

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD

BURGESS, MICHAEL (2019-286)  
COMBS, JAMIE (2019-287)  
DEAN, DAVID (2019-288)  
EWING, WILLIAM (2019-289)  
FISHER, PAUL (2019-290)  
HICKS, KEVIN (2019-291)  
MCMENAMA, MELANIE (2019-292)  
MONROE, BRANDON (2019-293)  
NESSELRODE, BRIAN (2019-294)  
REINERT, CHARLES (2019-295)  
SCHAFFNER, AARON (2019-296)  
SCHAFFNER, ADAM (2019-297)  
SHELBY, JAMES (2019-298)  
SWAIN, KIM (2019-299)  
TATUM, KAYLA (2019-300)  
TAYLOR, JUSTIN (2019-301)  
WAINSCOTT, TABITHA (2019-302)  
WELCH, VICKI (2019-303)  
and  
YAGEL, ANNE (2019-304)

APPELLANTS

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

VS.

FINANCE AND ADMINISTRATION CABINET

and

PERSONNEL CABINET

APPELLEES

\*\*\* \*\*

The Board, at its regular February 2022 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated January 19, 2022, 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 16<sup>th</sup> day of February, 2022.

**KENTUCKY PERSONNEL BOARD**

  
\_\_\_\_\_  
**MARK A. SIPEK, SECRETARY**

A copy hereof this day sent to:

Hon. Robert Long  
Hon. Catherine Stevens  
Michael Burgess  
Jamie Combs  
David Dean  
William Ewing  
Paul Fisher  
Kevin Hicks  
Melanie McMenama  
Brandon Monroe  
Brian Nesselrode  
Charles Reinert  
Aaron Schaffner  
Adam Schaffner  
Kim Swain  
Kayla Tatum  
Justin Taylor  
Tabitha Wainscott  
Vicki Welch  
Anne Yagel  
James Shelby  
Hon. Rosemary Holbrook (Personnel Cabinet)  
Stacy Perry

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FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND RECOMMENDED ORDER

FINANCE AND ADMINISTRATION CABINET

and

PERSONNEL CABINET

APPELLEES

\*\*\*\* \* \* \* \* \*

These matters came on for a pre-hearing conference on September 29, 2020, at 10:00 a.m., ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A. This pre-hearing conference was conducted using Amazon Chime video teleconference.

The Appellants, Michael Burgess, Jamie Combs, David Dean, William Ewing, Paul Fisher,

Kevin Hicks, Melanie McMenama, Brandon Monroe, Brian Nesselrode, Charles Reinert, Aaron Schaffner, Adam Schaffner, Kim Swain, Kayla Tatum, Justin Taylor, Tabitha Wainscott, Vicki Welch, and Anne Yagel, were present by Amazon Chime video teleconference and not represented by legal counsel. The Appellant, James Shelby, was not present and not represented by legal counsel. The Appellee Finance and Administration Cabinet was present by Amazon Chime video teleconference and represented by the Hon. Cary Bishop. The Appellee Personnel Cabinet was present by Amazon Chime video teleconference and represented by the Hon. Catherine Stevens.

The purposes of the pre-hearing conference were to discuss the status of the appeals, including discovery, and to prepare a dispositive motion schedule.

The Personnel Cabinet filed a Motion for Summary Judgment. The Finance and Administration Cabinet joined in the Personnel Cabinet's motion. The Appellants, Justin Taylor and William Ewing, filed responses to the Personnel Cabinet's Motion for Summary Judgment. The Personnel Cabinet filed a reply to Appellants Taylor and Ewing's responses. This matter is now submitted to the Hearing Officer for a ruling on the Motion for Summary Judgment.

#### **FINDINGS OF FACT**

1. The Appellants all filed their individual appeals on December 19, 2019. The Appellants are all classified employees, with status, employed with the Finance and Administration Cabinet in the Department of Revenue as either Revenue Section Supervisors (grade 15) or Revenue Branch Managers (grade 16).
2. The Appellants allege that, in July 2015, they were told by management officials within the Department of Revenue that each of the job classifications within the Division of Collections would receive salary grade increases. These increases were to be given to Revenue Collection Officers, Taxpayer Services Specialist Is and IIs, Revenue Section Supervisors, Revenue Branch Managers, and Assistant Directors.
3. Taxpayer Services Specialist Is and IIs received a one level salary grade increase, from grade 12 to grade 13, and grade 13 to grade 14, respectively, effective October 16, 2015.
4. Revenue Collection Officers received a salary grade increase from grade 12 to grade 13, effective January 16, 2016.
5. Assistant Directors received a salary grade increase from grade 17 to grade 18, effective June 16, 2017.
6. The Appellants alleged they were penalized because they have not also received a one level salary grade increase. The Appellants who are Revenue Section Supervisors requested that their salary grade be increased to grade 16. The Appellants who are Revenue Branch

Managers requested an increase to salary grade 17. In addition, the Appellants requested a fifteen percent (15%) increase in pay and requested that they receive back pay from June 16, 2017, when Assistant Directors received their pay grade increase.

7. In its Motion for Summary Judgment, the Personnel Cabinet argued that the appeals were untimely, because the Appellants did not file their appeals within a year of when they knew, or should have known, they were penalized. The Personnel Cabinet also argues that the Appellants had not alleged a penalization. They pointed out that the Appellants are still in a higher pay grade than the employees they supervise, Revenue Collection Officers and Taxpayer Services Specialist Is and IIs. Also, they are still in a lower pay grade from Assistant Directors who are their supervisors. Lastly, the Personnel Cabinet argues that the Appellants are not entitled to a fifteen percent (15%) pay increase, even if they receive a one (1) - level salary grade increase.

8. The Finance and Administration Cabinet joined in the Personnel Cabinet's Motion for Summary Judgment, arguing that the appeals were untimely.

9. The Appellant, Justin Taylor, filed a response and stated that some of the Appellants met with a Deputy Commissioner in September 2019 to discuss position discrimination regarding Revenue Section Supervisors and Revenue Branch Managers. He stated they filed grievances and appeals in a timely manner after that meeting. He stated that the Appellants may have been provided false information previously having never been told that their pay increases were denied. Taylor also argued that the Appellants have articulated a penalization, citing the Lilly Ledbetter Fair Pay Act of 2009, which states that each paycheck containing discriminatory compensation is a separate and ongoing violation regardless of when the discrimination began. He also criticized the sixteen (16) year-old Hay Study relied on by the Personnel Cabinet. He argued that the Personnel Cabinet relied on outdated information in determining that the Appellants were not entitled to a pay grade increase. Lastly, Taylor argued that the Appellants are entitled to a fifteen percent (15%) pay increase, which would still be below midpoint for the pay grade.

10. The Appellant, William Ewing, also filed a response to the Appellee's Motion to Dismiss. He alleged that the time to file an appeal never started to run because the Appellants were never told that they would not receive grade changes. He also argued that the Appellants were penalized when those working above and below their pay grade received a raise and pay grade increase and the Appellants did not. Ewing also criticized the use of the Hay Study and referred to it as outdated. He cited turnover within his job class as a reason for increasing the pay rate.

11. In its reply, the Personnel Cabinet argued that the concept of continuing violations mentioned in the Lilly Ledbetter Fair Pay Act of 2009 has been rejected by the Kentucky Court of Appeals and the Personnel Board with respect to Personnel Board Appeals.

### CONCLUSIONS OF LAW

1. The Hearing Officer concludes, as a matter of law, that the Appellants have not alleged a penalization. KRS 18A.005(24) defines "penalization" as follows:  
...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.
2. The Appellants alleged they were denied grade changes and pay increases, however, they do not point to any statute or regulation that would entitle them to either one.
3. The Appellants alleged that they were promised grade changes by management officials. This broken promise seems unfair to the Appellants, but it does not constitute an actionable penalization under Chapter KRS 18A.
4. The Appellants are not entitled to a pay increase pursuant to 101 KAR 2:034. The Appellants have not alleged any facts that would require a pay increase under this regulation.
5. Despite the allegation that the Appellants were promised grade and salary increases, without specific statutory or regulatory support for their allegations, they do not have a legitimate claim of entitlement to these benefits. See *Bishop v. Wood*, 426 U.S. 341 (1976) and *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972).
6. Under KRS Chapter 18A, the pay plan for the classified service is under the authority of the Personnel Cabinet. Specifically, KRS 18A.110(7)(b) states that the pay plan shall consider duties and responsibilities for classes of positions pay rates for comparable positions outside of state government and the state's financial resources. The Appellants disagree with the decisions made by the Personnel Cabinet with respect to their grade levels, however, they have not alleged that the Cabinet violated any provisions of KRS Chapter 18A.
7. Importantly, the Appellant's claims can be distinguished from the claims in case of *Cabinet for Human Resources v. Kentucky State Personnel Board*, 846 S.W.2d 711 (Ky. App. 1992), herein referred to as "*Bargo*." In the *Bargo* case, the Appellants were Nurse Consultants/Inspectors (NC/Is), one of nine (9) classifications for nurses within the Cabinet of Human Resources. Their classification, NC/I, required the highest level of education and experience of all nine (9) classifications. In *Bargo*, the Appellants filed appeals with the Personnel Board after all eight (8) other nurse classifications below NC/I received two (2) salary and grade increases. Following these increases, all other nurse classifications were equal or higher in grade than NC/Is, a result that the Court of Appeals determined was unjust. In determining that such a set-up was unjust, the Court considered the fact that NC/Is would be the same grade as licensed

practical nurses, a classification which requires less education than NC/Is who are required to be registered nurses. The Court further pointed out that, in addition to requiring less education, licensed practical nurses required only one-fourth (1/4) the experience as an NC/I, yet would end up in the same grade. The Court of Appeals determined such a result was unjust and reversed the decision of the Personnel Board.

In this case, the Appellants did not – and do not - allege they were in the same or lower pay grades than classifications requiring less education and experience. Here, the Appellants' allegation was that classifications above and below received increases and unduly altered the "gaps" between the classifications. However, in the end, the Appellants' grades are still higher than the Revenue Collections Officers and Taxpayer Services Specialists Is and IIs that they supervise and still lower than Assistant Directors that supervise them. There is no basis to extend the holding of the *Bargo* case to the allegations made by the Appellants in this case. See also *Chris Southworth, Linda Ward, and Neelofar Moula vs. Finance and Administration Cabinet, Department of Revenue and Personnel Cabinet*, November 17, 2020, 2020 WL 7426176 (KY PB).

8. This decision is further supported by the Personnel Board's Final Order in *Scott Huddleston, et al., vs. Transportation Cabinet and Personnel Cabinet*, 2018 WL 4037967 (KY PB). In the *Huddleston* case, the Personnel Board held that an unfulfilled promise of a salary increase from the appointing authority did not constitute a penalization. Such a holding applies to the promises allegedly made to the Appellants here.

9. The Appellants' claims also fail on equal protection grounds because they have not alleged discrimination based on membership in a protected class (age, gender, religion, race, color, or disability). Their claims are analogous to the "class of one" allegations discussed in *Engquist vs. Oregon Department of Agriculture, et al.*, 553 US 591 (2008). In *Engquist*, the Court distinguished between a government acting as a sovereign and acting as an employer. The Court held "the government as employer indeed has far broader powers than does the government as sovereign." *Id.* at 598. The court concluded that "...the class-of-one theory of equal protection – which presupposes that like individuals should be treated alike, and that to treat them differently is to classify them in a way that must survive at least rationality review – is simply a poor fit in the public employment context. To treat employees differently is not to classify them in a way that raises equal protection concerns. Rather, it is simply to exercise the broad discretion that typically characterizes the employer-employee relationship." *Id.* at 605.

10. The Hearing Officer makes no finding or conclusion regarding the timeliness of these appeals. It is completely unclear from the record when the Appellants knew or should have known they had been penalized. In fact, it is impossible to make that determination in this case because the Appellants have not been penalized.

11. There are no genuine issues of material fact and this case can be decided as a matter of law. KRS 18A.095(18)(a) and KRS 13B.090(2).

### RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeals of **MICHAEL BURGESS (2019-286), JAMIE COMBS (2019-287), DAVID DEAN (2019-288), WILLIAM EWING (2019-289), PAUL FISHER, (2019-290), KEVIN HICKS (2019-291), MELANIE MCMENAMA (2019-292), BRANDON MONROE (2019-293), BRIAN NESSELRODE (2019-294), CHARLES REINERT (2019-295), AARON SCHAFFNER (2019-296), ADAM SCHAFFNER (2019-297), JAMES SHELBY (2019-298), KIM SWAIN (2019-299), KAYLA TATUM (2019-300), JUSTIN TAYLOR (2019-301), TABITHA WAINSCOTT (2019-302), VICKI WELCH (2019-303), and ANNE YAGEL (2019-304) v. FINANCE AND ADMINISTRATION CABINET and the PERSONNEL 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).

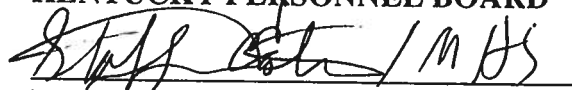
**Any document filed with the Personnel Board shall be served on the opposing party.**

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.

**ISSUED** at the direction of Hearing Officer Mark Sipek this 19 day of January, 2022.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK  
EXECUTIVE DIRECTOR



**Michael Burgess, Jamie Combs, David Dean, William Ewing, Paul Fisher, Kevin Hicks,  
Melanie McMenama, Brandon Monroe, Brian Nesselrode, Charles Reinert, Aaron  
Schaffner, Adam Schaffner, James Shelby, Kim Swain, Kayla Tatum, Justin Taylor,  
Tabitha Wainscott, Vicki Welch, and Anne Yagel**  
Recommended Order  
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A copy hereof this day mailed to:

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Hon. Catherine Stevens  
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Vicki Welch  
Anne Yagel  
James Shelby  
Hon. Rosemary Holbrook (Personnel Cabinet)