

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2019-156**

RENE' POITRA-RILEY

APPELLANT

VS.

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

DEPARTMENT OF EDUCATION

APPELLEE

** ** * * *

This matter came on for a pre-hearing conference on October 28, 2019, at 1:00 p.m., ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Rene Poitra-Riley, was present in person and was not represented by legal counsel, however, she was accompanied by her former coworker, Elaine Jett. The Appellee, Department of Education, was present and represented by the Hon. Ashley Lant. Also present for the Appellee were Lynn McGowan-McNear and Angela Smith.

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.

BACKGROUND

1. The Hearing Officer notes the Appellant filed her appeal with the Personnel Board on July 31, 2019, alleging age discrimination. The Appellant stated that, in July 2019, her coworkers had been given pay raises as Program Consultants. The increases ranged from 13% to 16%. The increases went into effect July 1, 2019. The Appellant filed her appeal believing that she had been denied this pay increase based on age discrimination. The Appellant opted to

retire August 1, 2019. The Appellant stated that, if she had been eligible for a salary increase, she would have stayed up to 20 years' service. The Appellant stated that she and two others were notified that they did not receive this increase.

2. At the pre-hearing conference, it was established that the Appellant was a Child Nutrition Program Consultant, which is a grade 15. At the time of her retirement, she was earning \$4,193.50 per month. She is requesting that she receive a similar increase to the other employees, effective July 1, 2019.

3. The Appellee responded that, due to a new hire, there was a new in-range appointment pursuant to 101 KAR 2:034. The Appellee appointed an employee as a Child Nutrition Program Consultant earning \$3,958.34. All other Child Nutrition Program Consultants making less than that amount were raised to that level. The Appellant and other employees earned more than that amount and did not receive a salary increase. The Appellee believed they followed the appropriate statutes and regulations.

4. The Appellee requested time to file a Motion to Dismiss and a schedule was set.

5. In its Motion to Dismiss, the Appellee argued that the facts are not in dispute. On July 1, 2019 a new employee was appointed with an in-range appointment salary as a Child Nutrition Program Consultant. Fourteen employees received a raise as a result of this in-range appointment. The Appellant did not receive a raise because, on July 1, 2019, the Appellant was already receiving a salary of \$4,193.50 while the new appointee salary was \$3,958.34.

6. The Appellee argued that its actions followed the language contained in 101 KAR 2:034, Section 1, which only applies to employees who are earning less than a new appointee's salary. The Appellee argued that the Appellant could not establish the necessary elements to prove an age discrimination case because she was not qualified under the regulation to receive a pay increase.

7. In her response, the Appellant believed she was discriminated against because 14 other Child Nutrition Program Consultants received a pay increase. She stated that pay increases should not have been given based on a dollar amount but instead on a percentage increase. The Appellant requested an increase of 15.479% which was the average increase received by the employees.

8. The Appellant also attached a memorandum from Personnel Cabinet Secretary Thomas B. Stevens dated May 24, 2019. This memorandum, which concerned updates to the classified and unclassified salary schedule, included the following quote; “Any Appointing Authority seeking to implement a salary increase for all employees in a specific job classification following this revision shall state in writing to the Office of State Budget Director and Secretary of Personnel, the justification for the salary increase. The Appointing Authority shall also confirm that sufficient funds are available to accommodate the salary increase.” The Appellant argued the fact that she did not receive the pay raise demonstrates that this was age discrimination. The Appellant requested to have her pay adjusted back to July 1, 2019, an adjustment to her sick and annual leave balances, and an adjustment to her retirement.

9. In its reply, the Appellee stated that the Appellant did not contest that she made more than the new appointee and, therefore, was not entitled to a pay adjustment pursuant to 101 KAR 2:034, Section 1, which only applies to employees who are earning less than the new appointee.

10. 101 KAR 2:034, Section 1, reads as follows:

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 job classification;
 - (b) Is in the same work county; and
 - (c) Has a similar combination of education and experience relating to the relevant job class specification.

FINDINGS OF FACT

1. The Appellant was employee as a Child Nutrition Program Consultant earning \$4,193.50 per month.

2. On July 1, 2019, the Appellee hired a new appointee through an in-range appointment pursuant to 101 KAR 2:034. The new employee was earning \$3,958.34 as a Child Nutrition Program Consultant.

3. As a result of the provisions of 101 KAR 2:034, Section 1, the Appellee raised the pay of 14 employees. Three employees did not receive raises, including the Appellant, because they earned more than the new employee did.

4. The Appellant was not eligible for a raise pursuant to 101 KAR 2:034, Section 1, because of her salary.

CONCLUSIONS OF LAW

1. Pursuant to 101 KAR 2:034 the Appellant was not eligible for a salary increase upon the hiring of the new employee because she earned more than the salary that was being provided to the new employee.

2. To establish a claim for age discrimination, the Appellant must show that she is a member of a protected class, that she did not receive a benefit that she was qualified to receive said benefit, and she “received disparate treatment from a similarly situated younger person ... by a significantly younger person.” *Flock v. Brown-Forman Corp.*, 344 S.W.3d 111, 114 (Ky. Ct. App. 2010).

3. The Appellant cannot establish the elements of an age discrimination case because she was not qualified to receive a pay raise.

4. Neither the Appellee nor the Personnel Board are free to fashion a remedy such as the one suggested by the Appellant where all employees receive the same percentage of raise. The regulation in question describes who is eligible for a raise and the type of raise they receive. The Personnel Board has no legal authority to ignore a properly promulgated state regulation. KRS 13A.130

5. KRS 13B.090(2) allows for a recommendation of dismissal without a hearing “if the hearing officer determines there are no genuine issues of material fact in dispute and

judgement is appropriate as a matter of law.” Such is the case here.

6. There are no genuine issues of material fact and this matter can be decided as a matter of law based on the appeal form, the statements of the parties at the pre-hearing conference, the motion to dismiss, the response and replies.

RECOMMENDED ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Kentucky Personnel Board that the appeal of **RENE' POITRA-RILEY VS. KENTUCKY DEPARTMENT OF EDUCATION (APPEAL NO. 2019-156)** 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).

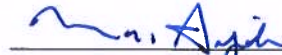
[Hearing Officer Note: Any document filed with the Personnel Board shall also be served on the opposing party.]

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 A. Sipek** this 14th day of April, 2021.

KENTUCKY PERSONNEL BOARD



**MARK A. SIPEK
EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:
Hon. Ashley Lant
Rene' Poitra-Riley