

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2012-254**

BRENDA STARR

APPELLANT

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

**AUDITOR OF PUBLIC ACCOUNTS,
CINDY JAMES, APPOINTING AUTHORITY**

APPELLEE

** ** *

This matter came on for a pre-hearing conference on January 15, 2013, at 28 Fountain Place, Frankfort, Kentucky, before Boyce A. Crocker, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Brenda Starr, was present and was not represented by legal counsel. The Appellee, Auditor of Public Accounts, was present and represented by the Hon. Robert McBeath. Also appearing was on behalf of the Appellee as its agency representative was Ms. Libby Carlin, Assistant State Auditor and Appointing Authority.

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 noted the appeal was filed with the Personnel Board on November 14, 2012. Appellant indicated she was appealing an Employee Evaluation and "Other Penalization." Appellant specifically stated she disagreed with a comment in the interim evaluation prepared for the period of May to August 2012, and as relief, seeks to have this language stricken from her evaluation. Appellant currently has a pending disability determination claim before the state ADA coordinator's office. Counsel for the Appellee stated this was not an appeal of a penalization properly before the Personnel Board and he may file a motion to dismiss.

The Appellee filed a Motion to Dismiss on January 31, 2013. An Order was entered giving Appellant time in which to respond. Appellant filed a timely response on March 4, 2013. Appellee then filed a reply on March 13, 2013.

Appellant also filed a document on May 2, 2013, which appears to be a reply to the Appellee's reply. On May 8, 2013, Appellee filed a response to Appellant's reply/motion. The

matter is ready for ruling and stands submitted to the Hearing Officer for a ruling on the Appellee's Motion to Dismiss.

BACKGROUND

1. During the relevant times, the Appellant was a classified employee with status, employed at the Appellee, Auditor of Public Accounts (APA).

2. In the narrative portion of her appeal, Appellant stated:

The most recent evaluation by immediate supervisor stated an instance of Non Professional Communication of SNIFFING in the aisle and specifically not related to health problems of lung disease. My appeal is to get this type of evaluation problem eliminated in my future evaluations.

3. In its Motion to Dismiss, Appellee contends the Appellant has not stated a penalization per KRS 18A, as appealing an interim evaluation review is not something the Personnel Board would have jurisdiction over, and cites a previous Personnel Board case in support of this argument.

4. The Appellant filed a timely response to the motion to dismiss. Appellant states in that response, "The appeal is not just about Evaluations, it is a management and personnel problem." Appellant also states, "Not all Merit Personnel have the same problems, and some are definitely outside the realm of the identified laws to the contrary." She continues by saying, "My specific appeal is regarding the 'Non Professional' comment of 'Sniffing in the Aisle' stated to me in the evaluation interim time. The concern is that the evaluation is including something which is part of my ongoing health problem with Asthma, which requires the patient to remove Triggers of the Asthma Attacks, and this is what I was attempting to do. (The state ADA office is involved.)"

5. The Appellant then goes on to recount specifics of issues occurring in the workplace. The Appellant also states she can no longer audit in some of the audit work spaces, due to health problems. The Appellant continues to talk about disability, stating, "If a disabled person works there is no assistance for the disability through any government source."

6. The Appellee filed a reply. The Appellee takes issue with some of the matters set forth in the Appellant's response, asking that certain matters be stricken from the record.

7. Counsel for the Appellee comments on the Appellant's statements that the "state ADA office is involved" and states that it is true that the ADA coordinator is working with the parties in a "mutually cooperative manner to determine whether the Appellant has, in fact, a disability covered by the ADA; but this determination has not yet been made."

8. As noted, on May 2, 2013, Appellant filed what appears to be a reply to Appellee's reply. The Hearing Officer is aware that counsel for the Appellee has asked for time in which to file a response to any further reply received from the Appellant. Counsel for Appellee filed a response to Appellant's May 2, 2013 pleading, denying allegations of impropriety or discrimination.

9. KRS 18A.110(7)(j)(4) states, as follows:

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.

FINDINGS OF FACT

1. During the relevant times, the Appellant was a classified employee with status, employed at the Appellee, Auditor of Public Accounts (APA).

2. The Appellant has stated, both in the appeal and in the response to the Appellee's Motion to Dismiss, that this appeal is specifically about comments made in an interim review for the calendar year 2012 evaluation cycle. The Hearing Officer finds that although the Appellant has made reference to disability and being involved with the state ADA coordinator's office (which the Appellee concurs was ongoing at the time of its reply), no claim of disability discrimination has been made.

3. The Hearing Officer finds that the Appellant's claim, as it is about comments made in an interim review for an annual evaluation cycle, is not a matter over which the Personnel Board would have jurisdiction. If the Appellant wants to make a claim of disability discrimination or denial of records, such must explicitly be made in a separate appeal.

CONCLUSION OF LAW

1. The Hearing Officer concludes as a matter of law that under KRS 18A.095(18)(a), having had pre-hearing conferences and the matter being briefed, the Personnel Board lacks the ability to grant relief, as it lacks jurisdiction to consider the appeal. KRS 18A.095(15).

2. The Hearing Officer concludes the appeal should be dismissed.

3. As to the Appellant's reply to the Appellee's reply, to the extent that the Appellant is complaining of documents held by the agency, or by particular employees, that is not an issue for appeal before the Personnel Board and is irrelevant to the matters considered here. The Appellant may request such documents pursuant to an open records request, or take other appropriate action. Such claims are not germane to the issue at question here.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **BRENDA STARR V. AUDITOR OF PUBLIC ACCOUNTS, (APPEAL NO. 2012-254)** 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 13th day of May, 2013.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Robert McBeath
Ms. Brenda Starr