

**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2017-040**

**LORI SCHOLL**

**APPELLANT**

**VS.**

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

**TOURISM, ARTS AND HERITAGE CABINET,  
DEPARTMENT OF PARKS**

**APPELLEE**

\* \* \* \* \*

The Board, at its regular July 2017 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated June 23, 2017, 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** Conclusion of Law 1 and substitute the following:

1. Identical to the Conclusions of Law reached previously by the Personnel Board in Kathryn Parrish v. Office of the Attorney General, 2012 WL 3059632, the Hearing Officer finds "that a salary comparison, such as that being sought by Appellant in this appeal, is strictly governed by the administrative regulation found at 101 KAR 2:034, Section 1." Pursuant to that regulation, "in order to qualify for salary comparisons, the employees must fall squarely within the confines of that regulation." Here, when the new Serving Attendant was hired, she began state service as a new appointee at a lower salary rate than that being earned by the Appellant, meaning the provisions of 101 KAR 2:034, Section 1 do not apply to the Appellant. This is because she is not "an employee who is

earning less than the new appointee's salary." To clarify, at the time the new Serving Attendant was given her "initial probationary increase," which resulted in her earning slightly more per hour than the Appellant, she was no longer classified as a "new appointee" as required by 101 KAR 2:034, Section 1(2).

**IT IS FURTHER ORDERED** that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer, as Altered, be and they hereby are, approved, adopted and incorporated herein by reference as a part of this Order, and the Appellant's appeal is **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 17<sup>th</sup> day of July, 2017.

**KENTUCKY PERSONNEL BOARD**

  
\_\_\_\_\_  
**MARK A. SIPEK**  
**SECRETARY**

A copy hereof this day mailed to:

Hon. William H. Adams II  
Ms. Lori Scholl

**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2017-040**

**LORI SCHOLL**

**APPELLANT**

**V.**

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

**TOURISM, ARTS AND HERITAGE CABINET  
DEPARTMENT OF PARKS**

**APPELLEE**

This matter came on for a pre-hearing conference on April 27, 2017, at 11:00 a.m., EST, at 28 Fountain Place, Frankfort, Kentucky, before Stafford Easterling, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Lori Scholl, was present by telephone and not represented by legal counsel. The Appellee/Agency, Tourism, Arts and Heritage Cabinet, Department of Parks, was present and represented by the Hon. William H. Adams.

This matter is before Hearing Officer Stafford Easterling for a ruling on the Agency's Motion to Dismiss filed with the Personnel Board on May 26, 2017. At issue is the Appellant's claim that she had been penalized because a new hire was hired into her workstation and receives a higher hourly wage than she does, even though she is a sixteen-year employee. The Agency's Motion to Dismiss argues that the Appellant has failed to articulate an actionable penalization because both the Appellant's and the new hire's salary were set by the application of the applicable statutes and regulations. The Appellant was given an opportunity to file her own motion and/or to file a response to the Agency's Motion to Dismiss but has failed to do so. This matter now stands submitted to the Hearing Officer for a ruling on the Agency's Motion to Dismiss.

**BACKGROUND**

1. The Hearing Officer notes the facts underlying the instant appeal were largely agreed to by the parties during the April 27, 2017, pre-hearing conference. Moreover, the Appellant was given an opportunity to set out understanding of the facts upon which this appeal is based but has failed to do so. Accordingly, the Hearing Officer accepts the facts as described in the Agency's Motion to Dismiss.

2. During the pendency of this appeal, Appellant, Lori Scholl, was a classified employee with status with the Tourism, Arts and Heritage Cabinet, Department of Parks.

3. The Appellant was and is employed by the Department of Parks as a Serving Attendant at Kentucky Dam Village State Resort Park in Marshall County.

4. In her capacity as a Serving Attendant, the Appellant was earning an hourly rate of \$4.954 per hour.

5. On June 8, 2015, former Governor Steve Beshear issued an executive order establishing a minimum wage of \$4.90 per hour for tipped employees. However, because the Appellant's hourly rate was already higher than the newly established minimum wage, Gov. Beshear's executive order did not affect the Appellant's hourly rate of pay.

6. On August 1, 2015, the Appellant received her annual increment, resulting in an adjustment of her hourly rate from \$4.954 per hour to \$5.004 per hour.

7. On November 16, 2015, a new employee was hired into the same position occupied by the Appellant. In accordance with Gov. Beshear's executive order, the new employee's starting salary was set at the new minimum wage of \$4.90 per hour.

8. Following the successful completion of her probationary period, the new employee was awarded an initial probationary increase of 5%, pursuant to 101 KAR 2:034 § 4(1). After applying the probationary increase, the new employee was earning an hourly rate of \$5.145 per hour, an amount greater than that paid to the Appellant, a sixteen-year employee.

9. After discovering the new employee's hourly rate was higher than the Appellant's, the instant appeal followed.

10. As noted above, the Agency filed its' brief with the Personnel Board on May 26, 2017, arguing the Appellant's claims are without merit and should be dismissed. The Agency contended that the Personnel Board lacks jurisdiction over this appeal because the Appellant has not been the subject of a penalization as defined by KRS Chapter 18A or KAR Title 101.

11. KRS 18A.005(24) provides:

Notwithstanding any other prescribed limitation of action, an employee that has been penalized, but has not received a written notice of his or her right to appeal as provided in this section, shall file his or her appeal with the Personnel Board within one (1) year from the date of the penalization or from the date that the employee reasonably should have known of the penalization.

12. 101 KAR 2:034, Section 1 (2) provides:

The appointing authority shall adjust to that salary an employee who is earning less than the new appointee's salary, if the appointing authority determines that the incumbent employee:

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

13. 101 KAR 2:034, Section 4 (1) provides:

Initial probation increase. A full-time or part-time employee who completes an initial probationary period shall be granted a five (5) percent salary advancement on the first of the month following completion of the probationary period, except as specified under Section 2(3) of this administrative regulation.

### **FINDINGS OF FACT**

1. During the pendency of the instant appeal, Appellant, Lori Scholl, was a classified employee with status within the Tourism, Arts and Heritage Cabinet, Department of Parks.

2. It is undisputed that a new employee began working with the Appellant at the Kentucky Dam Village State Resort Park in Marshall County and the new employee was in the same job classification, has the same work county, and has an inferior combination of education and experience relating to service as a Serving Attendant, given the Appellant's sixteen (16) years of prior service in the position.

3. The Hearing Officer finds that, before August 1, 2015, the Appellant received an hourly rate from \$4.954 per hour and, after August 1, 2015, the Appellant's hourly rate increased to \$5.004 per hour. The Hearing Officer finds the new employee began her state service receiving an hourly rate of \$4.90 per hour and, after completing her probationary period, received a 5% probationary increase bringing her hourly rate to \$5.145 per hour.

4. While perhaps unfair for a sixteen-year employee to make less than a relatively new hire, the Hearing Officer finds, however, that the Agency correctly applied the relevant statutes and regulations in setting both the Appellant's hourly rate and the new employee's hourly rate.

### **CONCLUSIONS OF LAW**

1. Identical to the Conclusions of Law reached previously by the Personnel Board in Kathryn Parrish v. Office of the Attorney General, 2012 WL 3059632, the Hearing Officer finds "that a salary comparison, such as that being sought by Appellant in this appeal, is strictly governed by the administrative regulation found at 101 KAR 2:034, Section 1." Pursuant to that regulation, "in order to qualify for salary comparisons, the employees must fall squarely within the confines

of that regulation.” Here, when the new Serving Attendant was hired, she began state service as a new appointee at a lower salary rate than that being earned by the Appellant, meaning the provisions of 101 KAR 2:034, Section 1 do not apply to the Appellant. This is because she is not “an employee who is earning less than the new appointee’s salary.” 101 KAR 2:034, Section 1

2. Because the Appellant cannot establish the provisions of 101 KAR 2:034, Section 1 apply to her appeal, the Appellant has failed to articulate a penalization as defined by KRS 18A.005(24). This is because Appellant’s claims do not implicate any right afforded to merit employees by KRS Chapter 18A. The Appellant was not penalized in the Agency correctly applying the relevant statutes and regulations, even though such application resulted in what appears to be, at least on its face, an unfair result. Therefore, pursuant to KRS 18A.095(18)(a), the Personnel Board lacks jurisdiction to consider this appeal as the Board is unable to grant relief.

### **RECOMMENDED ORDER**

The Hearing Officer recommends to the Personnel Board that the appeal of **LORI SCHOLL V. TOURISM, ARTS AND HERITAGE CABINET, DEPARTMENT OF PARKS, (APPEAL NO. 2017-040)** 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 Stafford Easterling** this 23<sup>rd</sup> day of June, 2017.

**KENTUCKY PERSONNEL BOARD**

  
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**MARK A. SIPEK**  
**EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:

Hon. William H. Adams  
Lori Scholl