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23-ORD-080

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In re: Kelly Reynolds/Justice and Public Safety Cabinet

Summary: The Justice and Public Safety Cabinet (“the Cabinet”) did not violate the Open Records Act (“the Act”) when it did not provide records that do not exist.

Open Records Decision

On February 28, 2023, Kelly Reynolds (“Appellant”) asked the Cabinet to allow her to inspect “all personnel records/documentation” for her period of employment from November 1, 2022, to February 28, 2023, including “any disciplinary records (including the investigations), evaluations conducted on this employee, and any e-mails containing information about [the Appellant’s] employment, disciplinary actions/reports, and termination.” In a timely response, the Cabinet provided the Appellant a copy of her personnel file along with two emails, but stated that it “did not locate any investigations or evaluations.” This appeal followed.

Once a public agency states affirmatively that it does not possess any additional responsive records, the burden shifts to the requester to present a *prima facie* case that requested records do exist. *Bowling v. Lexington–Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). Here, the Appellant claims she “was terminated because [she] did not ‘fit in’ and based upon [her] evaluation,” but she has “not seen this evaluation nor was that evaluation discussed with” her. According to the information in the Appellant’s personnel file, a copy of which she has provided to this Office, the Appellant was employed in the classified service as a Forensic Autopsy Technician in the Office of the State Medical Examiner and was separated from employment during her six-month initial probationary period. The documents pertaining to her separation do not contain any reference to an evaluation, nor do they state any other cause for termination.

On appeal, the Cabinet states that no evaluation of the Appellant was conducted because she was separated during initial probation. “Annual performance evaluations shall be completed for all full-time classified employees with status at the beginning of the performance year who have remained in continuous merit status throughout the performance year.” 101 KAR 2:190 § 2. “Status’ means the acquisition of tenure with all rights and privileges granted by [KRS Chapter 18A] after satisfactory completion of the initial probationary period by an employee in the classified service.” KRS 18A.005(37). Only “[a]n employee who satisfactorily completes the initial probationary period [is] granted status.” KRS 18A.111(2). Because the Appellant was not employed for six months, she did not complete her initial probationary period, and therefore, did not acquire status. Accordingly, the Cabinet was not required to conduct a performance evaluation of the Appellant. Thus, to the extent the Appellant may have established a *prima facie* case that an evaluation should exist, the Cabinet has explained why it does not.¹ See *Eplion v. Burchett*, 354 S.W.3d 598, 603 (Ky. App. 2011).

With regard to disciplinary records or investigations, the Cabinet states, “No responsive documents were found pertaining to any disciplinary records including investigations concerning or pertaining to” the Appellant. The Appellant has not attempted to establish a *prima facie* case that any disciplinary records or investigations exist. Under KRS 18A.111(1), “[a]n employee may be separated from his position . . . during [an] initial probationary period” without cause.² There is no reason to believe an investigation or disciplinary action should exist simply because the Appellant was separated from employment during the initial probation period. Accordingly, the Cabinet did not violate the Act.³

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Pursuant to KRS 61.880(3), the Attorney General shall be notified of any action in circuit court, but shall not be named as a party in that action or in any subsequent proceedings. The Attorney General will accept notice of the complaint emailed to OAGAppeals@ky.gov.

¹ To the extent examination materials might be considered a type of “evaluation,” the Cabinet correctly notes that under KRS 61.878(3) public agency employees do not “have the right to inspect or to copy any examination.” See also KRS 18A.020(4) (“a state employee shall not have the right to inspect or to copy any examination materials”).

² Cf. KRS 18A.095(1) (“A classified employee with status shall not be dismissed [or] otherwise penalized except for cause”).

³ On appeal, the Appellant makes a new request for correspondence from six named individuals, which the Cabinet states is not in its possession but may be in the possession of the Office of the State Medical Examiner. This new request is not at issue in this appeal.

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s/ James M. Herrick
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