

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2011-074**

REDA DARLENE HEFLIN

APPELLANT

VS.

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

**JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF JUVENILE JUSTICE,
J. MICHAEL BROWN, APPOINTING AUTHORITY**

APPELLEE

This matter came on for an evidentiary hearing at 9:30 a.m., ET, on December 10, 2012, at 28 Fountain Place, Frankfort, Kentucky, before Boyce A. Crocker, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellant, Reda "Darlene" Heflin, was present at the evidentiary hearing and was represented by the Hon. Jeremy Aldridge. Also present with Mr. Aldridge was the Hon. Kate Barnes. Appellee Justice and Public Safety Cabinet, Department of Juvenile Justice (DJJ), was present and represented by the Hon. Jamhal Woolridge. Appearing with Mr. Woolridge as agency representative was Mr. Kevin Garvin.

The issue for the evidentiary hearing was whether KRS 18A.145 was violated by making a false statement during the appointment process when appointed to the position of Administrative Specialist III with the Appellee Department of Juvenile Justice in 2007, and if Appellant suffered a penalization with regards to her salary upon appointment to that position. The burden of proof had been assigned to the Appellant by Interim Order dated June 24, 2011. Such burden of proof was by a preponderance of the evidence.

Neither party made an opening statement. As the party bearing the burden of proof, the Appellant proceeded first in the presentation of evidence.

BACKGROUND

1. Appellant, Reda "Darlene" Heflin, called herself as the first witness. Upon being properly sworn, Appellant offered the following testimony.

2. Appellant stated that she began as Administrative Specialist III with the Department of Juvenile Justice on March 1, 2007. Appellant previously had worked several years for the Department for Community-Based Services (DCBS), within the Cabinet for Health and Family Services, before transferring via promotion to DJJ. Appellant's starting salary with DJJ was \$29,129.28 per annum.

3. Appellant testified that she now makes approximately \$32,425 per annum, which is a result of periodic increments or increases to salary.

4. Appellant testified that in her position as Administrative Specialist III, she is the Personnel Liaison for her region, which involves essentially doing many human resources functions for the region.

5. Appellant stated when she interviewed with Kevin Garvin, who was the Regional Director in early 2007, she had asked to be placed at the mid-point of the salary range for Administrative Specialist III. Appellant was told by Garvin that it was not offered for the Administrative Specialist III position.

6. Appellant testified that one of the reasons she wanted to transfer from DCBS to DJJ was that DJJ, at the time in early 2007, was still offering tuition assistance for those wishing to further their education, and that such was not the case in DCBS. However, several months after Appellant began her employment with DJJ, the tuition assistance program was apparently ended by DJJ as well.

7. Appellant had interviewed with Garvin for the Administrative Specialist III position and had requested that she be given a salary at the mid-point of the Administrative Specialist III classification. Appellant stated that when told that such was not offered nor was it available to Administrative Specialist III positions, she did not follow up with that nor seek clarification.

8. As relief, Appellant seeks to have the mid-point salary made retroactive to March 1, 2007, and to be made otherwise whole.

9. Appellant next called **Kevin Garvin**. Mr. Garvin is currently the Juvenile Services Regional Manager for the West Region Community Division. During the relevant time in early 2007, Mr. Garvin was actually the Regional Director, and later had taken a voluntary demotion to his current position.

10. Appellant states that the decision on what initial salary to offer largely would rest with the interviewer, in his experience, but that the appointing authority would have the final say. Garvin said he chose not to offer the mid-point salary to Appellant at the time the position was

offered and did not believe her experience level, though considerable, rose to the level where a mid-point salary offer should be made.

11. Garvin stated he did not recall what salary Tonya Houchens (Heflin's predecessor in the Administrative Specialist III position in the region) was offered when she came to DJJ. He also stated he doesn't recall whether he usually requests mid-point for persons he would recommend to be hired.

12. On cross-examination, Garvin stated he previously had been Central Region Division Director and was not aware of salaries in other regions. He typically did not believe he could recommend a mid-point salary for someone who had been a new hire unless they had exceptional qualifications. He stated he did not have personal knowledge of Heflin's qualifications other than she did come recommended from Ms. Houchens.

13. Appellant's next witness was **Tonya Houchens**. Houchens had previously been the Administrative Specialist III working directly for Mr. Garvin, until she left to seek other employment. She is currently the Administrative Specialist II at the Green River Youth Development Center.

14. Houchens stated that when she was hired by Mr. Garvin, she was not given a mid-point salary either and that she also did not request it.

15. Houchens did recall that she spoke with Appellant shortly after Appellant had interviewed for the Administrative Specialist III position, and was informed that she did not receive the mid-point salary.

16. Houchens did recall that superintendents hired under Mr. Garvin typically received mid-point or above the minimum or entry-level salary. She was not aware of any other hire in positions such as Appellant's who received more than the minimum.

17. Upon the conclusion of Houchens' testimony, Appellant rested her case.

18. Appellee made a motion for directed verdict, contending that Appellant had not met her burden of proof, considering the issues which were set for hearing. This motion was overruled.

19. Appellee's first witness was **Stephanie Appel**. Appel is the Personnel Director for the Justice and Public Safety Cabinet and also the Human Resources Director for the Department of Corrections.

20. Through Ms. Appel, Appellee introduced several exhibits, all admitted into evidence with no objection. These included Appellee's Exhibits 2 through 8, which were various P-1s and/or other personnel action forms. In particular, Appellee focused on Ms. Jessica McKinzie (Matthews), who had been hired in as an Administrative Specialist III at a mid-point of that salary range in the Western Services Region of DJJ in July 2007.

21. Counsel for the Appellant pointed out that McKinzie/Matthews had significantly less work experience and significantly less state seniority than Appellant.

22. Upon conclusion of the presentation of evidence, both parties made closing statements.

23. KRS 18A.145(1) states:

18A.145 Other acts prohibited.

(1) No person shall make any false statement, certificate, mark, rating, or report with regard to any test, certification, or appointment made under any provision of KRS 18A.005 to 18A.200 or in any manner commit or attempt to commit any fraud preventing the impartial execution of KRS 18A.005 to 18A.200 and the rules, regulations or orders thereunder.

24. KRS 18A.005(24) states:

"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;

25. 101 KAR 2:034, Section 3(1) states:

101 KAR 2:034. Classified compensation administrative regulations.

RELATES TO: KRS 18A.030(2), 18A.110, 18A.165

STATUTORY AUTHORITY: KRS 18A.110(1)(c), (d), (g), (7)

NECESSITY, FUNCTION, AND CONFORMITY:

KRS 18A.110 requires the Secretary of Personnel to promulgate administrative regulations which govern the pay plan for all employees in the classified service. This administrative regulation establishes requirements to assure uniformity and equity in administration of the pay plan in accordance with statutory requirements.

...
Section 3. Salary Adjustments.

(1) Promotion. An employee who is promoted shall receive the greater of five (5) percent for each grade, or an increase to the minimum of the new grade except as provided under subsection (2)(b) of this section.

FINDINGS OF FACT

1. During the relevant times, Appellant was a classified employee with status.
2. On March 1, 2007, Appellant transferred from the Department for Community-Based Services (DCBS) to DJJ, being promoted from the position of Office Support Assistant I (Pay Grade 8) to the position of Administrative Specialist III (Pay Grade 12). Appellant began her position with DJJ at the entry-level salary for the Administrative Specialist III position.
3. The Hearing Officer finds that Appellant asked to be given the mid-point salary upon hire, but that the interviewer and supervisor, Kevin Garvin, declined to authorize such. The Hearing Officer finds that Garvin told Appellant that the mid-point salary was not being offered for the Administrative Specialist III position.
4. The Hearing Officer finds that Appellant made no further inquiry, believing the matter closed, and ultimately began employment at the entry-level salary for the Administrative Specialist III (Pay Grade 12) position. Appellant's starting salary with DJJ was \$29,129.28 per annum.
5. The Hearing Officer finds that 101 KAR 2:034, Section 3(1) applies to this situation, which regulation spells out the type of salary adjustments for a promotion.
6. The Hearing Officer finds credible Garvin's testimony that he did not have the authority to make any binding salary offer, nor did he inform Appellant that mid-point salary would not be attainable at all. The Hearing officer finds credible Garvin's testimony that he chose not to offer Appellant a mid-point salary for the position, believing her experience did not justify such.
7. The Hearing Officer finds this does not rise to the level of a fraud or a falsification of information relative to the appointment of person to a position. Rather, the Hearing Officer finds that the statement made by Garvin to Appellant is merely part of the bargaining process at which Appellant's initial salary as Administrative Specialist III would be set. Appellant made no further inquiry, and in fact, the Hearing Officer finds it credible that one of Appellant's primary

motivations for coming to work at DJJ was to take advantage of the now-defunct tuition assistance program.

8. The Hearing Officer hereby incorporates and includes herein as a part of this Findings of Fact, Conclusions of Law and Recommended Order the Interim Order entered May 16, 2012, wherein the parties admitted that 101 KAR 2:034, Section 1, the salary comparison regulation, had no application to the facts in this case. [Attachment A – Interim Order dated May 16, 2012.]

9. The Hearing Officer finds that though perhaps the agency allowed Balentine to resign and reappoint to the position of Administrative Specialist III to the mid-point of that salary range, such action was not required for Appellant. The Hearing Officer finds that the decision to allow one employee to resign and reappoint at a higher salary and to not make the offer to allow another to do so, is a discretionary act and was not a fraud.

CONCLUSIONS OF LAW

1. The Hearing Officer concludes as a matter of law that Appellant did not prove a penalization and did not prove any violation of KRS 18A.145.

2. The Hearing Officer concludes as a matter of law that this appeal should be dismissed.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **REDA “DARLENE” HEFLIN V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF JUVENILE JUSTICE, (APPEAL NO. 2011-074)** 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.

ISSUED at the direction of **Hearing Officer Boyce A. Crocker** this 5th day of February, 2013.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Jahmal Woolridge
Hon. Jeremy Aldridge

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2011-074**

REDA DARLENE HEFLIN

APPELLANT

V.

INTERIM ORDER

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

APPELLEE

This matter is before the Hearing Officer on the Appellee's Motion to Dismiss. During the interim, Appellant retained counsel, who filed a timely response. The matter is submitted to the Hearing Officer for a ruling on the Appellee's motion.

Having reviewed the arguments made by counsel with regard to the application of 101 KAR 2:034, Section 1, it is conceded by counsel for the Appellant (and acknowledged by counsel for the Appellee) that Appellant and the other employee in question, Ms. Balentine, had different work counties. Thus, in accordance with precedent cited by Appellant, if all of the provisions of that regulation are not met, the starting salary comparison cannot be made. Thus, this will not be an issue going forward regarding the application of the regulation, as it clearly does not apply.

In addition, at the initial pre-hearing conference, Appellant expressed concern and claimed that she had been told she could not be promoted to the midpoint salary. Appellant found out much later (in March 2011) that Ms. Balentine had, in fact, been allowed to resign and then be reappointed to the position of Administrative Specialist III at the midpoint of that range in July 2007. Counsel for the Appellant contends that behavior arguably violated KRS 18A.145.

KRS 18A.145(1) states, as follows:

No person shall make any false statement, certificate, mark, rating, or report with regard to any test, certification, or appointment made under any provision of KRS 18A.005 to 18A.200 or in any manner commit or attempt to commit any fraud preventing the impartial execution of KRS 18A.005 to 18A.200 and the rules, regulations, or orders thereunder.

Thus, there appears to be a question of fact as to whether that statute was violated as Appellant alleges when she was told it was "unattainable" for her to be hired

at midpoint, essentially that Appellant claiming that she was lied to during salary negotiations.

Counsel for the Appellee had cited the case of Kenny Abrams v. Finance and Administration Cabinet, 2008WL 5601004, for the proposition that there is no right to any particular starting salary for a state employee except as to what is negotiated. However, what was not addressed in the Abrams' case by any party (nor the Hearing Officer) is the allegation raised here by Appellant that violation of KRS 18A.145 occurred, i.e. a false statement was made regarding the appointment of a person to a position in the classified service (i.e. Appellant's promotion to Administrative Specialist III).

A motion to dismiss for failure to state a claim should only be granted if it appears that Appellant would not be entitled to relief under any set of facts that could be proved in support of his claim. *Pari-Mutuel Clerk's Union, Local 541 v. Kentucky Jockey Club*, 551 S.W.2d 801 (Ky. 1977). All allegations on the appeal form are accepted as true for purposes of ruling on the motion. *Pike v. George*, 434 S.W.2d 626 (Ky. 1968). The appeal form, like a complaint in a civil action, should be liberally construed in a light most favorable to Appellant. *Gall v. Scroggy*, 725 S.W.2d 867 (Ky. App. 1987).

When considering a dispositive motion, the Hearing Officer must consider all facts alleged in a light most favorable to the non-moving party—in this case, the Appellant. Having done so, while the Hearing Officer does acknowledge that 101 KAR 2:034, Section 1 has no application to this case and is not at issue herein, there does appear to be a material question as to whether KRS 18A.145 was violated.

The Appellee has not had a chance to respond to these allegations, and it appears to the Hearing Officer the only way for the Appellee to respond would be at an evidentiary hearing. That leaves the question of whether if there was a violation of KRS 18A.145, would such be a penalization within the meaning of the statute? If so, would any relief be entitled to the Appellant?

WHEREFORE, the Hearing Officer, having reviewed the file and being duly advised, hereby **ORDERS**, as follows:

1. Appellee's Motion to Dismiss is **GRANTED** as to the issue regarding 101 KAR 2:034, Section 1, and that will not be an issue for the evidentiary hearing.
2. The rest of Appellee's Motion is **OVERRULED** as to any other claims made by Appellant, specifically as to whether KRS 18A.145 was violated when Appellant was allegedly lied to during the course of salary negotiations. The burden of proof on this issue shall rest with the **Appellant**, and shall be by a preponderance of the evidence.
3. The Hearing Officer is aware this matter is scheduled for an evidentiary hearing to commence on **May 25, 2012**. Should either of the parties require more time

to prepare, they are welcome to submit a Motion for Continuance. Witness and Exhibit lists are due as soon as possible.

SO ORDERED at the direction of the Hearing Officer this 16th day of May, 2012.

KENTUCKY PERSONNEL BOARD



Mark A. Sipek
Executive Director

A copy hereof this day sent via Facsimile
to:

Hon. Jeremy S. Aldridge
Hon. Jamhal Woolridge