

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-036

MELISSA PERKINSON

APPELLANT

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

JUSTICE AND PUBLIC SAFETY CABINET
DEPARTMENT OF CORRECTIONS
J. MICHAEL BROWN, APPOINTING AUTHORITY

APPELLEE

** ** *

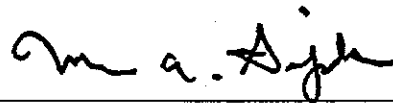
The Board at its regular September 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated July 23, 2014, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be, and they hereby 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 17th day of September, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Angela Cordery
Melissa Perkinson
Bobbie Underwood

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-036**

MELISSA E. PERKINSON

APPELLANT

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

**JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF CORRECTIONS,
J. MICHAEL BROWN, APPOINTING AUTHORITY**

APPELLEE

** ** *

This matter came on for a pre-hearing conference on April 21, 2014, at 9:30 a.m., ET, at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Boyce A. Crocker, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Melissa Perkinson, was present by telephone and was not represented by legal counsel. The Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Angela Cordery.

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 Hearing Officer notes this appeal was filed with the Personnel Board on February 28, 2014. Appellant made clear in the appeal and at the pre-hearing conference that she was appealing a written reprimand which had been issued to her based upon what she believed to be "blatant fabrication." During the pre-hearing conference, Appellant stated she had worked for the Department of Corrections for 18 years and had never received a disciplinary action. This matter concerns her greatly, especially as she was going up for a promotional opportunity in the near future, and did not want this to negatively affect that.

The Appellant did not indicate at the pre-hearing conference she was making any other claims or seeking any relief other than having the written reprimand removed from her file.

Counsel for the Appellee indicated her desire to file a Motion to Dismiss, contending she did not believe Appellant had stated a penalization under KRS 18A. The Hearing Officer explained to the Appellant what happens when an agency asks to file a motion to dismiss. A briefing schedule was set.

The parties complied with the briefing schedule entered at the pre-hearing conference held April 21, 2014. The matter stands submitted to the Hearing Officer for a ruling on the Appellee's Motion to Dismiss.

BACKGROUND

1. During the relevant times, Appellant, Melissa E. Perkinson, was a classified employee with status.

2. In its Motion to Dismiss, counsel for Appellee contends the Personnel Board lacks the jurisdiction to consider this appeal, as Appellant has not stated a penalization over which the Board would have jurisdiction.

3. Counsel contends a written reprimand is not a penalization, and the sole remedy to be found for being issued a written reprimand for an employee is at KRS 18A.020(2)(c). Counsel cites previous Personnel Board cases in which the Board has found it cannot consider an appeal of a written reprimand.

4. Counsel closes by noting that Appellant has not made any claim of discrimination based a protected class, thus, the Personnel Board has no jurisdiction.

5. Lastly, counsel noted that Appellant availed herself of the remedy called for in the statute, and that she had included with her appeal a four-page typewritten statement identified as "Response to the Reprimand." The Hearing Officer is not clear whether this was actually filed alongside the written reprimand in Appellant's personnel file, as is allowed for under statute.

6. As noted, Appellant filed a timely response to Appellee's Motion to Dismiss. Appellant disagrees that a written reprimand is not a penalization, stating "a written reprimand negatively impacts any opportunity I may have for future promotions, and therefore is a penalization." Appellant contends that the written reprimand and the motion to dismiss contain conflicting information, and the Board cannot base their findings on these facts because they are not factual.

7. KRS 18A.020(2)(c) states as follows:

Whenever an employee is reprimanded for misconduct, other infraction, or failure to perform his duties in a proper or adequate manner, the supervising employee taking such action shall document such action in detail, and shall provide the employee with a copy of such documentation. The supervising employee shall inform the employee that he has the right to prepare a written response to the action taken after he has reviewed the written documentation prepared by the supervising employee. Such response shall be attached to the documentation prepared by the supervising employee. The supervising employee shall place a copy of the documentation and response provided for herein in the employee's personnel file and shall transmit a copy to the cabinet to be placed in the

official personnel file of the employee. The supervising employee shall notify the employee that copies of the documentation and the response provided for herein have been placed in his personnel files.

8. KRS 18A.005(24) states as follows:

"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;

9. 101 KAR 1:335, Section 6 states as follows:

Written Reprimand.

(1) An employee or former employee may petition the Personnel Cabinet Secretary for removal of a written reprimand and all related documentation from the employee's official personnel file after a period of three (3) years.

(a) An employee's request shall not be granted if the employee has received any disciplinary action or written reprimand in the three (3) years prior to the request for removal.

(b) A petition for removal shall:

1. Be made by the employee, and be dated and signed; and

2. Include the following information:

a. The employee's current position, agency, work phone number, and work address;

b. The employee's immediate supervisor at the time of the petition for removal;

c. The date the written reprimand was issued;

d. A statement by the employee that the employee has not received any disciplinary actions or written reprimands in the three (3) years prior to the petition; and

e. A statement that the information contained in the petition is correct and complete to the best of the employee's knowledge, and that the employee has provided a copy of the petition to the employee's current appointing authority.

- (c) The petition for removal shall be mailed by first-class mail or hand-delivered to the office of the Personnel Cabinet Secretary.
- (2) A petition for removal of a written reprimand shall be subject to the approval of the Personnel Cabinet Secretary.
- (a) The Personnel Cabinet Secretary shall approve or deny the petition for removal within thirty (30) days of receipt of the petition.
- (b) If the petition is denied, the Personnel Cabinet Secretary shall notify the employee in writing and provide justification for denial. The decision by the secretary with respect to the petition shall be final and not appealable to the Personnel Board.
- (c) If the petition is approved, the Personnel Cabinet Secretary shall notify the employee and the appointing authority of the employee's agency in writing of the approval.
- (3) Upon removal from an employee's official personnel file maintained by the Personnel Cabinet, a written reprimand shall be handled as established in this subsection.
- (a) The written reprimand shall be delivered to the Office of Legal Services and remain in the custody and care of the Office of Legal Services.
- (b) The Office of Legal Services shall maintain the document as confidential work-product materials for the availability or use in any future legal proceeding.
- (c) If no legal proceeding involving the employee's personnel file has been filed within five (5) years of receipt, the written reprimand shall be permanently destroyed.
- (d) Upon removal from the official personnel file, but prior to destruction, a written reprimand shall not be considered as part of any personnel action.
- (e) The employing agency shall be notified by the Personnel Cabinet of the removal of a written reprimand from an employee's official personnel file.

FINDINGS OF FACT

1. During the relevant times, Appellant, Melissa E. Perkinson, was a classified employee with status.
2. The Hearing Officer finds the Personnel Board is without jurisdiction to consider the merits of this appeal; that is, challenging the underlying merits of the written reprimand issued to the Appellant.

3. The Hearing Officer finds the remedy is to have a statement enclosed alongside the written reprimand in Appellant's personnel file, which Appellant may do by appropriately annotating any response to that reprimand she has and submitting that to be placed in her file. The Appointing Authority would be required to do so.

4. Likewise, the Hearing Officer finds another remedy is for Appellant to follow the procedures set forth at 101 KAR 1:335, Section 6 (reprinted above), for petitioning the Personnel Cabinet for removal of written reprimand in accordance with the procedures set forth in that regulation.

CONCLUSIONS OF LAW

Based on the Findings of Fact, the Hearing Officer concludes that as a matter of law that the Personnel Board is without jurisdiction to consider an appeal challenging the underlying merits of a written reprimand, and that is the Board (in the past) has consistently taken the position that a written reprimand is not a penalization, the Hearing Officer concludes this matter must be dismissed.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **MELISSA E. PERKINSON V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2014-036)** 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 Boyce A. Crocker** this 23rd day of July, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Angela Cordery
Ms. Melissa M. Perkinson