

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2016-039

KELLIE LANG

APPELLANT

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

FINANCE AND ADMINISTRATION CABINET

AND

PERSONNEL CABINET

APPELLEES

*** **

The Board at its regular December 2016 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated August 25, 2016, Appellees' Joint Exceptions, Appellant'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. **Add** Findings of Fact paragraph 4 as follow:

4. The Board finds that the Appellant was not a career employee as that term is defined at KRS 18A.005(4). The Board so finds because the Appellant's 12.7 years as a Deputy PVA do not constitute unclassified service as the term is used at KRS 18A.005(4).

B. **Delete** the Conclusions of Law and substitute the following:

1. KRS 132.370(1) and (3) provides:

(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.

...

(3) The Property Evaluation Administrators and all deputies and assistants of their offices who qualify as fulltime employees shall be eligible for participation in the provisions of KRS 18A.205, 18A.230 – 18A.355, and 61.510 – 61.705.

2. The Board concludes that in order to determine the status of Appellant's time spent as a Deputy PVA it is important to read these two subsections of KRS 132.370 together. The Board concludes that PVAs, deputies and assistants are unclassified state employees for specific purposes as outlined in these provisions. These purposes include participation in life insurance (KRS 18A.205), deferred compensation (KRS 18A.230 – 18A.275), annual increments (KRS 18A.355) and state retirement (KRS 61.510 – 61-705). The Board interprets the language in KRS 132.370(1) as designating deputy PVAs as unclassified state employees for specific purposes and not for all purposes. As a result, the Board concludes that the Appellant's time as a Deputy PVA does not count towards the accumulation of unclassified service time to be used to attain a career employee status pursuant to KRS 18A.005(4).

3. The Board's position is supported by the fact that all of these statutes cited in KRS 132.370(3) include broad definitions of state employees that go beyond employees covered under the provisions of KRS Chapter 18A, either in the classified or unclassified service. [KRS 18A.205(2), KRS 18A.230(1), KRS 18A.350 and KRS 61.522(6)(a).]

4. The Board's position is supported by KRS 18A.115(1) which does not list property valuation administrators or deputies as employees exempted from the classified service. If the intention of KRS 132.370(1) is to designate Deputy PVAs as unclassified state employees for all purposes, they should be listed under one of the subsections of KRS 18A.115(1).

5. The Legislature has demonstrated that when it wishes to convey that employees of an organization are unclassified for all purposes under KRS Chapter 18A, it knows how to make this clear and unambiguous. The Legislature did just that with respect to employees of the Kentucky Peace Corps under KRS 154.1-730(2). Employees of the Kentucky Peace Corps are also exempted from the classified service in KRS 18A.115(1)(y).

6. The Board agrees with the Appellees' position that KRS 18A.030(2)(j) demonstrates the Legislature's acknowledgement that there are unclassified employees who are not subject to the provisions of KRS Chapter 18A.

7. The Board concludes the Appellant was not a career employee because her service as a Deputy PVA did not constitute unclassified service as that term is used at KRS 18A.005(4). Because the Appellant was not a career employee, the Appellees correctly determined that she was not entitled to revert pursuant to KRS 18A.115(4) and KRS 18A.130.

C. Delete the Recommended Order and substitute the following:

IT IS HEREBY ORDERED that the appeal of **KELLIE LANG V. FINANCE AND ADMINISTRATION CABINET AND PERSONNEL CABINET (APPEAL NO. 2016-039)** is **DISMISSED**.

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer as Altered be, and they hereby 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 15th day of December, 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPER, SECRETARY

A copy hereof this day mailed to:

Hon. Paul Fauri
Hon. Cary Bishop
Hon. Rosemary Holbrook
Ms. Stacy Perry
Mr. Troy Robinson

**COMMONWEALTH OF KENTUCKY
KENTUCKY PERSONNEL BOARD
APPEAL NO. 2016-039**

KELLIE LANG

APPELLANT

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

FINANCE AND ADMINISTRATION CABINET

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* * * * *

This matter came on for a pre-hearing conference on May 3, 2016 at 10:30 a.m., ET at 28 Fountain Place, Frankfort, Kentucky before the Hon. Boyce A. Crocker, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Kellie Lang was present, accompanied by her husband, and was represented by the Hon. Paul Fauri. The Appellee Finance and Administration Cabinet was present and represented by Hon. Cary Bishop. The Appellee Personnel Cabinet was present and represented by the Hon. Rosemary Holbrook.

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

The Hearing Officer noted the appeal was filed with the Personnel Board on February 23, 2016. The Appellant, prior to retaining counsel, indicated the appeal was related to "terminated unclassified employee denied reversion." (sic)

In the narrative attached to her appeal, Appellant gave further information indicating that she was terminated from her position as a Division Director in the Department of Revenue and that she considered her previous services as a Deputy in the PVA offices to have been state service, which should have qualified and counted for her career time, entitling her to reversion to the Assistant Director position.

The Hon. Paul Fauri entered his appearance and amended the appeal to assert that the Appellant was entitled to reversion to the Assistant Director position and that the failure to have reverted her was arbitrary and capricious, in violation of Section 2 of the Kentucky Constitution and also violated KRS Chapter 18A, specifically KRS 18A, 18A.115(4) and 18A.130(2). Through the pleading, Appellant's counsel also made a motion that the Personnel Cabinet be made a party to the proceeding based upon its decision that the Appellant did not have reversion rights.

Appellant's counsel also filed a motion for the Board to require that the vacant Assistant Director position be held open pending resolution of the appeal.

In response to Appellant's motion, counsel for the Appellee Finance and Administration Cabinet noted that the position was open and would likely remain open due to budget constraints. Counsel also noted that even if it was filled, the Finance Cabinet would be doing so at its own risk, knowing the Personnel Board could lawfully order (as the Hearing Officer understands counsel's statement) Appellant to be placed into the position, if the Personnel Board agreed with her statement of appeal.

Counsel for the Appellee Personnel Cabinet concurred with counsel for Finance's statement.

After discussion, it did not appear there would be much dispute of fact and the Appellees proposed this matter be briefed. A briefing schedule and date for evidentiary hearing were set. Counsel for the Appellant noted the need to obtain some documents through discovery. He indicated he would file a discovery request and the Appellees agreed to provide responses as soon as possible, noting that the unavailability of Ms. Honor Barker might affect the timeliness of their response to the discovery.

An Interim Order was issued by the Hearing Officer on May 6, 2016, establishing the briefing schedule and on May 13, 2016 an Interim Order followed ordering that the Personnel Cabinet to be made a party Appellee to the proceeding.

Discovery requests were made by the Appellant and the Appellees provided notice of compliance.

On June 7, 2016, the Appellees jointly filed Exhibit 1 stipulating to the Appellant's employment history and providing supporting documents.

Upon subsequent request, and with the agreement of all parties, the briefing schedule was adjusted by Interim Order dated June 8, 2016 (corrected by Interim Order of June 13, 2016), and the evidentiary hearing that had been scheduled for July 15, 2016 was canceled.

The parties complied with the briefing schedule, and this matter stands submitted to the current assigned Hearing Officer, Brenda D. Allen, for a ruling on the Appellant's Motion and Brief in Support of Sustaining Appellant's Appeal. The Hearing Officer considered the entire administrative record.

BACKGROUND

1. Appellees' joint stipulation of the Appellant's history of employment relevant to these proceedings is as follows:

Workplace:	Start Date	End Date	Total Time
Campbell County PVA	8/16/1994	9/30/2001	85.5 months
Boone County PVA	10/1/2001	11/30/2002	14.0 months
Campbell County PVA	12/1/2002	8/15/2003	8.5 months
KY Dept. of Revenue	8/16/2003	12/31/2001	16.5 months
Franklin County PVA	1/1/2005	8/31/2008	44 months
KY Dept. of Revenue	2/1/2008	2/16/2016	<u>89.5 months</u>
Combined Years PVA and Dept. of Revenue Service:		21.5 yrs.	(258 months)

2. Through Appellant's Brief and Reply, Appellant's counsel argues that she was a KRS 18A employee at the time of her termination and, therefore, the Personnel Board has jurisdiction to hear her appeal. Appellant also argues that at the time of her termination from her unclassified position as a Division Director, she was a career employee with more than 16 years of service and, therefore, she was entitled by KRS 18A.005(4) to revert to her former position of Assistant Director in the Department of Revenue, a position that was vacant.

3. Appellant also argues that throughout her career at PVA and Revenue she utilized various provisions of KRS Chapter 18A relating to annual leave accrual, sick leave accrual, sick leave sharing and receipt of a twenty-year recognition certificate from former Governor Beshear which shows her to be an KRS 18A employee.

4. Appellant argues, with the support of case law, that during her time at PVA she was subject to the provisions of the Executive Branch Code of Ethics, was eligible to participate in the state government life insurance, the state Deferred Compensation plan and the Kentucky Retirement System as outlined in KRS 18A.205, and KRS 18A.230-18A.355.

5. Appellant also argues that in accordance with KRS 132.370(1), Deputy PVAs, and their assistants, are deemed unclassified state employees and that her 12.7 years of service with the various PVAs should be combined with her nearly 9 years of work at the Department of Revenue to total 21.5 years, far more than the 16 years of service needed to attain career employee status and reversion rights.

6. In response, the Appellees argue that at the time of her termination, the Appellant did not meet the definition of a career employee, and had no reversion rights. In support, the Appellees argue that the Appellant's county PVA service was deemed unclassified service and that this label does not automatically entitle an employee to all of the rights and privileges afforded to employees under KRS 18A. In other words, the Appellees argue that by statute, certain unclassified positions are subject to the provisions of KRS 18A, while others are not. In support, the Appellees point to the fact that Deputy PVAs and PVA staff members are absent from the provisions of KRS 18A.155(1), the statute enumerating specific groups of employees to which KRS 18A applies.

7. In response to Appellant's argument relative to the personnel documents signed by Finance Cabinet officials, Appellee's counter that PVA offices are administratively attached to the Department of Revenue by KRS 130.130, but in accordance with KRS 131.190 and KRS 131.190(1)(a) PVA employees are not deemed Finance Cabinet employees.

8. The Appellees also argue that had the General Assembly intended to designate employees of PVA offices subject to all of the provisions of KRS Chapter 18A, it could have done so in the same manner that it did for Kentucky Peace Corp employees by way of KRS 154.1-730(2) which states: "[a]ll employees of the corps, including its director, shall be deemed unclassified employees of the Executive Department covered by the provisions of KRS Chapter 18A relating to unclassified employees." The Appellees argue that no such statute exists and accordingly, the Personnel Board must abide by the rules of statutory interpretation, and has no authority to extend the statutes beyond what the General Assembly enacted.

9. The Appellees argue that because the duty of determining career employee status is vested in the Personnel Cabinet, the Appellant could not legitimately rely upon the opinions of others relative to this matter.

10. Finally, in addition to the above, the Appellees cite prior Personnel Board Orders and Attorney General Opinions and copies of the PVA Personnel Administration Manuals to support

their contentions and also assert that PVA employees are at will employees that serve at the pleasure of the Property Valuation Administrator. [KRS 132.590(8).]

FINDINGS OF FACT

1. The Hearing Officer finds it undisputed that Appellant, Kellie R. Lang, was terminated from her unclassified service position of Division Director with the Department of Revenue on February 16, 2016, a position she had held since March 1, 2015. [See P-1 attached to Appellee's Joint Exhibit 1, KRS 18A.115(1)(i).]
2. The Hearing Officer finds it undisputed that prior to assuming the Division Director position, the Appellant had 7.8 years of classified service with the Department of Revenue. (Appellee's Joint Exhibit 2)
3. The Hearing Officer finds that the remaining 12.7 years of Appellant's career was spent serving in four Property Valuation Administrator (PVA) offices in the position of Deputy PVA or other assistant positions. Id

CONCLUSIONS OF LAW

1. KRS 132.370(1) provides: "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."
2. The Hearing Officer concludes as a matter of law that Kellie Lang had 21.5 years of classified and unclassified state service at the time of her termination.
3. KRS 18A.005 (4) provides:

"Career employee" shall mean a state employee with sixteen (16) or more years of permanent full-time state service, or the part-time employment equivalent of at least sixteen (16) years of full-time state service. The service may have been in the classified service, the unclassified service, or a combination thereof.

4. KRS 18A.115 (4) provides:

Career employees within the classified service promoted to positions exempted from classified service shall, upon termination of their employment in the exempted service, revert to a position in that class in the agency from which they were terminated if a vacancy in that class exists. If no such vacancy exists, they shall be considered for employment in any vacant position for which they were qualified pursuant to KRS 18A.130 and 18A.135.

5. The Hearing Officer concludes as a matter of law that at the time of her termination, the Appellant was a "career employee" as defined by KRS 18A.005(4) and therefore was entitled to revert to her former, vacant classified Assistant Director position within the Department of Revenue as outlined in KRS 18A.115(4).

6. The Hearing Officer concludes that the termination of the Appellant by the Appointing Authority was erroneous in view of all the surrounding circumstances.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **KELLIE LANG V. FINANCE AND ADMINISTRATION CABINET AND PERSONNEL CABINET (APPEAL NO. 2016-039)** be **SUSTAINED**. In accordance with KRS 18A.095 (22) (c) the Hearing Officer **RECOMMENDS** that the Personnel Board **ORDER** the Appointing Authority to immediately rescind the termination and revert the Appellant to her former vacant position of Assistant Director and that she receive back pay and other benefits to which she may be entitled from the date of her termination to the date of her reversion and that she otherwise be made whole as a result of the termination. **[KRS 18A.105 and 200 KAR 12:030.]**

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen 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 exception 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 the 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 Brenda D. Allen** this 25th day of August 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy this day mailed to:

Hon. Paul Fauri
Hon. Cary Bishop
Hon. Rosemary Holbrook