

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2017-147

DAWN COCKEREL

APPELLANT

VS.

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

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

*** **

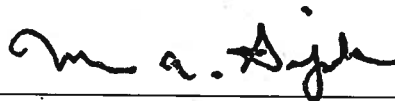
The Board, at its regular December 2018 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated November 8, 2018, and being duly advised,

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 21st day of December, 2018.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Brent Irvin
Ms. Dawn Cockerel
Mr. Jay Klein

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2017-147**

DAWN COCKEREL

APPELLANT

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

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

** **

This matter came on for a pre-hearing conference on July 11, 2018, at 9:30 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, Dawn Cockerel, was present and was not represented legal counsel. The Agency/Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Brent Irvin.

The purposes of the pre-hearing conference were to discuss the status of the appeal and to schedule an evidentiary hearing, if necessary.

The Appellee filed a "Motion to Dismiss for Lack of Jurisdiction or, in the Alternative, for Summary Judgment." The Appellant filed a response to Appellee's Motion to Dismiss, to which the Appellee filed a reply memorandum. This matter now stands submitted to Hearing Officer R. Hanson Williams for a ruling on the Appellee's Motion to Dismiss.

BACKGROUND

1. This appeal was filed with the Personnel Board on July 13, 2017. On the appeal form, the Appellant, Dawn Cockerel, a classified employee with status, indicated she was appealing her "Layoff." Following a pre-hearing conference on October 19, 2017, the Appellant clarified that she is challenging her placement on directed sick leave following a car accident in a state vehicle on state time while performing her state job duties. The Appellant explained that she was not paid following her car accident because she did not have sufficient leave balance to cover the period she was placed on directed sick leave and seeks payment for that period of time. Specifically, the Appellant was placed on directed sick leave for the period of May 18, 2017, until June 19, 2017, when her restrictions were lifted.

2. Subsequent to the initial pre-hearing conference, both parties filed interrogatories, requests for admissions, and requests for production of documents, all of which have been complied with to the extent ordered by the Personnel Board.

3. On September 19, 2018, the Appellee filed a Motion to Dismiss for Lack of Jurisdiction or in the Alternative for Summary Judgment. By Order dated October 2, 2018, the Appellant was given an opportunity to file a response. The Appellant filed her response on October 18, 2018, to Appellee's Motion to Dismiss. On October 18, 2018, the Appellee filed a reply memorandum in support of its motion to dismiss.

4. Both parties appear to agree to the following statement of material, undisputed facts:

a. The Appellant is a surveyor for the Cabinet of Health and Family Services (CHFS), Office of Inspector General (OIG).

b. She was injured in an auto accident while driving a state vehicle and was awarded limited Worker's Compensation benefits.

c. The Appellant's physician restricted her from driving for a period of one month while she recuperated from the auto accident.

d. Driving a state vehicle to and from survey sites is an unavoidable essential duty of Appellant's job as a surveyor for the OIG.

5. The Appellee declined to allow Appellant to perform temporary modified duties by working in the regional office for clerical matters (with the exception of three days) for the one month restriction from driving a motor vehicle.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Appellant's claim was that the Cabinet failed to properly apply the Americans with Disabilities Act (ADA), however, the ADA, as well as its counterpart found in the Kentucky Civil Rights Act, does not apply to employees unable to work temporarily due to a non-permanent injury. "The impairment's impact must also be permanent or long term." *Toyota Motor Manufacturing, Ky. Com. Inc. vs. Williams*, 534 U.S. 184, 198 (2002). The Appellee's management determined that driving to and from survey sites to conduct said surveys was an essential function of the Appellant's job. Due to the physician's restrictions on driving for a one-month period, management determined that she could not perform the essential functions of her job.

2. Appellant next argues that she was penalized in some manner because she was not granted Temporary Modified Duty during her one-month driving restriction. However, Appellant

has cited no statute or regulation stating this is a legal right which must be granted to employees. In sum and substance, the Appellant's primary complaint is that she was not permitted to perform modified light duties on a temporary basis. As stated above, the lack of a statute or regulation conferring any rights to agency employees as related to an agency's Temporary Modified Duty policy does not confer a right for those employees. Even though the Appellant's perception may be that the failure to provide her with temporary modified duties was unfair, this does not create an appealable claim.

3. Lastly, the Appellant argues that a receipt of Kentucky Unemployment Insurance benefits by decision dated May 18, 2017, constitutes a determination that she was "laid off." Assuming she received said benefits, the findings of that decision state, in pertinent part: "The claimant was separated from the employment when the claimant presented herself as ready to return to work following a period of leave." Although the Appellant may have been eligible for UI benefits, this does not constitute a "layoff" as referenced in KRS 18A.113 and KRS 18A.1131. KRS 18A.1131(1) states: "A layoff of a state employee with status in the executive branch due to the abolition of a position, lack of work or a material change in duties or organization shall comply with the provisions of this Section." None of the above cited conditions are applicable herein.

4. The circumstances of the Appellant being under a one-month physician's restriction from driving and, therefore, unable to perform the essential functions of her job, does not constitute a layoff.

5. KRS 13B.090(2) states, in pertinent part:

The 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.

RECOMMENDED ORDER

Therefore, because there was no legal duty to make available a Temporary Modified Duty plan to the Appellant; because there was no protection afforded under the ADA; and because the physician's restrictions for 30 days did not constitute a layoff, the Hearing Officer hereby recommends to the Personnel Board that the appeal of **DAWN COCKEREL V. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2017-147)** 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 5th day of November, 2018.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Brent Irvin
Ms. Dawn Cockerel