

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD

KATIE MCKONE (APPEAL NO. 2013-034)

AND

ARIC PAYNE (APPEAL NO. 2013-035)

APPELLANTS

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

ENERGY AND ENVIRONMENT CABINET
DR. LEN PETERS, APPOINTING AUTHORITY

APPELLEE

** ** *

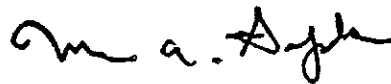
The Board at its regular July 2013 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated May 28, 2013, and being duly advised,

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 Appellants' appeals are 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 16th day of July, 2013.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Gordon Slone
Katie McKone
Aric Payne
Lynn Keeling

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PERSONNEL BOARD**

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VS.

**FINDINGS OF FACT, CONCLUSIONS OF LAW
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These appeals came on for a pre-hearing conference on April 9, 2013, at 10:00 a.m., 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.

Appellants, Katie McKone and Aric Payne, were present at the pre-hearing conference and were not represented by legal counsel. Appellee, Energy and Environment Cabinet, was present and represented by the Hon. Gordon Slone. Also present on behalf of the agency as its representative was Ms. Lynn Keeling.

The purposes of the pre-hearing conference were to determine the specific penalizations alleged by Appellant, to determine the specific section of KRS 18A which authorizes this appeal, to 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.

Appellants stated these appeals were essentially filed "jointly" as the issues arose out of the same set of circumstances regarding the promotion of another employee. The Hearing Officer inquired and no party objected to the matters being consolidated for all purposes.

In the appeals, Appellants indicate that they had been hired into the Energy and Environment Cabinet (EEC) in August 2009, both as Environmental Biologist Specialists (pay grade 14), receiving a 5 percent increment when they came off initial probation in February 2010. Subsequent to that, later in 2010, they requested a promotion, but were informed that none were available as there were no vacant slots, but instead were offered reclassifications, as they were told it would be years before promotions might be available. Appellant McKone stated she had been approached about a reclassification, and Appellant Payne as well had inquired. Ultimately both were reclassified to the position of Environmental Biologist Consultant (pay grade 15) and received the concomitant 5 percent increase in pay. Of course, with

reclassification there is no probationary period, thus, there is no 5 percent increase for coming off promotional probation.

Appellants noted that Mr. Mark Martin had begun as they had as an Environmental Biologist Specialist (pay grade 14) in 2011. According to Appellants, Martin later, like they, was approached about a reclassification (or had sought one – the Hearing Officer is unclear), but Appellants stated that Martin's supervisor told him that what had gone up as a request for reclassification to the Environmental Biologist Consultant position (pay grade 15) came back as a promotion.

Appellants were upset that a fellow employee with less state service than they in the same exact job classification was given a promotion, which will entitle him, should he complete the promotional probation as expected, to an additional 5 percent pay raise, and he would be making more than they and have less experience, especially since they were told promotions were not available.

The agency representative, Ms. Keeling, as did counsel for the Appellee, clarified that the promotion was not "given" to Mr. Martin, but had gone through the proper process. Appellants countered that what was posted as a promotional opportunity was in fact the exact position and the exact job duties which Mr. Martin had been performing as a pay grade 14, so even though it was posted as a promotional opportunity and interviews were conducted, etc., the promotion was intended clearly for Mr. Martin.

In accordance with the briefing schedule entered by Interim Order dated April 16, 2013, the Appellee filed a Motion to Dismiss; the Appellants jointly responded; and Appellee filed a reply. This matter now stands submitted for a ruling on Appellee's Motion to Dismiss.

BACKGROUND

1. During the relevant times the Appellants, Katie McKone and Aric Payne, were classified employees with status.

2. Appellants were both at the time of filing these appeals Environmental Biologist Consultants (pay grade 15), having been reclassified in 2010 from the positions of Environmental Biologist Specialists (pay grade 14).

3. As was noted in the preamble above, Appellants filed these appeals, and had earlier filed grievances, requesting they be correctly compensated due to a fellow employee, Mark Martin, having received a promotion which would conceivably result in employee Martin ultimately making a higher salary than the Appellants.

4. In its Motion to Dismiss, Appellee recounts the hiring, and subsequent reclassification and salaries of the Appellants. Counsel also discusses how employee Martin was

hired and the subsequent promotional opportunity for which he was selected. Counsel notes that grievances filed by Appellants were denied.

5. Counsel argues that these matters should be dismissed for failure to state a penalization over which the Board would have jurisdiction and because it cannot provide relief for the alleged harm. Appellee argues the personnel actions are in compliance with the Personnel regulations, and that the establishment of the new Environmental Biologist Consultant position for which Martin was ultimately selected did not penalize the Appellants. Counsel notes the Appellants did not apply for the position nor had they been selected for the position in question would they have been eligible for any salary increase. Counsel states that, "The appropriate remedy would be to remove the improperly promoted employee from the position, not raise the salaries of other employees."

6. Counsel stated that, "In essence, Appellants have requested the Board to find that the regulation regarding salary advancement is arbitrary merely because they have similar education and experience to Martin and yet he will receive a 5 percent salary advancement and they will not."

7. The regulations in question are as follows:

A. 101 KAR 2:034, Section 3, regarding salary adjustments and states in pertinent part:

(1) Promotion. An employee who is promoted shall receive the greater of five (5) percent for each grade, or an increase to the minimum of the new grade except as provided under subsection (2)(b) of this section.

...

(3) Reclassification.

(a) An employee who is advanced to a higher pay grade through reclassification shall receive the greater of five (5) percent for each grade or the new grade minimum except as provided under subsection (2)(b) of this section.

(b) An employee who is placed in a lower pay grade through reclassification shall receive the same salary received prior to reclassification but shall not be eligible for a salary increase upon promotion, reclassification, detail to special duty or reallocation until he is moved to a job class with a higher pay grade than that from which he was reclassified. If a promotion, reclassification, detail to special duty or reallocation occurs, it shall be deemed as having been made from the grade from which the employee had been reclassified.

B. 101 KAR 2:034, Section 4(2) which states:

(2) Promotional probation increase. An employee shall receive a five (5) percent salary advancement on the first of the month following completion of the promotional probationary period except as provided under Section 3(2)(b) of this administrative regulation.

8. Finally, counsel contends that Appellants did not have standing to contest Martin's promotion as they did not seek this position themselves, and quite frankly have not been harmed. Essentially, counsel is arguing that in accepting the reclassification, the Appellants avoided the possibility of not completing promotional probation, and losing not only the potential for 5 percent increase when coming off promotional probation, but also the 5 percent for accepting the position. Counsel contends that accepting reclassification involves no risk.

9. Appellants filed a joint response. Appellant McKone stated in her response that, "I wanted to stay in the TMDL section because I have a field partner and supervisor that I respect, and these benefits outweighed applying for an environmental biologist consultant in another section if a vacancy became available, and there would be no guarantee that I would receive the position." Appellant McKone went on to state that, "To reiterate, my supervisor told me that she could not create a position for me to apply for within our section, which would result in me staying in our section, keeping my job duties, and receiving a 5 and 5 if I completed the probation period."

10. Appellant Payne stated much the same. He enjoyed the section he worked in with the partners at that time and that "... the benefits of staying in a section I enjoyed outweighed the other possibilities. Therefore, I accepted the reclassification and received a 5% pay increase based on the facts which I was presented. To reiterate, my acting supervisor (branch manager) told me that he could not create a position for me to apply for within my section, which would result in me staying in my section, keeping my job duties, and receiving a 5 and 5 if I completed the probation period."

11. Appellants further questioned the legitimacy of the process by which a position was created for which ultimately employee Martin was selected, and also cites two other Division of Water employees, Barbara Scott and Zach Couch, one of whom (Couch) had received a promotion when Appellants claimed they were being told this was not a possibility unless there is a vacancy because there is a "cap" on positions.

12. For employee Scott, she apparently laterally transferred into another position, and did not receive a pay increase. Appellants went on to state, "If Martin had stepped from one position into another with completely different job duties, and then his previous position had been posted, no questions would have been asked. However, when Martin went through the exact same process as the Appellants, he had his job duties posted and was given the opportunity

for a promotion. If there was a legitimate need to establish the Consultant position, then why was Mark not reclassified to a Consultant like Payne and McKone?"

13. Appellants argue this is inconsistent and unfair treatment and that they are still requesting a 5 percent salary increase as stated in the grievance.

14. Appellee filed a timely reply to the joint response by Appellants. Appellee argues that, "If promotions and transfers are made improperly, the remedy is to void the improper personnel actions. The remedy would not be to corrupt the personnel system for the benefit of Appellants and award them each a 5% salary increase." Counsel cites previous Personnel Board cases which counsel contends state that. Counsel goes on to also make a previously not raised argument that the appeals are time barred.

15. KRS 18A.095(18)(a) states:

The board may deny a hearing to an employee who has failed to file an appeal within the time prescribed by this section; and to an unclassified employee who has failed to state the reasons for the appeal and the cause for which he has been dismissed. The board may deny any appeal after a preliminary hearing if it lacks jurisdiction to grant relief. The board shall notify the employee of its denial in writing and shall inform the employee of his right to appeal the denial under the provisions of KRS 18A.100.

16. KRS 18A.005(24) states:

‘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.

FINDINGS OF FACT

1. During the relevant times the Appellants, Katie McKone and Aric Payne, were classified employees with status.

2. The Hearing Officer finds that the Appellants did not apply for the position for which employee Martin was ultimately selected.

3. The Hearing Officer finds both Appellants accepted reclassifications to their current positions of Environmental Biologist Consultant, knowing full well such eliminated the possibility of being promoted into such position should a vacancy occur, and receiving the “5 and 5” (5 percent for the promotion and 5 percent for successfully completing the promotional probationary period) that would accompany such a move. The Hearing Officer finds instead that both Appellants knew full well that accepting reclassification within their current positions, would allow them to remain in their current jobs working with people they liked and respected, but that there would only be a 5 percent increase in pay as a result.

4. The Hearing Officer finds that Appellee is correct in that the Appellant’s lack standing to challenge the promotional process, in an appeal, for employee Martin as they did not apply for that position. The Hearing Officer finds the Appellants could request an investigation of such, but if the Board found that the promotional process was invalid or flawed that would not entitle the Appellants to receive an upward adjustment in their pay.

5. The Hearing Officer finds that the Personnel Board lacks jurisdiction to consider these appeals pursuant to the language set forth in KRS 18A.095(18)(a) and that there is no relief that can be afforded the Appellants.

6. The Hearing Officer finds no merit in Appellee’s argument that the appeals would be time barred.

CONCLUSIONS OF LAW

1. The Hearing Officer concludes as a matter of law that pursuant to KRS 18A.095(18)(a) that the Personnel Board lacks jurisdiction to further consider this appeal as it lacks the ability to grant relief based on the claims stated by the Appellants.

2. The Hearing Officer concludes as a matter of law that pursuant to KRS 18A.005(24) that the Appellants have failed to state a penalization that would entitle them to any further consideration of the matters raised in these appeals by the Personnel Board.

3. The Hearing Officer concludes these appeals must fail as a matter of law.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the consolidated appeals of **KATIE MCKONE (APPEAL NO. 2013-034) AND ARIC PAYNE (APPEAL NO. 2013-035) VS. ENERGY AND ENVIRONMENT CABINET** 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 Boyce A. Crocker this 28th day of May, 2013.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Gordon Slone
Katie McKone
Aric Payne