

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2017-062**

LISAANN HAMPTON

APPELLANT

V.

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

KENTUCKY DEPARTMENT OF EDUCATION

APPELLEE

This matter came on for a pre-hearing conference on June 5, 2017, at 10:00 a.m., EST, at 28 Fountain Place, Frankfort, Kentucky, before Stafford Easterling, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Lisaann Hampton, was present via telephone and was represented by the Hon. Alison Sparks. The Appellee/Agency, Kentucky Department of Education, was present and represented by the Hon. Todd Allen.

This matter is now before Hearing Officer Stafford Easterling for a ruling on the Agency's Motion to Dismiss for lack of jurisdiction filed with the Personnel Board on June 19, 2017. At issue is the Appellant's claim that she had been penalized by Agency retaliation. Specifically, the Appellant, a teacher at the Kentucky School for the Deaf and a self-described "certified employee," indicated she was appealing the findings of a grievance the Appellant filed with the Agency. The Appellant further explained her claims in the narrative portion of her appeal form wherein she states:

I received a suspension immediately after the findings of grievance were disseminated. In my suspension letter, the grievance was discussed. I view part of my suspension as retaliatory for the grievance because it is referred in the letter.

At the pre-hearing conference, the parties agreed that the Appellant is a teacher at KSD and, as such, is primarily under the provisions of KRS Chapter 161. The Appellant argues, however, that the Personnel Board has jurisdiction over her appeal, limited to her claim of retaliation against the Agency. The Agency argues that her retaliation claim should instead be advanced as mitigation evidence in front of the Board of Education, when that Board considers the underlying suspension.

The Agency submitted a Motion to Dismiss arguing that the Personnel Board does not have jurisdiction over any of the Appellant's claims as a result of the provisions of KRS Chapters 161, 163, and 167. In her response to the Agency's Motion to Dismiss, the Appellant acknowledges the provisions of KRS Chapters 161, 163, and 167 would apply. The Appellant argues, however, that the provisions of KRS Chapters 161, 163, and 167 do not permit claims of retaliation and, therefore, without the Personnel Board asserting jurisdiction, the Appellant is left with no administrative remedy to address claims of retaliation. The Agency then filed a Reply, highlighting KSD policies which may afford the Appellant a procedure path to address her claim of retaliation. This matter now stands submitted to the Hearing Officer for a ruling on the Agency's Motion to Dismiss and the ultimate question of whether the Personnel Board has jurisdiction over this appeal.

BACKGROUND

1. During the pendency of this appeal, Appellant, Lisaann Hampton, was a certified employee within the Kentucky Department of Education ("KDE").

2. The Appellant serves as a certified teacher with the Kentucky School of the Deaf ("KSD").

3. On February 20, 2017, the Appellant received an approximately two-week suspension without pay for alleged insubordination, conduct unbecoming a teacher, and neglect of duty.

4. The parties agree that the Appellant appealed that suspension to the Board of Education in accordance with KRS 161.790. Here, the Hearing Officer would note that a three-day tribunal hearing concerning the Appellant's suspension was, in fact, conducted on July 19-21, 2017. Although not considered by the undersigned except to the extent of deciding the central question of the Personnel Board's jurisdiction over this matter, the Hearing Officer would note, as set out in the Agency's supplemental reply in support of its motion to dismiss, that the tribunal upheld the discipline imposed against the Appellant.

5. As the Appellant correctly points out, in the February 20, 2017 suspension letter, amongst the grounds for discipline, the Agency includes a reference to a grievance filed by the Appellant against KSP administrators. The reference to the grievance states, in full:

On February 10, 2017, the Kentucky Department of Education ("KDE") provided you with a copy of its findings in response to your grievance. As you know, KDE did not discover evidence corroborating your allegations of harassment or unfair treatment by KSD administrators. When you return from suspension, Mr. Begley and Ms. Karsner will schedule a meeting with you to discuss strategies to improve communication as recommended in the February 10, 2017 Notice of Findings. Your participation and cooperation during this meeting will be key to improving

communication with KSD administrators in an effort to prevent future issues.

6. The Appellant argues that the inclusion of such reference to her grievance constitutes retaliation.

7. The Appellant further argues that the appeal procedure provided for in KRS 161.790 does not provide for an administrative remedy to address retaliation in the grievance process.

8. As noted above, the Agency filed its Motion to Dismiss with the Personnel Board June 19, 2017, arguing the Personnel Board does not have jurisdiction over this matter because of the provisions of KRS Chapters 161, 163, and 167.

9. The Appellant filed a response arguing that that the Personnel Board does have jurisdiction over this appeal because the provisions of KRS Chapters 161, 163, and 167 do not permit claims of retaliation in the grievance procedure and, therefore, without the Personnel Board asserting jurisdiction, the Appellant is left with no administrative remedy to address claims of retaliation.

10. KRS 18A.005(24) provides:

‘Penalization’ means demotion, dismissal, suspension, fines, and other disciplinary actions; involuntary transfers; salary adjustments; any action that increases or diminishes the level, rank, discretion, or responsibility of an employee without proper cause or authority, including a reclassification or reallocation to a lower grade or rate of pay; and the abridgment or denial of other rights granted to state employees;

11. KRS 18A.115(1)(ac) provides:

The classified service to which KRS 18A.005 to KRS 18A.200 shall apply shall comprise all positions in state service now existing or hereafter established, except the following:

...

Persons employed in certified teaching positions at the Kentucky School for the Blind and the Kentucky School for the Deaf[.]

12. KRS 18A.095(14)(a) allows an employee “who believes he has been discriminated against” to appeal to the Board. The Supreme Court in Martin v. Corrections Cabinet, 822 S.W. 2d 858, 860 (Ky. 1992), ruled this provision is broader than the prohibition against discrimination contained in KRS 18A.095(12), which prohibits discrimination due to race, color, religion, national origin, sex, disability or age. The Kentucky Supreme Court advised in Martin that KRS

18A.095(14) “permits appeals of all forms of illegal discrimination.” Id. The United States Supreme Court, in Jackson v. Birmingham Board of Education, 544 U.S. 167 (2005), held that Title IX’s prohibition on discrimination in educational opportunities and programs included claims for retaliations for plaintiffs who had protested and opposed wrongful practices. The Supreme Court stated, “Retaliation is, by definition, an intentional act. It is a form of ‘discrimination,’ because the complainant is being subjected to differential treatment.” Id. at 173-174. Discrimination as used in KRS 18A.095(14) is used broadly and covers a wide-range of intentional unequal treatment, including a bare claim of retaliation.

13. KRS 18A.095(18)(a) provides, in pertinent part, that the Personnel Board “may deny any appeal after a preliminary hearing if it lacks jurisdiction to grant relief.”

FINDINGS OF FACT

1. During the pendency of this appeal, Appellant, Lisaann Hampton, was a certified teacher with the Kentucky School of the Deaf (“KSD”) within the Kentucky Department of Education (“KDE”).

2. The Hearing Officer finds that the Personnel Board does not have jurisdiction over the discipline issued to the Appellant. Challenges to discipline for Kentucky School of the Deaf or Kentucky School of the Blind certified teachers are governed by KRS 161.790.

3. The Hearing Officer finds that the only question before the Personnel Board in this matter is whether the Board has jurisdiction over a bare claim of retaliation filed by a certified teacher whose conditions of employment are established by KRS Chapters 161, 163, and 167.

4. As the discrimination appeal rights set out in KRS 18A.095(14)(a) apply to “any employee, applicant for employment, or eligible on a register,” the Hearing Officer finds that the Board has jurisdiction over a claim of discrimination or retaliation filed by any state employee. Although exempted from the classified service by KRS 18A.115(1)(ac), certified teachers employed by the Kentucky School of the Deaf and/or the Kentucky School of the Blind are still state employees entitled to the protections of KRS 18A.095(14)(a).

5. Nonetheless, the Hearing Officer finds that the Appellant has not stated a claim of retaliation that should proceed to an evidentiary hearing. This is because the Appellant’s general allegation that “[i]n my suspension letter, the grievance was discussed. I view part of my suspension as retaliatory for the grievance because it is referred in the letter” does not constitute an actionable claim of retaliation.

6. The Hearing Officer finds that the inclusion of a reference to the Appellant’s grievance in her February 20, 2017 suspension letter does not amount to a penalization as defined by KRS 18A.005(24). See Melissa Perkinson v. Justice and Public Safety Cabinet, 2014 WL 4965382 (KY PB).

CONCLUSIONS OF LAW

1. The Hearing Officer finds the determination of whether an employee has been retaliated against under KRS 18A lies solely with the Personnel Board. Nonetheless, it is also true that the Hearing Officer has a duty to closely review jurisdictional motions and determine whether the Personnel Board does in fact have jurisdiction to consider a claim.

2. The Hearing Officer concludes in order to state a claim of retaliation that could proceed to evidentiary hearing, the alleged retaliation must in some way be in reaction to the Appellant having pursued a legal right.

3. The Hearing Officer finds that the Appellant's claim of retaliation must fail as a matter of law prior to the taking of evidence. The Hearing Officer finds the Appellant's claim of retaliation, on its face, does not offer sufficient facts to state a legitimate claim of retaliation. In other words, this Hearing Officer sees no way the Appellant could prevail with the facts being as they are--no *prima facie* case of retaliation has been stated.

4. Pursuant to KRS 18A.095(18)(a), the Board, subsequent to a pre-hearing conference, may, on the recommendation of the Hearing Officer, dismiss or deny an appeal if it lacks jurisdiction to grant relief. The Hearing Officer concludes that the Board lacks jurisdiction to grant relief, as the Appellant has not stated a claim under law nor a justiciable claim of retaliation whereby the Board could grant any meaningful relief to the Appellant.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **LISAANN HAMPTON V. KENTUCKY DEPARTMENT OF EDUCATION, (APPEAL NO. 2017-062)** 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 Stafford Easterling** this 14th day of September, 2017.

KENTUCKY PERSONNEL BOARD



MARK A. SIPER
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Todd Allen
Hon. Ashley Lant
Hon. Alison Sparks