

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2023-063

NEIL GREEN

APPELLANT

VS.

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

JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF CORRECTIONS

APPELLEE

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

The Board, at its regular April 2025 meeting, having considered the record, including the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer dated March 21, 2025, 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 18th day of April, 2025.

KENTUCKY PERSONNEL BOARD



GORDON A. ROWE, JR., SECRETARY

Copies hereof this day emailed and mailed to:

Neil Green
Hon. Peter Dooley
Hon. Rosemary Holbrook (Personnel Cabinet)
Rodney Moore

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2023-063

NEIL GREEN

APPELLANT

v.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND
RECOMMENDED ORDER

JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF CORRECTIONS

APPELLEE

* * * * *

This matter last came on for a pre-hearing conference on August 21, 2024, at 9:30 a.m., ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Gordon A. Rowe, Jr., Executive Director/Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The appellant herein, Neil Green (the “Appellant”), was present by telephone and was not represented by legal counsel. The appellee herein, the Justice and Public Safety Cabinet, Department of Corrections (the “Appellee”), was present by telephone and was represented by the Hon. Peter Dooley.

The purposes of the pre-hearing conference were to discuss the dispositive motions filed by each party regarding the application of 101 KAR 2:034 to the facts of this case and next steps in the appeal.

At issue in this case is the Appellant’s contention that, pursuant to 101 KAR 2:034, he should receive a salary adjustment because a coworker, who the Appellant alleged in his appeal has the same qualifications and experience and works in the same county and has the same job classification, was allowed to resign and be reappointed at a higher (midpoint) salary while the Appellant was not allowed to do so. Prior to the pre-hearing conference, both the Appellee and the Appellant timely filed dispositive motions. During the pre-hearing conference, both parties were allowed to address the arguments raised in their respective dispositive motions regarding the application of 101 KAR 2:034 to the facts of the appeal. It should be noted that the parties previously agreed (at the prior June 2024 pre-hearing conference) there do not seem to be any material issues of fact in dispute and that this appeal could be decided based on dispositive motions focused on the application of 101 KAR 2:034 to the undisputed facts in the appeal.

After reviewing the motions and the applicable regulation, 101 KAR 2:034, the Hearing Officer has determined that 101 KAR 2:034 does not require the Appellee to raise the Appellant’s salary to midpoint. For the reasons set forth and discussed more fully herein, the Hearing Officer

finds that the Appellee's motion to dismiss for failure to state a claim should be granted and this appeal should be dismissed.

PROCEDURAL BACKGROUND

1. This appeal was filed with the Personnel Board on May 9, 2023. On his appeal form (the "Appeal Form") and during the pre-hearing conference, the Appellant alleged that he was penalized because the Appellee denied him a salary increase when his coworker, David Lovitt, was permitted to resign and be reappointed at the midpoint salary. The Appellant has stated that he is entitled to a salary increase commensurate with his coworker's raise to midpoint, pursuant to 101 KAR 2:034. In the narrative portion of his Appeal Form, the Appellant argued that:

"It was brought to my attention that one of my coworkers resigned and was reappointed at the midpoint salary. Upon learning of this I filed a grievance, concerned that 101 KAR 2:034, which lays out an order of operations in this particular circumstance was not being followed. I am an incumbent employee who meets all the criteria stated in section 1.2. My coworker was reinstated in accordance with the standards used for making new appointments, as that is the only allowance in policy for a midpoint salary accompanying a reinstatement. In light of these facts, I am seeking a salary adjustment in accordance with 101 KAR 2:034."

2. At the June 17, 2024 pre-hearing conference, the Hearing Officer ordered a briefing schedule for each party to submit legal briefs on the issue of whether the Appellant was penalized by the denial of the salary increase and, if so, to what relief he may be entitled. Both parties were given until July 25, 2024, to file dispositive motions and, thereafter, were to have fourteen (14) days to respond to the other party's dispositive motion.

3. The Appellant and the Appellee each submitted timely (and simultaneous) dispositive motions on the issue, in accord with the briefing schedule, on July 24, 2024. Neither party elected to submit a response to the other party's dispositive motion. This matter now stands submitted to the Hearing Officer for a ruling on the dispositive motions.

STANDARD OF REVIEW

1. A motion to dismiss should only be granted when it appears the complaining party would not be entitled to relief under any set of facts that could prove his claim. *Pari-Mutuel Clerk's Union, Local 541 v. Kentucky Jockey Club*, 551 S.W.2d 801 (Ky. 1977). In examining whether it is proper to grant such a motion, the facts must be liberally construed in favor of the complaining party and the facts alleged in the complaint document must be accepted as true. *Pike v. George*, 434 S.W.2d 626 (Ky. 1968).

FINDINGS OF FACT

1. The Appellant is a classified (merit) employee with status who is employed by the Appellee as a Boiler Operator Supervisor at the Kentucky State Reformatory.
2. The Appellant's coworker, David Lovitt (hereinafter, "Coworker 1"), who holds the same job title/classification as the Appellant (Boiler Operator Supervisor), was "allowed to resign and be reappointed into the same position" in order to place Coworker 1 in the "higher midpoint salary" in April 2023. [See Appellee's Motion to Dismiss at p. 2; Appellant's Dispositive Motion at p.1].
3. Coworker 1's resign and reappoint personnel action was not a reclassification, as suggested by the Appellee. Reclassification is defined as a change in the classification of an employee when there has been "a material and permanent change in the duties or responsibilities of that employee" and the change "has been assigned in writing by the appointing authority." KRS 18A.055(29). There is no evidence in the record that any of the Coworker 1's duties or responsibilities changed after he resigned and was reappointed.
4. Coworker 1's reappointment most closely resembles a new appointment in terms of analyzing the Appellee's duty to raise pay of an incumbent employee under 101 KAR 2:034.
5. Though they work in the same job classification, the Appellant and the reappointed Coworker 1 have different levels of education and experience:

- a) Coworker 1 has a plumbing license while the Appellant does not; and
- b) Coworker 1 has plumbing certifications and trainings that the Appellant does not have.

[See Appellee's Motion to Dismiss at p. 5 ¹].

CONCLUSIONS OF LAW

1. Even construing the facts in the light most favorable to the Appellant, he cannot establish that the Appellee misapplied the provisions of 101 KAR 2:034 to his detriment or that he was otherwise penalized as that term is defined by KRS 18A.005.
2. Under the version of KRS Chapter 18A in effect at the time the Appellant filed his appeal,² a penalization of a state employee meant "demotion, dismissal, suspension, fines, and other disciplinary actions; involuntary transfers; salary adjustments; any action that increases or diminishes the level, rank, discretion, or responsibility of an employee without proper cause or

¹ The Appellant does not dispute the plumbing licensure of Coworker 1 but characterizes it as "irrelevant to the job class specification." [See Appellant's dispositive motion at ¶ 7.]

² KRS Chapter 18A was amended by the Kentucky Legislature, effective June 29, 2023. Among other changes, the category of "other penalizations" was removed from KRS 18A.095 as a basis for the Personnel Board's jurisdiction. Since the action complained of occurred prior to June 29, 2023, the Appellant was able to appeal the action as a penalization.

authority, including a reclassification or reallocation to a lower grade or rate of pay; and the abridgment or denial of other rights granted to state employees.” KRS 18A. 005(30).

3. Coworker 1’s resign and reappoint was a new appointment for purposes of analyzing whether the Appellee is required to raise the Appellant’s pay to a level equivalent to Coworker 1 under 101 KAR 2:034.

4. Pursuant to 101 KAR 2:034, Section 1(2), when an agency makes a new appointment, the appointing authority is **required** to adjust the salary of an incumbent employee “who is not on initial or promotional probation and is earning less than the new appointee’s salary,” to the level of the new appointment’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.

5. Although the Appellant and Coworker 1 have the same job classification, are in the same department or office and in the same work county, they do not have a similar combination of education and experience. Specifically, Coworker 1 has a plumbing license while the Appellant does not, and Coworker 1 has plumbing certifications and trainings that the Appellant does not have.

6. The Appellant’s argument that plumbing licensure is not required for the job classification of Boiler Operator Supervisor has no bearing on whether the Appellee is required to raise the Appellant’s pay under the provisions of 101 KAR 2:034. The important consideration here is that the employer has determined that Coworker 1’s plumbing license (and other educational accomplishments that are different from the Appellant’s) **relates** to the position of Boiler Operator Supervisor; 101 KAR 2:034, Section 1, does not require that the employer only consider education and experience that are **required** for the position.

7. The Appellant has not been denied any right he is entitled to under KRS Chapter 18A. The Appellant was not penalized by Appellee permitting Coworker 1 to resign and be reappointed at a higher salary.

8. The Appellee’s action of raising the salary of Coworker 1 did not constitute a penalization against Appellant since his salary was not reduced or otherwise affected. *See Vicki Allen v. Justice and Public Safety Cabinet, Department of Corrections*, 2023 WL 4404751 at *3 (KY PB 2023) (holding that Appellant did not suffer a penalization or an adverse employment action when other co-employees, some in lower grade classifications, received raises while she did not); and *see Chris Southworth et al. v. Finance and Administration Cabinet*, 2020 WL 7426176 at *7, 8 (KY

PB 2020)(Board found no penalization when some employees were allowed to resign and reinstate, which triggered salary increases, and other employees were not allowed to do so); and *see Scott Huddleston et al. v. Transportation Cabinet and Personnel Cabinet*, 2018 WL 4037967 at *4, 5 (KY PB 2018)(no penalization where Appellants failed to show any statute or regulation entitled them to a raise, even though other employees received raises though resign and reinstate personnel actions).

9. Pursuant to 101 KAR 2:034, Section 1, the Appellee had discretion to adjust the Appellant's salary but was not required to do so.

10. The Appellee's act of allowing Coworker 1 to resign and reappoint at a higher salary than the Appellant did not amount to the type of wrongful conduct or other penalization the Personnel Board can review under KRS 18A.095 or 101 KAR 2:034. Therefore, the Appellant has failed to state a claim upon which relief can be granted and the Appellee is entitled to judgment as a matter of law pursuant to KRS 12.02, KRS 18A.095, and 101 KAR 2:034. This appeal should be dismissed by the Personnel Board.

RECOMMENDED ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Personnel Board that the appeal of **NEIL GREEN V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2023-063) 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 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).

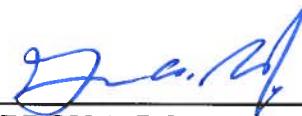
The parties are strongly encouraged to send any exceptions and/or requests for oral argument by email to: PersonnelBoard@ky.gov.

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.

Any document filed with the Personnel Board shall be served on the opposing party.

SO ORDERED at the direction of the Hearing Officer this 21st day of March, 2025.

KENTUCKY PERSONNEL BOARD



GORDON A. ROWE, JR.

EXECUTIVE DIRECTOR

A copy hereof was emailed and mailed to the following persons at their respective addresses as provided to the Personnel Board on this 21st day of March, 2025:

Neil Green, Appellant

Hon. Peter Dooley, Counsel for Appellee

Hon. Rosemary Halbrook (Personnel Cabinet)