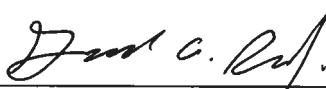


CERTIFICATION OF PERSONNEL BOARD RECORDS

I certify that attached hereto is a true and correct copy of the Findings of Fact, Conclusions of Law and Recommended Order and Final Order in the case of **ADEL RAYAN V. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2018-254)** as the same appears of record in the office of the Kentucky Personnel Board.

Witness my hand this 17th day of May, 2024.



**GORDON A. ROWE, JR., SECRETARY
KENTUCKY PERSONNEL BOARD**

Copy to Secretary, Personnel Cabinet

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2018-254

ADEL RAYAN

APPELLANT

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

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

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

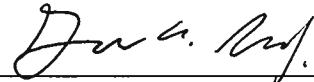
The Board, at its regular May 2024 meeting, having considered the record, including the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer dated March 6, 2024, Appellant's Exceptions and Request for Oral Argument, Memorandum in Support of Appellant's Exceptions, Appellee's Exceptions, Appellant's Response to Exceptions, Appellee's Response to Exceptions, oral arguments, and being duly advised,

IT IS 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 **SUSTAINED to the extent therein**.

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 17th day of May, 2024.

KENTUCKY PERSONNEL BOARD



GORDON A. ROWE, JR., SECRETARY

Copies hereof this day emailed and mailed to:

Hon. Lucas Roberts
Hon. Stuart Cobb
Hon. Rosemary Holbrook (Personnel Cabinet)
Jay Klein

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2018-254

ADEL RAYAN

APPELLANT

V.

FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND RECOMMENDED ORDER

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

** * * * *

This matter came on for an evidentiary hearing on February 16, 2022, at 9:30 a.m. ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Stafford Easterling, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Adel Rayan, was present and was represented by the Hon. Stuart Cobb. The Appellee, Cabinet for Health and Family Services, was present and was represented by the Hon. Lucas Roberts.

BACKGROUND

1. The Hearing Officer notes this appeal was filed with the Personnel Board on December 18, 2018. On the appeal form, the Appellant, a classified employee with status, indicated he was appealing a demotion and involuntary transfer in addition to advancing claims of gender, race, national origin, religious, and veterans status discrimination. The Appellant further explained his claims in the narrative portion of the appeal form wherein he states, in pertinent part:

I have been stereotyped based on the erroneous perception of my faith, gender, and Palestinian ethnicity by both OCSHCN Employees and Management. I am an Arab of the Muslim faith, one of a handful of male employees in the entire Agency. I am the only Male Manager among a staff of Women Managers in leadership. I have identified my faith and background on several occasions due to dietary restrictions.

Adel Rayan
Findings of Fact, Conclusions of Law,
and Recommended Order
Page 2

2. Following a series of pre-hearing conferences and the exchange of discovery, the Hearing Officer entered an Interim Order on June 6, 2019, assigning the Appellant the burden of proof on his discrimination claims and assigning the Appellee the burden of proof on the involuntary transfer issue.

3. The Appellee requested the Hearing Officer to reconsider assigning it the burden of proof. The Hearing Officer denied this request in an Interim Order dated November 12, 2019. This Interim Order was designated for review by the Personnel Board and a copy of this Interim Order is Attachment A to this Recommended Order.

4. After hearing from counsel for both parties at the regular December 2019 Board meeting, the Personnel Board sustained the Hearing Officer's Interim Order, which is Attachment B to this Recommended Order.

5. The Hearing Officer denied the Appellant's Motion for Summary Judgment and designated the Interim Order dated July 8, 2021, for review by the Personnel Board. which is Attachment C to this Recommended Order.

6. After hearing from counsel for both parties at the regular August 2021 Board meeting, the Personnel Board sustained the Hearing Officer's Interim Order, which is Attachment D to this Recommended Order.

7. The issues for the evidentiary hearing were the Appellant's claim that he was reverted as a result of gender, race, national origin, religion and veteran status discrimination and his involuntary transfer. The Appellee had the burden on proof on the involuntary transfer and the Appellant had the burden of proof with respect to the discrimination claim.

8. The parties entered the following Joint Exhibits on February 4, 2022:

- a) Joint Exhibit 001: Job Class Specification for Program Coordinator.
- b) Joint Exhibit 003: Personnel Action Notification dated May 16, 2018.
- c) Joint Exhibit 004: Personnel Action Notification dated November 10, 2018.
- d) Joint Exhibit 005: Personnel Action Notification dated November 10, 2018.

- e) Joint Exhibit 006: Reversion and Involuntary Transfer letter.
- f) Joint Exhibit 008: CHFS EEO Compliant Form.
- g) Joint Exhibit 010: CHFS EEO Civil Rights Compliance Branch Report.
- h) Joint Exhibit 020: CHFS EEO Civil Rights Compliance Branch Conclusion letter.
- i) Joint Exhibit 021: Affidavit of Missy Jones.

9. The parties entered ten (10) joint stipulations on February 14, 2022.

10. Witnesses:

- a) Howard J. Klein, Appointing Authority
- b) Adel Rayan, Appellant
- c) Cherjuantoe "Juan" Moran, Appellant's First Line Supervisor

11. Following the evidentiary hearing, the parties submitted closing briefs, responses and replies.

12. This appeal has been assigned to Hearing Officer Mark A. Sipek for entry of Findings of Fact, Conclusions of Law and Recommended Order.

FINDINGS OF FACT

1. The parties stipulated to the following facts which the Hearing Officer adopts as Findings of Fact:

- a) As of May 16, 2018, Adel Rayan has been and is currently a classified employee with status.
- b) On May 16, 2018, Adel Rayan was promoted from Program Coordinator, Pay Grade 13, to Human Services Program Branch Manager, Pay Grade 16.

Adel Rayan
Findings of Fact, Conclusions of Law,
and Recommended Order
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- c) The promotion came with a six-month promotional probationary period to November 16, 2018.
- d) On November 9, 2018, the Cabinet provided Adel Rayan written notification that he would be reverted to his former position as Program Coordinator effective November 10, 2018, on the grounds that he had failed to satisfactorily complete his promotional probationary period.
- e) On November 10, 2018, there were no vacant Program Coordinator positions within the Office for Children with Special Healthcare Needs.
- f) The Cabinet did not provide Adel Rayan with written notification that there were no vacant Program Coordinator Positions on November 10, 2018 when he was notified that the Cabinet was reverting him, or at any time on or prior to November 16, 2018.
- g) On November 9, 2018, the Cabinet also provided Adel Rayan with written notification that the Cabinet was involuntarily transferring Adel Rayan from Program Coordinator to Resource Management Analyst 1, Pay Grade 13.
- h) The Cabinet told Adel Rayan in the November 9, 2018 written notification that the reason for the involuntary transfer was that the Cabinet has a business need for Adel Rayan to be in the Resource Management Analyst I classification. The Cabinet did not provide Adel Rayan with any other details in writing for his involuntary transfer.
- i) Adel Rayan is a male, Muslim, ethnic Palestinian immigrant from Kuwait.
- j) Larissa May is a female who was appointed to the Human Services Program Branch Manager as an interim position for one year starting on December 1, 2018. May applied for and was appointed to the same position on August 16, 2019.

2. The Appellant was notified that he did not successfully complete his promotional probationary period as Human Services Program Branch Manager on

November 9, 2018. As a result of this notice, he did not complete his six (6) month promotional probationary period and he did not remain a Human Services Program Branch Manager. (Testimony of the Appellant, Klein, and Joint Exhibit 006).

3. Because he did not successfully complete his promotional probationary period, the Appellant should have been reverted to his previous position, Program Coordinator, in CHFS, Department for Public Health, Immunizations Branch. However, the Program Coordinator position was not vacant. (Joint Exhibit 021).

4. Because his last position was not vacant, the Appellant should have reverted "to a vacant position in the same or similar job classification as his" "last position held in the classified service." KRS 18A.005(35). Instead, the Appellant was reverted to a non-vacant Program Coordinator position with the Office for Children with Special Health Care Needs, Health Information and Technology Branch. (Testimony of the Appellant, Klein, Joint Exhibits 004 and 006 and Joint Stipulation 5).

5. The written notification letter of November 9, 2018, notifying the Appellant of the Involuntary Transfer, did not provide him with the specific reason for the penalization. This letter did not inform him that his previous position as a Program Coordinator was not vacant. It also did not inform him of the lack of vacant Program Coordinator positions in the Office for Children with Special Health Care Needs, or the Department for Public Health, Immunizations Branch. (Testimony of Klein, Joint Exhibit 006 and Joint Stipulation 6).

6. Notice that the Appellee had a business need for the Appellant to be in the Resource Management Analyst I classification, did not provide the specific reason for his involuntary transfer. The written notification of his involuntary transfer did not include "the specific action or activity" on which it was based. KRS 18A.095(8)(c)2. (Testimony of Klein, Joint Exhibit 006 and Joint Stipulation 8).

7. The CHFS Appointing Authority, Klein, believed he only had to comply with the regulation 101 KAR 1:335 and not the statute KRS 18A.095(8) when he involuntarily transferred the Appellant. He emphasized the Appellant "lost no money." (Testimony of Klein).

8. The Appellee did not carry its burden of proof that there was a business need for the Appellant to be involuntarily transferred.

9. The Appellant was penalized when he was improperly reverted and when he was involuntarily transferred without just cause.

10. The Appellant was not discriminated against based on his race, national origin, gender, religious or veteran's status when he was reverted and did not complete his promotional probationary period as a Human Services Program Branch Manager.

- a) No direct evidence of discrimination was presented. (Testimony of the Appellant, Moran, and Joint Exhibits 008, 010, and 020).
- b) The Appellant is a male Muslim Arab of Palestinian decent who served in the United States Military. (Testimony of the Appellant, Joint Exhibit 10 and Joint Stipulation 9).
- c) The Appellant alleged he was discriminated against citing the following examples:
 - 1) He alleges he was left out of meetings.
 - 2) His Executive Director, Shellie May (May), told him his tone put her on edge.
 - 3) He was excluded from the Governor's Equal Employment Opportunity (EEO) Conference.
 - 4) Moran told him May wanted certain types of people on her team.
 - 5) May told him it would be easy to fabricate a sexual harassment complaint against him because he was a man and because of his background.
 - 6) He alleged Moran told him he was reverted because he was a man and because of his background.
 - 7) He believed he did a good job as Human Services Program Branch Manager and the only reason for his reversion must have been discrimination.
- d) The Appellee articulated legitimate nondiscriminatory reasons for reverting the Appellant.
 - 1) His supervisor, Juan Moran, stated during the EEO investigation as follows:

Moran recalled that when she met with Rayan to notify him of his reversion, he said he felt discriminated against based on his gender. Moran explained that Rayan was reverted based on his negative interactions with employees, having to "constantly discipline" him, because he was "four months behind on work" without notifying her, not because of his national origin, ethnicity, relations, or gender. Moran added that Rayan also made changes to agency processes against her instructions without understanding how these changes would impact other departments. (Joint Exhibit 15).

- 2) Moran testified that the Appellant sat in the corner and refused to participate in training especially arranged for him.
- 3) Moran testified the Appellant's management skills were lacking. She received complaints from all staff the Appellant supervised.
- 4) The Appellant's EEO complaints were carefully investigated by the Appellee and was unfounded. (Joint Exhibits 008, 010 and 020).
- 5) Klein testified that the Appellant's proposed reversion was reviewed before he signed off to make sure there was no discrimination.

- e) The Hearing Officer finds that the Appellant did not prove that any of the Appellee's stated reasons for his reversion were pretext for discrimination.
- f) The Hearing Officer finds the testimony of Moran and Klein credible that there was no discrimination in its decision to revert the Appellant. The evidence demonstrated the Appellant was reverted because he was a bad manager.

CONCLUSIONS OF LAW

1. The Appellant was properly notified that he did not successfully complete his promotional probationary period as a Human Services Program Branch Manager and, thus, he did not remain in his promoted position. KRS 18A.111(1) and (4).

2. The reversion of the Appellant to a non-vacant Program Coordinator position did not comply with the provisions of KRS 18A.005(35), which defines reversion as follows:

"Reversion" means either the returning of a status employee to his or her last position held in the classified service, if vacant, or the returning of a status employee to a vacant position in the same or similar job classification as his or her last position held in the classified service. Reversion occurs after a career employee is terminated other than for cause from the unclassified service or after a status employee fails to successfully complete promotional probation. Reversion after unsuccessful completion of promotional probation, or in the case of a career employee after termination from the unclassified service, may only be appealed to the Personnel Board under KRS 18A.095(12)

3. Because he did not successfully complete his promotional probationary period, the Appellant should have been reverted to his previous position, Program Coordinator, in CHFS, Department for Public Health, Immunizations Branch, if vacant and to a vacant Program Coordinator (or similar classification) if not vacant. KRS 18A.005(35).

4. The Appellee's letter of November 9, 2018, notifying him of his involuntary transfer did not comply with the provisions of KRS 18A.095(8), which reads as follows:

A classified employee with status who is demoted, suspended or otherwise penalized shall be notified in writing of:

- (a) The demotion, suspension, or other penalization;
- (b) The effective date of the demotion, suspension, or other penalization;
- (c) The specific reason for the action including;

1. The statutory or regulatory violation;
2. The specific action or activity on which the demotion, suspension, or other penalization is based;
3. The date, time, and place of the action or activity; and
4. The name of the parties involved; and

(d) That he or she has the right to appeal to the board within sixty (60) calendar days, excluding the day that he or she received notification of the personnel action.

5. The Appellee did not provide the Appellant notice of the "specific reason for the action" or the "specific action or activity" on which the involuntary transfer was based. KRS 18A.095(8)(c).

6. An involuntary transfer was included in the definition of penalization in effect in 2018. KRS 18A.095(24).

7. Because this involuntary transfer constituted a penalization, it was necessary for the Appellee to comply with the statute, KRS 18A.095(8), and administrative regulation 101 KAR 1:335.

8. The Appellee failed to carry its burden of proof that there was just cause for the Appellant's involuntary transfer. KRS 13.090(7) and KRS 18A.095(1).

9. The Appellant failed to carry his burden of proof that he was discriminated against based on his race, national origin, gender, religious or veteran's status when he was reverted. Even if the Appellant established a *prima facie* case of discrimination, the Appellee articulated legitimate non-discriminatory reasons for the Appellant's reversion. The Appellant failed to prove the Appellee's articulated reasons were a pretext for discrimination. KRS 13B.090(7), KRS 18A.005(35), KRS 18A.095(12) and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (May 14, 1973).

10. The appropriate remedy in this case is to make the Appellant whole by requiring the Appellee to appropriately revert the Appellant in accordance with KRS 18A.005(35). He should revert to his Program Coordinator position in the Department of Public Health, Immunizations Branch, if vacant, and if not, to a vacant position in the same or similar job classification. KRS 18A.095(22)(d).

Adel Rayan
Findings of Fact, Conclusions of Law,
and Recommended Order
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11. The Appellant is not entitled to be reinstated to the position of Human Services Program Branch Manager with status and backpay. The one thing the Appellee clearly did correctly in the November 9, 2018 letter, is notify the Appellant he did not successfully complete his promotional probationary period. KRS18A.111.

12. Because all the events underlying this Appeal occurred before the effective date of Senate Bill 153, all references to KRS Chapter 18A are to the sections in effect at the time of the events associated with this Appeal.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **ADEL RAYAN VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2018-254)** be **SUSTAINED TO THE EXTENT** that the Appellee shall appropriately revert the Appellant in accordance with KRS 18A.005(35) and restore any leave time to the Appellant he used in attending pre-hearing conferences, evidentiary hearing and oral arguments before the Board. KRS 18A.095(25).

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 fifteen (15) 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).

The parties are strongly encouraged to send any exceptions and/or requests for oral argument by email to: PersonnelBoard@ky.gov

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.

Adel Rayan
Findings of Fact, Conclusions of Law,
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Page 11

SO ORDERED at the direction of Hearing Officer Mark A. Sipek on the 12 day of March 2024.

KENTUCKY PERSONNEL BOARD

Mark A. Sipek
MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day emailed and mailed to:

Hon. Lucas Roberts
Hon. Stuart Cobb
Hon. Rosemary Holbrook (Personnel Cabinet)

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2018-254

ADEL RAYAN

APPELLANT

V.

INTERIM ORDER

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

** * * * *

This matter last came on for a pre-hearing conference on October 22, 2019, at 2:00 p.m. EDT, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Stafford Easterling, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Adel Rayan, was not present but was represented by the Hon. Stuart Cobb, who appeared by telephone. The Agency/Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Jennifer Wolsing, who also appeared by telephone.

The purposes of the pre-hearing conference were to discuss the status of the appeal, to determine if any discovery issues remain outstanding, to discuss the option of mediation, and to schedule an evidentiary hearing, if necessary.

This matter is before Hearing Officer Stafford Easterling for a ruling on the Agency's Motion to Amend Interim Order and Reassign Burden of Proof, filed with the Personnel Board on October 4, 2019. At issue is the Hearing Officer's September 19, 2019 Interim Order, which assigned the Agency the burden of proof as to the involuntary transfer that accompanied the Agency's probationary reversion of the Appellant. The Appellant was given an opportunity to file a response to the Agency's Motion to Amend and did so on October 18, 2019. The Agency then filed a reply, dated October 21, 2019. This matter now stands submitted to the Hearing Officer for a ruling on the Agency's Motion to Amend.

WHEREFORE, the Hearing Officer having listened to the statement of the parties, having reviewed the file and being duly advised, **HEREBY ORDERS** as follows:

1. The Agency's Motion to Amend June 6, 2019 Interim Order is **DENIED**. For the reasons that follow, the Hearing Officer finds that the Agency's argument is without legal merit.

The facts upon which the burdens of proof were assigned are clear in the record and are largely uncontested by the parties. The record is clear that the Agency informed the Appellant that he "failed to satisfactorily complete your promotional probationary period," by letter dated November 9, 2018. The Appellant claims the failure to satisfactorily complete his promotional probation was the result of a number of different types of discrimination. The Appellant has the burden of proof on challenging the promotional reversion was improper in addition to the Appellant's claims of gender, race, national origin, religious, and veterans status discrimination. However, the Agency was assigned the burden of proof as to the involuntary transfer that accompanied the promotional revision that accompanied the Agency's promotional reversion of the Appellant.

The Agency challenges the imposition of the burden of proof for the involuntary transfer, arguing that KRS 18A.005(34) defines a promotional reversion as either the returning of a status employee to his or her last position in the classified service, if vacant, or the returning of a status employee to a vacant position in the same or similar job classification as his or her last position held in the classified service." Odom v. Education and Workforce Dev. Cabinet, 2014 WL 3808982 at *3 (KY PB 2013-233).

Accordingly, when an employee is subject to a promotional reversion, they are removed from their promotional position and transferred to either their old job or a job that is similar to their old job. The law is clear that the Agency has discretion as to where the reverted employee is placed and Odom further makes clear that reversion "after the unsuccessful completion of promotional probation . . . may only be appealed to the Personnel Board under KRS 18A.095(12)." Stated differently, an employee is required to allege and prove discrimination in order to successfully challenge a promotional reversion. If the Agency had reverted the Appellant to his old position, it is clear that the Appellant would have the burden of proof in challenging the promotional reversion. If the Agency had directly reverted the Appellant to a job similar to his old position, the Appellant would have the ultimate burden of proof, although the Agency may be required to prove that the new position is sufficiently similar to the old position.

Instead, as the Agency's November 9, 2018 letter makes clear, the Agency chose to revert the Appellant to his old position and then involuntarily transfer him to a new position. The key language on this issue is set out in the November 8, 2018 letter as follows:

Pursuant to KRS 18A.111 and 101 KAR 1:325, Section 2, you will be reverted to your former position of Program Coordinator, pay grade 13, position number to be determined by Kentucky Human Resource Information System (KHRIS), effective November 10, 2018, because you have failed to satisfactorily complete your promotional probationary period. In accordance with 101 KAR 2:034, Section 3, your salary will be reduced from your current rate of \$4,421.96 to your prior salary of \$3,845.18 plus any salary

advancements that would have occurred had the promotion not occurred.

Also, effective November 10, 2018, you are then transferred from your current position of Program Coordinator, position number 30027378, to Resource Management Analyst I, position number 31084554, with the Office for Children with Special Health Care Needs (OCSHCN), Division of Administrative Financial Services located at 310 Whittington Parkway, Suite 200, Louisville, KY 40222.

This transfer is due to the fact that your reversion was required to be into your prior Program Coordinator classification. However, OCSHCN has the business need for you to be in the Resource Management Analyst I classification.

(emphasis added)

The language of the November 9, 2018 letter makes clear that, for whatever reason, the Agency adopted a two-step process to effectuate the promotional reversion, reversion and then involuntary transfer, instead of the one-step process authorized by KRS 18A.005(34). By adopting the two-step process, the Agency penalized the Appellant twice, once by reverting the Appellant to his former position and then again when they transferred the Appellant to a new position. Otis and similar cases make clear that the Appellant would have the burden of proof of challenging the promotional reversion. However, the Agency has not – and cannot – establish a theory of law as to why they should be spared the assignment of the burden of proof that applies when a state agency takes a disciplinary action against a merit employee. It should be clear that taking two actions in one letter - instead of issuing two separate letters - does not change the legal standards applicable to either of the Agency's actions. Instead, the Agency's actions in reverting the Appellant for failing to satisfactorily complete his promotional probation would be analyzed pursuant to KRS 18A.005(34) and prior Board precedent, including Otis. While the Agency's actions in involuntarily transferring the Appellant would be analyzed pursuant to KRS 18A.095(1) and prior Board precedent.

Therefore, given the reasoning set out above, the Hearing Officer finds the burden of proof on the involuntary transfer is properly assigned to the Agency as the transfer of the Appellant was not part of the promotional reversion and was, instead, a separate disciplinary action. However, out of an abundance of caution, given the fact that this appears to be a matter of first impression, the Hearing Officer finds that the instant order should be reviewed by the Personnel Board in accordance with 101 KAR 1:365, Section 6, prior to further proceedings in this matter.

2. This matter is scheduled for review by the Personnel Board during the regularly scheduled Board Meeting on **December 13, 2019**, at **9:30 a.m., EST**, at the offices of the Personnel Board, 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky.

3. If the parties wish to file a response to the instant order, the parties shall have up to and including **December 10, 2019**. The parties shall have up to and including **9:30 a.m. on December 13, 2019** by to file any reply. The parties shall have up to and including **December 10, 2019** to submit a Request for Oral Argument.

SO ORDERED at the direction of Hearing Officer Stafford Easterling this 12th day of November, 2019.

KENTUCKY PERSONNEL BOARD

Staff Easterling /MDS
MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Board Members
Hon. Stuart Cobb
Hon. Jennifer Wolsing

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD

ADEL RAYAN

APPELLANT

VS.

BOARD ORDER

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

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

The Board at its regular December 2019 meeting having considered the record, including the Interim Order of the Hearing Officer dated November 12, 2019, the Appellee's Response to November 12, 2019 Interim Order & Request for Oral Argument, the Appellant's Reply to the Appellee's Response to November 12, 2019 Interim Order & Request for Oral Argument, oral arguments, and being duly advised,

IT IS HEREBY ORDERED that the Interim Order of the Hearing Officer be **SUSTAINED**. This matter is returned to the docket of the Personnel Board for further adjudication.

SO ORDERED at the direction of the Board this 16th day of December, 2019.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Jennifer Wolsing
Hon. Stuart Cobb
Board Members

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2018-254

ADEL RAYAN

APPELLANT

V.

INTERIM ORDER

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

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

This matter is before Hearing Officer Colleen Beach for a ruling on two motions filed by the Appellant.

The Hearing Officer, having reviewed the file, including the Appellant's Motions and Appellee's Response, and being duly advised, **HEREBY ORDERS** as follows:

1. The Appellant's Motion for Personnel Board Review of an Interim Order Ruling on Motion for Summary Judgment is **GRANTED** pursuant to 101 KAR 1:365, Section (2).

2. The Appellant's Motion for Summary Judgment is **DENIED**.

A. Summary Judgment is authorized by CR 56.01, et seq. It should only be granted if: (1) there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law. All doubts must be resolved in favor of the party opposing the motion. Ross v. Powell, 206 S.W.3d 327 (Ky. 2006).

B. Summary judgment should only be used "to terminate litigation when, as a matter of law, it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 480 (Ky. 1991).

C. In his Motion for Summary Judgment, Appellant asserts that the Agency/Appellee failed to comply with the requirements of KRS 18A, specifically, that the letter of November 8, 2018, improperly

stated that Appellant was being reverted into the Program Coordinator position, and then failed to provide him with the specific reason he was being involuntarily transferred to the Resource Management Analyst I position. Appellant contends that this alleged failure to comply with KRS 18A.095(8) renders both the reversion and transfer void *ab initio*, and that he is entitled to summary judgment as a matter of law.

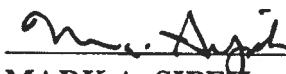
- D. In its Response, Appellee argues that Appellant's reversion and transfer are two separate and distinct actions. It contends that the November 9, 2018 letter correctly informed Appellant he was being reverted because he "failed to satisfactorily complete [his] promotional probationary period." (November 9, 2018 letter, page 1.) Appellee urges that any dispute over the transfer is irrelevant to the matter of the reversion.
- E. Appellee further alleges that it properly notified Appellant of the reason for the involuntary transfer, as the letter states his transfer was done in accordance with a "business need." (November 9, 2018 letter, page 1.)
- F. The November 12, 2019 Interim Order, sustained by the Personnel Board on December 16, 2019, stated that "the transfer of the Appellant was not part of the promotional reversion, and was instead a separate disciplinary action." The Interim Order further noted that "an employee is required to allege and prove discrimination in order to successfully challenge a promotional reversion."
- G. The Hearing Officer finds that any alleged impropriety regarding the involuntary transfer in this appeal is a separate issue from the promotional probationary reversion. The burden of proof remains with the Appellant to show that the reversion "was improper in addition to the Appellant's claim of gender, race, national origin, religious, and veterans' status discrimination." (Interim Order, November 12, 2019.)
- H. This matter turns on the proof necessary to sustain a discrimination claim. As such, it presents a genuine issue of material fact.

Resolving any doubts on this matter in favor of the non-moving party, as the Hearing Officer is required to, summary judgment must be denied on the issue of the reversion.

- I. Appellant contends that his involuntary transfer is void *ab initio* because the November 9, 2018 letter failed to provide the “specific reason for the transfer.” Appellee responds that, on the contrary, the stated reason on the November 9, 2018 letter was sufficient to satisfy the administrative directive.
- J. This matter turns on the proof necessary to determine whether the transfer was done in accordance with KRS 18A.095(1). As such, it presents a genuine issue of material fact. Resolving any doubts on this matter in favor of the non-moving party, as the Hearing Officer is required to do, summary judgment must be denied on the issue of involuntary transfer.
- K. All other provisions of the Interim Order dated November 12, 2019, and sustained by the Kentucky Personnel Board on December 16, 2019, remain in effect.

SO ORDERED at the direction of Hearing Officer Colleen Beach this 8th day of July, 2021.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Lucas Roberts
Hon. Stuart Cobb

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2018-254

ADEL RAYAN

APPELLANT

V.

BOARD ORDER

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

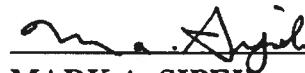
** ** ** ** ** **

The Board, at its regular August 2021 meeting, having considered the record including the Interim Order of the Hearing Officer dated July 8, 2021, Appellant's response to July 8, 2021 Interim Order and Request for Oral Argument, Cabinet's reply to Appellant's response and request for oral argument, oral arguments, and being duly advised,

IT IS HEREBY ORDERED that the Interim Order of the Hearing Officer be **SUSTAINED**. This matter is returned to the docket of the Personnel Board for further adjudication.

SO ORDERED this 25th day of August, 2021.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Lucas Roberts
Hon. Stuart Cobb
Jay Klein
Hon. Rosemary Holbrook (Personnel Cabinet)