COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2013-154

WILLIAM E. McCLELLAND (ESTATE) **APPELLANT**

VS.

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

JUSTICE AND PUBLIC SAFETY CABINET
DEPARTMENT OF STATE POLICE **APPELLEE**

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

The Board at its regular April 2016 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated March 10, 2016, and having considered Appellee's exceptions, oral arguments, 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 **SUSTAINED**.

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 20th day of April, 2016.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Heather Wagers
Ms. Annette McClelland
Lt. Col. Howard Logue

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2013-154

ESTATE OF WILLIAM MCCLELLAND **APPELLANT**

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

JUSTICE AND PUBLIC SAFETY CABINET
DEPARTMENT OF STATE POLICE **APPELLEE**

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

This matter came on for an evidentiary hearing on October 22, 2015, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Present for the (deceased) Appellant, William McClelland, was his widow, Ms. Annette McClelland. Ms. McClelland was not represented by legal counsel. The Appellee, Justice and Public Safety Cabinet, Department of State Police, was present and represented by the Hon. Morgain Sprague

BACKGROUND

1. The Appellant, William McClelland, filed an appeal with the Personnel Board on June 19, 2013. The Appellant was employed as a Commercial Vehicle Enforcement Inspector II with the Kentucky State Police. He was given notice of his dismissal on June 10, 2013. The reason given for his dismissal was that on February 7, 2013, the Caldwell Circuit Grand Jury issued an indictment against him for Sexual Abuse in the First Degree. The Appellee alleged that the criminal indictment provides probable cause to believe that the Appellant committed a Class C felony and that it was detrimental to the business interests of the Kentucky State Police for the Appellant to continue to serve as Commercial Vehicle Enforcement Inspector II.

2. On his appeal form the Appellant stated that although he had been accused of a crime, he has not been convicted of any crime. The Appellant alleged that he put in twenty-two years with the Commonwealth of Kentucky. He stressed the importance of his job and challenged the decision to dismiss him.

3. The Appellant appeared by telephone at a pre-hearing conference on August 19, 2013. He stated he and his attorney were requesting dismissal of the criminal indictment. A second pre-hearing conference was held on October 17, 2013. At that time an evidentiary hearing was scheduled to be held on February 4, 2014. The evidentiary hearing was rescheduled a number of times due to continuances in the Appellant's criminal case.

4. In March 2015, Appellee's counsel notified the Board's staff that the Appellant was deceased.

5. Thereafter, a pre-hearing conference was held on May 13, 2015, with Appellant's widow, Ms. Annette McClelland, appearing by telephone. Ms. McClelland stated that her husband passed away on December 29, 2014. The parties agreed that Appellant's criminal charges were moot at that point.

6. An evidentiary hearing was rescheduled to October 22, 2015.

7. Following an evidentiary hearing, the Hearing Officer entered an order giving Ms. McClelland to and including November 23, 2015, to file documents showing she is the representative of the estate of William McClelland. The Appellee was given to and including December 11, 2015, to file any response or objection to the Appellant's filing.

8. Ms. McClelland submitted documentation on October 28, 2015, demonstrating that she was appointed to act as the Administratrix of William McClelland's estate by an order entered April 23, 2015. No objection was filed by the Appellee.

9. At the evidentiary hearing, the parties stipulated that William McClelland passed away on December 29, 2014.

10. The Appellee called as its first witness **Captain Marcus Schnepp**. Schnepp is the Region Commander for Commercial Vehicle Enforcement with the Kentucky State Police. He works out of Henderson and is responsible for supervising twenty-three counties in Western Kentucky. He has been employed with the Department for twenty-eight years.

11. Captain Schnepp served as Mr. McClelland's supervisor for eight years. Mr. McClelland was employed as a CVE Inspector. His primary responsibility was to inspect commercial vehicles at the Lyon County Scale Facility. As an Inspector, he has the powers of a sworn Peace Officer on the grounds of scale facilities. Captain Schnepp clarified, however, that Mr. McClelland was a civilian employee.

12. Captain Schnepp testified that as an Inspector, Mr. McClelland would have been called on to interact with drivers and interact with commercial vehicle companies. On occasion he would be called to issue citations and would have occasion to testify. He performed his duties in uniform and served in an enforcement capacity.

13. Captain Schnepp testified that as far as he knew it was well known that Mr. McClelland was employed with the Kentucky State Police. The Kentucky State Police holds its employees accountable for their actions both on and off duty.

14. On February 7, 2013, Captain Schnepp testified that he received a phone call from his Lieutenant that Mr. McClelland was facing criminal charges. This information was provided by the Princeton Police Department. Captain Schnepp learned that Mr. McClelland had been indicted by the Caldwell County Grand Jury. Captain Schnepp notified his chain of command and Mr. McClelland was placed on investigative leave.

15. Mr. McClelland remained in this status for sixty working days pursuant to the regulation. At that time the Commissioner determined that it was in the best interest of the Kentucky State Police to terminate Mr. McClelland.

16. Captain Schnepp testified that Mr. McClelland never asked for a leave of absence. He never discussed the criminal charges with Mr. McClelland. He stated there was an administrative investigation on-going and he did not have any discussions regarding this matter.

17. In Captain Schnepp's opinion, termination was necessary because Mr. McClelland was in the spotlight as an employee of the Kentucky State Police. He stated that he did not feel he could work in an investigative capacity while he was facing charges. A copy of the dismissal letter was introduced through Captain Schnepp's testimony as Appellee's Exhibit 1 (attached hereto as **Recommended Order Attachment A.**).

18. Captain Schnepp testified he is not aware of any complaints about Mr. McClelland's work before this action. Captain Schnepp testified that the administrative investigation being conducted by the Kentucky State Police was on-going because they were waiting for the conclusion of the criminal case to complete that investigation.

19. The Appellee's next witness was **Detective Brian Ward** from the Princeton Police Department. He testified he is a Lieutenant in the Investigation Section and has been employed with the Princeton Police Department for nineteen years. He stated he knew Mr. McClelland from the community and knew that he was a CVE employee who worked at the weigh station.

20. He testified that he received a call from a Princeton Police Officer that a mother had brought in her daughter on July 28, 2012, complaining that her daughter had been sexually abused by Mr. McClelland. Thereafter, Detective Ward scheduled a forensic interview and a physical examination.

21. Introduced into evidence through Mr. Ward's testimony was Appellee's Exhibit 2, a Medical Report from the Pennyrile Childrens Advocacy Center. Produced as Appellee's Exhibit 3 was the criminal case file regarding Mr. McClelland's case. Appellee's Exhibit 4 was a Polygraph Report from the Kentucky State Police. Mr. Ward testified that the information was shared with the Commonwealth Attorney who presented this case to the Caldwell County Grand Jury. The Grand Jury indicted Mr. McClelland for a Class C Felony, Sexual Abuse – First Degree, described as sexual contact with a person incapable of consent because she was less than twelve years old. Mr. Ward testified that a Grand Jury Indictment indicated that there was

probable cause to believe that the defendant may have committed the crime. He testified that these charges were pending against Mr. McClelland while he was alive and that the Commonwealth Attorney was proceeding. He stated that the trial had been set several times and rescheduled. The case was dismissed when it was learned that Mr. McClelland had passed away on December 29, 2014. A copy of the Indictment was admitted into evidence as Appellee's Exhibit 5.

22. At the conclusion of Mr. Ward's testimony, the Appellee announced closed. The Appellant indicated she did not wish to testify and began making her closing statement.

23. When Ms. McClelland began her closing statement, it was apparent to the Hearing Officer that she was referring to matters not in evidence. She was again asked if she wanted to testify and she said she did.

24. **Ms. Annette McClelland** testified she believed that her husband was set-up with regard to the criminal charges. She also felt that the pending criminal charges and the fact that his trial was rescheduled a number of times led to his death. She testified that they had a close relationship with the mother and daughter involved in this complaint. She stated that the children were a part of their lives. She also stated that she thought that the complaint against her husband was racially motivated.

25. When she concluded her testimony, the Appellant indicated she did not wish to make any additional closing remarks.

26. Counsel for the Kentucky State Police made a closing statement. She felt that the termination of Mr. McClelland was proper. She stated that as a result of the indictment, which indicated there was probable cause to believe he committed a Class C Felony. The Commissioner determined that it was in the Kentucky State Police's best interest to terminate his employment. She stated that Mr. McClelland was well known in the community and the charges were inconsistent with his duties of enforcing commercial vehicle laws. She characterized his indictment as the lack of good behavior.

FINDINGS OF FACT

1. The Appellant, William McClelland, was employed as a Commercial Vehicle Enforcement Inspector with the Kentucky State Police. He was assigned to the Lyon County Weigh Station. His duties included inspecting commercial vehicles and enforcing national standards. As an Inspector, while on the grounds of the scale facility, he had police powers; otherwise he was a civilian employee. (Testimony of Captain Marcus Schnepp.)

2. The Appellant was indicted by the Caldwell County Grand Jury on a charge of Sexual Abuse – First Degree, which is a Class C Felony, on February 7, 2013. (Testimony of Lieutenant Brian Ward.)

3. Following his indictment, the Appellant was placed on investigative leave for sixty working days. (Testimony of Captain Marcus Schnepp.)

4. Following the expiration of his investigative leave, the Commissioner of the Kentucky State Police decided that termination of the Appellant was in the best interest of the Kentucky State Police. Mr. McClelland was dismissed effective June 10, 2013. The letter cited as grounds for his dismissal his Indictment and the Grand Jury had found probable cause to believe that he committed the offense. (Testimony of Captain Marcus Schnepp and Appellee's Exhibit 1.)

5. While the criminal charges were pending against the Appellant, he passed away on December 29, 2014. (Testimony of Lieutenant Brian Ward and Stipulation of the parties.)

6. The Hearing Officer finds that the Appellee has failed to demonstrate good cause for the dismissal of the Appellant by a preponderance of the evidence. Despite the sensitive nature of Mr. McClelland's duties, his Indictment was nothing more than a charge against him and did not prove that he had committed any criminal offense. The Appellee did not fire him for committing any specific conduct only for being indicted a particular Class C Felony. The Appellee did not introduce any evidence that the Appellant's indictment prevented him from performing his duties.

7. Both parties presented evidence regarding Mr. McClelland's innocence or guilt of the underlying criminal charges. The Hearing Officer makes no finding regarding this evidence as this was not an issue to be decided in this appeal. The Appellee did not accuse him of committing the underlying conduct.

CONCLUSIONS OF LAW

1. Based on the Findings of Fact, the Appellee has failed to demonstrate good cause for the dismissal of William McClelland. KRS 18A.095(2). The Legislature has provided that a classified employee may be dismissed for conviction of a felony. [KRS 18A.032(1)(i) and KRS 18A.146] KRS Chapter 18A does not provide for dismissal of a classified employee for indictment of a felony, as the Kentucky Supreme Court stated an indictment is the initiation of a criminal proceeding. *Fletcher v. Graham*, 192 S.W.3d 350 (Ky., 2006).

2. The Appellant's estate shall be awarded back pay from the date of his termination, June 11, 2013, through the date of his death, December 29, 2014. [KRS 18A.095(22)(b)]

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal **ESTATE OF WILLIAM MCCLELLAND VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF STATE POLICE (APPEAL NO. 2013-154)** be **SUSTAINED.** The Appellant's estate shall be awarded back pay from the date of his termination, June 11, 2013, through the date of his death, December 29, 2014, and otherwise made whole.

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.

SO ORDERED at the direction of **Hearing Officer Mark A. Sipek** this 10th day of March, 2016.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Heather Wagers
Ms. Annette McClelland

Steven L. Beshear
Governor

KENTUCKY STATE POLICE
919 VERSAILLES ROAD
FRANKFORT, KY 40601
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www.kentuckystatepolice.org

J. Michael Brown
Secretary

Rodney Brewer
Commissioner

MEMORANDUM

TO: Mr. William McClelland

FROM: Rodney Brewer, Commissioner

DATE: June 10, 2013

SUBJECT: Notice of Dismissal

Pursuant to KRS 18A.095(7), and 101 KAR 1:345(2), you are hereby advised that, effective close of business Monday, June 10, 2013, you are hereby dismissed from your employment with the Kentucky State Police as a Commercial Vehicle Enforcement Inspector II, Grade 10. I find that your dismissal is justified on the grounds of lack of good behavior as follows:

I find that probable cause and substantial evidence exists, justifying your dismissal as follows:

I find probable cause justifying your dismissal as follows:

- On February 7, 2013, the Caldwell Circuit Grand Jury issued Indictment Number 13-CR-00008 against you for Sexual Abuse in the First Degree. The grand jury found that there was probable cause to believe that on or between January 1, 2012 and July 28, 2012 you subjected a person, under the age of twelve (12) years old to sexual contact.

Your lack of good behavior is detrimental to the business interest of the Kentucky State Police and is disruptive to the workplace. As part of your job duties, you represent the Kentucky State Police to the public as a CVE Inspector. The Kentucky State Police is a law enforcement agency with statewide jurisdiction. Per KRS Chapter 16 the Kentucky State Police is charged with detecting and deterring crime as well as providing for public safety throughout the Commonwealth. Your criminal indictment provides probable cause to believe that you have committed a Class C felony and thus it is detrimental to the business interests of the Kentucky State Police for you to continue to serve as an

APPELLEE'S EXHIBIT

employee representing the agency in any capacity. I have considered whether lesser forms of discipline are appropriate and have determined that it is not in the best interest of the Kentucky State Police or the citizens of the Commonwealth for you to remain a KSP employee. Dismissal is not only justified, but in the best interest of the Kentucky State Police and the public we serve.

Pursuant to KRS 18A.095(8), you may appeal this action to the Personnel Board within the sixty (60) days after receipt of this notice, excluding the date notification is received. Such appeal must be filed in writing using the attached appeal form and in the manner prescribed on the form.

Rodney Brewer, Commissioner
Kentucky State Police

Attachment

cc: Tim Longmeyer, Secretary, Personnel Cabinet
Keith Peercy, Lt. Col., Commercial Vehicle Enforcement, Kentucky State Police
Leslie Gannon, Lt. Col., Admin. Division, Kentucky State Police
Scott Miller, Major, Admin. Support Troop, Kentucky State Police
Greg Jenkins, Major, CVE West Troop, Kentucky State Police
Amanda Cloyd, Commander, Human Resources, Kentucky State Police
Personnel File (2)