

Hon. James Maxson
Thomas Holliday

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2012-252

THOMAS HOLLIDAY

APPELLANT

VS.

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

EDUCATION AND WORKFORCE DEVELOPMENT CABINET
JOE MEYER, APPOINTING AUTHORITY

APPELLEE

** ** *

This matter came on for a pre-hearing conference on March 13, 2012, at approximately 10:00 a.m., ET, at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Boyce A. Crocker, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Thomas Holliday, was present and was not represented by legal counsel. The Appellee, Education and Workforce Development Cabinet, was also present and represented by the Hon. James Maxson, appearing by telephone.

The purposes of the pre-hearing conference were to discuss the status of the appeal and to schedule an evidentiary hearing, if appropriate.

After discussion, a briefing schedule was set for Appellant in which to file a response to the Appellee's motion to dismiss and motion for summary judgment and for the Appellee to file a reply to Appellant's response, should Appellee desire. As the Hearing Officer explained, it is not appropriate to set an evidentiary hearing date while the motion to dismiss and the motion for summary judgment are pending.

Appellee filed a Motion to Dismiss and Motion for Summary Judgment on February 15, 2013. Appellant filed a response to the Motion to Dismiss on March 22, 2013. Appellee filed a reply to Appellant's response; however, it did not contain any substantive information.

This matter stands ready for a ruling on Appellee's Motion to Dismiss and Motion for Summary Judgment.

BACKGROUND

1. During the relevant times, Appellant, Thomas Holliday, was a classified employee with status.

2. Appellant filed his appeal on November 9, 2012. Appellant was appealing what he termed as a "salary disparity" and also reclassification penalization. Appellant stated on his appeal form the following:

I am appealing the decision of the official grievance I filed with my whole chain of command up and including the Commissioner Ms. Brinly, in reference to unfair pay. I was hired as a pay grade 10 and did my probation and received 5% increase. Now all Vet reps are hired as pay grade 12's and do their probation and receive their 5% increase after probation and make more money than I do. I have worked for the state for five years. Everyone in my chain of command thinks this is OK and fair. New hires after 7 months make more money than I do. This is not right in any way you look at it.

3. In its Motion to Dismiss and Motion for Summary Judgment, Appellee noted that Appellant is a Local Veterans' Employment Representative (LVER) which is a working title for Workforce Development Specialist I (WFD I). Appellant was a pay grade 10 and brought in at the minimum for that pay grade on November 1, 2007. Appellant received a 5 percent post-probationary raise, when he achieved status as a classified employee on May 1, 2008, and a 1 percent annual increment on May 1, 2009.

4. Counsel goes on to note that Appellant was reclassified to a WFD II on March 16, 2010, which is a pay grade 12 position. Counsel explained that Appellant was brought up to the minimum rate for pay grade 12. Appellant was then promoted to a WFD Ops Administrator, which is a pay grade 15, on April 16, 2010. Appellant was brought up to the minimum rate for pay grade 15, because even a 15 percent pay raise (a 5 percent for each grade promoted) would not have brought him up to the minimum for that pay grade.

5. During Appellant's promotional probation he was reverted back to a WFD II, pay grade 12 position. Appellant's current pay is \$2,451.72 per month.

6. Appellee frames Appellant's argument as being that LVERS, as new hires, are being brought in as WFD IIs at the minimum for pay grade 12, at less than Appellant is making; however, after six months they receive a post probationary 5 percent raise and end up making more than he does.

7. Appellee further frames Appellant's argument in the request for relief in that the Agency needs to adjust his salary up pursuant to 101 KAR 2:034, Section 1, to the level of the new WFD IIs after they have come off probation.

8. Counsel argues that Appellant misconstrues the effect of 101 KAR 2:034, Section 1, contending that regulation does not entitle Appellant to a salary adjustment.

9. Counsel for Appellee cites *Kathryn Parrish vs. Office of the Attorney General*, Personnel Board Appeal No. 2011-189, 2012 WL 3059632, arguing that the Personnel Board consistently interprets this regulation to mean that the salary can only be adjusted if certain criteria are met and that the salary would only be adjusted to match the new employee's initial salary.

10. Appellant filed a timely response to Appellee's Motion to Dismiss. Appellant recounted the requirements of 101 KAR 2:034, Section 1, noting he is in the same job classification and pay grade as the new hire (Mr. Morris). Appellant states he also has more seniority and more education (Bachelor's degree) than Mr. Morris; however, they both work in the same county. Appellant believes this information should "debunk 101 KAR 2:034, Sections 1(2)." Appellant makes reference in his response to other possibilities for making adjustments to an employee's salary, such as educational awards; or by 101 KAR 2:034, Section 3 through Section 5, the Hearing Officer recommending and the Board ordering an adjustment, and states there are several other ways for an adjustment to be made to an employee's salary.

11. Appellant makes further reference to the state's affirmative action plan and quotes as follows:

Attention to sub paragraph e. (b. Provide for procedures to monitor appointments and salary adjustments to ensure that standards are uniformly applied so as to PREVENT SALARY DISPARITY: Paragraph 5 the secretary of personnel may also: (a) Promulgate administrative regulations in accordance with this chapter and KRS Chapter 13A to implement the affirmative action plan.

12. Appellant then discusses the "pot of monies" that Vet reps are paid out of, arguing that the state would get more money if they paid the Vet reps more. Appellant states that, "The way the system is not right and you are telling merit employees that their seniority and years of experience does not count or mean a thing. This is just not right!"

13. At the end of his response, Appellant also asked to be allowed to respond to any reply made by Appellee.

14. Appellee did file a reply, but included no new arguments or in fact any arguments of substance in the reply; therefore, no further reply or pleading is necessary.

15. 101 KAR 2:034, Section 1, states:

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.

16. 101 KAR 2:034, Section 3(6)(a)(1 and 2), states:
Section 3. Salary Adjustments.

...

(6) Reversion.

(a) The salary of an employee who is reverted while serving a promotional probationary period, or following detail to special duty in a higher class, shall be adjusted to:

1. The salary received prior to the promotion or detail; and

2. All salary advancements and adjustments which would have been awarded if the promotion or detail had not occurred.

FINDINGS OF FACT

1. During the relevant times, Appellant, Thomas Holliday, was a classified employee with status.

2. The Hearing Officer finds that Appellant, when he was reverted from pay grade 15, WFD Ops Administrator position, to pay grade 12, WFD II position, had his salary adjusted in accordance with 101 KAR 2:034, Section 3(6).

3. The Hearing Officer finds that the new hire, identified by Appellant as Mr. Greg Morris (who is in the same work county), and presumably other WFD IIs, were hired initially at a rate of pay of \$2,427.44 - \$24.28 less than the \$2,451.72 per month salary Appellant made after being reverted from the pay grade 15 position.

4. The Hearing Officer finds that the correct interpretation of 101 KAR 2:034, Section 1, evaluating when a salary comparison is needed states, "An appointing authority shall appoint a new employee at a salary not to exceed the midpoint of the pay grade." "The appointing authority shall adjust to that salary an employee who is earning less than the new appointee's salary, . . ." [Emphasis added.]

5. The Hearing Officer finds that the new appointee's salary is what that appointee makes upon entry into state service, not what he will make six months later, should he successfully complete initial probation. The Hearing Officer finds that Appellant, as he was making more than Mr. Morris at the time of his initial appointment, is not entitled to have his salary raised pursuant to 101 KAR 2:034, Section 1, merely because the new hire will be making more than Appellant should he successfully complete initial probation. The Hearing Officer finds that the regulation does not require that result.

6. As to the Appellant's claims that there are other mechanisms by which an agency could adjust his salary, such possible adjustments would appear to be discretionary on the Agency's part.

7. To the extent Appellant cites the Kentucky Affirmative Action Plan, especially the language Appellant quotes in his response, the Hearing Officer finds that the regulations promulgated at 101 KAR 2:034 are in fact those regulations that do attempt to enforce uniformity and prevent salary disparity in state government.

CONCLUSIONS OF LAW

1. The Hearing Officer concludes as a matter of law that Appellant has not suffered a penalization when a new employee is hired in the same classification as he; in the same work county as he; and is making less than Appellant. Even though the new employee will be making more upon completion of initial probation, such does not violate the requirements of 101 KAR 2:034.

2. To the extent a salary comparison is required by 101 KAR 2:034, Section 1, such comparison would be of the initial salary to the salary the existing employee was making at the time of the hire, not when the salary is adjusted later should that employee successfully complete initial probation. The Hearing Officer concludes that the other arguments raised by Appellant do not entitle him to the relief he seeks.

3. The Hearing Officer concludes as a matter of law that the appeal must fail.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **THOMAS HOLLIDAY VS. EDUCATION AND WORKFORCE DEVELOPMENT CABINET (APPEAL NO. 2012-252)** 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 21st day of May, 2013.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. James Maxson
Mr. Thomas Holliday