

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2012-079

VICKIE BROCKMAN

APPELLANT

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

**CABINET FOR HEALTH AND FAMILY SERVICES  
J. P. HAMM, APPOINTING AUTHORITY**

**APPELLEE**

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The Board at its regular April 2013 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated March 20, 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 \_\_\_\_\_ day of April, 2013.

**KENTUCKY PERSONNEL BOARD**

**MARK A. SIPEK, SECRETARY**

A copy hereof this day sent to:

Hon. Mary Tansey  
Hon. Robert L. Bertram  
Hon. Anna Whites  
J.P. Hamm

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These matters came on for pre-hearing conference on January 16, 2013, at 11:00 a.m. at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellant, Vickie Brockman, was present and represented by the Hon. Anna Stewart Whites, who was appearing for the law office of Robert Bertram. Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Mary Tansey.

The purposes of the pre-hearing conference were to discuss the status of these appeals, to discuss any discovery issues, and to reschedule a date for the evidentiary hearing.

This matter is now before Hearing Officer Boyce A. Crocker for a ruling the Appellee's Motion to Dismiss. The Appellee had filed a motion to dismiss on May 21, 2012, subsequent to Appellant having filed her appeal on March 30, 2012. The Appellant, by counsel, filed a response to the motion to dismiss on February 20, 2013. The motion to dismiss was filed prior to the first pre-hearing conference in this matter.

**BACKGROUND**

1. During the relevant times, Appellant was a classified employee with status.
2. The Appellant filed this appeal, as noted, on March 30, 2012, and checked the box for "Other Penalization" and specified "Hostile Work Environment." In the narrative portion of the appeal, the Appellant stated, "See attached document."
3. The document attached to the appeal form appears to be correspondence from the Appellant directed to Howard J. Klein, Appointing Authority for the Appellee, Cabinet for Health and Family Services (CHFS). Specifically, the Appellant appears to be responding to

various allegations, such as unsatisfactory performance of duties and lack of good behavior. The Appellant stated, "I know that there will be retaliation from my supervisory personnel after you receive this letter; therefore I am requesting that I be transferred to the probation and parole position at Russell County."

4. The Appellee's motion to dismiss contends that the April 2, 2011 letter was actually a response to a March 30, 2011 letter which notified the Appellant of the Appellee's intent to suspend her, which it carried forth on April 5, 2011. The Appellant was suspended for ten days for various allegations. The Appellee states, "Thus, the only basis for the hostile work environment that Ms. Brockman has asserted is the ten-day suspension imposed by the Cabinet on April 5, 2011." The Appellee contends this appeal is outside the timeframe set by KRS 18A.095.

5. In her response, the Appellant, by counsel, acknowledges that she never appealed the ten-day suspension received by letter dated April 5, 2011. Counsel states that the Appellant filed an appeal a year later, alleging the Cabinet had imposed a hostile work environment on her, and breached various policies. Counsel states "Brockman's appeal states that she was appealing due to improper discharge, improper discipline associated with that discharge, and an on-going hostile work environment later."

6. However, the Hearing Officer notes the Appellant was not actually discharged from employment until dismissed by letter dated June 14, 2012, which is the subject of a separate appeal, Appeal No. 2012-182. Counsel states, "While the April 5, 2011 suspension letter is certainly proof that her supervisor was not acting appropriately or in good faith, the present appeal is not an appeal of that particular suspension, and should not be considered as such." In fact, reviewing the totality of the Appellant's response to the motion to dismiss, counsel appears really to be arguing the dismissal which occurred in June 2012.

7. Counsel also contends that the appeal was timely filed.

8. 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, Appellant was a classified employee with status.

2. The Hearing Officer finds that the Appellant has not stated a claim in Appeal No. 2012-079 over which the Personnel Board would have jurisdiction. The Hearing Officer disagrees with counsel for the Appellant, and believes this appeal, while not explicitly appealing the suspension, essentially is attempting to argue and dispute matters which may have been in the April 5, 2011 suspension letter, especially as the only document attached to the appeal form was apparently a response to an intent to suspend.

3. The Hearing Officer finds the Appellant in her response to the motion to dismiss is arguing about the dismissal, that such arguments are better brought forth during the pending evidentiary hearing on the dismissal scheduled for April 2013.

4. The Hearing Officer finds that the Appellant baldly stating a “hostile work environment” and offering no more than a response to an intent to suspend letter a year after the suspension was imposed does not state a claim over which the Personnel Board would have jurisdiction. To the extent Appellant believes she was subject to a hostile work environment, the Hearing Officer believes such evidence could be offered at the hearing on her dismissal, either as a defense to the matters raised in the dismissal letter or as rebuttal to specific testimony. However, it cannot be raised in this fashion in an appeal which the Hearing Officer believes is a dispute for a suspension which would be untimely.

5. The Hearing Officer finds that the Personnel Board does not have jurisdiction to grant relief for this appeal, and it should be dismissed. See KRS 18A.095(18)(a)

### **CONCLUSION OF LAW**

The Hearing Officer concludes, as a matter of law, that pursuant to KRS 18A.095(18)(a) the Personnel Board lacks jurisdiction to grant relief on this appeal to the extent that it is an appeal of a year-old suspension, and would be untimely. To the extent that Appellant claims an on-going hostile work environment as a defense to the dismissal, the Hearing Officer notes the appeal on the dismissal is currently scheduled for an evidentiary hearing and that Appellant may be able to raise such as a defense, and has expressed her willingness to do so in the response to the motion in this appeal.

### **RECOMMENDED ORDER**

The Hearing Officer recommends to the Personnel Board that the appeal of **VICKIE BROCKMAN V. CABINET FOR HEALTH AND FAMILY SERVICES (Appeal No. 2012-079)** 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 \_\_\_\_\_ day of March, 2013.

**KENTUCKY PERSONNEL BOARD**

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**Mark A. Sipek**  
**Executive Director**

A copy hereof this day mailed to:

Hon. Robert L. Bertram  
Hon. Anna S. Whites  
Hon. Mary Tansey