

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2016-294

SUSAN MALLETTE

APPELLANT

VS.

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

ENERGY AND ENVIRONMENT CABINET

APPELLEE

AND

PERSONNEL CABINET

INTERVENOR

*** **

The Board, at its regular May 2018 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated April 11, 2018, 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 14th day of May, 2018.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:
Hon. Erritt Griggs
Hon. Rosemary Holbrook
Ms. Susan Mallette
Mr. David Dooley

**COMMONWEALTH OF KENTUCKY
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**FINDINGS OF FACT, CONCLUSIONS OF LAW
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** ** * * *

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, Susan Mallette, 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 she 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 explains her claims in the narrative portion of her appeal form wherein she states, in full:

On September 15, 2016, the Environmental Control Supervisor (ECS) and Environmental Control Manager (ECM) positions were granted a grade increase, but the more stringent Geologist Registered positions were not granted an equal grade increase. By not increasing the grade of the Geologist Registered (GR), Geologist Supervisor Registered (GSR), and Geologist Manager Registered (GMR), the incumbents were demoted.

Following discussion with the parties, the Appellant clarified that her 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; 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); and 3) that by giving a grade/salary increase to the less-qualified Environmental series and not giving one to the more-qualified Geologist series, the Agency decreased the salary gap between the two series, thereby “demoting” the Geologist series. Essentially, the Appellant argues that the salary gap between the two Geologist and Environmental series must be maintained because of the additional qualifications required to be a Geologist. As relief, the Appellant requests to have her classification increased by one (1) grade and to receive a ten percent (10%) 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 inapplicable to this appeal) on June 26, 2017, arguing, amongst other grounds, that the Appellant has failed to articulate a penalization as defined by KRS 18A. The Appellant failed to file a response to the Joint Motion to Dismiss. 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, highlighting that the Appellant did not respond, that the discrimination claim does not relate to a protected class and that the Appellant’s claim 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 claim should be dismissed for lack of jurisdiction.

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

BACKGROUND

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

2. The Appellant claims that, on or about September 15, 2016, she 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:

when comparing the qualifications for Environmental Control Supervisor and Environmental Control Manager positions to the Geologist Registered (GR) grade 15, Geologist Supervisor Registered (GSR) grade 16, and Geologist Manager Registered (GMR) grade 17 positions, it is clear that the qualifications for the Geologist series positions are more stringent and rigorous than that of the Environmental Control series positions.

4. Given the “more stringent and rigorous” 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. Additionally, the Appellant argues that the Agency effectively demoted those in the Geologist series when they changed the ECS and ECM job classifications, reducing the gap in pay between the Geologist series and the Environmental Control series.

6. As noted above, the Agency filed a Motion to Dismiss 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 salary spacing pay adjustment that the Appellant seeks. They also assert that the Appellant’s claim is moot as the Appellant’s current salary (\$3,967.60) is higher than the entry level salary for the next highest pay grade (\$3,553.38). Therefore, the Agency and Intervenor contend that the Personnel Board lacks jurisdiction over this appeal.

7. KRS 18A.005(11) provides:

“Demotion” means a change in the rank of an employee from a position in one (1) class to a position in another class having a lower minimum salary range and less discretion or responsibility.

8. 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.

9. 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, Susan Mallette, was a classified employee with status within the Energy and Environment Cabinet. The Appellant is a pay grade 15 Geologist Registered with a monthly salary of approximately \$3,967.60.

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 argues that she was demoted as a result of the job classification increase granted to the ECS and ECM positions. The Appellant does not allege, however, that she was subjected to a decrease in pay, that the job classification of her position was decreased, that she was moved to another job classification, or that she had less discretion or responsibility in her Geologist Registered position.

5. The Appellant also argues, in the alternative, that if she was not demoted she was otherwise penalized because, 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 and *de facto* demoted. She argues that the positions in the geologist series should be increased a minimum of one level to maintain the two-level pay gap that existed between the Geologist series and the Environmental series, prior to September 16, 2016.

6. 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) she made a lesser salary than the Environmental Control Supervisor and the Environmental Control Manager, evidence of which is not in the record; 2) she is in the same job classification, which she is not, Geologist series instead of Environmental series; 3) she was in the same work county, evidence of which is not in the record; and 4) she 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. The Hearing Officer finds that the Appellant was not demoted as defined by KRS 18A.005(11). The Appellant has not alleged that she was subjected to a decrease in pay, that the job classification of her position was decreased, that she was moved to another job classification, or that she had less discretion or responsibility in her Geologist Registered position. Thus, as a matter of law, the Appellant was not demoted.

4. 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 **SUSAN MALLETTE V. ENERGY AND ENVIRONMENT CABINET AND PERSONNEL CABINET (APPEAL NO. 2016-294)** 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
Susan Mallette