

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-149

EDWARD A. WILSON

APPELLANT

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

CABINET FOR HEALTH AND FAMILY SERVICES
J.P. HAMM, APPOINTING AUTHORITY, AND

PERSONNEL CABINET
TIM LONGMEYER, SECRETARY

APPELLEES

** ** *

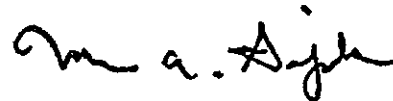
The Board at its regular December 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated November 14, 2014, having noted Appellant's exceptions were returned as untimely and being duly advised,

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 17th day of December, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Jennifer Wolsing
Hon. Whitney Meagher
Hon. John Gray
J.P. Hamm

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This matter came on for a pre-hearing conference on August 25, 2014, at 11:00 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, Edward A. Wilson, was not present, but was represented by the Hon. John Gray, appearing by telephone. The Appellee, Cabinet for Health and Family Services (CHFS), was present and represented by the Hon. Jennifer Wolsing. The Appellee, Personnel Cabinet, was present and represented by the Hon. Whitney Meagher.

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, and to discuss the option of mediation.

The Hearing Officer notes this appeal was filed with the Personnel Board on July 1, 2014. The Appellant indicated on the appeal form that he is appealing incorrect calculation of last date of paid employment.

In the narrative portion of his appeal, Appellant stated, "My last day of paid employment should have been May 16, 2012 – not April 12, 2012 as stated by the Cabinet." Appellant also indicated on his appeal form that he was applying for disability retirement, and presumably has an appeal filed with the Kentucky Retirement Systems.

Counsel for the Appellee CHFS stated she believed the Personnel Board had no jurisdiction to consider this. She asked for time in which to file a brief. Counsel for the Personnel Cabinet had no position at this time.

Counsel for the Appellant requested he be allowed to take depositions and otherwise engage in discovery.

The Appellees, Personnel Cabinet and CHFS, filed Motions to Dismiss. Appellant filed a Response to Motion to Dismiss. The Appellees filed Replies to the Response. The Appellant filed a Motion to Be Allowed to Take Discovery to which the Appellee, CHFS, filed a Response. The matter stands submitted for a ruling on the Motions to Dismiss and the Motion to Be Allowed to Take Discovery.

BACKGROUND

1. During the relevant times, Appellant, Edward A. Wilson, was a retired state employee.

2. The Hearing Officer will first address the Motions to Dismiss of Appellees, Personnel Cabinet and CHFS.

3. The Appellee, Personnel Cabinet, contends it is not a necessary party to this matter, as this relates to a dispute as to a settlement agreement between the Appellee CHFS and the Appellant.

4. The Appellee, CHFS, contends Appellant has no standing to appeal to the Personnel Board, that his appeal would also be barred by the applicable statute of limitations, and this action would more appropriately be filed against the Kentucky Retirement Systems as (quoting CHFS's motion), "Wilson's true goal is the acquisition of disability retirement."

5. The Appellee CHFS continued by going into detail in certain of its arguments, including Appellant lacks standing to bring an appeal to the Board, that he was improperly seeking to reform a settlement agreement between the parties, and the matter was untimely filed.

6. The Appellee CHFS also argues, "If Wilson believes he has been wronged by KRS's determination or policies, then KRS is the proper appellee or defendant in any action by Wilson." In other words, the Hearing Officer believes CHFS to be arguing that this matter should be more appropriately filed against KRS.

7. The Appellant filed a Response to Motions to Dismiss. In the response, Appellant reviews the settlement agreement between the parties which was approved by the Personnel Board on or about October 16, 2013. Appellant contends that CHFS did not reveal, at the time of entering into the settlement agreement, that Appellant's last date of paid employment would be calculated as April 19, 2012, instead of the May 16, 2012 date agreed upon by the parties as the retirement date. Counsel contends CHFS withheld information as to his last date of paid employment, and such constituted a penalty under KRS 18A.005(24). Counsel argues Appellant was penalized because he did not file for disability retirement until on or about May 16, 2014, at which time Appellant learned, to his dismay, his application was ruled to be untimely filed (by the Kentucky Retirement Systems.)

8. As noted, both Appellees filed replies. In its reply, the Appellee Personnel Cabinet stated the Personnel Cabinet made no substantive promises to Appellant per its review of the settlement agreement between Appellant and CHFS, and is not a necessary party to this matter.

9. The Appellee CHFS filed its reply supporting its Motion to Dismiss by noting that Wilson has admitted his last date of paid employment was April 19, 2012, and that Appellant has admitted he has no standing. Counsel for the Appellee CHFS contends Appellant has not responded to any of the Cabinet's arguments whether Appellant had a "right" to a certain calculation of last paid date of work.

10. Simultaneously with the dispositive motions filed by the Appellees, the Appellant filed a Motion to be Allowed to Take Discovery. Appellant asked to be allowed to have subpoenas issued, and to be allowed to take depositions of certain CHFS employees, specifically Jay Klein, Jennifer Wolsing and Beth Feddersen.

11. In its response, counsel for CHFS voices no objection to standard interrogatories, requests for admissions or document discovery, or even taking video depositions in lieu of live testimony, but did object to any depositions in addition to live testimony. Counsel especially objected to Appellant's motion to be allowed to take the testimony of CHFS's Attorney, the Hon. Jennifer Wolsing, as a witness.

12. 101 KAR 1:365, Section 6(6) states:

A deposition may be taken in an extraordinary circumstance and upon authorization by the hearing officer. A request to take a deposition shall be filed at least fifteen (15) days prior to the scheduled hearing. An objection to the request shall be filed prior to the scheduled hearing.

13. KRS 18A.095(18)(a) states:

The board may deny a hearing to an employee who has failed to file an appeal within the time prescribed by this section; and to an unclassified employee who has failed to state the reasons for the appeal and the cause for which he has been dismissed. 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.

FINDINGS OF FACT

1. During the relevant times, Appellant, Edward A. Wilson, was a retired state employee.
2. The Hearing Officer finds Appellant has claimed a penalization pursuant to KRS 18A.005(24) regarding a settlement agreement Appellant entered into with Appellee CHFS in 2013.
3. The Hearing Officer finds, Appellant stated he filed a claim with the Kentucky Retirement Systems (KRS) in May 2014 seeking disability retirement, only to be told such was untimely filed.
4. The Hearing Officer finds Appellant claims that the Appellee CHFS withheld information as to his true last date of paid work, which led to his alleged untimely filing for disability retirement benefits with KRS.
5. The Hearing Officer finds the Personnel Board has jurisdiction to determine if the terms of settlement agreements filed with the Board are being followed. However, Appellant is seeking a finding by the Board as to something (last day worked by Appellant) that was not addressed in the settlement agreement.
6. The Hearing Officer finds that the "retirement date" agreed to by the parties in the settlement agreement may or may not have been the last day he worked. Regardless, it is outside the Board's jurisdiction to make a finding as to Appellant's last day of employment and such would not be binding on KRS's determination in any event.
5. The Hearing Officer makes no further findings on Appellant's Motion for Deposition, as that issue is moot.

CONCLUSIONS OF LAW

1. The Hearing Officer concludes as a matter of law that pursuant to KRS 18A.095(18)(a), the Personnel Board is without jurisdiction to consider this appeal. Even assuming Appellant could claim a penalization regarding what his last paid day of work was, the Hearing Officer concludes it is fruitless to entertain such an appeal when it is without authority to effect a remedy.

2. The Appellant's dispute, at its core, is with KRS, and its apparent determination that Appellant untimely filed a claim for disability retirement benefits. Appellant attempts to make that claim into one against the Cabinet for Health and Family Services, but even should he be successful at the Personnel Board, any Order the Board might enter would be of no effect, as KRS would be under no requirement to abide by such order.

3. The Hearing Officer concludes that to the extent Appellant seeks to be made whole in regards to any denial of disability retirement benefits by having been told such filing was untimely, he must take action against KRS in another forum.

4. The Hearing Officer recommends to the Personnel Board that this appeal be dismissed. Having ruled in favor of the Appellee on the dispositive motion, the Hearing Officer would rule against the Appellant in his motion to take discovery.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **EDWARD A. WILSON V. PERSONNEL CABINET AND CABINET FOR HEALTH AND FAMILY SERVICES, (APPEAL NO. 2014-149)** 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 14th day of November, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Jennifer Wolsing
Hon. Whitney Meagher
Hon. John Gray