

**KENTUCKY PERSONNEL BOARD
MINUTES OF JANUARY 8, 2010**

1. The regular monthly meeting of the Kentucky Personnel Board was called to order by Chair Tina Goodmann on January 8, 2010, at approximately 9:30 a.m., 28 Fountain Place, Frankfort, Kentucky.

Board personnel present:

Christine J. Goodmann, Chair
M. Suzanne Cassidy, Vice Chair
Betty Gibson, Member
Larry B. Gillis, Member
David B. Stevens, Member
Wayne. "Doug" Sapp, Member
David Hutcheson, Member
Mark A. Sipek, Executive Director and Secretary
Linda R. Morris, Administrative Section Supervisor
Cynthia Perkins, Administrative Specialist

Board personnel absent:

Boyce A. Crocker, General Counsel (on military leave)

The first order of business was to swear in the newest Board Member, Mr. David Hutcheson who was appointed by Governor Steven Beshear to complete the term vacated by former member Mr. Bart Frazer. Mr. Hutcheson was sworn in by Mark A. Sipek, Executive Director and Secretary.

2. **READING OF THE MINUTES OF REGULAR MEETING HELD DECEMBER 11, 2009**

The minutes of the last Board meeting had been previously circulated among the members. Chair Goodmann asked for additions or corrections. Ms. Gibson moved to approve the minutes, as submitted. Dr. Stevens seconded, and the motion carried 6-0. [Chair Goodmann does not vote unless noted.] The Board members signed the minutes.

3. EXECUTIVE DIRECTOR'S REPORT

Mr. Sipek welcomed Mr. Hutcheson to the Board.

Mr. Sipek noted that a copy of the Court of Appeals opinion regarding *Cabinet for Health and Family Services v. Ruth Walker*, 2008-CA-000700-MR, has been provided to the Board members. The Court of Appeals ruled that on direct appeal the Franklin Circuit Court opinion and order is affirmed. However, the Franklin Circuit Court opinion and order on Ms. Walker's cross-appeal is remanded back, specifically to address Ms. Walker's discrimination claim.

Dr. Stevens asked what the issues were in this case. Mr. Sipek stated that it was largely an American with Disabilities Act claim. Ms. Walker, a Nurse Consultant with the Cabinet for Health and Family Services, has multiple chemical sensitivity. At issue was whether or not Ms. Walker's condition could be accommodated so that she could work. Ms. Walker was placed on "directed sick leave." She was eventually resigned from her position by the Agency. The Board ordered her back to work citing that the Cabinet had not followed all the steps in the regulations. For the most part, the Franklin Circuit Court and the Court of Appeals agreed, except for the discrimination claim which was remanded back to Franklin Circuit Court. Mr. Sipek stated that he did not know how significant that issue is, as she may not get any additional relief. Although Ms. Walker has been reinstated, she has filed additional claims, which are still pending.

At the conclusion of Mr. Sipek's report, Chair Goodmann called for the Personnel Cabinet's Report.

4. PERSONNEL CABINET'S REPORT

The Hon. Dinah Bevington, General Counsel for the Personnel Cabinet, came forward to present the Personnel Cabinet's report.

Ms. Bevington provided a year-end review for 2009 as follows:

- 20 reprimand removals from employees' personnel files;
- Job submissions increased by 78 percent, 298,840 total job submissions (one person can apply for multiple jobs);
- 70 percent decrease for walk-in applicants, with a total of 971 (to fill out applications);
- 750 veterans were assisted with the assistance of Veterans Affairs;

- 75,243 personnel actions (i.e. name changes, appointments, disciplinary actions, demotions, etc.);
- and over \$2 Billion in payroll disbursements (for judicial, executive and legislative branches).

For 2010, the Cabinet is interested in proposed legislation, particularly the Veterans' Preference regulation (101 KAR 2:066). Hopefully, the statute amendments will pass and the Cabinet can withdraw its regulation.

The Governor's Employee Advisory Council (GEAC) is progressing, which may result in proposed regulation amendment.

Mr. Sapp asked about the removal of written reprimands. Ms. Bevington stated that written reprimands are not appealable because they are not deemed a penalization. However, the Cabinet in conjunction with the Personnel Board amended the regulation so that after a period of three years an employee can petition the Personnel Cabinet to have their written reprimand removed from their personnel file. Per the regulation, the employee cannot have any disciplinary actions during those three years; the employee must notify their current manager; Personnel Cabinet reviews it; and the Cabinet notifies the Agency to see if there is any reason it cannot be removed. Although the written reprimand is removed from the personnel file, the Cabinet retains it for possible litigation and retention issues.

Mr. Sipek asked if some requests were denied. Ms. Bevington stated there were, in large part because the employee did not qualify for the removal or there was no reprimand in the file. The Cabinet gives the Agency the opportunity to approve or disapprove of the removal, since the Agency may want it retained if they are considering disciplinary action. To-date, no Agency has requested that it not be removed. Mr. Hutcheson asked how the employees were notified of the amended regulation. Ms. Bevington stated through personnel memorandums, newsletters, and through public comments during the regulation amendment change.

5. ORAL ARGUMENTS

A. Edward Davis v. Tourism, Arts and Heritage Cabinet

Present were counsel for Appellant, the Hon. Gatewood Galbraith, and counsel for the Appellee, the Hon. Catherine York, for oral argument. The parties answered questions from the Board.

B. Joby Gossett v. Tourism, Arts and Heritage Cabinet

Present were counsel for Appellant, the Hon. Daniel Yeast, and counsel for the Appellee, the Hon. Catherine York, for oral argument. The parties answered questions from the Board.

C. Alan Miller v. Justice and Public Safety Cabinet (Request for Oral Argument Withdrawn by Appellee)

D. Bradley Mitchell v. Cabinet for Health and Family Services
(MOVED TO FEBRUARY)

6. **MOTIONS**

- A. Michael Agbor v. Transportation
--Appellant's Motion for Extension of Time to File Exceptions
--Appellee's Response to motion

Mr. Sipek stated that no parties were present and that the Board can discuss it now or in closed session. The Board agreed to discuss this matter in closed session.

7. **CLOSED SESSION**

Ms. Gibson moved that the Board go into Executive Session for the purposes of discussing complaints, proposed or pending litigation, and deliberations regarding individual adjudications; Mr. Hutcheson seconded. Chair Goodmann stated that the motion had been made and seconded for the Personnel Board to retire into closed Executive Session, passed by a majority vote of the members present, with enough members present to form a quorum. Pursuant to KRS 61.810(1) (c), (f), and (j), the Kentucky Open Meetings Act, the Board will now retire into closed Executive Session. Specific justification under the Kentucky Open Meetings Act for this action are as follows, because there will be discussion of proposed or pending litigation against or on behalf of the Board; and deliberations regarding individual adjudication. The motion carried 6-0. (10:41 a.m.)

Ms. Gibson moved to return to open session. Ms. Cassidy seconded and the motion carried 6-0. (12:34 p.m.)

9. **CASES TO BE DECIDED**

Motions

A. Michael Agbor v. Transportation

Ms. Cassidy moved to deny Appellant's motion for extension of time to file exceptions. Ms. Gibson seconded and the motion carried 6-0.

The Board reviewed the following cases. At that time, the Board considered the record including the Hearing Officers' findings of fact, conclusions of law and recommendations, any exceptions and responses which had been filed, and oral arguments where applicable.

A. Edward Davis v. Tourism, Arts and Heritage Cabinet

Ms. Cassidy moved to defer this matter to the next Board meeting. Dr. Stevens seconded and the motion carried 6-0.

B. Joby Gossett v. Tourism, Arts and Heritage Cabinet

Dr. Stevens moved to defer this matter to the next Board meeting. Ms. Gibson seconded and the motion carried 6-0.

C. Alan Miller v. Justice and Public Safety Cabinet

Mr. Gillis moved to note that the Appellee had withdrawn its exceptions and request for oral argument and to accept the recommended order sustaining the appeal. Ms. Cassidy seconded and the motion carried 6-0.

D. **Bradley Mitchell v. Cabinet for Health and Family Services
(Moved To February)**

E. Terry Farmer v. Transportation Cabinet - **Deferred from December**

Ms. Cassidy moved to note Appellee's exceptions, Appellant's exceptions and response and oral arguments, and to alter the recommended order in accordance with the Final Order attached to these minutes sustaining the appeal to the extent that Appellant be returned to his previous classification as a Transportation Engineer Supervisor with back pay and dismissing the remainder of Appellant's claims. Dr. Stevens seconded and the motion carried 6-0.

F. Robert Perkins v. Transportation Cabinet - **Deferred from December**

Mr. Gillis moved to note Appellee's exceptions, Appellant's exceptions and oral arguments, and to alter the recommended order in accordance with the Final Order attached to these minutes sustaining the appeal to the extent that Appellant is retroactively detailed to special duty for the time period of January 1, 2005 to April 7, 2008, without additional compensation. The remainder of Appellant's appeal is dismissed. Dr. Stevens seconded and the motion carried 6-0.

G. Ted Schlenker v. Justice and Public Safety Cabinet

Ms. Gibson moved to note Appellant's exceptions and Appellee's response and to accept the recommended order dismissing the appeal. Mr. Hutcheson seconded and the motion carried 6-0.

H. Michael Agbor v. Transportation Cabinet – 2 appeals –

Ms. Cassidy moved to accept the recommended order dismissing the appeal. Ms. Gibson seconded and the motion carried 6-0.

I. Shannon Martin v. Transportation Cabinet

Mr. Sapp moved to accept the recommended order dismissing the appeal. Mr. Gillis seconded and the motion carried 6-0.

J. Irvin Mattingly v. Education and Workforce Development Cabinet

Ms. Gibson moved to accept the recommended order sustaining the appeal to the extent Appellant is reclassified to the position of Workforce Development Specialist II and dismissing all remaining issues. Mr. Hutcheson seconded and the motion carried 6-0.

K. Lori Miley v. Public Protection Cabinet

Mr. Sapp moved to accept the recommended order dismissing the appeal. Ms. Cassidy seconded and the motion carried 6-0.

L. Hondo West v. Tourism, Arts and Heritage Cabinet

Mr. Gillis moved to accept the recommended order dismissing the appeal. Ms. Gibson seconded and the motion carried 6-0.

Show Cause Order(s) – Appeal(s) Dismissed - No Response(s) Filed

The following case(s) had a show cause order entered by the hearing officer recommending that the appeal(s) be dismissed for failure to timely prosecute unless a statement was filed by the Appellant(s) stating sufficient cause to excuse their failure to appear at the scheduled hearing. There were no responses submitted by the Appellant(s) to the show cause order(s).

M. John Howard v. Cabinet for Health and Family Services

N. James Lambert v. Justice and Public Safety Cabinet

O. James Leachman v. Justice and Public Safety Cabinet

Ms. Gibson moved to find that the Appellant(s) had not responded to the show cause order(s) and that the recommended order be accepted dismissing the appeal(s) for failure to timely prosecute the appeal(s). Dr. Stevens seconded and the motion carried 6-0.

10. **WITHDRAWALS**

Dr. Stevens moved to consider the following withdrawals of appeals *en bloc* and to accept the withdrawals and dismiss the appeals. Ms. Gibson seconded and the motion carried 6-0.

A. Judy Fenley v. Personnel Cabinet

B. Rondal Keith Jervis v. Justice and Public Safety Cabinet (2009-131)

C. Meagan Mitchell v. Personnel Cabinet

- D. Ashley Morrison v. Personnel Cabinet
- E. Scott Wallen v. Personnel Cabinet
- F. Linda Weyler v. Cabinet for Health and Family Services
- G. Daniel T. A'Hearn v. Personnel Cabinet
- H. Brian Shane Cook v. Transportation Cabinet
- I. Connie Shepherd v. Education and Workforce Development Cabinet

11. SETTLEMENTS

Ms. Gibson moved to consider the following settlements *en bloc* and to accept the settlements as submitted by the parties sustaining the appeal to the extent set forth in the settlement. Mr. Sapp seconded and the motion carried 6-0.

- A. Larissa Pryor v. Cabinet for Health and Family Services (mediated)
- B. George McQuinn v. Justice and Public Safety Cabinet (mediated)

12. OTHER

- A. Election of Vice Chair

Ms. Gibson nominated Ms. Sue Cassidy for Vice-Chair; Mr. Sapp seconded. Dr. Stevens moved that nominations cease; Mr. Sapp seconded. The motion carried 5-0, with Ms. Cassidy abstaining.

- B. Discussion of Proposed Legislature

- KRS 18A.0551 (amended)

One concern Mr. Gillis raised regarding the Personnel Board elections was under Section 1, (3)(a) "in alphabetical order, with a brief biography of each candidate," which had been deleted. Mr. Sipek explained that the goal was to keep the statute simple, since it is difficult to get through legislation, and that detailed language could be added in the regulation. Another concern Mr. Gillis raised under Section 1(3)(d) and (4)(d) was deleting language verifying authentication of the voting employee. Mr. Sipek stated that the idea is to get an emergency regulation ready to go if the statute passes, because otherwise the effective date of the statute would not be until July 15, 2010, after the election. Mr. Sipek stated that Section 2 covers emergency regulation. Mr. Sapp asked how this would work. Mr. Gillis stated that an "E" regulation and an "O" regulation are submitted simultaneously.

Chair Goodmann had hoped that the Kentucky Human Resources Information System (KHRIS) would have been up and running in order to authenticate the electronic information submitted by employees, but it has not happened yet.

Mr. Sapp made reference to the biography of the candidate. Mr. Sipek stated that the biography was comprised of the candidate's name, job title, agency and length of service. Mr. Sipek stated that the ballot would contain the names of the candidates and then there would be another place to go, for example Personnel Board website, to look at the biography, which could contain more detail about the candidate. Ms. Cassidy stated that ballots usually just contain the names and you go somewhere else to find out about the candidate. Mr. Sapp said that listing a name would not mean much to most people, unless that candidate happened to be in the voter's area.

Mr. Sipek stated that this amendment almost passed legislation last year and was hesitant about recommending changes at this point. He added that Representative Kent Stevens is now sponsoring the bill.

After further discussion, Mr. Sipek stated he will prepare a draft of the proposed regulation by the February Board meeting.

➤ House Bill 149 – Representative Cherry

Chair Goodmann stated that she and Mr. Gillis had some concerns about HB 149. One concern [p. 26 (7)] was the possibility of non-merit employees "burrowing" into merit employee positions. This bill would make the initial probationary period twelve (12) months. Mr. Sipek stated that the language is so broad, that it may be an impediment for certain employees to gain status in their new position. Mr. Sipek asked Mr. Gillis if there was an exclusion for career employees, which would be one way of addressing this issue. Chair Goodmann stated career employees are covered by reversion. Mr. Gillis said that there is language "unless that employee had previously had status in the classified service," but he thought this may cause non-merit employees to "burrow" earlier. Mr. Sapp asked if the concern is the amount of time of the probationary period. Mr. Gillis said it was.

As to [p. 26 (8)], "Notification to an employee on initial or promotional probation of the reason the probationary employment has been terminated . . . shall not confer a right to appeal to the Board." Mr. Sipek stated that agencies are concerned that probationary employees would have an appeal right by providing a reason, and that this language will be a "security blanket."

Chair Goodmann had a question pertaining to the definition of “reentrance” [p. 5 (33)] and the definition of “reversion” [p. 6 (36)], which contains both terms. Mr. Sipek stated that there is no reason to define a term if you are not going to use that term anywhere else in the statute. Mr. Sipek stated that the term “reentrance” has the possibility of harming the existing reversion rights that employees have.

Chair Goodmann also posed a question regarding the language “otherwise penalized” being removed [p. 16 (3)], whether there are instances employees would not be able to file an appeal because that language was taken out. Mr. Sipek stated that “reclassification” or “reallocation” are instances where it would only be a penalization if there was a reduction in pay or grade.

Mr. Gillis stated that the change in the definition of penalization [p. 4 (24)], specifically, “denial of promotion” could increase the number of appeals. Especially, if a hundred (or a thousand) applicants who did not even interview, were notified by letter that they may have been penalized! Mr. Sipek stated that the person would have to show they were not given appropriate consideration. Mr. Sapp said if someone is on the register and did not get an interview, for example the register for Correctional Officer may list a hundred names and only ten get an interview, what about the other ninety. Mr. Sipek stated that applicants already have that right and the Board has accepted those appeals; however, more people would get notice of it.

Chair Goodmann asked how the Board would get their concerns to Representative Cherry. Mr. Sipek stated that they could either write a letter or talk to him, or both. Mr. Sipek stated that the Board members need a copy of the complete bill and can decide at the February Board meeting the position of the Board. However, if the bill makes significant progress, Mr. Sipek will notify them by e-mail.

There being no further business, Ms. Gibson moved to adjourn. Dr. Stevens seconded and the motion carried 6-0. (1:30 p.m.)

Christine J. Goodmann, Chair

M. Suzanne Cassidy, Vice Chair

Betty Gibson, Member

Larry B. Gillis, Member

Dr. David B. Stevens, Member

Wayne D. Sapp, Member

David Hutcheson, Jr., Member