



COMMONWEALTH OF KENTUCKY
DEPARTMENT OF PERSONNEL
200 FAIR OAKS LANE
5th FLOOR
FRANKFORT, KENTUCKY 40601

Ernie Fletcher
Governor

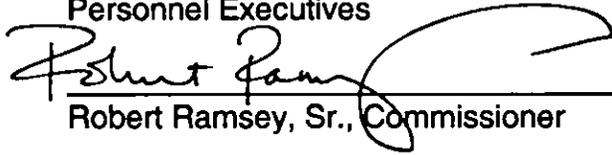
Robert Ramsey, Sr.
Commissioner

March 19, 2004

MEMORANDUM

PERSONNEL MEMO 04 - 06

TO: Cabinet Secretaries
Agency Heads
Personnel Executives

FROM: 
Robert Ramsey, Sr., Commissioner

SUBJECT: Written Reprimands

The Department of Personnel has received a number of inquiries as to whether agencies should direct supervisors to include notice of rights of appeal when issuing written reprimands pursuant to K.R.S. 18A.020. For the reasons stated in the attached legal opinion from the Department of Personnel's General Counsel, we believe that the current format for written reprimands, which does not require notice of rights to appeal to the Personnel Board, is correct.

Questions concerning this matter may be addressed to Daniel F. Egbers, General Counsel for the Department of Personnel at (502) 564-4460.

Attachment



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March 18, 2004

MEMORANDUM

For: Robert Ramsey, Sr.
Commissioner

From: Daniel F. Egbers
General Counsel

A handwritten signature in black ink, appearing to read "D. Egbers", written over the printed name "Daniel F. Egbers".

Re: Legal Opinion: Written Reprimands

Background:

The Department of Personnel has received a number of inquiries from agencies with respect to the impact of a recent interim order entered by the Personnel Board in *Pamela Perkins v. Health and Family Services Cabinet*, Personnel Board Appeal No. 2003-221 on February 17, 2004. The Personnel Board's Order in this case remanded it to the Hearing Officer, and rejected the Hearing Officer's recommendation to dismiss the appeal of the issuance of a written reprimand. The Board concluded that the reprimand for inappropriate behavior was an "other disciplinary action" and a "penalization" within the meaning of K.R.S. 18A.005. The Board further held that the Appellant had a right to appeal this penalization and that the remedy of responding in writing for the official personnel file, as outlined in K.R.S. 18A.020, was not an exclusive remedy.

Issue:

Because this interpretation of a written reprimand as an appealable "penalization" and "other disciplinary action" flies in the face of more than twenty years of contrary legal precedent, including the Personnel Board's own decision in *Travis Fritsch v. Attorney General*, PB 94-510, October 19, 1994, (which the Board submitted as an authoritative annotation to both official statute publications)¹, the Department of Personnel has been

¹ The annotation states: "The personnel board is without jurisdiction to consider an appeal from a written reprimand under KRS Ch 18A, as the sole remedy for an employee who has received a written reprimand is to place a written response in the employee's personnel file, which right the employee had already exercised,

asked whether it will require agencies to provide notice of a right of appeal to the Personnel Board as boilerplate language in all written reprimands.

Opinion:

For the reasons stated in this Memorandum, the Department of Personnel should not require notice of appeal rights to be given in Written Reprimands.

Discussion:

Contrary to the assertion in the Personnel Board's Interim Order, "written reprimands" , when properly issued and used, do not constitute 'disciplinary actions", either within the meaning of K.R.S. 18A.005(22) or according to the listing of disciplinary actions within the Personnel Board's own administrative regulation, 101 KAR 1:345, Disciplinary actions. A "penalization", as defined by the statute is a "...demotion; dismissal; suspension; fines *and other disciplinary actions*; involuntary transfer; salary adjustment; any action that diminishes the level, rank, discretion, or responsibility of an employee without proper cause (including a reclassification or reallocation; and the denial or abridgement of other rights granted to state employees.... "Under this statutory definition, a penalization is an objective negative action that has an identifiable and direct negative impact on an employee's rank or salary. A written reprimand is a cautionary note to the employee that the supervisor has a concern with respect to a conduct or performance issue. It cannot rise to the level of an appealable penalization because it is not and cannot be a formal action taken by an Appointing Authority. Because a supervisor has no authority to issue a formal disciplinary action [a function that is reserved to the Appointing Authority by K.R.S. 18A.005 (1)], the Personnel Board's reasoning that it is a disciplinary action is seriously flawed. Employee appeal rights are outlined in K.R.S. 18A.095. That statute uses the term "appointing authority" twelve (12) times in referring to actions that may be appealed and effectively limits employee rights of appeal to actions taken by the "Appointing Authority"—not by a supervisor. By contrast, under K.R.S. 18A.020, supervisors have the clear right to issue written reprimands. K.R.S. 18A.020 also prescribes the notice that must be given when written reprimands are issued. The statute requires that the employee be given notice as follows:

and an attempt by an employee in the attorney general's office to appeal a written reprimand from the director of the victims advocacy division which concerned alleged violations of office policy by the employee in making unauthorized comments regarding a judge and pending litigation, which appeal also alleged political discrimination against her will be dismissed for failure to state a basis upon which relief can be granted where the employee's statement in support of her appeal does not set forth any facts or circumstances sufficient to form a prima facie case of discrimination but instead alludes to differences of opinion between the employee and the office of attorney general over how statutes involving victims of violent crimes are being implemented, and does not set forth the political beliefs or affiliation of either the employee or her superior but instead addresses differences of opinion over office policy regarding implementation of certain recent legislation relating to domestic violence. *Fritsch v Attorney General*, PB 94-519 (10-19-94)." KRS 18A.020.

(c) Whenever an employee is reprimanded for misconduct, other infraction, or failure to perform his duties in a proper or adequate manner, the supervising employee taking such action shall document such action in detail, and shall provide the employee with a copy of such documentation. The supervising employee shall inform the employee that he has the right to prepare a written response to the action taken after he has reviewed the written documentation prepared by the supervising employee. Such response shall be attached to the documentation prepared by the supervising employee. The supervising employee shall place a copy of the documentation and response provided for herein in the employee's personnel file and shall transmit a copy to the cabinet to be placed in the official personnel file of the employee. The supervising employee shall notify the employee that copies of the documentation and the response provided for herein have been placed in his personnel files. K.R.S 18A.020.

If the General Assembly intended that written reprimands should be appealable, logic, as well as the principle, "*inclusio unius est exclusio alterius*"², dictate that K.R.S. 18A.020 would have required notice of appeal rights in addition to the right to have a copy of the response included in the official personnel files. It did not do so. Nor did it restrict the right to issue written reprimands to the Appointing Authority.

The courts have recognized that a penalization cannot be subjective or speculative, but rather must be real and immediate in order to be actionable at law. Subjective employee expectations that are not clearly based on a statute or regulation are not actionable from a Constitutional standpoint. *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed. 2d 684 (1976). As the Supreme Court stated in *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1972):

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

² The ancient legal maxim of statutory construction is: "The inclusion of one thing is the exclusion of the other."

Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed. 2d 570 (1972) held that the rights or "legitimate claims of entitlement" that public employees have are defined by the applicable state laws and regulations. Written reprimands are corrective or instructive rather than disciplinary in character. They do not change the terms and conditions of employment, reduce an employee's rank, grade or pay, or do anything of an immediate and substantive nature other than advise the employee that there is a problem with conduct or work performance that needs to be corrected. No personnel action form is issued. Pay is not impacted. The written reprimand may be expunged upon request of the Appointing Authority and the employee has a statutory right to state his case by responding to the reprimand in all official files. There is no time limit on the right of response and the agency has no authority to censor it. More importantly, the statute that creates the procedures to be followed in issuing written reprimands does not require notice of appeal rights. K.R.S. 18A.020 (2) (c). Clearly, this is because the General Assembly recognized that such minor corrective statements do not penalize an employee to the extent that the authority of a supervisor to manage should be capable of challenge by right of appeal to the Personnel Board.

As we noted, the Personnel Board's decision in *Perkins* ignores the history of written reprimands in the state personnel system. The last regulatory reference to "written reprimands" was in the 1988 Kentucky Administrative Regulations Service, Volume 1 at 101 KAR 1:340, Section 5 (effective 9-4-86). The regulation was in the "Disciplinary Actions" title and stated:

Section 5. Written Reprimand. (1) An employee may be given a written reprimand preliminary to a disciplinary action. The written reprimand may be issued by the appointing authority or his designee, an intermediate supervisor, a division director, or the employee's immediate supervisor.

(2) A written reprimand shall be documented in detail. The employee shall be provided with a copy of the documentation and shall have the right to prepare a written response to the written reprimand after review of the documentation.

(3) The written reprimand shall include notice to the employee of his right to respond in writing to the written reprimand and shall advise the employee that the written reprimand, the supporting documentation, and the employee's response will be placed in his personnel files.

(4) The employee's written response shall be attached to the written reprimand and the supporting documentation, and a copy of each shall be

placed in the employee's personnel file maintained by the agency. A copy of each shall also be forwarded to the Department of Personnel and included in the employee's official personnel file maintained by the department if it complies with the requirements of this section.

(5) *Receipt of a written reprimand, in and of itself, is not an appealable penalization. The subject matter of the written reprimand may be grievable under 101 KAR 1:370.* (Emphasis added).

This regulation was repealed by 101 KAR 1:305 (along with a number of Personnel Board regulations, including 101 KAR 1:350, Right of Appeal which defined "other penalization") in Section 13 as: "...any other action which diminishes the level, rank, discretion or responsibility of the employee without proper cause or which is an abridgement or denial of other rights granted to state employees....") on March 8, 1989.

One of the problems with the Personnel Board's attempt to make new personnel policy by decree, rather than administrative regulation, is that Personnel Board decisions are unpublished. This means that the general public has no regularly published, authoritative source by which it can determine what the personnel rules are. The philosophy adopted by the General Assembly in requiring that all policies issued by the Executive Branch be in the form of an administrative regulation is that an employee ought to be able to go to the personnel statutes or administrative regulations to determine what their rights are under the Merit System. In essence, rule making by decree is exactly the kind of quasi-secret process that the General Assembly attempted to prevent when it said that: "An administrative body shall not by internal policy, memorandum, or other form or action...expand or limit a right...guaranteed by...a statute or an administrative regulation.... Any...form of action...violative of this section of the spirit thereof is null, void, and unenforceable." K.R.S. 13A.130. Moreover, making policy through unpublished decisions violates the spirit, if not the letter of K.R.S. Chapter 13A because there is no publicly announced public hearing at which comments may be made by the public with respect to proposed policy. The approach adopted by the Board also bases a decision on a single set of facts as determined in an adversarial hearing as opposed to public comments from a number of sources. The Personnel Board does not conduct its deliberations in public when it discusses cases and does not invite public comment on decisions that it makes on them. Making policy by decree not only runs the risk of error due to the emotional issues that may be present in a particular case, but also reduces the applicability of the policy to the set of facts that the case presents. Finally, policy-making by decree clearly circumvents the legislative oversight required by K.R.S. Chapter 13A that is necessary to insure that the policy is consistent with legislative intent. Administrative regulations are subject to public scrutiny before legislative committees to ensure that they are consistent with the statutes. We asked the Personnel Board to address the issue of the appeals of

written reprimands by proposing an administrative regulation at its regular meeting of March 13, 2004. It is my understanding that it discussed this matter in executive session without coming to a decision as to whether to do so.

The Board's concern as to whether a reprimand might be misused or assigned too much weight in a future personnel action, such as a promotion or disciplinary action, is both speculative and misplaced. Employees have the right to appeal those actions if and when they occur and if the evidence shows that the Appointing Authority abused his or her discretion in making *that* personnel decision, K.R.S. 18A.095 gives the Personnel Board the right to fashion a remedy. Concern over whether a corrective action might have a negative effect in the future does not justify ignoring the clear mandate of K.R.S. Chapter 13A or justify rule-making by decree. To the contrary, if agencies are concerned that their limited resources will be wasted in defending *de minimus* corrective actions, such as written reprimands in Personnel Board appeals, the natural result will be that agencies will abandon this useful managerial tool and simply place the note in an evaluation. The inherent delay in doing so creates problems with contemporaneous documentation and ultimately results in the employee's not being placed on timely notice of problems with conduct or work performance.

I conclude that the Personnel Board's decision is erroneous as a matter of law and as a matter of good management policy. We have urged the Board to reconsider its approach and sincerely hope that it will do so. If this issue cannot be resolved by discussion, I will recommend that the issue be litigated and offer the resources of this office to assist in reversing this decision.