

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2019-216

DEBORAH ZIMMERMAN

APPELLANT

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

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

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The Board, at its regular October 2021 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated September 8, 2021, and being duly advised,

**IT IS HEREBY ORDERED** that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer 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 14<sup>th</sup> day of October, 2021.

**KENTUCKY PERSONNEL BOARD**

  
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**MARK A. SIPEK, SECRETARY**

A copy hereof this day sent to:

Hon. Lucas Roberts  
Deborah Zimmerman  
Hon. Rosemary Holbrook (Personnel Cabinet)  
Jay Klein

**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
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**V.**

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

**CABINET FOR HEALTH AND FAMILY SERVICES**

**APPELLEES**

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This matter came on for a pre-hearing conference on February 11, 2020, at 10:30 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, Deborah Zimmerman, was present by telephone and was not represented by legal counsel. The Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Lucas Roberts.

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. which authorizes this appeal, to determine the relief sought by the Appellant, to define the issues, to address any other matters relating to this appeal, to determine whether this appeal was filed within the time limitations set forth in KRS 18A.095, and to discuss the option of mediation.

**BACKGROUND**

1. The Hearing Officer notes this appeal was filed with the Personnel Board on September 30, 2019. On the appeal form and during the pre-hearing conference, the Appellant, a classified employee without status, indicated she was appealing her removal from future registers following her probationary dismissal, in addition to advancing a claim of disability discrimination, and an allegation that the Appellee mishandled her ADHD (Attention-Deficit/Hyperactivity Disorder) accommodation request. The Appellant further explained her claims in the narrative portion of the appeal form, wherein she states in pertinent part:

After I informed my manager, Belinda Beard, on 6/26/19 of my ADA qualifying disability, Attention Deficit Hyperactivity Disorder and

requirement of daily medication she terminated me on 6/28/19. She did not follow the OHRM Policy for ADA + EEO Civil Rights, assisting me with requesting or requesting herself, as my manager, the ADA accommodations I require and by ADA law should receive.

2. Following discussion, the Appellant clarified that she, a probationary employee separated from state service before the successful completion of her probation, was asserting the Appellee mishandled her ADHD accommodation request and then terminated her as a result of disability discrimination. The Appellee argued that the Personnel Board does not have jurisdiction over this matter; the Appellee asserts that the Appellant did not file her appeal within thirty (30) days as required by KRS 18A.095 and, as a result, requested an opportunity to file a dispositive motion.

3. The Appellee filed a Motion to Dismiss. Although given an opportunity to file a response, the Appellant has failed to do so. This matter has now been assigned to Hearing Officer Mark A. Sipek for a ruling on the Appellee's Motion to Dismiss.

#### **FINDINGS OF FACT**

1. The Appellant was hired on March 18, 2019, as a Nurse Consultant Inspector with the Office of Inspector General.

2. On August 28, 2019, while still serving her initial probationary period, the Appellant was informed she was terminated from her position pursuant to KRS 18A.111. The Appellee also informed Ms. Zimmerman that she could file a claim of discrimination with the Kentucky Personnel Board within thirty (30) days.

3. Ms. Zimmerman filed her appeal with the Personnel Board, which was received on September 30, 2019, thirty-three (33) days after she was notified of her termination.

4. The Appellant also included a claim of disability discrimination when she filed her appeal.

#### **CONCLUSIONS OF LAW**

1. As an employee serving their initial probation pursuant to KRS 18A.111, the Appellant may be separated from her position without a right to appeal, except as provided in KRS 18A.095.

2. KRS 18A.095(14)(a) allows any employee who believes they have been discriminated against to appeal to the Board.

3. KRS 18A.095(14)(d) has been interpreted by the Personnel Board to state that employees on initial probation have thirty (30) days to file appeals based on discrimination.

*Anthony Holder v. Tourism, Arts, and Heritage Cabinet, Department of Parks*, to Appeal No. 2016-304. The Appellant filed her appeal thirty-three (33) days after being notified of her dismissal. Her appeal was untimely and subject to dismissal by the Personnel Board.

4. The Hearing Officer believes that the Personnel Board incorrectly applied the thirty-day limitation in KRS 18A.095(14)(d) to all discrimination claims when the language of the statute limits this provision to applicants and eligibles. The actual language of the statute reads as follows:

(d) An appeal to the board by applicants or eligibles under subsections (11) and (13) of this section and under this subsection shall be filed in writing with the executive director not later than thirty (30) calendar days after the notification of the action in question was mailed.

Nonetheless, the Hearing Officer will apply the Personnel Board's precedent from the *Holder* case and recommends this appeal for dismissal.

#### **RECOMMENDED ORDER**

The Hearing Officer recommends to the Personnel Board that the appeal of **DEBOARH ZIMMERMAN VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2019-216)** 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 8 day of September, 2021.

KENTUCKY PERSONNEL BOARD



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MARK A. SIPEK  
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:  
Hon. Lucas Roberts  
Deborah Zimmerman  
Rosemary Holbrook (Personnel Cabinet)