

CERTIFICATION OF PERSONNEL BOARD RECORDS

I certify that attached hereto is a true and correct copy of the Personnel Board's Final Order in the case of **MICHELLE MITCHELL MCCLOSKEY V. ENERGY AND ENVIRONMENT CABINET AND PERSONNEL CABINET (APPEAL NO. 2019-236)** as the same appears of record in the office of the Kentucky Personnel Board.

Witness my hand this 14th day of February, 2024.



MARK A. SIPEK, SECRETARY
KENTUCKY PERSONNEL BOARD

Copy to Secretary, Personnel Cabinet

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2019-236**

MICHELLE MITCHELL MCCLOSKEY

APPELLANT

V.

**FINAL ORDER REJECTING THE HEARING OFFICER'S
FINDINGS OF FACT AND CONCLUSION OF LAW
AND RECOMMENDED ORDER**

ENERGY AND ENVIRONMENT CABINET

AND

PERSONNEL CABINET

APPELLEES

** ** *

The Board, at its regular February 2024 meeting, having considered the record, including the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer dated October 27, 2023, Appellee's Exceptions and Request for Oral Argument, Appellant's Response to Exceptions and Request for Oral Argument, oral arguments, and being duly advised, **HEREBY ORDERS AS FOLLOWS:**

The Board **REJECTS** the Hearing Officer's Findings of Fact, Conclusions of Law, and Recommended Order, largely adopts the arguments contained in the Appellee's Exceptions and enters its own Findings of Fact, Conclusions of Law, and Final Order.

FINDINGS OF FACT

1. This matter came on for an evidentiary hearing using Amazon Chime video teleconferencing software on February 23, 2021, at approximately 9:30 a.m., EDT, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Stafford Easterling, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

2. The Appellant, Michelle Mitchell, was present and was not represented by legal counsel. The Agency/Appellee Energy and Environment Cabinet (EEC) was present and represented by the Hon. Erritt Griggs. The Agency/Appellee Personnel Cabinet was present and represented by the Hon. Catherine Stevens. Also present as Agency representatives were Nina Hockensmith for EEC and Department of Human Resources Administration Commissioner Mary Elizabeth Bailey for the Personnel Cabinet. All appeared by Amazon Chime.

3. At issue in the evidentiary hearing was the following:
 - A. Whether the Appellees properly reallocated the Appellant. The **Appellees** had the burden of proof on this issue, which was by a preponderance of the evidence.
 - B. An additional issue was whether the Appellant was properly classified as a Procedures Development Specialist II. She contended that she should be classified in the Environmental Control Scientist series. The **Appellant** had the burden of proof on this issue, which was by a preponderance of the evidence.
4. The Appellees presented the testimony of four witnesses:
 - A. Department of Human Resources Administration (DHRA) **Commissioner Mary Elizabeth Bailey**, who testified about the reasons for the abolishment of the Internal Policy Analyst (IPA) series;
 - B. **Heather Alexander**, Environmental Control Supervisor with the Energy and Environment Cabinet's Division of Waste Management, who was the Appellant's first-line supervisor;
 - C. **Debbie Hatfield**, who works in the Personnel Cabinet's Classification, Compensation, and Organizational Management Branch, and reviewed all of the IPA series' reallocations for the Transportation, Public Protection, and Energy and Environment Cabinets and performed the reallocation assessment that resulted in the Appellant being reallocated to a Procedures Development Specialist II; and
 - D. **Rebecca Ogden**, a Personnel Program Manager in the Personnel Cabinet's Classification, Compensation, and Organizational Management Branch, and Debbie Hatfield's first-line supervisor, who was directly involved in the reconsideration of the Appellant's reallocation.

The Appellee also submitted two hundred twenty-three (223) pages of exhibits. The **Appellant, Michelle Mitchell McCloskey**, testified and offered nine (9) exhibits.

5. In 2019, the Personnel Cabinet completed a years' long review of the Internal Policy Analyst (IPA) series, a job classification created in the 1980s. This review included a working group with representatives from all major Cabinets in state government. The result of this review was the abolishment of the IPA series because the job classifications had become so vague and unwieldy that there was insufficient commonality between the job duties performed by employees in the series. Some of the employees within the IPA classification who were assigned to different Cabinets had radically different duties and responsibilities, even though they were in the same job classification. The inconsistent application and definitions of the IPA series were repeatedly causing conflict between: (1) various state agencies, (2) various state agencies and the Personnel Cabinet and, (3) the Personnel Cabinet with itself at various points in time, depending on whom was filling key policy interpreting positions within the Cabinet over the years.

6. The Appellant had served twenty-two (22) years with EEC including serving as an Internal Policy Analyst until her reallocation in 2019. She received outstanding evaluations as an IPA and helped fill any administrative/leadership vacuum whenever her next line supervisor was out of the office. The parties all agreed that the Appellant's work performance was not a factor in her reallocation. The decision on the Appellant's reallocation was made by the Agencies in consultation with each other, and by comparing the Appellant's Position Description to other classifications within the EEC. After considering several options, including the Environmental Control Scientist series which the Appellant argued, the Agencies determined the Appellant should be reallocated as a Procedures Development Specialist II.

7. On March 28, 2019, following a conversation within EEC about the looming reallocation process, the Appellant submitted an updated Position Description (PD) to her first-line supervisor, which was then forwarded up the chain of command to EEC's Office of Administrative Services (OAS). On April 12, 2019, the Appellant spoke in detail with OAS about the PD that was going to be used by the Agencies during the reallocation process to determine where to reallocate the Appellant. On April 15, 2019, the Appellant and OAS had a follow-up discussion about the Appellant's request to have the phrase "oversee" to either remain or be re-inserted in her PD after OAS previously removed the phrase. Following discussion, the Appellant and EEC agreed that her job duties justified the inclusion of the word "oversee" and that the Appellant could submit an updated PD that included the word "oversee" and a couple other tweaks in language that the Appellant believed more accurately reflected her actual job duties. The Appellant timely submitted her version of her PD to EEC in May 2019 and, by no later than May 24, 2019, the PD submitted by the Appellant was then submitted to the Personnel Cabinet for their review during the reallocation process.

8. The Appellant received notice that she was reallocated on Monday, June 17, 2019, when she was presented with a form entitled "Notice of Reallocation." This document informed

the Appellant that she was reallocated effective Sunday, June 16, 2019 (a non-working day), to a Procedures Development Specialist (Grade 14). The Appellant refused to assign the acknowledgement because she did not receive a Personnel Action Notification (PAN) with her Notice of Reallocation.

9. There was no further communication about the reallocation until EEC reissued the Appellant a Notification of Reallocation on August 14, 2019, officially informing her that she had been reallocated on June 16, 2019, from Internal Policy Analyst (IPA) III (Grade 15) to Procedures Development Specialist II (Grade 14). The Appellant disagreed with the reallocation, noting especially that the PD included for her in the state's HR system was still outdated and was not the one she had submitted in May 2019. So, by no later than August 27, 2019, she requested that the Agencies reconsider her reallocation as a Procedures Development Specialist, specifically given the previously agreed-upon addition of the phrase "oversees" into her previous IPA III position description. However, largely as a result of procedural/communication bottlenecks in the Agencies caused by processing approximately 360 reallocations to various IPAs across the state – and then having to handle approximately ninety (90) requests for reconsideration from IPAs displeased with their reallocations, the Personnel Cabinet failed to respond to the Appellant's request for reconsideration in the sixty (60) – day window mandated by KRS 18A.095(10)(c)¹. There was no further communication between the parties about the Appellant's request for reconsideration until the Appellant reached out to the Personnel Cabinet on October 29, 2019. During that conversation, the Personnel Cabinet acknowledged that their response was overdue, but the Appellant was not given a specific date that she could expect the reconsideration to be completed. The Appellant then filed the underlying Personnel Board appeal on November 1, 2019.² Thereafter, on November 12, 2019, the Personnel Cabinet issued their response to the request for reconsideration again concluding that the Appellant was properly reallocated as a Procedures Development Specialist II. The propriety of the reallocation, the timeliness of the Personnel Cabinet's response to the Appellant's request for reconsideration, and the fitfulness of the Appellant's reallocation were issues to be resolved though evidentiary hearing.

10. The Board makes these Findings with respect to the reallocation of the Appellant:

A. The Appellant receiving initial notice of reallocation on Monday, June 17, 2019, when the reallocation was retroactively effective

¹ The version of KRS 18A.095(10)(c) in effect during the relevant period of time provides, in pertinent part, that "the employee shall file a written request for reconsideration of the reallocation of his position with the secretary in a manner and form prescribed by the secretary and shall be given a reasonable opportunity to be heard thereon by the secretary. The secretary shall make a determination within sixty (60) days after the request has been filed by an employee."

² Although the appeal filed by the Appellant originally challenged only the Personnel Cabinet's failure to respond to her request for reconsideration in a timely manner, by agreement of the parties at a subsequent pre-hearing conference, the appeal was later amended/expanded to incorporate the merits of the underlying reallocation in addition to the Appellant's procedural arguments.

Sunday, June 16, 2019 (a non-working day), was a *de minimus* violation of the Appellant's KRS Chapter 18A rights.

- B. The Personnel Cabinet also was fourteen (14) days late in deciding the Appellant's appeal from her reallocation.
- C. The record does not establish the Appellant suffered any harm as a result of either of these violations.
- D. The Agencies' decision to reallocate the Appellant to a Procedures Development Specialist II was supported by the evidence presented at the hearing.

11. As discussed in detail, the primary issue in controversy about the procedural processing of the Appellant's reallocation was the Personnel Cabinet's determination that the Appellant did not qualify for the Environmental Control Scientist series because her prior IPA duties were not "technical, scientific" in nature. The Appellant's duties involved, among other things, helping to draft administrative regulations that translate/operationalize state and federal requirements that pertain to the Division of Waste Management in addition to analyzing data provided by EEC's field scientists. The parties agree that the Appellant's duties were technical in nature, however, the key dispute between the parties is whether the Appellant's duties constitute "scientific" duties. To broadly paraphrase, the Personnel Cabinet argued that an employee is required to actually perform the scientific experiments/collection/analysis in order for their duties to qualify as "scientific" in nature while the Appellant argued that performing technical work in a scientific field means her duties are both "technical" and "scientific" in nature and should qualify her for the Environmental Control Scientist series. The Agencies' witnesses provided slightly differing definitions of the terms "technical" and "scientific" as is included in the position description for most of the Environmental Control Scientist series, but, on the whole, the witnesses consistently testified that the Appellant performed technical duties but did not perform any scientific duties.

12. After consideration of the evidence of record, including the Appellant's job duties and the various available job classifications, the Hearing Officer finds that the Appellant did not establish that she was misclassified as a Procedures Development Specialist II, did not establish that she was entitled to another job classification, and did not establish that another job classification series would have been a better fit for her job duties. The Appellant's claims that she was entitled to be reclassified into a classification other than Procedures Development Specialist II must fail as a matter of fact and as a matter of law.

CONCLUSIONS OF LAW

1. The General Assembly has delegated to the Personnel Cabinet the discretion to prepare, maintain, review, evaluate, and revise the merit system of job classification and to allocate positions in the classified service to the appropriate job classification. KRS 18A.025(3)(b)1c; KRS 18A.110(1)(c) and (7)(a); and 101 KAR 2:020.

2. In 2019, the Personnel Cabinet properly performed these functions when it determined that it was in the best interest of the classified service to abolish the Internal Policy Analyst series.

3. The Appellees committed a *de minimus* violation of KRS 18A.095(8) and (10) when they notified the Appellant of her reallocation on June 17, 2019, instead of when it became effective on June 16, 2019. To be effective, statutorily required notice should be given before a personnel action is taken. Debra Ratliff v. Transportation Cabinet, 2010 WL 2936017 (KY PB Appeal No. 2008-291) and John Holloway v. Transportation Cabinet, 2010 WL 677198 (KY PB Appeal No. 2008-296).

4. The Appellant was also penalized when she received notice of the decision on her appeal of her reallocation from the Personnel Cabinet fourteen (14) days beyond the statutory deadline. KRS 18A.095(10).

5. Despite these two penalizations, the proof shows that the Appellant did not suffer any harm as a result.

6. The Appellees carried their burden of proof that the Appellant was properly reallocated as a Procedures Development Specialist II. KRS 13B.090(7).

7. The Appellant failed to carry her burden of proof that she was not properly classified as a Procedures Development Specialist II and that she should have been classified in the Environmental Control Scientist series. KRS 13B.090(7).

8. Because the proof establishes that the Appellant was not harmed by any of the actions of the Appellees, she is not entitled to any relief from these appeals except for the restoration of her leave time used to attend the pre-hearing conferences, the evidentiary hearing, and the oral argument before the Board. KRS 18A.095(22) and (25).

IT IS FURTHER ORDERED that the appeal of appeal of **MICHELLE MITCHELL MCCLOSKEY V. ENERGY AND ENVIRONMENT CABINET AND PERSONNEL CABINET (APPEAL NO. 2019-236)** be **SUSTAINED to the extent** that the Appellant was

penalized as set forth above and the Agencies shall reimburse the Appellant for any leave time she used to attend pre-hearing conferences, the evidentiary hearing, and oral arguments in this matter before the Personnel Board. KRS 18A.095(25).

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 February, 2024.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
SECRETARY

A copy hereof this day emailed and mailed to:

Michelle Mitchell
Hon. Jessica Robles
Hon. Catherine Stevens
Hon. Rosemary Holbrook (Personnel Cabinet)
Stacy Perry
David Dooley