

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NOs. 2019-169 and 2019-215

KATRINIA WILBANKS

APPELLANT

VS.

FINDINGS OF FACT, CONCLUSIONS OF LAW
RECOMMENDED ORDER

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

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These matters came on for a pre-hearing conference on October 10, 2019, at 10:00 a.m., EDT, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Stafford Easterling, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Katrina Wilbanks, was present by telephone and was not represented by legal counsel. The Agency/Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Mona Womack.

The purposes of the pre-hearing conference were to determine the specific penalization(s) alleged by the Appellant, the specific section of KRS Chapter 18A that authorizes this appeal, to determine the relief sought by the Appellant, to define the issues, to address any other matters relating to this appeal, and to discuss the option of mediation.

BACKGROUND

1. The Hearing Officer notes that Appeal No. 2019-169 was filed with the Personnel Board on August 12, 2019. On the appeal form, the Appellant, a classified employee with status, indicated she was appealing the loss of flex schedules in the Hardin County Office. Appeal No. 2019-215 was filed with the Personnel Board on September 27, 2019. In that appeal, the Appellant indicated that she was appealing the issuance of time and attendance requirements imposed on her by the Agency. The Appellant further explained her claims in Appeal No. 2019-215 in the narrative portion of the appeal form, wherein she states, in full:

This is my request that you remove the Written Time and Attendance/Verification of Illness Requirements issued to me on 9/06/19, this reprimand was issued unjustly and contains false/misleading information. Please see enclosed letter and documents.

2. Following discussion, the Agency requested an opportunity to file a dispositive motion as to both of the Appellant's claims.

3. The Appellee filed a Motion to Dismiss in both appeals. Appellant was given an opportunity to respond but failed to do so. This matter has now been assigned to Hearing Officer

Mark A. Sipek for a ruling on the Motion to Dismiss.

FINDINGS OF FACT

1. The Appellant, Katrina Wilbanks, is a Family Support Specialist III who is working in the Cabinet for Health and Family Services in the Hardin County office. The Appellant had been working a flex schedule.
2. The Appellant received notice that the Hardin County office would no longer allow flex scheduling and all employees would be required to work the 8:00 a.m. to 4:30 p.m. shift with an hour for lunch.
3. The Appellant did not agree with the justifications given by her supervisors for this change. The supervisors alleged that flex schedules were no longer viable because the office was short staffed and an increased call volume. The Appellant disputed each of these justifications.
4. The Appellant filed Appeal No. 2019-169 alleging she was penalized by the loss of her flex schedule.
5. The Appellant also received notice from her supervisor that she was being placed on "time and attendance/verification of illness requirements." This required the Appellant to provide a doctor's statement for use of any sick leave.
6. The Appellant filed Appeal No. 2019-215 alleging she was penalized by being placed on these time and attendance requirements. She alleged her time and attendance was no worse than other employees in the office.
7. The Appellee filed a Motion to Dismiss in both appeals alleging that the Appellant's claims do not constitute penalizations.

CONCLUSIONS OF LAW

1. Merit system employees do not have a right to work a flexible schedule. Section 5.19 (VII) of the Cabinet for Health and Family Services - Personnel Procedures Handbook, states that flexible work schedules are a privilege. Because a flexible work schedule is a privilege, withdrawing such a schedule is not a penalization. KRS 18A.005(24).
2. When the Appellant's flexible schedule was withdrawn, she returned to the normal workday for state employees, 8:00 a.m. to 4:30 p.m., as set forth in 101 KAR 2:095, Section 3.
3. Because losing her flexible schedule was not a penalization, the Appellant cannot prevail on her appeal, even if she is right that the Appellee's justifications for ending the flexible schedule were not valid. Because this action was not a penalization, the Personnel Board simply has no jurisdiction to review this Agency decision.

4. The time and attendance requirements, that 1) the Appellant must ask for leave in advance and 2) must provide health care provider's statements after use of any sick leave, are consistent with 101 KAR 2:102, Section 2.
5. Specifically, 101 KAR 2:102, Section 2(5)(b) states as follows:
Except for an emergency illness, an employee shall request advance approval for sick leave for medical, dental, or optical examinations, and for sick leave without pay.
6. 101 KAR 2:102 Section 2(5)(d) reads as follows:

An appointing authority may, for good cause and on notice, require an employee to supply supporting evidence in order to receive sick leave.
7. The actions taken by the Appellee to place the Appellant on "time and attendance/ verification of illness requirements" does not constitute a penalization, and the Personnel Board has no jurisdiction to review this Agency decision.
8. There are no material issues of fact, and this appeal can be decided as a matter of law based on the appeal form, the statement of the parties at the pre-hearing conference, and the Appellee's Motion to Dismiss. KRS 18A.095(18)(a) and KRS 13B.090(2).

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeals of **KATRINA WILBANKS V. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NOS. 2019-169 and 2019-215)** 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 Mark A. Sipek**, this 22nd day of September, 2021.

KENTUCKY PERSONNEL BOARD

A handwritten signature in black ink, appearing to read 'Mark A. Sipek' with a stylized flourish at the end.

MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Ashley Kennedy
Katrina Wilbanks