



COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2018-047

ALCENIA BINGHAM

APPELLANT

VS.

FINDINGS OF FACT, CONCLUSION OF LAW  
AND RECOMMENDED ORDER

JUSTICE AND PUBLIC SAFETY CABINET,  
DEPARTMENT OF CORRECTIONS

APPELLEE

\* \* \* \* \*

This matter came on for an evidentiary hearing on August 20, 2018, at 9:30 a.m., at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Colleen Beach, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Alcenia Bingham, was present at the evidentiary hearing and was not represented by legal counsel. The Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Oran S. McFarlan. Also present as Agency representative was Aaron Smith, former Warden at the Kentucky State Reformatory.

**BACKGROUND**

1. The Appellant was employed as a Correctional Officer with the Justice and Public Safety Cabinet, Department of Corrections, Kentucky State Reformatory.
2. On March 2, 2018, under the signature of Aaron Smith, Warden, Appellant was notified of her termination prior to the completion of her initial probationary period. See **Recommended Order Attachment A**.
3. The Appellant filed a timely appeal with the Personnel Board on March 19, 2018. The Appellant provided the following statement relating to her appeal:

On March 2, 2018 I was terminated and was not given a reason. In fact I was in training and on probation for six month. I told Mr. (crossed-out) (AB) and Mr. Tingle that I have an appointment and gave (crossed-out) (AB) Mr. Harrison documents in which I missed a day and that my daughter school called because she missed the bus to go home but if there

is any other reason for my dismissal I have no knowledge and was told by Mr. St. Clair he couldn't (crossed-out) (AB) discuss it with me cause I was on probation. (sic)

4. Pursuant to Interim Order dated May 25, 2018, Appellant was assigned the burden of proof and presented her case first.

5. **Appellant, Alcenia Bingham**, testified on her own behalf. She was hired sometime during the first week of February, 2018. (She could not recall the exact date). She was hired as a Correctional Officer at the Kentucky State Reformatory (KSR). She began her probationary period by first shadowing another officer for a "week or two." She then began basic training at the Training Academy, which is housed at KSR. Appellant described the program as a place "to learn how to interact with inmates—how to protect them and yourself." Basic training at the Training Academy is conducted Monday through Friday, from 8:00 a.m. until 4:00 p.m.

6. Appellant stated that there were approximately twenty-five to thirty other individuals in her training class, four of whom were from KSR. Appellant stated that she had become acquainted with these four officers.

7. On March 1, 2018, Appellant and another officer, Victoria Sharp, were beginning a "frisk and pat" exercise. Appellant testified that, during this activity: "Sharp had a funny look on her face. She said to me, 'I don't know how to tell you this, but Officer Storm told me that people like you (meaning Appellant), they put sheets over their heads. You should be careful of him.'" Appellant identified Officer Storm (she could not recall his first name) as one of the four officer trainees from KSR.

8. Later that day, a staff member informed Appellant that she had a phone call from her daughter's school. Appellant went to the office to take the call and was informed that her daughter, a ten-year-old with special needs, would not be allowed to take the school bus home, due to behavioral issues. Not having a local support network, Appellant was the only one who could provide the child a ride home. Appellant estimated that she received the phone call sometime around 2:00 p.m.

9. Before leaving the Training Academy at approximately 2:30 p.m., Appellant spoke to John Harrison, a Senior Instructor at the Division of Corrections Training. She told him she needed to get her child from school although she did not want to leave "because of the events that had happened earlier that week." Appellant testified that Harrison responded, "That is a decision that you have to make."

10. Appellant explained that "the events" she had been referring to were two absences earlier that week. On February 26, 2018, Appellant had to miss training to make a court appearance to prevent her eviction. On February 28, 2018, she had to miss training to visit a rental assistance organization to secure funds necessary to pay a bill that would allow her to stay in her home. Appellant testified that she gave Harrison documentation regarding both absences.

11. The next day, March 2, 2018, Officer Harrison and another gentleman (Appellant could not recall his name) asked her to come to the office. There she met with the men and another staff member, Officer Mays. She was told, "These are the papers for your termination." When she asked why she was being terminated, they responded, "Because you are on probation, we do not have to give you a reason." Her termination was effective March 3, 2018. She was asked to immediately turn in her identification badge and her uniform at the front gate, which she did.

12. Appellant, an African American woman, stated that she felt she was the victim of racial discrimination because she "was trying to get all the training that she could," but when she asked certain things, the training officers told her, "You just gotta watch." She also believed that Officer Storm was talking to other staff about her, based on what Officer Sharp had told her. Appellant identified Officer Sharp and Officer Storm as being Caucasian.

13. Appellant summarized, "I came to Louisville to better my life, and then I come into this facility and feel that I was not being treated the same. I was not being treated equally."

14. On cross-examination, Appellant agreed that she was not present when Officer Storm allegedly made the statement about her.

15. When pressed on how she knew Storm had been referring to her, Appellant explained that Sharp had first said "she had been around black people before, and she didn't know why he [Storm] would say something of that nature about her [Appellant]."

16. At the end of Appellant's testimony, she rested her case.

17. Appellee, Justice and Public Safety Cabinet, Department of Corrections (DOC), called its first witness. **John Harrison** is employed at the Department of Corrections, Division of Corrections Training. He is a Training Instructor Coordinator II, a position he has held for eight years. His job duties include the oversight and management of all DOC training, including the Basic Academy, Adult Facilities, Probation and Parole, Jails, and other specialized training.

18. Harrison was familiar with Appellant as she had been enrolled in the Basic Academy from February to March, 2018. Harrison added that all DOC employees begin their employment with basic training.

19. Through Harrison's testimony, Appellee's Exhibit 1 was introduced into the record. The exhibit contained three Incident Reports, all written on March 1, 2018, by three different instructors, and two emails.

20. Harrison testified that three instructors at the training center had approached him and informed him that Appellant had demonstrated a "failure to participate and a lack of desire to be there." He then instructed them to write Incident Reports.

21. This same day, March 1, 2018, Appellant told Harrison she had to leave early to pick up her child. Harrison instructed her to do so and said he would advise her instructors of her absence.

22. Over the course of the approximate three weeks Appellant had been in training, she missed work on the following days:

2/14/18	8 hours	(week 1 of training)
2/26/18	8 hours	(week 3 of training)
2/28/18	2 hours	(week 3 of training)
3/1/18	1.25 hours	(week 3 of training)

23. On March 1, 2018, Harrison also sent an email to Antony Duggins, Branch Manager. In the email, Harrison informed Duggins that Appellant had to leave training that day to pick up her daughter. He stated that he had also reviewed her attendance records with her, and that she had, so far, missed 24.25 hours of training. Harrison also attached the three staff reports, asserting in the email that Appellant had displayed “disruptive and inattentive behavior as well as lack of attention.” He also told Duggins that he had observed this behavior himself.

24. The second email, also dated March 1, 2018, was sent from Duggins to James Coyne, Deputy Warden for Security at KSR, and Major Travis St. Clair, the most senior uniformed officer at KSR. The email recounts what Harrison had documented and suggests a schedule for Appellant to make up for training missed during her absences. The email concludes, “I leave how this is handled to your discretion. We can speak tomorrow about how you choose to handle her situation. Thank you for your consideration.” (Appellee’s Exhibit 1).

25. Harrison was asked to address Appellant’s behavior at training. Harrison testified that he had seen Appellant “just walk off” on one occasion and exhibit an overall “lack of concern.” In one instance, Harrison observed Appellant during a physical conditioning class in which trainees were supposed to perform push-ups. Appellant was attempting to do a modified push-up with her toes and knees on the ground. He observed her lay down and not “even try to get up.” While Harrison noted that the DOC “does not have a strict standard, we just ask for a good faith effort.” In Harrison’s opinion, Appellant only put in a “half-hearted effort” in the remaining exercises.

26. In other instances, Harrison had observed Appellant “engaged in conversation with others, and not applying restraints and defensive tactics.” He stated that he pushed the instructors to make an extra effort to engage her. Harrison added that correctional institutions are in “dire need” of employees, but he agreed with the instructors’ assessments of her performance during training, as evidenced by the Incident Reports.

27. Harrison denied that Appellant’s race had anything to do with his involvement in her dismissal.

28. Harrison stated that there are African American Correctional Officers at KSR, and they had all successfully completed basic training.

29. On cross-examination, Harrison was asked what his definition of “half-hearted effort” was. He replied, “[Appellant] does part of the activity, then just quits.” He added that in his opinion, when issues were addressed with her, “[Her] response indicated no interest.”

30. **Aaron Smith** has been Director of KY Correctional Industries since July 1, 2018. Prior to that, he was Warden of KSR, a position he held for over four years. He has been employed with the Department of Corrections since 1988.

31. Smith stated that Appellant was first brought to his attention by James Coyne. He was informed that there was a problem with one of the trainees, Appellant, which centered primarily on her time and attendance issues, as well as her lack of effort.

32. Smith testified that, based on the information they had received from the Training Academy, he and Coyne discussed her possible probationary dismissal. Smith added “KSR is a mental health institution. It is a much more difficult facility than any other in the state. 75% of all assaults and 72% of use of force in all the state institutions occur at KSR. We are a 24/7 facility, and time and attendance is very important.”

33. Smith added that Appellant’s alleged “lack of attention” was also very concerning. “Attention is paramount in a volatile institution with volatile individuals.”

34. Smith stated that it was standard operating procedure not to explain to an employee the reason for a probationary dismissal.

35. Through Smith’s testimony, the dismissal letter, given to Appellant on March 2, 2018, was entered into the record as Appellee’s Exhibit 2.

36. Smith denied that race played any part in Appellant’s dismissal.

37. Smith stated that he did not know Officer Storm and had never had a conversation with him.

38. At the end of Smith’s testimony, the Appellee rested its case.

39. **Appellant** testified on rebuttal. She stated that she took issue with some of the statements in the instructors’ Incident Reports. She specifically denied that she had “interrupted class” or “walked away” during an instruction unless it was to use the bathroom. She noted that she had passed every skills test that she had taken and had been allowed to proceed to learn the next task.

40. Appellant also stated that “No one had forced her to be there.” If she had been unable to concentrate on March 1, 2018, it was because she had just learned what Officer Storm had said about her.

41. KRS 18A.111(1) states:

Except when appointed to a job classification with an initial probationary period in excess of six (6) months, and except as provided in KRS 18A.005 and this section, an employee shall serve a six (6) months probationary period when he is initially appointed to the classified service. An employee may be separated from his position, reduced in class or rank, or replaced on the eligible list during this initial probationary period and shall not have a right to appeal, except as provided by KRS 18A.095. The employee may be placed on an eligible list but shall not be certified to the agency from which he was separated unless that agency so requests. Unless the appointing authority notifies the employee prior to the end of the initial probationary period that he is separated, the employee shall be deemed to have served satisfactorily and shall acquire status in the classified service.

42. KRS 18A.095(14)(a) states:

Any employee, applicant for employment, or eligible on a register, who believes that he has been discriminated against, may appeal to the board.

### **FINDINGS OF FACT**

1. The Appellant, Alcenia Bingham, was employed as a Correctional Officer at Kentucky State Reformatory from approximately the first week of February, 2018, until March 3, 2018. She was dismissed while serving her initial probationary period as provided by KRS 18A.111. Appellant was enrolled in training at the Training Academy when she was dismissed. (Testimony of Appellant).

2. Appellant, an African American woman, contends that she was dismissed due to a discriminatory motive. Appellant testified that another Correctional Officer, Victoria Sharp, told Appellant that Officer Storm (another trainee at Training Academy), had said “People like [Appellant], they put sheets over their heads.” Appellant stated that Sharp had also warned her to “be careful” of Storm. (Testimony of Appellant).

3. Appellant also contends that she was treated in a discriminatory way when she asked questions of her instructors. Their response to her was “You just gotta watch.” (Testimony of Appellant).

4. The Hearing Officer finds that Appellant missed 19.25 hours of work during the time period of February 14, 2018, and March 1, 2018 (Appellee’s Exhibit 1). According to

Appellant, some of these absences were due to her defending an impending eviction; another was due to her lack of child care assistance. (Testimony of Appellant; Appellee's Exhibit 1).

5. The Hearing Officer finds that on March 1, 2018, John Harrison, Training Instructor Coordinator II, compiled three Incident Reports from three different instructors, which documented Appellant's alleged lack of participation, an inability to concentrate, and disruptive behavior that "prevented other staff from learning." (Appellee's Exhibit 1). At the evidentiary hearing, Appellant denied the veracity of these claims regarding her behavior in class. (Testimony of Appellant).

6. The Hearing Officer finds that on March 1, 2018, Harrison sent an email to Antony Duggins, Branch Manager, informing him of Appellant's absences, as well as the behavior described in the Incident Reports. Duggins then emailed James Coyne, Deputy Warden for Security at KSR, informing him that there had been an issue with Appellant's lack of effort given and causing occasional disruption in the class. Duggins also informed Coyne of Appellant's absences and suggested a way for her to make up the missed training. (Appellee's Exhibit 1).

7. The Hearing Officer finds that James Coyne then brought Appellant's situation to the attention of Warden Aaron Smith. Smith was told "there was a problem with one of the trainees (Appellant), which centered primarily on her time and attendance issues, as well as her lack of effort." Smith and Coyne discussed the matter and Smith decided to dismiss her. (Testimony of Warden Smith).

8. The Hearing Officer finds that Warden Smith did not know, nor was he ever acquainted with, Officer Storm. (Testimony of Warden Smith). Consequently, the Hearing Officer finds that Storm's alleged statement had no bearing on Smith's decision to dismiss Appellant.

9. Because Appellant was dismissed during her probationary period, the sole issue before the Hearing Officer is not whether Appellant was dismissed for cause, but whether Appellant was dismissed for a discriminatory reason. In order to prevail on a claim of race discrimination, the Appellant must first establish a *prima facie* case that, at a minimum, she was a member of a protected class and that she suffered an adverse action as a result thereof. Once a *prima facie* case is established, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the employer's action. If the employer meets that burden, the burden shifts back to Appellant to show that the employer's proffered reason for the action was merely a pretext for discrimination. *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

10. The Hearing Officer finds that Appellant met her burden of proof of establishing a *prima facie* case of race discrimination. Appellant is the member of a protected class (African American) and suffered an adverse action (dismissal).

11. The Cabinet stated that Appellant was dismissed for improper behavior and effort in the classroom, as well as time and attendance issues. However, the Hearing Officer is not



persuaded that Appellant had inappropriate behavior in the classroom. Appellant's testimony denying that characterization was persuasive, and it strains credulity that all three instructors by their own volition approached Harrison on March 1, 2018, the same day Appellant had to leave work early to pick up her child, and the same day Mr. Harrison began the email chain that led to her dismissal. However, one of the objectionable behaviors on Appellant's part was unrebutted: she had missed an unduly large and unacceptable amount of work in a very short time. While the Hearing Officer is sympathetic to Appellant's statement of the personal hurdles she faces, the reality is that the Kentucky State Reformatory must be able to depend on its Correctional Officers to show up on time and for the entire duration of their scheduled shift.

12. The Hearing Officer finds that the Appellee offered a legitimate, non-discriminatory reason for its dismissal of Appellant while on probation.

### CONCLUSIONS OF LAW

1. The Appellee based its dismissal of Appellant during probation on her time and attendance issues, which were unacceptable in a Correctional Officer. No evidence was presented that an alleged discriminatory attitude of Officer Storm toward Appellant had any influence on the Appellee's decision to terminate Appellant.

2. The Hearing Officer concludes that Appellant was not dismissed during probation for discriminatory reasons, and that the actions of the Appellee were neither excessive nor erroneous in the exercise of its rights under the statute as it pertains to the dismissal of a probationary employee.

### RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **ALCENIA BINGHAM V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS, (APPEAL NO. 2018-047)** 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 Colleen Beach** this 19<sup>th</sup> day of October, 2018.

**KENTUCKY PERSONNEL BOARD**

  
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**MARK A. SIPEK**  
**EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:

Hon. Oran S. McFarlan  
Ms. Alcenia Bingham



54527-30039 460  
Bingham, Alcenia

3-3-18

**DEPARTMENT OF CORRECTIONS**

James L. Erwin  
Commissioner

Kentucky State Reformatory  
3001 W. Hwy 146  
LaGrange, Kentucky 40032  
Telephone: 502/222-9441  
www.kentucky.gov

Aaron Smith  
Warden

March 2, 2018

Alcenia Bingham

PERNR#

Dear Alcenia Bingham:

Pursuant to KRS 18A.111, you are advised you will be terminated from the position of **Correctional Officer**, effective **March 03, 2018**. You shall not be certified on future registers for employment within **Kentucky Department of Corrections** unless **Kentucky Department of Corrections** so requests.

As an employee serving an initial probationary period as provided by KRS 18A.111, you do not have the right to appeal this action to the Kentucky Personnel Board. However, KRS 18A.095 provides that you may file a claim of discrimination with the Kentucky Personnel Board if you believe the action was based on unlawful discrimination. In accordance with KRS 18A.095, any claim of discrimination must be filed within thirty (30) days, excluding the date notification is sent. Such appeal must be filed in writing using the attached appeal form and in the manner prescribed on the form.

Sincerely,

Aaron Smith, Warden

Attachment: Appeal Form

CC's: Thomas B. Stephens, Secretary - Personnel Cabinet  
James L. Erwin, Commissioner - Department of Corrections  
Rodney Moore, Director - Division of Personnel Services