

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NOS. 2018-052 and 2018-108

DONALD KROEGER

APPELLANT

VS.

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

TOURISM, ARTS AND HERITAGE CABINET,
DEPARTMENT OF PARKS

APPELLEE

*** **

The Board, at its regular February 2019 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated January 17, 2019, 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 appeals are 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 13th day of February, 2019.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Evan Jones
Mr. Donald Kroeger
Ms. Misty Judy

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NOS. 2018-052 & 2018-108**

DONALD KROEGER

APPELLANT

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

**TOURISM, ARTS & HERITAGE CABINET,
DEPARTMENT OF PARKS**

APPELLEE

** ** * ** *

This matter last came on for a pre-hearing conference on June 11, 2018, 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, Donald Kroeger, was present by telephone and was not represented by legal counsel. The Agency/Appellee, Tourism, Arts & Heritage Cabinet, Department of Parks, was present and represented by the Hon. Evan Jones.

This matter is before Hearing Officer Stafford Easterling for a ruling on the Agency's Motions to Dismiss filed with the Personnel Board on June 15, 2018, arguing that the Appellant has not been penalized as defined by KRS 18A. The Appellant has had an opportunity to file a response but has failed to do so. This matter now stands submitted to the Hearing Officer for a ruling on the Agency's Motion to Dismiss.

BACKGROUND/ FINDINGS OF FACT

The Hearing Officer notes that both of the instant appeals stem from the Appellant's prior Personnel Board appeal, Donald Kroeger v. TAH, Department of Parks, 2018 WL 4037952 (KY PB 2017-150). Therefore, as it applies to the instant appeal, the Hearing Officer will summarize the facts underlying that prior Personnel Board decision and hereby incorporates those findings herein:

1. During the pendency of this appeal, Appellant, Donald Kroeger, was a classified employee with status with the Tourism, Arts and Heritage Cabinet, Department of Parks.
2. The Appellant was employed by the Department of Parks as a Maintenance Supervisor for Taylorsville Lake State Park.

3. On June 1, 2017, a new Park Manager began his employment with Taylorsville Lake State Park. The Agency alleged that the Appellant acted inappropriately on that day by using inappropriate language towards his second-line supervisor and refusing to demonstrate how to use Park equipment to the new Park Manager.

4. The Appellant disputed the allegations against him and filed the instant Personnel Board appeal on July 14, 2017.

5. The Personnel Board conducted an initial pre-hearing conference on September 26, 2017. During the pre-hearing conference, the Appellant stated that he disagreed with the two-day suspension and wanted it removed from his record. Further, both parties expressed an interest in mediation.

6. Thereafter, on October 4, 2017, the Board directed the parties to mediation.

7. Mediation was conducted by the Kentucky Employees Mediation Program on November 7, 2017. The parties were unable to reach an agreement.

8. On December 19, 2017, the Board conducted another pre-hearing conference and set this matter for a March 20, 2018 evidentiary hearing.

9. Then, on or about February 16, 2018, the Agency unilaterally rescinded the challenged two-day suspension, removed all documentation relating to the suspension from the Appellant's personnel file, and issued the Appellant compensation for the two days of withheld pay.

10. In place of the rescinded suspension, by the same February 16, 2018 letter, the Agency issued the Appellant a written reprimand for the allegations underlying the previous two-day suspension.

11. Then, on March 2, 2018, the Agency submitted a Motion to Dismiss as Moot, arguing that the Board no longer had jurisdiction over that appeal.

12. On March 8, 2018, the Appellant filed a response to the Agency's Motion to Dismiss as Moot stating, in pertinent part:

I am writing this letter to say that I want my record cleared that means the Written Reprimand and the PIP both go away and are removed from my record so that my work record is entirely clean or I want my day in court. Parks tried this nonsense of offering to give me back my days but that I would have to keep a written reprimand from a proven liar. I did not take their offer then and I do not take their offer now.

I want my ENTIRE record clear including PIP and Written Reprimand or I want my day in court so that I can publicly prove how people in Parks have lied on me. If I do not get my day in court or my record cleared then I will have no choice but to file a Whistleblower Appeal.

13. By Final Order dated June 13, 2018, the Personnel Board dismissed the Appellant's prior appeal, 2017-150.

14. Following the Final Order, the Appellant filed the appeals at issue herein, challenging: 1) the issuance of the written reprimand that resolved the prior appeal and 2) alleging a statement made contained in the Agency's exceptions in the prior appeal amounted to a penalization.

15. KRS 18A.020(2)(c) provides, in full:

Whenever an employee is reprimanded for misconduct, other infraction, or failure to perform his duties in a proper or adequate manner, the supervising employee taking such action shall document such action in detail, and shall provide the employee with a copy of such documentation. The supervising employee shall inform the employee that he has the right to prepare a written response to the action taken after he has reviewed the written documentation prepared by the supervising employee. Such response shall be attached to the documentation prepared by the supervising employee. The supervising employee shall place a copy of the documentation and response provided for herein in the employee's personnel file and shall transmit a copy to the cabinet to be placed in the official personnel file of the employee. The supervising employee shall notify the employee that copies of the documentation and the response provided for herein have been placed in his personnel files.

16. KRS 18A.095(18)(a) provides, in pertinent part:

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.

17. KRS 18A.005(24) provides:

'Penalization' means demotion, dismissal, suspension, fines, and other disciplinary actions; involuntary transfers; salary adjustments; any action that increases or diminishes the level, rank, discretion, or responsibility of an employee without proper cause or authority, including a reclassification or reallocation to a lower grade or rate of pay; and the abridgment or denial of other rights granted to state employees.

CONCLUSIONS OF LAW

1. In these appeals, the Appellant seeks to re-litigate issues that were resolved in Appeal No. 2017-150; specifically, the Appellant claims he should not have received the written reprimand issued to resolve the prior appeal and, even more bafflingly, claims penalization in an assertion contained in the Agency's exceptions during the prior appeal.

2. The Board has previously concluded that 18A.020(2)(c) "provides the sole means of handling an employee's claim that a written reprimand is not warranted and as long as the procedures outlined in KRS 18A.020(2)(c) are followed, no further appeal rights regarding a reprimand are given to employees." Ramey v. Cabinet for Health and Family Services, 2003 WL 25749476 at *2 (KY PB). The Appellant does not argue the Agency failed to follow the procedures outlined in KRS 18A.020(2)(c); instead, he merely argues that he did not deserve a written reprimand. Accordingly, pursuant to KRS 18A.005(24), the Appellant has failed to state a penalization that would entitle him to any further consideration of the written reprimand.

3. Similarly, as to the Appellant's claim that he was penalized by a factual assertion contained in the Agency's exceptions during the prior appeal, pursuant to KRS 18A.005(24), the Appellant has again failed to state a penalization that would entitle him to any further consideration.

4. Because the Appellant has failed to establish any type of penalization, the Hearing Officer concludes that, pursuant to KRS 18A.095(18)(a), the Personnel Board lacks jurisdiction to further consider this appeal as the Board lacks the ability to grant relief based on the claims stated by the Appellant. Accordingly, the instant appeals must fail as a matter of law.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeals of **DONALD KROEGER V. TOURISM, ARTS & HERITAGE CABINET, DEPARTMENT OF PARKS (APPEAL NOS. 2018-052 & 2018-108)** 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 Stafford Easterling** this 17th day of January, 2019.

KENTUCKY PERSONNEL BOARD



Mark A. Sipek
Executive Director

A copy hereof this day mailed to:

Hon. Evan Jones
Donald Kroeger
Misty Judy