COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-199

JERRY JAY FOSTER, II **APPELLANT**

VS.

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

TRANSPORTATION CABINET **APPELLEE**

*** *** *** *** ***

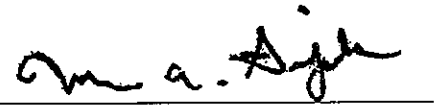
The Board, at its regular July 2016 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated June 15, 2016, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be, and they hereby 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 13th day of July, 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. William Fogle
Mr. Jerry Jay Foster, II
Mr. J. R. Dobner

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-199

JERRY JAY FOSTER, II **APPELLANT**

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

TRANSPORTATION CABINET **APPELLEE**

** ** ** ** **

This matter came on for a pre-hearing conference on October 5, 2015, at 10:00 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellant, Jerry Jay Foster, was present by telephone and was not represented by legal counsel. Appellee, Transportation Cabinet, was present and represented by the Hon. William H. Fogle. Also present for the Appellee was J. R. Dobner.

The purposes of the pre-hearing conference were to determine the specific penalization(s) alleged by Appellant, to determine the specific section of KRS 18A which authorizes this appeal, to determine the relief sought by Appellant, to define the issues, to address any other matters relating to the appeal, and to discuss the option of mediation.

BACKGROUND

1. The Appellant filed his appeal with the Personnel Board on August 26, 2015. The Appellant was appealing his dismissal. The Appellant was dismissed from his position as a Highway Equipment Operator I while serving initial probation. He stated he was told he was dismissed due to using the phone too much and time and attendance. On his appeal form and at the pre-hearing conference, the Appellant stated his employer was aware that he had court-ordered visitation with a child every Tuesday afternoon and he had to leave early. He also stated he carried a phone due to National Guard and other duties. He stated he used a blue-tooth and it did not get in the way of his employment.

2. The Appellant also stated that he felt people were being singled out. He stated he was not allowed to do work assignments for which he was qualified. The Appellant had previously worked for the Transportation Cabinet, but came back and had to serve an initial probationary period.

3. At the pre-hearing conference, counsel for the Appellee stated he wished to file a Motion to Dismiss.

4. At the pre-hearing conference, all parties agreed that the Appellant was dismissed by letter dated August 19, 2015. The letter set forth that he was being separated from his position without cause while serving his initial probationary period.

5. In its Motion to Dismiss, the Appellee argued that the Appellant had not alleged any type of illegal discrimination and, therefore, the Personnel Board lacked jurisdiction to hear his appeal. Specifically, the Appellee stated that nothing in KRS Chapter 18A affords employees any additional rights with respect to court-ordered visitation or status due to service in the National Guard.

6. Although Appellant was given time to file a response to Appellee's Motion to Dismiss, no response was filed.

7. KRS 18A.111(1) and (8) reads in pertinent part, as follows:

> **18A.111 Probationary periods for classified service - Initial and promotional.**
>
> 1. 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.

> (8) Notification to an employee on initial or promotional probation of the reason the probationary employment has been terminated by the appointing authority shall not confer a right to appeal to the board.

8. KRS 18A.095 (12) and (14)(a) read as follows:

18A.095 Rights of executive branch employees.

> (12) Any classified employee may appeal to the board an action alleged to be based on discrimination due to race, color, religion, national origin, sex, disability, or age forty (40) and above. Nothing in this section shall be construed to preclude any classified or unclassified employee from filing with the Kentucky Commission on Human Rights a complaint alleging discrimination on the basis of race, color, religion, national origin, sex, disability, or age in accordance with KRS Chapter 344.
>
> (14) (a) 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 FACTS

The Hearing Officer makes the following findings by a preponderance of the evidence:

1. The Appellant, Jerry Jay Foster, II, was employed as a Highway Equipment Operator I with the Transportation Cabinet. While serving his initial probationary period, he was notified that he was separated from his position without cause on August 19, 2015.

2. The Appellant filed his appeal with the Personnel Board on August 26, 2015. He did not allege any type of illegal discrimination. He did state that he had received a "verbal" on time and attendance. He stated he had to take time off for family court and visitation with children at social services. He stated that the District office knew about this well in advance. He stated another employee had been asked to take his telephone from him, however, Appellant stated he is a member of the Kentucky National Guard, and was working with the Sheriff's office on an undercover matter.

3. At the pre-hearing conference on October 5, 2015, the Appellant did not allege any type of illegal discrimination. He referred to the court-ordered visitation and discussed carrying a phone due to National Guard and other duties. He stated he used a blue-tooth and it

did not get in the way of his employment. He also stated he was not allowed to do work assignments for which he was qualified.

4. The Appellee filed a Motion to Dismiss alleging that the Personnel Board lacks jurisdiction over this matter because the Appellant has not alleged any form of illegal discrimination. The Appellee affirmatively stated that the Appellant was not afforded any specific rights under KRS Chapter 18A based on his court-ordered visitation or National Guard service. Lastly, the Appellee stated that because Appellant had not alleged discrimination, the factual circumstances regarding his termination were not relevant.

5. Although given an opportunity to respond to the Motion to Dismiss, the Appellant did not file anything.

6. The Hearing Officer finds there is enough information in the record through the appeal form, the statements at the pre-hearing conference, the Motion to Dismiss, and the dismissal letter to decide this appeal.

CONCLUSIONS OF LAW

1. The Appellant was dismissed from his position as a Highway Equipment Operator I while serving his initial probationary period. He has filed an appeal to the Personnel Board but has not alleged any form of discrimination and, therefore, the Personnel Board lacks jurisdiction to hear his appeal. [KRS 18A.111 and KRS 18A.095]

2. The issues raised by Appellant regarding his court-ordered child visitation and the need to use a telephone due to National Guard duties are not recognized causes of action pursuant to KRS Chapter 18A.

3. There are no genuine issues of material fact, and the record contains sufficient information to decide this appeal, including the appeal form, the statements at the pre-hearing conference, the Motion to Dismiss, and the dismissal letter. [KRS 18A.095(18)(A)]

RECOMMENDED ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Kentucky Personnel Board that the appeal of **JERRY JAY FOSTER, II VS. TRANSPORTATION CABINET (APPEAL NO. 2015-199)** be **DISMISSED.**

NOTICE OF EXCEPTION AND APPEAL RIGHTS

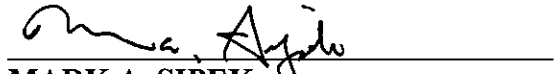
Pursuant to KRS 13.B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that 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).

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 15th day of June, 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. William Fogle
Mr. Jerry Jay Foster, II
J. R. Dobner