

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2024-032**

ERIN ENDICOTT

APPELLANT

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

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

*** **

The Board, at its regular September 2025 meeting, having considered the record, including the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer dated August 21, 2025, 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 18th day of September, 2025.

KENTUCKY PERSONNEL BOARD



GORDON A. ROWE, JR., SECRETARY

Copies hereof this day emailed and mailed to:

Hon. Shane Sidebottom
Hon. Blake Vogt
Hon. Rosemary Holbrook (Personnel Cabinet)
Jay Klein

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2024-032**

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

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

* * * * *

This matter last came before the Hearing Officer on July 1, 2025, at 11:00 a.m., ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, for a pre-hearing conference before the Hon. Gordon A. Rowe, Jr., Executive Director/Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The appellant herein, Erin Endicott (the “Appellant”), was not present but was represented by her attorney, the Hon. Shane Sidebottom, who appeared telephonically. The appellee herein, Cabinet for Health and Family Services, (the “Appellee”), was present by telephone and was represented by the Hon. Blake Vogt.

The purposes of the pre-hearing conference were to discuss the dispositive motion filed by the Appellee and the responses that followed. Since the last pre-hearing conference, counsel for the Appellant supplemented the Appellant’s response to the Appellee’s motion to dismiss and counsel for the Appellee has filed a reply brief. During the pre-hearing conference, the parties offered arguments to support their respective positions. The Appellee contends that this appeal should be dismissed because current law, specifically 101 KAR 2:190, does not give the Personnel Board any authority to hear the appeal of a performance evaluation when the evaluation did not receive either of the lowest two ratings. The Appellant has argued that the Appellee has waived the argument of subject matter jurisdiction and/or the Personnel Board may have jurisdiction over this particular case because the legal deficiencies pointed to by the Appellee are merely procedural issues, which should not relieve the Board of subject matter jurisdiction. After considering the arguments of the parties and for the reasons below, the Hearing Officer has concluded that, based on KRS 18A.110 and 101 KAR 2:190, this is not the type of case the General Assembly has authorized the Board to hear; the Personnel Board does not have jurisdiction over this appeal and it should be dismissed.

FINDINGS OF FACT and PROCEDURAL BACKGROUND

1. Appellant Erin Endicott filed her appeal with the Personnel Board on February 22, 2024. In her appeal, the Appellant stated that she was appealing her end of year evaluation for 2023 because her “new supervisor of less than three months” made comments in her evaluation that were hostile, personal and untrue.” [See Appeal Form at p. 2.] On her Appeal Form, the Appellant checked the box for “Other Penalization.” Notably, the Appellant did not

provide any statutory, regulatory or other legal basis for challenging her evaluation in the Appeal Form. It should be noted that “other penalization” is no longer an appealable category under KRS 18A.059.

2. The Appellant did not claim that the evaluation was the result of discrimination on the basis of any protected class, which is prohibited by state and federal law. The appeal was docketed as Appeal No. 2024-032.

3. It is undisputed that the Appellant was rated as “Distinguished” in her final annual evaluation for 2023, which is one of the two (2) highest possible ratings. The Appellant stated in the initial pre-hearing conference conducted on June 27, 2024 that she was not contesting the overall “Distinguished” rating of her evaluation, but she was challenging statements in the evaluation which she characterized as untrue. [See Interim Order dated August 29, 2024 at ¶ 4.]

4. The Appellant did not sign her evaluation, as would be required for reconsideration of the evaluation under 101 KAR 2:190, Section 7(2). In addition, the Appellant did not request reconsideration of the evaluation by the supervisor who evaluated her, as required by 101 KAR 2:190, Section 7(1).

5. The Appellee filed a motion to dismiss on August 6, 2024. In its motion, the Appellee argued that the appeal should be dismissed because the Appellant’s overall final evaluation rating was “Distinguished,” which is not one of lowest two (2) categories of evaluation ratings. The Appellee argued that, pursuant to KRS 18A.110(7)(i) and 101 KAR 2:190, state employees may only appeal their final annual evaluation to the Personnel Board when the evaluation receives one of the lowest two ratings and only after the employee signs the evaluation and uses the agency’s internal processes for reconsideration of the appeal. The Appellee argued in its motion that the Appellant failed to properly use internal processes and that the evaluation was not rated in one of the two lowest categories.

6. The Appellant filed a Supplemental Memorandum in Opposition to the Motion to Dismiss (the “Response Brief”) on May 16, 2025. In the Response Brief, the Appellant did not address the requirements of KRS 18A.110(7)(i) and 101 KAR 2:190 but instead argued that the Appellee waived its jurisdictional claims because it failed to file a motion to dismiss until seven (7) months after the appeals were filed. This argument is unavailing. The Appellee filed its Motion to Dismiss far before the deadline for dispositive motions, October 30, 2024, which was established by the Hearing Officer in his Interim Order dated August 29, 2024. In fact, the Motion to Dismiss was filed just over sixty (60) days after the initial pre-hearing conference and prior to entry of the August 29, 2024 Interim Order. Clearly, the Motion to Dismiss was filed timely.

7. The Appellant has also argued that the Personnel Board has jurisdiction over this particular case, regardless of the Appellant’s failures to comply with KRS 18A.110(7)(i) and 101 KAR 2:190, and has tried to distinguish particular case jurisdiction from subject matter jurisdiction. The Appellant contends that the Board’s jurisdiction in this case turns on procedural requirements in KRS 18A.110(7)(i) and 101 KAR 2:190, which the Appellant argues do not amount to requirements for subject matter jurisdiction. This argument is also unavailing.

8. The Appellant cites the Kentucky Supreme Court case of *Commonwealth v. Steadman*, 411 S.W.3d 717 (Ky. 2013) to support its position. The case is not on point. In *Steadman*, the question at issue was whether the lower court retained jurisdiction to order restitution in a criminal case more than ten (10) days after entering a final judgment in the case. *See Steadman*, 411 S.W. 3d at 721. There was never a question as to whether the Court had subject matter jurisdiction over restitution but whether a procedural rule requiring entry of the final order within ten (10) days and the finality of said order might block a later modification of the final judgment by the trial court. In this case, the Board's subject matter jurisdiction is at issue. Specifically, does the Personnel Board have the authority to hear an appeal of an evaluation that is not in the one of the lowest rating categories? That question must be answered in the negative because KRS 18A.110(7)(i) and 101 KAR 2:190, Section 7, are clear and unambiguous; the Board can only hear an appeal of an evaluation when the rating is in one (1) of the lowest two (2) categories of ratings.

9. On May 19, 2025, the Appellee timely filed its Reply to Cabinet's Motion to Dismiss (the "Reply"). In its Reply, Appellee reiterated its argument that the Board does not have jurisdiction over this type of case, an appeal of an evaluation which did not fall into the lowest two categories of ratings, as explicitly stated in KRS 18A.110(7). The Appellee also argued, correctly, that it has followed all orders of the Board and has done nothing to waive its right to assert a jurisdictional argument in this appeal.

STANDARD OF REVIEW

1. It is well-established that a motion to dismiss should only be granted if the moving party can show that the party who filed the claim "would not be entitled to relief under any set of facts which could be proven in support of his claim." *Morgan v. Bird*, 289 S.W.3d 222, 226 (Ky. App. 2009). The pleadings filed by the claiming party "should be liberally construed in the light most favorable to the plaintiff, all allegations being taken as true." *Pari-Mutuel Clerks' Union of Kentucky, Local 541, SEIU, AFL-CIO v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977). A court should rule on a motion to dismiss when the question at issue is purely a matter of law. *James v. Wilson*, 95 S.W.3d 875, 884 (Ky. App. 2002).

2. The Personnel Board does not have authority to hear any appeal not specifically authorized by KRS Chapter 18A. In fact, the Personnel Board is **required** to dismiss any appeal in which it determines "it lacks jurisdiction to grant relief." KRS 18A.095(16)(a).

CONCLUSIONS OF LAW

1. The Personnel Board's subject matter jurisdiction is purely a matter of law and the Board does not have jurisdiction in this case. The Board does not have jurisdiction to hear an appeal of the Appellant's final, annual performance evaluation for 2023 because the overall rating of the evaluation was not in one (1) of the two (2) lowest categories of ratings. KRS 18A.110(7)(i)(4).

2. KRS 18A.110 requires the Secretary of the Personnel Cabinet to set up administrative regulations governing performance evaluations. The statute also mandates that those regulations only allow the Board to hear an appeal of a final performance evaluation which falls into one (1) of the two (2) lowest categories of ratings. Nothing in the statute allows for a regulation permitting appeal to the Personnel Board if the employee disagrees with comments made in the evaluation.

3. The only limited authority for the Board to hear an appeal regarding a performance evaluation is found in 101 KAR 2:190, which authorizes the Board to hear an appeal of a state employee whose final, annual performance evaluation falls into one of the lowest two rating categories. Section 7 of 101 KAR 2:190 provides that an employee who has complied with the other sections of the regulation may appeal to the Personnel Board a final evaluation that has an overall rating in the either of the two (2) lowest overall ratings categories. 101 KAR 2:190, Section 7(7). Nothing in 101 KAR 2:190 allows an employee to appeal an evaluation to the Personnel Board because the employee disagrees with particular statements in the evaluation. Instead, such matters are to be handled internally. The Appellant's sole pathway to challenge an evaluation under circumstances other than when the overall rating is in one of the two lowest rating categories is an internal challenge within the agency when the employee requests "reconsideration of the annual performance evaluation by the evaluator." 101 KAR 2:190(7)(1). A prerequisite of such reconsideration is that the employee must sign the evaluation and submit a request for reconsideration within five (5) working days of receipt of the evaluation. 101 KAR 2:190(7)(2). The Appellant herein is ineligible for reconsideration because she did not follow the mandates of 101 KAR 2:190(7)(2); the Appellant did not sign the evaluation and did not properly request reconsideration of the evaluation.

4. The language of KRS 18A.110(7) and 101 KAR 2:190, Section 7, is plain, straightforward and unambiguous. The General Assembly intended for the Personnel Board to have jurisdiction over evaluations only when the rating is in either of the two lowest categories. The Appellant's evaluation is not in either of those categories.

5. The Appellant's overall rating was "Distinguished," which is far from the two lowest overall ratings. 101 KAR 2:190(7)(7) does not make an exception for a disagreement regarding the language of the evaluation. As long as the rating is above the two lowest categories, the evaluation is not appealable to the Personnel Board.

6. Thus, the Appellant is not entitled to appeal her 2023 final year end performance evaluation to the Personnel Board under any provision of KRS 18A.111 or 101 KAR 2:190 and the appeal should be dismissed as a matter of law.

RECOMMENDED ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Personnel Board that the appeal of **ERIN ENDICOTT V. CABINET FOR HEALTH AND FAMILY SERVICES**, 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).

[Hearing Officer Note: Any document filed with the Personnel Board shall also 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).

The parties are strongly encouraged to send any exceptions and/or requests for oral argument by email to: PersonnelBoard@ky.gov.

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 21st day of August, 2025.

KENTUCKY PERSONNEL BOARD



GORDON A. ROWE, JR.
EXECUTIVE DIRECTOR

A copy hereof was emailed and mailed by first class, U.S. mail to the following persons at their respective addresses as provided to the Personnel Board on this 21st day of August 2025:

Hon. Shane Sidebottom, Counsel for Appellant
Hon. Blake Vogt, Counsel for Appellee
Hon. Rosemary Holbrook, Personnel Cabinet