

CERTIFICATION OF PERSONNEL BOARD RECORDS

I certify that attached hereto is a true and correct copy of the Findings of Fact, Conclusions of Law and Recommended Order and Final Order in the case of **LESLIE GLASS V. DEPARTMENT OF MILITARY AFFAIRS AND PERSONNEL CABINET (APPEAL NO. 2019-220)** as the same appears of record in the office of the Kentucky Personnel Board.

Witness my hand this 14th day of October, 2021.



**MARK A. SIPEK, SECRETARY
KENTUCKY PERSONNEL BOARD**

Copy to Secretary, Personnel Cabinet

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2019-220

LESLIE GLASS

APPELLANT

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

DEPARTMENT OF MILITARY AFFAIRS

AND

PERSONNEL CABINET

APPELLEES

*** **

The Board, at its regular October 2021 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated September 8, 2021, 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 **SUSTAINED to the extent** therein.

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 14th day of October, 2021.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Charla Sands
Hon. Rosemary Holbrook
Hon. Paul Fauri

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2019-220**

LESLIE GLASS

APPELLANT

V.

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

DEPARTMENT OF MILITARY AFFAIRS

and

PERSONNEL CABINET

APPELLEES

*** **

This matter came on for a pre-hearing conference on February 18, 2020, at 11 :00 a.m. EST, 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, Leslie Glass, was not present, but was represented by the Hon. Paul Fauri, who was present. The Agency/Appellee Department of Military Affairs was present and represented by the Hon. Katherine Fitzpatrick. The Agency/Appellee Personnel Cabinet was not present, as they were added as a party after the pre-hearing conference.

The purposes of the pre-hearing conference were to determine the specific penalization(s) alleged by the Appellant, the specific section of KRS 18A. which 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.

BACKGROUND

1. The Hearing Officer notes this appeal was filed with the Personnel Board on October 8, 2019. On the appeal form and during the pre-hearing conference, the Appellant, a classified employee with status, indicated she was appealing being issued a 2018 annual employee performance evaluation when she only worked approximately five weeks during that calendar year. The Appellant further explained her claims in an attachment to the narrative portion of the appeal form wherein she states, in pertinent part:

As the Personnel Board Appeal No. 2018-076 sets forth, I was placed on investigative leave by Executive Director Jones on February 12, 2018. Thereafter, I was terminated with an effective date of March 30, 2018... Thereafter, I was not a merit employee eligible to be evaluated for the year.

2. Following discussion, the parties agreed that there were few, if any, contested questions of fact and that this matter could be resolved through motion practice. The parties also agreed that the Personnel Cabinet should be added as a party as the Agency relied on Personnel Cabinet advice in conducting the employee evaluation.

3. The Appellant and Department of Military Affairs entered into stipulations. This appeal has been fully briefed by the Appellant and the Department of Military Affairs. This matter is now submitted to Hearing Officer Mark A. Sipek for a Recommended Order.

FINDINGS OF FACT

1. The Appellant and the Department of Military Affairs entered into sixteen (16) stipulations that is included in this order as Findings of Fact. These stipulations are adopted by the Hearing Officer, will be relied on in preparing this Order, and are attached hereto and incorporated herein as **Recommended Order Attachment A**.

2. Once the Appellant was dismissed on March 30, 2018, she was no longer in merit status. Thus, she did not remain in continuous merit status throughout the performance year of 2018.

3. The Appellant was not reinstated with the Department of Military Affairs until July 1, 2019. This was long after January 31, 2019, - the due date for her 2018 evaluation to be completed.

4. The fact that the Appellant was reinstated to her position, or a position of like pay and status with backpay, except for the period of suspension by the Personnel Board's Final Order in Appeal Numbers 2018-031 and 2018-075, does not mean she was in continuous merit status throughout 2018 for purposes of completing an annual employee performance evaluation.

5. The Hearing Officer makes no Findings of Fact regarding who should have conducted an evaluation of the Appellant because she was not eligible to be evaluated pursuant to regulation.

6. The Personnel Cabinet memorandum from March 21, 2014, relied on by the Appellee, does not support the Appellee's position. The Appellant was not on leave for the entire performance year and thus this memorandum has no application to the Appellant's situation.

CONCLUSIONS OF LAW

1. 101 KAR 2:180, Section 2, reads as follows:

Section 2. Employee eligibility. Performance evaluations shall be completed for all full-time classified employees with status at the beginning of the performance year who have remained in continuous merit status throughout the performance year.

2. As stated in the Findings of Fact, the Appellant did not remain in continuous merit status throughout performance year 2018 and, thus, she was not eligible to be evaluated pursuant to 101 KAR 2:180.

3. The fact that the Appellant's previous appeals were **SUSTAINED to the extent** that she was reinstated to her former position or a position of like pay and status, does not change the fact that she was not in a continuous merit status for calendar year 2018, the performance year in question.

4. The Appellant has properly invoked the jurisdiction of the Personnel Board pursuant to KRS Chapter 18A by alleging a penalization. The definition of penalization contained in KRS 18A.005(24) includes "the abridgment or denial of other rights granted to state employees." In this case, the Appellant has properly alleged a penalization when the Appellee conducted the performance evaluation for her performance year 2018, since she was not eligible pursuant to regulation. To hold otherwise would be to allow agencies to ignore the language of personnel regulations in the management of its employees.

5. The Appellee's reliance on *Chevron USA Inc. v. Natural Resources Council, Inc.* 468 US 837 (1984) is misplaced. The language in the regulation in question in this case is not at all ambiguous and should be given an interpretation consistent with the plain meaning of the words of the regulation.

6. For relief, the Appellant has requested her annual employee performance evaluation for calendar year 2018 be removed from any and all personnel files relating to her. Because this annual employee performance evaluation was performed without regulatory authority and was in violation of the plain language of the regulation, the relief requested by the Appellant is reasonable and appropriate.

7. The Appellant's requested relief is also consistent with a long line of Personnel Board cases in which the Board has ordered employee performance evaluations performed outside of statutory or regulatory provisions to be removed from an employee's personnel file at the request of the employee. *Turner v. Kentucky Transportation Cabinet* 574 Fed.Appx. 664, 2014 WL 3719109, (PB Appeal No. 2009-061).

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board the appeal of **LESLIE GLASS V. DEPARTMENT OF MILITARY AFFAIRS and PERSONNEL CABINET (APPEAL NO. 2019-220)** be **SUSTAINED to the extent that the Appellant's annual employee performance evaluation for performance year 2018 be removed from any and all personnel files relating to her in its entirety.**

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this 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 Mark A. Sipek** this 8 day of September 2021.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Charla Sands
Hon. Paul Fauri
Hon. Rosemary Holbrook

Leslie Glass
Recommended Order
Attachment A
Joint Stipulations

1. From January 1, 2018, and continuing until March 30, 2018, Appellant's immediate supervisor at DMA was Jackie Watkins and her second-line supervisor was Joe Sanderson.

2. On February 9, 2018, OMA issued Glass a letter informing her that she was being placed on paid investigatory leave effective February 12, 2018, concerning alleged misconduct pursuant to 101 KAR 2: 102, Section 9(3).

3. On February 28, 2018, OMA issued Glass a letter of intent to dismiss her from her position. Glass was removed from paid investigatory leave status and placed on paid administrative leave pursuant to KRS 18A.095(2)(c).

4. On March 22, 2018, and following a pre-termination hearing, DMA issued Glass a letter of dismissal with an effective date of March 30, 2018.

5. On February 12, 2018, until March 30, 2018, Glass was not working and was on paid leave.

6. Glass appealed her dismissal and the Personnel Board sustained the appeal "to the extent that the dismissal is modified to a fifteen-day suspension. [Glass] should be reinstated to her previous position or a position of like pay and status with back pay except for the period of suspension and she should otherwise be made whole. [KRS 18A.105 and 200 KAR 12:030.]"¹

7. Pursuant to the Order, DMA reinstated Glass to a position of similar status and responsibilities within the same grade classification as a classified employee with status, suspended her for fifteen (15) days (March 30, 2018 through April 19, 2018), and otherwise sought to make her "whole" within the meaning of the Order.

8. Glass returned to work at DMA July 1, 2019.

9. Watkins, Glass's former supervisor, retired effective August 1, 2018, prior to Glass's reinstatement. Ron Parritt was appointed to fill Watkins' position October 1, 2018, and held this position until his transfer to another state agency February 15, 2019. DMA promoted Sandra Coone April 16, 2019, to replace Parritt. At all times, Sanderson was the immediate supervisor for the position held by Watkins, Parritt, and Coone.

10. On August 14, 2019, Sanderson signed Glass's interim performance reviews for two periods: January 1, 2018 through March 30, 2018, and July 1,

¹ There were two appeals which were consolidated, numbers 2018-031 and 2018-076.

2018, through December 31, 2018. No interim review was performed for Glass for the period April 1, 2018 through June 30, 2018.

11. On August 15, 2019, Sanderson signed Glass's annual performance evaluation for 2018 ("Evaluation.") On August 19, 2019, Michael Jones, then DMA's Executive Director, signed the Evaluation.

12. On August 23, 2019, Glass signed the Evaluation acknowledging receipt however, on the form and in a written statement, Glass responded to the Evaluation and in an attachment, set forth reasons why she should not be evaluated.

13. On August 27, 2019, Sanderson signed the Evaluation indicating that he had reconsidered the Evaluation but found no changes.

14. On September 2, 2019, Glass signed the Evaluation disagreeing with Sanderson's assessment and requesting final reconsideration.

15. On September 17, 2019, Jones signed and mailed the Evaluation to Glass with a brief cover letter indicating that no changes were made.

16. Glass timely appealed the Evaluation to the Personnel Board.