COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-142

DARLETHA S. CLARK **APPELLANT**

VS.

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

PUBLIC PROTECTION CABINET **APPELLEE**

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

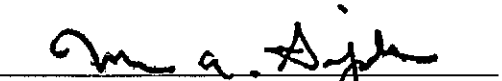
The Board at its regular December 2015 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated November 16, 2015, and being duly advised,

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 15th day of December, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Cannon Armstrong
Darletha S. Clark

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-142

DARLETHA S. CLARK — APPELLANT

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

PUBLIC PROTECTION CABINET,
AMBROSE WILSON IV, APPOINTING AUTHORITY — APPELLEE

* * * * *

This matter came on for a pre-hearing conference on September 24, 2015, at 9:30 a.m., ET, at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Boyce A. Crocker, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Darletha S. Clark, was present and was not represented by legal counsel. The Appellee, Public Protection Cabinet, was present and represented by the Hon. Cannon Armstrong. Ms. Sherry Butler appeared as agency representative.

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.

The Hearing Officer noted this appeal was filed with the Personnel Board on July 13, 2015. The Appellant checked the box for "Other Penalization," specifically: "Verbal reprimand put in evaluation did not file a grievance but would like to know if I should." In the narrative portion of her appeal form, Appellant recollected a meeting that occurred on June 16, 2015, and on June 19, 2015, when she was called to the Director's office and received a supervisory documentation "Verbal Reprimand."

At the pre-hearing conference, Appellant expressed her displeasure with having received this document, stating she had not been able to respond with her side of the story, and stating it was not true. Appellant detailed other instances of issues in the office. The Hearing Officer noted that the planned move of Appellant never occurred.

Counsel for the Appellee and also the Agency Representative explained on the record that supervisory documentation of a verbal reprimand is something that could be relied on in an interim review or in an evaluation, but otherwise is not placed in the personnel file. Counsel for the Appellee stated that if the verbal reprimand is referenced in the annual employee performance evaluation, it would then be in a personnel file.

The Hearing Officer suggested mediation to the parties. Counsel for the Appellee stated he would check with his client to determine if mediation would be helpful. Counsel also tendered a Motion to Dismiss, hand-delivering a copy to the Appellant at the same time. The Hearing Officer informed the Appellant he would give her 45 days to respond in writing to the Appellee's Motion to Dismiss. This also allowed time for the Appellee to determine if mediation would be helpful and for the mediation to occur, if possible.

The Appellant filed a timely response to the Appellee's Motion to Dismiss, and the matter is submitted to the Hearing Officer for a ruling.

BACKGROUND

1. During the relevant times, the Appellant, Darletha S. Clark, was a classified employee with status.

2. In its Motion to Dismiss, the Appellant contends the Personnel Board lacks jurisdiction to consider this matter as Appellant has not stated a "penalization" as that term is defined at KRS 18A.005(24), and also cites a previous Personnel Board case in support of its argument that neither a verbal reprimand nor a written reprimand would be appealable to the Personnel Board. Counsel noted that even though a verbal reprimand would not be placed in an employee's personnel file, nothing would prevent it from being discussed in an interim or year-end employee evaluation.

3. As noted, Appellant filed a timely response. Appellant contends the verbal reprimand included false information, and stated she did not believe false information should be allowed to be placed in any permanent document concerning her. Appellant also discussed the issue of being told to physically move her workstation and later being told she did not have to move. Appellant stated, "All I want is the verbal reprimand dismissed and my evaluation corrected." Appellant noted she has always in the past received an outstanding evaluation.

4. KRS 18A.005(24) states:

"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;

5. 101 KAR 2:180, Section 7(7) states:

Section 7. Reconsideration and Appeal Process.

(7) Within sixty (60) calendar days after an employee has received the written decision from the next line supervisor, the employee who has complied with this administrative regulation may appeal a final evaluation which has an overall rating in either of the two (2) lowest overall ratings to the Personnel Board.

6. KRS 18A.095(18)(a) states:

The board may deny a hearing to an employee who has failed to file an appeal within the time prescribed by this section; and to an unclassified employee who has failed to state the reasons for the appeal and the cause for which he has been dismissed. 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.

FINDINGS OF FACT

1. During the relevant times, the Appellant, Darletha S. Clark, was a classified employee with status.

2. The Hearing Officer finds Appellant is essentially appealing issuance of a verbal reprimand, and also inclusion of such in an interim evaluation. Appellant's main complaint, as the Hearing Officer finds, is her contention that the verbal reprimand contains false information.

3. The Hearing Officer finds the Personnel Board does not have jurisdiction to consider an appeal of a verbal reprimand per the Court of Appeals' decision in *Perkins v. Cabinet for Health and Family Services,* (unpublished) 2007 WL 1893374, as further discussed in the Personnel Board appeal of *Reed v. Cabinet for Health and Family Services,* (2013 WL 874366). *Perkins* essentially held that a written reprimand, and by extension, a verbal reprimand, would not be appealable to the Personnel Board.

4. Likewise, the Hearing Officer finds Appellant's claims regarding inclusion of the information in an interim evaluation would not be appealable per 101 KAR 2:180, Section 7(7), as it is not an appeal of an employee's final year-end evaluation with an "Unacceptable" or "Needs Improvement" rating. The Hearing Officer finds that interim reviews are also not appealable to the Personnel Board.

CONCLUSIONS OF LAW

1. The Hearing Officer concludes that pursuant to KRS 18A.095(18)(a), the Personnel Board may dismiss appeals over which it would not have jurisdiction following a pre-hearing conference. Following the pre-hearing conference and motion practice, the Hearing Officer concludes the Personnel Board lacks jurisdiction to further consider this appeal of a verbal reprimand and/or information being contained in an interim review/interim evaluation. The Hearing Officer understands this issue is very important to the Appellant, but the Personnel Board lacks the mechanism by which to address this issue. The Hearing Officer would still encourage the parties to consider mediation.

2. The Hearing Officer would note that if Appellant receives a year-end employee evaluation with one of the two lower overall scores, she may always appeal that to the Personnel Board.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **DARLETHA S. CLARK V. PUBLIC PROTECTION CABINET, (APPEAL NO. 2015-142)** 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).

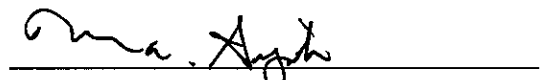
Any document filed with the Personnel Board shall be served on the opposing party.

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 Boyce A. Crocker** this 16th day of November, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Cannon Armstrong
Ms. Darletha S. Clark