

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2013-277

CHARLES WEAVER

APPELLANT

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

TRANSPORTATION CABINET
MIKE HANCOCK, APPOINTING AUTHORITY

AND

PERSONNEL CABINET
TIM LONGMEYER, SECRETARY

APPELLEES

** ** *

The Board at its regular July 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated June 4, 2014, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be, and they hereby 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 July, 2014.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. William Fogle
Hon. Whitney Meagher
Hon. Stella B. House
Kathy Marshall

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This matter comes before the Hearing Officer upon Appellee's Motion to Dismiss.

This matter previously came on for a pre-hearing conference on February 10, 2014, at 9:30 a.m., ET, at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Boyce A. Crocker, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Charles N. Weaver, was present by telephone and was not represented by legal counsel. The Appellee, Transportation Cabinet, was present and represented by the Hon. Will Fogle. The Appellee, Personnel Cabinet, was present and represented by the Hon. Whitney Meagher, appearing by telephone.

The purpose of the pre-hearing conference was to define the issues.

The Hearing Officer referenced the previous pre-hearing conference held January 22, 2014, before the Personnel Cabinet had been ordered included as a party.

During the course of the February 10, 2014 pre-hearing conference, counsel for the Appellee Personnel Cabinet stated Appellant had not been added back to any register for employment at the Transportation Cabinet due to the Personnel Cabinet not having received from the Transportation Cabinet any express written request that Appellant be added to any register. Counsel for the Personnel Cabinet cited KRS 18A.032 -- specifically as it regards employees who have been terminated not being certified back to the agency which took the

disciplinary action unless there is an express request in writing from the agency that took the action.

As was discussed at the January 22, 2014 pre-hearing conference, Appellant again expressed his concern that another employee had a felony conviction and was allowed to later be placed on a register with Transportation, and was, in fact, later employed with the Transportation Cabinet for a period of time after having been convicted of a felony. Appellant's concern was if this other employee could be so treated, why could Appellant not be placed back on a register for the Transportation Cabinet?

Counsel for the Appellee Transportation Cabinet stated it was his belief that the Transportation Cabinet would not be requesting in writing, or at all, that Appellant be placed back on registers with the Transportation Cabinet. The Hearing Officer asked counsel for the Appellee if any writing to that effect could be provided to the Appellant.

Counsel for the Appellees Transportation Cabinet and Personnel Cabinet both requested time in which to file motions to dismiss. The Hearing Officer explained to Appellant that he would be given at least as much time to respond to any motion to dismiss filed as the parties were granted in which to file such motion.

Both the Appellee Personnel Cabinet and the Appellee Transportation Cabinet filed Motions to Dismiss. The Personnel Cabinet also styled its motion as a response to the Transportation Cabinet's motion. The Appellant, by counsel, filed a response to both Appellees' Motions to Dismiss and the matter now stands submitted to Hearing Officer Boyce A. Crocker for a ruling.

BACKGROUND

1. During the relevant times, the Appellant, Charles N. Weaver, was a former classified employee who had been dismissed by the Transportation Cabinet.

2. In its Motion to Dismiss, counsel for Appellee Transportation Cabinet contends this matter should be dismissed because the Appellant does not have a right to be placed on a register, and as he was making no claim of discrimination as protected by KRS 18A.095, the Personnel Board lacks jurisdiction.

3. The Appellee, Personnel Cabinet, also filed a Motion to Dismiss. Counsel notes that the Appellant, in March 2008, pled guilty to the felony offense of conspiring to commit voter fraud in Federal Court, and subsequent to that, on May 6, 2008, the Appellant was dismissed for cause from his position of Highway Equipment Operator with the Transportation Cabinet.

4. Counsel continues by noting that in October 2013, Appellant applied for consideration as a Maintenance Worker II, via the state on-line application system. This was a vacant position with the Department of Highways, Transportation Cabinet.

5. On October 28, 2013, the Personnel Cabinet notified the Appellant that he was being removed from consideration for the position due to a disqualifying event. Counsel states that the Personnel Cabinet will, in general, deny an applicant certification for a position with an agency which previously had dismissed that individual, unless the agency "expressly approves the applicant's certification." The Personnel Cabinet states it has never received such approval from the Transportation Cabinet.

6. Counsel argues that the Personnel Board has consistently upheld the Personnel Cabinet's authority to deny certification to applicants for placement on registers pursuant to its authority found at KRS 18A.032. Counsel specifically cites KRS 18A.032(1)(h), which states:

(1) Except as provided by the provisions of this chapter, the secretary may refuse to examine an applicant; or, after examination, may disqualify an applicant, remove his name from a register, refuse to certify any eligible on a register, or may consult with the appointing authority in taking steps to remove such person already appointed if:

(h) He has previously been dismissed from a position in the state service for cause or has resigned while charges for dismissal for cause of which he had knowledge were pending;

7. Counsel for the Appellant filed a timely response to Appellees' Motions to Dismiss. Counsel contends that Appellant was treated differently from another employee. Counsel states that the Personnel Cabinet and Transportation Cabinet have allowed that other employee to get on a register and come back to work, but not the Appellant.

8. Counsel contends in her argument that the other employee had been convicted of a DUI, and that such is more, or should be more, disqualifying for allowing him to return to work than to deny the Appellant due to his federal conviction for conspiracy to commit voter fraud.

9. Counsel also contends that the Personnel Cabinet and the Transportation Cabinet acted arbitrarily in violation of Section 2 of the Kentucky Constitution in denying the Appellant certification to the Maintenance Worker II register.

10. Section 2 of the Kentucky Constitution states, as follows:

Absolute and arbitrary power over the lives, liberty, and property of free men exists nowhere in a republic, not even in the largest majority.

11. Counsel for the Appellant takes issue with the Personnel Cabinet's statement that it had never received notification from the Transportation Cabinet approving the Appellant to be certified to a register, contending that both Wayne Sizemore, County Highway Foreman, and Cass Napier, Chief District Engineer, did approve the Appellant to be placed on a register subsequent to his conviction.

FINDINGS OF FACT

1. At all times relevant to this appeal, the Appellant, Charles N. Weaver, was a former classified employee who had been dismissed by the Transportation Cabinet.

2. The Hearing Officer finds that the Appellant was dismissed for cause from his position with the Transportation Cabinet in May 2008.

3. The Hearing Officer finds that the Appellant, in October 2013, applied to be certified to a register for a Maintenance Worker II position for the Department of Highways in the Transportation Cabinet.

4. The Hearing Officer finds that the Personnel Cabinet denied Appellant placement on that register, based on Appellant's having been dismissed for cause in 2008 by the Transportation Cabinet and the lack of any explicit request from the Transportation Cabinet that the Appellant be certified to a register with the Transportation Cabinet.

5. The Hearing Officer finds that the Personnel Cabinet's decision to deny Appellant certification to a register with the Transportation Cabinet (the agency which dismissed the Appellant in 2008), for cause, is consistent with the Personnel Board's interpretation of the Personnel Cabinet's authority, and with the clear language expressed at KRS 18A.032(1)(h).

6. The Hearing Officer finds that the Appellant has not stated a claim over which the Personnel Board would have jurisdiction, that is, to order the Personnel Cabinet to certify Appellant to a Transportation Cabinet register. The Hearing Officer finds that the communications by Mr. Sizemore and Mr. Napier do not amount to a request from the Transportation Cabinet to the Personnel Cabinet to certify the Appellant to a register. The Hearing Officer finds those essentially were character references.

7. The Hearing Officer finds that the Personnel Board, under the statutes as written, and applying a plain interpretation to those, does not have jurisdiction to hear general claims of arbitrary action. This would include a claim of arbitrary refusal to hire based on prior termination or arbitrary treatment pursuant to Section 2 of the Kentucky Constitution, as it relates to applicants or eligibles on registers.

8. Classified employees, especially classified employees with status, have greater protections than unclassified employees, interim employees, FFTL employees or applicants or eligibles. One area very specifically where classified employees have greater protection is that classified employees can claim "penalization" as defined at KRS 18A.005(24). A classified employee who has been penalized can indeed invoke what appears to be broad jurisdiction of the Board as it relates to them.

9. However, applicants or eligibles on a register cannot claim penalization and are, the Hearing Officer believes and so finds, limited to what is specified at KRS 18A.095(11), (13) and (14). The Hearing Officer finds that KRS 18A.075(3) printed above, gives a broad outline to the powers of the Board with regards to hearing appeals from eligibles or applicants, and that the

specifics are set forth in KRS 18A.095. While it is clear to the Hearing Officer that an eligible on a register may claim protected class discrimination pursuant to KRS 18A.095, the Hearing Officer finds that an eligible on a register may not claim or allege arbitrary action to the Personnel Board.

CONCLUSION OF LAW

1. The Hearing Officer concludes thus, as a matter of law, that the Personnel Board pursuant to KRS 18A.095(18)(a) is without jurisdiction to hear Appellant's claims regarding arbitrary action either in regards to a general claim of violation of Section 2 of the Kentucky Constitution or the claim of arbitrary refusal to hire based on prior dismissal.

2. The Hearing Officer concludes that KRS 18A.075(3) gives a broad outline to the powers of the Board with regards to hearing appeals from eligibles or applicants, and that the specifics are set forth in KRS 18A.095. While it is clear to the Hearing Officer that an eligible on a register may claim protected class discrimination pursuant to KRS 18A.095, the Hearing Officer finds that an eligible on a register may not claim or allege arbitrary action to the Personnel Board.

3. The Hearing Officer concludes the appeal rights of applicants or eligibles are set forth very clearly in KRS 18A.075(3) and KRS 18A.005(11), (13), and (14) and do not include such allegations as addressed herein.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **CHARLES N. WEAVER V. TRANSPORTATION CABINET AND PERSONNEL CABINET (APPEAL NO. 2013-277)** 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 Boyce A. Crocker** this 4th day of June, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. William Fogle
Hon. Whitney Meagher
Hon. Stella B. House
Ms. Kathy Marshall