

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-334**

KENNY R. MITCHELL

APPELLANT

**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

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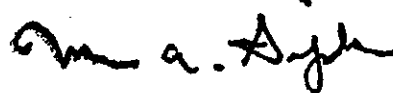
The Board at its regular June 2015 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated May 8, 2015, and being duly advised,

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.100.

SO ORDERED this 24th day of June, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Leesa Moorman
Kenny Mitchell
Lynn K. Gillis
Sherry Butler

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* * * * *

This matter came on for a pre-hearing conference on February 23, 2015, at 10:00 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, Kenny R. Mitchell, was present by telephone and was not represented by legal counsel. The Appellee, Energy and Environment Cabinet, was present and represented by the Hon. Leesa B. Moorman. Also present as agency representative was Ms. Lynn Gillis.

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

The Hearing Officer notes this appeal was filed with the Personnel Board on December 29, 2014. Appellant claimed "Other Penalization" and stated in the narrative portion of the appeal: "During the re-organization of the Office Of Mine Safety to the Division of Mine Safety, I was awarded the position of Branch Manager in the Madisonville district. The District Supervisor position and the Assistant District Supervisor position, which I held for 4 years, were combined to create the new Branch Manager position. The other five Branch Managers are currently earning approximately a \$10,000.00 per year higher salary than my current annual salary. I feel that I should be awarded the same pay for doing the same duties. I appreciate your consideration to resolve this matter."

During the course of the pre-hearing conference, Appellant stated one problem he had with the Branch Manager pay was that when he went from District Supervisor to the Branch Manager position, he was the only one who was going to make less than the other people who were made Branch Managers, and he felt the pay should have been raised right then. Appellant

also noted how he had been four years as an Assistant Supervisor, and felt an obligation to take the job, noting it was a lot of work and was an important job.

Counsel for the Appellee questioned whether the Personnel Board has jurisdiction to consider the matters raised in this appeal, and requested time in which to file a motion to dismiss. The Hearing Officer discussed this some with the parties, and a briefing schedule was agreed to. In addition, the Hearing Officer believed an evidentiary hearing date should be set should the matter survive the motion to dismiss.

The Appellee filed a timely Motion to Dismiss. Though given ample time in which to file a response, the Appellant has not done so. The matter stands submitted to the Hearing Officer for a ruling on the Appellee's Motion to Dismiss.

BACKGROUND

1. During the relevant times, the Appellant, Kenny R. Mitchell, was a classified employee with status.

2. In its Motion to Dismiss, the Appellee, Energy and Environment Cabinet, contends the Personnel Board lacks jurisdiction to grant Appellant the relief he seeks, that is, to be paid the same as other Mine Safety Specialist Branch Managers.

3. Counsel for the Appellee explains that the Office of Mine Safety and Licensing had undergone a significant reorganization at the outset of fiscal year 2015 due to a significant loss of funding and also a loss of merit positions, as well as elimination of certain positions such as Mine Inspectors and Mine Safety Analysts and the creation of new Mine Safety Specialist positions and six new "multi-functional" Mine Safety Specialist Branch Manager positions. These six new Mine Safety Specialist Branch Manager positions were open to all qualified applicants, and Appellant applied, was interviewed, and was the successful applicant for the Branch Manager position located in the Madisonville office of the new Division of Mine Safety. At the time of the appointment to the Branch Manager position, the Appellant was making \$5,606.40 per month in the Mine Inspector III (Pay Grade 27), which salary was already near the mid-point of the (Pay Grade 17) Branch Manager position, thus Appellant accepted a voluntary demotion to the position without loss of pay. Counsel explained a written explanation had to be supplied, and this was attached to one of the exhibits to the motion.

4. Counsel for the Appellee stated the other five new Mine Safety Specialist Branch Manager positions were also filled by application and interviews, and in fact, each of the successful candidates for those positions was allowed to voluntarily demote into the position with no loss of pay.

5. Counsel argues the Appellant has not been penalized as defined at KRS 18A.005(24), and he did not suffer anything that would constitute an abridgement or denial of other rights granted to state employees. Counsel contends there is no right to a salary adjustment to make all persons in the same classification equal in terms of compensation. Counsel cites 101 KAR 2:034, Section 3(2)(a) regarding demotions, and in fact, this Personnel Cabinet regulation

allows agencies or Appointing Authorities the discretion to allow demoted employees to retain salaries if an explanation is provided and placed in the file. Counsel argues there is nothing in this regulation which allows an agency to make salary adjustments to ensure all persons requesting voluntary demotions make the same salary.

6. Counsel for the Appellee also cites 101 KAR 2:034, Section 1, which deals with new appointees (under certain circumstances) making incumbent employees eligible for salary adjustments. Counsel contends that regulation does not apply here, as it would not apply to the current situation regarding voluntary demotions.

7. In support of this, Counsel cites the Personnel Board case of *Mary Jett v. Education and Workforce Development Cabinet*, (PB Appeal No. 2010-224), in which the Board agreed with the Hearing Officer that there was no claim...“over which the Board would have jurisdiction to order an in-grade salary adjustment or even to have an evidentiary hearing on same.”

8. As noted, though given ample time, Appellant filed no response.

9. 101 KAR 2:034, Section 3(2)(a) states:

(2) Demotion.

(a) If an employee is demoted, the appointing authority shall determine the salary in one (1) of the following ways:

1. The employee's salary shall be reduced by five (5) percent for each grade the employee is reduced; or

2. The employee shall retain the salary received prior to demotion. If the employee's salary is not reduced upon demotion, the appointing authority shall explain the reason in writing and place the explanation in the employee's personnel files.

10. 101 KAR 2:034, Section 1 states:

Section 1. New Appointments.

(1) An appointing authority shall appoint a new employee at a salary not to exceed the midpoint of the pay grade.

(2) 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 class;

(b) Is in the same work county; and

(c) Has a similar combination of education and experience relating to the job classification.

11. 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 Appellant, Kenny R. Mitchell, was a classified employee with status.

2. The Hearing Officer finds that the Appellant accepted a voluntary demotion after successfully interviewing for the Mine Safety Specialist Branch Manager position in Madisonville, and was allowed to keep the same salary he had made as a Mine Safety Inspector III.

3. The Hearing Officer finds that the Appellant is not entitled to a salary adjustment because other employees who were demoted and allowed to keep their salaries make more than he does.

4. The Hearing Officer finds the provisions of 101 KAR 2:034, Section 1 would not apply.

5. The Hearing Officer finds that Appellee's citation to 101 KAR 2:034, Section 3(2)(a) persuasive in that, while it would allow an employee to retain his salary upon voluntary demotion, there is no obvious mechanism under that regulation by which the Appointing Authority could raise voluntarily demoted employees salary to match those of other voluntarily demoted employees salaries.

6. The Hearing Officer finds KRS 18A.095(18)(a) applies, and there is no matter over which the Board would have jurisdiction, as Appellant has not suffered a penalization under KRS 18A.005(24).

CONCLUSION OF LAW

The Hearing Officer concludes as a matter of law that as the Appellant did not suffer a penalization as found above, the Personnel Board lacks jurisdiction to further consider this matter.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **KENNY R. MITCHELL V. ENERGY AND ENVIRONMENT CABINET, (APPEAL NO. 2014-334)** 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.

ISSUED at the direction of **Hearing Officer Boyce A. Crocker** this 8th day of May, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Leesa B. Moorman
Mr. Kenny R. Mitchell