

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 **RONALD GODSEY V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CRIMINAL JUSTICE TRAINING (APPEAL NO. 2020-053)** as the same appears of record in the office of the Kentucky Personnel Board.

Witness my hand this 11th day of December, 2023.



MARK A. SIPEK, SECRETARY
KENTUCKY PERSONNEL BOARD

Copy to Secretary, Personnel Cabinet

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2020-053**

RONALD GODSEY

APPELLANT

VS.

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

**JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF CRIMINAL JUSTICE TRAINING**

APPELLEE

** ** *

This matter came on for a pre-hearing conference on March 21, 2023, at 11:00 a.m., 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, Ronald Godsey, was present in-person and was represented by the Hon. Paul Fauri, who also appeared in-person. The Appellee, Justice and Public Safety Cabinet, Department of Criminal Justice Training, was present and represented by the Hon. Erritt Griggs and the Hon. Robin Cornette, both appearing by telephone.

The purposes of the pre-hearing conference were to discuss the status of the appeals and to schedule an evidentiary hearing, if appropriate.

BACKGROUND AND FINDINGS OF FACT

1. The Appellant filed Appeal No. 2020-053 on February 19, 2020, appealing and alleging he was penalized by his 2019 Annual Employee Performance Evaluation. In an attachment to the Appeal Form, the Appellant explained his claim, in pertinent part, as follows:

I received a score of 449 on my evaluation for 2019 and, when I inquired of my immediate supervisor as to why I did not receive an outstanding rating, I was informed that the DOCJT HR has a policy that, if you have any form of discipline process in a calendar year, an employee is not allowed to get an outstanding.

I asked for initial reconsideration as well as final reconsideration and submitted documents which are attached to the evaluation. The evaluation

violates Chapter 18A in that the denial of the outstanding was based on a policy that, to the best of my knowledge, is not in writing. Accordingly, it is arbitrary.

Furthermore, as I have set forth in my various attached statements for initial reconsideration and final reconsideration, the basis for my disciplinary actions are pending appeal before this Board but, in addition, the matters all occurred prior to 2019.

The demotion was based on my 2018 evaluation which is one of the appeals pending before the Board. It has nothing to do with my 2019 job performance.

The suspension, as noted above, relates to matters that took place in 2011 and have nothing to do with my job performance in 2019. Of course, these are all contested at this point and should have absolutely no bearing on my 2019 evaluation since my performance plan was started at the end of April and that is the time period that I should be evaluated. Of course, it is arbitrary and violates Section 2 of the Kentucky Constitution to claim that having a disciplinary action during an evaluation year is grounds for not receiving an outstanding evaluation.

The denial is contrary to the evaluation process. This action is further harassment and retaliation for my filing various appeals challenging the unjust and unlawful actions that have taken place against me which are all pending before the Board. (sic)

2. After multiple pre-hearings in this case, both parties have filed dispositive motions.
3. After review of the evidence of record, including the parties' dispositive motions with attachments, and as largely agreed to by the parties, the Hearing Officer finds that the Appellant was employed and evaluated as a Resource Management Analyst I from April 30, 2019, until December 31, 2019. He received a rating of 449 out of 500 on his 2019 Annual Employee Performance Evaluation, which was prepared by his supervisor, Marnie West. The evaluation score of 449 is in the "Highly Effective" category and is one point below the start of the "Outstanding" category.
4. The Appellant filed a Motion to Sustain Appeal as a Matter of Law and attached an Affidavit from West who performed the 2019 evaluation. In her affidavit, West stated that Godsey was entitled to an "Outstanding" rating, however, the Appellant was denied this rating on his evaluation because of an alleged Agency policy that stated that if an employee had a disciplinary

action during the calendar year, they would not be eligible for an “Outstanding” evaluation rating. The Appellant argued that, based on responses to his written discovery, he had determined that no such written policy exists. As a result, the Appellant argued that he should have received the “Outstanding” rating that his supervisor believed he deserved.

5. The Appellant pointed out that the disciplinary action that allegedly prevented the Appellant from obtaining the “Outstanding” rating was a thirty (30) - day suspension, which has since been withdrawn.

6. The disciplinary action at issue was a thirty (30) – day suspension issued to the Appellant on March 18, 2019, and was the subject of Personnel Board Appeal No. 2019-089. The Hearing Officer’s Findings of Fact, Conclusions of Law and Recommended Order in Appeal No. 2019-089 includes the following language:

This matter is before the Hearing Officer for a ruling on the Appellee’s “Motion to Withdraw Notice of Suspension,” filed with the Personnel Board on February 20, 2023, requesting leave of the Board to withdraw the Appellee’s notice of penalty without prejudice and reserving its right to re-issue a penalty at a later date. In its Motion to Withdraw Notice of Suspension, the Appellee stipulates that its March 18, 2019 letter suspending the Appellant from work and pay for thirty (30) days is procedurally defective under KRS 18A.095. The procedural defects include failure to properly cite the statutes and policies violated by the Appellant. The Appellant has had an opportunity to file a response and has done so. The Appellee did not submit a reply. The Appellant filed a “Response to the Motion of Appellee to Withdraw the Notice of Suspension Letter Subject to This Appeal,” affirming that he had no objection to the Motion to Withdraw Notice of Suspension and further set forth that the withdrawal would resolve the appeal by rescinding the thirty (30)-day suspension as the notice was *void ab initio*. Both parties have submitted proposed Findings of Fact, Conclusions of Law, and Recommended Orders.

This matter now stands submitted to the Hearing Officer for a ruling on the Appellee’s Motion to Withdraw Notice of Suspension and Response to the Motion of Appellee to Withdraw the Notice of Suspension Letter Subject to This Appeal. Upon review, the Appellee’s Motion to Withdraw the thirty (30) - day notice suspension is **GRANTED** without objection from the Appellant. The Hearing Officer does not address the Appellee’s ability to re-issue the penalty or any argument that may be raised by the Appellant to any future action.

RECOMMENDED ORDER

The Hearing Officer hereby recommends to the Personnel Board that the appeal of **RONALD GODSEY VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CRIMINAL JUSTICE TRAINING, (APPEAL NO. 2019-089)** be **SUSTAINED** and the Appellee is directed to rescind the thirty (30) -day suspension without pay, to restore to the Appellant all back pay for the period of the suspension and any lost benefits as a result of the suspension, to reimburse the Appellant for any leave time he used to attend the pre-hearings in this matter before the Personnel Board, and to otherwise make the Appellant whole. **KRS 18A.105, 200 KAR 12:030, and KRS 18A.095(25).**

7. The Personnel Board adopted the Hearing Officer's Findings of Fact, Conclusions of Law and Recommended Order on Appeal No. 2019-089. As a result, the Appellant argued that one of the disciplinary actions that prevented him from obtaining an "Outstanding" rating is no longer in his record, and he should receive an "Outstanding" evaluation on his 2019 Annual Employee Performance Evaluation.

8. In addition, the Appellant alleged that the thirty (30) – day suspension was based on allegations that occurred in 2011 and not in 2019.

9. Finally, the Appellant argued the demotion he received in 2019 was based on his 2018 Annual Employee Performance Evaluation. He alleged this demotion should not have been considered when rating his 2019 job performance.

10. The Appellee filed a Motion to Dismiss arguing that an employee evaluation with a rating of "Highly Effective" is not appealable to the Personnel Board. The Appellee pointed out that only evaluations with the two lowest ratings are appealable to the Personnel Board. The Appellee correctly notes that "Highly Effective" is the second highest category rating and would not independently establish an appeal to the Personnel Board. The Appellee alleged that the Personnel Board lacked jurisdiction to grant relief and the appeal should be dismissed.

11. In his response to the Appellee's Motion to Dismiss, the Appellant stated he was appealing the interference in his evaluation as arbitrary and fitting the definition of penalization. He stated that officials within the Department of Criminal Justice Training (DOCJT) instructed his supervisor that she could not give him a rating of "Outstanding" because of a nonexistent policy as a penalization separate from a direct appeal of the score of an evaluation.

12. The Appellee filed a reply in support of its Motion to Dismiss. The Appellee argued that the cases cited by the Appellant did not support his position. In addition, the Appellee attached emails from the Human Resource Branch Manager, Tina Moss, where she informed Marnie West, the Appellant's supervisor, as follows: "Yes, when an employee receives discipline in the year of the evaluation, the score must reflect the discipline." The Appellee also argued that there is nothing arbitrary about taking employee discipline into account in a performance evaluation. Counsel for the Appellee stated, "even accepting as true the facts posted by Mr. Godsey, as required on a Motion to Dismiss, even if DOCJT's Human Resources Branch Manager mistakenly or wrongly informed Mr. Godsey's supervisor that there was a policy mandating that an employee with discipline could not receive an "Outstanding" evaluation, these facts do not rise to a level of arbitrariness justifying the Board's jurisdiction over this appeal." The Appellee also argued that it should be allowed to reference misconduct even if it did not occur during the calendar year because otherwise the employer would be required to ignore serious wrongdoing in evaluating an employee only because of late discovery.

13. The Hearing Officer notes that there is a factual dispute present in this case. The Appellant contends the Appellant's supervisor, Marnie West, was instructed that the Appellant could not receive an "Outstanding" score on his evaluation because of a disciplinary action he received during the 2019 evaluation year. In response, the Appellee contends the Appellant's supervisor was merely instructed that she had to take the disciplinary action he received in 2019 into account. However, both parties agree that West was instructed to consider the Appellant's thirty (30) - day suspension, which was the subject of Appeal 2019-089, during the 2019 evaluation process. Therefore, even though the parties disagree on the exact language of the instruction West received, the Hearing Officer finds the dispute is not material in resolving this case.

14. It is clear, based on the Final Order entered in Appeal No. 2019-089, that the Personnel Board ordered the Appellee to wholly rescind the Appellant's thirty (30) - day suspension and "to otherwise make the Appellant whole."

15. The Hearing Officer finds that the evidence of record establishes that the Appellee has no written policy mandating that an employee cannot receive a rating of "Outstanding" on their evaluation if they have received a disciplinary action during the evaluation year.

16. The Hearing Officer finds there are no genuine issues of material fact outstanding in this appeal and that this matter can be decided as a matter of law.

CONCLUSIONS OF LAW

1. The Hearing Officer finds that there are no genuine issues of material fact outstanding in this appeal and a decision is appropriate as a matter of law based on the appeal form including attachments, the statements of the parties at the pre-hearing conferences, and the parties' competing dispositive motions, responses, and replies. KRS 13B.090(2) and KRS 18A.095(18)(a).
2. It is clear that the Appellant cannot directly challenge the rating on his 2019 Annual Employee Performance Evaluation because he received an overall rating of "Highly Effective." The Board's express jurisdiction in evaluation appeals is strictly limited to review of Annual Employee Performance Evaluations when those evaluation scores fall within the two lowest overall ratings. Here, the Appellant's score did not fall within the two lowest overall ratings, so the Board does not have express jurisdiction over the Appellant's 2019 Annual Employee Performance Evaluation. KRS 18A 110(7)(j)4 and 101 KAR 2:180, Section 7(7).
3. In this case, however, the Appellant alleges he was penalized by the Appellee's inappropriate consideration of a withdrawn thirty (30) - day suspension on his evaluation. The Board has previously found employees have been penalized as defined by KRS 18A.005(24) in situations where they received a rating that was not one of the two lowest ratings. *Elsworth Turner v Transportation Cabinet* 2011 WL 1689724 (KY PB).
4. More importantly, the Appellant challenged his thirty (30) – day suspension in Appeal No. 2019-089, which resulted in the suspension being withdrawn. The Board's Final Order in Appeal No. 2019-089 rescinded the suspension and ordered the Appellee "to otherwise make the Appellant whole."
5. In *Robin Parks and Jennifer Merkle v Justice and Public Safety Cabinet, Department of Corrections*, 2020 WL 16710487 (KY PB), the Personnel Board sustained the appeals and set aside suspensions against the two (2) Appellants. A part of the relief the Appellants sought and won was the removal of references to the suspensions and the conduct underlying the suspensions in their Annual Employee Performance Evaluation. Thus, the Personnel Board has recognized that, when a disciplinary action is rescinded, the impact on an employee's evaluation can be considered in granting relief to a successful Appellant.
6. In this case, the Appellant has filed appeals from a suspension and his evaluation. The Appellant had his thirty (30) - day suspension withdrawn in Appeal No. 2019-089. The Hearing Officer concludes that part of the relief set out in Appeal No. 2019-089 as part of "mak[ing] the Appellant whole" is to remove consideration of the withdrawn thirty (30) - day suspension from his 2019 Annual Employee Performance Evaluation. KRS 18A.095(22)(b) and (d).

7. Because this is not a direct challenge to the evaluation rating authorized by KRS 18A.095(15), the Hearing Officer concludes the appropriate relief is to return the Appellant's 2019 Annual Employee Performance Evaluation to the Agency for re-consideration and completion without the inappropriate inclusion of the withdrawn thirty (30) - day suspension.

8. As a result, the Appellee's Motion to Dismiss is **GRANTED in part** to the extent that the Appellant cannot file an appeal directly challenging the rating of "Highly Effective" on his 2019 Annual Employee Performance Evaluation.

9. The Appellant's Motion to Sustain Appeal as a Matter of Law is also **GRANTED in part** to the extent that the Agency must redo the Appellant's 2019 evaluation without taking into account the Appellant's withdrawn thirty (30) - day suspension.

10. Because all events underlying this appeal occurred before the effective date of Senate Bill 153, all references to KRS Chapter 18A were to the sections in effect at the time of the events associated with this appeal.

RECOMMENDED ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Kentucky Personnel Board that the appeal of **RONALD GODSEY VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CRIMINAL JUSTICE TRAINING (APPEAL NO. 2020-053)** be **SUSTAINED to the extent** that the Appellee is ordered to redo the Appellant's 2019 Annual Employee Performance Evaluation without consideration of the thirty (30) - day suspension, which was previously withdrawn in Appeal No. 2019-098. The Appellee is also ordered to reimburse the Appellant for any leave time used in attending any pre-hearing conferences and otherwise make the Appellant whole. KRS 18A.105, KRS 18A.095(25), and 200 KAR 12.030.

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).

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 27 day of October, 2023.

KENTUCKY PERSONNEL BOARD



**MARK A. SIPEK
EXECUTIVE DIRECTOR**

A copy hereof this day emailed and mailed to:

Hon. Robin Cornette
Hon. Erritt Griggs
Hon. Paul Fauri
Hon. Rosemary Holbrook (Personnel Cabinet)