

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2015-253

DONALD BREEDING

APPELLANT

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

TRANSPORTATION CABINET

APPELLEE

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The Board, at its regular September 2016 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated July 22, 2016, Appellant's Exceptions and Request for Oral Argument, Appellee's Response to Appellant's Exceptions, 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 15<sup>th</sup> day of September, 2016.

KENTUCKY PERSONNEL BOARD

  
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MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. William Fogle  
Mr. Donald Breeding  
Mr. J. R. Dobner

**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2015-253**

**DONALD BREEDING**

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**VS.**

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

**TRANSPORTATION CABINET**

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This matter came on for evidentiary hearing on April 21, 2016, at 9:30 a.m., at 28 Fountain Place Frankfort, Kentucky, before E. Patrick Moores, Hearing Officer. The proceedings were recorded by audio-video equipment pursuant to the authority found at KRS Chapter 18A.

The Appellant, Donald Breeding, was present and was not represented by counsel. The Appellee was represented by the Hon. William Fogle, with the Office of Legal Services of the Kentucky Transportation Cabinet.

**I. STATEMENT OF THE CASE**

1. The Appellant, Donald Breeding, is employed with the Transportation Cabinet, assigned to the Pineville, Kentucky, section of District 11, of the Transportation Cabinet. On August 10, 2015, Breeding filed a grievance after he was denied a lateral transfer from a Transportation Engineer II, Grade 16 position, to that of a Traffic Engineer Supervisor, Grade 16, with a significant increase in salary.

2. The grievance was denied by the Cabinet on September 16, 2015, by Carol Beth Martin, the Appointing Authority, on the basis that the Cabinet's Organizational Chart only allowed for two TE supervisors in any section, which were already filled and that there was no available vacancy to put him in.

3. Breeding filed this appeal with the Kentucky Personnel Board on September 30, 2015, alleging improper rejection of his application and age discrimination. This matter came on for a pre-hearing conference on December 15, 2015, at the Kentucky Personnel Board, Frankfort, Kentucky. The proceedings were recorded by audio-video equipment pursuant to the authority found at KRS Chapter 18A. The Appellant, Donald Breeding, was present and not represented by counsel. The Appellee Transportation Cabinet was represented by the Hon. William Fogle. The Personnel Cabinet was also named as a party in Breeding's appeal, but by agreement the Personnel Cabinet was dismissed. The issues were reviewed and the hearing officer informed the parties of the discovery process available and the burden of proof of the process that would take place for the presentation of evidence, the ability to introduce documents, and opportunity to cross-examine any witness. The hearing officer also informed the parties of the procedure to be followed for discovery, subpoenaing witnesses, and for giving the required disclosure of witnesses and exhibits. An Interim

Order was issued directing that the Transportation Cabinet file its Motion to Dismiss by January 15, 2016. The issue as to the Board's jurisdiction and timeliness of the appeal was briefed by the Appellee, with responses by the Appellant who argued that the grievance he filed was never about reclassification but that he had been promised a lateral transfer and raise. By Interim Order entered on April 5, 2016, the Board found that an issue of fact existed as to a dispute about what had been promised Breeding and **OVERRULED** the Motion to Dismiss.

4. The matter was brought on for a hearing on April 21, 2016. Appellant Breeding had the burden of proof by a preponderance of the evidence. The issue set forth was whether Breeding was improperly denied a lateral transfer to Transportation Engineer II with an accompanying raise of \$14,000.

## **II. STATEMENT OF FACTS**

1. **Sherri Chappell** is the Chief District Engineer for District 11 located in Manchester. She testified that lateral transfers often occur when a supervisor prepares a request to change an employee from one position to another, which she then forwards to the Central Office for approval. She testified that she did not consider the request she received to move Breeding to a position as a Transportation Engineer Supervisor as a lateral move but a request for a promotion. She said she did not make the request to move Breeding into the position requested as she contacted Mark Hoskins, the Administrative Coordinator in the Cabinet's personnel department, to see if there was availability for three Transportation Engineer Supervisors, and was informed that there was no such availability anywhere in the state. She testified that there was no available option for her to consider, so she did not evaluate the request in order to move it forward. She further said she did not know what the request for the anti-compression raises involved.

2. Chappell described the amount of personnel working at of the Pineville office, stating that it has more technicians than any other office in the 11<sup>th</sup> region, as it does all the contract stripping work in the region. She stated that the region had a vacancy for a Transportation Technologist, Grade 14 position, but that there was no vacancy for a Transportation Engineer II Supervisor. She further testified that she could not request a promotion for a position that was not approved by the Cabinet. She further testified that she is unaware of any procedure whereby the Cabinet's personnel policy allows a lateral transfer from a non-supervisory to a supervisory position.

3. **Donald Lee Breeding**, the Appellant testified that he has been a Registered Professional Engineer since 1982, and that he was hired by the Transportation Cabinet and served as a branch manager and section engineer in Frankfort until 1986 when he went to work with a private sector company performing transportation engineering work until 1995. He returned to the Transportation Cabinet, working in Jackson until 2009, when the Cabinet was reorganized and his position as an Engineer Specialist, Grade 17, was eliminated and he was moved to Pineville where he worked as an Engineer Specialist and Section Engineer. A couple years later, the District Engineer told him the Cabinet needed to open a position for another employee and asked him to step down to a Transportation Engineer II, Grade 16, which he agreed to do. He testified that he had a history of being a team player and that he performed multiple tasks, including serving as a staff supervisor, because he had the ability to do the work.

4. In the Spring of 2015, Breeding said they learned that there was going to be an “anti-compression” salary adjustment, for retention purposes, and that there would be substantial differences between that given a Transportation Engineer II, the position held by Breeding, in the amount of approximately \$8,520, and that given a Transportation Engineer Supervisor, in the amount of approximately \$14,169, despite the fact that both positions were a Grade 16 level. He testified that on May 1, 2015, his immediate supervisor, Robert Perkins, went to the Branch Manager, Michael Calebs, and they agreed to submit that Breeding be promoted to a Transportation Engineer Supervisor. He testified that his supervisors made the request because they believed he deserved the position and the salary adjustment. He testified that he learned Mark Hoskins had informed Calebs that there could not be more than two Transportation Engineer Supervisors in a section.

5. Breeding testified that he was made aware of an Administrative Regulation, 101 KAR 2:034, Section 3(9), which provides the requirements for a salary adjustment that may be made on the 16<sup>th</sup> of a month. He had learned that the adjustment was only going to be available to those holding the positions on June 16. He said that the difference between the two salary adjustments was \$5,649, and that since he was performing the work of a supervisory level his supervisors believed he should have the increase.

6. Breeding testified that he later learned that Hoskins had not considered the request because there was no provision allowing for more than two Transportation Engineer Supervisors in a section. He testified about a series of phone calls and electronic mail exchanges with his supervisors and the personnel office, and he was eventually told he could apply for any vacant supervisor position, which did not currently exist. Additionally, he testified that his opportunity for the higher salary adjustment had already passed, as he would have had to be in the supervisor position by June 16.

7. Breeding filed a grievance with the Cabinet, which was denied. Upon filing the appeal to the Personnel Board he submitted a discovery request for the statutory or regulatory authority documentation of the policy that each section could only have two Transportation Engineer Supervisors. He testified that all he received was a copy of an email from Chuck Knowles, Deputy State Highway Engineer, dated December 10, 2009, addressed to the section offices referencing three organizational charts for Section Offices Structure and Staff Supervisors, reflecting the “desired situation.” [Appellant’s Exhibit 7.] Breeding testified that he did not believe the charts sufficiently establish any reference to a statute or regulation or recognized policy that restricts the sections to just two supervisors. He expressed a belief that the Cabinet was performing an arbitrary decision, “simply because they want to,” without appropriate policy guidelines. He said he had been performing supervisory duties for four years, and that he was qualified for the position. He stated an opinion that the only reason the Cabinet doesn’t have more than two supervisors currently is a shortage of qualified professional engineers within the Cabinet.

8. Breeding testified that he sought a position vacancy that was available in the region, shown on a regional personnel chart as a Transportation Engineering Technologist II, which was previously held by Bill Sinkhorn who had died. Breeding claimed the title of the position is meaningless, as it is the slot availability that is important, which the Chief District Engineer can use to make up any staff shortage according to the need. He further interpreted the organizational charts as showing for two support supervisors, serving under the Transportation Engineer Supervisor, which he said provided for a total of three supervisors per section, and that

they were all of the same pay grade despite the fact that the Transportation Engineer Supervisor had controlling authority over the staff supervisors.

9. **Robert Perkins** is a Transportation Engineer Supervisor, with responsibilities over Bell and Harlan counties. He said he has one other supervisor in his crew, and alleges he is supposed to have two but that one is "on loan" to the Design department. He said that their section has a tremendous workload and that he uses other personnel, including Breeding, to fill the duties needed in the other supervisory position.

10. Perkins testified that on May 1, 2015, he requested that Breeding be moved into the supervisory position, as he was qualified and performed every job Perkins requested. He acknowledged that part of the request was to allow Breeding, who was a Transportation Engineer and already performing the supervisory functions, to be formally placed in the position in order to receive the higher anti-compression salary increase, as he knew the salary adjustment would not be available after June 16. Perkins said he was leaving the processing of the request to the personnel department but that a vacant position formerly occupied by Sinkhorn was available, which could have been filled with the personnel needed.

11. **George Michael Calebs** is the Branch Manager in District 11 that includes the Pineville Section. He said that his section supervisor, Robert Perkins, is short staffed and in need of help as one of the supervisors is on loan to another department. He said the vacancy affects the efficiency of the work crews. He testified that Perkins uses Breeding to perform supervisory duties and is a big help to Perkins, but with Breeding not being classified as a supervisor his authority is tainted. Calebs testified that he does not know of any engineer with the same level of experience as Breeding.

12. Calebs testified that on May 1, 2015, it became known that the Cabinet was working on a salary increase for the engineers as a "parity" raise to reduce the turnover. He said that Perkins has to do most of the supervisory work himself, and that he needed Breeding to be designated as a supervisor regardless of the organizational chart requirements. He testified that he told Breeding to apply for a lateral transfer to be upgraded to a supervisory position. However, he later learned that the Cabinet would not appoint more than two supervisors in any section.

13. **Charles Knowles** was a former Deputy State Highway Engineer for Construction and Maintenance. He drafted the 2009 email and recommended organizational charts introduced by Breeding to justify the organizational structure need for supervisors. Knowles testified that the purpose of preparing the organizational charts was to provide some guidance and direction to the field as far as the required functions within the Highway Department districts, and to give advice on filling supervisory positions. He said the charts were prepared because the Cabinet realized they did not have enough engineers, and that the reason for having two supervisors was due to the multiple counties of responsibility within each district. He said that as they looked at the then current availability of staffing and job requirements, the diagrams included in the charts illustrated to the field how they were to implement the positions. Knowles said that the organizational chart was the plan that was implemented by the Cabinet, which he said was still in force when he left the Cabinet in 2010.

14. **James Richard Dobner** is the Deputy Executive Director of Human Resources. He testified that he knows Breeding and described his position as a Transportation Engineer II and his duties in the Pineville Section of District 11. He also explained the duties of a Transportation Engineer Supervisor and the authority of the position to direct the tasks and work to be done.

15. Dobner said he was aware of the request to promote Breeding to the Transportation Engineer II Supervisor position. He also testified that he was aware of the 2009 email forwarding Knowles organization charts and the interpretation advanced on Breeding's behalf that the proposed organization structure called for a Transportation Engineer II Supervisor and two staff supervisors, one for the construction line and one for the maintenance line. However, Dobner testified that he researched the Master Report of Positions throughout the Commonwealth of Kentucky, and could not find a single section in any of the districts that had three Transportation Engineer Supervisors. He concluded that the possible interpretation of Knowles did not play out that three supervisors are called for, and that such interpretation had no binding effect on the Cabinet.

16. Dobner testified that Breeding was qualified and met the requirements for the supervisory position. He said that up to June 16, 2015, it would have been legally possible to make a lateral transfer of Breeding to a supervisory position, as both positions were a grade 16 pay level. After that date, the supervisory position was elevated to a grade 17. However, Dobner went on to state that the requested transfer of Breeding to a supervisor position would not have been considered as it is the preference of the Cabinet not to make unilateral promotions, but that all promotions be opened up to the application process in order for the Cabinet to be able to consider the best person for the position. He stated that his office would not do anything concerning a promotion until the application process is started, and that he said he did not have any conversation relating to the effort to promote Breeding.

### **III. FINDINGS OF FACT**

1. The Appellant, Donald Breeding, has been a professional engineer since 1982, with almost all his work experience performed with the Transportation Cabinet. In that capacity, he has performed almost every job relating to the construction and maintenance of the highway system of the Commonwealth of Kentucky, and has served in management and supervisory positions. The evidence showed that he has even performed the task probably considered most important to the users of the highways: operating the snow plow to clear the streets and roads.

2. Breeding was assigned to the Pineville section in District 11 in the position of Transportation Engineer II, and in that position he performed almost every task needed, including performing the duties of a supervisor when one of the supervisors was "loaned" out to perform another function in the department.

3. In 2015, the Cabinet determined to provide a salary adjustment, referred to as an "anti-compression" raise, for purposes of promoting retention of the engineers in the Cabinet. The proposed salary adjustment would be made to the engineers as of June 16, as required pursuant to Kentucky Administrative Regulation 101 KAR 2:034, Section 3(9). The proposed raise provided an adjustment to a Transportation Engineer II, the position held by Breeding, in the amount of \$8,520, and to a Transportation Engineer

Supervisor, in the amount of \$14,169. The difference between the two salary adjustments at the grade 16 pay level was a substantial difference of \$5,649.

4. Because of the significant difference in the amounts of the adjustments, and because Breeding had been performing the duties of a supervisor, his supervisor, Robert Perkins, and his Branch Manager, Mike Calebs, encouraged Breeding to apply for the position of supervisor in order to receive the additional salary adjustment, which they believed he had earned.

5. Under the conditions of the salary adjustment and the fact that on the effective date both the positions Breeding held and the supervisory position he was seeking was a grade 16 pay level, a lateral transfer of Breeding could have been performed. After that date, the supervisor position was upgraded to 17, which would have invoked consideration for a promotion.

6. However, the promotion to supervisor was not considered, as the Cabinet organizational charts only allow two supervisors in each section, and there was no available vacancy in which to place Breeding.

7. No evidence was introduced that Breeding was promised a promotion. The testimony of Robert Perkins and Mike Calebs was that they recommended that he apply for the supervisor's position.

8. The testimony and evidence of record establishes that the Cabinet's organization of the structure of the sections within the divisions of the highway department was that only two supervisors are allowed within each section. Since there was no vacancy in the supervisor slot, the Cabinet was prevented from considering the request.

9. The Cabinet has a policy that any personnel action moving a person into a management or supervisory position is to be conducted under an open application process so the Cabinet would be able to select the most qualified candidate. No application process was generated by the Cabinet for the supervisor position sought by Breeding, as there was no opening for a supervisor.

10. There was no evidence presented of any involvement of age discrimination against Breeding. Every person who testified stated that Breeding was unquestionably experienced and qualified for the position of supervisor. Unfortunately, there was no available slot to place him in.

#### **IV. CONCLUSIONS OF LAW**

1. The evidence established that the Pineville section was in dire need of someone in a supervisory position, with the authority of such position to direct efficient performance of the work crews in the construction and maintenance requirements of the highway department. This was necessitated by the loan of one of the engineer supervisors to another department. Unfortunately, the structure of the sections is not organized to provide a replacement for that supervisor so that the section could continue to operate in an efficient manner in his absence. Such management discretion in the Cabinet's decision making process is not within the jurisdiction of this tribunal nor this appeal.

2. The evidence establishes that although a supervisor was needed to replace the engineer removed from the Pineville section and loaned to another department, that engineer still occupied one of the available supervisor slots and there was no opening available to consider placing Breeding.

3. The retention raises, referred to as "anti-compression" raises, offered to the engineers on staff as of June 16, presented a significant difference in the salary adjustment between the transportation engineer and the supervisor of \$5,649. Breeding's supervisors felt that since he was performing the duties of a supervisor he deserved the higher salary adjustment and they encouraged him to apply for the position. However, contrary to the allegation of the Appellant, no evidence was presented of a promise made to Breeding that he would be given the supervisor's position. Additionally, no evidence was presented that Breeding was the victim of age discrimination.

4. Breeding argued that the Cabinet acted arbitrarily towards him in considering his application for the lateral transfer to the supervisor's position, which at the time was within the same pay grade. Although Mr. Dobner, the Cabinet's Deputy Executive Director of Human Resources, suggested that such a lateral move could have been legally performed within the same pay grade, he testified that it was the Cabinet's policy that any placement of a person in a supervisory or management position would have to go through an application process that would have enabled the Cabinet to select the best available candidate. Although the evidence suggested that Breeding would have met that requirement as the best available, the evidence clearly disclosed that there was no vacancy available. For that reason, Breeding's Chief District Engineer, Sherri Chappell, testified that when she was informed that the Cabinet's structural organization did not allow more than two supervisors per section, and that there was no supervisor vacancy available within the section or the department, she did not even consider the request, nor did she forward it to the Cabinet's personnel department.

5. The preponderance of the evidence establishes that there was no decision to be made on Breeding's application, as there was no opening in the supervisory position that required the Cabinet to fill. Therefore, there was no arbitrary or capricious action on Breeding's promotion effort.

#### **V. RECOMMENDED ORDER**

Having considered and weighed all the evidence and the laws of the Commonwealth of Kentucky, and based upon the foregoing findings of fact and conclusions of law, the Hearing Officer recommends to the Personnel Board that the appeal of **DONALD BREEDING VS. TRANSPORTATION CABINET (APPEAL NO. 2015-253)** 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 E. Patrick Moores this 22<sup>nd</sup> day of July, 2016.

**KENTUCKY PERSONNEL BOARD**

  
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**MARK A. SIPEK**  
**EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:

Hon. William Fogle  
Donald Breeding  
J. R. Dobner