

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-152**

SIMON BROOKS BERRY

APPELLANT

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

**PUBLIC PROTECTION CABINET,
AMBROSE WILSON IV, APPOINTING AUTHORITY**

APPELLEE

** ** *

This matter came on for a pre-hearing conference on February 6, 2015, at 9:30 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, Simon Brooks Berry, was present and was not represented by legal counsel. The Appellee, Public Protection Cabinet, was also present and represented by the Hon. Cannon Armstrong. Also present for the Appellee as agency representative was Ms. Lynn Gillis.

BACKGROUND

1. The Appellant, Simon Brooks Berry, an attorney for the Department of Financial Institutions, filed his appeal with the Personnel Board on July 3, 2014. In the narrative portion of his appeal, Appellant stated, "On July 8, 2013, the Executive Director and Deputy Executive Director of the PPC's Office of Legal Services informed me that I was being detailed to Acting General Counsel for the DFI, and that my salary would be increased to \$75,000. I served as AGC from July 8, 2013, through August 2013, but my salary never changed. This was a penalization as defined by KRS 18A.005(24)."

2. At the first pre-hearing conference held on August 25, 2014, it was determined that the Appellant claimed that he was entitled to an increase in pay for additional duties performed as Acting General Counsel at DFI for the period of July 8, 2013, through August 31, 2013.

3. Following discussions by the parties, a second pre-hearing conference was conducted on October 13, 2014. At the second pre-hearing conference, the parties stated there were not a lot of facts in dispute, and they thought this matter might be decided on dispositive motions. The parties agreed to file dispositive motions with a hearing date set for February 17, 2014, if the motions did not resolve the issues.

4. At the time of the second pre-hearing conference, the Hearing Officer defined the issue by stating there was no dispute between the parties that Appellant was performing the duties of General Counsel, but the dispute was how the Appellant should be compensated for that period of time.

5. In the Appellant's Motion for Summary Judgment, he stated that on July 8, 2013, he was a classified employee with status as a Staff Attorney Supervisor. He was told on that date that DFI's General Counsel had been placed on Administrative Leave due to an investigation into his conduct, and the Appellant would serve as General Counsel for DFI until the General Counsel returned or a new General Counsel was hired. The Appellant was also told his salary would be increased from \$55,125.36 to \$75,000. The Appellant stated he did not receive a written notice of the change of his duties. From July 8, 2013, through August 31, 2013, the Appellant performed the duties of General Counsel. During that time, each General Counsel of the agencies in the Public Protection Cabinet made \$75,000 or more.

6. The Appellant alleged he was penalized pursuant to KRS 18A.005(24) when he was asked to perform the duties of General Counsel. He stated that KRS 18A.095(22)(d) requires the Personnel Board to grant specific relief to a classified employee with status who is penalized without cause. The Appellant alleges he should have been paid at the rate of \$75,000 per year during the period of July 8, 2013, through August 31, 2013, including any increased contributions to his Kentucky Retirement System account.

7. In its Motion for Summary Judgment, the Appellee concedes that the Executive Director and Deputy Director communicated with the Appellant on July 8, 2013, the need for him to assist with the duties of General Counsel while the General Counsel was on leave. The salary for his special detail to General Counsel was mistakenly represented to be \$75,000, according to the Appellee. The Appellee concedes the Appellant accepted the detail and was aware it would be temporary.

8. The Appellee states that on July 9, 2013, Assistant Director for GAPS, Lynn Gillis, sent an email to her supervisor, Holly McCoy-Johnson, stating there was an issue with the \$75,000 salary offer to Appellant. The most Appellant could receive on special detail was five percent per grade. It was also stated that Appellant could not be detailed as Acting General Counsel as long as the position was occupied by a General Counsel.

9. The Appellee contends the salary issue and the inability to place the Appellant in the General Counsel position were verbally communicated to the Appellant on July 31, 2013, according to the Appellee. The Appellee offered to detail the Appellant into a vacant Assistant General Counsel position on July 31, 2013. This detail was approved to be effective August 16, 2013.

10. On August 15, 2013, the Appellee offered to detail the Appellant into the vacant Assistant General Counsel position for the next six months in an effort to compensate him for the time he spent as Acting General Counsel. The Appellant responded he did not want to be detailed to the Assistant General Counsel position.

11. The Appellee concedes that the Appellant continued as Acting General Counsel from July 9, 2013, until August 31, 2013. On September 1, 2013, a new General Counsel was hired.

12. The Appellee proposes that the only solution is to detail the Appellant into the vacant Assistant General Counsel position for the period of July 8, 2013, through August 31, 2013.

13. The Appellee argues that the Appellant cannot be compensated at \$75,000 per year. They state that pursuant to 101 KAR 2:034, Section 5, "An employee who is approved for detail to a special duty shall receive, during the period of detail, the greater of five percent for each grade or the new grade minimum..."

14. The Appellee alleges the Appellant was not set to start his detail as General Counsel until July 22, 2013. The Appellee contends it acted in good faith when it discovered the mistake, and offered an alternative Assistant General Counsel detail.

15. The Appellee also argues that Appellant could not be detailed into the General Counsel position due to the fact that the position was not vacated at the time. The Appellee also contends that a temporary overlap did not apply, since pursuant to 101 KAR 3:050, a non-merit position such General Counsel can only be the subject of a temporary overlap "for training purposes." Since the detail in this position in this situation was always going to be temporary, the Appellee contends it was not for training purposes, and temporary overlap could not have been used. The Appellee proposes that the appropriate relief would be a five percent increase for the period from July 8, 2013, through August 31, 2013. This is for a detail to the Assistant General Counsel position, which is Grade 18.

16. The Appellant responded to the Appellee's Motion for Summary Judgment. He stated that the Cabinet presents arguments about what could have happened if it had followed applicable laws and regulations in July and August, 2013. He states that the Cabinet's failure to follow the required legal process to detail him into the General Counsel position does not change the undisputed fact that he was told his salary would be increased to \$75,000 during the period of time he served as Acting General Counsel. He argues he was penalized and that the remedy is controlled by KRS Chapter 18A, and not the administrative regulations cited by the Cabinet.

17. The Appellant disputes the Cabinet's assertion that he accepted the detail and was aware that it would be a temporary detail. He states that the Cabinet failed to obtain the proper approvals, and thus he was never detailed, as the term is used at 101 KAR 2:076.

18. The Appellant disputed that the Executive Director and Deputy Executive Director met with him on July 31, 2013, as the Appellant states he was attending a meeting in Chicago at the request of DFI's Commissioner. He was informed of issues with the detail on August 2, 2013. He also states that the Appellee admits it was aware of an issue with increasing his salary to \$75,000 on July 9, 2013, but did not inform him until August 2, 2013.

19. The Appellant states the Appellee's legal arguments are premised on administrative regulations that would have been applicable had they followed the proper procedures. He stated that since they did not, he was penalized and the regulations do not control the remedy.

20. The Hearing Officer reviewed both Motions for Summary Judgments and the responses. Having read those motions on January 22, 2015, an Order was entered overruling both motions. The Hearing Officer stated there were issues of fact as to what was communicated when, and what effect those communications had on the outcome. In addition, there was a significant dispute as to the relief, if any, the Appellant could be granted. For that reason, the matter was scheduled for an evidentiary hearing on February 25, 2015.

21. At the request of the parties, a third pre-hearing conference was conducted on February 6, 2015, before Hearing Officer Boyce A. Crocker. The parties believed they could reach a stipulation as to any facts that might previously appeared to have been in dispute. Neither party felt that an evidentiary hearing was necessary. In light of the new proposed stipulations, the Hearing Officer requested that the parties file new briefs.

22. On February 20, 2015, the parties entered Stipulations of Fact and the evidentiary hearing was cancelled. The Stipulations of Fact are attached to this Recommended Order as **Attachment A**.

23. The Appellant filed a brief stating that the only legal question that the Personnel Board needs to decide is the remedy. He felt that the appropriate remedy was the \$75,000 he had been promised. He also stated that it was more than other General Counsels in the Cabinet were making.

24. In its brief, the Appellee argued that the Appellant did not suffer a permanent material change during his time as Acting General Counsel, and thus he was limited to the relief offered under the detail to special duty regulation.

FINDINGS OF FACT

1. The Stipulations of Fact submitted by the parties are adopted as Findings of Fact by the Hearing Officer.

2. As of July 8, 2013, the Appellant was a classified employee with status working as a Staff Attorney Supervisor at the DFI. This classification was a Grade 17 position.

3. From July 8, 2013, through August 31, 2013, the Appellant served as Acting General Counsel for DFI. His salary was not increased. General Counsel for DFI is a Grade 19 position.

4. The Appellant was penalized when he was asked to perform duties of a higher classification without additional compensation.

5. There are no material issues of fact and this matter can be decided as a matter of law based on the Stipulations of Fact, the statements on the appeal form, and the motions and briefs filed by the parties.

CONCLUSIONS OF LAW

1. The Appellant was penalized as that term is defined at KRS 18A.005(24) when he was asked to perform duties outside of his classification of a higher classification without additional compensation. In this instance, the Appellant, who was a Grade 17, was asked to perform duties of a Grade 19 position.

2. These actions constituted a penalization because the action increased the level, rank, discretion or responsibility of an employee without proper cause or authority. KRS 18A.005(24).

3. Pursuant to KRS 18A.110, the Personnel Cabinet Secretary shall promulgate administrative regulations for the classified service governing classification and compensation plans. Similar responsibilities placed on the Personnel Cabinet Secretary for unclassified employees at KRS 18A.155. The Secretary has done so by promulgating 101 KAR 2:020 and 101 KAR 2:034 with respect to classified employees, and 101 KAR 3:045 with respect to unclassified employees.

4. When the Appellant worked duties outside his classification, he was entitled to additional compensation. Pursuant to regulation, this would be five percent per grade. Thus, when he performed the duties of the Grade 19 General Counsel position, the Appellant was entitled to a ten percent (10%) increase.

5. The fact that his superiors promised him \$75,000 salary for the position is not binding upon the Appellee or the Commonwealth, as the employer in this case. The Appellant is entitled to what the statutes and regulations allow for under these circumstances.

6. The fact that the Appellee did not take steps to detail or otherwise properly provide or allow for the Appellant to perform these duties does not change the fact that they were obligated to compensate him for his additional work duties.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **SIMON BROOKS BERRY V. PUBLIC PROTECTION CABINET, (APPEAL NO. 2014-152)** be **SUSTAINED TO THE EXTENT** that the Appellant be granted a ten percent (10%) increase for performing the duties of General Counsel from July 8, 2013, through August 31, 2013. The Appellant shall receive all other benefits he is entitled to during that time period. The Appellant shall also be compensated for the leave time he used in attending the pre-hearing conferences in this case, pursuant to KRS 18A.095(25).

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 the **Hearing Officer** this 29th day of September, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Cannon Armstrong
Hon. Simon Brooks Berry

Received

FEB 20 2015

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-152**

Personnel Board

SIMON-BROOKS BERRY

APPELLANT

V.

PUBLIC PROTECTION CABINET

APPELLEE

STIPULATIONS OF FACT

The parties, as evidenced by the signatures below, hereby make the following stipulations of fact and respectfully request the hearing officer to make his recommended order based upon these stipulations:

1. On the morning of July 8, 2013, La Tasha Buckner and Peter Ervin with the Office of Legal Services for the Public Protection Cabinet were mistakenly informed by Holly McCoy-Johnson, Appointing Authority for the office of General Administrative and Program Support for Shared Services (GAPS), that they could detail Simon Berry into the General Counsel position for the Department of Financial Institutions (DFI) at a salary of \$75,000. (See attached Affidavit of Holly McCoy-Johnson, Exhibit A.)

2. On July 8, 2013 Buckner and Ervin informed Berry that he would act as General Counsel for DFI for an indefinite but temporary period of time because DFI's General Counsel was on administrative leave. Buckner and Ervin also informed Berry that his salary would be increased from \$55,125.36 to \$75,000.

3. As of July 8, 2013, Berry was a classified employee with status working as a Staff Attorney Supervisor at the DFI.

4. By e-mail dated July 9, 2013, Lynn Keeling Gillis, Appointing Authority designee for GAPS, informed Buckner and Ervin of "a salary issue" that she "didn't catch" and that the most Berry could be paid on a special detail to DFI General Counsel was \$5,051.36 per month/\$60,637.90 per year. (See copy of e-mail attached, Exhibit B).

5. On July 31, 2013, the DFI's General Counsel who had been on administrative leave resigned.

6. On August 2, 2013, Buckner and Ervin informed Berry that his salary could not be increased to \$75,000. They also informed Berry that a new General Counsel for the DFI had been hired and that the new General Counsel would begin as of 9/1/2013. Buckner and Ervin also informed Berry of the possibility to pay him at a higher salary for a six month period in an effort to compensate him for time spent as acting General Counsel.

7. The Public Protection Cabinet did not provide Berry with a written notification regarding the change in his position from Staff Attorney Supervisor to Acting General Counsel.

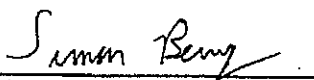
8. On August 15, 2013 Buckner offered to detail Berry into the vacant Assistant General Counsel for six months. Berry refused the Assistant General Counsel detail because he thought the potential offer proposed on August 2, 2013 was for him to remain in his current position of Staff Attorney Supervisor at the DFI with a 5% increase in salary and no change in job duties for six months. (See attached email, Exhibit C.)


9. From July 8, 2013 through August 31, 2013, Berry served as Acting General Counsel for DFI and his salary was not increased.

10. Berry was not detailed under 101 KAR 2:076 and 101 KAR 2:034 to the position of General Counsel.

11. During the time period July 8, 2013 through August 31, 2013, all of the General Counsels for agencies within the Public Protection Cabinet made at least \$75,000 annually.

Seen and agreed


Simon Berry
Appellant


Hon. Cannon Armstrong
Counsel for Appellee

CERTIFICATE OF SERVICE

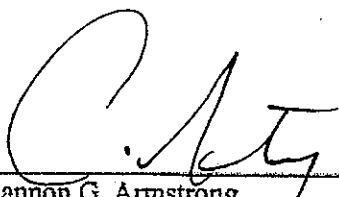
This is to certify that a true and accurate copy of the foregoing was this day, February 20, 2015, served by U.S. mail and State E-mail, upon the following:

Simon Berry

Cannon G. Armstrong
Office of Legal Services
Public Protection Cabinet
Capital Plaza Tower, 5th Floor
500 Mero Street
Frankfort, Kentucky 40601

And by hand delivery to:

Personnel Board
28 Fountain Place
Frankfort, KY 40601


Cannon G. Armstrong