

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2018-228**

SCOT KAEFF

APPELLANT

V.

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

**LABOR CABINET and
PERSONNEL CABINET**

APPELLEES

** ** ** ** ** **

This matter came on for a pre-hearing conference on December 11, 2018, at 9:30 a.m., ET, at 1025 Capital Center Drive, Suite 105, 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, Scot Kaeff, was present by telephone and was not represented by legal counsel. The Appellee Labor Cabinet was present and represented by the Hon. Kate Bennett. The Appellee Personnel Cabinet was present and represented by the Hon. Catherine Stevens.

The purposes of the pre-hearing conference were to determine the specific penalization(s) alleged by Appellant, to determine the specific section of KRS 18A which authorizes this appeal, to determine the relief sought by Appellant, to define the issues, to address any other matters relating to the appeal, and to discuss the option of mediation.

BACKGROUND

1. The Hearing Officer notes this appeal was filed with the Personnel Board on November 13, 2018, checking the box for reclassification. On his appeal form, and at the pre-hearing conference, the Appellant indicated he was reclassified from an OSH Compliance Officer III to a Certified Safety Compliance Officer I. Both positions were a grade 14 and he did not receive a pay increase. After filing a grievance over this matter, he learned he was going to receive (and has received) a five percent (5%) increase. At the same time, other coworkers were reclassified from an OSH Compliance Officer II to an OSH Compliance Officer III and received a ten percent (10%) increase. With these increases, a number of similarly situated employees with less experience and less certifications are earning higher pay than the Appellant. The Appellant has asked that his current position receive a grade change and that other positions be upgraded as well to create what he believes would be a more logical progression available for employees. At the pre-hearing conference, the Appellant also made clear he was alleging age discrimination. He specifically pointed out that the Compliance Officers who were getting ten percent raises when reclassified were below 40 and some were below 30.

2. The Appellant had spent a lot of time researching this issue. Before his appeal to the Personnel Board, he pursued a grievance through all the levels but was denied. A more detailed statement of the Appellant's concerns are contained in an attachment to his appeal form. This document is attached hereto and incorporated herein as **Recommended Order Attachment A**.

3. At the pre-hearing conference, the Appellant stated that he would like to receive a pay grade change as the relief he was requesting. The parties were interested in mediation, however, the Appellees requested first to file a Motion to Dismiss. The Hearing Officer informed the parties to take a look at the case of Cabinet for Human Resources vs. Kentucky State Personnel Board, 846 S.W.2d 711 (Ky. App. 1992).

4. The Labor Cabinet and Personnel Cabinet filed a joint Motion to Dismiss. In their motion, the Cabinets argued that, "the Personnel Board lacks jurisdiction to hear Kaeff's claims, as he has not suffered a penalization and he fails to identify a statute or regulation that would entitle him to a raise." The Appellees pointed out that the Appellant received a five (5) percent salary increase when he was reclassified from an OSH Compliance Officer III (grade 14), to an OSH Certified Safety Consultant/Compliance Officer (grade 14). Pursuant to 101 KAR 2:034, Section 3, both Cabinets argued that only reclassification to a higher pay grade requires a mandatory five (5) percent increase in salary. Kaeff received a discretionary salary increase pursuant to a different subset of the same regulation. The Cabinets argued that the Appellant has not established that he was been penalized because he has not established any right to the pay grade change he seeks. Quoting United State Supreme Court precedent, the Cabinets argued that the Appellant has only a subjective or unilateral expectation of a pay increase not a legitimate claim of entitlement. The Cabinets argued that, even if the Appellant received a one pay grade increase to a grade 15, he would not be entitled to a salary increase unless he was below the new grade minimum, which is not the case.

5. The Cabinets pointed out that the Appellant's scheme of reorganizing pay grades in the Department is just a subjective expectation. Decisions on whether to modify the grade and pay assigned to a particular classification are based on a number of factors, including market factors relating to supply and demand.

6. The Cabinets also alleged that the Appellant failed to state a proper claim of age discrimination. They stated the Appellant was only propounding such claim as a "strategic move." They also stated he was speculating that some compliance officers getting larger raises "were below 40 and some were below 30."

7. The Appellant filed a response to the Motion to Dismiss stating that the Certified Safety Consultant/Compliance Officer I position, being a pay grade 14, is the issue and source of penalization because it requires more experience, knowledge, and the attainment of an industry-recognized certification. He alleged that the system of progression and succession within the Division of Occupational Safety and Health penalizes anyone who attains a certification and is reclassified to the certified CSHO I position.

8. The Appellant stated that this occurred when, in 2016, the classification of Compliance Officers I, II, and III were given a pay grade increase of one level. This upset the balance between those positions and the Certified CSHO I position. The Certified CSHO I position requires greater education, attainment of a recognized certification, has greater responsibility, and was not afforded a commensurate salary advancement.

9. In his response, the Appellant also stated:

Six Compliance Officers were recently reclassified from CSHO II to CSHO III and received 10% salary increases. The Appellant, having recently been reclassified from CSHO III to Certified CSHO I (at the same Pay Grade of 14), initially received no salary increase due to the Pay Grades being the same. It was only after the Appellant's Grievance was filed that he received a 5% salary increase. The reclassifications that had occurred within the Division of OSH Compliance previously were afforded 5% salary increases for Pay Grade jumps, such as CSHO II (pay Grade 13) to CSHO III (Pay Grade 14). There was a 5% salary increase when the Appellant was reclassified from CSHO II to CSHO III.

The Appellant then attached a chart showing that six (6) individuals, whose ages ranged from 25 through 34, received a ten (10) percent salary raise when they were reclassified from a CSHO II to a CSHO III. The Appellant pointed out that he was age 45 when he received only a five (5) percent raise after being reclassified from a CSHO III to a Certified CSHO I.

10. The Appellant also stated:

It is not the intent but the result that is important here. Whether due to an arbitrary decision or ageism, the discrepancy in the salary raises is obvious. The salary increase discrepancy was resolved, however, with the new salary structure put into place in the Division of OSH Compliance on January 28, 2019, and that took effect on February 1, 2019. Each position within the Division was moved to midpoint of their Pay Grades for salaries. Due to this, the six Compliance Officers noted above and the Appellant, all at Pay Grade 14 though in different positions with different responsibilities, are now earning the same salary, \$46,690.80/year.

The fact that the CSHO III and Certified CSHO I positions have the same Pay Grade, thus penalizing the Appellant, was and is the pertinent and relevant matter in Appeal No: 2018-228.

11. Appellant argued that because a classification with less qualification and experience requirements is at the same grade as his classification he was penalized without proper cause. As a Certified Safety Consultant/Compliance Officer I, the Appellant has a special requirement that he, "must be certified as an Occupational Health and Safety Technologist (OHST) or a Construction Health and Safety Technician (CHST)." With respect to experience, the Appellant's classification requires three (3) years of professional experience in the Occupational

Safety and Health field, while a CSHO III allows for experience in a related field or requisite skills. Appellant also pointed out that his classification requires that he must serve as a specialist in the field of industrial safety, which is not required for the CSHO III position.

12. The Appellant also included a Position Description for the Certified CSHO I position, which shows that this classification must perform all the tasks of a CSHO III with additions.

13. The Appellant stated that to require the attaining and maintaining of recognized industry certifications without a higher pay grade constitutes a penalization. Appellant alleges that the pay grade changes within the Division of OSH Compliance salary structure in 2016 “diminish the level, rank, discretion, or responsibility of an employee without proper cause or authority” and, thus, constituted a penalization.

14. The Appellant continues to believe that these pay grades for the various positions within the Division of OSH Compliance show an illogical and non-commensurate framework of salary progression.

15. Most significantly in his response, the Appellant waived his age discrimination claim due to recent changes made in the salary structure.

16. In its reply, the Cabinets state that the Appellant would not be entitled to a salary increase even if the pay grade for his position was raised to a pay grade 15. In addition, they argue that, under the regulation, the appointing authority had the discretion to grant either a five (5) percent or ten (10) percent increase upon a pay grade change. They also argue that this salary adjustment must only be uniform among the salary of all employees in the agency in the same job classification.

17. The Appellees argued that the Appellant has not presented evidence to show that his additional certification, in and of itself, requires his job classification to be classified to a higher pay grade. They urged dismissal of his appeal.

FINDINGS OF FACT

1. Effective February 16, 2016, OSH Compliance Officer I, II, and III positions were raised one pay grade to pay grades 12, 13, and 14 respectively. The Certified CSHO I position remained a grade 14.

2. Effective November 1, 2018, the Appellant was reclassified from an OSH Compliance Officer III to an OSH Certified Safety Consultant/Compliance Officer I. He received a five (5) percent increase. Both positions were grade 14.

3. At least six (6) other employees received a ten (10) percent increase when they were reclassified from a CSHO II to a CSHO III.

4. On October 30, 2018, the Appellant filed a grievance requesting that the pay grade for an OSH Certified Safety Consultant/Compliance Officer I be raised from a grade 14 to a grade 16 and that his salary be adjusted in accordance with the change. The Appellant contended that the Certified Safety Consultant/Compliance Officer I position required additional certifications not required for Compliance Officers II and III and, thus, should be assigned a higher pay grade. His grievance was denied by the Appointing Authority.

5. On November 13, 2018, the Appellant filed an Appeal to the Personnel Board requesting the same relief. He also alleged age discrimination at the time he filed his Appeal.

6. While his Appeal was pending, all positions within the Division of OSH Compliance were moved to mid-point of their pay grade for salary. As a result, the Appellant dropped his age discrimination claim.

7. There are no material issues of fact in dispute and this matter can be decided as matter of law based on the Appeal Form, statements of the parties at the pre-hearing conference, the Motion to Dismiss, responses, and replies.

CONCLUSIONS OF LAW

1. Although it is not in dispute that the Appellant's classification requires an additional certification not required by other classification assigned the same pay grade, this does not constitute a penalization as defined at KRS 18A.005(24).

2. The Appellant has failed to cite any statute or regulation which requires that his pay grade be increased or that he receive additional pay as a result of this difference.

3. This situation can be distinguished from Cabinet for Human Resources vs. Kentucky Personnel Board and Bargo, et al., 846 S.W.2d 711 (1992). In the Bargo case, the Court of Appeals found that it was a penalization for Nurse Consultant Inspectors to be assigned a lower pay grade than other nurses who were in classifications that required lesser qualifications. In Mr. Kaeff's case, there was only a slight difference in the qualifications for the two (2) classifications and the pay grade is the same between the classifications. The Bargo case also does not rely on any statute or regulation and there does not appear to be any reason to extend Bargo beyond the specific discrepancy found in that case.

4. In 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 statutes 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.

5. For the reasons set out above, the Appellant has failed to articulate an actionable penalization. Scotty Robinson vs. Energy and Environment Cabinet and Personnel Cabinet, Appeal No. 2616-295.

6. Because the Appellant has not stated an actionable penalization, the Board lacks jurisdiction to grant relief to the Appellant and this Appeal may be dismissed following a preliminary hearing. KRS 18A.095(18)(a).

7. Because there are no genuine issues of material fact in dispute and judgment is appropriate as a matter of law, the Hearing Officer may issue a Recommended Order based on the Appellees' dispositive motion. KRS 13B.090(2).

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **SCOT KAEFF V. KENTUCKY LABOR CABINET and KENTUCKY PERSONNEL CABINET (APPEAL NO. 2018-228)** 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).

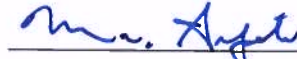
Any document filed with the Personnel Board shall be served on the opposing party.

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 the **Hearing Officer** this 18 day of May, 2021.

KENTUCKY PERSONNEL BOARD



MARK A. SIPER
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Catherine M. Stevens

Ms. Katherine A. Bennett

Mr. Scott N. Kaeff

Hon Rosemary Holbrook (Personnel Cabinet)

CLASSIFIED, ELIGIBLE OR APPLICANT, PREPARE THIS SECTION

The following is a short, plain, and concise statement of the facts which relate to the action I am appealing:

I am appealing the final determination of the Labor Cabinet regarding the Grievance I filed on October 30, 2018. My grievance, which is attached, along with other relevant documents, was regarding the pay Grades within the Labor Cabinet, Department of Workplace Standards, Division of Occupational Safety and Health Compliance, OSH Compliance Safety Branch, and their impact on the recent Personnel Action Request (PAR) involving me.

I am an OSH Compliance Officer III (CSHO III) and the PAR for my reclass to OSH Certfd Safe Cnsltnt/Cmplnc Officer I (Certified CSHO I) was sent to me via email on October 16, 2018. In this email, it was noted that although this was a promotion (reclass) to a different and higher position, it was the same pay Grade and would carry no raise in salary. This struck me as illogical based on previous compliance officers that had attained certifications and promotions, so I researched the situation with pay Grades and the current salaries of compliance officers in our Division. This led to my Grievance, the goal of which was to attain the pay Grade and salary elevation that I had earned and, as a corollary effect, to seek a review of the pay Grades in our Division to create a logical progression and succession plan. Having been with the Division of OSH Compliance for nearly five years, I have seen firsthand the importance of the work we do in the field every day and hoped this would help us retain the talented officers we currently have.

It is obvious that the current administration has the same desire. I noted in my Grievance that, "There are currently six Safety Compliance Officers at this level (CSHO II), pay Grade 13, earning a salary of \$37,681.44 per year. They are, or will soon be, eligible for reclass or promotion to CSHO III, pay Grade 14, and would receive a 5% pay increase to approximately \$39,565.51 per year. That would put six Compliance Officers with at least a year, or more, less experience than me at a higher yearly salary than me while I would be at a higher position, with more experience and a certification, within the Division and Branch. My currently yearly salary is \$38,058.48...."

In researching the current salaries of officers in our Division, I found that four of those six Safety Compliance Officers have received their reclass from CSHO II to CSHO III and, rather than the typical 5% raise, they received 10% raises and are now making yearly salaries of \$41,449.68. During a telephone conversation with Director Randy Harris on November 9, 2018, I was told that a change had been made in my reclass from CSHO III to Certified CSHO I and that it would now carry a 5% raise. When this occurs – it has either not occurred yet based on the KY Transparency site, though the PAR had noted being effective on November 1, 2018, or the site has not updated yet – my yearly salary will be approximately \$39,961.40. This will still be significantly less than four, soon to be six, compliance officers with no certifications and less experience than I have.

It was noted by Anya Carnes, Designated Appointing Authority for the Labor Cabinet, in her Final Determination letter, dated November 9, 2018, that "Furthermore, the Labor Cabinet has no authority to adjust or change a pay grade." I believe that the root issue of the CSHO III and Certified CSHO I positions having the same pay Grade, however, is because of pay Grade changes made within the Cabinet in the last three years. When I began studying for my certification, there was a pay Grade jump from CSHO III to Certified CSHO I. The fact that the officers that received their reclass from CSHO II to CSHO III received 10% salary raises instead of the typical 5% also shows that various salary adjustments are possible.

In short, I request that my Grievance be re-evaluated by the Personnel Board in hope of attaining the pay Grade and salary that I have earned through my excellent service, work, and attainment of a recognized certification. I also request that my Grievance be re-evaluated in hope of recreating the pay Grades within the Division of OSH Compliance in an effort to retain our talent, create a logical line of progression and succession, and to attract future officers to protect the safety of the working people of the Commonwealth.

Attachments: #1 – Grievance Final Determination; #2 – Current Salaries in the Division of OSH Compliance; #3 – Relevant Personnel; #4 – Original Grievance (provided for legibility due to the many scans made of Attach

**Recommended Order
Attachment A**