

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2015-192

FRANKLIN D. MCGOWAN

APPELLANT

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

EDUCATION AND WORKFORCE DEVELOPMENT CABINET

APPELLEE

\*\*\* \*\*

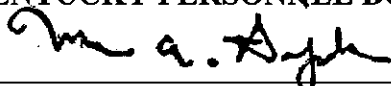
The Board at its regular March 2016 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated February 3, 2016, and being duly advised,

**IT IS HEREBY ORDERED** that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer 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.1 00.

**SO ORDERED** this 16<sup>th</sup> day of March, 2016.

KENTUCKY PERSONNEL BOARD

  
MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Patrick Shirley  
Franklin D. McGowan

**COMMONWEALTH OF KENTUCKY  
KENTUCKY PERSONNEL BOARD  
APPEAL NO. 2015-192**

**FRANKLIN D. McGOWAN**

**APPELLANT**

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

**EDUCATION AND WORKFORCE DEVELOPMENT CABINET**

**APPELLEE**

\* \* \* \* \*

This matter came on for the first day of a two-day evidentiary hearing on December 2, 2015 at 9:30 a.m. at 28 Fountain Place, Frankfort Kentucky before Brenda D. Allen, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Franklin D. McGowan, was present and was not represented by legal counsel. The Appellee, Education and Workforce Development Cabinet was present and was represented by the Honorable Patrick Shirley and the Honorable Tess Russell.

The Hearing Officer outlined that the burden proof was upon the Appellant to establish his claims regarding reclassification, back pay, performing duties outside of his classification and for proving discrimination based upon race.

**PROCEDURAL HISTORY**

1. The Appellant, Franklin D. McGowan, Jr. filed an appeal on August 21, 2015. In the appeal Mr. McGowan claimed racial discrimination and retaliation by his Director Lori Collins. Mr. McGowan contended that he was retaliated against for requesting a desk audit. He also claimed that he was discriminated against when lesser qualified and lesser experienced whites were hired and promoted within the Cabinet.

2. The Appellant supplemented the Appeal form with a Grievance form making the same allegations and seeking as his desired outcome, a reclassification, back pay and the reinstatement of duties that he contended were taken away from him. In responding to the grievance, Mr. McGowan's Assistant Director, Director and Executive Director each wrote that they needed additional information from Mr. McGowan to accurately respond to his grievance. By email of August 11, 2015, to Executive Director Jason Dunn, Mr. McGowan refused to provide any documentation. As a result, the grievance was denied and Mr. McGowan appealed that decision to the Personnel Board.

## BACKGROUND

1. On the first day of the Hearing, the Appellant made a motion to amend his witness and exhibit list to add three witnesses and work related emails. He also sought to add Agency documents that he recently received from the Appellee. The Appellee objected to the addition of witnesses and exhibits and made a motion for a continuance if the Hearing Officer granted Appellant's motion. After discussion, consideration and a brief recess, the Hearing Officer queried the Appellant as to who the additional witnesses were and the nature of their testimony. The Appellant responded. The Hearing Officer also required Appellant to produce the potential exhibits for Appellee's review. Over the objection of the Appellee, the Hearing Officer **GRANTED** Appellant's Motion to Amend subject to the Appellee being afforded a two-hour recess within which to review the potential exhibits and prepare for the additional witnesses. The Hearing Officer recessed the hearing at 10:00 a.m.

2. At 12:00 noon, the Hearing Officer re-convened the hearing and asked if the Appellee had reviewed the potential exhibits. The Appellee relayed that all potential exhibits had been reviewed. The Appellee again made a Motion for Continuance. The Hearing Officer **OVERRULED** the Motion, citing that because the burden of proof was upon the Appellant, the Appellee was not unduly prejudiced by the additional witnesses or exhibits because the Appellee had been afforded two hours to review the documents and had also been provided a verbal summary of the witness testimony. The Hearing Officer noted that this was more information than would have been provided if Appellant had filed complete witness and exhibit lists in accordance with the Hearing Officer's Interim Order.

3. The Appellee then made a Motion to amend its witness list to add Priscilla McCowan who would also serve as the Agency representative during the hearing. The Motion was granted and Ms. McCowan was present during both days of hearing as the agency representative.

4. The Appellant made an opening statement, followed by the Appellee.

5. The first witness to be called by the Appellant was **Judy Hill** a retired Internal Policy Analyst with the Education and Workforce Development Cabinet. Ms. Hill, stated that she worked with Mr. McGowan as a part of a team for The Trade Program, a federally funded program established to assist workers who have lost their jobs because their positions had been sent to a foreign country. She testified that Mr. McGowan was the Program Coordinator for the Trade Program and that he worked with her and Brandon Inman on this program. She testified that she was hired as a temporary worker in 2009 and was hired full time in 2013 at a Grade 15. She stated that Mr. Inman, who was also white, was promoted to a Grade 15, as well. Ms. Hill stated that she believed that Mr. McGowan should have also been a Grade 15 because he was performing work similar to the work that she and Mr. Inman performed. Ms. Hill admitted on cross-examination that she had no experience as a supervisor or working with the Personnel Cabinet to support her opinion that a reclassification was appropriate. Ms. Hill testified that she was not involved in and did not know the reasons supporting Mr. Inman's promotion. She stated

that she had no knowledge of Mr. McGowan being retaliated against by the Cabinet based upon his race.

6. The second witness to be called on behalf of the Appellant was **Terri Bradshaw**. Ms. Bradshaw testified that she is currently the Executive Director of the Kentucky Capital Development Corporation, but formerly served as the Branch Manager for the Workforce Development Cabinet until June 2015. She stated that she was the Appellant's first-line supervisor and Lori Collins served as their Director. Ms. Bradshaw identified Appellant's Exhibit 1 as the Appellant's Evaluation Plan for 2015. She stated that she prepared and signed the document at the beginning of the calendar year along with Mr. McGowan as the planning document for his 2015 Evaluation. The document was entered without objection.

7. Ms. Bradshaw testified that during her tenure as Mr. McGowan's supervisor, he had never asked her for a reclassification. She testified that there were occasions when she had discussed with Lori Collins that Mr. McGowan and some of his co-workers were performing similar duties.

8. Ms. Bradshaw then began to testify about Mr. McGowan's work performance and duties and provided that she had complained to Ms. Collins about Mr. McGowan as she had complained about others, but could not recall any specifics.

9. She testified as to an incident when Mr. McGowan had contacted the U.S. Department of Labor about an issue with unemployment appeals decisions without first informing his supervisors. Ms. Bradshaw testified that Ms. Collins had directed her to issue Mr. McGowan a written reprimand for his conduct. Ms. Bradshaw testified that she agreed that Mr. McGowan's failure to follow the chain of command on this issue was a problem, but testified that she did not issue Mr. McGowan a written reprimand as Ms. Collins directed.

10. As it pertains to Mr. McGowan's assigned duties, Ms. Bradshaw testified that the Rapid Response Program, another federal program was taken away from Mr. McGowan in January 2015 and given to Michelle DeJohn, a newly hired branch manager. Ms. Bradshaw admitted that some of her own duties and programs were re-assigned to Ms. DeJohn, as well.<sup>1</sup>

11. Ms. Bradshaw testified that as Mr. McGowan's first line supervisor, she would normally approve his travel and that he would travel frequently for the Rapid Response Program. She stated that Ms. Collins directed her to notify Mr. McGowan that Ms. Collins would now assume this responsibility and that Mr. McGowan's requests for travel would need to come directly to her. She testified that Ms. Collins did not provide a reason for this change, but she relayed the message to Mr. McGowan. Ms. Bradshaw stated that she was unable to recall whether the change in Mr. McGowan's travel approval occurred at the same time that the Rapid Response Program was reassigned to Ms. DeJohn.

---

<sup>1</sup> The Hearing Officer notes for the record that for purposes of analysis of this race discrimination claim that Michelle DeJohn and Terri Bradshaw are white and Frank McGowan is black.

12. Ms. Bradshaw testified that the Cabinet implemented reorganization in September or October of 2013 and that she did not know if Mr. McGowan's reassignment of duties or Mr. Inman's promotion were related to the reorganization. She testified that while she supervised both Mr. McGowan and Mr. Inman, the decision to promote Mr. Inman occurred just prior to her hiring into the Branch Manager position.

13. On cross-examination, Ms. Bradshaw testified that she maintained a professional relationship with Ms. Collins, but admitted that she had filed two Personnel Board actions against the Cabinet and a grievance against Ms. Collins. Ms. Bradshaw testified that Ms. Collins was responsible for assigning Ms. Bradshaw the duties of Assistant Director without providing her the increased pay. Ms. Bradshaw admitted that Ms. Collins had testified against her in those proceedings and that they were awaiting a recommended order from the Hearing officer in both of her Personnel Board Cases.

14. Ms. Bradshaw testified that she has no knowledge of any retaliation against Mr. McGowan based on race.

15. The next witness to testify was **Amanda Hall** who serves as the Workforce Development Consultant and worked with Mr. McGowan, although not in the same Branch. She testified that she and Mr. McGowan oversee different programs. She identified Appellant's Exhibits 2 and 3 and they were entered into the record over the objection of the Appellee. Ms. Hall testified that these exhibits were notes that she had taken for her personal use after attending two meetings. She testified that the first set of notes she wrote just after a May 27, 2015 meeting during which she was called in by her supervisor who, along with other supervisors from the Unemployment Insurance Division all of whom expressed significant concerns that Mr. McGowan had contacted the Department of Labor without going through the chain of command. Ms. Hall testified that in her own branch the chain of command is utilized before anyone contacts the Department of Labor and her supervisor and others were upset by Mr. McGowan's failure to do so. Ms. Hall testified that Mr. McGowan was not present during the meeting, but his supervisors Lori Collins and Roger Phillips joined the meeting later to discuss Mr. McGowan's conduct and how to address the situation Mr. McGowan created going forward.

16. Ms. Hall identified Appellant's Exhibit 3 as a set of notes from a meeting the following week during which Mr. McGowan, Mr. Inman and she each provided a verbal summary of their duties to Assistant Director Roger Phillips. She admitted that her notes only capture her impression of what each person said during the meeting and that it was not necessarily a representation of their actual position descriptions.

17. Ms. Hall testified that she had no knowledge of any instance of Mr. McGowan being retaliated against because of his race.

18. The next witness to testify on behalf of the Appellant was **Greta Greenwade Jones**. Ms. Jones testified that she serves a Workforce Development Facilitator for the Trade Program in Western Kentucky. She testified that she had a good working relationship with Mr. McGowan related to the Trade Program and that he had made five to seven trips to Western Kentucky between 2013 and mid-2015. She testified that on July 2, 2015 she received an email from her supervisor directing that from that point forward all communication regarding Trade had to be directed to Brandon Inman and Roger Phillips only. She testified that later, she received an email from Lori Collins to Western Kentucky District clarifying the communication process going forward. Although the second email did not limit the ability of anyone to contact any central office staff, Ms. Jones checked with her own supervisor, who stated that since the process established was working fine she should continue to contact only Brandon Inman or Roger Phillips for questions. Ms. Jones identified Appellant's Exhibits 4 and 5 as both emails and they were entered into the record over the objection of the Appellee.

19. Ms. Jones testified that she has no knowledge of any facts to indicate that Mr. McGowan was retaliated against because of his race.

20. The Appellant, **Franklin McGowan**, then took the stand on his own behalf. He testified that he is a Program Coordinator with the Cabinet and that he was hired in August of 2013. He stated that prior to that he worked for Employment Solutions and his educational level is 18 hours short of a Master's Degree. He testified that his job duties were taken away for no reason and this was retaliation. He said he was doing the same work as his coworkers and they were being paid more than him and that no blacks could serve in leadership positions at the Cabinet.

21. Mr. McGowan stated that Lori Collins retaliated against him by requiring him to "jump through hoops" to travel for work and that no other person in the entire Cabinet had to follow the rules imposed on him. He stated that he was required to complete a summary of any meetings that he traveled to within the state and that Lori Collins had to pre-approve his travel. He testified that if he did request permission to travel, Roger Phillips would call ahead to see if Mr. McGowan's presence was actually required prior to authorizing his travel. Mr. McGowan estimated there were 2000 to 3000 employees in the Cabinet and admitted that he had discussed this issue with only 4 or 5 people in the Cabinet. He stated that none of the 5 people were required to go through the same process.

22. Mr. McGowan also stated that he was retaliated against for requesting a desk audit and that Ms. Collins refused to provide him with a desk audit. On cross examination, however Mr. McGowan admitted that after he requested a desk audit, Ms. Collins met with him and directed him to prepare a document outlining his duties and assigning a percentage to the various duties he performed. He admitted that after he prepared the document, she met with him again and in reviewing his document found that the combined percentages for Mr. McGowan's duties greatly exceeded 100 percent. Mr. McGowan testified that he did correct the document and provided it to Ms. Collins again, but she did nothing to move his request for a desk audit forward. Mr. McGowan was asked to identify Appellee's Exhibit 1. Mr. McGowan identified this as the document he created for his desk audit at Ms. Collins' request. He admitted after

reviewing the exhibit that the percentages he assigned to each duty when combined, still exceeded 100 percent and that he did not change the document as she had requested. He testified that instead of 100 percent the document's percentage total was likely 350 or 400 percent. Appellee's Exhibit 1 was entered into the record over the objection of the Appellant.

23. Mr. McGowan testified that he had filed a grievance against Ms. Collins because she had promoted whites with lesser experience and that this was discrimination against him because he was black.

24. On cross examination, Mr. McGowan admitted that after filing his grievance, he refused to provide the Appellee with the names of any of the lesser qualified whites that he contended were unjustly hired or promoted to his detriment.

25. Throughout his direct testimony, Mr. McGowan contended that he had always performed well and had no performance issues that would have warranted a change in how he was treated by management or the removal of his duties. Mr. McGowan discussed that he had created a user manual for facilitators throughout the state who were responsible for the Rapid Response Program. He stated that he had provided the draft to Ms. Collins for her review and after several months she reviewed and met with him to indicate that it was not acceptable and that significant changes needed to be made. Mr. McGowan admitted during the hearing that despite Ms. Collins' directive, he sent the draft manual out to several individuals throughout the state. Mr. McGowan claimed that Ms. Collins was copied on the email so knew what he had done.

26. The Appellant identified Appellee's Exhibit 2 as Mr. McGowan's email that accompanied the draft manual. Upon review of the exhibit, he admitted that Ms. Collins was not copied on the email as he had just testified and that she confronted him after she received a complaint from someone out in the state. Appellee's Exhibit 2 was entered into the record without objection.

27. As it pertains to his claim that duties were being taken away from him as a retaliatory act, Mr. McGowan testified that the duties for Rapid Response were given to Michelle DeJohn and the Trade duties were also taken away. However upon questioning from the Hearing Officer, Mr. McGowan admitted that the duties of Trade Coordinator were only removed for the Western Kentucky District and he remained the Trade Coordinator for the remaining 9 districts in the state.

28. Mr. McGowan also admitted to being verbally reprimanded by Ms. Bradshaw about his failure to follow the chain of command when contacting the Department of Labor, although he contended at the hearing that he and others routinely called the Department of Labor and that his conduct was not a breach of protocol.

29. The Appellant identified Appellant's Exhibit 6 as his personnel file. The Exhibit was entered into the record. Upon motion of the Hearing Officer, post hearing, Appellant's Exhibit 6 was entered into the record **UNDER SEAL**. Appellant's Exhibit 7, the evaluation planning document completed by Roger Phillips after some of Mr. McGowan's duties were reassigned, was entered into the record without objection. The Appellant rested.

30. The Appellee made a Motion for Summary Disposition arguing that with the exception of the Appellant, each of Appellant's witnesses testified that they had no knowledge that Mr. McGowan was retaliated against because of his race. The Appellee objected to the Motion. The Hearing Officer **OVERRULED** the motion citing that the legal standard for discrimination cases required a burden shifting and that after putting forth claims of discrimination, the burden shifts to the Appellee to proffer legitimate nondiscriminatory reasons for their decisions. The hearing adjourned for the day and the parties were set to return on December 3, 2015.

31. The second day of the hearing convened on December 3, 2015 at 9:30 a.m. The first witness to testify for the Appellee was **Beth Steinle** who serves as the Director of Human Resources in the Education and Workforce Development Cabinet. She testified that she oversees all aspects of personnel and payroll for most agencies within the Cabinet. She stated that the protocol for requesting a desk audit was for the employee and the employee's supervisor to establish what the employee's permanent duties are. If the supervisor finds that there are permanent changes to the position different than the position description, the supervisor should put together a draft position description to be submitted to her office for review. She stated that as it pertains to this case, her office was contacted by Lori Collins who inquired about the process for a desk audit. The process was outlined to her, and no request for reclassification was received.

32. She testified in reviewing Mr. McGowan's complaint she had worked with Priscilla McCowan to review the personnel files of several employees in the division and the two branches to determine who Mr. McGowan contended was unjustly promoted instead of him. She testified that in reviewing the file of Mr. Inman, she found that he was reclassified to an Internal Policy Analyst on August 3, 2013, the same day that Mr. McGowan was hired. She testified that Mr. Inman had 10-12 years of experience within the Cabinet in positions of increased responsibility. Ms. Steinle testified that there were two promotions while Mr. McGowan was employed, Michelle DeJohn was promoted to branch manager and Roger Phillips was promoted to Assistant Director. She testified that she reviewed the register for each of these two positions and Mr. McGowan did not apply for either job.

33. The next witness to testify was **Lori Collins**. She stated that she formerly worked as the Division Director for the Office of Employment Training and oversaw federal programs. She stated that she was responsible for oversight compliance and supervising staff.

34. Ms. Collins testified as to the basis for all of her business decisions regarding Mr. McGowan and stated that she was greatly bothered by his contention that she had discriminated against him.



35. She testified that In July 2013 a reorganization was initiated and that as a result there was a decision to functionally align the programs to either serve the employees or the employers. Accordingly a second branch was established to follow this programmatic change. Because Rapid Response was a function of serving the employer it was assigned to one branch. Trade, which primarily served the individual employees, was assigned to the second branch. Ms. Collins stated that the reorganization took some time to implement and there were numerous meetings to decide how to implement the reorganization. She stated that Mr. McGowan's was the only position that had duties associated with both Rapid Response and Trade, so it became necessary for her to begin supervising Rapid Response until they could effectuate the hiring for the newly created branch. Terri Bradshaw as the existing branch manager continued to oversee the Trade Program. Once the new branch was established, the duties of Rapid Response were, consistent with the reorganization, taken from Mr. McGowan and assigned to the new Branch Manager, Ms. DeJohn, as they went through process of hiring her staff.

36. As it pertains to Mr. McGowan's travel, she testified that she had received numerous complaints from staff in the field throughout the state that Mr. McGowan's presence was not needed and that he added no value to the meetings, yet continued to travel to the region with great frequency. She outlined that she received complaints from a number of regions including Cumberland, Western Kentucky, Bluegrass and Northern Kentucky. She testified that complaints became quite common. She stated that staff reported that Mr. McGowan would arrive late to the meetings, leave early and usually spend the bulk of his time on two cell phones. She testified that she discussed these concerns with Ms. Bradshaw and asked her to address them with him. When the complaints continued, she took over approving Mr. McGowan's travel. Her Executive Director, Buddy Hoskinson, also began receiving complaints about this issue so directed her to require that Mr. McGowan write a summary of his meetings in the field to determine if they were necessary.

37. Ms. Collins testified that Mr. McGowan was never directed to prepare the Rapid Response manual, but that he did so on his own. She stated that after reviewing it, she was not in agreement with the direction Mr. McGowan was attempting to take the program. She stated the manual was also riddled with grammatical errors that made it difficult to understand. She testified that she was very clear with him that it needed a total rewrite and it was her expectation that Mr. McGowan would make the changes and provide a revised draft to her. However, instead she received a call from someone in the state inquiring as to why the draft manual was sent out by Mr. McGowan. She met with him and addressed his failure to follow her clear directives.

38. Ms. Collins stated that with regard to the desk audit, Mr. McGowan asked her for a reclassification and contended that he was entitled to it because he worked with other Grade 15 staff and felt that he should be one as well. She inquired of the Department of Human Resources as to the process, then met with Mr. McGowan and explained to him that he needed to prepare a document outlining his duties so that she could determine if his assigned work was no longer consistent with his position description. She explained to him that he needed to assign a percentage of time to each task. When he provided a document, she first realized that it looked a

great deal like his existing position description. However, she noted that he had no percentage of time assigned to any task. She explained again what she needed and it was her expectation that he would comply. Instead, he submitted to her the document with totals well over 100% and never supplied her with a useful document for her to consider for the desk audit and reclassification.

39. As it pertains to Mr. McGowan calling the Department of Labor, she states that she actually overheard him and two others on the conference call at the time and inquired of Ms. Bradshaw why they were calling the Department of Labor. She indicated the protocol was, if there was an issue that warranted the involvement of an outside entity, the issue should have first been brought to the attention of Mr. McGowan's superiors.

40. Ms. Collins testified that as the Director, she relied upon Ms. Bradshaw as the Branch Manager to address all concerns that she had relayed to her about Mr. McGowan's work performance and she had no reason to believe that Ms. Bradshaw wasn't carrying out those duties.

41. Ms. Collins reviewed Appellant's Exhibit 4, the email from Gina Triplett outlining that questions regarding Trade needed to be directed to Brandon Inman and Roger Phillips. She stated that she received the email and does not know what brought about Ms. Triplett's decision to send that to her staff. Afterward she stated that she had received concerns that those in the state felt that they could not communicate with Central Office, so sent an email, Appellant's Exhibit 5, indicating that questions could be sent to them at any time

42. The final witness to testify on behalf of the agency was **Priscilla McCowan**. She serves as the Cabinet Training and Education Coordinator and investigates Equal Employment Opportunity Complaints. She stated that she received Mr. McGowan's grievance alleging discrimination, but that Mr. McGowan indicated he wanted to file an Equal Employment Opportunity (EEO) Complaint. She stated that she advised that there was a separate document to initiate and provided it to him and he filed that on August 5, 2015.

43. She testified that she met with her supervisor, Beth Steinle to review and develop a plan to investigate both the grievance and the EEO Complaint since the allegations were similar. Ms. McCowan indicated that overall, investigation of this claim was a taxing process because as they attempted to work with Mr. McGowan to obtain information to investigate, he would refuse to answer questions citing that it was "upon the advice of counsel." She stated that he never would provide the name of his counsel and the counsel never participated in the process.

44. Ms. McCowan testified that she and the Executive Director of the Office of Employment Training, Jason Dunn, met with Mr. McGowan on August 10, 2015 to discuss both complaints, since Mr. Dunn was responsible for investigating the grievance and Ms. McCowan was responsible for the EEO investigation. Mr. McGowan did not provide any information during the meeting and the next day sent an email, Appellee's Exhibit 3, stating that he would

not provide any additional documentation to them. Appellee's Exhibit 3 was entered into the record.

45. Despite Mr. McGowan's lack of cooperation, Ms. McCowan testified that she still investigated the complaint and found no evidence at all that any of the decisions that were made were based on his race and that all were sound business decisions.

46. The Appellee rested. Both parties made closing arguments. The record was closed. The Hearing Officer considered the entire administrative record.

### **FINDINGS OF FACT**

1. The Appellant, Franklin McGowan, was employed on August 3, 2013, in the Education and Workforce Development Cabinet as a Program Coordinator, Grade 13. (Appellant's testimony, Appellant's Exhibit 7.)

2. The Appellant's position was the only position that assumed responsibility for Trade and Rapid Response, two federal programs that supported displaced employees and their employers. (Testimony of Appellant, Collins.)

3. Pursuant to an agency reorganization in July 2015, the programs Rapid Response and Trade were separated and the Rapid Response Program removed from Mr. McGowan and assigned to newly created branch headed by Branch Manager Michelle DeJohn. (Testimony of Collins.)

4. Other programs and work duties belonging to white employees were also reassigned to Ms. DeJohn. (Testimony of Terri Bradshaw, Appellant.)

5. Mr. McGowan requested that his director, Lori Collins, conduct a desk audit and reclassification of his position. Ms. Collins directed Mr. McGowan to provide her with a document outlining his duties and assigning percentages of time to each task totaling 100 percent in order to determine if his existing position description and actual work were still aligned. (Testimony of Appellant, Collins.)

6. After two requests, Mr. McGowan provided a document with percentages totaling more than 600 percent and never provided a usable document for his Director to move the desk audit forward. (Appellee's Exhibit 1, Testimony of Collins, Appellant.)

7. In the course of performing his work, Mr. McGowan had been the subject of numerous complaints to both his Director and Executive Director Buddy Hoskinson. According to the complaints received from several regions throughout the state, Appellant would attend meetings in their districts without adding value to the meeting, arriving late, leaving early and spending time on two cell phones during the meetings. (Testimony of Collins.)

8. As a result of the complaints, the Executive Director required that Appellant complete a summary of all meetings he attended throughout the state and the Director required that all travel be approved by her. (Testimony of Appellant, Collins.)

9. On the day that Mr. McGowan was hired, Brandon Inman, who had been employed in the Cabinet for more than a decade, was reclassified to an Internal Policy Analyst, Grade 15. (Testimony of Steinle, Collins.)

10. After Mr. McGowan's hiring there were promotions of at least three white employees. Mr. McGowan did not apply for any of these positions. (Testimony of Steinle)

11. Appellant filed a grievance and EEO Complaint alleging discrimination. (Testimony of McCowan, Appellant).

12. The Appellant failed to cooperate and refused to provide any facts to support his claim for either the grievance or the EEO Complaint. (Appellee's Exhibit 3, Testimony of Appellant, McCowan.)

13. Despite the lack of cooperation, the allegations were investigated and no discrimination was found. (Testimony of McCowan.)

14. In the instant matter, Appellant has alleged that he has been discriminated against because of his race. All of Appellant's own witnesses testified that they had seen nothing to indicate that the Appellant had been discriminated or retaliated against because of his race. (Testimony of Hall, Collins, Jones, Bradshaw, Hill)

15. Appellant has failed to provide any evidence that his duties performed were outside of his classification and has failed to identify any position that he applied for during his employment with the Cabinet.

### **CONCLUSIONS OF LAW**

1. KRS 18A.095(14) (a) provides "Any employee, applicant for employment, or eligible on a register, who believes that he has been discriminated against, may appeal to the Board."

2. In accordance with KRS 18A.037, the Commonwealth has created a classification and compensation structure to establish the credentials, qualifications and pay of state government positions.

3. The Appellant has alleged that he was required to work outside of his classification, was denied a reclassification and pay in accordance with his duties, was retaliated against for requesting a desk audit and discriminated against because of his race. The Appellant has put forth no evidence to show that he was improperly classified or required to perform duties outside of his classification.

4. The Appellant has put forth no evidence to show that he was retaliated against for requesting a desk audit or because of his race.

5. The Appellant contends that the rules that applied to him regarding his travel were a means used by Director Lori Collins to discriminate against him because of his race. However, the Appellee has put forth numerous and specific legitimate non-discriminatory reasons in support of its business decisions.

6. The Appellant contends that duties were taken away from him and assigned to others and that this was a form of racial discrimination. The Appellant has put forth no evidence to support this claim. The Appellee has put forth legitimate non-discriminatory reasons, an agency reorganization, and alignment of programs to support its decisions.

### **RECOMMENDED ORDER**

The Hearing Officer recommends to the Personnel Board that the case of **FRANKLIN McGOWAN VS. EDUCATION AND WORKFORCE DEVELOPMENT CABINET (APPEAL NO. 2015-192)** be **DISMISSED**.

### **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 3<sup>rd</sup> day of February 2016.

**KENTUCKY PERSONNEL BOARD**

  
\_\_\_\_\_  
**MARK A. SIPEK**  
**EXECUTIVE DIRECTOR**

A copy this day mailed to:

Hon. Patrick Shirley  
Hon. Tess Russell  
Franklin McGowan