

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2012-056**

KATHRYN PARRISH

APPELLANT

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

**OFFICE OF THE ATTORNEY GENERAL
CARLA VINEGAR, APPOINTING AUTHORITY**

APPELLEE

**** ** ***

The Board at its regular May 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated April 3, 2014, 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 14th day of May, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Morgan Ransdell
Hon. Armand I. Judah

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2012-056**

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VS.

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

**OFFICE OF THE ATTORNEY GENERAL
CARLA VINEGAR, APPOINTING AUTHORITY**

APPELLEE

** ** *

This matter came on for evidentiary hearing on December 3, 2013, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before Geoffrey B. Greenawalt, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Kathryn Parris, was present at the evidentiary hearing and was represented by the Hon. Armand Judah. The Appellee, Office of the Attorney General (OAG), was present and was represented by the Hon. Morgan Ransdell.

The issue at the evidentiary hearing was the Appellant's claims of discrimination as to the starting salaries given Ken Gillingham, James Mobley and Danny Gibbons. The Appellee's defense of laches may also be argued during the hearing. The burden of proof was upon the Appellant to demonstrate by a preponderance of the evidence that the salary discrepancies complained of was the result of gender discrimination. An Interim Order containing Findings of Fact and Conclusions of Law dated November 21, 2012, is attached to and incorporated herein as **Recommended Order Attachment A**.

BACKGROUND

1. The Appellant, Kathryn Parrish, filed her appeal with the Personnel Board on March 9, 2012, appealing from a grievance she filed on August 19, 2011, over a salary dispute and amending her original appeal to include gender discrimination.

2. The first to testify was the Appellant, **Kathryn Parrish**. Ms. Parrish started her employment with the Attorney General's Office in Jefferson County, Kentucky, as an Administrative Specialist Senior in 1990. She was later reclassified as a Paralegal in 1991 in the Consumer Protection Division wherein she remained for a period of approximately eight years. In 1994 or 1995 she was reclassified as an Investigator I, although her duties remained primarily the same. She was later assigned to the Appellee's Special Investigations Division and, after receiving Police Academy Training in Richmond, Kentucky, promoted to an Investigator II. By

this point in her career, the Appellant investigated election fraud, public corruption, welfare fraud and Medicaid fraud. After approximately three to three and a half years with the Special Investigations Division, the Appellant was placed in the Appellee's Welfare Fraud Unit. According to the Appellant, investigating Medicaid fraud is a very specialized job requiring knowledge of all the "ins and outs" of the Medicaid program. The Appellant received her basic Medicaid 101 training and has been in the Medicaid Fraud Investigations Unit for approximately eight years. Her immediate supervisor is Janet Bonham. The Appellant is presently classified as an Investigator III.

3. According to the Appellant, a law enforcement background may be helpful but does not, in and of itself, automatically qualify someone to handle the duties required of Medicaid Fraud Investigator. Although experience in law enforcement provides basic investigating skills, it does not equip one with the knowledge necessary to understand the complexities found in the various Medicaid programs. According to the Appellant, her background is such that she is now able to find answers to questions when there are changes to the Medicaid programs which investigators with a basic law enforcement background could not.

4. Appellant's Exhibit 1 was introduced through the witness and are copies of the Appellant's various P-1s.

5. According to the Appellant, there are (were) three people in the OAG being paid more than she is for doing the same exact work. The first is Danny Gibbons. Mr. Gibbons has since been promoted and is presently a supervisory Investigations Manager but in 1999 when he was first hired by the Appellee, Mr. Gibbons and the Appellant were both classified as Investigator IIs. At that time (and at all times since) Mr. Gibbons made considerably more money than the Appellant. According to the Appellant she first learned of this discrepancy when she filed her original grievance with Paul Underwood (presumably in August, 2011). Appellant's Exhibit 2 was introduced to the record and are copies of Danny Gibbons P1s. According to the Appellant, Mr. Gibbons originally came to the OAG on a personal service contract in a unit that was later disbanded. He was retained and appointed as an Investigator II and was paid the maximum salary of \$3,859 a month which was quite a bit higher than the Appellant's salary. Mr. Gibbons has consistently made more money than the Appellant since his initial appointment.

6. According to the Appellant, she was never given a reason as to why Mr. Gibbons made more money than her. Appellant's Exhibit 3 was introduced into the record and is a copy of 101 KAR 2:036 which has since been repealed.

7. According to the Appellant, Mr. Gibbons came from the Lexington Police Department where he worked homicides. When he was appointed to the Special Investigations Unit in 1999 as an Investigator II he had no specialized training and was appointed at a salary

higher than mid-point.

8. The next male Investigator making more money than the Appellant is Mr. James Mobley. Appellant's Exhibit 4 was introduced to the record and is a copy of various applications from Mr. Mobley as well as his P1s. Mr. Mobley has worked in the Department of Criminal Investigations, the Kentucky Bureau of Investigation, or the Special Investigations Division throughout his career with the Commonwealth's OAG. According to the Appellant, Mr. Mobley was never employed in Medicaid Fraud Unit and has no more training within the office than the Appellant. However, when Mr. Mobley was hired in as an Investigator II, his starting salary was higher than the Appellant's. The Appellant knows of no justification for why Mr. Mobley was hired in as Investigator II at a higher salary than hers. Mr. Mobley has since retired.

9. The next male Investigator complained of by the Appellant was Mr. Kenneth Gillingham. Mr. Gillingham was appointed as Investigator II with the Special Investigations Division at a salary of \$2,792 which was more than the Appellant was making (\$2,741.42) at the time. According to the Appellant, she and Mr. Gillingham performed the same work. Mr. Gillingham had no college education and had been a Kentucky State Police Trooper. Mr. Gillingham also never worked in the Medicaid Fraud Unit.

10. Appellant's Exhibit 6 was introduced to the record and is a copy of the Class Specification for the Investigator II position as it existed in 1999.

11. According to the Appellant, she filed her original grievance with the Appellee regarding her salary the disparity on August 5, 2011. At the time, gender discrimination was not her motivation. Rather, she simply thought there was no fairness regarding salaries amongst Investigators. As an example, she thought it was unfair to allow someone to take a voluntary demotion from supervisor to an Investigator in another Division and maintain his higher salary while the salaries of the other Investigators were not adjusted. After she learned of this particular situation occurring, the Appellant began looking into things and first became aware of the salary disparities amongst the Investigators. According to the Appellant, it was not common for people to talk openly about their salaries and that several years ago, when the various appointments were being made, salary information was not as readily available to the public as it is today.

12. On cross-examination, the Appellant admitted her name was not on the Internal Mobility Register of Qualified Candidates when Danny Gibbons, Ken Gillingham, and James Mobley were appointed. Also, in 1999 and 2000, the Appellant never applied with the Commonwealth for a transfer of her employment into Franklin, Jessamine or McCracken Counties. She also never sought to relocate outside of Jefferson County.

13. The Appellant stated her problem with Dan Gibbons hiring was that he was paid at the maximum salary rather than the salary mid-point as required by regulation. Regarding Ken Gillingham, although he had 323 months of experience as a Kentucky State Trooper at the time of his appointment (while the Appellant had 93 months of experience as an Investigator), the Appellant thought their experience should have been considered equal because her experience was job specific while Gillingham's was general. Regarding James Mobley, the Appellant acknowledged he held a four-year degree and had 338 months of experience as a Kentucky State Trooper at the time he was appointed (while the Appellant had 92 and a half months experience as an Investigator), but like Ken Gillingham, the Appellant's experience was job specific while Mobley's was general in nature. In both instances, the Appellant thought her experience should have outweighed that of the Investigators with only general experience.

14. According to the Appellant, Mike Duncan spearheaded the hiring of Kenneth Gillingham in December of 2000. The Appellant admitted she had never heard Mr. Duncan make a sexist statement and had no evidence the hiring of Kenneth Gillingham was based on his gender. However, it is the Appellant's opinion that Mr. Duncan's friendship with Mr. Gillingham played a part in his hiring decision which could be considered a form of gender discrimination. The Appellant noted that while Mr. Duncan was Director, he hired several ex-Kentucky State Troopers who were all former friends of his.

15. Loren Carl spearheaded the hiring of James Mobley. The Appellant admitted she barely knows Mr. Carl and never heard him make a sexist statement. In addition, the Appellant had no other evidence that Mr. Mobley's hiring was based on his gender.

16. The Appellant stated that her current salary is \$43,993.92 and acknowledged that 101 KAR 2:034 would have prevented her from obtaining a mid-point salary as an incumbent employee back when Mr. Gibbons, Mr. Mobley, and Mr. Gillingham were hired.

17. The next to testify was **Janet Bonham**, who is the Investigative Supervisor with the Medicaid Fraud Unit and has been since May 2005. According to Ms. Bonham, she was hired by the OAG in July 2003 after nine years as a Police Officer with the Bowling Green Police Department. She also holds a Bachelor of Science degree in Criminal Justice.

18. Ms. Bonham stated that the Medicaid Fraud Unit is a specialized unit and that every Investigator has to go through Medicaid 101 Training within the first twelve months on the job. More specific training is received down the road. According to Ms. Bonham, although her training as a regular Police Officer was helpful, there was a big learning curve going into Medicaid Fraud Unit and getting a handle on the various rules, regulations and the interaction between the different agencies involved constitutes a big learning curve.

19. According to Ms. Bonham, Dan Gibbons is her direct supervisor. Although Mr. Gibbons has more years of law enforcement experience, he does not have more experience with Medicaid fraud. He also has no college education or military background. Yet, Mr. Gibbons makes \$20,000 more than any other Branch Manager in the OAG. She is aware of no reason for this salary discrepancy.

20. The next to testify was **Kelly Hensley** who has been an Investigator with Medicaid Fraud Unit since June of 2005. Ms. Hensley has a Bachelor's of Science in Police and Public Administration and has three hours towards her Master's Certification in Healthcare Fraud. She worked between 1994 and 2005 with the Richmond Police Department as an Investigator.

21. Ms. Hensley is now an Investigator III. She stated that being an Investigator in the Medicaid Fraud Unit requires specialized training and that although a police background is helpful, there is a big learning curve in specialized units such as Medicaid Fraud Unit.

22. The next to testify was **George Bean**, who has been an Investigator III with the Medicaid Fraud Unit since June 2005. In addition, Mr. Bean has approximately four years of welfare fraud investigation experience in Jefferson County and over twenty years of experience as a Kentucky State Trooper.

23. Mr. Bean has been to several different trainings since being hired in the Medicaid Fraud Unit. He, like others, had to go to Medicaid 101 Training for one week before investigating Medicaid fraud cases. According to him, his Kentucky State Police background did not translate in the Medicaid Fraud Unit. Although it helped with the basic details of investigations and the fundamentals thereof, it did not help in the fine details. According to Mr. Bean, there is a big learning curve to investigating Medicaid fraud.

24. Also according to Mr. Bean, there is a big difference in the amount the Investigators are paid in the OAG even though they hold the same title and do the same job. Mr. Bean is unaware of any reason for this discrepancy. Mr. Bean knows Ken Gillingham and worked with him at the Kentucky State Police Department for several years. He is unaware of any reason why Mr. Gillingham is being paid more than he is.

25. Mr. Bean's testimony marked the end of the Appellant's case in chief. The Appellee's Motion for Directed Verdict was **DENIED**.

26. The next to testify was **Carla Vinegar**. Appellee's Exhibits 1, 2, 3, 4, 5, 6, 7 and 8 were introduced into the record by Ms. Vinegar and speak for themselves. Ms. Vinegar is the Executive Director of Administrative Services and is familiar with merit-based employment. According to Ms. Vinegar, the pay differential between Investigators results from what each

investigator's salaries were prior to on-going promotions or reclassifications. This is so even though Investigators may be performing the same job duties. As an example, when Paul Underwood was hired by the OAG, he transferred in from another cabinet and maintained his salary. Thereafter, he received the same increments as everyone else based upon his starting wage rate. According to Ms. Vinegar, across state government there are women making both more and less than men doing the same work in the same position.

27. The next to testify was **Parker Loren (Squirrel) Carl**. Mr. Carl is currently with the United States Marshals Office. Mr. Carl reviewed Appellant's Exhibit 4 regarding the hiring of James Mobley. He recalled interviewing Mr. Mobley and recommending his hiring. According to his recollection, Mr. Mobley had past experience in financial crimes detective work and was certified by the secret service in handwriting analysis. According to Mr. Carl, the hiring of Mr. Mobley was not based on his gender and was not considered when he recommended his hiring. Mr. Mobley's starting salary of \$3,014.22 a month was not determined by Mr. Carl.

28. The next to testify was **James E. Huggins**. Mr. Huggins retired from the FBI in 1995 and the OAG in 2003. Mr. Huggins hired Dan Gibbons in August 1999. According to Mr. Huggins, it was he who reached out to Mr. Gibbons to determine if he would be interested in becoming an investigator with the OAG. Mr. Huggins stated that Mr. Gibbons' gender played no part in his decision to hire Mr. Gibbons. In fact, when Mr. Huggins was hired (by then Attorney General Ben Chandler) as the Director of Public Corruptions, a newly formulated division, Attorney General Chandler specifically tasked him with filling the division with highly qualified candidates. Mr. Huggins knew of four to five people who were ready to retire from police service. So he reached out to those he knew were highly qualified (including Dan Gibbons). Mr. Huggins stated that Mr. Gibbons' gender had nothing to do with his hiring as an investigator with the OAG.

29. The next to testify was **Mike Duncan**, who worked at the OAG until January 2004 as the Director of the Special Investigations Division. Prior to that, Mr. Duncan worked with the Kentucky State Police for twenty-five years. Mr. Duncan knew Mr. Ken Gillingham and recommended his hiring as an investigator with the OAG.

30. According to Mr. Duncan, there were two reasons Mr. Gillingham was hired. The first was that he needed someone in Western Kentucky to investigate welfare fraud and the second was that he knew Mr. Gillingham had covert surveillance experience in addition to his twenty-five years of Kentucky State Police experience. According to Mr. Duncan, he had nothing to do with the salary determination of Mr. Gillingham and his gender played no part in his hiring.

31. The next to testify was **Susan Bryan**, who was the Personnel Administrator with the OAG between 1996 and August 2002.

32. According to Ms. Bryan, the hiring process during her tenure was as follows: she or the Appointing Authority would be told that a Director wanted a position filled. The position opening would first be posted internally. She would then request a register through the Personnel Cabinet. That register and the applications of the qualified candidates would then be forwarded to the Director who would then set up interviews. Once interviews were completed, the register would be returned to Ms. Bryan with a hiring recommendation. The Appointing Authority would rely on Ms. Bryan to ensure that the new hire was being paid at either the entry or mid-point salary level. Depending on the amount of the new hire's starting salary, if required, Ms. Bryan would perform an in-range salary review. If an incumbent employee was making less than the new hire but worked in the same county, was in the same classification, and had the same qualifications as the new hire, including education and experience, an adjustment to the incumbent's salary could be mandated.

33. Ms. Bryan testified she had no knowledge of any sex/gender discrimination going on in the office of the OAG during her tenure.

34. This matter is governed by KRS 18A.140(1) which states:

No person shall be appointed or promoted to, or demoted or dismissed from, any position in the classified service, or in any way favored or discriminated against with respect to employment in the classified services because of his political or religious opinions, affiliations, ethnic origin, sex, race or disability. No person over the age of forty (40) shall be discriminated against because of age.

35. This matter is also governed by KRS 18A.095(12) which states:

Any classified employee may appeal to the board an action alleged to be based on discrimination due to race, color, religion, national origin, sex, disability, or age forty (40) and above. Nothing in this section shall be construed to preclude any classified or unclassified employee from filing with the Kentucky Commission on Human Rights a complaint alleging discrimination on the basis of race, color, religion, national origin, sex, disability, or age in accordance with KRS Chapter 344.

36. The Hearing Officer has considered the entire administrative record, including the testimony and statements therein.

FINDINGS OF FACT

1. The Appellant, Kathryn Parrish, a classified employee with status, filed her appeal with the Personnel Board on March 9, 2012, appealing from an unfavorable response to a grievance filed with the OAG on or about August 5, 2011, regarding the alleged disparity in salary between male and female Investigators within the OAG.

2. Although the issues on appeal were somewhat nebulous to begin with, by order dated March 15, 2013, the issues to be heard at the hearing were the Appellant's claims of discrimination as to the starting salaries given Ken Gillingham, James Mobley and Dan Gibbons. The Appellant was to bear the burden of proof as to her claims of discrimination which were to be proven by a preponderance of the evidence.

3. The Appellant is a female. Ken Gillingham, James Mobley and Dan Gibbons are each male.

4. Dan Gibbons was hired in Jessamine County on or about August 1, 1999, at a starting salary of \$3,850 per month. On the date of his hiring, Mr. Gibbons had not been employed by the Commonwealth of Kentucky. On the date of his hiring, the Appellant, Kathryn Parrish, was earning a salary of \$2,610.78 per month and was an incumbent employee of the Commonwealth of Kentucky. On the date of Mr. Gibbons hiring, Ms. Parrish was an Investigator II in Jefferson County and had worked 77 months as an Investigator with the OAG. On the date of his hiring, Mr. Gibbons had 313 months of investigative experience with the Lexington Police Department. Mr. Gibbons was hired upon a recommendation of Mr. Jim Huggins who knew him to be well qualified. Mr. Huggins testified that Mr. Gibbons was hired solely on his qualifications and not because of his gender.

5. Kenneth Gillingham was appointed as an Investigator II on December 1, 2000, at an initial salary of \$2,792 per month in McCracken County. On the date of his hiring, Mr. Gillingham had not been employed by the Commonwealth of Kentucky. On the date of his hiring, the Appellant, Kathryn Parrish, was earning a salary of \$2,741.32 per month and was an incumbent employee of the Commonwealth of Kentucky. On the date of Mr. Gillingham's hiring, Ms. Parrish was an Investigator II in Jefferson County and had worked 93 months as an Investigator with the OAG. On the date of his hiring, Mr. Gillingham had 323 months of investigative experience with the Kentucky State Police.

6. Mike Duncan, formerly the Director of the Special Investigations Division for the OAG, testified he hired Mr. Gillingham for two reasons. The first was he needed someone to work welfare fraud in Western Kentucky. The second was Gillingham had covert surveillance experience in addition to his 25 years with the Kentucky State Police. According to Mr. Duncan, Mr. Gillingham's sex/gender did not play any part in his decision to recommend his hiring.

7. James Mobley was hired as an Investigator II in Franklin County on October 16, 2000, at an initial salary of \$3,014.22. On the date of his hiring, Mr. Mobley had not been employed by the Commonwealth of Kentucky. On the date of his hiring, the Appellant, Kathryn Parrish, was earning a salary of \$2,741.32 per month and was an incumbent employee of the Commonwealth of Kentucky. On the date of Mr. Gillingham's hiring, Ms. Parrish was an Investigator II in Jefferson County and had worked 92.5 months as an Investigator with the OAG. On the date of his hiring, Mr. Mobley had 338 months of investigative experience, including 48 months attributable to his Bachelor of Science degree from Eastern Kentucky University in Law Enforcement.

8. Loren "Squirrel" Carl testified he recommended Mr. Mobley for the investigator II position based upon his experience with financial crimes and because he had handwriting analysis certification from the secret service which he believed would be helpful in identity theft cases. According to Mr. Carl, Mr. Mobley's sex/gender was not considered when he made his recommendation.

9. There is no evidence of record demonstrating that the Appellant was the victim of an adverse employment action.

CONCLUSIONS OF LAW

1. The wage disparity complained of by the Appellant is the bi-product of the KRS Chapter 18A merit and seniority system. There is no evidence of record that demonstrates the Appellant was not being paid appropriately and in accordance with the established rules and regulations of the said merit system at the time Mr. Gibbons, Mr. Gillingham, and Mr. Mobley were each hired. On those various new hire dates, the Appellant's merit system wage rate had long been established. Given that each of these men were not incumbent merit based employees and had approximately three times more investigative experience than the Appellant at the time they were hired, their initial wage rate does not appear to be out of line or inappropriate. Further, there was no evidence of record to suggest that the OAG intended to discriminate in any way against the Appellant based upon her gender.

2. The Appellant has failed to demonstrate by a preponderance of the evidence that the wage discrepancies complained of were the result of sex discrimination suffered at the hand of the Appellee.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **KATHRYN PARRISH VS. OFFICE OF THE ATTORNEY GENERAL (APPEAL NO. 2012-056)** 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 Geoffrey B. Greenawalt** this 3rd day of April, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Armand Judah
Hon. Morgan Ransdell

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2012-056**

KATHRYN PARRISH

APPELLANT

**V. INTERIM ORDER CONTAINING
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

OFFICE OF THE ATTORNEY GENERAL

APPELLEE

* * * * *

This matter came on for a pre-hearing conference on June 29, 2012, at 9:30 a.m. ET, at 28 Fountain Place, Frankfort, KY, before Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment pursuant to the authority found at KRS Chapter 18A.

Appellant Kathryn Parrish was present by telephone and not represented by legal counsel. Appellee Office of the Attorney General was present and represented by the Hon. Morgan G. Ransdell. Also present for the Appellee was Larry Clarke.

The purposes of the pre-hearing were to discuss the status of the appeal and to schedule an evidentiary hearing, if appropriate.

Since the time of the last pre-hearing conference, the Hearing Officer entered a Recommended Order dismissing Appellant's other appeal (Appeal No. 2011-189), thus, there was no reason to consider consolidation. The parties also had a brief discussion regarding a document submitted by the Appellant styled as an open records request. The parties agreed to consider this as a discovery request and a copy was provided to counsel for the Appellee.

Subsequent to the pre-hearing conference held on June 29, 2012, Appellee filed a Motion to Dismiss. A briefing schedule was entered giving Appellant time in which to file a response and counsel for the Appellee time in which to file a reply. The Appellant did file a timely response; Appellee filed an Amended Motion to Dismiss and later a Reply in support of its amended motion. At that point, it was determined the matter should be submitted to the Hearing Officer for a ruling on both the motion and amended motion to dismiss.

BACKGROUND

1. During the relevant times, Appellant was a classified employee with status. Appellant is currently classified as an Investigator III with the Appellee.

2. In the appeal filed by Appellant on March 9, 2012, Appellant claimed discrimination based on gender. She stated, "[T]here have been several Investigators hired at the office and given preferential treatment because they are male employees." Appellant went on to identify "just a few of the inappropriate actions are concerning three ... investigators, Danny Gibbons, Titus Riner, and John Thompson. ... These are just a few examples of the inappropriate salaries/discrimination actions by the agency against me."

3. Though Appellant did appear to limit herself to challenging the hiring and/or salary increases given to Riner, Thompson, and Gibbons, in her response to Appellee's motion to dismiss, she identified other hires and/or promotions or adjustments to salaries she believed further constituted discrimination against her based on her gender.

4. Counsel for the Appellee responded to those allegations. The Hearing Officer does note the issue identified in the Order entered July 10, 2012, stated, "[...]shall be whether or not the Appellant was discriminated against based on her gender regarding her salary."

5. Thus, the Hearing Officer will address (as if pled in the appeal) the additional information Appellant provided in her response to the Appellee's motion. In the motion, the Appellee sets forth that Titus Riner and John Thompson were both hired as non-merit employees and, in fact, both made less than the Appellant at the time of their hire and to this day still earn less than Appellant. Appellee argues that as the employees make less, and as they are not similarly situated, having been non-merit employees upon hire, those two individuals cannot form the basis for any gender discrimination claim when it comes to salary equity.

6. As to Dan Gibbons, in the original motion to dismiss, Appellee admits that Gibbons was hired and making in excess of what Appellant did. Counsel for the Appellee notes that Gibbons was hired August 1, 1999, and that 101 KAR 2:034, Section 1(2), became effective August 25, 1999. Gibbons was hired in a position in Jessamine County—not in Jefferson County (where Appellant was hired), nor in Franklin County. Appellee concedes that had Appellant been hired September 1, 1999, it would not have been able to set Gibbons' initial salary at the maximum for that grade. Appellee argues that as the regulation did not apply and as Appellant had not applied for that position in 1999, had she applied for that position, even under the rules in effect on August 1, 1999, she would only have been entitled to a transfer with no additional salary.

7. Prior to Appellant filing her response, Appellee filed an Amended motion to dismiss. In this motion, Counsel for the Appellee sets forth the requirements for a disparate treatment claim of discrimination based on gender. Counsel contends that Appellant cannot satisfy the requirements for a *prima facie* case on discrimination based on gender in that Gibbons was not similarly situated to Appellant, and that Appellant did not suffer an adverse employment action, which would be two of the *prima facie* elements needed.

8. Counsel then goes on to assume that even if Appellant had met the requirements for a *prima facie* case, the non-discriminatory explanation offered by Appellee (following the administrative regulations in place at the time of hiring Gibbons), counsel states, "[W]hen Ms. Parrish was promoted to the positions of Investigator II and Investigator III, her salary resulting in adjustments were specifically governed and dictated by 101 KAR 2:034, Section 3; therefore, she cannot properly plead or prove intentional discrimination with regard to the salary adjustments." On page 15 of the amended motion, counsel sets forth the three grounds on which he believes Appellant's claim should be dismissed.

9. The Appellant filed a response to the motion and amended motion. Appellant brought forth names of individuals not previously disclosed that she believes represent evidence of discrimination based on gender against her in setting of salary. In addition, Appellant stated:

My original complaint began with my transfer and promotion into an entirely different classification, unit, and retirement systems/benefit plan (that being from non-hazardous to hazardous duty) in April 1998 upon my completion of basic training at DOCJT. Additionally, I was not given credit for any of my investigative experience for the previous 8 year (sic) while another unit or for my college degree.

Appellant points specifically to the hiring of Dan Gibbons on August 1, 1999, which was the same date Appellant had been changed from the position of Investigator Senior to Investigator II, with no change in salary.

10. In response, Appellee states that Appellant's title change from Investigator Senior to Investigator II actually occurred March 16, 1999, and that this title change was in no way discriminatory.

11. Appellant points to the hiring (on October 16, 2000) of James Mobley (Investigator II) at a starting salary higher than her salary at the time, and also the hiring of Kenneth Gillingham on November 29, 2000, (also to the position of Investigator II) also at a higher salary than Appellant.

12. In response, counsel for the Appellee argues that both Mobley and Gillingham had more experience than Appellant and would not be similarly situated.

Appellant mentioned other names in her response, specifically, George Bean and Dennis Spalding—both of which counsel for the Appellee states were hired making less than Appellant.

13. Appellant mentions Paul Underwood, and claims he made a lateral transfer from DOCJT to the position of Investigator II at a starting salary higher than she earned at the time. Counsel for the Appellee concedes that when Underwood transferred, he did make a salary higher than Appellant; however, the transfer would not trigger the salary comparison regulation at 101 KAR 2:034 and could not form the basis for a discrimination claim against OAG. Appellant also mentioned Bill Stewart (appointed to the position of Investigator II in 2004); counsel for the Appellee contends that when appointed, Stewart was making less than Appellant. The same goes for Robert O'Neil, appointed as Investigator II on October 11, 2004; and also George Wilding, Jr., on March 2, 2005. Counsel for the Appellee reiterated his arguments concerning the hiring of Riner and Thompson into non-merit positions.

14. A motion to dismiss for failure to state a claim should only be granted if it appears that Appellant would not be entitled to relief under any set of facts that could be proved in support of his claim. *Pari-Mutuel Clerk's Union, Local 541 v. Kentucky Jockey Club*, 551 S.W.2d 801 (Ky. 1977). All allegations on the appeal form are accepted as true for purposes of ruling on the motion. *Pike v. George*, 434 S.W.2d 626 (Ky. 1968). The appeal form, like a complaint in a civil action, should be liberally construed in a light most favorable to Appellant. *Gall v. Scroggy*, 725 S.W.2d 867 (Ky. App. 1987).

FINDINGS OF FACT

1. The Appellant is a classified employee with status and currently holds the position of Investigator III in Jefferson County.

2. The Hearing Officer finds Appellant has not stated adverse employment actions with regards to the appointments of George Bean, Dennis Spalding, Bill Stewart, Paul Underwood, Robert O'Neil, George Wilding Jr., Titus Riner, and John Thompson in that each of those individuals, upon their initial appointments, made less than Appellant. In addition, the Hearing Officer finds that some of these individuals to this day make a salary less than that of Appellant.

3. The Hearing Officer finds that Dan Gibbons, James Mobley, and Kenneth Gillingham, at the time of their initial appointments, were appointed at a salary higher than that of Appellant.

4. The Hearing Officer finds that the regulation at 101 KAR 2:034, which requires salary comparisons if certain criteria are met, would not apply for the hiring of Dan Gibbons, but the Hearing Officer cannot find that for Mobley and Gillingham, as the Hearing Officer is not aware of the county of those individuals hired at initial appointment.

5. The Hearing Officer finds the Appellant's claims, as regards Dan Gibbons, James Mobley, and Kenneth Gillingham may or may not make a claim of adverse employment action, and that issue may be best resolved at an evidentiary hearing. However, the Hearing Officer finds it is unclear whether this appeal is timely as to those claims, and the issue of timeliness should specifically be addressed.

CONCLUSIONS OF LAW

1. The Hearing Officer concludes as a matter of law that having found Appellant's appeal cannot succeed as to the claims regarding the hiring of George Bean, Dennis Spalding, Paul Underwood, Bill Stewart, Robert O'Neil, George Wilding, Jr., Titus Riner, and John Thompson, that those claims should be dismissed.

2. The Hearing Officer concludes that it is not clear whether the claims Appellant has asserted against Dan Gibbons, Jonathan Mobley, and Kenneth Gillingham might state an adverse employment action or were timely filed. Thus, the Hearing Officer believes those issues should be addressed.

3. The Hearing Officer thus **ORDERS** that Appellee shall file any supplemental motion to dismiss regarding timeliness and/or whether adverse employment claims were actually by the Appellant as regards Gibbons, Mobley, and Gillingham, no later than **December 17, 2012**.

Appellant would then be given up to and including **January 15, 2013**, in which to respond.

The matter will then stand submitted to the Hearing Officer for a ruling.

SO ORDERED at the direction of Hearing Officer Boyce A. Crocker this 21st day of November, 2012.

KENTUCKY PERSONNEL BOARD



Mark A. Sipek
Executive Director

A copy hereof this day mailed to:

Hon. Morgan S. Ransdell
Ms. Kathryn L. Parrish