

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2017-119

JAMIE HOWE-THORNTON

APPELLANT

VS.

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

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

*** **

The Board, at its regular December 2017 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated November 9, 2017, 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 December, 2017.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Mona Womack
Ms. Jamie Howe-Thornton
Mr. Jay Klein

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2017-119**

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VS.

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

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEES

** ** *

This matter came on for a pre-hearing conference on July 12, 2017, at 10:00 a.m., ET, at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Jamie Howe-Thornton, was present and was not represented by legal counsel. She was accompanied by Christa Martin, a Job Placement Specialist with the Department of Vocational Rehabilitation. The Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Mona Womack. Also present for the Appellee were Robert Back and Samya Quabili.

The purposes of the pre-hearing conference were to determine the specific penalization(s) alleged by Appellant, to determine the specific section of KRS 18A which authorizes this appeal, to determine the relief sought by Appellant, to define the issues, to address any other matters relating to the appeal, and to discuss the option of mediation.

The Appellee filed a Motion to Dismiss prior to the pre-hearing conference. The Appellant filed a response on August 14, 2017. The Appellee did not file a reply. This matter now stands submitted to the Hearing Officer for a ruling on the Appellee's Motion to Dismiss.

BACKGROUND

1. The Appellant filed her appeal with the Personnel Board on June 6, 2017. She alleges she was penalized due to an investigation and disability discrimination. She specifically stated that she wished to appeal the entire investigation conducted by Cathy Cox of the Cabinet for Health and Family Services, Equal Employment Opportunity Office. She alleged she was penalized due to false information entered into the investigation. The Appellant attached a copy of a report dated February 13, 2017.

2. At the pre-hearing conference, the Appellant stated she wished to have the EEO report removed from all files maintained by the Cabinet. She stated she thought the purpose of the EEO investigation was to conduct a fact-finding investigation. She alleged that no facts were included in the investigation and that she was penalized and discriminated against. She specifically alleged that false information was entered into the investigation.

3. The Appellee, Cabinet for Health and Family Services, filed a Motion to Dismiss. The Appellee stated that the Appellant attached a memorandum dated February 13, 2017, to her appeal form. This was the Report of Findings and Recommendations where an investigator, Cathy Cox, of the CHFS EEO Office investigated allegations of disability discrimination and harassment made by the Appellant against her supervisor and three principal workers in Fayette County. The Cabinet alleged that Ms. Cox reviewed eleven documents, interviewed the Appellant and five others, and concluded that the Appellant was not discriminated against, or harassed, due to her disability. The Appellee included an Acknowledgement of Receipt form signed by the Appellant on February 13, 2017, in which the Appellant wrote, "I do not agree to findings."

4. In its Motion to Dismiss, CHFS argues that the EEO discrimination review is not appealable. The Appellee alleges that the EEO review does not fit the definition of a penalization, and this fact finding investigative process was conducted at the request of the Appellant. Because it was not a penalization pursuant to KRS 18A.005(25), the Appellee alleges that this matter is not appealable to the Personnel Board.

5. The Appellee also points out that KRS 18A.095(17) directs that all administrative hearings conducted by the Board shall be done in accordance with KRS Chapter 13B. The Cabinet points out that KRS Chapter 13B does not apply to, "investigations, hearings to determine probable cause, or any other type of information gathering or fact finding activities." 920 KAR 1:090 governs the EEO review process and establishes that it is merely a fact-finding and investigative process.

6. The Appellee also alleges that the Appellant filed her appeal untimely by waiting 112 days after receipt of the EEO review to file her appeal. **[Hearing Officer Note: The Appellant filed Appeal No. 2017-037 from her dismissal, alleging disability discrimination on February 14, 2017.]**

7. The Appellee filed its Motion to Dismiss prior to the pre-hearing conference. Also prior to the pre-hearing conference, the Appellant sent an email to the staff of the Personnel Board arguing against the Appellee's Motion to Dismiss. She stated that the investigation conducted by Cathy Cox was not conducted on "fact-finding" and violated 920 KAR 1:090. She also alleged that her Open Records Request did not get completed by Jay Klein until March 30, 2017. The Appellant alleged that the Cabinet had evidence of retaliation by her supervisor while

she was employed at CHFS. The Appellant alleged that the EEO investigation overview contains false allegations of sexual harassment, work performance, and lack of improvement. She also alleges negligence in the submission of the doctors' letter confirming her disability in the EEO investigation. She further alleges that documents from her vocational job specialist were left out.

8. The Appellant filed a more lengthy response to the Appellee's Motion to Dismiss on August 14, 2017. The Appellant alleged that the EEO review conducted by Cathy Cox meets the definition of penalization of including, "dismissal and denial of other rights granted to state employees." The Appellant disagrees with the conclusion of the report that she was not discriminated or harassed because of her disability. The Appellant points out she provided documentation to Ms. Cox establishing this disability. She alleges although she requested accommodations, this information was not in any team notes or personnel notes. The Appellant alleges that her request(s) for accommodation were denied in October, November and December 2016. She alleged that the EEO investigator failed to conduct fact-finding and did not conduct a thorough investigation.

9. The Appellant stated that she was terminated on February 13, 2017, but did not receive a copy of the investigation from Ms. Cox for a week and a half after her termination.

10. Attached to the Appellant's response was a letter dated January 6, 2017, to Steven Courtney, the Service Region Administrator Associate. The EEO investigation originated with a January 17, 2017 grievance alleging disability, discrimination and harassment sent to the EEO Civil Rights Compliance Branch within CHFS.

FINDINGS OF FACT

1. The Appellant was hired as a Family Support Specialist I on August 15, 2016, at the Fayette County DCBS Office by the Appellee. While employed in that capacity, she filed a grievance, which was forwarded to the Cabinet's EEO Civil Rights Compliance Branch on January 17, 2017.

2. Thereafter, Cathy Cox, the Manager of the EEO Civil Rights Compliance Branch conducted an investigation, which included an interview of the Appellant and five other employees, and a review of eleven documents. A Report of Findings and Recommendations was completed by Ms. Cox on February 13, 2017. She concluded that the Appellant was not discriminated against or harassed due to her disability.

3. On February 13, 2017, the Appellant was informed of the results of the EEO investigation. She states that she received a copy of this investigation a couple of weeks later.

The Appellant was also dismissed while serving her initial probationary period on February 13, 2017. The Appellant filed an appeal alleging disability discrimination and challenging her dismissal the following day.

4. On June 6, 2017, the Appellant filed this appeal alleging disability discrimination and penalization due to the Appellee's EEO investigation conducted by Ms. Cox.

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

CONCLUSIONS OF LAW

1. The Appellant appeals from her EEO investigation. She has alleged that this was supposed to have been a fact-finding investigation, however, facts were not found. Her argument appears to be that she feels she was penalized because the Investigator did not believe she was subjected to disability discrimination or harassment. The Hearing Officer finds that this does not constitute a penalization as that term is defined at KRS 18A.005(24). The Appellant points to the fact that dismissal is included in that definition, however, the Appellant has filed a separate appeal from her dismissal, which is currently pending before the Board. (See Appeal No. 2017-037.)

2. The Appellant also alleges that she has been penalized by being denied "other rights granted to state employees." Appellant's claims that the EEO investigation did not find sufficient facts, was not thorough enough, or did not find that she was discriminated against or harassed does not constitute a penalization and does not violate any specific right granted to state employees.

3. The Appellee correctly points out that KRS 18A.095(17) states that all administrative hearings conducted by the Board shall be conducted in accordance with KRS Chapter 13B. Specifically excluded from the provisions of KRS Chapter 13B are "investigations, hearings to determine probable cause, or any other type of information gathering or fact finding activities." [KRS 13B.020(2)(a). See also; 920 KAR 1:090, Sections 3, 4 and 5.]

4. All of the issues the Appellant has alleged can be litigated in Appeal 2017-037. The real issue is whether or not the Appellant has been discriminated against or harassed due to her disability. No provision in KRS Chapter 18A allows the Personnel Board to conduct a review as to whether or not an agency has conducted a thorough or proper EEO investigation.

5. Because the Personnel Board lacks jurisdiction to grant relief in this case, this appeal may be dismissed following a preliminary hearing. [KRS 18A.095(18)(a).]

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 **JAMIE HOWE-THORNTON VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2017-119)** 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).

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 the **Hearing Officer** this 9th day of November, 2017.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:
Hon. Mona Womack
Jamie Howe-Thornton