

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2019-198

DEBORAH NEWCOM

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 January 2020 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated December 13, 2019, and being duly advised,

IT IS FURTHER 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 appeals are 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 15th day of January, 2020.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Carmen Ross
Ms. Deborah Newcom
Mr. Jay Klein

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This matter came on for a pre-hearing conference on October 28, 2019, at 1:30 p.m., ET, at 1025 Capital Center Drive, Suite 105, 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, Deborah Newcom, was present and was not represented by legal counsel. The Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Carmen Ross.

The purposes of the pre-hearing conference were to determine the specific penalization(s) alleged by the Appellant, to determine 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 the appeal, and to discuss the option of mediation.

BACKGROUND

1. The Appellant, Deborah Newcom, filed her appeal with the Personnel Board on September 12, 2019, alleging she had been penalized. Specifically, the Appellant stated she had given notice to the Cabinet that she was retiring at the end of November 2019. She was informed that she would be able to maintain a compensatory leave balance of at least 175 hours. The Appellant had to take some time off from work due to a work-related injury and required medical appointments. She used annual leave for these absences and tried to save her compensatory leave in accordance with the assurances she had been given.

2. After utilizing annual leave and submitting timesheets, the Appellant was informed on July 9 or 10, 2019, that she would not be allowed to use annual leave and must use compensatory leave, if her balance was over 100 hours. This included correcting her time for the June 16 through June 30, 2019 time period. This has also continued going forward. The Appellant stated that her leave balance is now below 100 hours. She stated that she believed the Cabinet should be required to keep its word allowing her to use annual leave and maintain a compensatory balance of at least 175 hours.

3. At the pre-hearing conference, counsel for the Appellee stated that, pursuant to regulation 101 KAR 2:102 and a Personnel Memorandum from 2016, the Appellant was not allowed to use annual leave and save compensatory leave with a balance over 100 hours.

4. This matter was scheduled for an evidentiary hearing.

5. Following the pre-hearing conference, the Appellee filed a Motion to Dismiss to which the Appellant has responded. This matter is now before the Hearing Officer for a ruling on Appellee's Motion to Dismiss.

6. In its Motion to Dismiss, the Appellee does not contest any of the facts alleged by the Appellant. As the Appellee points out, 101 KAR 2:102, Section 5(2)(a) provides:

An appointing authority may require an employee who has accrued at least 100 hours compensatory leave to use compensatory leave before annual leave and shall otherwise allow the use of compensatory leave if it will not unduly disrupt the operations of the agency.

7. The Cabinet argues that, to the extent the Appellant was told she could maintain a compensatory leave balance of at least 175 hours, she was not told by anyone with appointing authority. The Appellee contends that the supervisor who told her this did not have the authority to change Cabinet policy that requires the use of compensatory leave, if the balance is over 100 hours.

8. The Appellant filed a response setting forth the events leading up to her request to use compensatory leave. She stated that the Cabinet should have to live up to its promise that she should be able to maintain a compensatory leave balance of at least 175 hours.

FINDINGS OF FACT

1. There are no material facts in dispute.
2. The Appellant, Deborah Newcom, a classified employee with status, timely filed

her appeal with the Personnel Board on September 19, 2019.

3. The Appellant had a compensatory leave balance over 100 hours. Following discussions with her supervisors, the Appellant was informed she would be able to maintain a compensatory leave balance of at least 175 hours, in anticipation of her retirement at the end of November 2019. The Appellant had to take time off from work due to a work-related injury and required medical appointments. Under the agreement, the Appellant used annual leave for these absences and tried to save her compensatory leave.

4. When the appointing authority learned that the Appellant was using annual leave, she was instructed she would need to correct her timesheet to reflect using compensatory leave for the June 16 through June 30, 2019 time period. This would also continue going forward.

5. The regulation in question, 101 KAR 2:102, Section 5(2)(a) reads:
An appointing authority may require an employee who has accrued at least 100 hours compensatory leave to use compensatory leave before annual leave and shall otherwise allow the use of compensatory leave if it will not unduly disrupt the operations of the agency.

6. In a Personnel Cabinet memorandum issued on May 3, 2016, Personnel Cabinet Secretary Thomas Stevens directed all Cabinet appointing authorities to follow the cited regulation. The Appellee has followed this directive since that time.

7. The Appellant does not have the right to use annual leave instead of compensatory leave, as long as her leave balance is over 100 hours.

8. This appeal may be decided based upon a review of the appeal form, the Appellee's Motion to Dismiss, the Appellant's response, and statements made by the parties at the pre-hearing conference.

CONCLUSIONS OF LAW

1. The Appellant has not alleged a penalization as the term is defined at KRS 18A.005(24) because she did not have a right to use annual leave instead of compensatory leave. Although she was instructed by her supervisors that she would be able to maintain a compensatory leave balance of at least 175 hours, her supervisors were not appointing authorities and did not have the authority to make this assurance. The Appellant did not have a right to use annual leave and thus has not alleged an appealable penalization.

2. Because the Appellant has not been penalized, this appeal may be dismissed following a pre-hearing conference. [KRS 18A.095(18)(a).]

3. There are no material facts in dispute and this matter may be decided as a matter of law based on the appeal form, the Appellee's Motion to Dismiss, the Appellant's response, and statements made by the parties at the pre-hearing conference. [KRS 13B.090(2).]

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **DEBORAH NEWCOM V. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2019-198)** 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.

SO ORDERED at the direction of **Hearing Officer Mark A. Sipek** this 13th day of December, 2019.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Carmen Ross
Deborah Newcom