COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-079

GARY L. WISE **APPELLANT**

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

EDUCATION AND WORKFORCE DEVELOPMENT CABINET **APPELLEE**

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The Board, at its regular July 2016 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated April 25, 2016, Appellee's Exceptions, Appellant's Response to Exceptions, Appellant's Corrected Response to Exceptions and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be altered as follows:

A. **Delete** Finding of Fact paragraph 7, and substitute the following:

7. The Board rejects the Hearing Officer's Findings that the evidence demonstrated Appellant performed the majority of the duties of the Workforce Development Manager, which were outside of his classification. Rather, the Board specifically relies on the testimony of Mr. James Lambert and his considerable expertise in performing desk audits in the Classification and Compensation Branch of the Personnel Cabinet in this regard. The Board adopts Mr. Lambert's testimony, and so finds as factual, that the Appellant's supervision of employees expanding from a

single office to four offices, was only an increase in volume and not a permanent, material change in duties, and as such would not justify reclassification.

B. **Delete** Conclusions of Law paragraphs 3, 4 and 5, and substitute the following:

3. The Board rejects the Hearing Officer's Conclusions of Law that Appellant suffered a permanent, material and substantial change in his duties when his period of detail ended. The Board concludes, as a matter of law, that Appellant did not suffer a penalization when his period of special duty ended.

4. The Board concurs with the Hearing Officer's Conclusions of Law that the Appellant's appeal was timely filed, and thus, the Appellee's Motion to Dismiss was properly **OVERRULED**.

C. **Delete** the Recommended Order and substitute the following:

IT IS HEREBY ORDERED that the appeal of GARY L. WISE V. EDUCATION AND WORKFORCE DEVELOPMENT CABINET (APPEAL NO. 2015-079) is DISMISSED.

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer, as altered, be and they hereby are approved, adopted and incorporated herein by reference as a part of this Order and that the Appellant's appeal is **DISMISSED**.

The parties shall take notice that is Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this 13th day of July, 2016.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK
SECRETARY

A copy hereof this day mailed to:

Hon. Patrick Shirley
Hon. Tess Russell
Mr. Gary L. Wise
Hon. Rosemary Holbrook

COMMONWEALTH OF KENTUCKY
KENTUCKY PERSONNEL BOARD
APPEAL NO. 2015-079

GARY WISE **APPELLANT**

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER

EDUCATION & WORKFORCE DEVELOPMENT CABINET **APPELLEE**

** ** ** ** ** ** ** ** ** **

This matter came on for evidentiary hearing on March 21, 2016, at 9:30 a.m., at 28 Fountain Place, Frankfort Kentucky before Brenda D. Allen, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Gary Wise, was present at the evidentiary hearing and was not represented by legal counsel. The Appellee, Education Workforce and Development Cabinet, was present and was represented by the Honorable Tess Russell. Also present was Agency Representative Beth Steinle and assistant Megan Fischer.

The issues before the Hearing Officer were whether the Appellant was performing the duties of a Workforce Development Manager without proper compensation and, if so, whether he is entitled to reclassification or additional compensation for that time period. The Appellant had the burden of proof by a preponderance of evidence. Also before the Hearing Officer was the issue of whether the Appellant's appeal was timely filed. With regard to that issue, the Appellee has the burden of proof.

BACKGROUND

1. The Appellant filed his appeal with the Personnel Board on April 20, 2015, contending that he is classified as a Workforce Development Operations Administrator and that he was performing the duties of a Workforce Development Manager. The appeal outlined that the Appellant filed a grievance in 2013 regarding this issue and that in order to resolve the grievance the Cabinet detailed him to Special Duty to the Manager position for a period of one year from September 2013. According to the Appellant, at the conclusion of the detail he reverted back to the position of Workforce Operations Administrator, but continued to perform the Manager duties. Ultimately, in March of 2015, Appellant filed another grievance regarding this, asserting that the situation constituted a permanent and material change in duties and warranted permanent reclassification to the appropriate grade with appropriate compensation.

2. In response to the grievance, the Appellant's first line supervisor, Lori Collins responded, writing that the Administrator duty requiring that the employee travel to one or more counties was not unreasonable and was not a material and permanent change in duties warranting a reclassification. She also contended that the grievance was untimely and asserted that it must be "filed within 30 days of the occurrence or discovery of the event." The Appellant appealed to his second-line supervisor and the Commissioner, both of whom concurred with Ms. Collins. Fourteen days later, the Appellant filed the instant appeal with the Personnel Board on April 20, 2015.

3. At the commencement of the Hearing, each party made an Opening Statement. The Appellant then called **Regina K. Oney** as his first witness. After being sworn, Ms. Oney testified that she is now the Regional Program Manager for the Workforce Development Cabinet, but that in August 2011 she was hired as the Assistant Director, reporting to Lori Collins. She testified that she was not the Appellant's supervisor, but became involved when she was advised that there were concerns regarding the overlap of job duties between the Grade 15 Operations Administrator position and the Grade 16 Workforce Development Manager position, and that, as a result, grievances were being filed.

4. The witness stated that to address this situation, she was assigned by the executive level to convene a workgroup of the Grade 15 Operation Administrators and the Grade 16 Workforce Development Managers within the Cabinet. She stated that her role was facilitating the discussions to determine what duties each employee performed and to obtain the group's recommendations. She testified that the workgroup, comprised mostly of grade 15 employees, recommended that the Cabinet reallocate the Grade 15 positions to a Grade 16. The witness identified Appellee's Exhibit 1 as the Workforce Development OPS Administrator Job Class Specification with a revision date of April 16, 2015. According to the witness, this revision of the Job Classification occurred several years after the workgroup completed its assigned task.

5. The witness testified that during her employment, she has never reclassified an individual to a management position, but she had requested reclassifications if an employee was performing duties outside of the employee's classification for a period of six months or more.

6. The next witness to testify on behalf of the Appellant was **Keni Winchester Brown**. She testified that she has been employed with the Cabinet since December 2011 when she was hired as a Workforce Development Spec 1. She testified that the Appellant was on her interview panel and after she was hired, he became her supervisor. She testified that she was reclassified several times, then applied for and was promoted to a facilitator position. She stated that in January 2015, she applied for and was promoted to the positon of Regional Manager and became the Appellant's boss and that it was her understanding that the Appellant applied for the positon she now holds.

7. The witness identified Appellant's Exhibit 1, the Job Specification for the Workforce Development Manager, and Appellant's Exhibit 2, the Job Specification for the Workforce Development OPS Administrator. Under questioning from the Appellant, Appellee and the Hearing Officer, the witness testified that the Appellant serves in the position of OPS Administrator and noted that according to the OPS Administrator Job Specification, this position provides assistance to a Manager, and provides supervision in a designated service office or for a section of employees. She admitted that the Appellant was actually providing assistance to the higher level position of Regional Manager, and that he does not supervise the employees in a single office, but four offices: Shelbyville, Shepherdsville, Louisville Cedar and Louisville Preston.

8. The witness then went through the duties outlined in the Workforce Development Manager Job Classification; Appellant's Exhibit 1, and compared the duties listed in the document to the work currently performed by the Appellant. She admitted that the Appellant is tasked with performing several of the listed duties enumerated in the third paragraph of the second page. Specifically, of the eighteen (18) separate sentences listed, she admitted that the Appellant was performing ten (10) of them including, among others, assigning and evaluating the work of personnel, ensuring that employees carry out services in accordance with statutes, policy and regulation, evaluating employees, initiating employee corrective action, conducting staff meetings, recommending personnel actions, and traveling to conduct presentations and attend meetings. Appellant's Exhibits 1 and 2 were entered into the record without objection. The witness identified Appellant's Exhibit 3, 4 and 5 as Position Descriptions for the Appellant and two other Cabinet employees, one of whom serves in the positon of an OPS Administrator, and a second who serves in the positon of Workforce Development Manager.

9. During questioning by the Appellee, the Appellee tendered a document for identification, elicited testimony and moved entry. The Appellant **OBJECTED**. The objection was **SUSTAINED** and the document was not entered into the record. The Hearing Officer made the same ruling with regard to a second document that the Appellee indicated would be proffered.

10. The witness then identified and testified regarding Appellee's Exhibit 2, the Desk Audit ordered by Interim Order of the Personnel Board to be conducted in this matter. The witness identified Appellee's Exhibit 3, a two-page document the first of which initiated the Appellant's Detail to Special Duty in September 2013, and the second of which reverted the Appellant back to his former positon effective September 1, 2014. The exhibit was entered into the record without objection.

11. The witness identified Appellee's Exhibit 4, Mr. Wise's Annual Performance Evaluation Plan for the period of January 1, 2015 to December 31, 2015. The document was entered into the record without objection. Appellee's Exhibit 5, the Position Description (PD) for Wilhelmina Cornish, who formerly held the vacant Manager position above the Appellant, was entered into the record over the objection of the Appellant.

12. With regard to Appellant's Exhibit 3, the Position Description for Manager Jeanne Scott, upon questioning from the Hearing Officer, the witness was asked to review the PD and compare the tasks listed to the work performed by Mr. Wise. Of the five tasks listed, she testified that Tasks 3 and 4 are tasks that Mr. Wise does not perform. She admitted that as it related to Task 4, Mr. Wise does not perform the duty of making recommendations regarding staffing and personnel actions because there was a hiring freeze. The witness stated that she did not believe that the Appellant was eligible to be reclassified because he has not been given a material and permanent change to his duties in writing.

13. The Appellant, **Gary Wise,** then took the stand on his own behalf. He testified that he has been employed with the Cabinet for twenty-six years. He identified Appellant's Exhibit 6 as the grievance he filed in July 2013 because he was performing duties outside of his pay grade. The exhibit included a letter from Mark White, the Appointing Authority, stating that the Appellant would be detailed to special duty "to resolve the pending grievance for a period of one year." The Appellant testified that the letter detailing him outlined that he was being "assigned supervision of the Central Louisville Office, East Louisville Office and Shelbyville Office." He testified that after the detail ended, he continued supervision of the Central Louisville, East Louisville and Shelbyville Office without compensation. He noted that the Shelbyville and Shepherdsville Offices were under one umbrella, so he has continued responsibly for four separate offices after the detail ended.

14. The Appellant stated that after the detail ended, there was no removal of any duties, and to this day, he continues to perform all of the duties he performed while detailed to special duty, including responsibility for the performance planning and evaluations of all staff in the four offices throughout the region.

15. The Appellant then refuted the testimony of Ms. Brown relative to her contention that he was not performing some of the duties of the Manager because he had delegated them to others. Appellant stated that he has to delegate some duties because it is impossible for him to be in four physical locations in the state every day, so he has to rely upon staff in the various offices throughout the region to carry out the work.

16. As it pertains to Ms. Brown's testimony regarding the Positon Description for Manager, Appellee's Exhibit 5, he testified that he performs all of Tasks 1 and 2 and a portion of Tasks 3 and 4. He stated that he participates in meetings, but not speaking engagements.

17. On cross examination, Mr. Wise stated that he could not recall the exact date that he realized he was performing the work of a Manager, but admitted that after the detail ended in September 2014, he was aware that he continued to perform the duties, and filed his grievance in March 2015 because he was attempting to allow the Cabinet time to address the problem as they said they would.

18. Mr. Wise then reviewed Appellant's Exhibit 1 and continued to take issue with the testimony of Ms. Brown, specifically he stated that while Ms. Brown testified that he did not provide technical assistance to subordinates and employees, her testimony was inaccurate. He stated that he did provide technical assistance relative to the programs of the office. Likewise, he testified that he did provide leadership in the selection and hiring process. Specifically, he stated that he was tasked with completing the paperwork to make recommendations for every personnel action for positions under his purview at the Cabinet in 2013 until the hiring freeze was implemented. Mr. Wise testified that he answers questions from clients and employers, but not from community partners and relayed to the Hearing Officer the detail of such duties. As it pertains to employee training, the Appellant testified that he makes recommendations for employee training.

19. The Appellant stated that he does agree with Ms. Brown that he does not perform the task of monitoring office expenditures, as that function is performed by the central office. He stated that he does not define program goals, nor visit employers to highlight and market services.

20. The Appellant concluded his testimony by stating that he believed he was entitled to back pay from September 1, 2014 forward, the period of time after his detail ended, since he has continued to perform the Manager duties without compensation.

21. The Appellant rested.

22. The Appellee, as a part of its case, called as its first witness **James Lambert**, Staff Assistant with the Personnel Cabinet. He testified that he been employed with the Cabinet for twelve and a half years, with a total of forty-six years working for state government in the areas of classification and compensation.

23. As it pertains to Appellee's Exhibit 2, the Desk Audit for the Appellant's position, the witness testified that he completed the document with the assistance of Ms. Moreland, the Manager of the Classification and Compensation Branch. He stated that he performed the audit as a result of an interim order of the Board. He stated that a Desk Audit is a tool to help learn more about a position. In conducting the audit, he speaks with the employee and his first line supervisor, asking about specific duties performed and changes over time.

24. Mr. Lambert testified that he has completed approximately 60 desk audits in his career. He stated that in performing this desk audit on July 21, 2015, he conducted it by phone with Mr. Wise, Ms. Brown, the Appellant's current supervisor and Appellant's former supervisor, Connie Schnell, since Ms. Brown had not been Appellant's supervisor for long. Mr. Lambert stated that the desk audit took less than two hours, and included the phone conversations with the three relevant individuals, a review of the position description, and job specs for the OPS Administrator and Manager positions and a copy of the Appellant's Performance Plan.

25. The witness testified that he wrote the audit and made a recommendation that the duties that Mr. Wise was performing more closely matched the OPS Administrator position because he believed there was a change in the volume of work, but not in the duties. He did, however, make a recommendation that Mr. Wise's PD should be updated to "reflect current duties."' He did note for the record there were two corrections needed in his response to question 11 in the Audit and outlined the two typographical errors to clarify the record.

26. Mr. Lambert testified that for a reclassification under KRS 18A.005, there must be a material and permanent change in duties given to the employee in writing. Mr. Lambert stated that the fact that the Appellant initially supervised the employees in a single office, but later supervised the employees in four offices, that was merely an increase in volume and not a change of duties. He admitted under questioning by the Appellant, however, that a desk audit does not capture all of the duties that a person performs. Under questioning from the Hearing Officer, Mr. Lambert stated that to resolve differences of opinion between the Appellant and his supervisor relative to the Appellant's duties, he sought the input of the former supervisor.

27. The next witness to testify on behalf of the Appellee was **Beth Steinle** who serves as the Director of Human Resources for the Workforce Development Cabinet. She testified as to the history within the Cabinet leading up to this issue. Ms. Steinle stated that although she was hired after the workgroup Ms. Oney testified to have convened, she was made aware of the reasoning for the workgroup's existence. She stated that in the past the Cabinet had undergone a re-organization to establish various regions, each of which would have an OPS Administrator and a Manager. At some point, a determination was made that there were too many layers of managers in most of the offices and that to address this, the manager positions would be reduced through attrition. Over time, some employees began to grieve because they contended they were performing duties of the vacated manager positions in their regions without compensation. She noted that the class specifications, the workgroup was utilizing at that time, no longer exist and were updated with her assistance some years later.

28. Ms. Steinle stated that when practicable, a manager position should be filled through posting, competition and filling and not reclassification. Ms. Steinle testified that the Manager positions are funded federally and because of a shortage of funding, she does not know how a reclassification, if ordered by the Personnel Board, could be funded. She testified that if the Personnel Board were to order that there needed to be a Manager position created, it should be filled through posting and applications, not through reclassification. She asserted that, if Mr. Wise is performing the duties of Workforce Development Manager, a reclassification is not the appropriate remedy. However, upon questioning by the Hearing Officer, she was unable to articulate what remedy would compensate the Appellant if it were determined that he had been performing such duties without compensation on a permanent basis.

29. The Appellee rested.

30. The Appellee made a **MOTION TO DISMISS**, arguing that because the grievance was untimely filed, then by extension the Personnel Board Appeal was likewise untimely. The Appellant **OBJECTED**. The Hearing Officer **RESERVED RULING** on the Motion.

31. Each party made a closing statement. The Hearing Officer considered the entire administrative record.

FINDINGS OF FACT

1. The Appellant, Gary Wise, was classified as a Workforce Development Operations Administrator, Grade 15. (Appellant, Appellee's Exhibit 4.)

2. Beginning in July 2012, the Workforce Development Manager position above the Appellant's position was vacated and the Appellant began performing the duties. (Appellant's Exhibit 6.)

3. In July 2013, the Appellant filed a grievance alleging he was performing duties outside of his classification without compensation. (Appellant's Exhibit 6, Appellant.)

4. In order to resolve the grievance, the Appellee detailed the Appellant to Special Duty to the Workforce Development Manager position, Grade 16, effective September 1, 2013. In the grievance response, the Appellee acknowledged in writing that the two positons were "extremely similar" and contended they were working to better define the two. (Appellant's Exhibit 6.)

5. Through the letter of Detail to Special Duty, the Appellee specifically assigned the Appellant "responsibility over the Louisville East, Central and Shelbyville Offices for one year." (Appellant's Exhibit 6.) The Appellant performed a large number of other Manager duties during the period of detail. (Testimony of Brown, Appellant.)

6. By letter of August 18, 2014, Beth Steinle, the Appointing Authority, provided the Appellant notice of reversion back to his former position effective September 1, 2014, but did not detail to whom the manager duties would be assigned or provide the Appellant notice of any appeal rights. (Appellant's Exhibit 6.)

7. The evidence of record demonstrates that the Appellant performed the majority of the duties of the Workforce Development Manager, which were outside of his classification and pay grade without compensation since September 1, 2014. (Testimony of Appellant, Brown, Appellant's Exhibit 1, Appellee's Exhibit 4.)

8. On April 20, 2015, the Appellant filed a Personnel Board Appeal alleging that he has suffered a penalization by performing duties outside of his class without compensation.

CONCLUSIONS OF LAW

1. KRS 18A.005(24) provides that an increase in responsibility without cause or authority constitutes a penalization.

2. KRS 18A.095(29) provides:

> *[A]n employee that has been penalized, but has not received a written notice of his or her right to appeal as provided in this section, shall file his or her appeal with the Personnel Board within one (1) year from the date of the penalization or from the date that the employee reasonably should have known of the penalization.*

3. Through the August 18, 2014 letter, the Appointing Authority reverted the Appellant back to his former position and pay effective September 1, 2014. However, beginning September 1, 2014, the Appellee continued to require that the Appellant perform duties of the Manager, even incorporating some into his performance evaluation planning document. *See* Appellee's Exhibit 4.

4. The Appellant's duties have undergone a permanent, material and substantial change.

5. Such conduct constitutes a penalization as defined in KRS 18A.005(24), for which the Appellant did not receive written notice of his right to appeal as provided in KRS 18A.095(29). Accordingly, the Hearing Officer concludes that the Appellant's April 20, 2015 appeal to the Personnel Board was within the one year limitations period and the Appellee's Motion to Dismiss is **OVERRULED**.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the Appeal of **GARY WISE vs. EDUCATION AND WORKFORCE DEVELOPMENT CABINET (APPEAL NO. 2015-079) be SUSTAINED.**

The Hearing Officer also recommends to the Personnel Board that the Appellee be ordered to provide the Appellant back pay from September 1, 2014 forward including any contributions to retirement or other benefits lost as a result of the penalization and that the Appellant be made whole. Further, the Appellee is to reimburse Appellant for any leave time he used attending the hearing and any pre-hearing conferences at the Board, and to otherwise make Appellant whole. [KRS 18A.105, KRS 18A.095(25), and 200 KAR 12:030.]

The Hearing Officer also recommends that the Appellant be Reclassified to the Position of Workforce Development Manager, Grade 16, with the requisite pay, duties and responsibilities associated with the position.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen 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 exception 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 the 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 Brenda D. Allen** this 25th day of April 2016.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Tess Russell
Gary Wise