COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD

SCOTT HUDDLESTON (APPEAL NO. 2015-194)
GRETCHEN JEWELL (APPEAL NO. 2015-218)
MINNIE WEAVER (APPEAL NO. 2015-220)
WAYNE SIZEMORE (APPEAL NO. 2015-255) **APPELLANTS**

V. **FINAL ORDER SUSTAINING THE HEARING OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER AS ALTERED**

TRANSPORTATION CABINET

AND

PERSONNEL CABINET **APPELLEES**

** ** ** ** **

The Board, at its regular July 2018 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated April 27, 2018, Appellants' Exceptions and Request for Oral Argument, the Appellee Personnel Cabinet's Response to Exceptions and Request for Oral Argument, the Appellee Transportation Cabinet's Response to Exceptions, Oral Arguments, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be altered as follows:

A. **Delete Conclusions of Law** paragraph 6 and 10 and substitute the following:

6. The Engquist Court then specifically applied the statement set out above to public employees and determined that principle of individual assessment "applies most clearly in the employment context, for employment decisions are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify. Id. at 604. Further, "to treat employees differently is not to classify them in a way that raises equal protection concerns. Rather, it is simply to exercise the broad discretion that typically characterizes the employer-employee relationship." Id. at 605. Thus, the Equal Protection Clauses of neither the United States nor the Kentucky Constitutions are implicated where "government employers are alleged to have made an individualized, subjective personnel decision in a seemingly arbitrary or irrational manner." Id.

10. Lastly, the Hearing Officer would note that the Appellants challenge the legality/propriety of the resign/reappoint personnel actions that occurred after the Appellees put a hold on the resign/reinstate actions. As the challenge is advanced to argue that the Appellees acted in an arbitrary manner and as case law provides that the Constitution is not implicated when "government employers are alleged to have made an individualized, subjective personnel decision in a seemingly arbitrary or irrational manner," the Hearing Officer declines to substantively address the propriety of the resign/reappoint personnel actions.

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer, as altered, are approved, adopted and incorporated herein by reference as a part of this Order, and the Appellants' appeals are 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 July, 2018.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK
SECRETARY

A copy hereof this day mailed to:

Hon. Paul Fauri
Hon. Edwin Logan
Hon. Rosemary Holbrook
J.R. Dobner

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER

TRANSPORTATION CABINET

AND

PERSONNEL CABINET **APPELLEES**

** ** ** ** **

These matters are before Hearing Officer Stafford Easterling for a ruling on Appellees' Joint Renewed Motion to Dismiss. Appellants, by counsel, filed a timely response.

The Appellees filed their Joint Renewed Motion to Dismiss arguing that there was nothing in KRS Chapter 18A that would give the Personnel Board jurisdiction to consider this appeal as it relates to employees receiving pay raises or salary adjustments. The Appellees further argue that a United States Supreme Court case, Engquist v. Oregon Dept. of Agr., 553 U.S. 591 (2008) dictates a finding that the Appellants' claims are legally deficient and must be dismissed as a matter of law.

The Hearing Officer notes that in ruling on the Motions to Dismiss submitted previously, Hearing Officer Boyce A. Crocker found:

> [T]he Hearing Officer will note that the denial of these Motions to Dismiss, which are well-stated, is done with an abundance of caution. It would appear to the Hearing Officer, much like in the Abner, et. al. (Personnel Board appeal no. 2015-204) cases that the Appellants should have the chance to make a record as to their claims.

Accordingly, given Hearing Officer Crocker's prior ruling in this matter, the question currently before this Hearing Officer is does the United States Supreme Court's finding in Engquist render the Appellants' claims legally deficient and mandate dismissal of these appeals.

BACKGROUND

Largely accepting the facts as set out by the parties, the Hearing Officer will analyze these appeals using the relevant factual background as set out below:

1. At the time of the submission of their appeals, the Appellants were all classified employees with status, serving with the Transportation Cabinet.

2. In May of 2015, the Appellants received notifications that the Transportation Cabinet's Appointing Authority approved recommendations to allow them, along with several other similarly situated employees, to resign/reinstate, effective on either May 15, 2015 or June 1, 2015.

3. Through the resign/reinstate personnel action, on paper, the Appellants would leave their then-current positions with the Transportation Cabinet and be reinstated to the same position on the next business day at a higher salary. As a practical matter, the resign/reinstate personnel action is effectively a method to afford state employees a pay raise absent a promotion or another employee being hired into the same position in the same county, thereby triggering the provisions of 101 KAR 2:034.

4. The Appellees began to process the resign/reinstate personnel actions and several Transportation Cabinet employees' actions were, in fact, processed.

5. Before the resign/reinstate actions of the Appellants were processed, however, the Appellees put a hold on all remaining resign/reinstate actions. While there is a question of fact as to which of the Appellees requested the hold, for the purposes of this analysis, such hold will be deemed equally attributable to both Appellees.

6. Importantly, the record as currently developed does not contain any explanation as to the order in which the resign/reinstate actions were processed. It is unclear whether the actions were processed "first come, first served," alphabetically, north-to-south, using employee seniority, etc.

7. Equally importantly, however, there is no allegation that the resign/reinstate actions were processed in a discriminatory manner, i.e. youngest-to-oldest, Americans first, men-first, whites-first, etc.

8. The Appellants filed the instant action arguing that they had been penalized as a result of them not receiving the resign/reinstate salary adjustments that they were promised.

9. 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.

10. KRS 18A.005(4) provides:

'Reinstatement' means the privilege of restoration of an employee who has resigned in good standing at the option of the appointing authority, or who has been ordered reinstated by the board or a court to a position in his former class, or to a position of like status and pay.

11. 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.

12. Section 2 of the Kentucky Constitution provides:

Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.

FINDINGS OF FACT

1. It is undisputed that, in 2015, the Transportation Cabinet appointing authority promised the Appellants a resign/reinstate personnel action that would increase their salaries.

2. It is also undisputed that the Appellants did not receive such a personnel action.

3. Underlying the instant appeal is the Appellants' attempt to gain the benefit of the salary adjustment, which would have accompanied the resign/reinstate personnel action. The Hearing Officer finds the Appellants' right to a salary adjustment, if any such right exists, would be established by the provisions of 101 KAR 2:034.

4. The Appellants, however, do not claim entitlement to a salary adjustment under the provisions of 101 KAR 2:034. Instead, the Appellants claim that they were subjected to unconstitutionally arbitrary action in that similarly situated Transportation Cabinet employees received a resign/reinstate personnel action while they did not. The Appellants' sole remaining claim asserts that such arbitrary action violates Section 2 of the Kentucky Constitution and that the Personnel Board has jurisdiction over such an action.

CONCLUSIONS OF LAW

1. The Hearing Officer finds that the cases of Engquist v. Oregon Dept. of Agr., 553 U.S. 591 (2008) and Giberson v. City of Ludlow, 2015 WL 1880755[1] (Ky. Ct. App. 2015) do, in fact, mandate the dismissal of the Appellants' appeals.

2. In Engquist, as here, the Plaintiff alleged that she was penalized not because she was a member of a protected class (i.e., age, race, gender, religion, etc.) but, instead, that she was penalized for seeming arbitrary, vindictive, and/or malicious reasons. Such a claim sounds in the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and is known as a "class-of-one" claim.

3. It is well-settled law that Section 2 of the Kentucky Constitution is "broad enough to embrace both due process and equal protection of the laws, both fundamental fairness and impartiality." Pritchett v. Marshall, 375 S.W.2d 253, 258 (1963). Thus, the Appellants' arbitrariness claims against the Appellees sound in the Equal Protection Clause established by the Kentucky Constitution, making Engquist relevant to Kentucky state law claims.

4. Engquist begins by acknowledging that "it is well settled that the Equal Protection Clause 'protect[s] persons, not groups' and that the Clause's protections apply to administrative as well as legislative acts." 553 U.S. at 597 (internal citations omitted). Engquist then goes on to note "it is equally well settled that States do not escape the strictures of the Equal Protection Clause in their role as employers." Id. Nonetheless, the Court determined that the Equal Protection Clause operates differently when considering the government operating as a lawmaker and the government operating as an employer. Stated simply, "given the 'common-sense realization that government offices could not function if every employment decision became a constitutional matter," "constitutional review of government employment decisions must rest on different principles than review of ... restraints imposed by the government as sovereign," Id. at 599. Even simpler, "absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." Connick v. Myers, 461 U.S. 138, 147 (1983).

5. Engquist continues:

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[1] Kentucky Rules of Civil Procedure (CR) 76.28(4)(c) permits unpublished Kentucky appellate decisions rendered after January 1, 2003, to be cited for consideration if there is no published opinion adequately addressing the issue.

> There are some forms of state action, however, which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments. In such cases the rule that people should be "treated alike, under like circumstances and conditions" is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted. In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.

553 U.S. at 603.

6. The Engquist Court then specifically applies the statement set out above to the public employees and determined that principle of individual assessment "applies most clearly in the employment context, for employment decisions are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify. Id. at 604. Further, "to treat employees differently is not to classify them in a way that raises equal protection concerns. Rather, it is simply to exercise the broad discretion that typically characterizes the employer-employee relationship." Id. at 605. Thus, the Equal Protection Clauses of neither the United States nor the Kentucky Constitutions are implicated where "government employers are alleged to have made an individualized, subjective personnel decision in a seemingly arbitrary or irrational manner." Id.

7. In a nutshell, the Supreme Court declined to apply class-of-one principles to public sector employment because, if it applied, "an allegation of arbitrary differential treatment could be made in nearly every instance of an assertedly wrongful employment action—not only hiring and firing decisions, but any personnel action, such as promotion, salary, or work assignments—on the theory that other employees were not treated wrongfully." 553 U.S. at 608 (internal citation omitted).

8. Here, the Appellants' claim that they were penalized because other employees were not treated wrongfully seems to be the exact situation the Engquist Court was trying to avoid. The Appellants do not claim that they were entitled to a resign/reinstate personnel action pursuant to KRS Chapter 18A. The Appellants do not claim that they were subject to unlawful discrimination in violation of KRS Chapters 18A and 344. Instead, the Appellants claim they were arbitrarily harmed because other Transportation Cabinet employees received an unmandated resign/reinstate and they did not. The Hearing Officer finds that, at the Personnel Board, such a claim is not recognizable under KRS Chapter 18A or Section 2 of the Kentucky Constitution.

9. Accordingly, the Hearing Officer finds that the Appellants have failed to articulate a penalization as defined by KRS 18A.005(24). This is because none of the Appellant's claims implicate any right afforded to merit employees by KRS Chapter 18A or any applicable regulation. While it seems improper that only certain Transportation Cabinet

employees get a salary adjustment that was promised to a much larger group, the Appellants were not penalized when the Agency put a hold on resign/reinstate personnel actions, even though not processing all of those actions resulted in what appears to be, at least on its face, an unfair result. Therefore, the Hearing Officer finds, pursuant to KRS 18A.095(18)(a), the Personnel Board lacks jurisdiction to consider this appeal as the Board is unable to grant relief.

10. Lastly, the Hearing Officer would note that the Appellants challenge the legality/propriety of the resign/reappoint personnel actions that occurred after the Appellees put a hold on the resign/reinstate actions. As the challenge is advanced to argue that the Appellees acted in an arbitrary manner and as case law provides that the Constitution is not implicated when "government employers are alleged to have made an individualized, subjective personnel decision in a seemingly arbitrary or irrational manner," the Hearing Officer declines to substantively address the propriety of the resign/appoint personnel action.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeals of **SCOTT HUDDLESTON (APPEAL NO. 2015-194), GRETCHEN JEWELL (APPEAL NO. 2015-218), MINNIE WEAVER (APPEAL NO. 2015-220), and WAYNE SIZEMORE (APPEAL NO. 2015-255) V. TRANSPORTATION CABINET and PERSONNEL CABINET 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 Stafford Easterling** this 27th day of April, 2018.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Paul Fauri
Hon. Edwin Logan
Hon. Rosemary Holbrook
J.R. Dobner