

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-331

MICHAEL L. REFFITT

APPELLANT

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

TRANSPORTATION CABINET
MIKE HANCOCK, APPOINTING AUTHORITY

AND

PERSONNEL CABINET
TIM LONGMEYER, SECRETARY

APPELLEES

** ** *

The Board at its regular August 2015 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated July 13, 2015, 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 20th day of August, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. William Fogle
Hon. Rosemary Holbrook
Michael L. Reffitt
Kathy Marshall

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-331**

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

**KENTUCKY TRANSPORTATION CABINET,
MIKE HANCOCK, APPOINTING AUTHORITY**

AND

**PERSONNEL CABINET,
TIM LONGMEYER, SECRETARY**

APPELLEES

** ** *

This matter came on for a pre-hearing conference on March 27, 2015, at 9:30 a.m., E.T., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Boyce A. Crocker, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Michael L. Reffitt, was present by telephone and was not represented by legal counsel. The Appellee, Kentucky Transportation Cabinet, was present and represented by the Hon. Will Fogle.

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.

The Hearing Officer noted this appeal was filed with the Personnel Board on December 24, 2014. Appellant indicated he was appealing Other Penalization, specifically, "Fair pay & snow & ice duty to receive the premium payment & If it is correct for me to be made to work snow & ice since I'm not able to receive the premium payment." In the narrative portion of his appeal, Appellant stated, "All content in grievance filed 10/21/14 plus all content in grievance 6/13/14. Action requested pertaining to snow & ice duty & fair pay for year of service."

The Appellant had filed two grievances during 2014, the denial of which was the subject of this appeal.

As the Hearing Officer understands it, the Personnel Cabinet had approved supplemental premiums for certain job classifications for snow and ice duty, and not for others, including the series "Transportation Engineer Technologist" of which Appellant is an employee.

The Appellant contends it would be equitable to all that for those who want to work snow and ice duty to be paid the premium, or certainly those who are made to work snow and ice duty to be paid the premium. The Appellant stated he had never refused or caused a fuss over any of the number of duties he had been made to perform over the years, however, he wanted what was right.

The Appellant repeatedly indicated his desire that Personnel, be it the Personnel Board, the Personnel Cabinet, or both, look into this and fix this inequity.

The Hearing Officer notes the Appellee filed a Motion to Dismiss prior to the pre-hearing conference. The Appellant indicated he wished his statements made on the record during this pre-hearing conference to be considered as his response to the Appellee's Motion to Dismiss.

The earlier grievance Appellant filed during 2014 related to the hiring of an employee in the Transportation Engineering Technologist series in his district, though apparently not in the same work county as Appellant, who was hired in making thousands of dollars more per year than Appellant. Again, Appellant expressed that this was not equitable, and would be an easy fix to address this policy which allows for such inequity. The Appellee asked for time in which to file a Motion to Dismiss as to that issue.

The Hearing Officer indicated his understanding of Appellant's claims regarding the snow and ice duty premium, and also understands that the Personnel Cabinet apparently had some role in this. The Hearing Officer sought a response from the Personnel Cabinet on that issue as well, in not only this case, but also in the companion cases for snow and ice duty supplemental premium pay in the cases of *Keenan Muncie vs. Transportation Cabinet*, (2014-291) and *Jack Hughes vs. Transportation Cabinet*, (2014-290).

The Appellee Transportation Cabinet filed a Motion to Dismiss to which the Appellant responded on the record at the time of the pre-hearing conference held March 27, 2015. The Appellee then filed a Supplemental Motion to Dismiss to which Appellant filed a response, and to which the Appellee Personnel Cabinet has filed a response. The matter is ripe for a ruling on the Motion to Dismiss.

BACKGROUND

1. During the relevant times, the Appellant, Michael L. Reffitt, was a classified employee with status.

2. In its Motion to Dismiss, the Appellee Transportation Cabinet contends that Appellant is not entitled to any supplemental shift premium for performing snow and ice duties.

Counsel for the Transportation Cabinet cites 101 KAR 2:034, Section 9(1) in support, which states:

Section 9. Supplemental Premiums.

(1) Shift premium.

(a) Upon request by an appointing authority, the secretary may authorize the payment of a supplemental premium for an employee who is regularly assigned to work an evening or night shift in that agency.

(b) Once authorized, this premium shall apply to all employees in that agency who are regularly assigned to work an evening or night shift in a job classification for which the shift premium is approved.

(c) An employee shall not receive a shift premium after shift reassignment, transfer, promotion or demotion to a position that is ineligible for a shift differential premium.

(d) The secretary may rescind authorization to pay shift premium for a class at any time.

(e) Shift differential pay shall not be considered a part of base pay or wages.

3. Counsel contends the discretion regarding assignment of shift premiums rests with the Appointing Authority and the Personnel Cabinet. The assignment of shift premiums for snow and ice duties was not extended to the Appellant's classification.

4. The Appellant believed there should be equal pay for equal work and not certain favored classifications, such as heavy equipment operators receiving the shift premium for snow and ice, and employees such as Appellant not receiving it when they are doing the same work under the same conditions.

5. The Appellee Personnel Cabinet responded that the regulation in question allowed for the Personnel Cabinet to approve requests for shift premiums for using agencies, such as the Transportation Cabinet, and the Transportation Cabinet had submitted requests to the Personnel Cabinet for certain job classifications to be authorized shift premiums, but such request did not include Appellant's job classification. Counsel for the Personnel Cabinet stated the Personnel Cabinet agreed with the Transportation Cabinet that shift premium authorization is discretionary and would not confer jurisdiction on the Personnel Board from denial of same.

6. Counsel for the Appellee Transportation Cabinet also filed a Supplemental Motion to Dismiss regarding salary discrepancy between a newly hired co-worker, Christopher Tuel, and Appellant. Counsel noted that both employees are Transportation Engineering

Technologists III. Counsel cites 101 KAR 2:034, Section 1(2) as being controlling here, and that regulation states as follows:

Section 1. New Appointments.

(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 class;

(b) Is in the same work county; and

(c) Has a similar combination of education and experience relating to the job classification.

7. The Transportation Cabinet argues that as Mr. Tuel was hired in a different work county, there would be no need to undertake a salary comparison, and Appellant would not have any right to a salary equalization under that regulation.

8. Appellant responded that not only was the new employee being paid more, but he was allowed to drive a state vehicle to and from his county of residence, and only a few are allowed to do so, and then questioned, "If you are going to be fair, why not allow all employees in this classification the same option?" Appellant noted his long work history and above-average evaluations in regards to what he believes to be a deficient salary.

9. The Appellee, Personnel Cabinet, filed a response to this claim as well. The Personnel Cabinet concurred again with the Transportation Cabinet regarding the salary comparison regulation at 101 KAR 2:034, Section 1(2), which is controlling and Appellant can find no relief under that statute.

10. KRS 18A.095(18)(a) states:

The board may deny a hearing to an employee who has failed to file an appeal within the time prescribed by this section; and to an unclassified employee who has failed to state the reasons for the appeal and the cause for which he has been dismissed. The board may deny any appeal after a preliminary hearing if it lacks jurisdiction to grant relief. The board shall notify the employee of its denial in writing and shall inform the employee of his right to appeal the denial under the provisions of KRS 18A.100.

FINDINGS OF FACT

1. During the relevant times, the Appellant, Michael L. Reffitt, was a classified employee with status.

2. The Hearing Officer finds that the Appellant has a different work county than the employee Christopher Tuel (that this is undisputed, even in Appellant's response). As such, the Hearing Officer finds there is no relief Appellant can be granted under the salary comparison regulation at 101 KAR 2:034, Section 1(2), and the Personnel Board would lack jurisdiction to grant relief.

3. The Hearing Officer finds the Appellee Transportation Cabinet did not approve a shift premium for Appellant's classification for snow and ice duty, and that such action is within their discretion and would not constitute a penalization.

4. The Hearing Officer finds that as the Transportation Cabinet did not request a shift premium authorization for Appellant's classification, that the Personnel Cabinet would not have been authorized to have approved such, and also finds it was within the Transportation Cabinet's discretion as to what classifications it would request approval for from the Personnel Cabinet.

5. The Hearing Officer finds the decision to award or not award shift premium was an agency decision within their discretion, and the failure to award shift premium for any particular classification does not state a penalization for any one employee.

CONCLUSION OF LAW

The Hearing Officer concludes as a matter of law that pursuant to KRS 18A.095(18)(a), the Appellant has not stated a penalization over which the Personnel Board could grant relief, and the Personnel Board thus lacks jurisdiction to further consider this matter.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **MICHAEL L. REFFITT V. TRANSPORTATION CABINET AND PERSONNEL CABINET, (APPEAL NO. 2014-331)** 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).

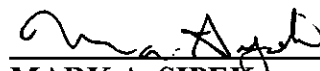
Any document filed with the Personnel Board shall be served on the opposing party.

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 Boyce A. Crocker** this 13th day of July, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Will Fogle
Hon. Rose Holbrook
Mr. Michael L. Reffitt
Ms. Kathy Marshall