

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2016-263

**SHERRI CHAPPELL**

**APPELLANT**

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

**VS.**

**TRANSPORTATION CABINET**

**AND**

**PERSONNEL CABINET**

**APPELLEES**

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The Board, at its regular January 2018 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated November 27, 2017, Appellant's Exceptions, Appellee Personnel Cabinet'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 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 18<sup>th</sup> day of January, 2018.

**KENTUCKY PERSONNEL BOARD**

  
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**MARK A. SIPEK, SECRETARY**

A copy hereof this day sent to:  
Hon. William Fogle  
Hon. Rosemary Holbrook  
Hon. Richard Guarnieri  
Mr. J. R. Dobner

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PERSONNEL BOARD  
APPEAL NO. 2016-263**

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**FINDINGS OF FACT, CONCLUSIONS OF LAW  
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This matter came on for a pre-hearing conference on May 17, 2017, at 10:00 a.m., at 28 Fountain Place, 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.

Appellant, Sherri Chappell, was present and was represented by the Hon. Richard Guarnieri. Appellee Transportation Cabinet was present and represented by the Hon. William H. Fogle. Appellee Personnel Cabinet was present and represented by the Hon. Rosemary Holbrook.

This matter is before the Hearing Officer for a ruling on the Personnel Cabinet's Motion to Dismiss.

**BACKGROUND**

1. The Appellant, Sherri Chappell, filed her appeal with the Personnel Board on October 13, 2016, alleging that she was penalized based on the salary she received upon reinstatement to a position as a Transportation Engineer II. The Appellant had served in an unclassified position as an Executive Director (Chief District Engineer) for a number of years. At that time, she was allowed to reinstate to her position as a Transportation Engineer II (TE II). She was told her salary would be set at \$69,117.60. She later learned that her salary would be \$56,495.52.

2. The Appellant alleged she was penalized based on her salary upon reinstatement to the merit system. The Appellant described her claim on her appeal form as follows;

On January 1, 2012, I was hired as a TE II at \$56,495 at KYTC. For the last four years, I have served as CDE. During that time, other TE II's received a compression and salary adjustment averaging 36% increase in salary (ranging from 17% to 44%). Additionally, during that time, I earned two 1% raises. With this reinstatement as a TE II effective October 16, 2016 at the original hire salary, all additional or potential earnings are being denied to me. According to 101 KAR 2:034, Section 2 Reentrance to Classified Service for former unclassified employees with prior classified service, Option 3 states the salary is the same as the salary the employee last received in the classified service with adjustments for increases that would have been received if the employee had remained in the classified service prior to resignation if the salary does not exceed the mid-point salary plus the difference, in dollars, between entry level and mid-point salary. As previously set forth I had resigned to take an unclassified position as Chief District Engineer. I have now resigned that position to be reinstated as a classified employee. Had I previously remained a classified employee on average my salary would now have been greater than the proposed salary, which I now seek.

Reversion of my salary back to what I receive upon initial hiring is grossly unfair and is not of what I am entitled under the KAR by the requesting authority (Kentucky Department of Transportation). As it is now proposed my salary would be cut by fifty percent of what I made as CDE. What was initially approved by the Personnel Cabinet by the requesting authority stated that my salary would be 69,117.60 and was a fair interpretation of the above KAR. Further said request, factors in that I had prior experience as a CDE and all educational components required in the administration of said position. Also, the requested salary is supported in that I graduated with a math degree in 1997 and an engineering degree in 1998 and have been licensed as a P.E. for over a decade. Furthermore, the mid-point pay plus the difference between the base pay and mid-point pay totals \$70,344.48.

In short, what has been requested by the Kentucky Department of Transportation is supported by the KAR and by my resume. I believe the law in this regard supports the requesting authorities' position and hope that you review and adjust the salary of this position in consideration of the above listed law and factors.

3. The Appellant believed that her salary should have been higher based on the regulations. The Personnel Cabinet took the position that her salary was correct and was set pursuant to 101 KAR 2:034. The Transportation Cabinet took no position on this appeal.

4. The Appellee Personnel Cabinet has submitted its Motion to Dismiss. The Appellant has filed a response and the Personnel Cabinet has filed a reply. In addition, the parties had a chance to discuss their position with the Hearing Officer at a second pre-hearing conference.

5. In its Motion to Dismiss, the Personnel Cabinet contends that the Appellant has not stated an appealable penalization and her appeal should be dismissed. The Personnel Cabinet argues that the Appellant has not cited a statute or regulation that requires her salary to be increased.

6. The Personnel Cabinet contends that the Appellant's salary upon reentrance to the classified service is set by 101 KAR 2:034, Section 2(2)(b), which reads as follows:

Former unclassified employees with prior classified service. An appointing authority shall set the salary of a former classified employee who moved to the unclassified service and who is reinstated, reemployed or probationarily appointed to a position in the classified service in one (1) of the following ways:

1. In accordance with the standards for making new appointments;

2. Up to the same salary as that paid at the time of separation from the classified service, **if that salary does not exceed the mid-point salary plus the difference, in dollars, between the entry level salary and the mid-point salary;**

3. At a salary that is the same as the salary the employee last received in the classified service with adjustments for increases that would have been received if the employee had remained in the classified service prior to resignation **if the salary does not exceed the mid-point salary plus the difference, in dollars, between the entry level salary and the mid-point salary;** [Emphasis added.]

...

7. The Personnel Cabinet further contends that the "entry level" as used in the regulation is interpreted to mean the special entrance rate for the relevant job classification if one

exists. The Cabinet argues that this is a long-standing interpretation of the Personnel Cabinet entitled to substantial deference.

8. At the time the Appellant was reinstated to her TE II job classification, a special entrance rate for that classification was enacted which equals the pay grade 16 mid-point or \$4,707.96. The Cabinet argues that because there is no longer a difference between entry level salary and mid-point salary there is no statutory or regulatory authority to allow the Appellant's salary to be increased above mid-point or \$4,707.96. In other words, the Cabinet argues that if her salary is set using any of the three methods authorized at 101 KAR 2:034, Section 2(2)(b), the maximum for her salary is the same.

9. Finally the Appellee argues that reinstatement as defined at KRS 18A.005(34) is defined to mean: "the privilege of restoration of an employee who has resigned in good standing at the option of the appointing authority..." "Because this appeal concerns the privilege of reinstatement and not a right, the Appellant has not stated a penalization as that term is defined at KRS 18A.005(24) according to the Personnel Cabinet's argument.

10. In her response to the Motion to Dismiss, the Appellant alleges that her appeal should not be dismissed because the salary she received upon reinstatement is less than the salary amount authorized under the regulation for a former unclassified employee who is returning to the classified service and the salary is less than the salary she was promised when she returned to her TE II position.

11. The Appellant agrees that 101 KAR 2:034, Section 2(2)(b), is the appropriate regulation. She argues, however that when the regulation uses the term "entry level salary" it does not mean "special entrance rate" and must mean "the minimum salary for the pay grade." The Appellant attached to her response the Job Class Specification for a TE II classification. This document includes the minimum, mid-point and special entrance rate salaries.

12. The Appellant argues the regulation should be interpreted to give unambiguous words their plain and ordinary meaning. The Appellant argues the term "entry level salary," as used within the regulation, must be interpreted as the minimum salary as set forth on the Job Class Specification. The Job Class Specification form, which is \$3,553.88 per month and not the special entrance rate, which is \$4,707.96. The Appellant argues that an administrative agency's interpretation of a regulation, no matter how long-standing it may be, does not take precedence when it contradicts the plain and unambiguous language of the regulation. The Appellant contends that the Personnel Cabinet's Motion to Dismiss should be set aside and a hearing held to determine the Appellant's correct salary under the regulation.

13. The Appellant also argues that she was penalized when she was not provided the salary she was promised upon her resignation from her non-merit position and her reinstatement

to the TE II position. The Appellant argues this is a penalization without just cause and she is entitled to an evidentiary hearing in order to present evidence and argument in support of her position.

14. In its reply, the Personnel Cabinet argues that to the extent the regulation in question is ambiguous, the Personnel Cabinet's interpretation must be given deference.

15. In addition to the extent the Appellant is arguing she was promised a higher salary upon her return, she is not entitled to such a salary because an "erroneous interpretation of the law will not be perpetuated." The Cabinet argues that the Appellant's contention that she was promised a higher salary equates to an argument that the Personnel Cabinet should be equitably estopped from denying her the pay increase she was promised. The Cabinet argues that the doctrine of equitable estoppel has no application to government agencies when officials are acting in their governmental capacities.

#### **FINDINGS OF FACT**

1. The Appellant, Sherri Chappell, resigned from her position as a Transportation Engineer II on September 16, 2013, in order to be appointed as an Executive Director (Chief District Engineer). At the time she resigned from her classified position of TE II, her salary was \$4,943.36; her salary as Executive Director was \$8,583.34.

2. On October 16, 2016, the Appellant resigned as an Executive Director to be reinstated to her former classification of TE II. Her salary upon reinstatement as a TE II was \$4,707.96, which was both the mid-point for grade 16 and the special entrance rate for a TE II.

3. At the time she resigned her non-merit position to reinstate, the Appellant was promised that her salary would be \$5,759.80 per month.

4. As of October 16, 2016, the minimum salary for grade 16 was \$3,553.88. The mid-point salary was \$4,707.96. A special entrance rate was in effect which was the same as the mid-point entrance rate for a grade 16, which was \$4,707.96.

5. This appeal can be decided as a matter of law based on the allegations on the appeal form, the Motion to Dismiss, the response and reply, plus attachments, and the statements of the parties at the two pre-hearing conferences. There are no material facts in dispute.

CONCLUSIONS OF LAW

1. When the Appellant resigned her Executive Director position (unclassified) and was reinstated to the merit system in the job classification of TE II, her salary was to be set in accordance with 101 KAR 2:034, Section 2(2)(b), Reentrance to classified service, which states in part;

Former unclassified employees with prior classified service. An appointing authority shall set the salary of a former classified employee who moved to the unclassified service and who in reinstated, reemployed or probationarily appointed to a position in the classified service in one (1) of the following ways:

1. In accordance with the standards for making new appointments;

2. Up to the same salary as that paid at the time of separation from the classified service, **if that salary does not exceed the mid-point salary plus the difference, in dollars, between the entry level salary and the mid-point salary;**

3. At a salary that is the same as the salary the employee last received in the classified service with adjustments for increases that would have been received if the employee had remained in the classified service prior to resignation **if the salary does not exceed the mid-point salary plus the difference, in dollars, between the entry level salary and the mid-point salary; [Emphasis added.]**

...

2. The parties discussed the three possible provisions of this regulation, which could have been used to set the Appellant's salary. Under the first option, "in accordance with the standards for making new appointments; the Appellant's salary could be set 'not to exceed the mid-point of the paygrade' thus under this method her salary could be anywhere between minimum and mid-point or \$3,553.88 and \$4,707.96."

3. The second option is for the same salary, as paid at the time of separation from the classified service, if that salary does not exceed the mid-point salary plus the difference, in dollars, between the entry-level salary and the mid-point salary.

4. The third option is the same salary the employee last received in the classified service with adjustments for increases that would have been received if the employee had

remained in the classified service prior to resignation, if the salary does not exceed the mid-point salary plus the difference, in dollars, between the entry level salary and the mid-point salary.

5. Both the second and third methods require an interpretation of the phrase “entry level salary.” The Hearing Officer concludes that because this regulation does not include “minimum salary for the pay grade” or “special entrance rate,” the regulation is ambiguous.

6. Because the language in the regulation is ambiguous, the Hearing Officer believes that the Personnel Cabinet’s long-standing construction of the language in this regulation to equate “entry level salary” to “special entrance rate,” if one exists, is entitled to deference. *Bd. of Trustees of the Judicial Form Retirement Sys. v. Attorney General*, 132 S.W.3d. 770, 786-87 (Ky. 2003) [citing *Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 US 837, 844-45 (1984)].

7. Because the Hearing Officer concludes that the appropriate reading of the phrase “entry level salary” means a job classification special entrance rate, if one exists, the maximum salary under any of the three options of the regulation was \$4,707.96, which was the salary provided to the Appellant at the time of her reinstatement.

8. Although the Appellant was promised a higher salary at the time of her resignation from the unclassified service and her reinstatement as a TE II, she was awarded the maximum salary allowed under the regulations. Thus, she has not stated a claim for penalization. Equitable Estoppel does not apply against either the Transportation Cabinet or the Personnel Cabinet under the facts alleged by the Appellant in this case. [*Delta Airlines Inc. v. Commonwealth, Revenue Cabinet*, 689 S.W.2d. 689 SW.2d 14, 20 (Ky. 1985)] [*J. Branham Erecting and Steel Service Co., Inc. v. Kentucky Unemployment Ins. Com’n*, 880 S.W. 2d. 896, 897 (Ky. App. 1994)].

9. KRS Chapter 18A.005(34) defines reinstatement as a “privilege.” Nonetheless, the Appellant has the right to have her salary set according to the appropriate regulation if she is reinstated. Under the undisputed facts of this case, the Appellant’s salary was so set and she has not stated a claim for penalization.

10. Because the Appellant has not stated a claim for penalization and cannot prevail in this matter, the Board may deny an appeal after a preliminary hearing if it lacks jurisdiction to grant relief. [KRS 18A.095(18)(a).]



**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 **SHERRI CHAPPELL VS. TRANSPORTATION CABINET AND PERSONNEL CABINET (APPEAL NO. 2106-263)** 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).

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 Mark A. Sipek** this 27<sup>th</sup> day of November, 2017.

**KENTUCKY PERSONNEL BOARD**

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

A copy hereof this day mailed to:

Hon. William Fogle  
Hon. Rosemary Holbrook  
Hon. Richard Guarnieri  
J. R. Dobner