

**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD**

**CHRIS SOUTHWORTH (APPEAL NO. 2018-134)  
LINDA WARD (APPEAL NO. 2018-135)  
NEELOFAR MOULA (APPEAL NO. 2018-136)**

**APPELLANTS**

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

**FINANCE AND ADMINISTRATION CABINET,  
DEPARTMENT OF REVENUE**

**APPELLEE**

**AND**

**PERSONNEL CABINET**

**INTERVENOR**

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The Board, at its regular November 2020 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated October 5, 2020, Appellants' Exceptions (returned as untimely), Appellants' Motion to Resubmit Exceptions Returned in Error, Personnel Cabinet's Response in Opposition to Appellants' Motion to Resubmit Exceptions, and being duly advised,

**IT IS HEREBY ORDERED** that the Appellants' Motion to Resubmit Exceptions Returned in Error is **DENIED**.

**IT IS FURTHER 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 Appellants' appeals are 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 17<sup>th</sup> day of November, 2020.

**KENTUCKY PERSONNEL BOARD**

  
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**MARK A. SIPEK, SECRETARY**

A copy hereof this day sent to:

- Hon. Robert Long
- Hon. Rosemary Holbrook
- Hon. Catherine Stevens
- Mr. Chris Southworth
- Ms. Linda Ward
- Mr. Neelofar Moula
- Ms. Stacy Perry



Conference (filed September 13, 2019, renewed on October 29, 2019); and, Appellants' Renewed Request for Ruling On Motions (filed April 28, 2020).

### BACKGROUND

1. Appellants, Chris Southworth and Neelofar Moula, are currently employed with the Finance and Administrative Cabinet as Revenue Section Supervisors. (**Hearing Officer Note:** Linda Ward, previously employed at the Cabinet as a Revenue Section Supervisor, has terminated her employment with the Commonwealth of Kentucky but has not withdrawn her appeal.)

2. In their consolidated appeals, filed in July of 2018, Appellants allege that Appellee Finance Cabinet had “not rectified” a “pay imbalance in which some supervisors were paid less than some auditors.” (See Statement of Facts, Appeal Nos. 2018-134, 2018-135, and 2018-136).

3. Appellee Finance and Administration Cabinet filed a Motion to Dismiss on January 18, 2019. In its motion, Appellee alleges that the Personnel Board lacks jurisdiction with respect to the consolidated appeal because Appellants’ “...concern is ‘some supervisors’ may be paid less than some auditors.” Appellee notes that “...pay bands for grades within Revenue’s Auditor series, established by the Personnel Cabinet, overlap one another. It is possible and lawful, albeit uncomfortable, that employees in higher grades make less than employees one grade below.” (Id. at p. 3.)

4. Appellants filed a Motion for Summary Judgment on January 18, 2019. In their motion, Appellants assert that in August of 2017, “multiple salary adjustments drastically increased the starting pay for Revenue Auditors and increased all [salaries for] employees in the Office of Field Operations similarly...Revenue Auditors, who report to Revenue Section Supervisors, became paid more than their supervisors in many cases.” (Appellants’ Motion for Summary Judgment, pp. 1, 2.)

5. Appellants note that while their salaries were not adjusted, they were allowed to “resign” their positions in June of 2018 and were then “reinstated” to Auditor IIIs. This allowed them to receive a 5% increase in salary. They later re-interviewed and were rehired to their previous positions of Revenue Section Supervisors, which resulted in an additional 5% salary increase after successfully completing promotional probation.

6. Appellants argue that they have suffered a “penalization,” as defined by KRS 18A.005(24), because they have not been “made whole by full salary adjustment commensurate with other adjustments made throughout the department.” (Appellants’ Motion for Summary Judgment, p. 2.)

7. Appellants further argue that the “resign to reinstate” mechanism offered to them was a *de facto* “demotion.” Appellants stated they followed the suggested “resign to reinstate” plan “not because it was correct or what they actually desired to do, but because they saw no

solution to the penalization they had received and chose the risk for potential reward.” (Appellants’ Motion for Summary Judgment, p. 6.) In Appellants’ estimation, the “resign” component of this personnel action meant that they “effectively lost their jobs.” (Id. at 7.)

8. Finally, Appellants contend that requiring them to complete a promotional probationary period for the Revenue Section Supervisor position that they were re-hired for was also a penalization. Besides delaying their receipt of the probationary 5% salary increase by six months, they allege that being placed on probation “endangered their status in the merit system once again.” (Id. at 7.)

9. Intervenor, Personnel Cabinet, filed a Motion to Dismiss Appeals for Lack of Jurisdiction on February 22, 2019. In its Motion, the Personnel Cabinet asserts Appellants were not penalized because “...subjective expectations of salary adjustments that are not clearly based on a statute or regulation are not actionable.” (p. 4.) The Personnel Cabinet further contends that Revenue Section Supervisor positions are not entitled to a salary adjustment due to increases received in other job classifications because the language in 101 KAR 2:034, Section 1(2), limits such adjustments to employees in the same job classification, in the same work county, and with similar education and experience.

10. The Personnel Cabinet also notes that Appellants may be attempting to argue they suffered a penalization because, in their estimation, it is inherently unfair for a Revenue Section Supervisor to earn less than an employee he or she supervises. The Personnel Cabinet asserts this argument must fail because “[T]he Board lacks jurisdiction of these appeals as this type of ‘class-of-one’ theory of equal protection does not apply in the public employment context.” (p. 6.) They cite Engquist v. Oregon Dept. of Agr., 553 U.S. 591 (2008) in support of that conclusion.

11. The Personnel Cabinet’s final argument is that uniformity of pay is not required in the merit system. “All employees are guaranteed a minimum level of pay in every job classification. There is no regulation or statute that requires equality of pay for every subsequent personnel action that occurs in an employee’s salary history.” (p. 11.)

### **FINDINGS OF FACT**

Largely accepting the facts as set out by the parties, the Hearing Officer will analyze these appeals using the relevant factual background as set out below:

1. At the time of the filing of their appeals, July 2 and 3, 2018, Appellants were all classified employees with status, serving as Revenue Section Supervisors with the Finance and Administration Cabinet. Appellant Linda Ward has since resigned from her position as Revenue Section Supervisor with the Cabinet, but did not withdraw her appeal.

2. The Personnel Cabinet processed numerous individual personnel actions as requested by the Finance and Administration Cabinet, effective August 1, 2017. Employees who

received salary increases were in the job classes of Revenue Field Auditor I, II, III, and IV; Revenue Auditors I, II, and III; Revenue Selection and Review Officers; Revenue Audit Supervisor; Revenue Selection and Review Supervisors; and Revenue District Managers.

3. There were no pay grade changes through the reclassification and reallocation processes as set forth in 101 KAR 2:034, Sections 3(3) and (4), nor were any of the job classifications in question assigned a higher pay grade in accordance with 101 KAR 2:034, Section 3(7).

4. As a result of the August 1, 2017 personnel actions, almost all Auditor III positions qualified under 101 KAR 2:034, Section 1(2) to receive monthly salary adjustments.

5. Revenue Section Supervisors are responsible for the supervision of employees in the position of Auditor I, II, and III. As a result of these salary adjustments, many of the Auditor IIIs earned more than the Revenue Section Supervisors who supervised them.

6. The monthly salaries for the job classifications of Auditor I, II, and III, and Revenue Section Supervisor compare as follows on the salary schedule below:

<b>JOB CLASS/PAY GRADE</b>	<b>MINIMUM (\$)</b>	<b>MIDPOINT (\$)</b>
Auditor I – Grade 12	2,589.26	3,430.10
Auditor II – Grade 13	2,848.22	3,791.68
Auditor III – Grade 14	3,133.00	4,150.30
Section Supv. – Grade 15	3,446.22	4,565.44

7. After the August 1, 2017, salary adjustment, many of the Auditor IIIs' monthly salaries were increased to \$3,781.70. As of that same date, Appellants' monthly salaries were as follows: Neelofar Moula, \$3,618.45; Chris Southworth, \$3,727.84; and Linda Ward, \$3,802.80.

8. The salaries of Appellants were not adjusted, and they filed grievances on February 21, 2018, complaining that the salary adjustments that occurred on August 1, 2017, "...created a real scenario in which the Revenue Auditor IIIs are paid more than their Revenue Section Supervisors." (Grievance Form, p. 1, attached to Appeal Nos. 2018-134, 2018-135, and 2018-136.)

9. The grievances document that the first and second level reviews (done by Angie Morris, the Appellants' supervisor, and J. Todd Renner, Executive Director, respectively) found

the grievances to be factually accurate, but asserted that neither of these reviewing supervisors had the “authority to grant the relief requested.” (Grievance Form, p. 2, attached to Appeal Nos. 2018-134, 2018-135, and 2018-136.)

10. On May 17, 2018, Appellants received a response from the appointing authority’s review of their grievances. Stacy M. Perry, Appointing Authority of the Finance and Administration Cabinet, denied the requested salary adjustment, explaining that “After reviewing the budget impact of the request, the Department and Cabinet both have determined that the cost of the requested compensation increases cannot be absorbed in the approved FY ‘19 and FY ‘20 operating budgets.” (May 17, 2018 letter from Stacy M. Perry, attached to Appeal Nos. 2018-134, 2018-135, 2018-136.)

11. Appellants were offered the opportunity to resign their Revenue Section Supervisor positions (Grade 15) and reinstate with no break in service to the positions of Revenue Auditor III (Grade 14). They then interviewed for their vacant previous positions and were promoted again to Revenue Section Supervisors. This process resulted in a monthly salary increase of \$550.89 for Neelofar Moula, \$441.50 for Chris Southworth, and \$168.00 for Linda Ward, who resigned before completing promotional probation. As a result of these personnel actions, Appellants’ monthly salaries were increased to a point higher than that of the Revenue Auditor IIIs.

12. Appellants assert that they have not been made whole by a full salary adjustment commensurate with the other adjustments made throughout the department. They contend, “Starting with the higher-paid Revenue Auditor Is from the salary increase, and adding 5% per grade, plus 5% promotional increase, brings the total appropriate salary for the Revenue Section Supervisors to \$52,543.” (Appellants’ Motion for Summary Judgement, p. 13.)

13. KRS 18A.005(24) reads:

"Penalization" means demotion, dismissal, suspension, fines, and other disciplinary actions; involuntary transfers; salary adjustments; any action that increases or diminishes the level, rank, discretion, or responsibility of an employee without proper cause or authority, including a reclassification or reallocation to a lower grade or rate of pay; and the abridgment or denial of other rights granted to state employees;

14. 101 KAR 2:034, Section 1(2) reads:

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

### CONCLUSIONS OF LAW

#### APPELLANTS' MOTION TO STRIKE INTERVENOR'S MOTION TO DISMISS

1. In Appellants' Motion to Strike Intervenor's Motion to Dismiss, filed April 15, 2019, Appellants allege that they "received the mail so many days after February 22 that they had suspicion of wrongdoing..." (Id. at 1.) Appellants claim that the Intervenor actually "served" their Motion to Dismiss on February 25, 2019, apparently interpreting CR 5.02(1), which states that "service is complete upon mailing," to mean that service is complete the day the envelope is post-marked.

2. The September 25, 2018 Interim Order provided: "The Agency and the Intervenor are given up to and including February 22, 2019, in which to file its Motion to Dismiss and/or Motion for Summary Judgment." Appellee's Response to Appellants' Motion to Strike noted that Appellee's Motion to Dismiss was file stamped February 22, 2019, and that, as the certificate of service indicated, it was placed in the mail that same day.

3. Appellee is correct in its contention that there is nothing in the language of CR 5.02(1) requiring that an envelope be post-marked to satisfy the filing deadline of a motion. *Black's Law Dictionary* defines "mail" as "one or more items that have been properly addressed, stamped with postage, and deposited for delivery in the postal system." *Mail, Black's Law Dictionary* (10<sup>th</sup> ed. 2014.) Under the express language of CR 5.02(1), then, service is complete upon mailing, which occurs when the properly addressed, postage-stamped envelope is deposited for delivery in the mail system. The Certificate of Service noted on Appellee's Motion to Dismiss reveals that this occurred on February 22, 2019. The Hearing Officer concludes that Appellee's Motion to Dismiss was timely filed.

4. The Hearing Officer is cognizant of Appellants' contention that the unexpected delay of Intervenor's Motion to Dismiss affected a time schedule they had created in order to juggle the requirements of full-time work and family obligations. However, Appellants were granted latitude in the filing of their own submissions. While the Certificate of Service on their Response to Intervenor's Motion to Dismiss was dated March 22, 2018, the Personnel Board did not actually receive the Response until March 28, 2019. (Per Interim Order dated September 25, 2019, Appellants' Response was due March 22, 2019.) Additionally, Appellants' Motion to Strike Intervenor's Motion to Dismiss was filed April 15, 2019, and was not excluded by the Hearing Officer. Appellants have not alleged they suffered any prejudice that could not have been resolved by asking for even more time, which they failed to do.



5. Appellants' Motion to Strike Intervenor's Motion to Dismiss is hereby **DENIED**.

### **MOTIONS TO DISMISS AND MOTION FOR SUMMARY JUDGMENT**

1. Both the Finance and Administration Cabinet and Personnel Cabinet filed Motions to Dismiss. Appellants filed a Motion for Summary Judgment and attached a number of documents, which the Hearing Officer did not exclude. It is well-settled law that reliance on "matters outside the record, if not excluded by the court, effectively converts a motion to dismiss into a motion for summary judgment pursuant to CR 56 and CR 12.02." McCray v. City of Lake Louisville, 332 S.W.2d 837 (Ky. App. 1960).

2. The issues before the Hearing Officer are more properly decided under the Motion for Summary Judgment standard of review.

3. A Motion for Summary Judgment shall be granted when there is no genuine issue as to material fact, and the moving party is entitled to a judgment as a matter of law (CR 56.03).

### **CONCLUSIONS OF LAW**

1. Appellants first argue they were penalized as a result of the August 1, 2017 salary adjustments because "[R]evenue Auditor IIIs were immediately receiving salaries higher than their supervisors." (Appellants' Motion for Summary Judgment, pp. 5, 6). They contend that Appellee improperly disregarded the "interrelationship between the classes," and cite the holding of Cabinet for Human Res. v. Ky. State Pers. Bd., 846 S.W.2d 711 (Ky. App. 1993) in support of that conclusion.

2. In Cabinet for Human Res., eight out of nine classes of nurses were granted one, and in some cases two, pay grade changes, along with corresponding salary increases. Appellants' nursing class, Nursing Consultant Inspectors (NCIs), received no such change or adjustment. The Kentucky Court of Appeals concluded that such an outcome constituted a "penalization" of the NCI class as that class required the most education and experience but was paid the least amount of all the classes of nurses.

3. What distinguishes Cabinet for Human Res. from the present appeal, however, is that the Revenue employees who received salary pay increases did not receive changes in pay grade assignments. Instead, they received salary adjustments within their existing pay grades. As Intervenor Personnel Cabinet points out: "The Appellants do not think that pay grades are wrongly assigned to the Department of Revenue job classifications, but seek to realign salaries among the different job classes to have, what they consider to be, perfect 'spacing.' In Appellants' 'perfect world,' a grade 14 never makes more than a grade 15..." (Personnel Cabinet's Reply to Appellants' Response to Its Motion to Dismiss, p. 3.)

4. Appellants are essentially asserting that a “buffer” should be built between Revenue Auditors and the staff who supervise them. However, Appellants cannot cite any statute or regulatory authority requiring that such a buffer be implemented.

5. The Hearing Officer concludes as a matter of law that Appellants did not suffer a penalization when Auditor IIIs were awarded a higher salary than some Revenue Section Supervisors on August 1, 2017, the day after the salary adjustments were implemented. Such an outcome does not violate the requirements of 101 KAR 2:034.

6. To the extent a salary comparison is required by 101 KAR 2:034, Section 1(2), such a comparison would be of the initial salary to the salary the existing employee was making at the time of the hire, and only if the incumbent employee is in the same job classification, in the same work county, and has a similar combination of education and experience. None of the Appellants met these limiting conditions.

7. Intervenor Personnel Cabinet proposes a further argument, which is well taken by the Hearing Officer. They allege that Appellants are essentially arguing that they were arbitrarily treated differently from other similarly situated Revenue employees. Because Appellants have not asserted that their treatment was based on their membership in a particular class, their claim is analogous to the “class of one” allegations discussed in Engquist v. Oregon Dept. of Agr., 553 U.S. 591 (2008).

8. In Engquist, the Plaintiff alleged she was penalized not because she was a member of a protected class (i.e. age, race, gender, religion etc.) but for arbitrary, vindictive, and malicious reasons. Such a claim sounds in the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and is known as a “class-of-one” claim.

9. In Engquist, the court distinguished between when a government acts as a sovereign and when it acts as an employer. It held that “the government as employer indeed has far broader powers than does the government as sovereign.” (Id. at 598.) The court concluded that “...the class-of-one theory of equal protection – which presupposes that like individuals should be treated alike, and that to treat them differently is to classify them in a way that must survive at least rationality review – is simply a poor fit in the public employment context. To treat employees differently is not to classify them in a way that raises equal protection concerns. Rather, it is simply to exercise the broad discretion that typically characterizes the employer-employee relationship.” (Id. at 605.)

10. Here, Appellants claim they were penalized because the salaries of other Revenue employees were raised and theirs was not. This is the very situation in Engquist that the court deemed to be “individualized, subjective personnel decisions” that do not raise equal protection concerns. The Hearing Officer notes that Appellants do not claim discrimination in violation of KRS Chapter 344 or KRS 18A.140(1), nor do they claim a violation of the salary adjustment regulation, 101 KAR 2:034. The Hearing Officer concludes that, at the Personnel Board, such a claim is not recognizable under KRS Chapter 18A.

11. Appellants' second claim of penalization is the manner in which Appellee eventually arranged for them to receive a salary increase. In order to increase their salaries, the Department of Revenue management suggested to Appellants that they "resign to reinstate" and then interview to be promoted to their original position. Appellants' contend that these personnel actions are penalizations as they effectively caused Appellants to accept a demotion, and then complete a second probationary period. (Appellants' Motion for Summary Judgment, pp. 6, 7). In support of that conclusion, Appellants cite the case of Com. of Ky., Tourism Cabinet v. Stosberg, 948 S.W.2d 425 (Ky. App. 1997).

12. In Stosberg, a Park Manager Senior at E.P. Sawyer State Park, Rita Stosberg, was transferred to Natural Bridge State Park to be its Park Manager Chief. This was a position that Stosberg did not want and had not applied for. The Kentucky Court of Appeals found that the transfer was "involuntary," and had been made in violation of KRS 18A.0095(2) in that such a penalization had not been done "for cause." In the Court's opinion, Stosberg's resignation from the Natural Bridge position was "...a reasonable response to the involuntary transfer forced on her by the Cabinet." (Id at 427.) (Emphasis added.)

13. While Stosberg involved a different personnel action, an involuntary transfer, it is distinguishable from the instant appeals in two other ways. First, Appellee's award of a salary adjustment to some Department of Revenue employees but not to Revenue Section Supervisors was not a violation of a salary statute or regulation, nor do Appellants allege that it was. Secondly, the personnel actions allowing Appellants to "resign to reinstate" and then promote were not "forced" upon them. Appellee Finance and Administration Cabinet offered this mechanism to address Appellants' salary grievances, and Appellants accepted. If they had not chosen to follow that course of action, nothing in Appellants' circumstance would have changed. Unlike Stosberg's situation, where she was instructed to work in a different park in a different county, Appellants were not forced to change any aspect of their employment. The "resign/reinstate and promote" personnel actions were presented as completely voluntary mechanisms by which Appellants could receive an increase in salary.

14. While Appellants may find such a procedure objectionable after the fact, they have failed to identify a statute or regulation that such personnel actions violate.

15. Accordingly, the Hearing Officer finds that the Appellants have failed to articulate a penalization as defined by KRS 18A.005(24). None of the Appellants' claims implicate any right afforded to merit employees by KRS Chapter 18A or any applicable regulation. Therefore, the Hearing Officer finds, pursuant to KRS 18A.095(18)(a), the Personnel Board lacks jurisdiction to consider these consolidated appeals since the Board is unable to grant relief.

16. This conclusion is further supported by the Board's ruling in the case of Scott Huddleston, et al. v. Transportation and Personnel Cabinets, Personnel Board Appeal No. 2015-194, et seq.

17. The Hearing Officer concludes as a matter of law that these consolidated appeals must fail.

18. Lastly, because it is not possible for the non-moving party, here the Appellants, to produce evidence at trial that would warrant a judgment in their favor regarding their penalization claims, the Hearing Officer concludes there are no issues of material fact and that Appellee, Finance and Administration Cabinet, and Intervenor, Personnel Cabinet, are entitled to judgment as a matter of law. In light of the foregoing conclusion, Appellants' assertion that Appellee did not comply with discovery orders, Appellee's Request for a Status Hearing, and Appellants' Renewed Request for Ruling on Motions are rendered **MOOT**.

### **RECOMMENDED ORDER**

The Hearing Officer recommends to the Personnel Board that the appeals of **CHRISTOPHER SOUTHWORTH (APPEAL NO. 2018-134), LINDA WARD (APPEAL NO. 2018-135) and NEELOFAR MOULA (APPEAL NO. 2018-136) VS. FINANCE AND ADMINISTRATION CABINET AND PERSONNEL CABINET** 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 Colleen Beach** this 5<sup>th</sup> day of October, 2020.

**KENTUCKY PERSONNEL BOARD**

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

A copy hereof this day mailed to:

Hon. Cary Bishop  
Hon. Rosemary Holbrook  
Hon. Catherine Stevens  
Mr. Chris Southworth  
Ms. Linda Ward  
Mr. Neelofar Moula