

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2013-067**

LISA M. AUG

APPELLANT

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

**DEPARTMENT OF VETERANS AFFAIRS
KEN LUCAS, APPOINTING AUTHORITY**

APPELLEE

**** ** ***

The Board at its regular February 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated December 30, 2013, 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 19th day of February, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Dennis Shepherd
Lisa M. Aug

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2013-067**

LISA M. AUG

APPELLANT

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

**DEPARTMENT OF VETERANS' AFFAIRS,
KEN LUCAS, APPOINTING AUTHORITY**

APPELLEE

**** ** ***

This matter came on for a pre-hearing conference on May 14, 2013, at 10:00 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, Lisa M. Aug, was present and not represented by legal counsel. The Appellee, Department of Veterans' Affairs, was present and represented by the Hon. Dennis Shepherd.

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 notes this appeal was filed with the Personnel Board on March 20, 2013. Appellant claims "Penalized 20% on evaluation because of discrimination for disability." Appellant also attached a two-page narrative to the appeal form outlining what had happened with the calendar year 2012 evaluation including discussion of medical conditions for which she believes she was penalized, that the calendar year 2012 evaluation was performed improperly, and that the third interim review was performed after the final evaluation had been performed and/or delivered to her.

As relief, Appellant presented a document which appears to be the front page of a Grievance form previously filed. This document was attached to the Interim Order entered May 16, 2013. Appellant stated she was not seeking to have the score raised for the final calendar year 2012 evaluation. The Hearing Officer notes the Appellant had received a final score of 379, placing her in the "Highly Effective" category.

Subsequent to the first pre-hearing conference noted above, a second pre-hearing conference was held, at which time a briefing schedule was set. The Appellee filed a timely Motion to Dismiss. The Appellant was given ample time in which to respond and has not done so. The matter is submitted for a ruling on the Appellee's Motion to Dismiss.

BACKGROUND

1. During the relevant times, the Appellant, Lisa M. Aug, was a classified employee with status.

2. In its Motion to Dismiss, counsel for the Appellee, Department of Veterans' Affairs, contends Appellant has not been penalized, as the matter of which she complains, that is, receiving a "Highly Effective" evaluation for the calendar year 2012, led to a reward rather than a penalty. (Hearing Officer Note: Counsel is referring to the "Highly Effective" rating leading to one day of leave time for the employee who receives such.)

3. Counsel contends Appellant did not comply with KRS 18A.110 or the regulation at 101 KAR 2:180 which spell out the circumstances by which an evaluation may be appealed to the Personnel Board.

4. Counsel also contends that KRS 18A.095 does not authorize appeals based upon claims of discrimination, except for an action describing a penalty. Counsel contends there was no penalty; that the allegation of discrimination was based upon Appellant having been off work with a medical condition which required a short recuperative period. Counsel contends this was not a permanent condition.

5. According to counsel, Appellant noted her supervisor questioned her about the healing time for the medical issue, and did not make any connection between that and her final performance evaluation, other than to state a "thought" that she had been discriminated against because of the temporary medical condition.

6. As noted, Appellant did not file a response to the Motion to Dismiss, although given ample time in which to do so.

7. 101 KAR 2:180, Section 7, states:

Section 7. Reconsideration and Appeal Process.

(1) Within five (5) working days of a performance evaluation, an employee may request initial reconsideration of the performance evaluation by the evaluator.

(2) Within five (5) working days of the receipt of the request for reconsideration, the evaluator shall respond to the request in writing.

(3) If the employee refuses to sign the form in the employee response section, the evaluation shall not be eligible for reconsideration.

(4) Within five (5) working days after the initial reconsideration by the evaluator, an employee may submit a written request for reconsideration of the evaluation by the next line supervisor. If neither the evaluator nor the next line supervisor responds to the request for reconsideration in the designated time period, the employee may submit a written request to the appointing authority for response to the request for reconsideration and compliance with this section.

(5) The next line supervisor shall:

(a) Obtain written statements from both the employee and the evaluator; or

(b) Meet individually with the employee and the evaluator.

(6) The next line supervisor shall inform both the employee and evaluator in writing of the decision no later than fifteen (15) working days after receipt of the employee's request.

(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.

FINDINGS OF FACT

1. During the relevant times, the Appellant, Lisa M. Aug, was a classified employee with status.

2. The Hearing Officer finds, to the extent Appellant seeks to appeal her calendar year 2012 "Highly Effective" rating, that such is not a stated penalization.

3. The Hearing Officer finds that Appellant has not stated a clearly cognizable claim of discrimination, i.e., the temporary medical condition described in her appeal, about which Appellant claims her supervisor had questioned her use of sick time. Notably, the Hearing Officer finds Appellant did not claim that the condition precluded her from performing her job duties after she returned from sick leave, or that, for purposes of a "disability discrimination" claim, she was regarded as having an impairment, or actually having an impairment, which affected one of her major life activities. *McKay v. Toyota Motor Manufacturing, USA Inc.*, 110 F 3d 369 (6th Cir., 1997).

4. The Hearing Officer finds that Appellant, where she had claimed she was retaliated against as a result of requesting re-evaluation of her calendar year 2012 evaluation,

was making reference to “negative comments.” Lack of further elucidation of this allegation by Appellant, especially with no response to the Motion to Dismiss having been received, leads the Hearing Officer to believe that such does not amount to a penalization or a legitimate claim of retaliation which resulted from a protected activity. The Hearing Officer finds the “retaliation” would need to take the form of some type of tangible action, more than a negative comment from a supervisor.

CONCLUSIONS OF LAW

1. The Hearing Officer concludes as a matter of law that the Appellant has not stated a penalization over which the Personnel Board would have jurisdiction, and her claim of discrimination does not amount to one which states a legitimate claim of disability discrimination, as all that is claimed is a temporary medical condition, and at most, Appellant being questioned regarding her use of sick leave.

2. Likewise, the Hearing Officer concludes as a matter of law that Appellant’s claim of retaliation does not state an actual claim of retaliation, as the protected activity (requesting reconsideration of a year-end evaluation) resulted in no more than negative comments. It is worth noting that Appellant’s calendar year 2012 evaluation was still in the “Highly Effective” category.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **LISA M. AUG V. DEPARTMENT OF VETERANS’ AFFAIRS, (APPEAL NO. 2013-067)** 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 30th day of December, 2013.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Dennis Shepherd
Ms. Lisa M. Aug