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 **CHRISTOPHER ROGERS V. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2020-030)** as the same appears of record in the office of the Kentucky Personnel Board.

Witness my hand this 13th day of June, 2022.

MARK A. SIPEK, SECRETARY
KENTUCKY PERSONNEL BOARD

Copy to Secretary, Personnel Cabinet

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2020-030

CHRISTOPHER ROGERS **APPELLANT**

VS.

FINAL ORDER
ALTERING HEARING OFFICER'S
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER

CABINET FOR HEALTH AND FAMILY SERVICES **APPELLEE**

* * * * * * * * *

The Board, at its regular June 2022 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated May 6, 2022, Appellant's Exceptions, Appellee's Exceptions and Request for Oral Argument, Appellee's Response to Exceptions, and Appellant's Response to Appellee's Response to Exceptions, and oral arguments, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be altered as follows:

A. **Delete** Conclusions of Law paragraph 1 and substitute the following:

1. As set out previously, primarily at issue in this evidentiary hearing was the Appellant's claim of penalization through the setting of his salary. The Appellant was assigned the burden of proof on establishing his entitlement to a different salary and the Appellant proceeded first in the presentation of evidence. The Appellant focused his argument on Section 3 of 101 KAR 2:034, arguing the regulation granted the Agency the discretion to intentionally request a salary adjustment beyond five percent (5%) if they so choose. While that is a correct reading of the regulation, here, the Hearing Officer finds that the Agency did not intend to offer the

Appellant a raise beyond the standard five percent (5%). It is clear from review of the record that the Agency intended to offer the Appellant the $3,038.84 monthly salary that would result from applying the standard five percent (5%) promotional raise to the Appellant's previous salary, instead of the $3,308.84 as offered by Queen in reliance on the Quire email. To the extent that the Appellant claims rest upon 101 KAR 2:034, such claims must fail as a matter of fact and as a matter of law. The Appellant has failed to establish any applicable statute or regulation that would entitle him to the higher salary going forward.

B. **Delete** the Recommended Order and substitute the following:

The Personnel Board **ORDERS** the appeal of **CHRISTOPHER ROGERS V. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2020-030),** is **SUSTAINED to the extent** that the Appellant receive an amount from the Agency/Appellee equaling the difference in salary ($270 per month) for the period from November 16, 2019, until the Personnel Board issues its Final Order herein. This amount shall be paid in a lump sum and shall not be a salary adjustment. KRS 18A.095(22)(d).

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer, as altered, are approved, adopted and incorporated herein by reference as a part of this Order and that the Appellant's appeal is **SUSTAINED to the extent** herein.

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 13th day of June, 2022.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK
SECRETARY

A copy hereof this day mailed to:

Hon. Jenna Davis
Christopher Rogers
Jay Klein
Hon. Rosemary Holbrook (Personnel Cabinet)

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2020-030

CHRISTOPHER ROGERS — 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 using Amazon Chime video teleconferencing software on July 29, 2021, at approximately 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, Christopher Rogers, was present by Amazon Chime and was not represented by legal counsel. The Agency/Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Jenna Davis, who also appeared by Amazon Chime. April Davis was also present throughout the evidentiary hearing as the Agency's representative.

Primarily at issue in the evidentiary hearing was the Appellant's claim of penalization through the setting of his salary. The Appellant was assigned the burden of proof on establishing his entitlement to a different salary and the Appellant proceeded first in the presentation of evidence.

BACKGROUND/ FINDINGS OF FACT

1. Following the denial of an Agency Motion to Dismiss asserting that the Appellant was not penalized as defined by KRS 18A.005(24) and the presentation of an opening statement by the Appellant, the Appellant called **Andrea Queen** as its first witness. Queen serves in Fayette County as a Field Services Supervisor in the Division of Family Support within the Agency's Department of Community Based Services (DCBS), supervising approximately eleven (11) employees. Most importantly for this appeal, Queen was the person delegated the authority by the Agency to contact the Appellant and inform him 1) he was selected for a promotion to a Family Support Specialist I (FSS I), 2) the start date of the new position, and 3) the salary offered in the new FSS I position. As essentially agreed to by the parties and testified to by Queen, Queen received an email from the Office of Human Resource Management (OHRM) containing a transcription error; specifically, that the Appellant's monthly salary would be $3,308.84 per month instead of the $3,038.84 monthly salary that would result from receiving the standard 5%

promotional increase paid to most other FSS Is in DCBS, a difference of $270.00 per month. As a regular part of her supervisor job duties, Queen served as the lead or "hiring manager" for a number of positions in the Division of Family Support, including many Family Support Specialist Is. As a routine part of the new employee intake process, after a hiring panel selects an individual for a particular position, Queen contacts the new hire to inform them: 1) they have been hired, 2) they are being offered a particular salary, and 3) they are expected to start their employment on a particular date at a particular location. On October 28, 2019, Queen called the Appellant to inform him that he had been selected for a promotion from a Social Service Aide I, pay grade 10, with a monthly salary of $2,894.12 to a Family Support Specialist I position, pay grade 11, in Fayette County. As a result of his promotion from a pay grade 10 position to a pay grade 11, pursuant to Section 3 of 101 KAR 2:034, the classified compensation administrative regulations, the Agency intended to offer the Appellant the standard five percent (5%) per grade granted upon a promotion. Applied to the Appellant's previous salary, the standard promotional calculation utilized by the Agency and most state government employers would have yielded a new monthly salary for the Appellant of $3,038.84. However, during the telephone call conditionally informing the Appellant of his promotion, Queen relied upon the transcription error contained in the OHRM email and offered the Appellant a salary $270.00 higher than "normal," $3,308.84, which the Appellant then accepted. As acknowledged by the parties, Queen was specifically authorized to inform the Appellant that 1) he was hired for a Family Specialist I position in Fayette County and 2) the Appellant's particular start date and workstation. Given Queen's relay of the transcription error, the parties now dispute whether Queen was authorized to inform the Appellant that he would receive a particular salary, and whether the Appellant is entitled to rely on the Agency's offer as relayed by Queen.

2. As verified by CHFS Bates-stamped page 004 of Agency's Exhibit 1[1], Queen testified credibly that: 1) On October 28, 2019, she received an email from Shawna Quire with OHRM listing a series of personnel actions that had been approved by the Appointing Authority, 2) she called the ten (10) individuals listed on CHFS Bates-stamped page 004 as a "first contact" to inform them they had been selected for a position, to offer them the salary listed next to their name, and to inform them they had a start date of November 16, 2019, 3) as a standard part of her process, she reads/paraphrases the top blurb of the email and informs new hires, including the Appellant, that the offer is conditional upon approval of the Personnel Cabinet, and 4) she then informs OHRM whether the new hire accepts the job offer and whether they will be able to begin their employment on the proposed start date. Importantly, as testified to by Queen, acknowledged by the parties, and as verified by documents introduced into the record, Queen specifically informed the Appellant that final approval over all aspects of the hiring process rests with the Personnel Cabinet as a routine part of the intake process.

3. Accordingly, the core controversies to be resolved in this evidentiary hearing are: 1) whether the Appellant is entitled to a monthly salary of $3,308.84 per month as offered by Queen and agreed to by the Appellant, 2) was the Appellant penalized by the Agency processing

[1] By agreement of the parties, Appellant's Exhibits A through E and Appellee's Bates-stamped pages 001-015 were entered into the record without objection.

intake paperwork establishing a salary different than that agreed to by the Appellant, and 3) if the Appellant has been penalized, what is the appropriate remedy?

4. The witness noted that, were the Appellant to receive the additional $270.00 per month conveyed by the transcription error, the Appellant's monthly salary would be higher than the standard salaries paid for several steps up the Family Specialist career ladder, including employees who would supervise the Appellant. Queen perceived the $3,308.84 per month salary offer as "high," but relayed the number set out on CHFS Bates-stamped page 004. She noted that the Appellant was a transfer from the Transportation division, instead of a new hire, and, therefore, she did not think it was unusual that the Appellant might have received a salary offer that deviated from the norm.

5. The witness further testified that she then reviewed paperwork effectuating the job offer made to the Appellant, including the Personnel Action Request (PAR) form contained on CHFS Bates-stamped page 001. Here, as noted by Queen, the PAR had the monthly salary the Agency deemed "correct," the $3,038.84 monthly salary resulting from adding five percent (5%) to the Appellant's previous salary. She acknowledged that she never told the Appellant that there was a transcription error affecting his job offer, that he was being offered a lower monthly salary, or otherwise communicated the difference in salary to the Appellant.

6. Queen acknowledged that, in previous first contacts, she has worked with prospective hires to amend proposed start dates and testified that she has never altered or amended a prospective hires' start date without their feedback and consent. She also credibly testified that she has never worked to alter or amend the terms and conditions of a prospective hires' salary at all.

7. The Appellant then called himself as the next witness. The Appellant, **Christopher Rogers**, is a Family Support Specialist I stationed in Fayette County with the Division of Family Support within the Agency's Department of Community Based Services (DCBS). He testified largely consistently with Queen and the background established above. He testified that he was first made aware that he was not being paid $3,308.84 per month as offered by Queen when he received his first paycheck, and it was not in the amount he expected. He then began contacting various individuals in his supervisory and Human Resources (HR) chain, trying to get clarification about the discrepancy. He also testified credibly that he was repeatedly told by the individuals he contacted that there had been a "mistake" in the salary amount he was offered by Queen and that his paycheck reflects the "correct" salary amount he should receive, which was a standard five percent (5%) raise atop his previous salary resulting in a salary of $3,038.84 per month. The Appellant testified credibly that he had another job possibility with DCBS that was in his home county but forwent that position in reliance upon the higher salary offered by Queen. Importantly, the Hearing Officer finds that KRS 337.060 does not apply, that the Agency never notified the Appellant that there was a transcription error affecting his job offer, that he was being offered a lower monthly salary, that his paperwork had been processed in an amount $270.00 per month lower than he was offered, or otherwise communicated the difference in salary to the Appellant in any way. The Appellant testified credibly that, following that crucial October 28, 2019

conversation with Queen, he did not discuss his salary with any employee of the Agency until on or about November 27, 2019, when he began following up with questions about receiving a smaller-than-expected paycheck and discussed the matter with Stacy Holly, a frontline supervisor. The Appellant then rested his case-in-chief.

8. After the presentation of the Agency's reserved opening statement, the Agency's first witness was **Lynn Keeling Gillis**, Assistant Director of the Division of Human Resource Administration (HRA) within the Agency's Office of Human Resource Management (OHRM), a role she has held for approximately three years. She is responsible for the operations of HRA, which handles payroll, personnel actions, and benefit administration for the Agency. She became aware of the matters underlying this appeal through responding to an internal grievance filed by the Appellant in December 2019. Gillis reviewed several documents previously entered into the record[2], including CHFS Bates-stamped page 001, and verified that the Agency consistently authorized/processed paperwork requesting the $3,038.84 monthly salary that would result from a "standard" promotional raise. She noted that, from the Agency's perspective, this was a simple typo in processing one of the thousands of actions HRA handles monthly; Shawna Quire made a minor mistake in transposing a couple numbers, Queen relayed those transposed numbers to the Appellant, but the Agency never actually authorized the higher amount, so the Appellant is not entitled to receive that amount. She argues that this matter was a simple mistake that was easy to make and that HRA was obligated to correct the paperwork to reflect a standard five percent (5%) pay raise "to get it right." She also noted that the raise actually processed by HRA and the Personnel Cabinet was consistent with Section 3 of 101 KAR 2:034 and that the conversation with Queen and all of the paperwork was conditional, subject to subsequent change by several parties, including by the Personnel Cabinet. She also noted that, while Section 3 of 101 KAR 2:034 also granted the Agency the discretion to intentionally request a salary adjustment beyond five percent (5%) if they so choose, here, the Agency did not intend to offer the Appellant a raise beyond the standard five percent (5%).

9. The witness testified in great detail on cross-examination about each of the HR documents pertinent to this appeal, including the Personnel Action Request form (PAR), the email sent from Shawna Quire, and Personnel Action Notification form (PAN). She also discussed appointing authority within the Agency and which individuals had CHFS appointing authority in 2019. In response to the Appellant's suggestion that the Agency had the discretion to offer him a higher salary, the witness offered that she reviewed thirty-two (32) months of Family Support Specialist I hires within CHFS and, of the almost one thousand (1,000) hires and/or promotions processed during that time, all of those employees were offered either 1) the entry rate for the position or 2) 5% over their previous salary. She testified that offering the Appellant a higher salary based on a typo would not be equitable to the other employees similarly situated to the

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[2] After review of CHFS Bates-stamped page 002, because the issue was not raised by the parties, not identified as an issue to be resolved, and no proof was taken on the issue, the Hearing Officer declines to make any ruling about whether Dorcas Bargo actually had appointing authority over the Agency as purported by the document and/or any ruling as to the potential propriety of the redelegation inherent with the Secretary of the Governor's Executive Cabinet purporting to delegate appointing authority over the Agency to Dorcas Bargo.

Appellant and that no appointing authority sought to exercise their discretion to offer the Appellant an abnormally high salary herein.

10. Upon Hearing Officer's questioning, the witness then walked through the process by which the Agency informs a successful candidate of key information: they received the job/promotion for which they applied, their start date in the new position, and their salary in the new position. She verified that the Agency relies upon hiring managers down the organizational chain of command to inform candidates of that key information and that the hiring managers are authorized on behalf of the Agency to offer candidates employment. Accordingly, here, the hiring manager Andrea Queen was acting properly in informing the Appellant of his promotion, verifying his start date, and offering him the new salary attendant to the promotion. However, the Agency argues because Queen's offer was based on Quire's typo, the Agency cannot be bound by Queen's offer and that the Appellant's acceptance of Queen's offer has no legal importance. Further, the witness verified that, once being made aware of the Quire's typo and Queen's subsequent offer to the Appellant, the Agency did not contact the Appellant to inform him of the series of events; instead, the Agency fixed the "error" without notifying the Appellant, and he only discovered the discrepancy upon the receipt of his first post-promotion paycheck. After a lengthy series of questions from the Hearing Officer touching on basic principles of agency theory and offer and acceptance, the witness was broadly given an opportunity to respond to the assertion that the Appellant could rely on Queen's communication offering him the promotion and establishing a November 16, 2019 start date in the new job, but not the particular salary offered in the exact same conversation, the witness testified what the appointing authority actually approved is determinative. Lastly, the witness also verified that a single contact from the hiring manager (Queen) to the Appellant from notification of promotion/hire until the start of the new position is standard procedure for the Agency.

11. Next, the Agency recalled **Andrea Queen**. She first testified in greater detail about the details of her primary job duties as a Family Services Supervisor in addition to her attendant duties as a hiring manager in promotional/new hire processes. She verified the details of Lynn Keeling Gillis's testimony, including that she did not have any input in determining an individual's salary. She also verified the details of the promotional process at issue herein, including her receipt of the Quire email containing the salary typo, her memory of the telephone call with the Appellant where she offered him the promotion, including telling the Appellant that he would have to serve a six (6) – month promotional probation, and discussion of why she offered the Appellant a particular monthly salary that was higher than the standard salary. She also testified that the Appellant's status as a transfer from another state agency resolved any of her concerns that the Appellant's promotional process was abnormal in any way.

12. Upon questioning from the Hearing Officer, the witness verified that, during her hiring manager conversations with successful candidates, she informs them of three things: 1) congratulations, you received the job!, 2) your start date for the new job is X, 3) your salary for the new job will be Y, and 4) everything is conditional until the paperwork is finalized ("the Four Items"). She then reports back to the Office of Human Resource Management (OHRM) that the candidate has accepted the job and/or reports any questions or concerns with the start date to

OHRM; Queen testified that she has no involvement in salary determinations. She noted that, in her experience as a hiring manager, prospective candidates for the Family Support Services Specialist I position to which the Appellant applied are repeatedly informed that the monthly salary for the position would be $2,206.92/month and the Appellant received a different salary as a transfer into the position. She verified that the process for onboarding a new hire is the same as onboarding a promotional hire; she also testified that, as far as she has been trained/knows, she was the same authority to offer the Four Items in a new hire process as she does in the promotional process.

13. Lastly, she verified that she did not communicate with the Appellant, including any changes to any of the terms and conditions of his employment, beyond the initial October 28, 2019 phone call and was unaware of any other communications between OHRM and the Appellant about changes to the Four Items.

14. The Agency's next witness was **April Davis**. She is an employee of the Agency's Department for Community Based Services, Division of Service Regions, Southern Bluegrass Service Region, where she serves as a Service Region Administrator (SRA), and has an extensive portfolio of executive duties including oversight of child and adult protection services under Protection and Permanency for ten (10) counties in addition to oversight of the provision of family support services, including the distribution of medical and food assistance to needy families. Here, she was Andrea Queen's second-line supervisor and was made aware of the Appellant's salary inconsistency at the heart of this appeal in her role in Agency leadership in handling the Appellant's grievance about his salary. The witness's signature was also placed on the Appellant's PAR with permission by her employee, Service Region Administrator Associate (SRAA) Saprina "Crissy" Grubbs, which was entered into the record as CHFS Bates-stamped page 001 of Agency's Exhibit 1. Importantly, the PAR she submitted - the document that actually effectuated the Appellant's promotion - requested the Appellant receive a salary $3,038.84 per month, which was a standard five percent (5%) raise atop his previous salary, instead of the $3,308.84 per month offered by Queen. The PAR requesting the lower salary was not sent to the Appellant during the processing of his promotion. Broadly directed to the Agency's assertion that Queen had the authority to offer the Appellant the promotion and to establish a start date, but not to offer the Appellant a salary upon which he can rely, the witness agreed that the salary distinction was not part of Agency training that she has offered. With that, after some additional questions from the Hearing Officer and the parties, the Agency rested its case-in-chief, the evidentiary record stood closed, and the parties then each filed a written closing brief setting forth their legal position; importantly, as agreed to by the parties, very few factual matters remain at issue between the parties and the arguments primarily relate to the legal implications of the largely uncontested facts.

15. After review of the evidence of record, including the testimony of witnesses and the documentation introduced, the Hearing Officer determines the following findings of fact:

Andrea Queen received an email from the Office of Human Resource Management (OHRM) containing a transcription error sent by Shawna Quire; specifically, that the Appellant's monthly salary would be $3,308.84 per month instead of the $3,038.84 monthly salary that would

result from applying the standard five percent (5%) promotional raise to the Appellant's previous salary, a difference of $270.00 per month. As a regular part of her supervisor job duties, Queen served as the lead or "hiring manager" for a number of positions in the Division of Family Support, including many Family Support Specialist I positions. As a routine part of the new employee intake process, after a hiring panel selects an individual for a particular position, Queen contacts the new hire to inform them: 1) they have been hired, 2) they are being offered a particular salary, and 3) they are expected to start their employment on a particular date at a particular location, all contingent upon the approval of the Personnel Cabinet.

Here, on October 28, 2019, Queen called the Appellant to inform him that he had been selected for a promotion from a Social Service Aide I, pay grade 10, with a monthly salary of $2,894.12 to a Family Support Specialist I position, pay grade 11, in Fayette County, contingent upon the approval of the Personnel Cabinet. As a result of his promotion from a pay grade 10 position to a pay grade 11, pursuant to Section 3 of 101 KAR 2:034, the classified compensation administrative regulations, the Agency intended to offer the Appellant the standard five percent (5%) per grade granted upon a promotion. Applied to the Appellant's previous salary, the standard promotional calculation utilized by the Agency and most state government employers would have yielded a new monthly salary for the Appellant of $3,038.84. However, during the telephone call conditionally informing the Appellant of his promotion, Queen relied upon the transcription error contained in the OHRM email and offered the Appellant a salary $270.00 higher than "normal," $3,308.84, which the Appellant then accepted. As acknowledged by the parties, Queen was specifically authorized to inform the Appellant that 1) he was hired for a Family Specialist I position in Fayette County and 2) the Appellant's particular start date and workstation. As set out earlier, given Queen's relay of the transcription error, the parties disputed whether Queen was authorized to inform the Appellant that 1) he received the promotion and 2) he would start on a particular date, but not that 3) he would receive a particular salary. Thereafter, the Hearing Officer had to decide whether the Appellant was entitled to rely on the Agency's offer as relayed by Queen. The Hearing Officer hereby determines that, as a hiring manager specifically authorized by the Agency to inform both new hires and current employees receiving a promotion about the terms and conditions of their new employment, Queen was authorized to inform the Appellant that 1) he received the promotion and 2) he would start on a particular date. The Hearing Officer also finds that Queen was authorized to inform the Appellant that he would receive a particular salary and that the Appellant was reasonably entitled to rely upon the Agency's offer as relayed by Queen.

16. As to the burden initially assigned in this appeal, the Hearing Officer finds the Appellant has failed to carry his burden to establish the Agency failed to follow any applicable provision(s) of 101 KAR 2:034, the classified compensation administrative regulations. The Agency properly set the Appellant's salary and the Appellant failed to establish a penalization through denying his claimed entitlement to a monthly salary offered to him as a result of a typographical error.

17. Nonetheless, for the legal reasons set out below, the Hearing Officer finds the Appellant established an actionable Chapter 18A violation through the Agency unilaterally changing the terms and conditions of the Appellant's employment and then failing to inform the

Appellant about those changes in the terms and conditions of his employment. The Hearing Officer finds the Appellant was never given adequate notice of the change in his salary, has been penalized without just cause through the unilateral adjustment of his salary, and that the penalization was either excessive or erroneous.

CONCLUSIONS OF LAW

1. As set out previously, primarily at issue in this evidentiary hearing was the Appellant's claim of penalization through the setting of his salary. The Appellant was assigned the burden of proof on establishing his entitlement to a different salary and the Appellant proceeded first in the presentation of evidence. The Appellant focused his argument on Section 3 of 101 KAR 2:0.34, arguing the regulation granted the Agency the discretion to intentionally request a salary adjustment beyond five percent (5%) if they so choose. While that is a correct reading of the regulation, here, the Hearing Officer finds that the Agency did not intend to offer the Appellant a raise beyond the standard five percent (5%). It is clear from review of the record that the Agency intended to offer the Appellant the $3,038.84 monthly salary that would result from applying the standard five percent (5%) promotional raise to the Appellant's previous salary, instead of the $3,308.84 as offered by Queen in reliance on the Quire email. To the extent that the Appellant claims rest upon 101 KAR 2:034, such claims must fail as a matter of fact and as a matter of law. The Appellant has failed to establish any applicable statute or regulation that would entitle him to the higher salary going forward.

2. Nonetheless, the evidence of record did establish that the Appellant's Chapter 18A rights were penalized through the Agency unilaterally changing the terms and conditions of the Appellant's employment and then failing to inform the Appellant about those changes in the terms and conditions of his employment.

3. As drafted, KRS Chapter 18A does not establish critical elements of terms and conditions of employment for state government service, including the most basic fact of all: when, exactly, does employment begin? Does employment begin when the hiring manager informs the candidate that they have been selected for the new position? Does employment begin the first moment the successful candidate walks in the front door on their first day of work? Does employment begin once the onboarding paperwork is completed? Or, at the latest, does employment begin when that successful candidate receives their first actual paycheck?

4. The Hearing Officer finds that knowing exactly when the employment relationship begins is critical to resolving 1) the rights and obligations of the employer to the successful candidate, 2) the rights and obligations of the successful candidate to the employer, and 3) the ability of either party to amend to basic terms and conditions of employment, like the salary to be paid from the employer to the successful candidate.

5. Because KRS Chapter 18A is silent as to when the employee/employer relationship begins in state government employment, it is appropriate to turn to common law to fill in the

definitional gaps. This is consistent with the rules of statutory construction, including KRS 446.080, which provides in subsections (1) and (4) as follows:

> (1) All statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature, and the rule that statutes in derogation of the common law are to be strictly construed shall not apply to the statutes of this state.
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> * * *
>
> (4) All words and phrases shall be construed according to the common and approved usage of language, but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed according to such meaning.

6. The Hearing Officer finds that, in accordance with worker compensation standards, National Labor Relations Board precedent, and a review of case law that state government employment begins upon the "meeting of the authorized minds" on the terms and conditions of employment, which includes, but is not limited to, 1) an agreement the candidate has been hired, 2) an agreement they are being offered a particular salary, and 3) an agreement they are expected to start their employment on a particular date, possibly at a particular location. [See Putnam v. Producers' Live Stock Mktg. Ass'n, 256 Ky. 196, 75 S.W.2d 1075, 1076 (1934) ("The duration of the employment must be treated always as an open question, to be determined by the circumstances of each particular case, or as one which is dependent upon the understanding and intent of the parties to be ascertained by inference from their written or oral negotiations (as the case may be), the usages of business, the situation and object of the parties, the nature of the employment, and all the circumstances surrounding the transaction. Labatt, Master and Servant, §§ 156, 159; 18 R. C. L. 508; 39 C. J. 43 et seq., notes, 8 Ann. Cas. 280; Annotations, 11 A. L. R. 469, 480; Smith v. Theobald, supra; Morris Shoe Company v. Coleman, supra. Compare, Miller v. N. W. Ritter Lumber Company, 110 S. W. 869, 33 Ky. Law Rep. 698; Bridgeford & Company v. Meagher, 144 Ky. 479, 139 S. W. 750; Stewart Dry Goods Company v. Hutchison, 177 Ky. 757, 198 S. W. 17, L. R. A. 1918C, 704; Newark Shoe Stores Company v. Kemmis, 207 Ky. 226, 268 S. W. 1114; Hospital College of Medicine v. Davidson, 140 Ky. 776, 131 S. W. 1004; Mogg v. Farley, 205 Ky. 25, 265 S. W. 449; Atkins v. Atkins' Adm'r, 203 Ky. 291, 262 S. W. 268.); Nichols v. Kentucky Unemployment Ins. Com'n, 677 S.W.2d 320–21 (Ky. App. 1984) ("The principle is well-established that a worker faced with changes in his employment does not have good cause to quit without making a reasonable attempt to adjust to the new circumstances of employment. In Kentucky Unemployment Insurance Commission v. Day, Ky., 451 S.W.2d 656 (1970), for example, a worker was denied benefits on the basis of a voluntary quit when he refused to attempt to work on a newly converted production line. See also City of Lancaster v. Trumbo, Ky.App., 660 S.W.2d 954 (1983). Presumably this same rationale would have been applied to the appellant had he quit his job immediately upon being requested to temporarily take on the additional duties of the departing night watchman until a replacement could be found. This set of conflicting rules would, as a result, truly place a worker such as the appellant on the horns of a dilemma. Knowing

that a refusal to attempt to work under proposed modifications in the circumstances of his employment would be construed as a voluntary quit, an employee would have no alternative but to accept the changes. Having done so, however, the employee would now be faced with the very real possibility that the Kentucky Unemployment Insurance Commission could argue that he had acquiesced in the changes and, therefore, could not quit with good cause when he later discovered his inability to function in the new work situation. The unfairness of such a result is manifest and runs counter to the underlying philosophy of unemployment compensation which is to encourage individuals to work. The appellant made an honest attempt to do just that and, having subsequently discovered that the conditions of employment imposed by the appellee were unreasonable, he should not be penalized by the denial of unemployment benefits." Wojcik v. Board of Review, Division of Employment Security, 58 N.J. 341, 277 A.2d 529 (1971)].

7. Here, Andrea Queen was specifically authorized to serve as the hiring manager for the Appellant's hiring process, so both Queen and the Appellant were authorized to come to a meeting of the minds about the terms and conditions of the Appellant's employment. In short, it is the agreement to do work that creates the relationship of employment.

In addition to being legally supported, this conclusion makes also common sense if one were to stop to think about it. An employee may not work on the weekends, but they would still be regarded as an employee during that time because they have an agreement that they will return to work on Monday.

The same principle holds if an employee has initially agreed to be employed but has not yet started work. At the moment the successful candidate and an authorized hiring manager reach an agreement about the terms and conditions of employment, the successful candidate then immediately becomes an employee of that state agency – even though that newly-minted employee has not yet performed a single duty for the state agency and the state agency does not intend to pay the employee until they do.

8. Applying that conclusion to the facts of this case, the evidence of record establishes that, as of the conclusion of the October 28, 2019 telephone call, Queen and the Appellant were in agreement that the Appellant was to begin work as a Family Support Specialist I, pay grade 11, in Fayette County on November 16, 2019, at the salary of $3,308.84 per month. The Hearing Officer finds that the Appellant's terms and conditions of employment were set upon the conclusion of the October 28, 2019 telephone call and that KRS Chapter 18A operates to protect and enforce the terms and conditions of employment as agreed to by Queen and the Appellant.

9. Because the Appellant had a right to the terms and conditions of employment as established by the October 28, 2019 telephone call with Queen, the Appellant was entitled to notice of any change to the terms and conditions of employment and any such change must be taken with just cause and shall not be excessive nor erroneous. KRS 18A.095(1). Importantly, the Hearing Officer believes that Gillis's testimony about the Agency's intent in establishing the Appellant's salary would have met their burden in justifying changing the Appellant's salary from $3,308.84 per month to the $3,038.84 per month to which the Agency actually intended to offer the Appellant,

had they given the Appellant proper notice of the change in salary. To be clear, the Hearing Officer finds that the Appellant was entitled to notice that the Agency was going to change the terms and conditions of his employment but was not entitled to enforce the terms and conditions of employment as agreed to by Queen. Had the Agency properly notified the Appellant of the typographic error before he began employment, the Appellant would not have been entitled to enforce the agreement agreed to by Queen.

10. The Hearing Officer finds that the Appellant was entitled to notice of the Agency's adjustment in his salary compliant with the notice provisions set out in KRS 18A.095(8). The Hearing Officer orders that the Appellant shall have been deemed to have received adequate notice upon the Personnel Board issuing its Final Order in this appeal and that the appropriate remedy herein is that the Appellant should receive the $270 difference in monthly salary from the Appellant's November 16, 2019 start date until the issuance of the Board's Final Order.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **CHRISTOPHER ROGERS V. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2020-030) be SUSTAINED TO THE EXTENT that the Appellant receive an amount from the Agency equaling the difference in salary ($270.00 per month) for the time period from the October 28, 2019 telephone call where the terms and conditions of employment were agreed upon until the Personnel Board issues its Final Order herein.**

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 Stafford Easterling** this 6 day of May, 2022.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Christopher Rogers
Hon. Jenna Davis
Hon. Rosemary Holbrook (Personnel Cabinet)