

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2021-013

MICHELLE GROSS

APPELLANT

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

**JUSTICE AND PUBLIC SAFETY CABINET,  
DEPARTMENT OF JUVENILE JUSTICE**

and

**PERSONNEL CABINET**

**APPELLEES**

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The Board, at its regular July 2022 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated June 8, 2022, 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 15<sup>th</sup> day of July, 2022.

**KENTUCKY PERSONNEL BOARD**



**MARK A. SIPEK, SECRETARY**

A copy hereof this day sent to:  
Michelle Gross  
Hon. William Codell  
Hon. Catherine Stevens  
Hon. Rosemary Holbrook (Personnel Cabinet)  
Cynthia Watson

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This matter came on for a pre-hearing conference on February 25, 2022, at 11:30 a.m., ET, at 1025 Capital Center Drive, Suite 105, 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 Appellant, Michelle Gross, was present and was not represented by legal counsel. The Appellee Justice and Public Safety Cabinet, Department of Juvenile Justice, was present and represented by the Hon. William Codell. The Appellee Personnel Cabinet was present and represented by the Hon. Catherine Stevens.

The purposes of the pre-hearing conference were to determine the specific penalizations alleged by the Appellant, the specific section of KRS 18A which authorizes this appeal, to determine the relief sought by the Appellant, to define the issues, address any other matters relating to this appeal, to determine whether the appeal was filed within the time limitations set forth in KRS 18A.095, and to discuss the option of mediation.

This matter is now before the Hearing Officer for a ruling on the Appellee Personnel Cabinet's Motion for Summary Judgment.

**FINDINGS OF FACT**

1. The Appellant filed her appeal with the Personnel Board on February 15, 2021, alleging that she has been penalized by unfair salaries. The Appellant stated that she was the most senior Nurse Shift/Program Supervisor (NSPS) and was the fourth highest paid NSPS at the time she filed her appeal. She had over twelve (12) years' experience with Department of Juvenile Justice and sixteen (16) years of service with state government. She requested that her salary be

brought up to the same level as people holding her position with less seniority. Attached to the Appellant's appeal form was a grievance she filed within her Agency.

2. At the pre-hearing conference, the Appellant stated she thought her salary should be at least the same as Perri Mathis, an NSPS at a group home. She thought the difference in pay was just a couple of thousand dollars, but she felt she deserved equal pay.

3. Following the pre-hearing conference, Justice and Public Safety Cabinet, Department of Juvenile Justice (DJJ) filed a motion to dismiss. In its motion, DJJ argued that, although the Appellant makes less than three (3) other DJJ employees in the same job classification as the Appellant, they do not work in the same county. As a result, DJJ argued the Appellant had not alleged an appealable penalization based on 101 KAR 2:034, Section 1.

4. The Personnel Cabinet filed a Motion for Summary Judgment. In the Personnel Cabinet's motion, they argued that the Appellant had not stated an actionable penalization. In addition, they attached a Personnel Action Notification (PAN) showing the Appellant's salary, a job class specification for a Nurse Shift/Program Supervisor, and a PAN notification for Perri Mathis.

5. Although given an opportunity to respond to the Appellees' motions, the Appellant has not filed a response.

6. The Appellant is a merit employee with status who is employed as a Nurse Shift/Program Supervisor with DJJ in Breathitt County. At the time she filed her appeal, the Appellant's salary was \$4,366.16 per month.

7. At the time the Appellant filed her appeal, she had over twelve (12) years' experience with DJJ and nearly sixteen (16) years with state government. The Appellant alleged she was the most senior Nurse Shift/Program Supervisor with DJJ.

8. At the time the Appellant filed her appeal, there were three (3) Nurse Shift/Program Supervisors who earned more money than the Appellant but had less service than she did. There was no dispute that these other three (3) Nurse Shift/Program Supervisors do not work in Breathitt County.

9. There are no material facts in dispute, and this appeal can be decided as a matter of law based on the appeal form, the statements of the parties at the pre-hearing conference, and the Appellees' motions.

### CONCLUSIONS OF LAW

1. Penalization is defined at KRS 18A.005(24) as follows:

“Penalization” means 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 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.

2. 101 KAR 2:034 Section 1(2) provides:

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 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. The Appellant cannot establish that the Agency misapplied the provisions of 101 KAR 2:034, Section 1. To her detriment, the Appellant has failed to articulate a penalization as defined by KRS 18A.005(24). This is because the Appellant's claim does not implicate any right afforded to merit employees by KRS Chapter 18A. The Appellant was not penalized in the Agency having correctly applying the relevant statutes and regulations, even though such application resulted in what appears to be, at least on its face, an unfair result. Therefore, pursuant to KRS 18A.095(18)(a), the Personnel Board lacks jurisdiction to consider this appeal as the Board is unable to grant relief.

4. The Hearing Officer would note that, across the merit system, each job classification, employment position, and individual salary is analyzed to determine whether they are in compliance with the applicable provisions of statute and regulation, including KRS Chapter 18A and the 101 KAR series, even though it sometimes results in salaries that cause confusion and frustration by employees. This approach, which was mandated by the General Assembly, can sometimes produce results that appear unfair when comparing salaries across job classifications, across agencies, across county lines, and across individual employee's competence. Nonetheless, no matter how reasonable or seemingly unfair, such frustration does not give rise to an actionable penalization. For the reason set out above, the Appellant has failed to articulate an actionable penalization.

### **RECOMMENDED ORDER**

The Hearing Officer recommends to the Personnel Board that the appeal of **MICHELLE GROSS V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF JUVENILE JUSTICE, (APPEAL NO. 2021-013)** 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).

**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.

**ISSUED** at the direction of **Hearing Officer Mark A. Sipek** this 8 day of June, 2022.

**KENTUCKY PERSONNEL BOARD**

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

A copy hereof this day e-mailed and mailed to:

Hon. William Codell  
Hon. Catherine Stevens  
Michelle Gross  
Hon. Rosemary Holbrook (Personnel Cabinet)