

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD

GARY GLASS (APPEAL NO. 2012-225),
DANNY HARNEY (APPEAL NO. 2012-226),
BENJAMIN TOMPKINS (APPEAL NO. 2012-227),
DANIEL GREER (APPEAL NO. 2012-230)
MARK HUMSTON (APPEAL NO. 2012-231), AND
JOHN RIEHL (APPEAL NO. 2012-232)

APPELLANTS

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

FINANCE AND ADMINISTRATION CABINET
LORI H. FLANERY, APPOINTING AUTHORITY

APPELLEE

** ** *

The Board at its regular March 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated January 31, 2014, having considered Appellants' exceptions, Appellee's response, 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 19th day of March, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Stewart Douglas Hendrix
Hon. S. Ryan Newcomb
Danny Harney

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD**

**GARY GLASS (APPEAL NO. 2012-225),
DANNY HARNEY (APPEAL NO. 2012-226),
BENJAMIN TOMPKINS (APPEAL NO. 2012-227),
DANIEL GREER (APPEAL NO. 2012-230)
MARK HUMSTON (APPEAL NO. 2012-231), AND
JOHN RIEHL (APPEAL NO. 2012-232)**

APPELLANTS

VS.

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

**FINANCE AND ADMINISTRATION CABINET,
COMMONWEALTH OFFICE OF TECHNOLOGY
LORI H. FLANERY, APPOINTING AUTHORITY**

APPELLEE

** ** *

These consolidated matters came on for a pre-hearing conference on August 7, 2013, at 10:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellants, Gary Glass, Mark Humston, Daniel Greer, Danny Harney, Benjamin Tompkins, and John Riehl, were present and were not represented by legal counsel. The Appellee, Finance & Administration Cabinet, Commonwealth Office of Technology (COT), was present and represented by the Hon. Doug Hendrix.

These consolidated appeals have been the subject of more than one pre-hearing conference and are currently the subject of a dispositive motion filed by the Appellee.

These appeals had been ordered consolidated without any objection from any of the parties by Interim Order entered November 28, 2012. Subsequent to that, another pre-hearing conference was held and an Interim Order entered February 26, 2013, which set the matter for evidentiary hearing and stated, "The issue in the evidentiary hearing shall be whether or not the Appellants were entitled to a salary adjustment when Laura Noe was hired in state government in September 2012. The Appellants rely on the provisions of 101 KAR 2:034, Section 1(2) and KRS 18A.110 in support of their appeal. . ."

The Appellee filed a Motion to Dismiss, to which Appellants responded, by counsel, and Appellee then replied. The matter is submitted to the Hon. Boyce A. Crocker for a ruling.

BACKGROUND

1. During the relevant times, the Appellants were classified employees with status.
2. According to the appeals filed by the Appellants, each of them held the same classification as Ms. Laura Noe, on or about September 1, 2012, but each after her hire was making less than Ms. Noe. The contention was that pursuant to 101 KAR 2:034, Section 1(2) that their salaries should have been raised when Ms. Noe was hired at a higher salary than they earned at the time of the filing of these appeals.
3. The position in question, which the Appellants each held and to which Ms. Noe was reappointed in September 2012 was Network Engineer IT.
4. 101 KAR 2:034, Section 1, states 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 earning less than the new appointee's salary, if the appointing authority determines that the incumbent employee:
 - (a) Is in the same class;
 - (b) Is in the same work county; and
 - (c) Has a similar combination of education and experience relating to the job classification.
5. As the Hearing Officer understands, it is not contested by Appellee that the Appellants were in the same class, in the same work county, and had a similar combination of education and experience relating to the job classification as did Ms. Noe.
6. The contention made by Appellee that these appeals must be dismissed for lack of jurisdiction is that language that states: "The appointing authority shall adjust to that salary an employee who is earning less than the new appointee's salary. . ."

7. Counsel for Appellee points out that at the time Ms. Noe was reappointed to her position as Network Engineer IT, this action was completed by the Transportation Cabinet's appointing authority. (The Hearing Officer notes from the exhibits attached to the Motion to Dismiss that Ms. Noe was earning the same salary in September 1, 2012, as she was when she separated from state service in June 1, 2012.) The Appellants' appointing authority on September 1, 2012, was in the Finance and Administration Cabinet. These appointing authorities were different persons.

8. Counsel for Appellants argues that relying on the fact Ms. Noe was hired at the Transportation Cabinet with a different Appointing Authority than the Appellants, who all at the time of September 1, 2012, worked for the Finance Cabinet, ignores that the Commonwealth Office of Technology (COT) and IT personnel throughout state government were inevitably being reorganized to all be a part of COT with the same Appointing Authority.

9. Counsel for Appellants details this process in his response, noting that beginning with the administration of former Governor Ernie Fletcher and continuing into the current Governor, that there have been "multiple Executive Orders" directing COT to absorb IT positions and professionals from every state agency in the Executive Branch, which would include the Transportation Cabinet. From this argument, it is clear that the consolidation of IT services in state government to COT was on-going prior to and even after September 1, 2012.

10. Furthermore, Appellants contend one of the provisions of the Memorandum of Agreement (MOA) entered into between the Transportation Cabinet and COT in 2006, is that the Transportation Cabinet would agree to immediately freeze all hiring of staff or intra-Cabinet transfer of staff engaged in IT type duties. [MOA attached as Appellants Exhibit H to Appellants Response.]

11. In the alternative, Appellants argue that even if the Hearing Officer and the Board determine that 101 KAR 2:034, Section 1, does not apply, it should still find that a penalization occurred. Appellants cite KRS 18A.010 which states that one of the reasons for the regulations regarding state merit employment was to "improve the morale and motivation of state employees." Counsel contends that hiring a person at a much higher salary than what the Appellants made, knowing full well that they would all be under the same umbrella shortly thereafter, amounts to a penalization.

12. Appellee replied to Appellants' response. Appellee reiterates that this matter is controlled by regulation previously cited, 101 KAR 2:034, Section 1. Again, Appellee contends that the Appointing Authority for the Transportation Cabinet carried out this action and could not, even if it wished, require (pursuant to 101 KAR 2:034, Section 1) that the salaries of the Appellants be raised since they worked in a different agency and reported to a different Appointing Authority.

FINDINGS OF FACT

1. During the relevant times, the Appellants were classified employees with status.
2. The Hearing Officer finds that when Laura Noe was reappointed as a Network Engineer IT, such was done by the Transportation Cabinet.
3. The Hearing Officer finds uncontested that at that time, on or about September 1, 2012, the Appellants were employees of the Finance and Administration Cabinet.
4. The Hearing Officer finds that on or about September 2012, both immediately before and immediately after, the Transportation Cabinet and the Finance and Administration Cabinet had different Appointing Authorities, and are, in fact, separate state agencies.
5. For purposes of this ruling, the Hearing Officer finds it not necessary to determine whether or not the Appellants and Ms. Laura Noe were in the same class, in the same work county, or had a similar combination of education and experience relating to the job classification. The Hearing Officer finds this is so because having found that the Appellants and Ms. Noe during the time of dispute, on or about September 1, 2012, were employees of different state agencies with different appointing authorities that it is not necessary to undertake any salary comparison pursuant to 101 KAR 2:034, Section 1.
6. Even if the Appellants and Ms. Noe were in the same class, same work county and had a similar combination of education and experience relating to the job classification, again, the fact that Ms. Noe was reappointed by the Transportation Cabinet to a position within the Transportation Cabinet, by the appointing authority for that Cabinet, renders any salary comparison unnecessary. In fact, the Hearing Officer finds this regulation would not be appropriate to consider in such circumstance.
7. The Hearing Officer finds the Appellants suffered no penalization as defined at KRS 18A.005(24). At no time did the Appellants suffer any of those enumerated specific or general actions that would constitute a penalization.
8. The Hearing Officer **OVERRULES** the Appellants' motion to consolidate these appeals with the appeals filed in 2013: Gary Glass (Appeal No. 2013-220), John Riehl (Appeal No. 2013-221), Daniel Greer (Appeal No. 2013-222), Danny Harney (Appeal No. 2013-223), Mark Humston (Appeal No. 2013-227), and Benjamin Tompkins (Appeal No. 2013-229). Further, Appellee has objected to the 2013 appeals being consolidated with the current instant appeals.¹ However, those appeals do need to be addressed and a pre-hearing conference should be held as soon as possible to see what the parties desire as to those appeals.

¹ Pursuant to 101 KAR 1:365, the Hearing Officer cannot order those appeals consolidated, if one party objects.

CONCLUSIONS OF LAW

1. The Hearing Officer concludes as a matter of law that the Finance and Administration Cabinet complied with the law in not performing a salary comparison regarding the appointment of Laura Noe to the position of Network Engineer IT on or about September 1, 2012.

2. The Hearing Officer concludes that the language at 101 KAR 2:034, Section 1, only directs or allows an appointing authority to conduct a "salary comparison" between employees subject to that appointing authority. The Appellants at the time in question were all subject to the appointing authority in the Finance and Administration Cabinet and not the Transportation Cabinet. Even if the Transportation Cabinet appointing authority had wanted to conduct such a comparison, he would lack the legal authority to do so.

3. Having concluded the agencies acted correctly in not performing any salary comparison regarding the salary paid to Ms. Noe as a reappointment to the position of Network Engineer IT, the Hearing Officer concludes that pursuant KRS 18A.095 this matter should be dismissed as the Personnel Board lacks jurisdiction to grant relief to the Appellants.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the consolidated appeals of **GARY GLASS (APPEAL NO. 2012-225); DANNY HARNEY (APPEAL NO. 2012-226); BENJAMIN TOMPKINS (APPEAL NO. 2012-227); DANIEL GREER (APPEAL NO. 2012-330); MARK HUMSTON (APPEAL NO. 2012-231) AND JOHN RIEHL (APPEAL NO. 2012-232) VS. FINANCE AND ADMINISTRATION 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 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.

SO ORDERED at the direction of **Hearing Officer Boyce A. Crocker** this 31st day of January, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Stewart Douglas Hendrix
Hon. S. Ryan Newcomb
Danny Harney