COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION No. 17-CI-038

KELLIE LANG **PETITIONER**

vs.

COMMONWEALTH OF KENTUCKY FINANCE AND ADMINISTRATION CABINET, WILLIAM M. LANDRUM III, SECRETARY, KENTUCKY PERSONNEL CABINET, and KENTUCKY PERSONNEL BOARD **RESPONDENT**

ORDER

This matter is before the Court upon Petitioner's motion to correct clerical errors in this Court's Opinion and Order, entered on July 20, 2017. After reviewing the Petitioner's requests, each of the proposed corrections are accepted. A revised Opinion and Order containing those corrections accompanies this order. The corrections are on pages 2, 4, and 5 and have been underlined to be more readily identified. This Court hereby submits the accompanying order as a replacement to the order entered in this case on July 20, 2017.

So **ORDERED** this 9 day of August, 2017.

PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division I

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KENTUCKY PERSONNEL CABINET, and
KENTUCKY PERSONNEL BOARD **RESPONDENTS**

OPINION AND ORDER

This matter is before the Court upon Petitioner's Petition on Appeal of the Personnel Board's Final Order. Upon review of the record, and after being sufficiently advised, this Court hereby **REVERSES** the Final Order and **REMANDS** the case for further adjudication consistent with this Opinion.

STATEMENT OF FACTS

Kellie Lang, Petitioner, began working for various Property Valuation Administrator ("PVA") offices on August 16, 1994 until August 16, 2003. Petitioner then worked for the Department of Revenue until December 31, 2004. At that point, Petitioner returned to work in another PVA office up to August 31, 2008. On September 1, 2008, Petitioner returned to work at the Department of Revenue. While at the Department of Revenue, Petitioner was considered a "classified" state employee until March 1, 2015 when she was appointed Division Director within the Department of Revenue. This appointment was an "unclassified" position. Petitioner was terminated without cause from that position on February 16, 2016. Petitioner was a PVA employee for 12.7 years and an employee of the Department of Revenue for 8.8 years.

Petitioner's last "classified" position in the Department of Revenue was as Assistant Director. At the time of Petitioner's termination, that position was vacant. Petitioner asserts that she was a "career employee" under KRS 18A.005(4) and thus was entitled to employment reversion rights under KRS 18A.130 and 18A.135. When she was not reverted to her former position, she commenced this appeal to the Personnel Board.

Administrative Hearing and Denial

Petitioner asserted on her appeal to the Personnel Board that she was a "career employee" by virtue of her 16+ years of government service when combining her employment time spent with the PVA offices and the Department of Revenue. Respondents argued that under their interpretation of KRS 18A.005(4) and KRS 132.370(1), Petitioner's employment time with the PVA offices did not count toward "career employee" status and, thus, she was not a career employee with employment reversion rights under KRS Chapter 18A.

After arguments, the Hearing Officer determined that both KRS 132.370(1) and 18A.005(4) were unambiguous, clear statements by the General Assembly and found for Petitioner. The Personnel and Finance Cabinets filed exceptions to the Hearing Officer's decision and subsequently ruled in favor of its own interpretation of those statutes. Petitioner then appealed to this Court seeking a reversal of the Personnel Board's Final Order and a remand with instructions to uphold the decision of the Hearing Officer.

ANALYSIS

I. STANDARD OF REVIEW

Judicial review of a state agency's Final Order following an administrative adjudication is conducted in accordance with KRS 13B.150. That statute prohibits any court from substituting its

judgment on the weight of the evidence for that of the agency. Additionally, the statute limits the circumstances under which a court can reverse an agency's Final Order.

Kentucky Courts review agency determinations of law *de novo* under the standard of review set forth in *Chevron,* 467 U.S. 837 (1984). *Kentucky Occupational Safety and Health Review Commission v. Estill County Fiscal Court*, 503 S.W.3d 924, 927 (Ky. 2016). So long as it is in the form of an adopted regulation or formal adjudication, courts review an agency's interpretation of a statute it is charged with implementing pursuant to the *Chevron* doctrine. *Id.*

First, if the statutory language is clear, then we will offer no deference to agency action outside the statute's clear language. *Id.* In other words, where the apparent statutory ambiguity is resolved using traditional tools of statutory construction, an agency's interpretation is not entitled to *Chevron* deference. *Metzinger v. Kentucky Retirement Systems*, 299 S.W.3d 541 (Ky. 2009).

Second, if instead the statutory language is ambiguous or silent on the specific issue, then Kentucky courts will defer to an agency's reasonable interpretation of its enabling statute. *Kentucky Occupational*, 503 S.W.3d at 927. Courts must determine whether the agency used a permissible construction of the statute to reach its decision. *Metzinger*, 299 S.W.3d at 546.

II. DISCUSSION

Introduction

The Personnel Cabinet has asserted its interpretations of KRS 18A.005(4) and 132.370(1) warrant *Chevron* deference. This interpretation arose from a formal adjudication in the form of an administrative appeal. Thus, it is an agency action that qualifies for analysis under *Chevron.*

It is undisputed that if PVA employment time is counted toward "career employee" status, then Petitioner has attained that status. As a "career employee" Petitioner would possess reversion

rights under KRS 18A.130 and 18A.135 which would require her to be rehired at her last "classified" position, as it was vacant at the time of her termination.

Statutes at Issues

This dispute concerns the interpretation of two statutory provisions, KRS 18A.005(4) and KRS 132.370(1). Those provisions read as follows

> KRS 18A.005(4) – "Career employee shall mean a state employee with 16-years of permanent full-time state service, or the part-time employment equivalent of at least 16 years of full-time state service. The service may have been in the classified service, *the unclassified service*, or a combination thereof."

> KRS 132.370(1) – "There shall be a property valuation administrator in each county in lieu of a county assessor. Property valuation administrators shall be state officials and all deputies and assistants of their offices shall be *unclassified state employees*."

Specifically in dispute is whether KRS 132.370(1)'s designation of PVA employees as unclassified state employees qualifies as "unclassified service" under KRS 18A.005(4).

The Statutory Provisions are not Ambiguous

When reviewing an agency interpretation of a statute for *Chevron* deference, the court's analysis begins with the statutory language at issue. If the court finds the statutory provisions are clear and unambiguous on the issue presented, then the court must only apply that clear interpretation and need not consider the agency's interpretation or its reasonableness.

An ambiguity exists in a statute when the statute's undefined terms give rise to two mutually exclusive, yet reasonable, constructions. *MPM Financial Group v. Morton*, 289 S.W.3d 193 (2009). "It is not enough for one party to claim ambiguity." *Kentucky Association of Counties All Lines Fund Trust v. McClendon*, 157 S.W.3d 626, 633 (Ky. 2005). That a party attempts to create some question of interpretation does not necessarily create an ambiguity. *Id.* Only if the statute is ambiguous and frustrates a plain reading should courts resort to extrinsic aids such as the

statute's legislative history, the canons of construction, or the interpretations of other courts. *Jefferson County Bd. Of Educ. v. Fell*, 391 S.W.3d 713, 719 (Ky. 2012). Thus, the statute should be read in context with related statutes to determine whether it is ambiguous before resorting to a more intensive statutory interpretation in addressing the arguments of the parties before this Court.

A plain reading of the statutes leaves no room for ambiguity. KRS 18A.005(4) defines what constitutes a "Career Employee" for the purposes of Chapter 18A. To be considered a Career Employee, a person needs at least 16-years of full-time service in state employment. Indeed, whether the employment was "classified" or "unclassified" is immaterial. The second sentence in KRS 18A.005(4) is permissive due to its use of the word, "may." It is not mandatory that the state service be either "classified" or "unclassified." If there are state employees that are not within the categories of "classified" or "unclassified," their service would still count toward "career employee" status under a plain reading of the statute.

Even disregarding the permissiveness of the second sentence of KRS 18.005(4), the statute specifically states that *both* classified state employment and unclassified state employment are counted toward this status. KRS 132.370 clearly identifies PVA employees as "unclassified state employees." PVA employment time would count toward "career employee" status under a plain reading.

Respondents' Assertion of Ambiguity in Context of Chapter 18A

Because these statutes alone leave no room for ambiguity, ambiguity might only exist in the context of Chapter 18A. The plain language of KRS 132.370(1) leaves no room for doubt that employees of the PVA are considered "unclassified state employees." Yet the Personnel Board and the Revenue Department attempt to stretch the concepts of statutory interpretation beyond any reasonable boundaries by arguing that the "unclassified state employees" who serve in a PVA

office are somehow not equivalent to "unclassified state employees" of the Department of Revenue for purposes of calculating the minimum period of service necessary to achieve "career employee" status under KRS 18A.005(4). This interpretation is convoluted, unsupported by any reasonable canon of construction, and it defies common sense.

There is no definition of an "unclassified employee" in Chapter 18A. Here, the legislature has explicitly stated that employees of a PVA office are "unclassified state employees." Also, nowhere in Chapter 18A is any employment position directly indicated to be "unclassified." Rather, those employees exempted from the "classified" designation under KRS 18A.115(1) are considered "unclassified employees." Respondents assert that there are two categories of "unclassified state employees," those subject to Chapter 18A, and those not subject to it. Respondents argue that those Non-KRS 18A unclassified state employees should not get their service time counted toward Career Employee status. Respondents rely upon other statutory provisions to support these assertions.

Respondents' first cited provision in support of this assertion is KRS 18A.030(2)(j). That statute charges the Personnel Secretary with, "providing personnel services to unclassified employees in agreement with the agencies involved not otherwise provided for in KRS 18A.005 to 18A.200." The meaning of this statute is ambiguous. KRS 18A.030(2)(j) could mean the Personnel Secretary must provide those *personnel services* that are not provided for; or, that the Personnel Secretary must provide those personnel services for the *unclassified employees* that are not provided for. Respondents adhere to the second interpretation, asserting that this provision, "demonstrates the Legislature's acknowledgement that there are unclassified employees who are not subject to the provision of KRS Chapter 18A." Respondents' assertion is not clear from the statutory language. Rather, it is an inference based on one possible interpretation of the statute.

An inference made from one possible interpretation of an ambiguous statute is not sufficient to create ambiguity in the original statutes at issue.

Respondents next rely on KRS 18A.155(1) to create ambiguity. First, it should be noted that another statute, KRS 18A.115(1), lists dozens of state employee positions that are exempted from a "classified employee" designation. PVA staff employees are unique from this group in that they are designated as "unclassified state employees" in a statute in an entirely different KRS Chapter. KRS 18A.155(1) begins by mandating the Personnel Secretary create regulations for several of the positions exempted from the "classified" designation under KRS 18A.115(1). Respondents take this to mean only those positions enumerated in KRS 18A.155(1) are unclassified state employees to which KRS Chapter 18A would apply. Under the Respondents' interpretation, all other state employee positions under KRS 18A.115(1) not listed in 18A.155(1) would not have their service counted toward "career employee" status under Chapter 18A. There is no distinction made between those positions enumerated in KRS 18A.155(1) and those not. The only difference is that the General Assembly *required* the Personnel Secretary to promulgate regulations for those positions. Nothing in these statutes suggest that Chapter 18A cannot be applied to those unenumerated positions when proper.

Respondents next turn to KRS 154.1-730(2). That statute reads, "all employees of the Kentucky Peace Corps shall be deemed unclassified employees of the Executive Department, covered by the provisions of KRS 18A that relate to unclassified employees." KRS 154.1-730(2). Respondents suggest that because this statute contains the phrase "*covered by the provisions of KRS 18A*," the non-inclusion of such language in KRS 132.370 means the General Assembly did not intend to give PVA staff the same rights as those of the Kentucky Peace Corps. It is unpersuasive that the extra clarity provided in KRS 154.1-730(2) will create ambiguity in another

clear statute. This single phrase does not support Respondents' contention that the General Assembly intended to create two tiers of unclassified employees.

Next, Respondents assert that PVA service time should not be counted toward "career employment" status because "PVA staff" are stated separately from "executive branch agencies whose employees are subject to KRS 18A.005 to KRS 18A.200" in KRS 61.522(6)(a). Notably, the statute cited does not make any reference to the "classified" or "unclassified" status of an employee. Asserting that the General Assembly expressed its intent to entirely exclude PVA staff from Chapter 18A coverage in a statute separate from Chapter 18A and KRS 132.370 is an untenable stretch of logic.

Finally, Respondents assert that KRS 132.370(3) shows the General Assembly's intent to exclude PVA employees from KRS Chapter 18A. That provision makes PVA employees eligible for participation in the provisions of KRS 18A.205 and 18A.230 through 18A.355. Respondents argue that the enumeration of those provisions must mean the General Assembly intended the rest of Chapter 18A not to apply to PVA employees. Nothing in 18A.370(3) suggests that the earlier designation of PVA employees as "unclassified state employees" is not applicable to the definition of a "career employee" in KRS 18A.005(4). Respondents have not shown that this inference would overcome the plain language in the first subsection of this statute.

These provisions cited by Respondents do not clearly establish two categories of "unclassified employees." Without establishing that there are two categories of "unclassified employees," Defendants cannot succeed in creating some ambiguity in the original statutes at issue. However, even if Defendants were successful in establishing a new category of "unclassified state employees" to which Chapter 18A did not apply, nothing they have presented suggests such an employee's service should not be counted toward "career employee" status under

KRS 18A.005(4). KRS 18A.005(4)'s definition of "career employee" simply includes state employees in unclassified service. The statute does not suggest that some types of unclassified service would be improper to count toward "career employee" status.

It is undisputed that employees of the PVA are "unclassified state employees." It is undisputed that state employees "with 16 years of full-time state service" are considered career employees under KRS 18A.005(4). There can be no doubt that employment in a PVA office is employment in "state service" in light of binding precedent. *See Kentucky Executive Branch Ethics Commission v. Atkinson*, 339 S.W.3d 472 (Ky. App. 2010). Ms. Lang qualifies as a "career employee" under the statute, and there is no basis to deny Ms. Langford the protections of KRS 18A.005(4).

Chapter 18A Statutes in Support of the Plain Reading

Additionally, KRS 18A.113 deals with the lay-off rules for state employees. The very next statute in that chapter is KRS 18A.1131 which is titled, "Lay-off rules applicable to *classified* employees only." Also, KRS 18A.1132 is titled, "Lay-off rules applicable to both classified and unclassified employees." These statutes indicate that some of the provisions in KRS 18A.005 through 18A.200 are applicable to all unclassified employees. Nothing in 18A.1132 differentiate between types of unclassified employees or suggests that some unclassified employees are excluded.

KRS 18A.1132(6) establishes that laid-off employees shall be hired before any applicant or eligible except laid-off employees already on such registers. Nothing in the statutory language suggests that "laid-off employees" means only classified and unclassified employees that are subject to KRS Chapter 18A. Rather, in a statute titled for both classified and unclassified employees, the General Assembly used the term "laid-off employees." This indicates that such

employees were not to be distinguished by whether they were "classified" or "unclassified." The only item of import was whether the state employee was terminated due to lay-offs.

***Chevron* Deference is Inappropriate**

The two statutes at issue are clear and unambiguous. Respondents have not presented anything within the statutory scheme of KRS Chapter 18A that would create ambiguity in those statutes. For that reason, under *Chevron* doctrine, this Court need not continue to an evaluation of the reasonableness of Respondent's interpretation. This Court has determined the statutes at issue are clear and that PVA service time counts toward "career employee" status under Chapter 18A. No deference is required, or appropriate, when the agency's interpretation of the statute does violence to the plain meaning of the words used by the legislature.

CONCLUSION

The Personnel Board's Final Order was in violation of statutory provisions and therefore must be reversed under KRS 13.150(2)(a). Accordingly, for reasons discussed above, this Court **REVERSES** the Personnel Board's Final Order and **AFFIRMS** the determination of the Hearing Officer that the Petitioner Kellie Lang is entitled to all rights and privileges of a "career employee" under KRS 18A.005(4). This action is **REMANDED** to the Personnel Board for final action consistent with this judgment. This is a final and appealable order and there is no just cause for delay.

So **ORDERED** this 9 day of ~~July~~ August, 2017.

PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division I

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