

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 Altering in the case of **LAKEESHA TISDALE V. EDUCATION AND WORKFORCE DEVELOPMENT CABINET (APPEAL NO. 2015-130)** as the same appears of record in the office of the Kentucky Personnel Board.

Witness my hand this 15th day of March, 2017.



MARK A. SIPEK, SECRETARY
KENTUCKY PERSONNEL BOARD

Copy to Secretary, Personnel Cabinet

C. **Add Finding of Fact paragraph 12 as follows:**

12. No evidence was introduced into the record that the Appointing Authority assigned the Appellant, in writing, the duties of a Workforce Development Manager.

D. **Add Conclusions of Law paragraphs 7 and 8 as follows:**

7. KRS 18A.005(30) provides:

'Reclassification' shall mean the change in the classification of an employee when a material and permanent change in the duties or responsibilities of that employee **has been assigned in writing by the appointing authority.** [Emphasis added.]

8. Because no evidence was introduced into the record that the Appellant had been permanently assigned the duties of a Workforce Operations Manager in writing by the Appointing Authority, she is not entitled to a reclassification as that term is defined at KRS 18A.005(30). The Board rejects the Hearing Officer's recommended order to the extent that she recommends the Board order the Cabinet's Appointing Authority to reclassify the Appellant by assigning the Appellant in writing the duties or responsibilities of the position of Workforce Development Manager, grade 16. The Board believes the appropriate remedy is that the Appellee shall provide the Appellant with back pay as a Workforce Development Manager from May 16, 2013, forward.

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

IT IS HEREBY ORDERED that the appeal of LAKEESHA TISDALE V. EDUCATION AND WORKFORCE DEVELOPMENT CABINET (APPEAL NO. 2015-130) is **SUSTAINED to the extent** that the Appellee is ordered to provide the Appellant back pay from May 16, 2013, forward, including any contributions to retirement or other benefits lost as a result of performing the duties of a Workforce Development Manager, grade 16, without being compensated for those duties and to otherwise make the Appellant whole. Further, the Appellant shall be reimbursed for any leave time used in attending the pre-hearing conferences and the evidentiary hearing, and that she otherwise be made whole. [KRS 18A.095(25), KRS 18A.105 and 200 KAR 12:030.] The Board **ORDERS** that going forward the Appellee shall either: 1) Appropriately reclassify the Appellant to a Workforce Development Manager or 2) restore her duties as a Workforce Development Operations Administrator.

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 therefore **SUSTAINED to the extent** set forth 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 15th day of March, 2017.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day mailed to:

Hon. Tess Russell
LaKeesha Tisdale

**COMMONWEALTH OF KENTUCKY
KENTUCKY PERSONNEL BOARD
APPEAL NO. 2015-130**

LAKEESHA TISDALE

APPELLANT

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

EDUCATION AND WORKFORCE DEVELOPMENT CABINET

APPELLEE

* * * * *

This matter came on for evidentiary hearing on November 9, 2016, at 9:30 a.m., 28 Fountain Place, Frankfort Kentucky before Brenda D. Allen, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, LaKeesha Tisdale, was present at the evidentiary hearing and was not represented by legal counsel. The Appellee, Education and Workforce Development Cabinet, was present and was represented by the Honorable Tess Russell. Also present was Beth Steinle, Appointing Authority, and Amy Fint, Legal Assistant.

The issues before the Hearing Officer were whether the Appellant was performing the duties of Workforce Development Manager without proper compensation and, if so, whether she was entitled to reclassification or additional compensation for that time period. The Appellant had the burden of proof by a preponderance of evidence. Also before the Hearing Officer was the issue of whether the Appellant's appeal was timely filed. With regard to that issue, the Appellee had the burden of proof.

BACKGROUND

1. LaKeesha Tisdale filed her appeal with the Personnel Board on June 25, 2015. On the Appeal Form, she advised that she was currently classified as a "Workforce Ops Administrator," but that she had been performing the duties of a Workforce Manager for over two years. She advised that she had asked her regional (Manager) about a reclassification of her job title.

2. On August 12, 2015, the Cabinet filed a Motion for a Directed Verdict and a Motion to Dismiss. In its motions, the Cabinet argued that the Personnel Board lacked jurisdiction to entertain the appeal, citing a one-year limitations period as outlined in KRS 18A.095(29). For her response, the Appellant alleged that she was advised by the Cabinet on a number of occasions that the matter would be resolved, and ultimately it was not, and the Cabinet's conduct was misleading. The Appellant further argued that when she realized that other Administrators were detailed to special duty to the Manager position, and that the Cabinet would not address the problem on its own as the Cabinet had led her to believe, she filed the appeal.

3. By Interim Order, the Hearing Officer overruled the Appellee's motions, citing the Appellant's contention that the Cabinet misled her by advising her that they would address the matter, which caused her to miss the filing deadline. Additionally, the Hearing Officer raised the issue of whether the statute of limitations should be tolled and whether an employee would believe they had suffered a penalization if they were told they would be getting paid more for performing additional duties. The Hearing Officer deemed that the development of an evidentiary record at a hearing would be the best way to proceed.

4. On the day of the hearing, both parties waived opening statements and **Michelle McIntosh** was the first to testify on behalf of the Appellant. On direct and cross-examination, she testified that she is a Workforce Development Specialist II and the Appellant was her supervisor. She testified that the Appellant was in charge of the general day-to-day operations of the office, that she worked with outside employers, attended community meetings, also supervised staff and performed performance evaluations. Ms. McIntosh began working in 2002, and Ms. Tisdale began in 2003. They worked together until 2014. Ms. Tisdale held the positions of Workforce Specialist, served as a Disputed Claims Investigator and then a Workforce Administrator. She testified that Ms. Tisdale, supervised 8 to 10 employees in the Bowling Green office, and was in charge of a second office that was located in Simpson County that was open two days a week for approximately two years. The Regional Manager, Vicki Wade, was over Ms. Tisdale, but was rarely in the office.

5. Ms. McIntosh was asked to review a document which was marked for identification purposes as Appellant's Exhibit 1, a document that was the product of a workgroup which compared the duties of Workforce Operations Administrator, grade 15, and Workforce Development Manager, grade 16. The document was tendered for admission, but was not admitted for lack of a proper foundation.

6. Ms. McIntosh discussed that Ms. Tisdale had expressed to her at some point that she was performing the duties of a grade 16 Manager when others were doing the same work and were being paid as a grade 16, however, the witness did not recall when the conversation took place.

7. The next witness to testify on behalf of the Appellant was **Stan Hill**. Mr. Hill testified that he is employed as a Workforce Development Operations Administrator, the same position held by the Appellant. He testified that they perform the same work, but are located at different offices. Mr. Hill identified Appellant's Exhibit 1 as a document that was prepared by the facilitator of a workgroup to determine if there were differences between the Operations Administrator, Grade 15, and Operations Manager, Grade 16, positions and to make recommendations to resolve the problem of both positions appearing to have the same duties for different pay. Mr. Hill stated that Regina Oney, was the facilitator of this workgroup, and that she served as the Assistant Director in Field Services. He stated that he was asked to serve on the task group with others and that while no one from Central Office attended the meetings, it was his understanding that Ms. Oney was communicating back and forth with Central Office throughout the process.

8. Mr. Hill elaborated as to how the workgroup came about. He stated there were a number of conversations between local and central office Managers at managers' meetings with regard to concerns of the overlap between the duties of the grade 15 and grade 16 positions. He stated this was no secret and it was openly discussed. Lori Collins was the Director and she told them on a number of occasions that they were going to address this, and asked the staff to be patient with them. She stated that there would potentially be a reorganization to rectify the situation. He testified that some employees were scared to do anything, because they did not want to jeopardize the position they had and feared there would be some sort of retaliation. Some staff left because they were frustrated, specifically, Robin Carter and Tim Sanders. Mr. Hill testified that Ms. Tisdale never expressed concern with filing a grievance, and that he had no personal knowledge of anyone being the subject of retaliation.

9. Mr. Hill testified that ultimately nothing was ever done to rectify the issue. He testified that as soon as things would start to move, there would be a change in state government leadership. Mr. Hill stated that he had been placed on special duty to the Manager position for one year, which ended in April 1, 2016. He advised that he was responsible for supervising four offices.

10. Mr. Hill testified that there are no significant differences between the Administrator and the Manager jobs, and that it is essentially two different titles doing the same job duties. He advised that his opinion would be to address this by compensating them the same. **Appellant's Exhibit 1** was entered into the record without objection.

11. The next witness to testify was the Appellant, **LaKeesha Tisdale**. She stated that she is currently employed as a Workforce Development Operations Administrator and that she began working for the Cabinet on March 19, 2003, as a facilitator, then in December 2012 began doing the work of an Operations Administrator and Manager and in May 2013 officially was hired into the position of an Operations Administrator.

12. Ms. Tisdale testified that her duties include responsibility for the Bowling Green Office and its 8 to 10 employees. Her duties include opening and closing the office, attending board meetings (until one year ago), working with outside employers, performing employee evaluations, approving employee timesheets and serving on the panel and finalizing all paperwork for recommendations for new hires. She stated that she was also responsible for overseeing the Franklin office, until it closed.

13. Ms. Tisdale testified that her Regional Manager, who oversees 10 counties, is Vickie Wade and that she had spoken with Ms. Wade in June 2015 about the job duties she performed actually being Manager duties when she became aware that her peers, Stan Hill and Gary Wise, had been detailed to special duty and were receiving Manager pay for performing the same work that she was performing. Ms. Tisdale inquired about being detailed, and was told that this was not being done. She told Ms. Wade that she was going to file something and testified that Ms. Wade responded by advising her that, while Ms. Tisdale had experienced a learning

curve during the first year of her taking the position, after that Ms. Wade did not see a difference in the positions and that she should file an appeal.

14. Ms. Tisdale then began to testify regarding the desk audit that had been performed by order of the Personnel Board. The desk audit, which the parties had previously stipulated to be admitted, was completed in April 2016 by James Lambert. Ms. Tisdale stated that on page 8 of the desk audit, Mr. Lambert concluded after reviewing the position descriptions of both the Administrator and the Manager positions, and with input from both Ms. Tisdale and her Regional Manager, Vickie Wade, that Ms. Tisdale is performing the duties of Workforce Development Manager. He recommended that Ms. Tisdale be detailed to the position and that the position be posted and filled through promotion, citing KRS 18A.075.

15. However, Ms. Tisdale testified that she does not believe that after performing the duties of the position for so long, that she should be required to apply for the position, but instead, that she should be reclassified to the position. The Appellant rested.

16. The first witness to testify on behalf of the Appellee was **Vickie Wade**, Regional Program Manager for the Cabinet. She testified that she is Ms. Tisdale's first-line supervisor and she oversees the 10-county region. She advised that the distinction between the Administrator and Manager positions were very slight and that it included the degree to which the Manager position worked with employers in the community. She testified that she did not believe Ms. Tisdale was performing the duties of a Manager.

17. On cross examination, however, Ms. Wade admitted that during the course of her desk audit interview, when asked to identify any difference in the tasks between the two positions, she was unable to identify any differences between the Manager and Administrator positions. Ms. Wade testified that the reason she was able to identify differences in the positions now, but not at the time of the desk audit, was because she was "unprepared" for the desk audit and that she had never been involved in one before. She testified that the day after her desk audit, she made a phone call and asked how to clarify the information and that now she was able to identify differences in the positions.

18. Ms. Wade further testified that during her desk audit interview, when asked whether Ms. Tisdale was performing the duties of a Manager, Ms. Wade refused to answer the question. During the course of the hearing, however Ms. Wade testified that Ms. Tisdale was not performing the duties of a Manager. She explained the discrepancy in her certainty now, and her refusal to answer the question when posed by Mr. Lambert on her lack of preparation for the desk audit.

19. Upon cross examination, Ms. Wade admitted that Ms. Tisdale actually did perform work with employers in the community and with the Industrial Authority of Simpson County with regard to a new employer relocating to the area, and she also worked with Champion Pet Foods and another employer.

20. Upon questioning from the Hearing Officer, Ms. Wade testified that in order to address the issues with the overlap in the positions between the grade 15 Administrator positions and the grade 16 Manager positions, the Cabinet advised the Regional Managers to tell the staff that the Manager positions were going to be posted and they could apply for the positions. She relayed that information as directed and then a few weeks later, the Cabinet removed that option and the positions were never posted. She advised that Ms. Tisdale had told her at some point that she was going to file a grievance and Ms. Wade felt it was not her place to advise her not to do so. Ms. Wade was unable to recall when the conversation occurred, but believed one such conversation occurred in January or February of 2016.

21. **Appellee's Exhibits 1 through 9** were entered into the record.

22. The final witness to testify on behalf of the Appellee was **Beth Steinle**, who serves as the Director of Human Resources for the Cabinet and the Appointing Authority for purposes of personnel and payroll. She provided history of the Grade 15 Administrator and Grade 16 Manager position overlap, and stated that it existed for quite some time. She stated that in 2009 when she was hired as an Assistant Director, and Mark White was the Director, she realized that some offices were headed by an Administrator and some offices were headed by a Manager. She stated that there was a decision at some point that as the Manager positions became vacant through attrition that they would no longer fill them. Because all Managers did not retire simultaneously there was inconsistency throughout the regions. She testified that the decision was made to let the Operation Administrators oversee the offices and the Regional Managers would oversee several offices in each region.

23. She testified that there came to be discussions regarding this and at some point a workgroup was convened and facilitated by Gina Oney. Ms. Steinle testified that she ultimately received a copy of the document they created with recommendations for how to address it. However, she stated that it was never addressed and with a recent change in administration, they are now looking at it again. Ms. Steinle then began to provide testimony about certain discussions that had taken place relative to the structuring of the Cabinet. Because the information was not publicly available and had not yet been implemented, and was still the subject of discussion and revision, the Cabinet moved to SEAL that portion of Ms. Steinle's testimony. The Hearing Officer sustained the motion and **SEALED** that portion of Ms. Steinle's direct testimony from video time 3:00:32 until 3:09:36 and further **ORDERED** the Appellant not to repeat the information that was the subject of this portion of the testimony. Ms. Steinle then gave brief testimony regarding discussions of structure of the regions including that it was an evolving issue.

24. As had been testified to by Ms. Wade, Ms. Steinle also testified that there was a decision to post and fill Manager positions, and that was communicated out to the staff in the regions, but that decision was changed by management and no Manager positions were posted. She stated that instead, some individuals were detailed to the Manager positions. She stated that most of those individuals detailed to the Manager positions oversaw more than one office,

however, she admitted that in one such case the individual did not oversee multiple organizational unit offices, but rather a single office with a small satellite.

25. Ms. Steinle then testified about the desk audit and expressed her confusion about the recommendation from Mr. Lambert, citing another desk audit for an individual which concluded that the Workforce Operations Administrator (Gary Wise) was appropriately classified. Here he found the opposite, and Ms. Steinle testified that she was not clear as to the rationale.

26. The witness reviewed **Appellee's Exhibit 10**, a Position Description Worksheet. She testified that this was the document that was updated by Ms. Wade and sent to personnel during the desk audit. She stated that at the beginning of the desk audit, the protocol is to provide the position descriptions and that Ms. Tisdale's position description had not been updated in several years, so a new one was prepared by Ms. Wade and supplemented the position descriptions already provided for review during the desk audit.

27. Ms. Steinle testified that she had hoped this issue between the grade 15 and grade 16 positions would have been resolved by now, and when Cabinet officials met to discuss reclassifying, they opted not to implement any of the recommendations of the workgroup. Instead, they opted to establish positions temporarily and detail some Operations Administrators to those positions for periods of one year or less. She stated that while there are exceptions to every rule, traditionally when an individual is moving from one management position to another management position the procedure is to post and fill, not to reclassify. She stated that this practice is consistent with the recommendation of Mr. Lambert, who recommended that Ms. Tisdale be detailed and then a position be created, posted and Ms. Tisdale interview for the Manager position. **Appellee's Exhibit 11** was entered into the record.

28. The witness was asked by the Hearing Officer how the practice of "post and fill" appropriately addresses a situation in which a person's duties have been permanently changed; yet, the Cabinet has over the years, opted not to advertise the position such that anyone could officially move into the position. Ms. Steinle advised that they do not believe the position has changed sufficiently to have taken on the duties of the Manager position as it exists.

29. The Appellee rested.

30. Each party made a closing statement. The Hearing Officer considered the entire administrative record.

FINDINGS OF FACT

1. The Appellant, LaKeesha Tisdale, was classified as a Workforce Development Operations Administrator, Grade 15, beginning in May 16, 2013. (Testimony of Appellant, Vickie Wade)

2. Since at least 2009, the Cabinet has made a conscious decision not to fill Grade 16 Workforce Manager positions, as they became vacant through attrition. As the vacancies occurred, the oversight and management of offices within the Cabinet become the responsibility of Operations Administrators who were responsible for one or more offices, with the oversight of Regional Managers. (Testimony of Steinle.)

3. Over time this led to inconsistency throughout the state, as some offices were headed by grade 16 Managers, while other offices were headed by grade 15 Administrators that were tasked with the same responsibilities. (Testimony of Steinle.)

4. This inconsistency and overlap between the grade 15 Administrators and grade 16 Managers has been the subject of discussions within management for many years, without resolution. The cabinet advised Regional Managers to relay to staff that grade 16 Manager positions would be posted and staff could apply, but then did not do so. (Testimony of Steinle, Wade, Hill)

5. The class specification for the Workforce Operations Administrator details that individual performing these duties "Provides assistance to the Workforce Development Manager with day to day operations . . . or Supervises a section of employees engaged in the monitoring, evaluation, implementation, administration of a Workforce/Employment Service or Unemployment Insurance program . . ." (Appellee's Exhibit 9)

6. The duties of a Workforce Operations Manager requires that the incumbent "Manages the overall operation of a designated service office providing workforce/employment and unemployment services OR manages a workforce/employment service or unemployment insurance branch which oversees the implementation, development and/or monitoring and evaluation of one or more workforce, employment service or unemployment insurance programs . . ." (Appellee's Exhibit 3)

7. The evidence of record, including the desk audit and Appellant's evaluations for 2013, 2014 and 2015, reveals that since the time of her hiring into the position of Workforce Operations Administrator, in May of 2013, the Appellant has not assisted a Workforce Development Manager nor has she managed a branch, either of which is a required responsibility for the Administrator position. Instead, she has managed the overall operation of the Bowling Green Service Office, and for approximately two years, the Franklin Satellite Office. (Testimony of McIntosh, Tisdale, Appellee's Exhibits 5, 6, and 7.)

8. The Hearing Officer finds, as did the desk audit completed by James Lambert, that Appellant was performing the duties of a Workforce Operations Manager. He recommended that the Appellant be detailed to the Manager position and that the position be posted and the Appellant be permitted to apply for the position, citing KRS 18A.0751(4)(f). However, the Hearing Officer finds that these options have always been available to the Cabinet who has consciously chosen not to proceed in this manner. Contrary to the arguments of the Cabinet, and the recommendation of the desk auditor, KRS 18A.0751(4)(f) does not require that positions at

certain levels be filled only after posting and interviews. The Hearing Officer finds this prospective approach does nothing to address the period of time during which the Appellant has been penalized nor does it address the windfall the Cabinet has received by having an individual perform grade 16 duties for grade 15 pay.

9. While the Appellant testified that she began performing the duties of the Workforce Operations Administrator (and because of the overlap, Operations Manager duties) in December 2012, prior to her hiring into the Operations Administrator position in May of 2013, the desk audit reveals that she did not take on the responsibility of evaluating staff until May 2013 when she officially assumed the Administrator position. The Hearing Officer finds that evaluating staff is a key responsibility of the Manager position, and as such, the date she began performing Operations Manager duties was May 2013.

10. The Hearing Officer finds that there is no evidence of record to indicate that in May 2013 the Appellant knew or reasonably should have known that the duties of her newly acquired position were actually the duties of a Workforce Operations Manager.

11. The Hearing Officer finds that the Appellant reasonably should have known of her penalization when her request to be detailed to the position of Workforce Operations Manager, as was Stan Hill, was denied by Vickie Wade in June 2015.

CONCLUSIONS OF LAW

1. KRS 18A.005(24) provides that an increase in responsibility without proper cause or authority or the denial or abridgement of other rights granted state employees constitutes a penalization.

2. KRS 18A.095(29) provides:

[A]n 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.

3. The Appellant's duties have undergone a permanent, material and substantial change such that she has been performing Operations Manager duties without adequate compensation.

4. Such conduct constitutes a penalization as defined in KRS 18A.005(24), for which the Appellant did not receive written notice of her right to appeal as provided in KRS 18A.095(29).

5. There is no evidence that indicates that at the time that the Appellant was hired as a Workforce Operations Administrator, that she was aware that those duties were actually grade 16 Workforce Operations Manager duties.

6. However, after Stanley Hill's March 31, 2015 detail to a grade 16 position, the Appellant was on notice that there was a means to be compensated at a higher level for the work that she was performing and requested and was denied increased compensation. Accordingly, the Hearing Officer concludes that the Appellant's June 25, 2015 appeal to the Personnel Board was within the one-year limitations period and the Appellee has failed to meet its burden of proof that the Personnel Board lacks jurisdiction to entertain this appeal.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **LAKEESHA TISDALE VS. EDUCATION AND WORKFORCE DEVELOPMENT CABINET (APPEAL NO. 2015-130)** be **SUSTAINED**.

The Hearing Officer also recommends to the Personnel Board that the Appellee be ordered to provide the Appellant back pay from May 16, 2013, forward including any contributions to retirement or other benefits lost as a result of the penalization and that the Appellant be made whole.

KRS 18A.005(30) defines "reclassification." It provides:

'Reclassification' shall mean the change in the classification of an employee when a material and permanent change in the duties or responsibilities of that employee has been assigned in writing by the appointing authority.

Accordingly, the Hearing Officer recommends that the Personnel Board order the Cabinet's Appointing Authority to reclassify the Appellant by assigning to the Appellant in writing, the duties or responsibilities of the position of Workforce Development Manager, Grade 16, as a material and permanent change to the Appellant's duties. The Hearing Officer recommends that with the Appellant's reclassification, the Cabinet be ordered to provide the Appellant with the requisite duties, responsibilities and pay associated with the Workforce Development Manager position.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen 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 exception 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 the 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 Brenda D. Allen** this 3rd day of January, 2017.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Tess Russell
LaKeesha Tisdale