake of argument, that the Appellant was penalized, the basis of her appeal was rendered moot because the Cabinet has given the Appellant her remedy: the Cabinet chose not to appoint any applicant to the position and permitted the register to expire. Therefore, there is no longer a case or controversy that this Board can adjudicate because the Appellant has suffered no harm. *Commonwealth of Kentucky v. Hughes*, 873 S.W.2d 838, 829-30 (Ky. 1994).

CONCLUSION OF LAW

The Hearing Officer concludes as a matter of law that the Appellant has failed to show she was penalized within the meaning of KRS 18A.005(24).

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **DIANE H. TRAYLOR V. PUBLIC PROTECTION CABINET**, (APPEAL NO. 2016-036) 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).


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 R. Hanson Williams this 29th day of August, 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Kate Bennett
Hon. Carmine G. Iaccarino
Ms. Diane H. Traylor