

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD

THOMAS W. BEMISS (APPEAL NO. 2013-019)
NICOLE S. CREECH (APPEAL NO. 2013-017) and
ALLEN B. HOUCHIN (APPEAL NO. 2013-022)

APPELLANTS

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

PUBLIC PROTECTION CABINET,
ROBERT VANCE, APPOINTING AUTHORITY

APPELLEE

** ** *

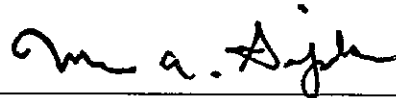
The Board at its regular September 2013 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated July 23, 2013, and being duly advised,

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 17th day of September, 2013.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Gordon Slone
Thomas Bemis
Nicole Creech
Allen Houchin
Lynn Keeling Gillis
Sherry Butler

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These appeals are before the Hearing Officer for a ruling on the Appellee's motion to dismiss filed in accordance with the Interim Order entered on March 5, 2013. The Hearing Officer had given the Appellees, until April 1, 2013, to file a motion, which counsel did. The Hearing Officer had given each of the Appellants until June 3, 2013, to file a response to the motion to dismiss. None of the Appellants filed a response to the Appellee's motion to dismiss.

The Appellee filed its reply on June 6, 2013, essentially informing the Hearing Officer that as none of the Appellants had filed a response to the Appellee's motion to dismiss, the cases were ready for ruling.

These matters previously came on for a pre-hearing conference on February 28, 2013, at 10:00 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 Appellants, Thomas Bemiss, Nicole Creech and Allen Houchin, were present and were not represented by legal counsel. The Appellee, Public Protection Cabinet, was also present and represented by the Hon. Gordon Slone. Also present for the Appellee as agency representative was Sherry Butler.

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 this appeal, to determine the relief sought by Appellants, to define the issues, to address any other matters relating to the appeal, and to discuss the option of mediation.

The Hearing Officer noted these appeals were filed with the Personnel Board in January 2013, all relating to claims regarding salary disparity. The Appellants are investigators for the Department of Charitable Gaming. The Appellants each claim that there are investigators

working for the Department of Charitable Gaming who were hired after them and were hired at higher salaries. The Appellants each believe their salary should be raised. In the cases of Creech and Houchin, they believe their salaries should be raised to that of Investigator Plunkett, with appropriate back pay. In the case of Investigator Bemiss, he believes his salary should be raised at least to the level of Investigator McFarlin. These would all be with appropriate back pay, and the Appellants' request to be made whole.

Counsel for the Appellee contended these appeals are stale, filed outside the applicable statutes of limitations, and there is no mechanism to grant the relief they seek as 101 KAR 2:034, Section 1 would not apply. To that end, counsel sought time in which to file a motion to dismiss. The Hearing Officer discussed this with the parties, giving the Appellants time in which to file a response, obtain counsel, or both. The Appellee was also given time in which to file a reply.

The Hearing Officer stated he would send a copy of the pertinent portion of 101 KAR 2:034, Section 1 to the parties, as well as a copy of the Personnel Board's Recommended and Final Order and any Court opinions interpreting the matter of *Briscoe and Roberts v. Finance Cabinet*.

As noted above, the Appellee filed a timely motion to dismiss in these appeals (counsel filed a joint motion which covered all three appeals.) None of the Appellants filed a response.

Though not addressed at the pre-hearing conference held February 28, 2013, the Hearing Officer believes these matters should be consolidated for purposes of ruling on the Appellee's motion to dismiss. Thus, with no objection having been stated by any party, the matters are **HEREBY CONSOLIDATED** for purposes of this ruling.

BACKGROUND

1. As noted at the pre-hearing conference, and reprinted above, and as further stated by counsel for the Appellee in his motion to dismiss, the Appellants, Thomas Bemiss, Nicole Creech and Allen Houchin, are each Investigators with the Department of Charitable Gaming. The crux of their claims is that other investigators hired after them make more money and the Appellants' salaries should be raised to match those investigators.

2. In his motion to dismiss, counsel for the Appellee recaps the history of the issues behind these appeals and notes that the Appellants had each filed grievances regarding the salary discrepancies. Counsel notes that Appellant Bemiss asked that his wages be raised to that of Investigator Michael McFarlin, and that Appellants Creech and Houchin requested that their wages each be raised to that Investigator Stella Plunkett. The grievances were denied.

3. The Appellants then filed these appeals, seeking the relief set forth above.

4. Counsel for the Appellee contends the Appellants, for a variety of reasons, are not entitled to relief as a result of filing these appeals, and each of the appeals must be dismissed. Attached as exhibits to the motion to dismiss are the P-1s (this document now being known as a

“PAN”), for example, Appellant Nicole Creech was hired as an Investigator in Franklin County in September 1999, and voluntarily transferred to Madison County in March 2000. Appellant Allen Houchin was hired in Warren County in May 2005. Appellant Thomas Bemiss was hired in Jefferson County in August 2006. Investigator Michael McFarlin was hired in Henderson County in September 2005, and voluntarily transferred to Barren County in April 2006. Finally, Investigator Stella Plunkett was hired in Clark County in August 2007, where she had transferred from the Justice and Public Safety Cabinet.

5. Counsel points to 101 KAR 2:034, Section 1, contending that the Appellants in these cases, pursuant to the strict interpretation of that regulation, are not entitled to any salary adjustment. The Appellee contends the requirements for these actions to meet the definition of a penalization set forth at KRS 18A.005(24) cannot be met if the Appellants cannot prove they are entitled to the salary comparison per 101 KAR 2:034, Section 1.

6. To support this argument, counsel points out that Stella Plunkett was not a new employee when she came to work for Charitable Gaming; that she had actually transferred from the Department of Criminal Justice Training, which is in the Justice and Public Safety Cabinet, and as such was not a “new appointee” which would qualify any of the Appellants to a salary comparison to her per 101 KAR 2:034.

7. Counsel also contends that none of the Appellants, and neither Investigators Plunkett nor McFarlin, have the same assigned work county at any time. As counsel pointed out in his argument, the Appellants, Plunkett, and McFarlin, all had different assigned work counties.

8. Counsel for the Appellee also argued that pursuant to KRS 18A.095(29), the time for the Appellants to have filed appeals regarding such claims has run. Counsel also cited the case of *McDonald, et al., v. Finance and Administration Cabinet*, a Court of Appeals case regarding the timing for filing of appeals.

9. As noted, the Appellants, though given ample time in which to file a response, did not do so.

10. Counsel for the Appellee did file brief replies to the Appellants not having filed responses, essentially stating the matters are ready to be decided.

11. 101 KAR 2:034, Section 1 states, as follows:

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 class;

(b) Is in the same work county; and

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

FINDINGS OF FACT

1. During the relevant times, the Appellants, Thomas Bemiss, Nicole Creech and Allen Houchin, each were classified employees with status.

2. The Hearing Officer finds each of the Appellants was employed as Investigators II in the Department of Charitable Gaming. At some point during their employment, other Investigators came into the Department of Charitable Gaming. The Appellants each contended that they should receive salary adjustments because of these new Investigators coming in at higher salaries.

3. The Hearing Officer finds that none of the employees were assigned to the same work county at the time of either their initial hire or transfer into the Department of Charitable Gaming. The Hearing Officer finds that Appellant Thomas Bemiss' work county is Jefferson County. The Hearing Officer finds that Appellant Allen Houchin's work county is Warren County. The Hearing Officer finds that Appellant Nicole Creech's work county was initially Franklin County, with a later voluntary transfer to Madison County. The Hearing Officer finds that Investigator Michael McFarlin's initial work county was Henderson County, with a later voluntary transfer to Barren County. Finally, the Hearing Officer finds that Investigator Stella Plunkett's initial work county is Clark County. The Hearing Officer also finds Investigator Plunkett had transferred into the Department of Charitable Gaming from the Justice and Public Safety Cabinet.

4. The Hearing Officer finds that, in order to satisfy the requirements of 101 KAR 2:034, Section 1, for a salary comparison to be made between employees, all of the criteria must be met. It is readily apparent, and the Hearing Officer so finds, that none of the Appellants and neither Investigator McFarlin nor Plunkett were assigned to the same work counties. Thus, the Hearing Officer finds that the provisions of 101 KAR 2:034, Section 1 are not met.

5. Likewise, as to Investigator Plunkett, the salary comparison would not be required as she was not a "new appointee" under 101 KAR 2:034, and thus, even if the other provisions had been met, no salary comparison would be required pursuant to that regulation.

6. The Hearing Officer finds that it is unnecessary, because of the Findings above, to determine whether or not the appeals were timely filed.

CONCLUSIONS OF LAW

1. Based upon the Findings of Fact, the Hearing Officer concludes as a matter of law that the Appellants, Thomas Bemiss, Nicole Creech and Allen Houchin, are not entitled to any relief regarding claims of salary and equity. The primary means by which such would be accomplished, the regulation at 101 KAR 2:034, Section 1, for salary comparisons could not be invoked, as none of the Appellants and Investigators McFarlin and Plunkett were ever assigned to the same work counties.

2. In addition, the Hearing Officer concludes that none of the Appellants would be entitled to any salary comparison with Investigator Plunkett, as she was not a "new appointee" for purposes of 101 KAR 2:034, Section 1.

3. The Hearing Officer concludes as a matter of law that these appeals must fail as there is no mechanism under the facts found in these appeals by which the Appellants could be offered the relief they desire.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeals of **THOMAS BEMISS, NICOLE CREECH, AND ALLEN HOUCHIN V. PUBLIC PROTECTION CABINET, (APPEAL NOS. 2013-019, 2013-017 and 2013-022)** 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.

[Hearing Officer Note: Any document filed with the Personnel Board shall also be served on the opposing party.]

ISSUED at the direction of Hearing Officer Boyce A. Crocker this 23rd day of July, 2013.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Gordon Slone
Mr. Thomas Bemiss
Ms. Nicole Creech
Mr. Allen Houchin