

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2016-291

DAVID JACKSON

APPELLANT

V.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER

ENERGY AND ENVIRONMENT CABINET

APPELLEE

AND

PERSONNEL CABINET

INTERVENOR

** ** *

This matter last came on for a pre-hearing conference on April 26, 2017, at 10:00 a.m. EST, at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, David Jackson, was present and was not represented by legal counsel. The Agency/Appellee, Energy and Environment Cabinet, was present and represented by the Hon. Leesa Moorman. The Intervenor, Personnel Cabinet, was present and represented by the Hon. Rosemary Holbrook.

This matter is now before Hearing Officer Stafford Easterling for a ruling on the Agency' and Intervenor's Joint Motion for Summary Judgment and Joint Motion to Dismiss for lack of jurisdiction, filed with the Personnel Board on June 26, 2017. At issue are the Appellant's claims that he has been penalized as a result of the Agency changing the grade classification of certain job classifications in the Environmental series of jobs. The Appellant also advances a claim of discrimination, presumably racial and age discrimination. The Appellant explains his claims in an attachment to the narrative portion of his appeal form wherein he states, in pertinent part:

Based upon the fact that the [Geologist Supervisor Registered] and the [Geologist Manager Registered] classifications perform virtually all the same duties of the [Environmental Control Supervisor] and the [Environmental Control Manager]. Plus, per the requirements of KRS 322A, they must maintain annual certification and licensure, and must mentor, supervise and signoff on work conducted by unlicensed geologists, Geologists-In-Training, and other employees who are not geologists, and whom may not work directly under them, but who inherently practice geology as part of their duties. Therefore, I am aggrieved by the

cabinet's action....this unfair process that has penalized supervisors and managers who are classified as Geologist Supervisor Registered and Geologist Manager Registered, by not being promoted or compensated monetarily either personally or collectively for performing like duties as our counterparts in the Environmental Control series has been, which has resulted in a promotion and a 5% increase in salary for them, and nothing for us.

Furthermore, as a Geologist Supervisor Registered and having worked in this position for the past 8 years supervising geologists in my section and the branch, it is my opinion, based upon the laws and regulations of the Commonwealth, that promoting one class of supervisors who on average have less supervisory experience than me, less duties to perform; and more often than not, have just been promoted into their current positions, amounts to an unfair practice and penalizes me by not offering me the same benefits for performing comparable managerial duties. From the very obvious fact that per the position descriptions, I as a Geologist Supervisor Registered possess [sic] the qualifications to legally perform the duties of an ECS and a ECM, but they, per KRS 322A, are not qualified to perform mine, points out the very real shortcomings and the unfair outcome of this personnel action that penalizes me both personally and professionally.

Following discussion with the parties, the Appellant clarified that his claim was that 1) Geologists, including Geologist Registered (GR), Geologist Supervisor Registered (GSR), and Geologist Manager Registered (GMR), have a higher set of minimum qualifications as required by the Intervenor Personnel Cabinet; and 2) the Agency afforded a pay grade increase – and therefore a salary increase - to certain members of the less-qualified Environmental series, specifically Environmental Control Supervisors (pay grade 15 to 16) and Environmental Control Managers (pay grade 16 to 17). Essentially, the Appellant argues that he and the other Geologist supervisors are entitled to a pay increase because of the additional qualifications required to be a Geologist. As relief, the Appellant requests to have his classification increased by a minimum of one (1) grade and to receive a pay increase.

After hearing the clarification of the Appellant's claims, the Agency and Intervenor requested the opportunity to submit dispositive motions. The Agency and Intervenor then submitted a Joint Motion to Dismiss and a Joint Motion for Summary Judgment on June 26, 2017, arguing, amongst other grounds, that the Appellant has failed to articulate a penalization as defined by KRS 18A. The Appellant filed a response to the Joint Motion to Dismiss and to the Joint Motion for Summary Judgment, arguing that his appeal should not be dismissed and pointing out that he is a member of two protected classes. The Agency and Intervenor then filed a Joint Reply to Appellants Robertson' and Jackson's Response to Motion for Summary Judgment and Motion to Dismiss, arguing that the discrimination claims do not set out a *prima facie* case of discrimination, do not relate to a protected class and that the Appellant's claims can

essentially be reduced to “it’s not fair.” The Agency and Intervenor then go on to argue that the Personnel Board does not have jurisdiction over every matter an employee may deem “unfair,” and that this appeal should be dismissed for lack of jurisdiction.

This matter now stands submitted to the Hearing Officer for a ruling on the Joint Motion to Dismiss, the Joint Motion for Summary Judgment, and the ultimate question of whether the Personnel Board has jurisdiction over this appeal.

BACKGROUND

1. During the pendency of this appeal, the Appellant, David Jackson, was a classified employee with status with the Energy and Environment Cabinet, serving as a Geologist Supervisor - Registered.

2. The Appellant claims that, on or about September 15, 2016, he became aware of the salary of a change in grade level for two job classifications – changing the position of Environmental Control Supervisor (ECS) from grade 15 to grade 16 and changing the position of Environmental Control Manager (ECM) from grade 16 to grade 17.

3. The Appellant asserts that:

I am aggrieved by the cabinet’s action....this unfair process that has penalized supervisors and managers who are classified as Geologist Supervisor Registered and Geologist Manager Registered, by not being promoted or compensated monetarily either personally or collectively for performing like duties as our counterparts in the Environmental Control series

4. Given the additional qualifications required to meet the minimum qualifications established for the Geologist series, the Appellant now alleges a penalization in the Agency’s elevation of the ECS and ECM job classifications. As relief, the Appellant seeks the Agency elevate the Geologist series (GR, GSR, GMR) a minimum of one grade each to reflect their additional qualifications, and for the employees currently in the Geologist series to receive a pay raise accordingly.

5. As noted above, the Agency filed a Joint Motion to Dismiss and Joint Motion for Summary Judgment with the Personnel Board on June 26, 2017, arguing the Appellant’s claims should be dismissed because the Appellant cannot identify a statute or regulation that was violated by the Agency and/or the Intervenor and because the Appellant cannot identify a statute or regulation that entitles them to the pay adjustment that the Appellant seeks. They also assert the Appellant has failed to advance an actionable discrimination claim and that the Appellant’s claim is moot as the Appellant’s current salary (\$5,800.62) is higher than the entry level salary for the next highest pay grade (\$3,908.94). Therefore, the Agency and Intervenor contend that the Personnel Board lacks jurisdiction over this appeal.

6. 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.

7. KRS 344.040(1) provides:

(1) It is an unlawful practice for an employer:

(a) To fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's race, color, religion, national origin, sex, age forty (40) and over, because the person is a qualified individual with a disability, or because the individual is a smoker or nonsmoker, as long as the person complies with any workplace policy concerning smoking;

(b) To limit, segregate, or classify employees in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect status as an employee, because of the individual's race, color, religion, national origin, sex, or age forty (40) and over, because the person is a qualified individual with a disability, or because the individual is a smoker or nonsmoker, as long as the person complies with any workplace policy concerning smoking;

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, the Appellant, David Jackson, was a classified employee with status within the Energy and Environment Cabinet. The Appellant is a pay grade 16 Geologist Supervisor - Registered with a monthly salary of approximately \$5,800.62.

2. It is undisputed that on or about September 16, 2016, the Agency granted a grade level increase for two job classifications – increasing the position of Environmental Control Supervisor (ECS) from grade 15 to grade 16 and increasing the position of Environmental Control Manager (ECM) from grade 16 to grade 17.

3. It is also undisputed that the Agency implemented this job classification change with the approval of the Intervenor, the Personnel Cabinet.

4. The Appellant is a 61-year old African-American male.

5. The Appellant argues that he was otherwise penalized because, essentially, by raising the pay grade of positions with less stringent qualifications and similar professional duties, the status and value of the professional geologist positions in state service have been diminished. He argues that the positions in the geologist series should be increased a minimum of one level and that he and other Geologists supervisors should be entitled to a pay increase.

6. The Appellant has failed to advance any evidence, direct or circumstantial, that the grade increase afforded to Environmental Control Supervisors or Environmental Control Managers was in any way related to his status as a 61-year old African-American male.

7. Lastly, although the Appellant requests a grade level increase and does not directly address salary adjustment, underlying this appeal is a clear request for a salary increase. Therefore, out of an abundance of caution, the Hearing Officer will address any potential claims of entitlement to a salary adjustment. To the extent that this appeal is the Appellant's attempt to gain the benefit of the salary increase afforded to the Environmental series, 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.

CONCLUSIONS OF LAW

1. First, to the extent the Appellant seeks a direct salary adjustment, 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 the Environmental Control Supervisor and the Environmental Control Manager, evidence of which is not in the record; 2) he is in the same job classification, which he is not, Geologist series instead of Environmental series; 3) he was in the same work county, evidence of which is not in the record; 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 and experience; nonetheless, there is still no "relevant job class specification" that the Appellant and the Environmental Control Supervisor or Manager share. Thus, 101 KAR 2:034, Section 1, does not offer the Appellant justification for any salary adjustment.

2. Further, pursuant to the holding in Cabinet for Human Resources v. Kentucky State Personnel Board and Bargo, et. al., 846 S.W.2d 711 (1992), salary adjustments in a tangential class are not penalizations unless pay discrepancies within the same job classification result in employees with less education and experience receiving higher pay than those with higher qualifications. Because the Geologist series and Environmental series are different job series, the Hearing Officer finds Bargo does not provide justification for the salary adjustment the Appellant requests.

3. To the extent argued, the Hearing Officer finds that the Appellant was not demoted as defined by KRS 18A.005(11). The Appellant has not alleged that he was subjected to a decrease in pay, that the job classification of his position was decreased, that he was moved to another job classification, or that he had less discretion or responsibility in his Geologist Supervisor - Registered position. Thus, as a matter of law, the Appellant was not demoted.

4. The Hearing Officer finds the Appellant has failed to assert an actionable claim of age or race discrimination. While the Appellant checked the discrimination box on the appeal form and identified himself as a 61-year old African American male in response to the Joint Motion for Summary Judgment, the Appellant has not claimed that the grade increase afforded to the ECS or ECM positions was in any way related to his status as a 61-year old African-American male. The Appellant has clearly advanced claims of penalization due to his status as a Geologist; however, the Appellant has not identified any way he was treated differently than any other Geologist due to his race or age. Thus, the Appellant has not identified any direct or circumstantial evidence of race or age discrimination in any action taken by the Agency or the Intervenor. Accordingly, the Hearing Officer finds the Appellant has not stated a claim of discrimination pursuant to KRS Chapter 344 or the federal anti-discrimination laws. The Appellant's discrimination claims must be dismissed as a matter of law.

5. Finally, 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, such frustration does not give rise to an actionable penalization. For the reasons 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 **DAVID JACKSON V. ENERGY AND ENVIRONMENT CABINET AND PERSONNEL CABINET (APPEAL NO. 2016-291)** 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 11th day of April, 2018.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Erritt Griggs
Hon. Rosemary Holbrook
David Jackson