

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2018-039**

ANGELA ROGERS

APPELLANT

VS.

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

**JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF CORRECTIONS**

APPELLEE

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

This matter came on for a pre-hearing conference on May 8, 2018, at 12:00 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, Angela Rogers, 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. Scotty McFarlan.

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 Chapter 18A which authorizes this appeal, to determine the relief sought by the Appellant, to define the issues, to address any other matters relating to this appeal, to discuss the option of mediation, and to schedule an evidentiary hearing, if necessary.

This matter now stands submitted to Hearing Officer Mark A. Sipek for a ruling on the Appellee's Motion to Dismiss.

BACKGROUND

1. The Appellant, Angela Rogers, filed Appeal No. 2018-039 with the Personnel Board on March 7, 2018, appealing from her employee evaluation. Specifically, she stated that her first-line supervisor, Sarah St. Clair, presented her with her evaluation in the presence of her next-line supervisor, Jessica Durrett.

2. At a second pre-hearing conference, held on June 28, 2018, the Appellant alleged that her employee evaluation was not done correctly. She alleged that Sarah St. Clair should not have done her year-end evaluation. The Appellee alleged that the Appellant checked the box "Disagree with performance evaluation, but accept" and, therefore, cannot pursue this appeal. The Appellant suggested that she was forced to check this box and signed the evaluation based on the demeanor of her supervisors during the evaluation process. The Appellee requested time to file a Motion to Dismiss.

3. The Appellee, in its Motion to Dismiss, argued that the Appellant had not alleged an appealable issue to the Personnel Board. The Appellee contended that the Appellant was merely arguing that her evaluation contained what she determined to be erroneous information. The Appellee also alleged that the Appellant received a score of 325 on her evaluation and indicated that she disagreed, but accepted her evaluation. For these reasons, the Appellee contended the Appellant had not stated proper grounds to appeal from her employee evaluation.

4. In her response to the Motion to Dismiss, the Appellant alleged that because both supervisors attended her performance evaluation meeting, her second-line supervisor would not have been objective in hearing an appeal from her evaluation. The Appellant stated she was not appealing the overall score associated with the evaluation, but instead the statements and comments that a particular error rate was noted. She stated that the annual evaluation form and supporting documentation shall be a permanent record of performance. She said there is no supporting documentation in her file. She summarized her appeal as "my appeal in regards to this particular evaluation is that Ms. St. Clair was allowed to include erroneous information of a derogatory nature into my employee file without supporting documentation."

5. In the Appellee's reply, counsel argued that 101 KAR 2:180, Section 5(5), states that unresolved disagreements on any aspect of the performance evaluation shall be reviewed through the reconsideration process. The Appellee also argued that only the two lowest overall ratings may be appealed to the Personnel Board. The Appellant's score of 325 was not in this

range. With regard to any erroneous information included in her evaluation, the Agency pointed out that the Appellant had the option to attach pertinent comments to her evaluation or to request reconsideration. Lastly, the Agency argued there was nothing to prevent the next-line supervisor from attending the evaluation meeting.

6. KRS 18A.095(15) states an evaluation may be appealed to the Board if an employee has complied with the review procedure established in KRS 18A.110(7)(j).

7. KRS 18A.110(7)(j) calls for the Secretary of the Personnel Cabinet to promulgate comprehensive administrative regulations which shall provide:

(j) For a uniform system of annual employee evaluation for classified employees, with status, that shall be considered in determining eligibility for discretionary salary advancements, promotions, and disciplinary actions. The administrative regulations shall:

1. Require the secretary to determine the appropriate number of job categories to be evaluated and a method for rating each category;

2. Provide for periodic informal reviews during the evaluation period which shall be documented on the evaluation form and pertinent comments by either the employee or supervisor may be included;

3. Establish a procedure for internal dispute resolution with respect to the final evaluation rating;

4. Permit a classified employee, with status, who receives either of the two (2) lowest possible evaluation ratings to appeal to the Personnel Board for review after exhausting the internal dispute resolution procedure. The final evaluation shall not include supervisor comments on ratings other than the lowest two (2) ratings;

5. Require that an employee who receives the highest possible rating shall receive the equivalent of two (2) workdays, not to exceed sixteen (16) hours, credited to his or her annual leave balance. An employee who receives the second highest possible rating shall receive the equivalent of one (1) workday, not to

exceed eight (8) hours, credited to his or her annual leave balance;
and

6. Require that an employee who receives the lowest possible evaluation rating shall either be demoted to a position commensurate with the employee's skills and abilities or be terminated; and

8. 101 KAR 2:180, Section 7, reads as follows:

Section 7. Reconsideration and Appeal Process.

1. Within five (5) working days of the year-end interim review and annual performance evaluation meeting, an employee may attach pertinent comments relating to the year-end interim review and may request initial reconsideration of the annual performance evaluation by the evaluator.

2. Within five (5) working days of the receipt of the request for reconsideration, the initial reconsideration shall be conducted by the evaluator.

3. If the employee refuses to sign the form in the employee response section, the evaluation shall not be eligible for reconsideration.

4. Within five (5) working days after the initial reconsideration by the evaluator, an employee may submit a written request for reconsideration of the evaluation by the next-line supervisor. If neither the evaluator nor the next line supervisor responds to the request for reconsideration in the designated time period, the employee may submit a written request to the appointing authority for response to the request for reconsideration and compliance with this section.

5. The next line supervisor shall:

(a) Obtain written statements from both the employee and the evaluator; or

(b) Meet individually with the employee and the evaluator.

6. The next line supervisor shall inform both the employee and evaluator in writing of the decision no later than fifteen (15) working days after receipt of the employee's request.

7. Within sixty (60) calendar days after an employee has received the written decision from the next line supervisor, the employee who has complied with this administrative regulation may appeal a final evaluation which has an overall rating in either of the two (2) lowest overall ratings to the Personnel Board.

FINDINGS OF FACT

1. The Appellant, a classified employee with status, serving as an Offender Information Specialist I with the Appellee, received an employee evaluation on January 23, 2018, with a final score of 325 from her supervisor. Her supervisor and her next-line supervisor were both present during the review. The Appellant checked the box that she "Disagree with performance evaluation, but accept."

2. The Appellant filed an appeal with the Personnel Board on March 7, 2018, alleging her next-line supervisor should not have attended her evaluation meeting and that her evaluation contained erroneous information.

3. The Appellee filed a Motion to Dismiss, the Appellant filed a response, and the Appellee filed a reply.

4. The Hearing Officer finds that there are no material facts in dispute and that this matter can be decided as a matter of law, the appeal form, the Appellee's Motion to Dismiss, Appellant's response, Appellee's reply, and the statements made at the pre-hearing conferences.

CONCLUSIONS OF LAW

1. The Appellant has not stated an appealable penalization over which the Personnel Board has jurisdiction. There is no dispute that the Appellant received an evaluation score of 325, which is not in one of the two lowest categories. In addition, the Appellant checked the box on the evaluation form that she disagreed with her evaluation, but accepted it. She did not request reconsideration and did not follow the process set forth in 101 KAR 2:180, Section 7.

2. There is no statute or regulation which prohibits the next-line supervisor from attending the evaluation meeting. In addition, the Appellant's claim that the evaluation form contains erroneous information is not a matter which is appealable to the Personnel Board, pursuant to KRS Chapter 18A.095(15), KRS Chapter 18A.110(7)(j), and 101 KAR 2:180, Section 7.

3. This appeal can be decided as a matter of law based on the appeal form, the Appellee's Motion to Dismiss, Appellant's response, Appellee's reply, and the statements made at the pre-hearing conferences. The Personnel Board lacks jurisdiction to grant the relief the Appellant has requested. KRS Chapter 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 **ANGELA ROGERS VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2018-039)** 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 Hearing Officer Mark A. Sipek this 12th day of March, 2019.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Scotty McFarlan
Ms. Angela Rogers