

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2012-137

DEVENNA BALES

APPELLANT

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

CABINET FOR HEALTH AND FAMILY SERVICES
J. P. HAMM, APPOINTING AUTHORITY

APPELLEE

** **

The Board at its regular June 2013 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated May 3, 2013, and having considered Appellant's exceptions, Appellee's response (returned as untimely), oral arguments 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 Appellant's appeal is 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 19th day of June, 2013.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Mary S. Tansey
Hon. Paul Fauri
J. P. Hamm

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This matter came on for an evidentiary hearing on February 6, 2013, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before Stephen T. McMurtry, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by KRS Chapter 18A.

Appellant, Devenna Bales, was present and represented by the Hon. Paul Fauri. Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Mary Tansey.

BACKGROUND

1. On April 18, 2012, the Kentucky Personnel Board in Appeal No. 2011-011 ordered the Cabinet for Health and Family Services to appoint Devenna Bales to the position of Nurse Administrator with back pay and other benefits subject to certain set-offs. The Personnel Board recognized her reemployment rights under KRS 18A.113 and KRS 18A.1131 in making this decision which resulted in a grade increase from 13, Registered Nurse, to 16, Nurse Administrator. The Cabinet calculated her salary to be \$3,784.56 monthly.

2. Bales disagreed with the calculation, and on June 15, 2012, filed an appeal to the Personnel Board alleging, *inter alia*, that the “provisions of the regulation, 101 KAR 2:034, Section 2, were not followed or did not apply.” She added, “I believe I am entitled to a minimum of a fifteen percent (15 %) salary increase which is the equivalent of being promoted.” Bales further stated that the pay calculation was “arbitrary” and “retaliatory,” arbitrary because Glenda Phillips, whom Bales had replaced in her successful appeal, had been promoted into the position with a 5 percent salary increase for each grade advancement and retaliatory because of her success in Appeal No. 2011-011. It is Bales’ demand that she receive a 15 percent increase in her pay, 5 percent for each increase, as if her reemployment was a promotion under 101 KAR 2:034, Section 3. Bales had been a Registered Nurse at the Communities at Oakwood in Pulaski County. She was laid off from that position on October 31, 2006, retaining her reemployment rights with state government for up to five years pursuant to KRS 18A.113. (See Final Order, Kentucky Personnel Board, Appeal No. 2011-011.)

3. **Melony Stephenson**, Office of Human Resources Management with the Cabinet, calculated Bales' reemployment salary. She testified that she utilized the procedures of 101 KAR 2:034, Section 2(2)(a)2 and added three increments, \$100 given to all returned Oakwood employees, a 1 percent salary increase on 7/1/08, and a 1 percent salary increase on 7/1/09. The increment came from an oral agreement made to reemployed Communities at Oakwood workers by the Cabinet. The result was a salary of \$3,609.98 (the salary at the time of her layoff) plus the three increments totaling \$3,784.56. She said the same calculations were used for twenty-eight other laid-off, reentering former employees of Oakwood. Stephenson sought confirmation for her calculations from James Lambert, Manager of Classifications and Compensation for the Personnel Cabinet.

4. **James Lambert** testified that he did not agree with the regulation she used, but the final calculation of \$3,784.56 was correct. He would have used Section 2(2)(a)1.

5. **J. P. Hamm**, Executive Director, Office of Human Resource Management for the Cabinet, testified that Bales was not given a 5 percent salary increase for each grade jump because she was reappointed not promoted. All other reentering employees who were laid off at Oakwood were treated the same as Bales in the calculation of their salary.

6. **Devenna Bales**, presently a Nurse Administrator for Children with Special Health Care Needs in Pulaski County, testified that at the time of the layoffs at Oakwood, J. P. Hamm had promised that all employees laid off would be treated the same as those employees who retained their positions. To prove that this promise had not been kept, she named Alice Randolph who, she believed, had been treated more favorably than she. She also testified that in her opinion Glenda Phillips, whom she had replaced as a result of her successful appeal, had been treated more favorably than she. Randolph and Phillips had been promoted to positions of Nurse Administrator with a 5 percent salary increase for each grade jump, whereas she was reappointed to that position with no increase in salary except the incremental benefits given to all laid off and subsequently reappointed classified service employees.

7. The issues of law are complex and can be expressed, as the Hearing Officer understands them, as follows:

a. Did the Cabinet violate Section 2 of the Kentucky Constitution in setting the monthly income of Devenna Bales upon her reappointment as a Nurse Administrator? Bales argues that the Cabinet treated Alice Randolph, a Registered Nurse subject to layoff at Oakwood, more favorably than she was treated even though they were similarly situated. Randolph instead of being laid off received a promotion to Nurse Administrator in Laurel County with a 5 percent pay increase for each grade jump. Bales further argues that the

Cabinet treated Glenda Phillips more favorably than she by “promoting” her to the Nurse Administrator’s position, also with a 5 percent pay increase for each grade jump.

b. Did the Cabinet violate Section 2 of the Kentucky Constitution when it utilized 101 KAR 2:034, Section 2(2)(a)2 rather than (2)(a)1 of that regulation in calculating Bales’ salary upon her reappointment to the classified service as a Nurse Administrator? Bales argues that Subsection 2(2)(a)1 was the applicable section, which would have given her a pay range sufficiently large to permit a 15 percent pay increase for three grade jumps which she is claiming in this appeal.

c. Does the merit system require the Cabinet in calculating Bales’ salary upon her reentrance to the classified service, to treat her as if she had never been laid off, thus entitling her to a 5 percent wage increase for each grade jump?

d. Did the Cabinet in recalculating Devenna Bales monthly salary retaliate against her because she prosecuted a successful appeal against the Cabinet in *Devenna Bales v. Cabinet for Health and Family Services*, Appeal No. 2011-011?

8. The following statutes and regulations are relevant to a decision in this appeal:

a. 101 KAR 2: 034, Section 2(2)(a)1

(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;

b. 101 KAR 2:034, Section 2(2)(a)2

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.

c. KRS 18A.1131(3)(a), (b) and (c):

(a) An employee subject to lay-off shall be transferred to a vacant position of the same pay grade, level of duties, and responsibilities for which he is qualified within the cabinet. Such position shall be located in the same county as the position from which the employee is subject to lay-off;

(b) If such a vacancy does not exist, the employee shall be transferred to a vacant position within the cabinet for which he is qualified. Such position shall be located in the same county as the position from which the employee is subject to lay-off; and

(c) If such a position is not available, the employee shall be notified of all vacant positions within the cabinet for which he is qualified to take an examination. The employee shall have the right to take an examination for any vacant position within the cabinet for which he is qualified. If he passes the examination, he shall be appointed to that position before any applicant or eligible on a register, except another laid-off employee with greater seniority already on such register.

d. Kentucky Constitution Section 2.

Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.

FINDINGS OF FACT

1. There are no contested factual issues. The facts recounted in the Background are adopted and incorporated in the "Findings of Fact." There is a dispute between the parties as to the correct legal interpretation of these undisputed facts.

CONCLUSIONS OF LAW

1. (a) The Cabinet did not violate Section 2 of the Kentucky Constitution by re-employing or “appointing” Devenna Bales under 101 KAR 2:034, Section 2(2)(a)2 from a Registered Nurse to a Nurse Administrator, when it had five years earlier “promoted” Alice Randolph from a Registered Nurse to a Nurse Administrator under Section 3(1) of that same regulation. Randolph received a 5 percent pay increase for each grade jump; Bales did not. Kentucky Courts have analyzed Section 2 of the Kentucky Constitution using case law generated by the Equal Protections Clause of the Fifth and Fourteenth Amendments to the United States Constitution. *Roberts v. Mooneyhan*, 902 S.W.2d 842, *D.F. v. Codell*, 127 S.W.3d 571. As applicable to the facts of this case, equal protection of the law means that all persons who are similarly situated in all relevant respects must be treated equally before the law unless there is a rational basis for different treatment. *Elkhorn Coal Corp. v. Cheyenne Resources, Inc.*, 163 S.W.3d 408, 412 (Ky. 2005).

(b) Randolph and Bales were not similarly situated in these respects: The Cabinet “promoted” Randolph while it “reappointed” Bales. Randolph was not laid off; Bales was. The Cabinet promoted Randolph from a position in Pulaski County to one in Laurel County. Most importantly, Randolph had more seniority at the time of her promotion than Bales had at the time of her reemployment or “reappointment.” The Cabinet treated Randolph more favorably because her seniority gave her a higher status and the Cabinet a rational basis to discriminate in her favor to Bales’ detriment.

(c) Bales argues that the Cabinet did not observe the procedures of KRS 18A.1131 when it “promoted” rather than “appointed” Randolph in 2006. Assuming the Cabinet violated the statute when it “promoted” Randolph, that fact does not mandate that the Cabinet cannot exercise in 2011 the limited discretion 101 KAR 2:034, Section 2, gives it in setting the salary of a reemployed, classified employee. Bales as a laid off employee reentering the classified service is not similarly situated to Randolph because she worked for the Cabinet without interruption giving the Cabinet the benefit of her skills, experience, and education. Bales worked outside of state government. That difference provides a further rationale for the unequal treatment. That rationale, combined with the fact that Bales and Randolph were not similarly situated, satisfies the Equal Protections Clause of the United States Constitution and Section 2 of the Kentucky Constitution.

2. The Cabinet did not violate Section 2 of the Kentucky Constitution when it utilized 101 KAR 2:034, Section 2(2)(a)2 rather than Section 2(2)(a)1 in calculating Bales’ salary. Again, the Equal Protection’s Clause furnishes the legal framework for analysis. Bales has no evidence that any person laid off from Oakwood in 2006, reappointed to the classified service at a later date and in all other relevant respects similar to her was treated more favorably than she was treated. The

evidence is that all other employees laid off from Oakwood had their reentry salaries calculated exactly as Bales'. Bales' use of Phillips as a similarly situated person treated more favorably than she also has no merit. Randolph and Phillips are not similarly situated in any relevant respect. Phillips was not laid off from Oakwood; Phillips had more years of seniority than Bales; Phillips was apparently more qualified; and Phillips was not an employee who reentered the classification service after being laid off.

3. The merit system articulated in KRS Chapter 18A and its corresponding regulations does not require that the Cabinet treat Devenna Bales as if she had never been laid off thus entitling her to a 5 percent pay increase for each grade jump and to be treated as Randolph and Phillips were. Lambert said that Stephenson's calculations would have been identical had she used Section 2(2)(a)1. That section would have given Stephenson the discretion to include a 15 percent pay hike in Bales' salary calculation, but that would have resulted in a denial of equal protections to some if not all of the laid off Oakwood employees who subsequently reentered the classified service and were similarly situated to Devenna Bales.

4. Finally, Bales argues that it must be inferred the Cabinet intended to retaliate against her because of her success in Appeal No. 2011-011 before the Kentucky Personnel Board. Bales failed to present any probative evidence that the Cabinet through its employees intended to retaliate against her because she had been successful in her appeal. One might argue that the temporal proximity of the Board's decision, entered April 2012, to the wage calculation made approximately May 17, 2012, inferred an intent to retaliate.

Courts are reluctant to find intent based solely on time proximity without other direct or circumstantial evidence. *Vereecke v. Hudson Valley School District*, 609 F.3d 392, 401 (6th Cir. 2001). Bales argues the Cabinet's failure to respond to her attorney's June 14, 2012 letter inquiring how the salary was calculated is further evidence of intent. That is hard to evaluate as the letter was never offered into evidence. The most persuasive evidence is against Bales; that is, Stephenson's request to James Lambert, former Branch Manager of the Classification and Compensation Branch, that he check her calculations. That request and the testimony of Hamm that the wage calculations of all former Oakwood employees laid off and subsequently rehired followed the same procedures proved by a preponderance of the evidence that there was no retaliation.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **DEVENNA BALES V. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2012-137)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.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).

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 Stephen T. McMurtry** this 3rd day of May, 2013.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Paul Fauri
Hon. Mary Tansey