



**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2017-166**

**ROBERT HORN**

**APPELLANT**

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

**TOURISM, ARTS AND HERITAGE CABINET,  
DEPARTMENT OF FISH AND WILDLIFE RESOURCES**

**APPELLEE**

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This matter came on for a pre-hearing conference on October 30, 2017, at approximately 11:00 a.m. EST, at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Stafford Easterling, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Robert Horn, was present by telephone and was not represented by legal counsel. The Agency/Appellee, Tourism, Arts and Heritage Cabinet, Department of Fish and Wildlife Resources, was present and represented by the Hon. Evan Jones.

This matter is now before Hearing Officer Stafford Easterling for a ruling on the Agency's Motion to Dismiss for lack of jurisdiction filed with the Personnel Board on November 13, 2017. At issue is the Appellant's claim that he had been penalized as a result of a salary adjustment afforded to Conservation Officer II Glen Smith. Specifically, Conservation Officer II Glen Smith filed an appeal challenging a Sergeant's promotional process administered by the Agency in January 2016. Importantly, Officer Smith settled his Personnel Board appeal (Appeal No. 2016-066) and, as part of the settlement agreement, Officer Smith remained a Conservation Officer II but received a significant salary adjustment upward. The Appellant now argues that he has been penalized by Officer Smith's salary adjustment. The Appellant explains his claims in the narrative portion of his appeal form wherein he states, in full:

Grievance over pay/salary adjustment that a Officer got.  
Grievance papers attached.

Following discussion with the parties, the Appellant alleged the Agency discriminated against him in setting his salary, but stated that he was not discriminated against due to membership in any protected class. The Appellant also acknowledged that he applied for promotion to Conservation Officer Sergeant in the same round of promotional opportunities in which Glen Smith was involved. Moreover, the Appellant was awarded a promotion to the Conservation Officer Sergeant position in District 5, effective February 1, 2016. The Agency

argued the statute of limitations as to the promotional opportunities in which Glen Smith was involved has already run and that no applicable statute or regulation applied to the instant appeal.

The Agency then submitted a Motion to Dismiss arguing that the Personnel Board does not have jurisdiction over any of the Appellant's claims because the facts underlying the instant appeal do not constitute a penalization under KRS 18A.005(24). In addition to their timeliness argument, the Agency argues that the interplay between Officer Smith's settlement-adjusted salary and the Appellant is governed by 101 KAR 2:034 and that the Agency has acted in accordance with the applicable regulations. The Appellant responded that the basis of his appeal was not discovered until March 15, 2017, that he filed his Personnel Board appeal on August 9, 2017, and is, thus, timely, pursuant to 18A.095(29). This matter now stands submitted to the Hearing Officer for a ruling on the Agency's Motion to Dismiss and the ultimate question of whether the Personnel Board has jurisdiction over this appeal.

### BACKGROUND

1. During the pendency of this appeal, the Appellant, Robert Horn, was a classified employee with status, serving as a Conservation Officer Sergeant with the Tourism, Arts & Heritage Cabinet, Department for Fish and Wildlife Resources.

2. The Appellant was and is employed by the Department of Fish and Wildlife Resources as a Grade 15 Conservation Officer Sergeant, a position the Appellant has held since February 1, 2016.

3. The Appellant claims, on or about March 15, 2017, that he first became aware of the salary of Glen Smith, a Conservation Officer II, who is undisputedly stationed in another county.

4. Specifically, as to Glen Smith, it is undisputed that Officer Smith filed an unrelated Personnel Board appeal (Personnel Board Appeal No. 2016-066) and Officer Smith's appeal was settled in 2016. As a result of the settlement, Officer Smith received a pay raise to approximately \$46,690.80, as of the submission of the instant appeal.

5. The Appellant now seeks a salary adjustment as a result of the Glen Smith settlement, ostensibly through the application of 101 KAR 2:034. The Appellant argues that he has the same amount of experience as Glen Smith, but, because he is a Conservation Sergeant, has more administrative duties, responsibility, liability and paperwork. The Appellant also supervises and evaluates several officers.

6. As noted above, the Agency filed a Motion to Dismiss with the Personnel Board on November 13, 2017, arguing the Appellant's claims are without merit and should be dismissed. The Agency contended that the Personnel Board lacks jurisdiction over this appeal because the Appellant has not been the subject of a penalization as defined by KRS Chapter 18A or KAR Title 101.

7. KRS 18A.005(24) provides:

‘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.

8. 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 work county; and
- (c) Has a similar combination of education and experience relating to the relevant job class specification.

### **FINDINGS OF FACT**

1. During the pendency of the instant appeal, Appellant, Robert Horn, was a classified employee with status within the Tourism, Arts and Heritage Cabinet, Department of Fish and Wildlife Resources. The Appellant began his employment with the Agency in approximately 2006.

2. It is largely undisputed that in 2016, Officer Glen Smith filed a Personnel Board appeal (2016-066), challenging the Agency’s awarding of Conservation Sergeant positions. Specifically, Glen Smith alleged the Agency failed to give him appropriate supervisory credit for completing an education/leadership class and, if awarded proper supervisory credit, whether he should have been chosen for one of the Sergeant positions.

3. It is also largely undisputed that the Agency and Glen Smith settled that prior Personnel Board appeal, resulting, in part, in Glen Smith receiving a pay raise of over twenty percent (20%).

4. Underlying the instant appeal is the Appellant’s attempt to gain the benefit of Glen Smith’s settlement agreement. Although the Appellant does not identify the statute or

regulation he believes would authorize a salary adjustment, the Hearing Officer finds the Appellant's right to a salary adjustment, if any such right exists, would be established by the provisions of 101 KAR 2:034.

5. Lastly, the Hearing Officer finds the instant appeal was filed on August 9, 2017, more than one year after the Agency concluded the Conservation Sergeant promotional process underlying this and the Glen Smith appeal, on or about January 26, 2016.

### CONCLUSIONS OF LAW

1. The Hearing Officer finds that, because the instant appeal was filed on August 9, 2017, any direct challenge to the KDFWR Conservation Officer Sergeant promotional process that concluded on or about January 26, 2016 is time-barred by the one-year statute of limitations established by KRS 18A.095(29).

2. Yet, to the extent the Appellant claims he only became aware in March 2017 of his alleged penalization through the establishment of Glen Smith's salary, the Hearing Officer finds the Appellant correctly states he would not be aware of any such penalization until Glen Smith's salary was amended in March 2017.

3. Nonetheless, identical to the Conclusions of Law reached previously by the Personnel Board in Kathryn Parrish v. Office of the Attorney General, 2012 WL 3059632, the Hearing Officer finds "that a salary comparison, such as that being sought by Appellant in this appeal, is strictly governed by the administrative regulation found at 101 KAR 2:034, Section 1." Pursuant to that regulation, "in order to qualify for salary comparisons, the employees must fall squarely within the confines of that regulation." Here, pursuant to 101 KAR 2:034, the Appellant would only be entitled to a salary adjustment if: 1) he made a lesser salary than Glen Smith, which he does, 2) he is in the same job classification, which he is not (Conservation Officer Sergeant v. Conservation Officer II), 3) he was in the same work county, which he is not, and 4) he has a similar combination of education and experience relating to the relevant job class specification. Viewing the record in the light most favorable to the Appellant, the Hearing Officer deems the Appellant to have a similar or superior combination of education; nonetheless, there is still no "relevant job class specification" that the Appellant and Glen Smith share. Thus, 101 KAR 2:034, Section 1 does not offer the Appellant justification for any salary adjustment.

### RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **ROBERT HORN V. TOURISM, ARTS AND HERITAGE CABINET, DEPARTMENT OF FISH AND WILDLIFE RESOURCES, (APPEAL NO. 2017-166)** 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 Stafford Easterling** this 31<sup>st</sup> day of January, 2018.

**KENTUCKY PERSONNEL BOARD**

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

A copy hereof this day mailed to:

Hon. Evan Jones  
Robert Horn