

**FILED**  
**FEB 05 2020**  
 FRANKLIN CIRCUIT COURT  
 AMY FELDMAN, CLERK

**COMMONWEALTH OF KENTUCKY**

**48<sup>TH</sup> JUDICIAL CIRCUIT  
 FRANKLIN CIRCUIT COURT  
 DIVISION I  
 CIVIL ACTION NO. 18-CI-00129**

**RECEIVED**  
**FEB 06 2020**  
 Personnel Board

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**SHERRI CHAPPELL** **PETITIONER**

v.

**KENTUCKY TRANSPORTATION CABINET, et al.** **RESPONDENTS**

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**OPINION AND ORDER**

This matter is before the Court on Petitioner’s petition for judicial review of the Final Order of the Kentucky Personnel Board (the “Board”). In its Final Order, the Board dismissed Petitioner’s appeal from the Transportation Cabinet’s (the “Cabinet”) decision to pay her \$4,707.96 per month, with Petitioner asserting that she was promised monthly pay of \$5,759.80. Upon review of the record, and otherwise being sufficiently advised, this Court hereby **AFFIRMS** the Final Order of the Board for reasons stated more fully below.

**BACKGROUND**

Petitioner is an employee of the Cabinet. In September of 2013, Petitioner was promoted from a Transportation Engineer II, which is a classified position, to the Executive Director of Highway District No. 11, which is an unclassified position. She worked as Executive Director for three years. In late 2016, Petitioner was told by the Cabinet that she needed to resign as Executive Director. Petitioner was permitted to return to her old position as a Transportation Engineer II.

Petitioner contends that she was promised a salary of \$5,759.80 per month upon return to her old position, which is an amount that would reflect what she would have been

paid had she remained in the Transportation Engineer II position and received corresponding pay increases. Instead, her salary upon reentry was set at \$4,707.96 per month. The Cabinet told Petitioner that according to 101 KAR 2:034 that \$4,707.96 per month was the most that she would be able to receive by returning to classified employment.

Petitioner appealed her new salary to the Board. She argued that she was promised a monthly salary of \$5,759.80 and that she was penalized by receiving a lower monthly salary. Petitioner argued that 101 KAR 2:034 did not limit her salary to \$4,707.96, arguing that the correct interpretation of the regulation would allow her to be paid the purportedly promised \$5,759.80 each month. Petitioner also argued that the doctrine of equitable estoppel should apply to the current case to bar the Cabinet from going back on its promise to pay Petitioner a monthly \$5,759.80 when returning to her old Transportation Engineer II position.

Ultimately, the Board agreed with the Cabinet finding that 101 KAR 2:034 limits Petitioner to a monthly salary of \$4,707.96. The Board also found that equitable estoppel does not apply against state government agencies. The Hearing Officer entered Findings of Fact, Conclusions of Law, and a Recommended Order on November 27, 2017. The Board entered its Final Order dismissing Petitioner's appeal on January 18, 2018, adopting the finding of the Hearing Officer that Petitioner had not been penalized. Because the basis for dismissal was that Petitioner had not articulated a penalty and therefore the Board lacked jurisdiction, no evidentiary hearing was held in this case.

Petitioner then petitioned this Court for judicial review of the Final Order of the Board. She first argues that the correct interpretation of 101 KAR 2:034 Section 2(2)(b)

allows for her to receive \$5,759.80 each month. The regulation provides that a formerly classified employee returning to classified employment is limited in his or her salary to “the midpoint salary plus the difference, in dollars, between the entry level salary and the midpoint salary.” Petitioner argues that the term “entry level salary” means entry level salary for new Transportation Engineer IIs as is listed on the Job Class Specification form for that position. Because that form lists \$3,553.88 as the entry level salary and midpoint pay for the position is \$4,707.96, the difference between the two is \$1,154.08. Therefore, Petitioner asserts that the regulation permits her to be paid a maximum of \$5,862.04 per month. Because she was purportedly promised a salary within that regulatory maximum, she argues that equitable estoppel should operate to require Transportation to pay her a monthly salary of \$5,759.80.

Respondents argue that 101 KAR 2:034 properly restricts Petitioner’s salary to \$4,707.96 per month, arguing that the “entry level salary” for the purpose of this regulation means the “special entrance rate” for the position. The special entrance rate for the Transportation Engineer II position is \$4,707.96, which is the same as the midpoint salary. They argue that because there is no difference between the two, the calculation in the regulation grants Petitioner a maximum monthly salary of \$4,707.96. Further, Respondents argue that equitable estoppel does not apply to Petitioner’s particular case; Respondents argue that Petitioner was told that her salary would be \$4,707.96 prior to her resignation and was informed of such early enough in advance that she would be able to clear up any misconception about her new salary.

### STANDARD OF REVIEW

“Judicial review of an administrative agency's action is concerned with the question of arbitrariness.” *Commonwealth, Transportation Cabinet v. Cornell*, 796 S.W.2d 591, 594 (Ky. Ct. App. 1990) (quoting *Am. Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Comm'n*, 379 S.W.2d 450, 456 (Ky. 1964)). Arbitrariness means “clearly erroneous, and by ‘clearly erroneous’ we mean unsupported by substantial evidence.” *Crouch v. Police Merit Board*, 773 S.W.2d 461, 464 (Ky. 1988); *See also City of Louisville by Kuster v. Milligan*, 798 S.W.2d 454, 458 (Ky. 1990). Substantial evidence is evidence of substance and relevant consequence having the fitness “to induce conviction in the minds of reasonable men.” *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972); *Owens-Corning Fiberglass Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998).

“The trier of facts in an administrative agency may consider all the evidence and choose the evidence he believes.” *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406, 409-410 (Ky. Ct. App. 1994). In reviewing an agency decision, this Court may only overturn that decision if the agency acted arbitrarily or outside the scope of its authority, if the agency applied an incorrect rule of law, or if the decision itself is not supported by substantial evidence on the record. *Fuller*, 481 S.W.2d at 300-301. Even if the agency's factual findings are upheld under the appropriate standard of review, the reviewing court must still determine whether the agency applied the correct rule of law to its factual findings. *Department of Education v. Commonwealth*, 798 S.W.2d 464, 467 (Ky. Ct. App. 1990). When an administrative agency's findings are supported by substantial evidence, and when the agency has applied the correct rule of law, these

findings must be accepted by a reviewing court. *Kentucky Bd. of Nursing v. Ward*, 890 S.W.2d 641, 642 (Ky. Ct. App. 1994).

### DISCUSSION

First, the Court finds that the proper interpretation of 101 KAR 2:034 Section 2(2)(b) does not support the Petitioner's position and that Petitioner is therefore limited to a salary of \$4,707.96 upon reemployment. This conclusion is supported by the plain language of the regulation itself as well as the Job Class Specification for the Transportation Engineer II position. 101 KAR 2:034 Section 2(2)(b) provides the ways to calculate salary for a former unclassified employee who is entering classified service:

(b) 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 pay grade midpoint salary plus the difference, in dollars, between the job class entry level salary and the pay grade midpoint 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 pay grade midpoint salary plus the difference, in dollars, between the job class entry level salary and the pay grade midpoint salary; or
4. At a salary up to five (5) percent above the pay grade entry level wage for each year of service in the KRS Chapter 18A system, if the salary does not exceed the pay grade midpoint salary plus the difference, in dollars, between the job class entry level salary and the pay grade midpoint salary. Salary shall be calculated using whole percentages.

101 KAR 2:034 Section 2(2)(b). By its terms, the regulation at issue allows for a former unclassified employee with prior classified service to be paid an amount reflecting the

listed midpoint salary plus the difference between the midpoint salary and entry level salary for the job class.

“The same rules of construction or interpretation that apply to statutes also apply to administrative regulations.” *Marksberry v. Chandler*, 126 S.W.3d 747, 753 (Ky. 2003). It is a core principle of statutory interpretation that a court is to interpret a statute as it is written, and its meaning is to be derived from the language found therein, so long as the statute is plain and unambiguous on its face. *Pearce v. University of Louisville*, 448 S.W.3d 746, 749 (Ky. 2014), quoting *Western Kentucky Coal Co. v. Nall & Bailey*, 14 S.W.2d 400, 401-402 (1929), see also *Commonwealth ex rel. Beshear v. Bevin*, 525 S.W.3d 673, 678 (Ky. 2019). If a statute is plainly unambiguous then there is no need to consider extrinsic evidence as to the statute’s meaning. *Id.*, citing *County Bd. of Educ. Jefferson County v. Southern Pac. Co.*, 9 S.W.2d 984, 986 (1928).

Applying the above principles of statutory interpretation to the administrative regulation at issue—101 KAR 2:034 Section 2(2)(b)—the Court finds that the regulation is unambiguous on its face. The regulation plainly and unambiguously provides that the difference between a particular “job class entry level salary” and the listed midpoint salary may be added to the midpoint salary to determine the maximum starting salary for such employees.

However, for the particular Job Class Specification for Transportation Engineer II, the term “entry level salary” is not used at all. Instead, the Job Class Specification provides a table of data that presents the regular entry-to-midpoint salary ranges for a Grade 16 position, while also presenting a “Special Entrance Rate” for a Transportation Engineer II. Accordingly, the listed Special Entrance Rate of \$4,707.96 per month for the

Transportation Engineer II job class circumvents the ordinary entry salary for a Grade 16 level employee of \$3,553.88 and is the appropriate entry level salary to use when performing the 101 KAR 2:034 calculation. And, because the listed midpoint salary for the job classification is the same as the listed Special Entrance Rate, the Transportation Cabinet was correct to find that \$4,707.96 is the maximum starting monthly salary that a person in Petitioner's position could receive.

Further, Petitioner cannot rely on equitable estoppel in the instant case. It is true that equitable estoppel may be applied against a state agency in particular circumstances, so long as "some gross inequity between the parties" is present. *Board of Trustees, Kentucky Retirement Systems v. Grant*, 257 S.W.3d 591, 594 (Ky. Ct. App. 2008), quoting *City of Shelbyville, ex rel. Shelbyville Municipal Water and Sewer Commission v. Commonwealth of Kentucky, Natural Resources and Environmental Protection Cabinet*, 706 S.W.2d 426 (Ky. Ct. App. 1986). In Kentucky, five elements must be present to prevail on a claim of equitable estoppel:

- (1) [c]onduct, including acts, language and silence, amounting to a representation or concealment of material facts;
- (2) the estopped party is aware of these facts;
- (3) these facts are unknown to the other party;
- (4) the estopped party must act with the intention or expectation his conduct will be acted upon;
- and (5) the other party in fact relied on this conduct to his detriment.

*Id.*, citing *Gray v. Jackson Purchase Production Credit Ass'n*, 691 S.W.2d 904, 906 (Ky. Ct. App. 2008). Relevant to this matter, the fact that Transportation intended to pay Petitioner \$4,707.96 per month must have been unknown to Petitioner. However, the facts on the record show that she was aware that Transportation intended to pay her that amount days in advance of her termination. At a prehearing conference on November 16, 2016, Petitioner stated that she was made aware "a few days before, probably two days before"

the effective date of her resignation that she would be paid \$4,707.96 per month. So, Petitioner could not have relied upon a promise to be paid \$5,759.80 when resigning from her Executive Director position, and this was not a surprise that Petitioner discovered upon first returning to work as a Transportation Engineer II. Accordingly, the third element of the above test has not been satisfied. Further, nothing in the record reflects that the Transportation Cabinet intended that Petitioner be induced to act in reliance on the promise of a higher salary upon return, and so the fourth element of the test fails as well. In short, Petitioner cannot prevail on a claim of equitable estoppel in the instant case.

### CONCLUSION

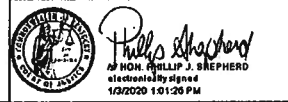
Giving deference to the factual findings of the Board, the Court finds that the Board properly dismissed Petitioner's appeal of the decision of the Transportation Cabinet regarding her salary. Because the Job Class Specification for Transportation Engineer II lists a Special Entrance Rate, the ordinary Grade 16 entry salary is bypassed. Therefore, Transportation correctly determined that the maximum amount that Petitioner could be paid upon return to work as a Transportation Engineer II would be \$4,707.96. Further, Petitioner knew in advance of her resignation what Transportation intended to pay her, and nothing on the record reflects an intent to mislead Petitioner into acting in a way that she otherwise would not have. Petitioner therefore is not able to prevail on a claim of equitable estoppel. A state agency cannot be estopped from enforcing an administrative regulation except in cases of extreme and extraordinary circumstances, involving clear misconduct or fraud. Here, the Transportation Cabinet simply applied an interpretation of its own pay regulation that Plaintiff disputes, but which is a reasonable application of the plain language of the regulation.



**WHEREFORE**, the Final Order of the Kentucky Personnel Board is **AFFIRMED**.

This order is final and appealable and there is no just cause for delay.

So **ORDERED**, this 3<sup>rd</sup> day of January, 2020.



**PHILLIP J. SHEPHERD, JUDGE**  
**Franklin Circuit Court, Division I**

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