COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-261

STEPHEN EASTIN **APPELLANT**

VS.

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

TOURISM, ARTS AND HERITAGE CABINET,
DEPARTMENT OF PARKS **APPELLEE**

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

The Board, at its regular May 2016 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated April 15, 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 altered, as follows:

A. **Delete** Finding of Fact number 3 and substitute the following:

> 3. The Board finds that while Appellant makes several novel arguments, especially as it relates to interpretation and enforcement of 101 KAR 2:034, the Hearing Officer believes, and so finds, enforcement of the regulation as it stands is not arbitrary.

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 the Appellant's appeal is **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 19th day of May, 2016.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. William H. Adams
Hon. Derrick Helm

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-261

STEPHEN EASTIN **APPELLANT**

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

TOURISM, ARTS AND HERITAGE CABINET
DEPARTMENT OF PARKS **APPELLEE**

** ** ** ** **

This matter came on for a pre-hearing conference on December 10, 2015, at 11:30 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, Stephen Eastin, was present and was represented by the Hon. Derrick Helm, also present. The Appellee, Tourism, Arts and Heritage Cabinet, Department of Parks, was present and represented by the Hon. Leigh Powers. Also present as Agency representative was Ms. Laurie Googe.

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 noted this appeal was filed with the Personnel Board on October 8, 2015. The Appellant was appealing "failure by the Department to fairly compensate" and also making a claim of discrimination. Appellant also filed a grievance which had been denied by the Commissioner of Parks. The Appellant is a Resort Park Manager III, apparently one of three in the state, and is Park Manager at Lake Cumberland State Resort Park. In his appeal and his grievance that had previously been filed, the Appellant noted that another Resort Park Manager had been hired at a significantly higher salary than he, with this new hire having much less experience than Appellant.

As relief, Appellant seeks to have his pay adjusted to bring it more in line, if not equal to, the new hire of the Park Manager at Lake Barkley State Resort Park.

As to the claims of discrimination, counsel noted Appellant was not making any claims of any protected class discrimination, but was claiming the system used (whereby compensation was determined and adjustments not made to Appellant's salary) to be arbitrary and capricious in violation of Section 2 of the Kentucky Constitution.

Subsequent to the Interim Order, the Appellee filed a Motion to Dismiss. Time was given to the Appellant to file a response, which he has done. The matter stands submitted for a ruling.

BACKGROUND

1. During the relevant times, the Appellant, Stephen Eastin was a classified employee with status.

2. In its Motion to Dismiss, the Appellee, Tourism, Arts and Heritage Cabinet, Department of Parks (Parks), contends the Personnel Board does not have jurisdiction and that this appeal should be dismissed.

3. In support of this argument, the Appellee contends that Appellant, Stephen Eastin, is currently a Resort Park Manager III currently at the Lake Cumberland State Resort Park. Counsel contends the Appellant laterally transferred from the Pine Mountain Resort Park to the Lake Cumberland Resort Park. Appellant was not given the opportunity to resign/reinstate. Parks contends that Appellant has not stated a penalization as that term is defined at KRS 18A.005(24) and that the regulation (101 KAR 2:034) may not be fair, but it is completely legal. Appellee states, "Eastin has failed to identify any individual in his work county with the same education and experience in the same class that has been brought up to mid-point so as to entitle him to a salary adjustment." Counsel made reference to the fact that the Appellant, Stephen Eastin, was basing his appeal on the fact that Ryan Stallons, a Business Manager at another State Park, was permitted by the Department of Parks to laterally transfer and receive a resign/reinstate which resulted in a salary adjustment to Stallons' mid-point level.

4. As noted, Appellant filed a timely response to the Appellee's Motion to Dismiss. Appellant contends he was penalized, without just cause, when the Appellee "arbitrarily and capriciously adjusted the salaries of other Park Manager III positions both at the Kentucky Dam Village and the Lake Barkley State Resort Parks to where those Managers make significantly more than Appellant. Appellant contends that Parks has allowed other employees, such as Mr. Stallons and the Park Managers at Lake Barkley and Kentucky Dam Village, to resign/reinstate or resign/reappoint and have their salaries adjusted higher. Appellant contends that this is "...the quintessential penalization."

5. Appellant goes on to contend that "101 KAR 2:034 is a regulation which is unfair, that must be changed to treat all state employees equally and fairly." Appellant further states that Parks should be barred from arguing this issue now as it did not raise such at the pre-hearing conference and that the cancelation of mediation unilaterally by Parks was also irregular.

6. 18A.095 (18) (a), Rights of executive branch employees, states:

> 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.

7. 101 KAR 2:034 states, in pertinent part:

> 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.

FINDINGS OF FACTS

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

1. During the relevant times, the Appellant, Stephen Eastin, was a classified employee with status.

2. The Hearing Officer finds that the refusal of Parks to allow Appellant to resign/reinstate at a higher salary, which would admittedly bring his salary more in line with other Resort Park Manager IIIs, does not state a penalization over which the Personnel Board would have jurisdiction and, in fact, appears to comply with the requirements of 101 KAR 2:034.

3. The Hearing Officer finds that while Appellant makes several novel arguments, especially as it relates to interpretation and enforcement of 101 KAR 2:034, the Hearing Officer does not believe, and so finds, enforcement of the regulation as it stands is not arbitrary.

4. Finally, the Hearing Officer finds that a motion arguing jurisdiction can be raised at any time, though obviously it would have been preferable if it had been raised at the pre-hearing conference.

CONCLUSION OF LAW

The Hearing Officer concludes as a matter of law that pursuant to KRS 18A.095 (18)(a) the Personnel Board lacks jurisdiction to further consider this appeal or to grant relief as the Hearing Officer has found (above) the Appellant has not stated a penalization vis-à-vis the interpretation and enforcement of 101 KAR 2:034. To the extent Appellant is directly challenging the regulation, at 101 KAR 2:034, the Hearing Officer concludes the Personnel Board cannot invalidate a lawfully promulgated regulation, as such authority resides elsewhere; see KRS 13A.130.

RECOMMENDED ORDER

Based on the foregoing Findings of Fact and Conclusion of Law, the Hearing Officer recommends to the Kentucky Personnel Board that the appeal of **STEPHEN EASTIN VS. TOURISM, ARTS AND HERITAGE CABINET, DEPARTMENT OF PARKS (APPEAL NO. 2015-261)** 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

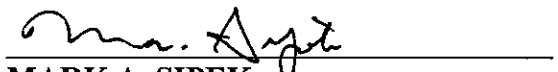
specifically excepted to. On appeal, a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

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 15th day of April, 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. William H. Adams
Hon. Derrick Helm