

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2022-138

RHONDA BLANTON

APPELLANT

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

**JUSTICE AND PUBLIC SAFETY CABINET,  
DEPARTMENT OF PUBLIC ADVOCACY**

APPELLEE

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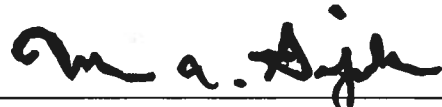
The Board, at its regular September 2023 meeting, having considered the record, including the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer dated August 18, 2023, and being duly advised,

**IT IS HEREBY ORDERED** that the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer 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 19<sup>th</sup> day of September, 2023.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Rhonda Blanton  
Hon. Melanie Lowe  
Hon. Rosemary Holbrook (Personnel Cabinet)

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**APPELLEE**

**\*\*\*\* \* \* \* \* \***

This matter came on for a pre-hearing conference on November 15, 2022, at 12:00 p.m., ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Stafford Easterling, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Rhonda Blanton, was present by telephone and was not represented by legal counsel. The Appellee, Justice and Public Safety Cabinet, Department of Public Advocacy, was present and represented by the Hon. Melanie Lowe, who also appeared by telephone.

The purposes of the pre-hearing conference were to determine the specific penalization(s) alleged by the Appellant, to determine the specific section of KRS Chapter 18A that authorizes this appeal, to determine the relief sought by the Appellant, to define the issues, to address any other matters relating to this appeal, and to discuss the option of mediation.

The Hearing Officer notes this appeal was filed with the Personnel Board on September 28, 2022. On the appeal form and during the pre-hearing conference, the Appellant, a classified employee with status, indicated she was appealing an employee evaluation in addition to advancing claims of retaliation and bullying. The Appellant further explained her claims in the narrative portion of the appeal form wherein she states, in pertinent part:

I am appealing the Grievance Form Decision and the Investigation Findings that were included from the Department of Public Advocacy.

I have experienced workplace harassment/bullying and have reported it several times[.]

Following discussion, the Agency requested an opportunity to file a dispositive motion explaining why this appeal should be dismissed as a matter of law. After discussion of the discovery and dispositive motion processes, a discovery and briefing schedule was established.

Thus, at issue in this appeal, are the Appellant's claims that she was subjected to penalization through an employee evaluation, the denial of her grievance, and being subjected to improper non-protected class harassment/bullying. The Appellant was assigned the burden of proof on all issues.

After the last pre-hearing conference, the parties agreed to a discovery schedule and a briefing schedule for the submission of a dispositive motion. Following the submission of what appears to be discovery requests and responses, on March 24, 2023, the Agency submitted a Motion to Dismiss and attached thereto certain documents upon which the Agency relies in its dispositive motion along with the Appellant's own prior statements.

On May 26, 2023, the Appellant submitted a response to the Agency's motions. In addition to offering a point-by-point response to the Agency's Motion, the Appellant made a number of important clarifications about her arguments in this appeal.

### **BACKGROUND AND FINDINGS OF FACT**

1. Upon review of the documents and the submissions, including the Appellant's clarification as to her legal arguments, the Hearing Officer finds that there are no genuine issues of material fact remaining. This appeal can be decided based on the appeal form and the Agency's "Motion to Dismiss" and attachments.

2. The Appellant filed her appeal with the Personnel Board on September 28, 2022, from an employee evaluation, the denial of her grievance and by being subjected to improper non-protected class harassment/bullying. The Appellant is employed by the Justice and Public Safety Cabinet, Department of Public Advocacy as a Legal Secretary in the Somerset office. The Appellant alleged in her Appeal Form that she had previously reported harassment to her employer and that "[e]ach time I have reported issues, it has been turned around to appear as though I am the problem and excuses made" and "that it is because of me causing it to happen and that I can make the work environment better." For the remainder of her Appeal Form, the Appellant offered a lengthy recitation of day-to-day frustrations underlying a completed EEO investigation and at least two (2) other internal Agency investigations, primarily about having to answer the office telephone more than she would like. However, importantly, the Appellant never alleged that any of the frustrations of which she was complaining were the result of any type of protected class discrimination. The Appellant also made clear that her "Employee Evaluation" claims relate to certain comments made in her "Mid-Year Interim Review" not her annual "Final Performance Evaluation." Accordingly, the Appellant's claims can be broken into two (2) sections: 1) the employee evaluation claims and 2) the day-to-day frustrations.

3. Counsel for the Appellee believed that the Personnel Board lacked jurisdiction over either section of the Appellant's claims and, therefore, the Board lacked jurisdiction to hear this appeal in its entirety. The Agency then requested time to file a written Motion to Dismiss.

4. In its Motion to Dismiss, as to the Appellant's employee evaluation claims, the Agency stated as follows:

[The Appellant's employee evaluation] claims reference her "Mid-Year Interim Review," and not a part of her "Final Performance Evaluation. (See Attachment 1 and Attachment 2)." 101 KAR 2:180 is the administrative regulation setting forth the employee performance evaluation process for Ms. Blanton and other employees classified under KRS 18A. Specifically, section 4, subsection (2) provides for a mid-year review and subsection (7) allows for an appeal process of the "Year-end Interim Review." Ms. Blanton does not qualify for Personnel Board Review under Section 7, Subsection (7) of this regulation because:

- a. The instant appeal relates to her Mid-Year Interim Review and comments contained within. 101 KAR 2:180, Section 7, Subsection (1).
- b. Ms. Blanton refused to sign her Mid-Year Interim Review or her Year-end Interim Review. 101 KAR 2:180, Section 7, Subsection (3). (See also Attachment 1 and Attachment 2).
- c. Ms. Blanton failed to initiate an appeal consistent with 101 KAR 2:180, Section 7 further making her ineligible for this appeal pursuant to subsection (7).
- d. Ms. Blanton's appeal was filed in September, nearly four (4) months prior to her Year-end Interim Review and accompanying rating[,] which occurred on January 25, 2023.
- e. This appeal is further untimely per 101 KAR 2:180, Section 7, Subsection (7). (See also 101 KAR 2:190).

5. In its Motion to Dismiss, as to the Appellant's claims regarding her day-to-day frustrations and how it amounts to a claim of discrimination, the Agency stated as follows:

Ms. Blanton fails in her appeal form to specify what protected class or classes are the basis of her claim of discrimination. In addition, her appeal statement fails to describe any discrimination or protected class-based agency action.

The Agency then listed the details of the Appellant's complaints, including disagreement with the findings of Agency inquiries regarding her grievance and EEO claims, frustrations that she was "demoted to cover phones" when such duties make up a substantial percentage of her Position Description, annoyance that the Agency declined to allow her to continue recording conversations in the workplace in violation of Agency policy, and imprecise allegations of "harassment/bullying" unrelated to any protected class status.

6. The Appellant filed a response to the Agency's Motion to Dismiss. In her response, the Appellant stated, in pertinent part, that this "appeal was for a grievance filed, in which statements were made in her evaluation to indicate that the appellant was a part of an altercation, and the statement is denied by the appellant based on hearsay." She later states that she alleges that she "was retaliated against based on religion, gender, and marital status, this has been updated to include FMLA," but the Appellant fails to link her allegations to any adverse action over which the Personnel Board has jurisdiction and/or any employee of the Agency with authority over her. At most, the Appellant alleges that a "temporary employee" who was later promoted to a non-supervisory administrative position:

was yelling at Miss. Blanton, slam things daily, intimidating and making demeaning comments to the appellant on a daily basis about her not being a true Christian and she would make facial gestures as though Miss. Blanton was gross and said she could not stand to look at her because she reminded her of her abusive mother, this was offensive to the appellant and she asked for it to stop several times.

7. The Appellant goes on to address other frustrations at length, including being exposed to unpleasant conversations with DPA clients, being offered a transfer to the Lexington DPA office, having her lunch set at a particular time, changes being made to her job duties over her DPA career, and the administrative staff, including herself, receiving salary increases that led to comparisons amongst coworkers.

8. After review of the parties' submissions, the Hearing Officer finds that there are no unresolved material issues of fact underlying this appeal and this appeal can be decided as a matter of law based on a review of the Appeal Form, the statement of the parties at the pre-hearing conference, and the Appellee's Motion to Dismiss. While it is clear that the Appellant is unhappy with the conditions of her current work environment and the Hearing Officer believes another attempt at workplace resolution with the Kentucky Employee Mediation Program may be warranted, the Personnel Board does not have jurisdiction over the Appellant's claims, either her employee evaluation claims or her claims relating to her day-to-day frustrations.

### **CONCLUSIONS OF LAW**

1. As to the Appellant's claims relating to her employee evaluation, the Appellant is seeking to appeal certain statements that were included in her Mid-Year Interim Review. However, the Personnel Board's jurisdiction over employee evaluations is set out in 101 KAR 2:190. Importantly, 101 KAR 2:190, Section 7(7) provides that an employee "may appeal a final evaluation which has an overall rating in either of the two (2) lowest overall ratings to the Personnel Board." The possible Annual Employee Performance Evaluation ratings are Exceptional, Distinguished, Valued, Satisfactory, Needs Improvement, and Unacceptable, with Exceptional being the highest possible rating and Unacceptable being the lowest possible rating. Here, it is undisputed that the Appellant did not receive an overall rating in either of the two (2) lowest overall ratings in her previous Annual Employee Performance Evaluations. Moreover, 101

KAR 2:190 does not contain a provision for Board review of interim employee evaluations, so the Board does not have jurisdiction over the Appellant's employee evaluation claims.

2. As to the Appellant's claims regarding her day-to-day frustrations, although the Appellant uses the phrases "harassment," "discrimination," and "hostile work environment," the Hearing Officer finds that, even if everything she alleges is accepted as true, the Appellant has not established a *prima facie* case of discrimination and/or retaliation based on protected class status and, further, the Hearing Officer finds it would be impossible for her to do so given the nature of her claims.

3. The Hearing Officer finds that the Appellant's claims are largely based on allegations of retaliation and that she was being treated differently than other similarly situated employees. In order to establish a *prima facie* case of retaliation, the Appellant must demonstrate:

- 1) That she was engaged in protected activity;
- 2) That she was subjected to adverse treatment by her employer; and
- 3) That there was a causal connection between the activity engaged in and the employer's treatment of her.

*Kentucky Dept. of Corrections v. McCullough*, 123 S.W.3d 130 (Ky. 2003).

4. Here, while the Appellant would be able to establish that she did engage in protected activity through the grievance process, the Appellant has not alleged that she was subjected to adverse treatment by her employer over which the Board has jurisdiction, and the Hearing Officer concludes that it would be impossible for the Appellant to do so, given the nature of her claims. The Appellant was not subject to disciplinary action, was not subject to penalization as defined by the previous version of KRS 18A.005(24), and cannot establish a *prima facie* case of discrimination, harassment, or retaliation as those terms are used in law.

5. Specifically, other than alleged statements made by a temporary employee stating the Appellant was not a "true Christian," none of the Appellant's allegations relate to protected class status. Instead, the Appellant asserts that she, in particular, was treated differently than others as a result of the ongoing conflicts in the office. As a result, because the Appellant has not – and cannot -assert(ed) that her alleged mistreatment was based on her membership in a particular protected class, the Hearing Officer finds that the Appellant's claims are analogous to the "class of one" allegations discussed in *Enquist v. Oregon Dept. of Agr.*, 553 U.S. 591 (2008).

6. In *Enquist*, the Plaintiff alleged she was penalized not because she was a member of a protected class (i.e. age, race, gender, religion etc.) but for arbitrary, vindictive, and malicious reasons. Such a claim sounds in the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and is known as a "class-of-one" claim.

7. In resolving claims that an individual employee is being treated differently for non-protected class reasons, the *Enquist* court distinguished between the government acting as a sovereign and the government acting as an employer. It held that “the government as employer indeed has far broader powers than does the government as sovereign.” *Id.* at 598. The court went on to say that “...the class of one theory of equal protection – which presupposes that like individuals should be treated alike, and that to treat them differently is to classify them in a way that must survive at least rationality review – is simply a poor fit in the public employment context. To treat employees differently is not to classify them in a way that raises equal protection concerns. Rather, it is simply to exercise the broad discretion that typically characterizes the employer-employee relationship.” *Id.* at 605.

8. Here, the Appellant claims “harassment,” “discrimination,” and a “hostile work environment” based on an extensive list of day-to-day frustrations, including being exposed to unpleasant conversations with DPA clients, being offered a transfer to the Lexington DPA office, having her lunch set at a particular time, changes being made to her job duties over her DPA career, and the administrative staff, including herself, receiving salary increases that led to comparisons amongst coworkers. The Hearing Officer notes that the Appellant does not claim discrimination in violation of KRS Chapter 344 or KRS 18A.140(1) and the Board does not have jurisdiction to resolve the Appellant’s “class of one” claims nor her day-to-day frustrations. Lastly, to the extent that the Appellant complains of a temporary employee allegedly telling her that she was not a “true Christian,” the Hearing Officer concludes that such an allegation cannot amount to actionable discrimination as defined by KRS Chapter 18A.

9. Although the standard for dismissal of an appeal involving claims of discrimination, harassment, and/or retaliation without the need for evidentiary hearing is quite high, the Hearing Officer finds that this is one of those rare cases that require dismissal on the pleadings. That is because, even if the Appellant is able to fully establish everything she seeks to establish, the Appellant fails to state a claim upon which relief can be granted. The Hearing Officer concludes that the Appellant has not advanced any facts or claims that could possibly establish even a *prima facie* case of discrimination, harassment, or retaliation due to any type of protected class status. Further, to the extent that the Appellant is arguing that she is being treated differently than her coworkers for arbitrary, vindictive, and malicious reasons, it is also clear that the Board does not have jurisdiction to resolve “class of one” claims.

10. As a result, after review of all the materials submitted, the Hearing Officer concludes that the Appellant’s frustrations are not covered by KRS Chapter 18A and do not rise to the level over which the Board would have jurisdiction, given the absence of protected class status. The Hearing Officer concludes that it would be impossible for the Appellant to establish penalization through her Mid-Year Interim employee evaluation, through the Agency’s denial of her grievance, and through her allegations of non-protected class harassment/bullying. The Hearing Officer further concludes that the Personnel Board does not have jurisdiction over the Appellant’s claims and this appeal must be dismissed as a matter of law.

**RECOMMENDED ORDER**

The Hearing Officer recommends to the Kentucky Personnel Board that the appeal of **RHONDA BLANTON V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF PUBLIC ADVOCACY (APPEAL NO. 2022-138)** 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 fifteen (15) 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).

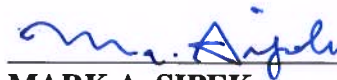
**Any document filed with the Personnel Board shall be served on the opposing party.**

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 the Hearing Officer this 18<sup>th</sup> day of August, 2023.

**KENTUCKY PERSONNEL BOARD**



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**MARK A. SIPEK**  
**EXECUTIVE DIRECTOR**

A copy hereof this day emailed and mailed to:

Rhonda Blanton  
Hon. Melanie Lowe  
Hon. Rosemary Holbrook (Personnel Cabinet)