

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2017-182

MARK HAMMOND

APPELLANT

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

KENTUCKY TRANSPORTATION CABINET

APPELLEE

** ** * ** **

This matter came on for an evidentiary hearing on September 6, 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, Mark Hammond, was present at the evidentiary hearing and was represented by the Hon. Gregory A. Ousley. The Appellee, Kentucky Transportation Cabinet, was present and represented by the Hon. William Fogle.

BACKGROUND

1. Appellant, Mark Hammond, was employed as a Highway Equipment Operator I with the Kentucky Transportation Cabinet, Department of Highways, District 7. He was dismissed during his initial probationary period, by letter under the signature of James R. Dobner, on September 8, 2017. Appellant filed a timely appeal of his dismissal on September 12, 2017, appealing his dismissal and employee evaluation, and alleging discrimination for being a non-smoker. In support of his appeal, Appellant made the following statement:

I feel my civil rights have been violated by Scott Co. Superintendent #01 Jackie Wright. I also feel this is why I received a bad evaluation and was terminated. In retaliation against me because I was complaining about his second hand smoke bothering me. Even though its against KY policy and procedure to not smoke inside state buildings and state vehicles he did so daily. I didn't feel like I could file a formal written complaint due to Superintendent #02 Kevin Arnold along with head engineer of Scott Co. (Kyle) reaptly (sic) witnessing him smoking and did nothing. I have also witnessed superintendent #01 give contraband

to inmate workers several times on the jobsite. Approximately on Aug. 04 2017 me, Jackie Wright, Dave Osburn was heading out to work I was driving Dodge baby dump #0000-1234 Jackie was in the front passengar seat as I was starting to pull out of the garage Jackie instructed me to stop beside the Superintendents office and told me to roll down the window and while giving me a cigarette he told me to give it to the inmate. As I got the cigarette from Jackie I made the comment to Jackie "Oh, promoting contraband, huh?" And he said "Yeah" while laughing it off. Against my will I gave the cigarette to the inmate he was African American and I think his nickname is "Shorty." Me being a former deputy jailer I knew it was against dept. of corrections policies but I was in fear of losing my job. I had been putting in for transfers due to the whole situation I thought it would be best to get transferred then write a formal written complaint. If need be I will be willing to take a polygraph test examination for state police or attorney general. (sic)

2. By Interim Order dated November 8, 2017, it was established that at issue in the evidentiary hearing would be whether or not Appellant's dismissal during probation was the result of illegal discrimination or retaliation. Appellant was assigned the burden of proof on all issues.

3. **Appellant, Mark Hammond**, testified on his own behalf. He was employed by the Kentucky Transportation Cabinet (KYTC) as a Highway Equipment Operator I (HEO I) from May 1, 2017, until September 8, 2017. His workstation was the Maintenance Garage located in Scott County. He described his job duties as cutting down trees and limbs, picking up trash along I-75, fixing potholes, cutting back brush, and putting culverts in for water drainage.

4. Appellant explained his chain of command while employed by KYTC: Jackie Wright, Superintendent I, was his immediate supervisor; Kevin Arnold, Superintendent II, was his second-line supervisor; and Kyle Bidwell, Engineer, was his third-line supervisor.

5. Appellant stated that he had daily contact with Wright, who was out on the job every day, supervising the crew.

6. Appellant testified that Wright was a smoker. He smoked in the Maintenance Garage and in state vehicles. Through Appellant's testimony, a picture of Wright smoking in the garage was entered into the record as Appellant's Exhibit 1. A photograph of Kevin Arnold and Daryl Baxter, a coworker, sitting in the garage at the same time that Wright was captured on film smoking, was introduced into the record as

Appellant's Exhibit 2. According to Appellant, Wright "did not even hide" his smoking from Arnold.

7. Appellant then related an incident during his tenure with KYTC when he and the crew were working on Ironworks Pike. Inmates, who occasionally assisted with minor tasks, were helping clear a tree. Appellant stated he was driving the "baby dump truck" and Billy Russell Long was loading wood onto it. One of the inmates asked Wright, who was standing by the fender of Appellant's truck, for a cigarette. Appellant testified that Wright answered, "What's guard's with you---oh, have it," and handed the inmate a cigarette.

8. Appellant stated that the incident really upset him and he complained to his coworkers about it.

9. There was a second incident with an inmate, Appellant recounted. A group of inmates were power washing the garage. Appellant was in his truck and Wright was sitting in the passenger seat. Wright handed Appellant a cigarette and told him to give it to an inmate who was standing by the truck. As Appellant took it from Wright, Appellant said, "Oh, promoting contraband now?" According to Appellant, Wright "didn't look too happy after that."

10. Appellant was asked with whom he discussed his concerns about Wright's behavior. Appellant stated he had discussed the situation with Billy Russell Long, HEO IV; Adam Dunn, HEO II; David Osborne, HEO III; Sara Jo Murphy, HEO I; and Daryl Baxter, HEO I. According to Appellant, some of his coworkers were also bothered by Wright's smoking habits, but "They didn't say a lot. I was more vocal about it. Smoking really bothers me."

11. Appellant was asked if he received a probation evaluation. He stated that he did get one on August 8, 2017, and characterized it as "very negative." In his opinion, management "wrote it up to get rid of me because I was complaining."

12. Appellant especially took issue with the portion of the evaluation that stated: "[Appellant] is not always available for call outs or overtime work when needed. This needs to improve." (Hearing Officer Exhibit 1).

13. After discussing the evaluation with Kyle Bidwell, his third-line supervisor, Bidwell agreed to change that section. Bidwell revised it to state: "[Appellant] has been available for call outs when needed." (Appellee's Exhibit 1).

14. Other than the evaluation, Appellant was never counselled on his job performance.

15. In Appellant's opinion, it was Wright who gave all the feedback to Arnold and Bidwell regarding Appellant's job performance. Appellant noted that it was Wright who worked with the crew daily, while Arnold appeared on the job site less frequently, and Bidwell even less.

16. Appellant stated that Wright had an animosity toward Appellant as a non-smoker. When asked if Wright showed animosity toward anyone else on the crew, Appellant answered, "No."

17. Appellant was asked if he agreed that he had difficulty using the chainsaw and pole saw. While he disagreed with that criticism, he admitted, "I wasn't used to them; I had little experience."

18. Appellant did not recall an incident when he allegedly used the chainsaw and accidentally cut through to the guardrail.

19. Appellant stated that he never filed a written grievance against Wright, nor did he ever complain to Arnold or Bidwell regarding Wright.

20. Appellant stated that Sara Jo Murphy also complained about Wright's smoking, but she waited until she had completed her probationary period.

21. **David Osborne** is employed as a HEO III with KYTC. He described his job duties as filling potholes, flagging, running the backhoe, and other road work. He was initially employed in Scott County, then later transferred to Nelson County in April 2018. He was Appellant's coworker when Appellant was employed with KYTC.

22. Osborne stated that while he was located in Scott County, Jackie Wright was his first-line supervisor. His second and third-line supervisors were Kevin Arnold and Kyle Bidwell, respectively.

23. When asked if he had ever observed Wright smoking in the state garage, Osborne answered, "He may have back in 2008, but they told him not to. I don't know if he did anymore."

24. Osborne did recall being in a vehicle when Wright smoked a cigarette, but he denied that he had ever seen Wright give a cigarette to an inmate.

25. Osborne was asked to describe Appellant's job performance. In his opinion, "He did alright." He could not recall any "big screw ups" on Appellant's part, but added, "I didn't work with him every day. Sometimes we got split up."

26. Osborne stated that staff evaluations were largely based on the opinions of the employee's first-line supervisor.

27. Jackie Wright is currently a Highway Equipment Operator IV, a position he was demoted to in July 2018. Prior to that, and during Appellant's tenure at KYTC, he was a Superintendent I at the Scott County Garage and Appellant's first-line supervisor.

28. Wright stated that he is a regular smoker and admitted to smoking, both in the garage and in state vehicles. No one had complained to him about his smoking, except Sara Jo Murphy, who made the complaint after she had passed her probationary period.

29. Wright agreed that Arnold "relied heavily" on Wright's opinion of the employees under Wright's supervision when completing their performance evaluations. When Arnold and Bidwell came to him and asked how Appellant was doing, Wright told them "he is struggling with the chainsaw."

30. Wright stated that the Scott County crew occasionally used the assistance of inmates to "pull brush, pick up trash," and other similar tasks.

31. When asked if he had ever handed a cigarette to an inmate, he stated "No." When pressed if he recalled an incident when Appellant was driving the "baby dump truck" and instructed Appellant to give an inmate a cigarette, Wright answered, "He [Appellant] made a choice on his own. I handed him [Appellant] a cigarette and he handed it to an inmate."

32. When asked if it "would be fair to say that you heard from other employees that Appellant didn't like your smoking," Wright answered, "Yes. I heard it a couple of times."

33. Wright was asked if he had ever been untruthful to Kyle Bidwell. He answered, "Yes. One time. But it's been resolved." When questioned further, Wright admitted that he had found a gun on a work site and took it home. When Bidwell had questioned him about it, Wright denied that he had found it. The Office of Inspector General investigated and Wright admitted to them what had transpired. Under further questioning at the evidentiary hearing, Wright admitted that there had been an incident with a deep freezer as well. He took it home, but told Bidwell he had not. When that incident was uncovered, Wright stated that he "was almost fired," but management made the decision to demote him instead.

34. On cross-examination, Wright was asked to describe how Appellant had used a pole saw when cutting tree limbs. Wright replied that if the limb didn't break when Appellant attempted to cut it, "he would beat it down. That bent the saw's shaft."

35. As for Appellant's use of a chainsaw, Wright testified that, once, he was using a chainsaw to cut through a tree, but ended up cutting through to the guardrail. "It tore the chain up," Wright testified.

36. Wright stated that while he had discussed how to better use the pole saw with Appellant, he did not counsel him on the proper use of the chainsaw. Wright added that during his job interview, Appellant stated that he knew how to use one.

37. Wright testified that he had been counselled by both Arnold and Bidwell not to smoke in the garage or state vehicles.

38. As for Appellant's probationary job performance, Wright testified that he did not submit any feedback in writing. Arnold and Bidwell approached him and asked what kind of performance Appellant exhibited. They did not ask Wright's opinion whether Appellant should pass probation and Wright only learned of Appellant's dismissal after the fact.

39. On cross-examination, Wright stated that he was not aware of any complaints by Appellant regarding his smoking.

40. On redirect, Wright was asked why he had testified earlier that he had heard from "a couple of people" that Appellant was complaining about his smoking. Wright responded, "I had no knowledge of it." He also stated that he was on medication for blood pressure and diabetes.

41. Wright summed up his feeling about Appellant: "He was not a team player. He did not fit in."

42. On questioning by the Hearing Officer, Wright clarified his earlier testimony regarding the passing of a cigarette to an inmate, stating, "I handed a cigarette to [Appellant] and told him to give the cigarette to the inmate."

43. **Kevin Arnold** is a Superintendent II at the Scott County Maintenance Garage. He was Appellant's second-line supervisor. When asked if Arnold relied heavily on Wright's opinion of Appellant when writing his probationary evaluation, Arnold answered, "No, sir. I am the boss."

44. Arnold stated that he took into account what everybody on the crew told him on a daily basis. He stated that he did not take the word of just one individual when making his assessment.

45. Arnold testified he did not do Appellant's evaluation; that Kyle Bidwell did. Arnold reiterated, "I had input into the evaluation, but Bidwell did it."

46. Arnold was asked to look at the probationary evaluation for Appellant dated 8/18/17. (Hearing Officer Exhibit 1). Arnold agreed the signature on this evaluation was his. Bidwell's name does not appear on this version; Bidwell signed the version designated "Appellee's Exhibit 1."

47. Arnold was asked again if he got the information needed to prepare the evaluation from Wright. He answered, "Yes, but also from everyone on the crew."

48. Arnold was asked to explain the evaluation comment that Appellant is not always available for call outs or overtime. Arnold responded that every Friday evening, Arnold asks the crew which employee will be in town over the weekend for emergency call. One weekend, Appellant stated he was available. A storm occurred and Arnold called him to come in. Appellant stated that he was actually in Somerset and it would take him an hour to get to Scott County. Arnold had to call someone else.

49. Arnold testified that he had seen Wright smoke in both the garage and in state vehicles, but only one employee had ever complained—Sara Jo Murphy. According to Arnold, she made the complaint while she was still on probation. Arnold spoke to Wright about it. Arnold denied that he had ever seen Wright give a cigarette to an inmate.

50. On cross-examination, Arnold stated that he had discussed Appellant's job performance with the following employees: Billy Russell Long, Adam Dunn, Dave Osborne, Jackie Wright, Daryl Baxter, and Sara Jo Murphy. Baxter and Murphy both began their HEO I positions at the same time as Appellant and both were on initial probation at this time.

51. Arnold addressed Appellant's deficiency with the pole saw: "I was told by the crew that [Appellant] pushed the limb down rather than cut it." He also recounted that Appellant had improperly used a chainsaw and had damaged a guardrail.

52. As for the statement in the Appellant's probation evaluation that Appellant "has problems adjusting and adapting to new tasks given," Arnold stated,

"Sometimes you have to go from one job to another real quick. After three months, you should be able to handle that."

53. Arnold addressed his criticism of Appellant in the evaluation that "he had problems communicating effectively" and did "not show eagerness." Arnold stated, "At 3:15, we have tables in the shop and we all sit around, cool down, and talk. [Appellant] would scoot away a little bit and look at his phone. When you work in close quarters, you become like a second family. [Appellant] would not interact, not even as much as the two other new people. They would cut up and laugh."

54. Arnold stated that Appellant never complained to him about Wright's smoking.

55. On redirect, Arnold was asked if he had documentation regarding Appellant's allegedly ruining the chainsaw. Arnold clarified, "The whole thing wasn't ruined, just the chain."

56. Arnold was asked if it "would be fair to say Wright didn't give Appellant a good recommendation regarding his probationary job performance." Arnold answered that he did solicit Wright's opinion and Wright had "good and bad things" to say about him. The good things were that Appellant showed up on time for his daily work. The bad things were his lack of skill with the chainsaw and pole saw.

57. Arnold admitted that he did not ask Appellant his opinion of Daryl Baxter or Sara Jo Murphy's job performance.

58. Arnold admitted that he was friends with Wright. Upon questioning by the Hearing Officer, Arnold clarified why he did not think Appellant took initiative, as he wrote in the evaluation. He stated that both Murphy and Baxter would "suggest things that needed to be done. [Appellant] never did."

59. When asked to clarify how Appellant had "communication problems," Arnold answered, "Well, he never communicated to me he had problems." Arnold concluded, "He said very few words."

60. Kyle Bidwell currently works for Henkel Construction. During Appellant's tenure at KYTC, Bidwell was a Section Supervisor (also known as "Engineer") of the Scott County District Office and Appellant's third-line supervisor.

61. Bidwell stated that he completed Appellant's evaluation. He could not recall whom he spoke to before he completed it, but assumed that he had probably consulted "through the chain of command," that is, Arnold and Wright.

62. In Bidwell's estimation, Arnold probably went to the crew's work site four times per week to check on his staff.

63. Bidwell acknowledged that Wright had lied to him regarding Wright's possession of a gun found at a work site. When asked why Wright wasn't fired for the infraction, Bidwell responded, "I don't know. I was gone by then."

64. Bidwell testified that he had caught Wright smoking in the garage "at least once." He had given him a "written verbal" warning regarding the smoking sometime after Appellant's termination. Bidwell denied he had ever seen Wright smoke in a state vehicle.

65. Bidwell was not aware that Appellant had ever complained about Wright's smoking.

66. Bidwell stated that he and Arnold completed the evaluation together. He admitted that he did not have personal knowledge of any of the alleged deficiencies in Appellant's job performance as documented in the evaluation. He admitted that the evaluation was "basically based on Arnold's feedback."

67. Appellant complained about the line in the evaluation regarding his failure to work overtime. Bidwell changed the statement and signed the revised evaluation.

68. **Billy Russell Long** is a Highway Equipment Operator IV. He has worked for KYTC since April 2010. He works in the Scott County Garage. He and Appellant were coworkers when Appellant was employed there.

69. Long was asked what kind of worker Appellant was. Long answered, "Decent. But he didn't know much about the chainsaw or pole saw."

70. Long was asked if Arnold solicited his opinion of staff workers' job performance when preparing their evaluations. He answered, "No." When asked if Arnold came to him to discuss Appellant specifically, Long stated, "I can't really remember that. I assume he would ask him someone higher up than me."

71. Long testified that he knew Appellant had a problem with Wright's smoking and the two had discussed it.

72. Long denied he ever saw Wright give a cigarette to an inmate.

73. On cross-examination, Long testified that he had seen Appellant saw through the limb of tree, straight to the guardrail.

74. When asked if Arnold would ask "how everyone was doing," Long answered, "Several of us discussed this."

75. When questioned by the Hearing Officer for clarification, Long stated that Arnold had asked him "how the new people were doing," referring to the three newest employees, Appellant, Baxter, and Murphy.

76. Long testified that he and some of the crew did tell Wright that Appellant had complained about Wright's smoking.

77. At the end of Long's testimony, the Appellant rested his case. Appellee made a motion for a Directed Verdict, which the Hearing Officer **OVERRULED**.

78. The Appellee went next in the presentation of proof and called its first witness.

79. **J.R. Dobner** is Deputy Executive Director of the Office of Human Resource Management for KYTC, a position he has held since 2016. His job duties include the supervision of the Division for Personnel Administration and Employee Compliance Branch. He is also the Appointing Authority designated to sign off on personnel actions.

80. Dobner first learned that there was an issue with Appellant on September 7, 2017, when he received an email chain that originated in District 7 (Scott County). The email originated from Kyle Bidwell on August 30, 2017, and was addressed to Tony McGaha. The email states: "Attached is the signed Probation Evaluation done 8-18 for Mark Hammond. I have not seen improvement on the issues listed on the evaluation. I do not wish to keep him past probation." (Appellee's Exhibit 3).

81. Dobner stated that he prepared and signed Appellant's letter of separation. No reason was given in the letter. Dobner explained that KYTC "typically does not state cause when terminating employees on initial probation." The separation letter, dated September 8, 2017, was entered into the record as Appellee's Exhibit 2.

82. Dobner stated that he did not know Appellant was a non-smoker when he executed the dismissal letter.

83. On cross-examination, Dobner testified that he relied on the feedback provided from Kyle Bidwell when he determined that dismissing Appellant was the

proper action to be taken. Dobner summarized Bidwell's opinion, "[Appellant] was just not doing the work."

84. Dobner stated that he was aware of the OIG investigation into Wright's actions regarding the freezer and gun. When asked why Wright was not fired, Dobner answered that management at District 7 "begged for mercy. They wanted to keep someone of Wright's experience on staff." Dobner added that Wright's taking the gun from the side of the road, where he found it, was not technically illegal. "His malfeasance was that he had lied to a supervisor." The decision was made to demote Wright from a supervisory position to a HEO IV.

85. 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.

86. 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.

87. KRS 344.040(1)(a) reads:

(1) It is an unlawful practice for an employer:

(a) To fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's race, color, religion,

national origin, sex, age forty (40) and over, because the person is a qualified individual with a disability, or because the individual is a smoker or nonsmoker, as long as the person complies with any workplace policy concerning smoking;

FINDINGS OF FACT

1. Appellant, Mark Hammond, was hired by Kentucky Transportation Cabinet as a Highway Equipment Operator I (HEO I) on May 1, 2017. His work station was District 7, in Scott County. He served approximately four months of his six month initial probationary period, but was separated from his employment on September 8, 2017. He was informed of his dismissal by letter under the signature of James R. Dobner, Appointing Authority.

2. Appellant contends that he, a non-smoker, was dismissed during probation because he complained that his first-line supervisor, Jackie Wright, smoked in the Maintenance Garage and in state vehicles. Appellant also testified that he had observed Wright give a cigarette to an inmate on two different occasions.

3. While the witness testimony concerning Wright's smoking in the Maintenance Garage was un rebutted, several witnesses testified that they had not seen Wright smoke in state vehicles, nor had they ever seen Wright hand a cigarette to an inmate. However, the most probative evidence concerning these actions was the testimony of Wright himself. He admitted that he had smoked in both the garage and in state vehicles. He also admitted he had once handed Appellant a cigarette to give to an inmate. The Hearing Officer finds, therefore, that Appellant's testimony concerning Wright's actions was largely corroborated, and the Hearing Officer accepts as true Appellant's testimony regarding this issue.

4. Appellant did not formally report Wright's smoking infractions to his second or third-line supervisors. Nor did Appellant complain directly to Wright, his first-line supervisor with the exception of his statement to Wright (on the occasion when Wright handed Appellant a cigarette to hand out the truck window to an inmate): "So we're promoting contraband now?" In fact, the only people Appellant spoke to directly regarding Wright's smoking were his coworkers; specifically, Billy Russell Long, Adam Dunn, David Osborne, Sara Jo Murphy, and Daryl Baxter.

5. By all accounts, Appellant was less than adept at using the chainsaw and pole saw. Appellant did not attempt to rebut this testimony. It is also noteworthy that Appellant did not take issue with that observation in his probation evaluation. By

Appellant's own admission, the only portion of his evaluation he contested was the section that stated he was not always available for call-outs or overtime.

6. Because Appellant was dismissed during his 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. Appellant claims he was dismissed for being a non-smoker, in violation of KRS 344. In order to prove discrimination under the *McDonnell Douglas* burden shifting analysis, Appellant must first establish a *prima facie* case that he was a member of a protected class and that he suffered an adverse employment action. *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

7. The Hearing Officer finds that Appellant met his burden of proof establishing a *prima facie* case of discrimination based on his status as a non-smoker, and his dismissal on September 21, 2017.

8. Appellee offered multiple non-discriminatory reasons for Appellant's dismissal, including Appellant's "not fitting in," problems communicating, and a "lack of eagerness." (While those reasons were merely vague assertions, based largely on Appellant's tendency not to participate in conversation during the crew's afternoon break time, it was un rebutted that Appellant was not skilled with the chainsaw or pole saw.) Therefore, the Hearing Officer finds that Appellee met its burden to articulate a legitimate, non-discriminatory reason for the dismissal.

9. Since Appellee met its burden, the burden then must shift back to Appellant to show that the employer's proffered reason for the action was merely a pretext for discrimination, which Appellant failed to do. Appellant offered no evidence that: (1) he was, in fact, competent in his use of the chainsaw and pole saw; (2) the use of that equipment was not a vital task for an HEO I; or (3) other HEO Is were also unskilled in these tasks, but still passed probation. In fact, Appellant offered no evidence on this issue, with the exception of his statement that he was "not used to them." His only statement regarding the alleged damage of a guardrail with a chainsaw was merely that he "did not recall" the incident.

10. Appellant also alleges that his dismissal was based on retaliation for his complaining about Wright's smoking. In order to show retaliation in the employment context, Appellant must show that (1) he engaged in a protected activity; (2) his employer knew he had engaged in the protected activity; (3) thereafter, his employer took some employment action adverse to the employee; and (4) there was a causal connection between the protected activity and the adverse employment action. *Smith v. City of Salem*, 378 F.3d 566, 570 (6th Cir. 2004). The Hearing Officer concludes that even assuming *arguendo* that Appellant satisfied the first three prongs, Appellant's retaliation

claim must fail because, as discussed above, Appellant did not prove any causal connection between Appellant's complaints about Wright's smoking behavior and Appellant's dismissal. The Hearing Officer finds that the Cabinet demonstrated a legitimate, non-retaliatory reason for the dismissal. Appellant failed to show that "but for the protected activity," the adverse action would not have occurred.

CONCLUSIONS OF LAW

1. An employee in the state service who is terminated while serving his initial probationary period may only appeal to the Personnel Board as provided in in KRS 18A.095(14)(a). Under that statute, an employee who has not yet attained status in the classified service may appeal to the Board only if the employee alleges that he has been discriminated against in violation of KRS 344.040(1)(a), which prohibits, among others, discrimination based on being a non-smoker.

2. Appellant, Mark Hammond, failed to sustain his burden of proof to show that his status as a non-smoker was a substantial motivating factor in his dismissal from a position as a Highway Equipment Operator I with the Kentucky Transportation Cabinet during his initial probation. While the fact that Appellant was a non-smoker (and his first-line supervisor was a smoker) and that he was dismissed from his position during initial probation arguably constitutes a *prima facie* case of discrimination, the Cabinet articulated a legitimate, non-discriminatory business reason for their decision to terminate Appellant. Appellant failed to introduce evidence to show that the reason set out by the Cabinet was a pretext.

3. The Hearing Officer concludes that Appellant did not demonstrate a causal connection between his complaints about Wright's smoking and his dismissal. The Hearing Officer concludes, therefore, that Appellant failed his burden of proof to show retaliation.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **MARK HAMMOND V. TRANSPORTATION CABINET (APPEAL NO. 2017-182)** 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).

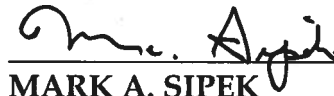
Any document filed with the Personnel Board shall be served on the opposing party.

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 5th day of November, 2018.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. William Fogle
Hon. Gregory A. Ousley
Mr. J. R. Dobner