

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2019-252

MELISSA RIFE

APPELLANT

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

CABINET FOR HEALTH AND FAMILY SERVICES

AND

PERSONNEL CABINET

APPELLEES

*** *** *** *** ***

The Board, at its regular May 2021 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated March 30, 2021, 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 16th day of May, 2021.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:
Hon. Brent Irvin
Hon. Catherine Stevens
Melissa Rife
Jay Klein

**COMMONWEALTH OF KENTUCKY
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**FINDINGS OF FACT, CONCLUSIONS OF LAW
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This matter came on for a pre-hearing conference on January 14, 2020, at 11:30 a.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, Melissa Rife, was present and was not represented by legal counsel. The Appellee Cabinet for Health and Family Services was present and represented by the Hon. Jennifer Wolsing, who appeared by telephone. The Appellee Personnel Cabinet was present and represented by the Hon. Catherine Stevens.

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.

BACKGROUND

1. The Hearing Officer notes the Appellant filed this appeal with the Personnel Board on November 13, 2019, appealing her reallocation from an Internal Policy Analyst IV to a Budget Specialist II.

2. The Appellant believed that, following her reallocation, there was no perfect position to assign her to, however, she listed four possibilities; Graduate Account Manager, Budget Manager, both grade 17, and Fiscal Manager and Federal Program Specialist, which are both grade 16. The Appellant believes that each of these four classifications are closer to her actual job duties than a Budget Specialist II. The Appellant stated that, in addition to being placed in the wrong classification, she believes any of these four would also result in additional pay. The Appellant stated she would be starting a new position on February 1, 2020, as a Budget Analyst III. She had no idea how this would impact the issues on her appeal.

3. The Cabinet for Health and Family Services took no position on the Appellant's classification or pay issues. Counsel stated they believed this issue was primarily between the Appellant and the Personnel Cabinet.

4. The Personnel Cabinet filed a Motion to Dismiss the appeal as untimely. In its Motion to Dismiss, the Personnel Cabinet stated as follows;

On July 8, 2019, Appellant, Melissa Rife, was notified that her job classification was being reallocated from Internal Policy Analyst IV to Budget Specialist II [Ex. 1-Appeal Form and attachments, PC004]. Pursuant to KRS 18A.095(10)(a)(2), Rife had the right to request that the Secretary of the Personnel Cabinet reconsider the reallocation decision. Rife did request reconsideration and received the response of the Personnel Cabinet by letter from Commissioner Mary Elizabeth Bailey, which was dated September 10, 2019 [PC003]. On her Appeal Form, Rife noted that the date she received the response was September 12, 2019 [PC002]. Appellant confirmed her date of receipt was September 12, 2019 at the Prehearing Conference held in this appeal on January 14, 2020.

Rife was informed in the September 10, 2019 correspondence that she “may appeal to the State Personnel Board using the enclosed form within sixty (60) calendar days of the date of this letter.” This was in accordance with KRS 18A.095(10)(c), which provides that an employee whose position is reallocated shall be notified in writing by the appointing authority, after response to her request for reconsideration that she may appeal to the Personnel Board. Pursuant to KRS 18A.095(8)(d), Rife had the “right to appeal to the board within sixty (60) days, excluding the day that he or she received notification of the personnel action.”

Rife’s Appeal Form was stamped as received by the Personnel Board on November 13, 2019 [PC002]. To have been timely filed the Appeal Form should have been filed no later than November 12, 2019. The 60th day actually fell on Monday, November 11, 2019 (Veterans Day) when state government offices were closed, giving the Appellant an additional day until November 12, 2019 to have timely filed her appeal with the Personnel Board.

5. The Personnel Cabinet argued that, because the Appellant did not file her appeal within the time frames required by statute, the Personnel Board lacked jurisdiction to hear this appeal.

6. In her response, the Appellant complained that the Personnel Cabinet did not raise timeliness at the pre-hearing conference. She also stated that she was a layperson. She argued that there were only fifty-eight (58) days from the date on the Personnel Cabinet’s letter to the date on her appeal form. The Appellant further argued that the timeframe in KRS 18A.095(8)(d) did not apply because she alleged she was not demoted, suspended, or otherwise penalized. The Appellant also argued that the date the appeal form was stamped as received by the Personnel Board may not have be the date it was actually received. Finally, she alleged that the Personnel Board had the discretion to not dismiss her appeal based on the language in KRS 18A.095(18)(a), which reads in part “the board may deny a hearing to an employee who has failed to file an appeal within the time prescribed by this section;...” The Appellant argued that because this statute uses the word “may”, it was not mandatory that her appeal be dismissed.

FINDINGS OF FACT

1. The Appellant, Melissa Rife, was employed as an Internal Policy Analyst IV (grade-16) with the Cabinet for Health and Family Services. Effective June 16, 2019, she was reclassified to a Budget Specialist II (grade-15). The Appellant requested reconsideration from the Personnel Cabinet. In a written notice dated September 10, 2019, she was notified by Commissioner Mary Elizabeth Bailey that her request for consideration was denied and she was notified she had sixty (60) calendar days to file her appeal.

2. The Appellant acknowledged that she received Commissioner Bailey's letter on September 12, 2019.

3. The Appellant filed her appeal with the Personnel Board on November 13, 2019. The Appellant stated she would be starting a new position as a Budget Analyst III on February 1, 2020.

4. There are no genuine issues of material fact in dispute and this matter can be decided as a matter of law based on the appeal form, the Motion to Dismiss, the response, the reply, the attachments thereto, and the statements of the parties at the pre-hearing conference.

CONCLUSIONS OF LAW

1. The Appellant's appeal of her reallocation is untimely and the Board lacks jurisdiction to hear this appeal. The Appellant acknowledges that she received notice of the denial of her request for reconsideration from Commissioner Bailey on September 12, 2019, and she did not file her appeal with the Personnel Board until November 13, 2019.

2. Contrary to the Appellant's arguments, a reallocation to a lower grade is a penalization. KRS 18A.005(24) defines penalization 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;

3. Because her reallocation to a lower grade was a penalization, the provisions of KRS 18A.095(8)(d), do apply, and the Appellant had sixty (60) days to file her appeal.

4. KRS 18A.095(18)(a) reads, in part as, follows; "the Board may deny a hearing to an employee who has failed to file an appeal within the time prescribed by this section;..." The Appellant is correct that this statute uses the term may, however, this has never been interpreted to mean the Board has discretion to hear appeals that have been filed beyond the statutory deadlines. Personnel Board precedent is clear that the Board lacks jurisdiction if the appeal is untimely.

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 **MELISSA RIFE VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2019-252)** 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).

[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 30th day of March, 2021.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK

EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Brent Irvin

Hon. Rosemary Holbrook

Hon. Catherine Stevens

Melissa Rife