

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-156

WILLIAM JOHNSON

APPELLANT

VS. **FINAL ORDER
SUSTAINING HEARING OFFICER'S
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER**

TRANSPORTATION CABINET

AND

PERSONNEL CABINET

APPELLEES

*** **

The Board, at its regular September 2017 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated July 24, 2017, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer are approved, adopted and incorporated herein by reference as a part of this Order, and the Appellant's appeal is 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 11th day of September, 2017.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:
Hon. Edwin A. Logan
Hon. Rosemary Holbrook
Mr. William Johnson
Mr. J. R. Dobner

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
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**V. FINDINGS OF FACT, CONCLUSIONS OF LAW AND
RECOMMENDED ORDER**

**TRANSPORTATION CABINET and
PERSONNEL CABINET**

APPELLEES

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This matter came on for a pre-hearing conference on March 3, 2017, at 10:30 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, William Johnson II, was present by telephone and not represented by counsel. The Agency/Appellee Transportation Cabinet was present and represented by the Hon. Edwin Logan. The Appellee Personnel Cabinet was present and represented by the Hon. Rosemary Holbrook.

This matter is before Hearing Officer Stafford Easterling for a ruling on the Transportation and Personnel Cabinets' separately filed Motions to Dismiss and the Personnel Cabinet's Motion for Summary Judgment all filed with the Personnel Board on April 5, 2017. At issue is the Appellant's claims of penalization on the issues of "wages; wage equality; denied issued cell phone, air card, ipad & other equipment" in addition to his claims of disability, political, and age discrimination. The Appellant also alleges he was also seeking ACE awards he believed he should have been awarded as far back as 2007 or 2008.

The Transportation and Personnel Cabinet's Motions to Dismiss and the Personnel Cabinet's Motion for Summary Judgment argue that the Appellant failed to appeal this matter in a timely fashion and that the Personnel Board does not have jurisdiction over this appeal. This matter now stands submitted to the Hearing Officer for a ruling on the Transportation and Personnel Cabinet's Motion to Dismiss.

BACKGROUND

1. At the time of his submission of this appeal, Appellant, William Johnson, was a classified employee with status within the Transportation Cabinet.

2. The Appellant was employed as a Transportation Engineering Technologist (TET) III with the Transportation Cabinet until his retirement on January 1, 2016.

3. At the time of his retirement, the Appellant earned a monthly salary of \$4,583.82, which is an amount above the mid-point for a TET III, pay grade 15.

4. The Appellant claims a penalization in that other Transportation Cabinet employees with lesser experience and lesser qualifications received salary increases to a rate above the Appellant's monthly salary.

5. The Appellant claims a penalization in being denied the use and/or purchase of certain work-related equipment like a new vehicle, a cell phone, and an iPad.

6. The Appellant also claims a penalization in that he was not awarded an ACE award in 2007 and/or 2008.

7. The Transportation Cabinet asserts that the Appellant has failed to provide any evidence of discrimination based on disability, age, or political intervention.

8. The Transportation Cabinet asserts that the claims regarding the Appellant's failure to receive ACE awards do not rise to the level of a penalization, as the granting of ACE awards is purely discretionary. Moreover, the Agency argues that, even if such a claim were actionable, the instant appeal challenging the distribution of ACE awards in 2007 and/or 2008 is untimely.

9. The Transportation Cabinet also argues that because the Appellant's salary is above midpoint for a TET III that he is unable to state a claim upon which relief can be granted on that issue. Additionally, the Transportation Cabinet argues that the Appellant lacks standing to advance an appeal regarding salary increases in job classifications for which he does not qualify (i.e., Transportation Cabinet Engineers).

10. Finally, the Transportation Cabinet argues that the Appellant's January 1, 2016 resignation from state service operates as a waiver to his claims regarding job classifications and/or salary increases.

11. The Transportation Cabinet is joined in its defense against the instant appeal by the Personnel Cabinet, who argues in its Motion to Dismiss that: 1) the Appellant's claims regarding a salary increase, an ACE award, and use of certain work-related equipment are now moot since the Appellant resigned on January 1, 2016; 2) the Personnel Board cannot afford the Appellant any relief as to his requested salary increase, as a matter of law; and 3) the Appellant has not been penalized in setting his salary because the Appellant cannot identify a statute or regulation that would afford the Appellant a legitimate claim to a higher salary.

12. The Personnel Cabinet also argues, in a separately filed Motion for Summary Judgment, that the Appellees are entitled to judgment as a matter of law on the Appellant's claims relating to disability, age, or political discrimination. The Personnel Cabinet asserts there no genuine issue of material fact exists regarding those claims as the Appellant has failed to provide any information to indicate that he is a member of a protected class as established by

KRS 18A.140. Further, the Personnel Cabinet claims that, even assuming the Appellant is a member of a protected class, the Appellant fails to establish a *prima facie* case of discrimination because he has failed to identify any other person similarly situated to him in all respects that was granted a salary increase. The Personnel Cabinet also claims KRS 344.100 would operate to bar the instant appeal.

13. KRS 18A.095(29) provides:

Notwithstanding any other prescribed limitation of action, an employee that has been penalized, but has not received a written notice of his or her right to appeal as provided in this section, shall file his or her appeal with the Personnel Board within one (1) year from the date of the penalization or from the date that the employee reasonably should have known of the penalization.

14. KRS 18A.140(1) provides:

No person shall be appointed or promoted to, or demoted or dismissed from, any position in the classified service, or in any way favored or discriminated against with respect to employment in the classified services because of his political or religious opinions, affiliations, ethnic origin, sex, race or disability. No person over the age of forty (40) shall be discriminated against because of age.

15. 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.

16. 101 KAR 2:034, Section 11, provides:

(1) On the 16th day of a month, an appointing authority may grant a salary adjustment of up to ten (10) percent of the grade midpoint to a full-time employee's base pay as an adjustment for continuing excellence award (ACE) under the following conditions:

(a) The employee has an established annual increment date;

(b) The employee has worked at least twenty-four (24) consecutive months, twelve (12) consecutive months of which shall have been served in the department granting the award;

(c) The employee has not received an ACE award or a distinguished service award in the preceding twenty-four (24) months or an employee recognition award (ERA) in the preceding twelve (12) months; and

(d)1. The employee has demonstrated a sustained level of exceptional job performance;

2. The employee has assumed a significant level of additional job responsibilities or duties consistent with the assigned job classification, and has performed them in an exceptional manner; or

3. The employee has acquired professional or technical skills or knowledge through department directed or authorized attainment of a job related licensure, certification, or formal training that will substantially improve job performance.

(2) An employee shall not be eligible for an ACE award under this section if an educational achievement award has been granted for the same training.

(3) The granting of an ACE award shall be within the sole discretion of the appointing authority.

(4) More than twenty-five (25) percent of the total number of full-time employees in a department, in a calendar year, shall not receive an ACE award.

(5) An appointing authority shall submit a letter or memorandum to the cabinet to grant an ACE award. The letter or memorandum shall:

(a) Explain the reason or reasons for the granting of the award; and

(b) Include a certification by the appointing authority that:

1. The criteria and limitations established in this section have been met; and

2. Funds are available within the department's current recurring base budget to support the award.

17. KRS 344.100 provides:

Notwithstanding any other provision of this chapter, it is not an unlawful practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, if the differences are not the result of an intention to discriminate because of race, color, religion, national origin, sex, or age forty (40) and over, or because the person is a qualified individual with a disability, nor is it an unlawful practice for an employer to give and to act upon the results of any professionally developed ability test provided that the test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, national origin, sex, or age forty (40) and over, or because the person is a qualified individual with a disability.

18. KRS 18A.355(1) provides:

An annual increment of not less than five percent (5%) of the base salary or wages of each state employee shall be granted to each employee on his anniversary date. The employee's base salary or wages shall be increased by the amount of the annual increment. When any increment due to a promotion, reallocation, reclassification or salary adjustment is granted an employee, the employee's base salary or wages shall be increased by the amount of such increment. An employee's base salary or wages shall not be increased by the amount of lump-sum payment awarded under KRS 18A.110(7)(j).

FINDINGS OF FACT

1. When the instant appeal was initially filed, Appellant, William Johnson, was a classified employee with status within the Transportation Cabinet.

2. While this appeal was still pending, Appellant retired from state service on January 1, 2016.

3. The Appellant advances claims of political, disability and age discrimination in not receiving a salary increase and in not receiving an ACE award in 2007 or 2008.

4. Although the Appellant claims he was penalized by not receiving a salary increase and/or and ACE award as a result of discrimination, the Hearing Officer finds the Appellant has not articulated any facts that would establish an actionable claim of political or disability

discrimination as defined by KRS 18A.140. The Appellant's claims of discrimination primarily appear to be claims of geographic discrimination; that is, his claims appear to be that he was discriminated against because allegedly similarly situated employees in other counties received a salary increase when he did not. KRS 18A.140 does not bar treating employees in different counties differently.

5. The Appellant has also failed to articulate facts that would establish an actionable claim of age discrimination. However, out of an abundance of caution, given the Appellant's retirement after many years of state service, the Hearing Officer takes judicial notice of the fact that the Appellant appears to be a person over the age of forty, which would make him a member of a protected class.

6. To establish an actionable claim of age discrimination absent direct evidence, the Sixth Circuit has found that:

It is fundamental that to make a comparison of a discrimination plaintiff's treatment to that of non-minority employees, the plaintiff must show that the "comparables" are similarly-situated in all respects. Thus, to be deemed "similarly-situated", the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.

Mitchell v. Toledo Hosp., 964 F.3d 577, 583 (6th Cir. 1992)(citations omitted)

7. Here, even if the Appellant is deemed to be a member of a protected class, the Hearing Officer finds that the Appellant has failed to identify any person in state service similarly situated to the Appellant who did, in fact, receive a salary increase or an ACE award in 2007 or 2008. Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344 (6th Cir. 1998); King v. Buckeye Rural Elec. Co-op., 211 F.3d 1269 (6th Cir. 2000). See also KRS 344.100; 101 KAR 2:034, Section 11.

8. The Hearing Officer finds that KRS 18A.355 does not apply to the instant appeal because that statute relates to the award of annual increments to all state employees and, absent the (near) universal award of such annual increment, does not create a property interest in a salary increase for any particular employee.

9. Further, sidestepping the question of whether the Appellant's retirement moots his claims and the KRS 18A.095(29) question of whether the Appellant's appeal is timely filed, the Hearing Officer finds that the Appellant has failed to articulate a penalization as defined by KRS 18A.005(24). The Appellant challenges the wholly discretionary distribution of an ACE award and, absent proof of discrimination and/or retaliation, an employee not selected to receive such an award has not been penalized. Similarly, the Appellant has failed to establish an actionable property interest in the discretionary award of a salary increase, as, given the facts of this case, such an increase is discretionary and an employee not selected to receive such a salary increase

has not been penalized. To clarify, not receiving a discretionary award or salary increase is simply not a penalization, absent proof of discrimination and/or retaliation.

10. Lastly, the Appellant cannot establish a property interest in the use of particular state equipment. As defined by KRS 18A.005(24), the Appellant has not been penalized by not receiving a new state vehicle, a state cell phone, a state iPad, or a state air card.

CONCLUSION OF LAW

The Appellant has failed to articulate a penalization as defined by KRS 18A.005(24). This is because Appellant's claims do not implicate any right afforded to merit employees by KRS Chapter 18A. The Appellant was not penalized in the Agency exercising their discretion and not awarding the Appellant a salary increase or an ACE award. Further, the Appellant has failed to establish a *prima facie* case of political, disability, or age discrimination. Therefore, pursuant to KRS 18A.095(18)(a), the Personnel Board lacks jurisdiction to consider this appeal as the Board is unable to grant relief.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **WILLIAM JOHNSON V. TRANSPORTATION CABINET AND PERSONNEL CABINET (APPEAL NO. 2015-156)** 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 24th day of July, 2017.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Edwin Logan
Hon. Rosemary Holbrook
William Johnson, II