

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2013-153

PAUL J. SCOTT

APPELLANT

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

FINANCE AND ADMINISTRATION CABINET
COMMONWEALTH OFFICE OF TECHNOLOGY
LORI H. FLANERY, APPOINTING AUTHORITY, AND

CABINET FOR HEALTH AND FAMILY SERVICES
J. P. HAMM, APPOINTING AUTHORITY

APPELLEES

** **

The Board at its regular March 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated February 14, 2014, having considered Appellee Cabinet for Health and Family Services' exceptions 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 19th day of March, 2014.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Stewart Douglas Hendrix
Hon. Mary Tansey
Paul J. Scott
Honor Barker
J. P. Hamm

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J. P. HAMM, APPOINTING AUTHORITY**

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**** ** ***

This matter came on for a pre-hearing conference on August 21, 2013, at 10:30 a.m., ET, at 28 Fountain Place, Frankfort, Kentucky, before Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Paul Scott, was present by telephone and not represented by legal counsel. The Appellee, Finance and Administration Cabinet, was present and represented by the Hon. Doug Hendrix. The Appellee, Cabinet for Health and Family Services was present and represented by the Hon. Mary Tansey.

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 whether the appeal was filed within the time limitations set forth in KRS 18A.095, 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.

This appeal was filed with the Personnel Board on June 17, 2013. The Appellant is appealing from his 2012 year-end evaluation, as well as the second and third interim evaluations. The Appellant received an overall score of 272, which is in the "Good"

range. The Appellant stated he was appealing the procedures used in conducting his 2012 evaluation.

Counsel for the Appellee, noting the score of "Good," stated they would file a motion to dismiss. The Hearing Officer set up such a schedule.

In accordance with the briefing schedule, the Appellee, Finance and Administration Cabinet, filed a Motion to Dismiss, to which the Appellant responded, and the Appellee, Finance and Administration Cabinet, replied. The matter is submitted to Hearing Officer Boyce A. Crocker for a ruling on the motion.

BACKGROUND

1. During the relevant times, Appellant, Paul J. Scott, was a classified employee with status.

2. In its Motion to Dismiss, the Appellee, Finance and Administration Cabinet (FAC), contends the Personnel Board lacks jurisdiction to consider this appeal, as it is a challenge of an evaluation which does not meet the requirements of KRS 18A.110(7)(j)4 and 101 KAR 2:180, Section 7(1). Counsel for FAC notes the subject matter of this appeal concerned Appellant's calendar year 2012 year end evaluation, for which he received a final score of 272, placing him in the "Good" range. Appellee FAC contends that as the final evaluation score was in the "Good" range, Appellant cannot appeal such to this Board.

3. The Appellee, CHFS, also filed a "Motion to Dismiss, or in the Alternative, Motion for Summary Judgment." Appellee CHFS contends that not only does 101 KAR 2:180, Section 7(7) not allow this appeal, as Appellant received a final overall year end evaluation of "Good," but the appeal would be untimely in any event even if the final evaluation had been one of the two lowest ratings, because Appellant filed the appeal more than sixty (60) days after the final review of his evaluation.

4. Appellant filed a response to the motion to dismiss. Appellant notes that the initial year end evaluation was 247, but raised upon request for reconsideration to 272. Appellant contends there were two reasons why the score was increased from the initial to the final evaluation. One would be that he would not be allowed to appeal such to the Personnel Board, and the second reason would be that Mr. McGirt would have to justify "why I was given the score of 247, which would have placed the score within the two lowest scores." Appellant closed his response to the motions to dismiss by asking for a Personnel Board hearing, and also "I want a formal investigation into

the behavior of both the Finance and Administration Cabinet and the Cabinet for Health and Family Services toward myself."

5. The Appellee FAC filed a reply to Appellant's response. The Appellee restated its initial argument that the Personnel Board doesn't have jurisdiction over this appeal, as Appellant received a final evaluation score of "Good" and not one of the two lowest final evaluation scores. Appellee FAC stated, "Mr. Scott raised no challenge to this regulation and his ongoing dispute with Mr. McGirt and Mr. Mudd do not satisfy the requirements to trigger this Board's jurisdiction; this Appeal should be dismissed."

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)4 states:

(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:

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;

8. 101 KAR 2:180, Section 7(7) states:

Section 7. Reconsideration and Appeal Process.

(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. During the relevant times, Appellant, Paul J. Scott, was a classified employee with status.
2. The Hearing Officer finds that Appellant's final year end evaluation score for the calendar year 2012 was 272, which is in the "Good" range.
3. The Hearing Officer finds the Appellee, Finance and Administration Cabinet, is correct – it is clear that an employee who receives a final year-end evaluation score not in the two lowest categories does not have an appeal right to the Personnel Board.
4. The Hearing Officer finds it is not necessary to arrive at a determination as to whether the appeal was timely filed, as the first requirement, that is, that the Appellant would have received a final evaluation score in one of the two lowest categories, was not met.

CONCLUSION OF LAW

The Hearing Officer concludes as a matter of law that the Personnel Board, based on the law and regulation cited in this Order, is without jurisdiction to further consider this Appeal pursuant to KRS 18A.095(18)(a), and as such, this Appeal must be dismissed.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **PAUL J. SCOTT V. FINANCE AND ADMINISTRATION CABINET AND JUSTICE AND CABINET FOR HEALTH AND FAMILY SERVICES, (APPEAL NO. 2013-153)** 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 14th day of February, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Douglas Hendrix
Hon. Mary S. Tansey
Mr. Paul J. Scott