

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-252

DEBORAH ZIMMERMAN

APPELLANT

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

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

*** **

The Board at its regular February 2016 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated January 7, 2016, 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 17th day of February, 2016.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Kathleen Hines
Hon. Andrew Burcham
Jay Klein

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

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APPELLEE

** ** ** ** **

This matter came on for a pre-hearing conference on November 17, 2015, at approximately 9:30 a.m., ET, at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Boyce A. Crocker, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Deborah B. Zimmerman, was not present, however, she was represented by the Hon. Andrew Burcham, appearing by telephone. The Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Kathleen Hines, appearing by telephone.

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 notes this appeal was filed with the Personnel Board on September 29, 2015. The Appellant was appealing denial of a grievance she filed regarding performance evaluations. These were denied ultimately by Teresa James, Commissioner of the Department for Community-Based Services.

Counsel for the Appellant affirmed that the relief being sought was as stated in the grievance, which is as follows:

1. Need to be evaluated lawfully in accordance to KRS 18A.110, 101 and KAR 2:180 (sic) and as directed by the performance evaluation system employee handbook.
2. Need the interim meeting notes be stricken from the job task section specifically statewide data, and comments that pertain to my productivity

which penalizes me by stating a performance improvement plan may be needed.

As noted in the Interim Order entered on November 23rd, 2015, Appellee filed a Motion to Dismiss prior to this pre-hearing conference. Counsel for the Appellant has complied with the briefing schedule and filed a timely response to the Motion to Dismiss. The matter is 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.
2. In its Motion to Dismiss counsel for the Appellee contends this appeal does not state a penalization as defined by KRS 18A.095 or any action that would fit within the definition of penalization defined at KRS 18A.005 (24). Counsel states that Appellant's dissatisfaction or disagreement of how interim reviews have been conducted for the evaluation process do not rise to the level of penalization. Counsel goes on to cite 101 KAR 2:180 which lays out the requirements for filing an appeal regarding a final year end evaluation that falls within one of the two lower ratings.
3. As noted, counsel for the Appellant filed a timely response. Counsel states that Appellant's claim does state a penalization and is actually quoted "...inserting their own interpretation without providing any basis for that interpretation from the Personnel Board's record or that of any other court, cannot be considered adequate support for granting a Motion to Dismiss"
4. KRS 18A.095(18)(a): The Board may deny a hearing to an employee who has failed to file an appeal within the time prescribed by this section; and to an unclassified employee who has failed to state the reasons for the appeal and the cause for which he has been dismissed. The Board may deny any appeal after a preliminary hearing if it lacks jurisdiction to grant relief. The Board shall notify the employee of its denial in writing and shall inform the employee of his right to appeal the denial under the provisions of KRS 18A.100.

FINDINGS OF FACTS

1. During the relevant times the Appellant was a classified employee with status.
2. The Hearing Officer finds that Appellant has not stated a claim which would rise to the level of a penalization either under KRS 18A.095 or as is found in the definition of penalization at KRS 18A.005 (24). Reading Appellant's appeal and the requested relief, it is

apparent to the Hearing Officer that the Appellant is dissatisfied with how the evaluation interim reviews are conducted and with alleged unfair procedures in the evaluation system. The alleged unfair procedures such as using a "statewide performance measure" on evaluating the job task section do not rise to the level of penalization.

3. The Hearing Officer finds Appellant has not stated a penalization that could be heard by the Personnel Board and that the Board lacks jurisdiction pursuant to KRS 18A.095(18)(a).

CONCLUSION OF LAW

The Hearing Officer concludes as a matter of law pursuant to KRS 18A.095(18)(a) the Personnel Board does not have jurisdiction to further consider this appeal as the Appellant has not stated a cognizable claim of penalization pursuant to KRS 18A.095 or under the definition of penalization set forth at KRS 18A.005(24). The Hearing officer concludes that disagreements on how interim reviews are conducted as part of the overall evaluation procedure do not rise to the level of a penalization, unless the requirements set forth at 101 KAR 2:180 are met then in such case an appeal may be filed. Appellant, if she disagrees with an interim review, certainly can write a statement responsive to the interim review for consideration in the final evaluation score.

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 **DEBORAH ZIMMERMAN VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2015-252)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13.B.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 Boyce A. Crocker** this 7th day of January, 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Kathleen Hines
Hon. Andrew Burcham