

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2022-154

RICHARD EHLING

APPELLANT

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

JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF JUVENILE JUSTICE

APPELLEE

*** **

The Board, at its regular June 2023 meeting, having considered the record, including the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer dated May 1, 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 13th day of June, 2023.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

Copies hereof this day sent to:

Richard Ehling
Hon. Heather M. Lee
Hon. Rosemary Holbrook (Personnel Cabinet)
Cynthia Watson

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** ** * ** * ** *

This matter came on for a pre-hearing conference on January 23, 2023, at 11:30 a.m., ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Richard Ehling, was present in person and was not represented by legal counsel. The Appellee, Justice and Public Safety Cabinet, Department of Juvenile Justice, was present by telephone and represented by the Hon. Heather Lee.

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 the appeal, and to discuss the option of mediation.

FINDINGS OF FACT

1. The Hearing Officer notes this appeal was filed with the Personnel Board on November 8, 2022. On his appeal form and during the pre-hearing conference, the Appellant stated he was appealing from an employee evaluation. He stated that he had always received outstanding Annual Employee Performance Evaluations until 2020 and 2021. He received Satisfactory Performance on his evaluations in 2020. He went through the reconsideration process, which did not result in a change of the category of his evaluation. In 2021, he filed a grievance with a similar result. The Appellant stated that, in 2022, he received an Exceptional Performance on his Annual Employee Performance Evaluation. He believes that his Annual Employee Performance Evaluation in 2020 and 2021 were unfair and were the result of his evaluator's personal vendetta against him.

2. The Appellee filed a Motion to Dismiss. The Appellant was given the opportunity to file a response but only filed a request for discovery. In his request for discovery, the Appellant asked for supporting or justifying documentation for the decline in his work performance for the years 2020 and 2021.

3. The Appellant received a Satisfactory Performance on his 2020 Annual Employee Performance Evaluation, which was presented to him in January 2021. He went through the reconsideration process and his evaluation rating remained unchanged. This process was completed in mid-June 2021.

4. The Appellant also received a Satisfactory Performance on his 2021 Annual Employee Performance Evaluation, which was presented to him in January 2022. The Appellant did not sign this evaluation and decided not to proceed through the reconsideration process. He chose to address his disagreement with this evaluation through the grievance process. Although there were some changes made to this evaluation, his overall evaluation category remained unchanged and his 2021 performance was deemed Satisfactory.

5. Thereafter, the Appellant filed this appeal with the Personnel Board on November 8, 2022.

6. There are no material facts in dispute and this appeal can be decided as a matter of law based on the appeal form, the statements of the parties at the pre-hearing conference, and the Appellee's Motion to Dismiss.

CONCLUSIONS OF LAW

1. KRS 13B.090(2) provides that a "hearing officer may make a recommended order in an administrative hearing submitted in written form if the hearing officer determines there are no genuine issues of material fact in dispute and judgment is appropriate as a matter of law." Furthermore, a motion to dismiss for failure to state a claim should only be granted if it appears the Appellant would not be entitled to relief under any set of facts that could be proved in support of his claim. *Pari-Mutuel Clerk's Union, Local 541 v. Kentucky Jockey Club*, 551 S.W.2d 801 (Ky. 1977).

2. Pursuant to regulation, an employee has sixty (60) calendar days from an Agency's evaluation reconsideration decision to appeal an Annual Employee Performance Evaluation to the Personnel Board. See 101 KAR 2:190, Section 7(7). The Appellant was issued the Agency's reconsideration decision for his 2020 final Annual Employee Performance Evaluation in mid-June 2021. The Appellant opted not to sign

acknowledgment of the reconsideration decision. Because the Appellant received the Agency's reconsideration decision in June 2021, the latest date that the Appellant could appeal this decision to the Personnel Board was the end of August 2021. The Appellant filed his appeal with the Personnel Board on November 8, 2022. This is well past the sixty (60) day statute of limitations to file an appeal.

3. A year later, the Appellant chose not to go through the reconsideration process for his 2021 final Annual Employee Performance Evaluation. However, even if the Appellant had initiated the reconsideration process, relying on the Appellant's 2020 reconsideration process as a reference as to how the Agency would handle such a request, a reconsideration decision of the 2021 performance evaluation likely would have been issued on or around mid-June 2022. As a result, the Hearing Officer finds that the latest possible date that the Appellant could appeal the Agency's decision to the Personnel Board would have been the end of August 2022. The Appellant filed his appeal with the Personnel Board on November 8, 2022. This is also well past the sixty (60) day statute of limitations to file an appeal.

4. Further, as to the merits, the Appellant is appealing his overall rating of Satisfactory Performance in both the 2020 and 2021 Annual Employee Performance Evaluations. 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 on either his 2020 or his 2021 Annual Employee Performance Evaluations.

5. Here, the Appellant's overall ratings for 2020 and 2021 were both "Satisfactory Performance." Accordingly, pursuant to KRS 18A.095 and 101 KAR 2:190, Section 7(7), the Hearing Officer finds that the Personnel Board does not have jurisdiction to hear an appeal from an evaluation rating that is higher than "Needs Improvement."

6. In addition, the Kentucky Administrative Regulations are very clear that any unresolved disagreements regarding a rating on an Annual Employee Performance Evaluation must be reviewed through the reconsideration process. 101 KAR 2:190, Section 5(4). The Appellant failed to comply with the regulation's mandate when he chose not to go through the reconsideration process. Though he filed a grievance regarding the issue of his overall rating for the 2021 evaluation, 101 KAR 2:190 requires an employee to utilize the reconsideration process.

7. Similarly, the Appellant exempted himself from being permitted to utilize the reconsideration process when he declined to sign his 2021 Annual Employee Performance Evaluation. 101 KAR 2:190, Section 5(5) requires the signature of the employee on an Annual Employee Performance Evaluation. Failure to sign prohibits an employee from using the reconsideration process. Consequently, failure to utilize the reconsideration process takes away the right to appeal an evaluation to the Personnel Board. As discussed above, an appeal of an Annual Employee Performance Evaluation may only be appealed to the Personnel Board "within sixty (60) calendar days after an employee has received the reconsideration decision." 101 KAR 2:190, Section 7(7).

8. There are no material facts in dispute and this appeal can be decided as a matter of law based on the appeal form, the statements of the parties at the pre-hearing conference, and the Appellee's Motion to Dismiss. KRS 13B.090(2) and KRS 18A.095(18).

9. The Hearing Officer recommends that the Motion to Dismiss should be granted. The Hearing Officer would note that he borrowed heavily from the Appellee's Motion to Dismiss for these Findings of Fact and Conclusions of Law, but the use of materials prepared and/or presented by the parties did not impact the Hearing Officer's impartiality or judgment.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **RICHARD EHLING VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF JUVENILE JUSTICE (APPEAL NO. 2022-154)** 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).

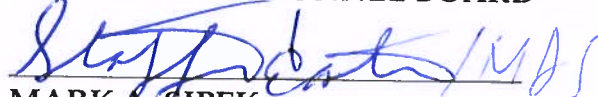
Any document filed with the Personnel Board shall be served on the opposing party.

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.

ISSUED at the direction of Hearing Officer Mark A. Sipek this 1 day of May, 2023.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK,
EXECUTIVE DIRECTOR

A copy hereof this day emailed and mailed to:

Hon. Heather Lee
Richard Ehling
Rosemary Holbrook (Personnel Cabinet)