

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2012-141

ANDREA RADER

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

**** ** ** ** ****

The Board at its regular March 2013 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated January 23, 2013, 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 _____ day of March, 2013.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Gordon Slone
Andrea Rader

**COMMONWEALTH OF KENTUCKY
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**FINDINGS OF FACT, CONCLUSIONS OF LAW
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This matter came on for evidentiary hearing on October 26, 2012, 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, Andrea Rader, was present at the evidentiary hearing and was not represented by legal counsel. The Appellee, Energy and Environment Cabinet, was present and represented by the Hon. Gordon Slone.

At issue in the evidentiary hearing was the Appellant's claims that she was discriminated against on the basis of gender and/or politics when she was not allowed to voluntarily demote from Environmental Scientist II (pay grade 15) to Environmental Inspector III (pay grade 14) and retain her current salary and pay grade. The Appellant was to bear the burden of proof which was to be by a preponderance of the evidence.

BACKGROUND

1. The Appellant, Andrea Rader, a classified employee, timely filed her appeal with the Personnel Board on June 18, 2012, alleging that she was discriminated against on the basis of her sex or political affiliation when she was not allowed to voluntarily take a demotion without a cut in salary.

2. The first to testify was the Appellant, **Andrea Rader**, who is presently an Environmental Scientist II (grade 15) working out of the Hazard office. She was promoted to Environmental Scientist II from her prior position as an Environmental Inspector III (grade 14) in December, 2007. In addition to maintaining all her previous inspection duties, the Appellant now also maintains standard operating procedure for the solid waste program and trains new employees.

3. In February of 2008, Ms. Rader was invited to join the Environmental Response Team (ERT) which according to her, is an opportunity that does not come along very often. In March, 2008, upon joining the ERT, the Appellant was required to be on-call twenty four hours a day for one week out of every three. According to the Appellant, being on call ties her down considerably and is a major personal sacrifice. However, she continues to enjoy being on the ERT because she can see tangible results. In October of 2008, she was asked to be on the ERT full-time for the London region which added nine more counties to cover and additional responsibilities. In addition, the Appellant is the recycling coordinator for her office.

4. According to the Appellant, she has taken on too much responsibility and is experiencing an unhealthy level of stress. As such, she thought it best to ask for a demotion. In November of 2008, an Inspector transferred from her office and the Appellant asked to be demoted to that open position. At the time she was told she had to be in her current position at least one year before she could voluntarily demote. Also, there was no mention of taking a pay cut along with the voluntary demotion.

5. After approximately eighteen to twenty months, the Appellant again asked to be demoted and was then told she had to be in her position for two years before she could voluntarily demote. Then, in December 2010, another Inspector left her office and the Appellant asked to be demoted to that open position. It was only upon that request that the Appellant was told if she voluntarily demoted she would have to take a 5 percent pay cut.

6. According to the Appellant, taking voluntary demotion with no pay cut is fairly common.

7. Appellant's Exhibit 1 was introduced into the record over the objection of the Appellee. This document was prepared by the Personnel Cabinet and purports to list the names of all the employees within the Department of Environmental Protection who took a voluntary demotion between January, 2008 and June, 2012, the pay grade each individual went from and to, and whether each individual was required to take a pay cut.

8. Appellant's Exhibit 2 was introduced through the witness and is a copy of employee Robert Staley's P-1 in connection with a voluntary demotion in which Mr. Staley did not receive a pay cut. Appellant's Exhibit 2 was introduced into the record over the objection of the Appellee. According to Ms. Rader, Mr. Staley was in the exact same position she is and was allowed to demote to a grade 14 without taking a pay cut. Ms. Rader pointed out that Mr. Staley was allowed to demote to the Environmental Inspector III position roughly seven and a half months after being promoted to the Environmental Scientist II position. According to the Appellant, their job duties were the same and the only noticeable difference between her and Mr. Staley was their gender.

9. Appellant's Exhibit 3 was introduced into the record and is a copy of an Executive Order signed by Governor Beshear ordering the Commonwealth of Kentucky to provide equal employment opportunity to all people in all aspects of the employer/employee relations without discrimination due to "race, color, religion, sex, national origin, sexual orientation or gender identity, ancestry, age, disability or veteran status." It should be noted that this Order does not provide for political affiliation.

10. The Appellant pointed out that like Mr. Staley, she too has had nothing but "outstanding" evaluations every year since she has been employed. According to the Appellant, she is not trying to get out of work. Rather, she has simply become overwhelmed with her responsibilities and is looking to decrease her stress level. Unfortunately, she is not being afforded the same opportunities to voluntarily demote as others have.

11. On cross-examination, the Appellant admitted that Mr. Staley's situation was different from hers because he was not applying for a demotion within the same office. In fact, Mr. Staley was in the Frankfort office and transferred to the Louisville office.

12. Appellant's Exhibit 4 was introduced through the witness and is a copy of an e-mail dated February 2012 wherein John Maybriar informed the Appellant that if she wanted to reclassify, she would have to take a 5 percent pay cut. Appellee's Exhibit 1 was introduced through the witness and is an e-mail dated December of 2010 wherein Mr. Maybriar informed the Appellant that if she wished to take a voluntary demotion she would have to take a 5 percent pay cut. According to the Appellant, this was the first time a pay cut was ever mentioned to her in connection with her request to voluntarily demote. Ms. Radar noted that after the Inspector referred to in Appellant's Exhibit 4 left his Inspector III position, the position was re-posted as an Inspector I position.

13. The Appellant went on to state that 9 of the 29 voluntary demotions set forth on p. 1 of Appellant's Exhibit 1 were female. She also stated that she did not think her demotion was politically motivated although she was not for sure. She further admitted that upon her promotion to her current position, she received a 5 percent pay increase and thereafter an additional 5 percent pay increase upon successfully completing her promotional probation period. As such, if she was required to take the 5 percent pay cut upon voluntarily demoting, she would still be earning more than she was when she was previously an Inspector III.

14. Whereupon the Appellant's case was concluded, and at which time the Appellee moved for a directed verdict on the basis that the Appellant's appeal was not timely filed and on the basis that the action taken by the Appellee was not appealable because the Appellant was not penalized as defined by KRS 18A.005(24). The Appellee further argued that the Appellant failed to make a *prima facie* case for gender or political discrimination and failed to demonstrate

that similarly situated males were treated more favorably than she was.

15. The Appellant countered by stating that she demonstrated that several male coworkers were allowed to demote in the past without taking a pay cut and further stated that the regulation should be applied equally to all classified employees.

16. The Appellee's motion was **DENIED**, and the next to testify was **Ms. Amanda Reid**, the Internal Policy Analyst III with the ECC. Ms. Reid is the human resource contact within the Department and deals regularly with promotions and disciplinary actions, etc. Ms. Reid stated she was familiar with the Appellant's request for a voluntary demotion. She is also familiar with the list marked as Appellant's Exhibit 1. Ms. Reid admitted that nine of the employees listed on Appellant's Exhibit 1 were female.

17. Ms. Reid reviewed Appellant's Exhibit 1 and commented on the various differences in circumstances between the Appellant's situation and (some) of the employees who were allowed to voluntarily demote. She further noticed that although Mr. Staley and the Appellant held similar positions, Mr. Staley did not voluntarily demote within the same office.

18. According to Ms. Reid, to the best of her knowledge, the Appellant's request was never presented to the Appointing Authority. The normal process was once an employee requests a voluntarily demotion, the personnel contact or Branch Manager sends the request up to the Director who will then send the request on to her. From Ms. Reid the request is sent to the Commissioner and then on to the Appointing Authority. According to Ms. Reid, the Appellant's request never reached her. Ms. Reid testified that she reviewed the Appellant's personnel file and noted that there was no question as to her qualifications. In addition to possessing all the necessary experience and education, the Appellant's most recent evaluations were all "outstanding."

19. Ms. Reid stated that Secretary Peters, Susan Smith [since retired], and Holly McCoy-Johnson are the Appointing Authorities for EEC. It was Ms. Reid's understanding that no paperwork on the Appellant's request was ever sent to Susan Smith (who at the time remained an appointing authority and had not yet retired) to process. Finally, according to Ms. Reid, once a decision is made by the Appointing Authority, final approval is determined by the Personnel Cabinet.

20. Ms. Reid testified that an employee is not required to wait until they are off promotional probation before they can request a voluntary demotion. Ms. Reid also stated that technically, the Appellant's request to demote was not official and noted that there was no personnel action request for the same in the Appellant's personnel file. Finally, Ms. Reid stated that she had no personal knowledge as to why the Appellant's request had been denied.

21. The next to testify was **Mr. Anthony Hatton**, the Director of the Division of Waste Management, Field Operations Branch. Mr. Hatton stated that Mr. Maybriar is the Branch Manager, and that all Inspector IIIs are in the Field Operations Branch. Mr. Hatton testified that the position of Environmental Scientist II was put in place in order to offer promotional opportunities outside the management track.

22. Mr. Hatton testified that had the Appellant voluntarily demoted from Environmental Scientist II to Environmental Inspector III, the position of Environmental Scientist II in her office would have been abolished and reestablished as an Inspector III.

23. The next to testify was **Mr. John Maybriar**, the Field Operations Branch Manager, in charge of overseeing 85 employees in 10 regional offices. When he started his position as Branch Manager, there were no Environmental Scientist II's so he worked to establish the position. As part of the agreement to establish these positions made with his boss, Mr. Maybriar was only allowed to have one Environmental Scientist II position per office. With that in mind, had the Appellant been allowed to voluntarily demote, it would have effectively abolished the position of Environmental Scientist II in Hazard office to the detriment thereof.

24. Mr. Maybriar stated that shortly after coming off promotional probation the Appellant began requesting the subject demotion. He also testified that no Inspector III position has been posted in the Hazard office. According to Mr. Maybriar, the Appellant did not want to take her demotion if it meant less pay to her. He also stated that ERT employees, such as the Appellant, are required to drive official vehicles back and forth from their home to work. As the Appellant lives thirty to forty miles away, if she quit the ERT, she would lose her vehicle benefit.

25. Upon review of Appellee's Exhibit 1, Mr. Maybriar stated that the person he talked to at the tower was Ms. Susan Smith who told him that if the Appellant demoted she would have to take a 5 percent pay cut.

26. Mr. Maybriar testified that the Appellant received her promotion to Environmental Scientist II via a competitive register where she was clearly the best candidate. He stated that the Appellant is a good employee

27. In 2012, Mr. Maybriar stated that he talked to Liz Shelby about the Appellant's demotion request and went on to forward a formal request to her. It was his understanding that from there, Liz Shelby contacted the Appellant concerning the subject request. Mr. Maybriar further stated that in December of 2010, when he spoke to Ms. Smith, or Lynn Keeling, about the Appellant's demotion request, he did not have a formal request to demote from the Appellant in which to forward.

28. Mr. Maybriar went on to note that the Appellant applied for a supervisor's position in March of 2011 but eventually withdrew her application. This Hearing Officer then questioned Mr. Maybriar as to whether the Environmental Scientist II position would have been eliminated had the Appellant received the supervisor's job. Mr. Maybriar stated that had it been stepped down to a "no vacancy," it would have effectively eliminated the Environmental Scientist II position. However, he usually drops any such opening down to an entry level position to prevent disharmony from occurring within the office which can occur anytime a new person off the street is brought in at a higher pay grade. According to Mr. Maybriar, had the Appellant been allowed to demote to the Inspector III position without decreasing her salary that would not have created disharmony in the Hazard office.

29. This matter is governed 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.

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

FINDINGS OF FACT

1. The Appellant, Andrea Rader, a classified employee, filed her appeal with the Personnel Board on June 18, 2012, alleging that she was discriminated on a basis of her sex or political affiliation when she was not allowed to voluntarily demote from the position of Environmental Scientist II (grade 15) to Environmental Inspector III (grade 14) without taking a pay cut. The Appellant's appeal is found to be timely filed as she was last notified that she would be required to take a pay cut if she reclassified on or about February 24, 2012 [see Appellant's Exhibit 4].

2. The Appellant was promoted to the position of Environmental Scientist II from the position of Environmental Inspector III in December, 2007. Within a year she was a member of the Environmental Response Team (ERT) which required her to be on-call one out of every three weeks, twenty-four hours a day, seven days a week. Shortly thereafter it became apparent to the Appellant that she had taken on too much responsibility and was experiencing an unhealthy level of stress. As such, because she did not want to step down from her position on the ERT, the Appellant decided the best way to lighten her responsibilities would be to request a voluntary demotion back to her previous position of Environmental Inspector III.

3. Shortly after coming off her six month promotional probation, the Appellant began requesting a voluntary demotion. The request appears to have been made to the Appellant's Branch Manager, John Maybriar. Upon one such request in December 2010, John Maybriar verbally consulted with Susan Smith, one of the Appellee's Appointing Authorities, regarding the same and was told by Ms. Smith that if the Appellant voluntarily demoted she would be required to take a 5 percent pay cut per grade.

4. It appears that in February 2012, the Appellant again requested to voluntarily demote. On this occasion, Mr. Maybriar consulted Liz Shelby concerning the request. Apparently after consulting with Tony (last name, position or authority unknown) it was decided that if the demotion were to be granted it would require the Appellant to take a 5 percent pay cut. This particular decision was forwarded to the Appellant by e-mail dated February 24, 2012 [see Appellant's Exhibit 4].

5. Mr. Maybriar stated that had the Appellant voluntarily demoted to her previous position of Inspector III, the position of Environmental Scientist II in the Hazard office would likely have been abolished to the detriment thereof and any opening resulting therefrom filled with an entry level position.

6. There is no evidence of record demonstrating an Appointing Authority for the ECC ever received a formal request from the Appellant to voluntarily demote or that a formal decision upon the same was ever made. Instead, the Appellant was told via electronic mail that if she proceeded with her request she would be required to take a 5 percent pay cut.

7. While allowing that she was unsure, the Appellant admitted that she was unaware of any political motivation surrounding her request to voluntarily demote.

8. Through the testimony of Amanda Reid, it is found that the employees listed on Appellant's Exhibit 1 were allowed to voluntarily demote without loss of salary based upon varying circumstances too dissimilar to compare directly with the Appellant's situation. A distinguishing feature between Mr. Robert Staley's being allowed to voluntarily demote without loss of pay to that of Appellant was the fact that Mr. Staley was transferring outside of his home office into another office. Ms. Reid's testimony also established that 9 out of the 29 employees listed on Appellant's Exhibit 1 were female, indicating that females were generally treated similarly to males when being allowed to voluntarily demote without loss of pay.

CONCLUSIONS OF LAW

1. The Appellant, Andrea Rader, a classified employee, timely filed her appeal with the Kentucky Personnel Board on June 18, 2012.

2. Pursuant to 101 KAR 2:034, Section 3(2)(a)(1) and (2), it is well within the Appointing Authority's discretion to require the Appellant to reduce her pay in connection with her voluntary demotion, and although it has not been demonstrated that an official request for the voluntary demotion was ever made directly to the Appointing Authority or decided upon by said Appointing Authority, the information actually provided to the Appellant regarding her request is consistent with the dictates of applicable regulation.

3. The Appellant remains entitled to have her request to voluntarily demote without loss of pay forwarded to the Appellee's Appointing Authority for an official decision.

4. Although the Appellant has established that at least 27 employees, 9 of which were female, within the Department of Environmental Protection were allowed to take a voluntary demotion without a reduction in salary, it is concluded that the circumstances surrounding each such allowance do not correlate sufficiently with the Appellant's circumstances to establish she has been treated differently than other such employees, or that she has been discriminated against on the basis of her gender or political affiliation. As such, the Appellant has not demonstrated by a preponderance of the evidence that she was discriminated against with respect to employment in the classified services because of her political affiliation or sex.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **ANDREA RADER V. ENERGY AND ENVIRONMENT CABINET (APPEAL NO. 2012-141)** 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).

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 _____ day of January, 2013.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Gordon Slone
Andrea Rader