

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

JAMES SCOTT HARRINGTON and
JOSHUA A. KELLERMAN,

Plaintiffs,

vs.

Case No. 5:20-cv-04081-HLT-KGG

STATE OF KANSAS, HERMAN JONES, AND,
JASON DEVORE,

Defendants.

Motion to Dismiss and Memorandum in Support

Defendants move, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss counts VI and VII of the Amended Complaint, *Doc. 43*, for failure to state a claim upon which relief may be granted.

Plaintiffs claim their dismissal/constructive discharge violated their Fourteenth Amendment right to due process. *Doc. 43, pp. 41-43*. Plaintiffs allege they had a property interest in continued employment with the KHP as members of the classified service. Defendants contend plaintiffs had no property interest, and even if they did, the plaintiffs were afforded constitutionally adequate pre-termination due process and plaintiffs failed to avail themselves of the post-deprivation due process afforded under the Kansas Civil Service Act.

Defendants advise the Court that Judge Crabtree elected to certify questions regarding the issue of whether the rank of Major is within the classified service to the Kansas Supreme Court under K.S.A. 60-3201. *See Bruce v. Kelly, et al.*, Case No. 20-4077-DDC-GEB, *Doc. 22*.

I. Plaintiffs had no property interest in continued employment with the KHP. Defendants are therefore entitled to dismissal of the due process claims

Plaintiffs claim a property interest in continued employment with the KHP, and that they

were deprived of that interest without due process. The theory that plaintiffs were entitled to continued employment with the KHP in the classified service cannot withstand scrutiny.

Plaintiffs held the rank of Major within the KHP. Doc. 43, ¶¶ 22 (“Harrington, with the rank of Major”), 223 (“Kellerman, with the rank of Major”) 372 (“Kellerman’s acceptance of a demotion in rank and termination amounted to a constructive dismissal from employment at the rank of Major”).

The Due Process clause of the Fourteenth Amendment protects against governmental deprivations of life, liberty, or property “without due process of law.” U.S. Const. amend. XIV; *Farthing v. City of Shawnee, Kan.*, 39 F.3d 1131, 1135 (10th Cir. 1994).

In determining whether an individual has been deprived of his right to procedural due process courts must engage in a two-step inquiry: (1) did the individual possess a protected interest such that the due process protections were applicable; and if so, then (2) was the individual afforded an appropriate level of process.

Farthing, 39 F.3d at 1135 (citations omitted). Property interests are not created or defined by the Constitution. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972). Property interests are created, and their scope is defined, by state law. *Id.* at 577, *Paul v. Davis*, 424 U.S. 693, 710 (1976) (protected property interest must be recognized and protected by state law). A property interest may be grounded in various sources of state law, including “state statutes, local ordinances, established rules, or mutually explicit understandings.” *Dickeson v. Quarberg*, 844 F.2d 1435, 1437 (10th Cir. 1988).

Plaintiffs’ bald assertion that they possessed or desired a property interest is insufficient. A legitimate expectation to continued employment must be created by statute or regulations placing substantive restrictions on a government actor's ability to make a personnel decision. *Hennigh v. City of Shawnee*, 155 F.3d 1249, 1253 (10th Cir. 1998). Employees whose government employer may fire them at will for any reason or for no reason at all do not possess a property interest in continued public employment. *Hesse v. Town of Jackson*, 541 F.3d 1240, 1245 (10th

Cir. 2008). Under Kansas law, “the tenure of any office not provided for in the constitution may be declared by statute, and when not so declared such office shall be held at the pleasure of the appointing authority.” *Stoldt v. City of Toronto*, 234 Kan. 957, 964, 678 P.2d 153, 160 (1984). “Kansas law clearly establishes the incumbent to a public office enjoys no property or vested interest in public office.” *Leek v. Theis*, 217 Kan. 784, 811, 539 P.2d 304 (1975).

Plaintiffs had no property interest in their positions as Majors nor did they have a property interest in any lower rank within the classified service. The rank of Major is not within the classified service. Further, once demoted from the rank of major, plaintiffs were subject to a 6-month probationary period from which they could be dismissed without cause. Thus, plaintiffs had no property interest in continued employment with the KHP. Whatever position plaintiffs might have occupied, they could have been fired at will for and had no property interest.

A. The rank of major is not within the classified service.

Before 2018, K.S.A. 74-2113(a) provided:

There is hereby created a Kansas highway patrol. The patrol shall consist of: (1) A superintendent, who shall have the rank of colonel and who shall have special training and qualifications for such position; (2) an assistant superintendent, who shall have the rank of lieutenant colonel; and (3) officers and troopers who are appointed in accordance with appropriation acts and as provided in this section. The superintendent and assistant superintendent shall be within the unclassified service under the Kansas civil service act. The assistant superintendent serving on the effective date of this act shall be appointed to such position by the superintendent. Thereafter, the assistant superintendent shall be appointed by the superintendent from among the members of the patrol, and shall serve at the pleasure of the superintendent. If a person appointed as superintendent or assistant superintendent is a member of the patrol when appointed, such person in each case, upon termination of the term as superintendent or assistant superintendent, respectively, shall be returned to a rank not lower than the rank such person held when appointed as superintendent or assistant superintendent. If such rank is filled at that time, a temporary additional position shall be created in such rank until a vacancy occurs in such rank. All other officers, troopers and employees shall be within the classified service under the Kansas civil service act.

L. 2009, ch. 134, § 1.

The statute was amended in 2018. L. 2018, ch. 18, § 1. The amendment transitioned the

rank of major to the unclassified service through development of the KHP's Career Progression Plan (CPP) and by operation of K.S.A. 75-2935(1)(x), which provides, in pertinent part that:

The unclassified service comprises positions held by state officers or employees who are:

...

(x) if designated by the appointing authority, persons in newly hired positions, including any employee who is rehired into such position and any current state employee who voluntarily transfers into, or is voluntarily promoted or demoted into such position, on and after July 1, 2015, in any state agency

In 2018, the legislature amended K.S.A. 74-2113 to effectuate the change. Prior to its amendment in 2018, subsection (a) of the statute had remained unchanged since 1991. H.B. 2159 added the position of assistant superintendent to the KHP. L. 1991, Ch. 234, § 1. The statute was amended by 2018 S.B. 369 and codified as K.S.A. 2019 Supp. 74-2113(a). The 2018 session law provides:

74-2113. (a) There is hereby created a Kansas highway patrol. The patrol shall consist of: (1) A superintendent, who shall have the rank of colonel and who shall have special training and qualifications for ~~such~~ **the** position; (2) an assistant superintendent, who shall have the rank of lieutenant colonel; and (3) officers and troopers who are appointed in accordance with appropriation acts and as provided in this section. The superintendent and assistant superintendent shall be within the unclassified service under the Kansas civil service act. ~~The assistant superintendent serving on the effective date of this act shall be appointed to such position by the superintendent. Thereafter,~~ The assistant superintendent shall be appointed by the superintendent from among the members of the patrol, and shall serve at the pleasure of the superintendent. If a person appointed as superintendent ~~or~~, assistant superintendent **or major** is a member of the patrol when appointed, ~~such~~ **the** person in each case, upon termination of the term as superintendent ~~or~~, assistant superintendent **or major**, respectively, shall be returned to a rank not lower than the rank ~~such~~ **the** person held when appointed as superintendent ~~or~~, assistant superintendent **or major**. If ~~such~~ **the** rank is filled at that time, a temporary additional position shall be created in ~~such~~ **the** rank until a vacancy occurs in such rank. All other officers, troopers and employees shall be within the classified service under the Kansas civil service act.

L. 2018, Ch. 18, § 1. The legislative history of S.B. 369, includes the testimony of former KHP Superintendent Mark Bruce, who pointed out that the rank of major requires candidates to leave classified service. *Doc. 45-1*.

Development of the Career Progression Plan (CPP) unintentionally required the highest ranking classified members of the Patrol, our majors, to become

unclassified employees, in order to be placed at the appropriate spot on the CPP.

Moving the majors to the unclassified service made them the only at-will uniformed members in the trooper ranks. They can be transferred, demoted or fired without cause

....

In fairness to our majors and in the best interests of the Patrol, I am requesting that their position be afforded the same, earned protection.

Id. The 2018 amendment restored a means for those serving at the rank of major to return to the classified service should their tenure as major be terminated by the Superintendent. The 2018 amendment restored the ability of those serving at the rank of major to return to the classified service should their tenure as major be terminated by the Superintendent.

As discussed in § 1.b (*infra*, p. 6), unless those promoted to the rank of major (and superintendent and assistant superintendent) were placed on unpaid leave of absence from their classified position before moving up to the rank of major (or superintendent or assistant superintendent), they are subject to a 6-month probationary period upon the return to a classified position. Stated differently, the only means by which either plaintiff *could* have remained within the classified service would have been by first securing a leave of absence from their position as captain before accepting the rank of major. The complaint does not allege either plaintiff secured the necessary leave of absence. Accordingly, plaintiffs left the classified service and entered the unclassified service.

The statute now provides the opportunity for superintendents, assistant superintendents, and majors upon termination of their terms in the unclassified service by placing them in the rank they had prior to the promotion to the unclassified service. The plain language of the statute states that “[a]ll other” officers and employees are classified employees. Including this language for majors would be superfluous and meaningless if the position of major were classified because classified employees already have protections under the civil service act. *See Wright v. Kansas Water Office*, 255 Kan. 990, 995, 881 P.2d 567 (1994) (“The [Kansas Civil Service Act] controls

a classified employee's employment status.”).

The Kansas Supreme Court instructs that a Kansas statute be interpreted by presuming “the legislature intended to change the law from how it existed prior to the amendment, and it is presumed that the legislature does not intend to enact useless or meaningless legislation.” *Kansas Dep't of Revenue v. Powell*, 290 Kan. 564, Syl. ¶ 7, 232 P.3d 856, 858 (2010). Also, a “court should avoid interpreting a statute in such a way that part of it becomes surplusage.” *State v. Van Hoet*, 277 Kan. 815, 826-27, 89 P.3d 606, 615 (2004).

The rank of major is unclassified, and all lower ranks and employees are classified. Plaintiffs had no property interest in continued employment at the rank of major.

B. Promotion and demotion within and into the classified service requires a mandatory probationary period before achieving permanent status.

Plaintiffs allege only that they held the rank of major. They do not allege they secured a leave of absence from the rank of captain in the classified service to hold the rank of major. They lost permanent status in their former position in the classified service by doing so. Though plaintiffs were entitled, under K.S.A. 74-2113 to return to the rank of captain, they were not entitled to permanent status in the classified service.

Plaintiffs were subject, pursuant to K.S.A. 75-2946 and K.A.R. 1-7-4(h), to a mandatory probationary 6-month period. *See* K.S.A. 75-2946 (“... all appointments within the classified service shall be for a probationary period, ... but dismissals, suspensions or demotions may be made at any time during such period.”); and K.A.R. 1-7-4(h) (“Each employee who is transferred, demoted, or promoted from any position in the unclassified service to a regular position in the classified service shall serve a probationary period of six months.”)

K.S.A. 74-2113, as amended in 2018, does not include any requirement that an individual return to their former position with permanent status. K.S.A. 75-2944(b) is an example where permanent status in classified service is preserved for employees who are promoted to a higher

position with probationary status but are subsequently dismissed before completing the probationary period in the new position. K.S.A. 74-2113 does not include similar language and does not require an individual be returned to his former position with permanent status. Preservation of an employee's permanent classified status while serving in an unclassified position is achieved by placement on leave of absence from the classified position pursuant to K.A.R. 1-9-6 (e), which provides:

Any employee with permanent status may be granted leave of absence without pay from the employee's classified position to enable the employee to take a position in the unclassified service, if the granting of this leave is considered by the appointing authority to be in the best interest of the service. Leave for this purpose shall not exceed one year, but the appointing authority may grant one or more extensions of up to one year, and the appointing authority may determine the number of extensions.

This did not occur when plaintiffs were promoted to Major. Plaintiffs forfeited permanent status when accepting the unclassified position of Superintendent without also securing a leave of absence from their classified position pursuant to K.A.R. 1-9-6(e).¹ Because plaintiffs were not on a leave of absence from their classified position pursuant to K.A.R. 1-9-6(e), they had no right to return to that position under the regulation after giving up his permanent status to accept the unclassified position of Major. Because of that probationary period, neither plaintiff had a protected property interest.

II. Claim for money damages under § 1983 for deprivation of due process is precluded by the Kansas Civil Service Act.

Even if plaintiffs possessed a property interest in continued employment, their claim is precluded because they were afforded constitutionally adequate pretermination due process and the Kansas Civil Service Act affords constitutionally adequate adequate post-deprivation due

¹ This regulation has last amended in 1995. The loss of permanent status in the classified service upon accepting an unclassified appointment is not new and preceded the date either plaintiff was first employed with the KHP. *Doc. 43*, ¶ 2 (Harrington employed with the KHP from 2000 to 2020), ¶ 4 (Kellerman employed with the KHP from 2003 to 2020).

process.

A permanent employee in the classified service has, under the Kansas Civil Service Act (KCSA), rights to continued employment in the absence of a legitimate cause for termination. *Wright v. Kansas Water Office*, 255 Kan. 990, Syl. ¶ 1, 881 P.2d 567 (1994); *Prager v. State, Dep't of Revenue*, 271 Kan. 1, 40, 20 P.3d 39 (2001).

On July 23, 2020, Plaintiffs each met with Col. Jones who advised plaintiffs he had been tasked with cleaning up the Patrol. Plaintiffs were presented the options of resigning or being dismissed. Plaintiffs asked Col. Jones why their employment was ending. They were told, “You know why.” Plaintiffs were given the option of resigning or being fired. *Doc. 43*, ¶¶ 194-199, 283-293. Neither plaintiff availed himself of an appeal from their dismissal/constructive discharge under the Kansas Civil Service Act. K.S.A. 75–2949(f).

A. Plaintiffs were afforded constitutionally adequate pre-termination due process.

The Due Process Clause does not require that a tenured public employee be notified he is under investigation prior to his pretermination hearing nor does it require that he receive “progressive discipline” before he is terminated. *Derstein v. State of Kansas*, 915 F.2d 1410, 1413 (10th Cir. 1990) (holding that the fact plaintiff did not know of internal investigation in advance of pretermination hearing was “not significant”); *Powell v. Mikulecky*, 891 F.2d 1454, 1458–63 (10th Cir. 1989) (discharging plaintiff at a summary meeting, without giving plaintiff prior notice he was under investigation or of the nature of the meeting, did not violate due process).

Assuming plaintiffs had a property interest in continued employment, they would have been entitled to only to “some form of hearing” prior to discharge. *Board of Regents v. Roth*, 408 U.S. 564, 571 n.8 (1972). Due process does not require advance notice of the purposes of a pretermination meeting. *Copple v. City of Concordia*, 814 F. Supp. 1529, 1538 (D. Kan. 1993). There need not be any delay between the “notice” and the “opportunity to respond.” *Powell*, 891

F.2d at 1459. The pretermination hearing is not intended to be an evidentiary hearing. *Copple*, 814 F. Supp. at 1538. The pretermination hearing need not definitively resolve the propriety of the discharge. *Brown v. Youth Center at Topeka*, 883 F.Supp. 572, 579 (D.Kan. 1995). “The pretermination hearing is merely the employee's chance to clarify the most basic misunderstandings or to convince the employer that termination is unwarranted.” *Powell*, 891 F.2d at 1459.

The Amended Complaint alleges plaintiffs were informed by Col. Jones that he had been appointed to “clean up” the KHP and the plaintiffs were presented the options of resigning or being dismissed.

B. Plaintiffs failed to avail themselves of the process afforded under the KCSA

The KCSA provides that an appointing authority may dismiss any permanent employee in the classified service when it considers that the good of the service will be served thereby. K.S.A. 75–2949(a) When a permanent employee is finally dismissed by the appointing authority, the employee may request a hearing from the Board to determine whether the appointing authority acted reasonably in taking such action under K.S.A.2003 Supp. 75–2949(f).

K.S.A. 75–2949 provides pre- and post-termination procedures for classified civil service employees. After the opportunity for a pretermination hearing, an employee can, within 30 days of the effective date of the employment action, request a post-termination hearing by an appeal to the Civil Service Board. Upon a proper request for a hearing, the Board shall grant a hearing in accordance with the procedures of the Kansas Administrative Procedure Act, K.S.A. 77–501 et seq. (KAPA), within 45 days of the request. K.S.A. 75–2949(f).

Prager v. State, Dep't of Revenue, 271 Kan. 1, 43, 20 P.3d 39 (2001). K.S.A. 75-2949(f) provides

(f) Any permanent employee finally dismissed, demoted or suspended, may request a hearing from the state civil service board to determine the reasonableness of such action. Each such request for a hearing shall be in writing and shall be filed in the office of the director of personnel services within 30 calendar days after the effective date of the dismissal, demotion or suspension. Additional days shall not be added to the thirty-day period in which an appeal may be filed if the notice of the effective date of the dismissal, demotion or suspension is mailed to the employee. The board shall grant the employee a hearing in accordance with the

provisions of the Kansas administrative procedure act within 45 calendar days after receipt of such request. At the hearing the burden of proof shall be upon the employee to establish that the appointing authority did not act reasonably in taking such action.

When statute provides plaintiffs an administrative remedy, exhaustion of that remedy is required before a litigant can resort to the courts. *Pecenka v. Alquest*, 232 Kan. 97, 100, 652 P.2d 679 (1982).

Plaintiffs did not appeal their dismissal/constructive discharge as under the Kansas Civil Service Act, K.S.A. 75-2925 *et seq.* (KCSA). The procedures provided under the KCSA affords constitutionally adequate post-termination due process. Thus, even assuming plaintiffs had a property interest in continued employment in the classified service, they waived any due process claim by filing to pursue the remedies under the KCSA.

Conclusion

Plaintiffs' due process claims should be dismissed because (1) they had no property interest in continued employment and (2) even if they did, they were afforded constitutionally adequate due process protections.

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Certificate of Service

I hereby certify that I caused the foregoing to be electronically filed on November 16, 2021, a with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to:

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