

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2013-166

SONJA SMILEY

APPELLANT

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

ENERGY AND ENVIRONMENT CABINET
DR. LEN PETERS, APPOINTING AUTHORITY

APPELLEE

** **

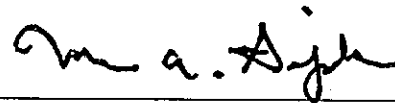
The Board at its regular December 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated October 28, 2014, and being duly advised,

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 17th day of December, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Leesa B. Moorman
Sonja Smiley
Lynn K. Gillis
Sherry Butler

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This matter came on for evidentiary hearing on September 4, 2014, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before Kim Hunt Price, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellant, Sonja Smiley, was present at the hearing, and was not represented by legal counsel. Appellee, Energy and Environment Cabinet, was present and was represented by the Hon. Leesa Moorman.

Appellant filed an appeal alleging "Other Penalization," specifically that she had been prevented from receiving promotional raises and stating: "The Division for Air Quality (DAQ) has unfairly and without cause prevented me from receiving promotions throughout my entire tenure with DAQ and delayed requests for reclassifications." At pre-hearing conferences she alleged sexual discrimination based upon gender as well. The burden of proof for both issues was placed upon the Appellant and she presented her case in chief first.

Appellee filed a Motion to Dismiss the appeal under the sexual discrimination allegations alleging that Appellant had not applied for any of the available positions for which males were hired. This motion was **OVERRULED** by Interim Order dated February 14, 2014. At the close of the Appellant's case in chief, a Motion for Directed Verdict was made on the same basis, but it was **OVERRULED** with the Cabinet then presenting its case.

BACKGROUND

1. **Constance Coy**, who was the Appellant's supervisor for three years and who hired the Appellant, testified that she is still employed at the Energy and Environment Cabinet (EEC), Division of Water, as an Environmental Inspector. She recommended Appellant for reclassifications from an Inspector I to an Inspector III and, at the time she was supervisor, was told that the state budget did not allow for promotions. Therefore, reclassifications were done. This was the policy with all employees during that time period and created a difference due to the fact that a reclassification only created a 5 percent raise while a promotion would allow the

opportunity for an additional 5 percent increase in pay at satisfactory completion of the promotional probationary period.

2. Coy testified that Appellant was an outstanding employee and she has no reason to believe that Appellant would not have received the full 10 percent increase in pay in the event that a promotion had taken place.

3. During the time that Coy completed job evaluations for Appellant, Appellant always received an "Outstanding" which is the highest rating. She was a very good inspector, did high quality work and great volumes of work. In addition, she was willing to do anything at anytime, even if she herself was stacked up with work. She felt that Appellant always gave 110 percent. Appellant always met her quotas for monthly and annual inspections and, in fact, she had the highest productivity of the group of inspectors that Coy supervised. In addition to high productivity, the quality of work by Appellant was high. Coy had been contacted by many facilities that were inspected numerous times about Appellant's wonderful professionalism and her going above and beyond to help the facilities solve problems. Coy verified that she would have considered Appellant for a job promotion had those been available.

4. At the time Coy was Appellant's supervisor, Kevin Flowers was her Branch Manager, and on several occasions she talked to him about the fact that Appellant deserved a promotion. At that time she was always told there was not a budget for promotions, but only reclassifications. Also, if promotions were done, a position could have been lost and with the prohibition at the time of new positions being created, the policy of the Cabinet at that time was to do reclassifications.

5. Coy had recommended Appellant for a reclassification from a I to a II and then again from a II to a III, prior to the time that Coy was transferred in October 2010. She did this before she left, as she knew there would be a gap before a new supervisor was appointed and she knew that Appellant's work deserved for her to move up. She did not want Appellant to lose out on this opportunity just because she was leaving as supervisor. To her knowledge, Appellant ultimately received the reclassification from Inspector II to III.

6. On cross-examination, Coy verified that a reclassification required a change in duties that was permanent. Each time Appellant was recommended to move to a reclassification from a I to a II and then from a II to a III she had been taking on additional duties and those had become and would continue to be permanent in her work.

7. Because Appellant worked in a highly industrial region, she took on many large facilities including the Toyota facility.

8. Coy verified that Appellant never put in for any posted positions that had to be interviewed and competed for because there were no such positions that were hired in what she was already reclassified into due to the fact that when someone left in a higher position, the policy was that their position went back to an Inspector I. According to Coy both males and females went through this same process.

9. Coy further testified that during the time period that she was an Inspector, the same policy had been in effect for about five and a half years and that she applied for a supervisory position in order to receive a promotion.

10. **Kathleen Saunier** was Appellant's supervisor in early 2011 through January 2012. She is now with the General Counsel's office at EEC. Saunier verified that her job evaluation of Appellant always resulted in an "Outstanding" rating because she was exemplary employee who went above and beyond what was required of her. All work was done in an outstanding manner. Saunier verified that she would have considered Appellant for promotion and did in fact submit a reclassification for her. At that time she was told about the same policy existed of using reclassifications, rather than promotions.

11. Saunier verified that when she was an Environmental Inspector herself she had a Doctorate Degree, but never received a promotion. She transferred from Paducah to the Frankfort office. She was hired as an Inspector I in Paducah and was reclassified to an Inspector II and transferred to Frankfort. When Jarrod Bell left as an Inspector III, that position was abolished and moved to an Inspector I and she was told there were no promotional opportunities at that time. Saunier was promoted to supervisor and her Inspector III position became open and was abolished and an Inspector I position created wherein Chad Bergenson was hired.

12. **Jarrod Bell** testified that he had been Appellant's supervisor since July 1, 2012. Appellant has always had an "Outstanding" evaluation since he has evaluated her. Appellant's reports are detailed and some of the best in the Division. She also has outstanding attendance, professionalism, and assisting other employees.

13. Bell had spent most of his career with the Department since 1991 and always understood that reclassifications were the only vehicle for grade changes. When he became a supervisor in 2012 and contacted the office, he was told there was then an option for promotion instead of reclassification. No reason was given for this. It occurred in conjunction with the request for a reclassification for Chad Bergenson. When Bell became Superintendent, Bergenson had the time necessary in for a reclassification to a II, and he was told of the promotion at that time. He does not know if the vacancy had already been in the Frankfort Regional office or moved from elsewhere. Later Bergenson was transferred to the Bowling Green office by voluntary transfer which left a vacancy for an Inspector II and a position was

posted for an Inspector I. At that time Appellant was already an Inspector III, so would not have received any promotion by applying for same.

14. **Chad Bergenson** testified that he was promoted from an Inspector I to an Inspector II after one to two years of service. His current rate of pay was close to \$33,700 annually and he got a 5 percent increase at the end of his probationary period in addition to the 5 percent increase when he was promoted from one position to the other. He started inquiring into a promotion as he was reading the policy and asked Bell which way he could go and was never told that promotions were not available. He had to apply and interview for the promotional position.

15. Appellant, **Sonja Smiley**, testified that she began work with the Cabinet in October 2007 as an Environmental Inspector I. After six months she received a 5 percent raise. In December 2008, she was reclassified to an Inspector II; receiving a 5 percent raise. On August 16, 2011, she was reclassified to an Environmental Inspector III; receiving a 5 percent raise. During her entire time at work, other than those initial 5 percent increases, she had received two 1 percent incremental raises and currently has a salary of \$35,200. During the time that she could have received promotional opportunities the system of using reclassifications was used and she was denied the opportunity for promotion. Within the last two years there has been a major difference in their office and during that time only a male has gone through the promotional process. In other offices four males had been promoted from Inspector Is to Inspector IIs. Within thirty months of service, those employees will top her in pay despite the fact she has seven years of experience and they have less than two years of experience.

16. Appellant testified that she first filed a grievance and no one personally talked to her about the matter. She was simply told that there was nothing that could be done about it. Even the week before the hearing at a meeting, they were told that they had the same budget now as they had ten years ago, so she did not feel that budgetary constraints were the reason for the matter. The first time she had seen a promotional opportunity be given was to a male. All three of the males that were promoted did not receive evaluations as high as hers. All three of them had "Highly Effective" ratings, while hers has always been "Outstanding."

17. Appellant stated that no one could ever tell her who made the decisions to use reclassifications, rather than promotions.

18. Appellant testified that she had always been raised that if you do what you are asked and do your job you will get the rewards. When she came into the office she was told that others had been there longer than her, so they were paid more. Now younger people with less experience are making more than she does and they cannot do the same job that she can do.

19. The Cabinet called **Sherry Butler**, EEC General Administration, who does Human Resources for several cabinets. She verified that KRS 18A.005 definitions for "Reclassification" as requiring a permanent and material change in duties and "Promotions" as being greater pay and responsibilities. You cannot fill a vacancy with a reclassification. Vacancies are not defined by KRS 18A. No person is currently performing the duties when a vacancy exists.

20. Butler introduced Appellee's Exhibit 1, Certified Register Report, showing the positions when Chad Bergenson received a promotion. At that time, Appellant was already an Environmental Inspector II and did not compete for the position to which Bergenson was promoted. Appellee's Exhibit 2, Certified Register Report, shows that Bergenson is a male and that only one other male applicant, Matthew Wallace, applied for the Environmental Inspector II when he was promoted. Appellee's Exhibit 3, Certified Register Report, shows that an Environmental Inspector II position for McCracken County existed and that Appellant did not apply for that position. Appellee's Exhibit 4, Certified Register Report, shows that there was another Inspector II position in McCracken County which was filled by a male and Appellant did not apply for that position.

21. Appellee's Exhibits 5 and 6, Personnel Action Notifications, show where Bergenson and Wallace were promoted. Appellee's Exhibits 7 and 8, Personnel Action Notifications, show where Benjamin Allen and Dustin Davis were promoted. Therefore, during 2013, four males were promoted. Appellee's Exhibit 9, Personnel Action Notification, show Deanna Picklesimer was promoted from an Inspector III to an Environmental Scientist II. Appellee's Exhibit Appellee's Exhibit 10, Personnel Action Notification, show Ashley Adams was promoted from an Inspector II to an Inspector III. Butler did not know if this person was male or female. Appellee's Exhibit 11, Personnel Action Notification, show Shauna Switzer was promoted from an Environmental Technologist II to an Environmental Technologist III. Based upon the information available through Butler, in 2012 three females had been promoted.

22. Butler introduced Appellee's Exhibit 13 which was a summary of reclassifications in Air Quality. In 2011, three men and four women were reclassified. In 2012, three men and two women were reclassified. In 2013, there was one reclassification of a woman. According to Butler, these reclassifications were not based on gender. It was pointed out on cross-examination, that the promotion reflected in Appellee's Exhibit 9 was in a different series from the Inspectors. In Appellee's Exhibit 10 you could not tell if the person was promoted or reclassified from an Inspector I to an Inspector II. Appellee's Exhibit 11, reflected promotions into positions outside of the Inspector series.

23. Butler verified that reclassifications are based on a permanent and material change in duties and that supervisors are responsible for making such requests. Promotions are made when there is a vacancy posted by the Agency. The Agency must determine if a vacancy is open, then there can be lateral transfers or, if not, a new register must be requested and people must competitively apply for the position.

24. On cross-examination, Butler acknowledged that if you look only at 2013 more males were promoted and no males were reclassified.

25. Butler was not aware whether there were any budgetary differences in 2011 to 2013.

26. Butler also testified that there was no mechanism within the Personnel regulations to allow an agency to increase an employee's wages due to the discrepancies that have occurred to Appellant. Every career path can cause a different pay rate. Butler testified that she certainly understood that on a personal level because her career path had caused the same results as that of Appellant's had caused her, with there not being an opportunity for promotion. She verified that wage discrepancies are not uncommon occurrences in any of the three Cabinets with which she deals.

27. **John Lyons**, the Assistant Secretary for Climate Policy with EEC and the Director of the Division of Air Quality for nearly twelve years, testified that he was the person responsible for recommending to the Appointing Authority how positions would be filled on a reclassification or a promotion. He testified that it has always been the Agency's policy that when an Inspector III left, the position became an Inspector I position. He acknowledged that there were more promotional opportunities in 2013 than in 2011 and 2012. He stated that at some points in time, the positions were much closer to their caps for the number of jobs being reached and that in those periods of time reclassifications were used, rather than promotions. There was a lot of turnover in 2013 due to retirements, particularly in the Paducah office, which caused some advertised positions and promotional opportunities to be created.

28. Lyons could not verify what the turnover was in 2011, but thought there had been a lot of early retirements in 2008 and 2009 and that those positions had not been reallocated which was a part of the reason that reclassifications had to be used. He verified that the cap on the number of allowed positions changes on an annual basis, and that both that and budgetary considerations were the reason for the policy of using reclassification.

29. According to Lyons, the only other way that any pay increase could be granted to Appellant was through an ACE Award or an Educational Achievement Award.

FINDINGS OF FACT

1. Appellant, Sonja Smiley, never applied for a promotional position during the time that she has been at the Cabinet and no promotional opportunities existed for her due to the policy that if an Environmental Inspector II or III left, their position was changed back to an Environmental Inspector I position.

2. This policy of moving positions to Inspector I existed across the board for male and female employees.

3. Appellant is an outstanding employee with "Outstanding" evaluations and one of the few employees that this Hearing Officer has ever heard only accolades about during the process of an appeal.

4. In 2013, due to retirements, there were several open positions available for promotional opportunities. In recent time, both male and female employees have been promoted by the Cabinet in various positions, although not always in the Inspector series.

5. 101 KAR 2:034, Section 3(1) and (3)(a) states:

Salary Adjustments (1) Promotion An employee who is promoted shall receive the greater of five (5) percent for each grade, or an increase to the minimum of the new grade except as provided under subsection (2)(b) of this section.

...

(3) Reclassification.

(a) An employee who is advanced to a higher pay grade through reclassification shall receive the greater of five (5) percent for each grade or the new grade minimum except as provided under subsection (2)(b) of this section.

6. 101 KAR 2:034, Section 4(2) states:

Promotional probation increase. An employee shall receive a five (5) percent salary advancement on the first of the month following completion of the promotional probationary period except as provided under Section 3(2)(b) of this administrative regulation.

7. Appellant filed a grievance concerning the matters herein, but did not appeal her grievance results.

8. Under the case *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d. 668 (1973), in order for an action of a Plaintiff to prove a *prima facie* case of discrimination they must show 1) that they are a member of the protected class; 2) that they are qualified for and applied for an available position; 3) that they did not receive the job and 4) that the position remained open and the employer sought other applicants. If a *prima facie* case is proved under the *McDonnell-Douglas* case then the burden shifts to an employer to articulate a legitimate non-discriminatory reason for the action.

9. Both male and female employees were reclassified, rather than promoted during the period of time that Appellant has been employed by Appellee.

CONCLUSIONS OF LAW

1. Appellant was not able to establish a *prima facie* case of discrimination under *McDonnell-Douglas* as she did not apply for any available positions. This is due to the fact that there were no available positions.

2. Even if one assumes that there were no available positions due to some plan of gender discrimination by Appellee, the Appellee has met any shifted burden to show that there was a legitimate non-discriminatory reason for the actions, that being that the policy existed for all positions to be filled by reclassification, rather than promotion, due to primarily the cap on the number of employees permitted and, secondarily, to budgetary constraints.

3. Regretfully, it appears that there is an injustice to this employee. Unfortunately, that regularly happens within state government depending upon either a chosen or required career path for employees. Therefore, the Hearing Officer must recommend that the appeal be dismissed. However, due to the fact that this employee is a very valued employee and one that we obviously need in state government, the Hearing Officer would hope that there may be some way that this employee could be rewarded in the future through promotional opportunities.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **SONJA SMILEY VS. ENERGY AND ENVIRONMENT CABINET**, (APPEAL NO. 2013-166) 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 Kim Hunt Price** this 28th day of October, 2014.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof mailed this date to:

Hon. Leesa Moorman
Sonja Smiley