

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD

BILLY CAUDILL (Appeal No. 2022-010)
ROBERT CAUDILL (Appeal No. 2022-011)
JONES HIATT (Appeal No. 2022-012) and
MICHAEL NUNLEY (Appeal No. 2022-013)

APPELLANTS

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

PUBLIC PROTECTION CABINET

APPELLEE

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

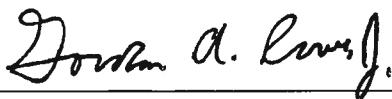
The Board, at its regular May 2024 meeting, having considered the record, including the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer dated March 29, 2024, Appellants' Exceptions, Appellants' Request for Oral Arguments, Appellee's Response to Exceptions, and being 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.
GORDON A. ROWE, JR., SECRETARY

A copy hereof this day emailed and mailed to:

Hon. Sandra Reeves
Hon. Daniel Leffel
Hon. Rosemary Holbrook (Personnel Cabinet)
Sabrina Sandoval

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD**

**BILLY CAUDILL (APPEAL NO. 2022-010)
ROBERT CAUDILL (APPEAL NO. 2022-011)
JONES HIATT (APPEAL NO. 2022-012)
MICHAEL NUNLEY (APPEAL NO. 2022-013)**

APPELLANTS

V.

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

PUBLIC PROTECTION CABINET

APPELLEE

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

These consolidated matters came on for an evidentiary hearing on February 8, 2024, at 9:30 a.m., ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellants, Billy Caudill, Robert Caudill, Jones Hiatt, and Michael Nunley were present and were represented by the Hon. Sandra Reeves. The Appellee, Public Protection Cabinet, was present and was represented by the Hon. Daniel Leffel. Also present for the Appellee as Agency representative was the Appointing Authority Brian Raley.

BACKGROUND

1. Each of the Appellants filed his appeal on February 14, 2022. They alleged they were penalized due to a disparity in pay. The Appellants are all Investigator IIIs and have determined that there were other Investigator IIIs with less experience who are paid more than they are.

2. At the first pre-hearing conference, the parties agreed that these appeals should be consolidated.

3. Following the exchange of discovery and a series of pre-hearing conferences, this matter was scheduled for an evidentiary hearing.

4. The issue in the evidentiary hearing was whether or not the Appellants were penalized by their salaries in comparison to other employees or were penalized by being denied a salary adjustment. The Appellants had the burden of proof, which was by a preponderance of the

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evidence. As the party having the burden of proof, the Appellants proceeded first in the presentation of evidence.

5. The following witnesses testified at the hearing:
 - a. The **Appellant, Michael Nunley**, Investigator II, Department of Alcoholic Beverage Control.
 - b. The **Appellant, Robert Caudill**, Investigator II, Department of Alcoholic Beverage Control.
 - c. The **Appellant, Jones Hiatt**, Investigator II, Department of Alcoholic Beverage Control.
 - d. The **Appellant, Billy Caudill**, Investigator II, Department of Alcoholic Beverage Control.
6. Joint Exhibits 1 through 8, as introduced in the record:
 - 1) Michael Nunley's Personnel File.
 - 2) Michael Nunley's Appeal Form with Grievance attached.
 - 3) Robert Caudill's Personnel File.
 - 4) Robert Caudill's Appeal Form with Grievance attached.
 - 5) Jones Hiatt's Personnel File.
 - 6) Jones Hiatt's Appeal Form with Grievance attached.
 - 7) Billy Caudill's Personnel File.
 - 8) Billy Caudill's Appeal Form with Grievance attached.
7. Following the evidentiary hearing, counsel for both parties submitted closing briefs.

FINDINGS OF FACT

1. The Appellants are all Investigators with the Public Protection Cabinet, Department of Alcoholic Beverage Control (ABC), Division of Enforcement. They are all classified employees with status. (**Joint Exhibits 1, 3, 5, and 7**)

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2. The Appellants are all experienced law enforcement officers with distinguished careers.

- a. **Michael Nunley** was a Correctional Officer, a Police Officer, and a Police Chief before he was hired as an Investigator II with ABC on June 16, 2013. He was allowed to resign/reappoint and receive a five thousand five hundred dollar (\$5,500) raise on October 1, 2015. On the same date, his work county changed from Laurel County to Whitley County. By February 2019, Nunley had over one thousand (1000) hours of training and was recommended for reclassification. He was reclassified from Investigator II to Investigator III with a raise to midpoint on March 16, 2019. Although Whitley County is his work county, he also regularly works in Knox, Bell, and Laurel Counties. Like all ABC Investigators, Nunley has statewide jurisdiction. (Testimony of Nunley and **Joint Exhibit 1**)
- b. **Robert Caudill** started his law enforcement career with the Floyd County Sheriff's Office as a deputy. He also worked drug investigations with Operation UNITE while employed with the Prestonsburg Police Department. He was hired as an Investigator II with ABC on July 1, 2015. He was promoted to Investigator III on February 16, 2019. After his six (6) -month promotional probation, he was raised to a salary equal to others who were reclassified after him including some he was selected over for the promotion. He works in Floyd, Pike, Letcher, Magoffin, and Wolfe Counties. His work county is Floyd County. (Testimony of Robert Caudill and **Joint Exhibit 3**)
- c. **Jones Hiatt** retired after seventeen (17) years with the Lexington Police as an Officer and Sergeant. He was hired as an Investigator II on January 1, 2012, at five percent (5%) above entry level because of his experience. He received a raise on October 1, 2015, when he resigned to be reappointed. On the same date, his work county changed from Madison County to Fayette County. On November 16, 2015, he was promoted from Investigator II to Investigator III. On June 1, 2018, he was allowed to resign/reappoint for another raise. (Testimony of Hiatt and **Joint Exhibit 5**)
- d. **Billy Caudill** worked for the Hazard Police Department before he was hired as an Investigator II with ABC on March 16, 2014. He was allowed to resign/ reappoint at a higher salary on October 1, 2015. He was reclassified from Investigator II to Investigator III on March 16, 2019. In the memorandum recommending him for

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reclassification, it was pointed out that he had over one thousand (1000) training hours. He also had participated in Operation Zero Tolerance and the Targeted Enforcement Detail. He has worked in Perry, Harlan, Letcher, Owsley, Leslie, Knott, Breathitt, and Clay Counties. His work county is Perry County. (Testimony of Caudill and **Joint Exhibit 7**)

3. The Appellants filed grievances through their chain-of-command on November 24, 2021. They alleged their salaries were unfair compared to other ABC Investigators. They all requested that their salaries be raised to \$50,800, plus backpay. Michael Nunley's grievance reads as follows:

I am requesting that my annual salary be adjusted to that of my co-workers also holding the classification of Investigator III who achieved the classification in the same year as myself, or later who have salaries that exceed my annual salary. This adjustment would be from my current salary of \$46,680.80, the lowest of all Investigator III's, to a salary compatible with that of other of my co-workers who have achieved the rank after me, but with a higher salary of \$50,800.00. I am also request backpay to the date when I achieved the rank of Investigator III. (sic)

I am filing this grievance pursuant to 101 KAR 1:375, Section 2(1), KRS 18A.095(1) and all other applicable law. It is my assertion that I have been subjected to unfair and unjust treatment and have been penalized concerning the conditions of my employment. Specifically, I have been treated unfairly as it relates to the disparity between my annual salary and that of a number of my co-workers of the same job title or classification who have comparable education and/or training as myself, who were hired/promoted or reclassified to Investigator III at approximately the same time or after my classification as Investigator III, at a greater salary than mine.

In 2019, I was first reclassified as an Investigator III, from the prior classification of Investigator II. Upon achieving the classification of Investigator III, my annual pay was adjusted from that of Investigator II, to \$46,690.80 as an Investigator III. It has recently come to my attention that there have been other of my co-workers who have been hired, transferred or promoted either during the same year as myself, or later who have no greater education and/or experience than myself, yet whose salary exceeds my salary as an Investigator III.

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Over the past few weeks I have reviewed open record information online for the year 2020, as 2021 salary information was not available to me. From my review of the information available to me, it appears that my salary of \$46,690.80 as an Investigator III is among the lowest in the Public Protection Cabinet, Department of Alcoholic Beverage Control's Enforcement Division. Of the twenty (20) employees with a job-classification of Investigator III, it appears that 35% (7 employees) have income that exceed mine. Of those 10% (2) achieved the rank of Investigator III the same year as me (2019), with a greater salary than mine. An additional 15% (3) were first classified as Investigator III in 2020, also with a starting salary greater than mine. Of the employees currently identified as Investigator III, one was still classified as an Investigator II in 2019, while I was an Investigator III, and even then earned an annual salary as an Investigator II that was greater than my salary with my Investigator III classification. (sic)

I have also reviewed salaries for 2020 for Investigator II's and from my review of the information provided online, it appears that still in 2020 there are no less than 2 Investigator II's whose salary exceeds mine, even after 2 years with my current classification of Investigator III.

The disparity between my income and others with the same job classification is unfair. I can determine no justification for being penalized for doing the same job as those individuals of the same job classification who earn a greater pay than myself. (**Joint Exhibit 2**)

- a. Robert Caudill's grievance is almost exactly the same except that he was promoted from Investigator II to Investigator III in 2019, and not reclassified. (**Joint Exhibit 4**)
- b. Jones Hiatt's grievance is almost exactly the same except that it alleged he was reclassified from an Investigator II to Investigator III five (5) years before he filed his grievance. (**Joint Exhibit 6**) According to his personnel records, he was actually promoted from Investigator II to Investigator III. (**Joint Exhibit 5**)
- c. Billy Caudill's grievance was the same as Michael Nunley's. (**Joint Exhibit 8**)

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4. After the grievances were appealed through the chain-of-command, Brian Raley, the Appointing Authority, gave the final response on February 2, 2022, which reads as follows:

Findings:

101 KAR 2:034 Section 1(2) requires incumbent employees within the same job classification, department or office, work county, and those with a similar combination of education and relevant experience to receive salary adjustments when new **appointments** are made with a higher salary. Although your clients have alleged that their salaries should have been adjusted based upon higher salaries of other employees, an "appointment" personnel action has not occurred that meets the above criteria of 101 KAR 2:034, Section 1(2) that would require a salary increase for your clients. While transfers, demotions, and reclassifications constitute personnel actions that apply to various incumbent employees during their state careers, they do not constitute "appointment" personnel actions that require salary adjustments for other state employees as set forth in 101 KAR 2:034, Section 1(2).

Transfers

Demote and Retain

At present, the Public Protection Cabinet's Department of Alcoholic Beverage Control ("HBC") has four (4) employees with higher salaries and the same job classification of the Investigator Ills who submitted a grievance. They are Sarah Tackett, Lora Estes, Larry Casey, and William Crider. Each of these employee's most recent personnel actions are discussed below.

Two (2) Investigator Ills (Tackett and Estes) **transferred** from the Department of Criminal Justice Training ("DOCJT") as Law Enforcement Training Instructor IIs (grade 14) to the position of Investigator II (grade 13) at the Public Protection Cabinet. These employees did not "appoint" into PPC. Rather, these incumbent state employees were allowed to voluntarily **transfer, demote**, and retain their former monthly salaries of \$4,037.44 in compliance with 101 KAR 2:034. Since employment with the department, the employees have been **reclassified** to Investigator III (grade 14). As required by regulation, they retained their monthly salary of \$4,037.44.

The following regulations governed the salaries of transferring and demoting employees and any subsequent reclassifications they may receive:

101 KAR 2:034 Section 3(2)(a): "(I)f an employee is demoted, the appointing authority shall determine the salary in one (1) of the following ways: ... (1) The employee's salary shall be reduced by five (S) percent for each grade the employee is reduced; or (2) **The employee shall retain the salary received prior to demotion...**" In the case of the two (2) employees (Tackett and Estes) who were incumbent state employees at another agency, the appointing authority chose to allow the employees to retain their previous salaries upon demotion and transfer to the Public Protection Cabinet.

Although these two (2) employees were permitted to retain their salaries, their ability to receive a salary increase is limited going forward by 101 KAR 2:034. In most cases, 101 KAR 2:034 requires a 5% increase in salary for employees who advance grades. However, 101 KAR 2:034 Section 3(2)(b) restricts this increase for employees who have previously demoted, as follows: "An employee whose salary is not reduced by five (S) percent per grade upon demotion **shall not be eligible for a salary Increase upon promotion, reclassification, detail to special duty, reallocation, pay grade change, or successful completion of promotional probation until the employee is moved to a job classification with a higher pay grade than that from which he was demoted.** If a promotion, reclassification, detail to special duty, reallocation, or pay grade change occurs, it shall be deemed as having been made from the grade from which the employee had been demoted."

In summary, these employees did not "appoint" into PPC. Accordingly, 101 KAR 2:034, Section 1(2), which authorizes salary increases for certain other PPC employees did not apply.

Same Grade

One (1) additional employee (Casey), an incumbent state employee, **transferred** from another state agency, the DOCJT, as a Law Enforcement Training Instructor I (grade 13) to an Investigator II (grade 13). 101 KAR 1:335 does not authorize salary adjustments for other employees when another state employee "transfers" into an agency. Therefore, the employee transferred with his salary of \$4,037.46. The employee was later **reclassified** to an Investigator III (grade 14) in 2019. As required by the following regulation the employee's salary was increased by five (5) percent for the increase in grade.

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101 KAR 2:034 Section 3(3)(a): "An appointing authority shall adjust the salary of an employee who is advanced to a higher pay grade through reclassification in one (1) of the following ways: 1. The greater of five (5) percent for each grade or the new grade minimum ... "

In summary, at no point did Casey "appoint" into PPC. Accordingly, the salary increase provisions applicable to other state employees as set forth in 101 KAR 2:034, Section 1(2) did not apply.

Appointment

In 2017, one (1) ABC Investigator II (Crider) applied for and was the chosen candidate for an Investigator III position. At the time of the appointment there were no Investigator III's located in the same county as Investigator Crider. The position was filled by allowing the employee to resign as an Investigator II and be re-appointed as an Investigator III. The salary selected for the candidate was \$3,890.90. After successfully completing the initial probationary period, the required five (5) percent increase in salary was given, bringing the employee's salary up to \$4,085.46.

Determination:

As stated above, 101 KAR 2:034 Section 1(2) requires incumbent employees within the same job classification, department or office, work county, and those with a similar combination of education and relevant experience to receive salary adjustments when new appointments are made with a higher salary. However, the Cabinet finds no evidence that Tackett, Estes, and Casey were "appointed." Rather, they were incumbent state employees who came to the department as "transfers" from another state agency. The Cabinet also finds no Investigator III had a work county equal to that of Crider when his "appointment" became effective. Accordingly, 101 KAR 2:034, Section (1)(2) did not require a salary increase for your clients, as they were outside of Crider's work county. It is my conclusion that in each of the above four instances, the above cited regulations were used consistently and as they were intended. Therefore, no further action is required by the Public Protection Cabinet regarding this grievance.

(Joint Exhibits 2,4, 6, and 8)

5. The Appellants testified consistent with Raley's findings in his grievance response. They alleged their salary was lower than employees who transferred in to ABC as Investigator IIIs.

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The one employee who was appointed, Crider, was identified as having a work county in Western Kentucky. (Testimony of Nunley, Robert Caudill, and Hiatt.)

6. All ABC Investigators have statewide jurisdiction. All of the Appellants work outside of their designated work county. (Testimony of Nunley, Robert Caudill, Hiatt, and Billy Caudill.)

7. The Appellants did not identify any Investigator who was appointed to their same work county at a higher rate of pay. (Testimony of Nunley, Robert Caudill, Hiatt, and Billy Caudill.)

8. The Appellants did not identify any statute or regulation that entitled them to a salary increase.

9. On July 1, 2022, and July 1, 2023, the Appellants received eight percent (8%) and six percent (6%) raises like all state employees. In November 2023, the Appellants and all Investigator IIIs job titles were changed to Investigator IIs with a ten percent (10%) increase in pay. The Appellee testified this exacerbated the difference in their pay with Crider and the other higher paid Investigators.

10. The Appellants were not penalized in comparison to other Investigators or in being denied a salary increase.

11. Some of the Appellants have served as acting supervisor without an increase in pay. The Appellants did not appeal this issue.

CONCLUSIONS

1. 101 KAR 2:034, Section 1, reads as follows:

Section 1. 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 not on initial or promotional probation and is earning less than the new appointee's salary, if the appointing authority determines that the incumbent employee:

- a) Is in the same job classification;
- b) Is in the same department or office;
- c) Is in the same work county; and

d) Has a similar combination of education and experience relating to the relevant job class specification.

(3) If sufficient funds are available, the appointing authority may identify each incumbent employee affected by subsection (2) of this section whose salary is less than five (5) percent above the appointment salary assigned to the new employee. The appointing authority may adjust all affected incumbent employees' salaries to five (5) percent above the new appointee's salary.

2. The requirement in 101 KAR 2:034, Section 1(2)(c) that the employees for salary comparison must be in the same work county refers to the work county designated on the employee's Personnel Action Notification.

3. The Appellants are not entitled to a raise pursuant to 101 KAR 2:034, Section 1.

4. The Appellant's reliance on *Kentucky State Police v. Scott*, No. 2014-CA-001981-MR, is misplaced. The Court of Appeals decided the case on constitutional grounds and was subsequently overturned by the Kentucky Supreme Court in *Kentucky State Police v. Scott*, 529 S.W.3d 711 (2017). Neither decision, in any way, addresses the issue of "same work county" contained in 101 KAR 2:034, Section 1.

5. The Appellants also argued that their salary should have been raised to mid-point when they were reclassified or promoted to Investigator III. This argument is based on the language of 101 KAR 2:034, Section 3(1) and (3) version in effect February and March 2019), which reads as follows:

Section 3. Salary Adjustments.

(1) Promotion.

(a) If an employee is promoted shall receive the greater of five (5) percent for each grade, or an increase to the minimum of the new grade except as provided under subsection (2)(b) of this section; or

(b) If sufficient funds are available and except as provided under subsection (2)(b) of this section, an appointing authority may adjust the employee's salary up to the midpoint of the pay

grade as long as the increase is greater than the increase specified in subsection (1)(a) of this section.

(3) Reclassification.

(a) An appointing authority shall adjust the salary of an employee who is advanced to a higher pay grade through reclassification in one (1) of the following ways:

1. The greater of five (5) percent for each grade or the new grade minimum except as provided under subsection (2)(b) of this section; or
2. If sufficient funds are available and except as provided under subsection (2)(b) of this section, up to the midpoint of the pay grade as long as the increase is greater than the increase specified in sub-paragraph 1. of this section.

(b) An employee who is placed in a lower pay grade through reclassification shall receive the same salary received prior to reclassification, but shall not be eligible for a salary increase upon promotion, reclassification, detail to special duty, reallocation, pay grade change, or successful completion of promotional probation until the employee is moved to a job classification with a higher pay grade than that from which he was reclassified. If a promotion, reclassification, detail to special duty, reallocation, or pay grade change occurs, it shall be deemed as having been made from the grade from which the employee had been reclassified.

(c) An employee shall not be reclassified from a job classification that does not require the supervision of employees to a job classification that requires the supervision of employees as mandated within the job class specification.

6. The Appellants' argument is that sufficient funds must have been available because of the raises other employees received. However, this argument is based on a misreading of the regulation. The key language is that the appointing authority "may adjust the employee's salary up to midpoint" for promotion in the version of the regulation in effect when Robert Caudill was promoted.

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7. The key language for reclassification in March 2019 is “an appointing authority shall adjust the salary of an employee who is advanced to a higher pay grade through reclassification in one of the following ways...”. Thus, the appointing authority had discretion and was not required to raise Nunley and Billy Caudill’s pay to midpoint even if sufficient funds were available.

8. When Hiatt was promoted in 2015, 101 KAR 2:034, Section 3(1) read as follows:

Section 3. Salary Adjustments.

(1) Promotion. An employee who is promoted shall receive the greater of five (5) percent for each grade, or an increase to the minimum of the new grade except as provided under subsection (2)(b) of this section.

Thus, in 2015, the only alternative for the appointing authority was to raise Hiatt’s salary by five (5) percent per grade.

9. The Appellants have not identified any other statute or regulation that would entitle them to a raise.

10. The Appellants did not carry their burden of proof that they were penalized as that term was defined at KRS 18A.005(24). KRS 13B.090(7).

11. Because all the events underlying these Appeals 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 these Appeals.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeals of **BILLY CAUDILL (APPEAL NO. 2022-010), ROBERT CAUDILL (APPEAL NO. 2022-011), JONES HIATT (APPEAL NO. 2022-012) AND MICHAEL NUNLEY (APPEAL NO. 2022-013) VS. PUBLIC PROTECTION CABINET** 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 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

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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).

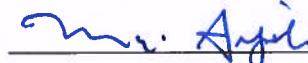
The parties are strongly encouraged to send any exceptions and/or requests for oral argument by email to: PersonnelBoard@ky.gov

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.

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

SO ORDERED at the direction of the Hearing Officer this 29 day of March, 2024.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day emailed and mailed to:

Hon. Sandra Reeves
Hon. Daniel Leffel
Hon. Rosemary Holbrook (Personnel Cabinet)