COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD

LEE C. COLEMAN (Appeal No. 2015-168),
JEFFERY H. DOTSON (Appeal No. 2015-169),
PHIL DEAN JUSTICE (Appeal No. 2015-170), AND
KYLE KESSLER (Appeal No. 2015-171) **APPELLANTS**

VS.

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

TRANSPORTATION CABINET **APPELLEE**

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

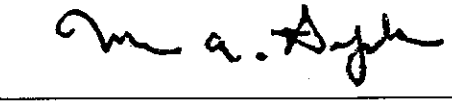
The Board at its regular April 2016 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated February 26, 2016, and being duly advised,

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 Appellants' appeals are 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 20th day of April, 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. William Fogle
Mr. Lee C. Coleman
Mr. Jeffery H. Dotson
Mr. Phil Dean Justice
Mr. Kyle Kessler
Mr. J. R. Dobner

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VS. **FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER**

TRANSPORTATION CABINET **APPELLEES**

** ** ** ** **

These matters came on for a pre-hearing conference on September 18, 2015, at 10:00 a.m., ET, at 28 Fountain Place, Frankfort, Kentucky, before Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellants, Lee C. Coleman, Jeffery H. Dotson, Phil Dean Justice and Kyle L. Kessler, were present by telephone and were not represented by legal counsel. The Appellee, Transportation Cabinet, was present and represented by the Hon. William Fogle.

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

Appellant Lee C. Coleman filed his appeal with the Personnel Board on July 28, 2015, alleging he was penalized when he did not receive midpoint for a Highway Equipment Operator III (HEO-III). He stated that HEO-IIIs in District 10 had received midpoint. He stated they were promised it in District 12; however, it did not happen. Mr. Coleman also alleged there were Mine Inspectors who transferred in as HEO-Is and made considerably more than he did. He specifically stated that some employees had been allowed to resign and reappoint. Appellant Coleman stated he was requesting at least midpoint for Grade 10.

Appellant Jeffery H. Dotson filed his appeal with the Personnel Board on July 28, 2015. He testified he is an HEO-III and he wished to receive at least midpoint for his grade. He mentioned the Mine Inspectors who earn over $50,000 while Dotson and others earn around $30,000 as HEO-IIIs. He also testified that when he came through the ranks, he reclassified from an HEO-I to an HEO-II and from an HEO-II to an HEO-III. He stated that now they are allowing employees to promote, and thus, they will come out with higher salaries.

Appellant Phil Dean Justice filed his appeal on July 28, 2015, alleging penalization. He is a HEO III. He was limited to five percent when he reclassified from HEO I to HEO II. He was allowed to promote from a HEO II to a HEO III, and is currently on promotional probation. He also mentioned the Mine Inspectors who earn more than he does, even though they are HEO Is. He stated he wanted at least midpoint for HEO III.

Appellant Kyle L. Kessler filed his appeal on July 28, 2015. He stated he is a HEO II, and he received five percent when he reclassified from an HEO I. He mentioned the Mine Inspectors, and also felt he should receive the midpoint for a HEO II.

The Appellants also made reference to an employee who retired and came back as an interim HEO III earning midpoint. Based on all this evidence, the Appellants felt they should receive at least midpoint for their current grades.

Counsel for the Appellee stated the Appellants had not stated an appealable issue and did not have standing to complain about the salary for the former Mine Inspectors. He stated he wished to file a motion to dismiss.

Subsequent to the pre-hearing conference, the Appellee filed a Motion to Dismiss. Though given ample time, the Appellants did not file any response to the Motion to Dismiss. The matter is submitted for a ruling.

BACKGROUND

1. During the relevant times, the Appellants, Lee Coleman, Jeffrey Dodson, Phil Justice and Kyle Kessler, were classified employees with status.

2. In its Motion to Dismiss, Counsel for the Transportation Cabinet contends the Appellants lack standing to question the rate of pay received by laid-off former Mine Inspectors who had apparently demoted or transferred into HEO positions. Counsel states these Mine Inspectors clearly would not be new appointments, as the regulation at 101 KAR 2:034 envisions that would require a salary adjustment.

3. As to the persons alleged by the Appellants to be making mid-point, these were apparently in a different district, let alone work county, than in which the Appellants worked. Counsel thus contends that the requirements of 101 KAR 2:034 were not met in that respect, and the Appellants are not entitled to any salary adjustments.

4. As noted, Appellants, though given ample time, did not file a response.

5. 101 KAR 2:034 Classified compensation administrative regulations states as follows:

Section 1. New Appointments.

(1) An appointing authority shall appoint a new employee at a salary not to exceed the midpoint of the pay grade.

(2) The appointing authority shall adjust to that salary an employee who is earning less than the new appointee's salary, if the appointing authority determines that the incumbent employee:

(a) Is in the same job classification;

(b) Is in the same work county; and

(c) Has a similar combination of education and experience relating to the relevant job class specification.

Section 2. Reentrance to Classified Service.

(1) Returning retirees. An employee who was formerly employed under KRS Chapter 18A and who is appointed to a position covered by the provisions of KRS Chapter 18A while receiving retirement payments through the Kentucky Retirement Systems or Kentucky Teachers Retirement System shall be appointed in accordance with the provisions for new appointments in this administrative regulation.

(2) Other reentering employees.

(a) Former classified employees. An appointing authority shall set the salary of a former classified employee, other than a returning retiree, who is being reemployed, reinstated, or probationarily appointed in one (1) of the following ways:

1. In accordance with the standards used for making new appointments in this administrative regulation; or

2. Up to the same salary as that paid at the time of separation from the classified service, if that salary does not exceed the midpoint salary plus the difference, in dollars, between the entry level salary and the midpoint salary.

(b) Former unclassified employees with prior classified service. An appointing authority shall set the salary of a former classified employee who moved to the unclassified service and who is reinstated, reemployed or probationarily appointed to a position in the classified service in one (1) of the following ways:

1. In accordance with the standards for making new appointments;

2. Up to the same salary as that paid at the time of separation from the classified service, if that salary does not exceed the midpoint salary plus the difference, in dollars, between the entry level salary and the midpoint salary;

3. At a salary that is the same as the salary the employee last received in the classified service with adjustments for increases that would have been received if the employee had remained in the classified service prior to resignation if the salary does not exceed the midpoint salary plus the difference, in dollars, between the entry level salary and the midpoint salary; or

4. At a salary up to five (5) percent above the grade entry level wage for each year of service in the KRS Chapter 18A system, if the salary does not exceed the midpoint salary plus the difference, in dollars, between the entry level salary and the midpoint salary.

(c) Former unclassified employees with no previous classified service. An appointing authority shall set the salary of a former unclassified employee with no previous

classified service, who is probationarily appointed or reemployed, in one of the following ways:

1. In accordance with the standards for making new appointments; or

2. At five (5) percent above the minimum salary for each year of service in the unclassified service, if the salary does not exceed the midpoint salary plus the difference, in dollars, between the entry level salary and the midpoint salary.

(d) Laid off employees. A former employee, separated from the classified service by layoff and reinstated or reemployed in the same or similar job classification within five (5) years from the date of layoff, may receive the salary they were receiving at the time of layoff, even if the salary is above the maximum of the pay grade.

(3) Probationary increments upon reentrance to state service.

(a) A former employee who is probationarily appointed at a salary below the midpoint of the pay grade shall receive a probationary increment upon successful completion of the probationary period.

(b) A former employee who is probationarily appointed at a salary that equals or exceeds the midpoint of the pay grade may, at the discretion of the appointing authority, receive a probationary increment at the time of successful completion of the probationary period. If the employee is not granted a probationary increment at the time of completion of the probationary period, an increment shall be awarded at the beginning of the month following completion of twelve (12) months of service from the date of appointment.

6. KRS 18A.095(18)(a) states as follows:

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

The Hearing Officer makes the following findings by a preponderance of the evidence:

1. During the relevant times, the Appellants, Lee Coleman, Jeffrey Dodson, Phil Justice and Kyle Kessler, were classified employees with status.

2. The Hearing Officer finds that the Appellants did not state a claim under which they can obtain relief because employees were transferred in making more money than they were.

3. Likewise, the Hearing Officer finds there is no cognizable claim when employees in a different district and different work county than the Appellants apparently received pay raises pursuant to the regulatory scheme and the Appellants did not.

4. The Hearing Officer finds the Appellants did not state any claim over which the Personnel Board could reasonable expect to grant relief.

CONCLUSION OF LAW

The Hearing Officer concludes that generalized claims of dissatisfaction with pay do not in and of itself give the Personnel Board jurisdiction or state a claim of penalization. The former office of Mine Safety and Licensure employees are not new appointments, and the other employees Appellants alleged received pay increases were not in the same work county as the Appellants. The Hearing Office concludes these appeals should be **DISMISSED**.

RECOMMENDED ORDER

The Hearing Officer thus concludes that the appeals of **LEE COLMAN VS. TRANSPORTATION CABINET (APPEAL NO. 2015-168), JEFFERY H. DOTSON VS. TRANSPORTATION CABINET (APPEAL NO. 2015-169), PHIL JUSTICE VS.**

TRANSPORTATION CABINET (APPEAL NO. 2015-170), AND KYLE KESSLER VS. TRANSPORTATION CABINET (APPEAL NO. 2015-171) 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 26th day of February, 2016.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. William Fogle
Mr. Lee C. Coleman
Mr. Jeffery H. Dotson
Mr. Phil Dean Justice
Mr. Kyle L. Kessler
J. R. Dobner