

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD

TRACY BIVENS (Appeal No. 2022-085)
SARAH MORENO (Appeal No. 2022-086)
FLOETTA BROWN (Appeal No. 2022-087)
MARGARET KETTERER (Appeal No. 2022-094) and
THOMAS BARTLEY (Appeal No. 2022-152)

APPELLANTS

V.

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

CABINET FOR HEALTH AND FAMILY SERVICES
and
PERSONNEL CABINET

APPELLEES

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

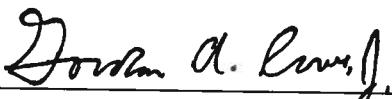
The Board, at its regular May 2024 meeting, having considered the record, including the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer dated April 12, 2024, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer 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 17th day of May, 2024.

KENTUCKY PERSONNEL BOARD



GORDON A. ROWE, JR., SECRETARY

A copy hereof this day emailed and mailed to:
Hon. Sandra Reeves
Hon. Lucas Roberts
Hon. Catherine Stevens
Hon. Rosemary Holbrook (Personnel Cabinet)
Jay Klein

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** * * * *

This matter came on for a pre-hearing conference on September 22, 2023, at 10:00 a.m. ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Stafford Easterling, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellants, Tracy Bivens (Bivens), Sarah Moreno (Moreno), Margaret Ketterer (Ketterer), and Thomas Bartley (Bartley), were not present, but were represented by the Hon. Sandra Reeves, who appeared by telephone. The Appellant, Floetta Brown (Brown), was present by telephone and was also represented by the Hon. Sandra Reeves. The Agency/Appellee Cabinet for Health and Family Services was present and represented by the Hon. Ashley Kennedy, who appeared by telephone and was covering for the Hon. Lucas Roberts. The Agency/Appellee Personnel Cabinet was present and represented by the Hon. Zach Mowen, who also appeared by telephone.

The purposes of the pre-hearing conference were to discuss the status of the appeals, to discuss whether discovery has been adequately completed, to discuss the possibility of mediation, to discuss the possibility of dispositive motions, and to schedule an evidentiary hearing, if appropriate.

BACKGROUND AND FINDINGS OF FACT

1. The Appellants filed their appeals in July 2022. At the first pre-hearing conference, they alleged they were penalized by unfair and unjust pay discrimination. Counsel for the Appellants clarified that they were alleging a disparity in pay and not any type of protected class discrimination. Counsel for Appellants agreed to consolidate the appeals and stated she needed to request some discovery.

2. Counsel for the Appellees did not believe that they would need any discovery. Counsel for the Cabinet for Health and Family Services (CHFS) stated that there were discussions involving the Personnel Cabinet and the Office of the State Budget Director regarding potential raises for the Office of Inspector General employees. Counsel for the Appellees agreed that these matters could be consolidated.

3. Following discussion at the September 22, 2023 pre-hearing conference, the parties agreed that the exchange of discovery had been adequately completed. The parties also agreed that the Personnel Cabinet's classification and compensation review impacted the Appellants and resulted in the Appellants receiving an upward salary adjustment. The Appellants agreed that they received the forward-looking remedy they sought but argued that they are still entitled to backpay for a period of time before the upward salary adjustment. After discussion of the applicable statutes, regulations, and burdens of proof, it was clear that the Appellants would have the burden of proof of establishing an entitlement to a prior salary adjustment, which is secured by KRS Chapter 18A. The Appellees assert that the Appellants are unable to establish such entitlement as a matter of law and requested the opportunity to file a dispositive motion. Thereafter, a dispositive motion schedule was established.

4. The Appellants filed these appeals alleging that they suffered a "Penalization" when they did not receive salary increases at the same time as some other employees at CHFS. The Appellants were employed at CHFS in the Office of Inspector General (OIG), Division of Audits and Investigations, Compliance Branch in either the OIG Investigator II or OIG Investigator III job classifications. The Appellants, Brown, Ketterer, and Moreno, were employed as OIG Investigator IIIs and the Appellants, Bartley and Bivins, were employed as OIG Investigator IIs. Effective April 1, 2023, Moreno voluntarily left her position in the Office of Inspector General and transferred to a position as a Citizen Assistant Specialist in the CHFS Office of the Ombudsman through a resign to reinstate action.

5. In order to clarify the exact nature of the Appellants' claims of "penalization," the Personnel Cabinet propounded interrogatories to the Appellants. The Appellants answered these interrogatories on August 9, 2023. In response to direct and specific questions, the Appellants failed to cite any case, statute, or regulation that would entitle them to a retroactive salary increase or an award of backpay. Moreover, the Appellants failed to identify any employee in

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the same job classification who received a salary increase that would have required that they receive a salary increase on the same date pursuant to KRS Chapter 18A.

6. In response to the Appellees' Joint Motion for Summary Judgment, counsel for the Appellants summarized the Appellants' claims as follows:

The Appellants are employed in the Compliance Branch of the Division of Audits and Investigations of the Office of the Inspector General, contained within the Office of the Secretary which under the umbrella of the Cabinet for Health and Family Services. (Cabinet for Health and Family Services Office of the Secretary Office of the Inspector General Division of Audits and Investigations Compliance Branch)

Appellants herein first became aware on April 13, 2022 of an electronic mail message sent by the Commissioner for the Department of Community Based Services ("DCBS") stating that substantial raises had been approved and funded for the different divisions and offices within the Cabinet for Health and Family Services (the "Cabinet"), effective May 6, 2022.

Thereafter, on May 6, 2022, employees of the DCBS received their scheduled raises. At the same time, the Audits and the Drug Enforcement branches of the Office of Inspector General (which are co-equal branches to the Compliance branch that employ the Appellants) also received substantial raises. However, the Office of the Inspector General's Compliance branch where the Appellants were employed did not in May 2022 receive the raises approved in the budget and given to employees of two other branches, and to DCBS.

Over the next several months employees of the OIG Compliance Branch, including the Appellants, made multiple inquires and requests regarding the substantial raises that other branches within the OIG office had received. The only response received by the Appellant was that the raises had been approved and would be forthcoming. Subsequently, when the promised raises never materialized, the Appellants filed their grievance and appeal. It was only in August 2023 that the Appellants received raises that brought them up to within 90% of the midpoint. However, they did not receive back pay, retroactive to May 6, 2022, the date when the other OIG employees and the DCBS employees received their raises.

When the Appellants received substantial raises in August 2023 that brought them close to the ninety percent (90%) midpoint for their

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classification and rank, the issue of straight out penalization or disparity in current pay became moot leaving for this body to decide only the issue of whether the Appellants are entitled to back pay for the period between May 6, 2022, the date when other branches of the OIG office and those within the DCBS received their raises and mid-August, 2023 when the Appellants finally received the substantial increase in salary they sought.

7. In their response to the Appellees' Joint Motion for Summary Judgment, the Appellants conceded that they are not relying on 101 KAR 2:034, Section 1(2) in their claims for backpay. The Appellants conceded their claim for backpay is not based on a statute or regulation. They defined the issue as follows: "whether backpay is permissible when an 'across the board' pay increase is not implemented uniformly between different branches of the same office or between different departments within the same cabinet." The Appellants argue that there is no statute or regulation that prohibits backpay in this situation.

8. The Appellants also argued that several individual CHFS employees have received backpay when their salaries have been adjusted.

9. In their Joint Reply, the Appellees stated as follows:

Appellants argue that the only issue remaining to be decided in this appeal is whether they are entitled to an award of back pay "for the period between May 6, 2022, the date when other branches of the OIG office and those within the DCBS received their raises and mid-August, 2023 when the Appellants' finally received the substantial increase in salary they sought." (Appellants' Response, p.3.) Appellants have cited no statute, regulation, or case law that supports their position that they were entitled to a pay raise/salary increase effective May 6, 2022 and they should now receive back pay. Appellants have no legal authority for their position that all salary increases were required to be effectuated on the same date across all of CHFS's office, departments, job classifications, and pay grades. Of course, there is no such requirement in KRS 18A or Title 101 of the Kentucky Administration Regulations.

10. The material facts are not in dispute. The Appellants seek backpay from May 6, 2022 to August of 2023. The Appellants allege pay discrimination based on the division of CHFS they work for. The Appellants have not presented any evidence or authority they are legally entitled to the backpay they are claiming.

11. There are no genuine issues of material fact and these appeals can be decided as a matter of law based on the Appeal Forms, the statements of the parties at the pre-hearing

conference, the Motion for Summary Judgment, the Appellants' Response, and the Appellees' Reply.

CONCLUSIONS OF LAW

1. Because all the events underlying this Appeal occurred before the effective date of Senate Bill 153, all references to KRS Chapter 18A are to the sections in effect at the time of the events associated with this Appeal.

2. Penalization was defined at KRS 18A.005(24) as follows:

"Penalization" means demotion, dismissal, suspension, fines, and other disciplinary actions; involuntary transfers; salary adjustments; any action that increases or diminishes the level, rank, discretion, or responsibility of an employee without proper cause or authority, including a reclassification of reallocation to a lower grade or rate of pay; and the abridgment or denial of other rights granted to state employees.

3. The Appellants have not identified any statute, regulation, or case law that would entitle them to the back pay they are seeking.

4. With regard to alleged penalizations related to salary, subjective expectations of salary adjustments that are not clearly based on a statute or regulation are not actionable. *See Bishop v. Wood*, 426 U.S. 341 (1976). In *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), the United States Supreme Court held as follows:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

5. Because the Appellants are not legally entitled to backpay, the Personnel Board lacks jurisdiction to grant them relief. KRS 18A.095(18)(a).

6. The Appellees are entitled to Summary Judgment. KRS 13B.090(2).

RECOMMENDED ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Kentucky Personnel Board that the appeal of **TRACY BIVINS (APPEAL NO. 2022-085)**, **SARAH MARINO (APPEAL NO. 2022-086)**, **FORETTA BROWN (APPEAL NO. 2022-087)**, **MARGARET KETTERER (APPEAL NO. 2022-094)** AND **THOMAS BARTLEY (APPEAL NO. 2022-152)** VS. **CABINET FOR HEALTH AND FAMILY SERVICES AND PERSONNEL CABINET** be **DISMISSED**.

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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 fifteen (15) 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).

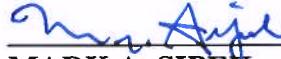
The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

The parties are strongly encouraged to send any exceptions and/or requests for oral argument by email to: PersonnelBoard@ky.gov

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** this 12 day of April, 2024.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day emailed and mailed to:

Hon. Lucas Roberts
Hon. Catherine Stevens
Hon. Sandra Reeves
Hon. Rosemary Holbrook (Personnel Cabinet)