

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-032**

RONALD E. VOILS

APPELLANT

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

**PUBLIC PROTECTION CABINET
AMBROSE WILSON IV, APPOINTING AUTHORITY**

APPELLEE

** ** ** ** **

The Board at its regular June 2015 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated May 1, 2015, Appellant's exceptions, Appellee's response 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:

Delete Background paragraph 2 and substitute the following:

2. In the course of conduct of the pre-hearing conference on April 7, 2014, and the exchanges of documentation between the parties, the express issue was clarified to be "... whether the Appellant was assigned additional duties such that he was penalized without just cause as defined in KRS 18A.005(24)." The Board incorporates as a part of the Final Order the Interim Order Containing Findings of Fact and Conclusions of Law issued at the direction of Hearing Officer Boyce A. Crocker on July 24, 2014. [Attachment A.]

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 24th day of June, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Douglas Howard
Hon. Cannon Armstrong
Lynn K. Gillis
Sherry Butler

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-032**

RONALD E. VOILS

APPELLANT

VS.

**INTERIM ORDER CONTAINING
FINDINGS OF FACT, CONCLUSIONS OF LAW**

**PUBLIC PROTECTION CABINET,
ROBERT VANCE, APPOINTING AUTHORITY**

APPELLEE

* * * * *

This matter came on for a pre-hearing conference on April 7, 2014, at 10:30 a.m., ET, at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Boyce A. Crocker, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Ronald E. Voils, was present and was not represented by legal counsel. The Appellee, Public Protection Cabinet, was present and represented by the Hon. Cannon Armstrong. Lynn Keeling-Gillis was also present as agency representative.

The purposes of the pre-hearing conference were to define the issues, address any other matters relating to this appeal and to discuss the option of mediation.

This appeal was filed with the Personnel Board on February 21, 2014. The Appellant was appealing Other Penalization. As indicated in the appeal, Appellant's complaint is that he has been asked to do more and more work, as evidenced by his evaluation and a memo he attached. As relief, Appellant seeks to have his salary raised to the level of other employees who make more than he, two of which Appellant identified as making approximately \$1300 more per year than he, and four of which he identified as making approximately \$7200 more per year than he.

Counsel for the Appellee stated he would be filing a motion to dismiss, and requested time in which to do so. The Hearing Officer explained the motion practice process to the Appellant, and set a briefing schedule with the parties.

The Appellee filed a Motion to Dismiss in accordance with a briefing schedule. Though given ample time in which to do so, the Appellant did not file a response. The matter stands submitted to the Hearing Officer for a ruling on the Appellee's Motion to Dismiss.

BACKGROUND

1. During the relevant times, Appellant, Ronald E. Voils, was a classified employee with status, working as an Elevator Inspector III with assigned work county Nelson.

2. In its Motion to Dismiss, counsel for Appellee contends there are two reasons why Appellant's appeal must fail:

(a) Appellant filed this matter out of time, pursuant to KRS 18A.095(29), and also citing *Finance Cabinet v. McDonald, et al.*, 304 SW3d 62 (Ky App 2009), and

(b) Appellant's claims do not fall squarely within the requirements found at 101 KAR 2:034, Section 1.

3. As to the time limits argument, Appellee contends Appellant knew of his claims as far back as 2007, and certainly knew of his claims regarding penalization as far as salary adjustment and increased workload when he filed his grievance in February 2011. Based on the *McDonald* case cited above, and also the plain language of KRS 18A.095(29), Appellee contends that this appeal is well outside of any accepted time limitation.

4. As to the other argument presented by the Appellee, counsel contends that Appellant does not fall squarely within the requirements of 101 KAR 2:034, Section 1, which states as follows:

New Appointments.

(1) An appointing authority shall appoint a new employee at a salary not to exceed the midpoint of the pay grade.

(2) 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 class;

(b) Is in the same work county; and

(c) Has a similar combination of education and experience relating to the job classification.

5. Appellee contends, importantly, that Elevator Inspectors Bushelman and Sutherland, both hired in 2005, never shared the same work county as Appellant.

6. As noted, Appellant did not file a response, although given time in which to do so.

7. However, the Hearing Officer notes that part of Appellant's initial claim, not responded to by Appellee, is that he was penalized when in 2013, "I added over 250 Inspections more by helping 2 employees in Jeff Co. & 1 employee in Fayette Co. because our section was behind in these areas, I rec'd eval & was told (sic.) Thank You on 1-24-14." Appellant also claimed he was being told that due to medical problems in these areas, he would be doing more for them (presumably either the agency or the employees with medical problems) this year.

FINDINGS OF FACT

1. During the relevant times, Appellant, Ronald E. Voils, was a classified employee with status, working as an Elevator Inspector III with assigned work county as Nelson County.

2. The Hearing Officer finds that Appellant's appeal as to salary comparison whether based on timeliness or not falling squarely within the requirements of 101 KAR 2:034, Section 1, must fail. Clearly, the appeals are untimely as regards to the salaries made by other elevator inspectors (referencing the 2007 appeals) and/or the employees hired who never shared the same work county as Appellant (101 KAR 2:034, Section 1).

3. The Hearing Officer finds, however, that Appellant's claims regarding the added workload in 2013 without any added compensation, clearly states a claim of penalization pursuant to KRS 18A.005(24). Neither the timeliness argument raised by Appellee nor the starting salary regulation argument raised by Appellee would address Appellant's penalization claim regarding the extra work added in 2013.

4. Thus, the Hearing Officer finds that issue, the added work in 2013 matter, should be returned for an evidentiary hearing.

CONCLUSIONS OF LAW

1. Based on the Findings of Fact, the Hearing Officer concludes that as a matter of law that the claims raised by the Appellant regarding starting salary comparisons should be **DISMISSED**.

2. However, Appellant's claim regarding having added work and whether such was a penalization under KRS 18A.005(24) should proceed to an evidentiary hearing.

Issues and burdens of proof will be set forth in the Order Scheduling Evidentiary Hearing.

ISSUED at the direction of Hearing Officer Boyce A. Crocker this 24th day of July, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Cannon Armstrong
Mr. Ronald E. Voils

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-032**

RONALD E. VOILS

APPELLANT

VS.

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

**PUBLIC PROTECTION CABINET
AMBROSE WILSON IV, APPOINTING AUTHORITY**

APPELLEE

** ** *

This matter came on for evidentiary hearing on March 3, 2015, at approximately 9:35 a.m., at 28 Fountain Place, Frankfort, Kentucky, before John C. Ryan, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by KRS Chapter 18A.

Appellant, Ronald E. Voils, was present and was represented by the Hon. Douglas Howard. The Agency, Public Protection Cabinet, was also present and was represented by the Hon. Cannon Armstrong.

This matter was the subject of at least two pre-hearing conferences. The Agency moved to dismiss it in May 2014, alleging untimeliness and other issues. A dispositive order relative to those matters was entered on July 24, 2014. Subsequent thereto Appellant engaged counsel, who has represented him for the duration of the appeal. Discovery efforts were also conducted.

BACKGROUND

1. As of February 21, 2014, Ronald E. Voils was a classified employee of the Public Protection Cabinet, Division of Housing, Buildings and Construction, Elevator Inspection Section, holding the position of Elevator Inspector III. By appeal initiated on that date under the category of "Other Penalization" he wrote:

In yr. 2013 I added over 250 inspections more by helping 2 employees in Jeff. Co. & 1 employee in Fayette Co. because our section was behind in these areas. I rec'd eval & was tolded (sic) thank you on 1-24-14 (see attached). Also told that due to medical problems in these areas I would be doing more for them this year. On 2-16-14 I went to Herald Leader Database & found out that I have 10 yrs seniority over these employees & make \$7208.00 less money. I am asking for equal pay for work that is above & beyond per 101 KAR 2.034 Section 1 all apply.

He attached certain materials to his appeal intending to indicate, among other things, his assignments and territories. He also supplied one or more representative Employee Performance Evaluations.

2. In the course of conduct of the pre-hearing conferences and the exchanges of documentation between the parties, the express issue was clarified to be “. . . whether the Appellant was assigned additional duties such that he was penalized without just cause as defined in KRS 18A.005(24).”

3. Upon convening the evidentiary hearing and following presentment of opening remarks by the respective parties, Appellant was assigned the burden of proof and offered the testimony of **George Tokarchick**, who holds the position of Elevator Inspector Supervisor and is Appellant's immediate supervisor with the Agency. He has been employed within the elevator industry for most of his career and currently supervises thirteen personnel including one administrative assistant. He explained that ordinarily each inspector is assigned a designated geographical territory encompassing a cluster of counties within the Commonwealth and each is expected to coordinate his own travel for inspection purposes, working autonomously. Any inspector can be directed to travel outside his assigned territory as needed. He described the various types of equipment which fall within the range of Agency inspection and the mode for certifying each. Specifically, following an inspection the employee documents his findings in a report which is entered into a centralized computer database, whereupon a certificate is issued to the operator of the device, assuming it passes inspection.

4. The witness introduced a map depicting territories assigned to the various inspectors, including that of Appellant, and discussed the contents thereof. As of the time this map was prepared, Appellant's designated territory consisted of fifteen counties and a portion of Jefferson County and the University of Kentucky at Lexington. The supervisor urged that the fifteen-county assignment has been in place for several years, as has the University of Kentucky, with the Jefferson County portion having been assigned to Appellant five or six years previously. He discussed and introduced the contents of a statistical chart reflecting the types of inspections or events ordinarily performed by each inspector and the mix thereof. He also discussed, in considerable detail, the length of time required for each, pointing out that the time spent will vary considerably depending upon the type of equipment, its age, the installation, and a variety of other factors which impact each job site. The witness also produced a mileage chart reflecting that driven by Appellant as compared to certain other employees and noted that he exceeded most or all of his coworkers for the years 2013 and 2014. All inspectors are provided with a Commonwealth owned vehicle. Pressed as to whether Appellant was assigned increased duties in the years under scrutiny, the witness deferred to the statistics, but noted that the mix of types of assignments varies and consequently a comparison is quite difficult as between years as well as among employees.

5. The supervisor discussed Appellant's Employee Performance Evaluations for the years 2013 and 2014, confirming that in those years (as well as others) he rated Appellant very high and that he routinely scores in the "Exceeds" range. He added that Appellant has always performed beyond the call of duty and has traveled wherever and whenever requested without question. Further, he is most dependable both in tending to the assigned sites and in the preparation of reports. The witness testified at some length relative to the specific types of inspections and the geographical aspects and travel, readily conceding that Appellant's salary lags behind that of similarly situated coworkers and in his view should be equal thereto since he performs the same duties. The supervisor also suggested the probability that Appellant, who resides in Nelson County, Kentucky, will be assigned additional inspections in Jefferson County and others close to his residence in future years, but gave no timeframe.

6. Under cross-examination by the Agency, the supervisor again reviewed the maps previously introduced. He confirmed that during the time periods referenced therein, three counties which are some distance from Appellant's home were removed from his responsibility and a portion of Jefferson County added. He noted in connection therewith that one or more other inspectors were also assigned as needed to Jefferson County to make certain that all equipment there is annually certified. He was directed to Appellant's job Position Description, specifically Elevator Inspection III, and ratified therefrom that the assigned duties are exclusively the inspection of elevators, escalators, moving sidewalks, and related equipment, with no other duties outside of Appellant's expertise. He reiterated that all inspectors are supplied a vehicle and a fuel card.

7. Redirected to the statistics for the prior years, the witness confirmed that in 2012 Appellant performed 732 inspections, with 933 inspections in 2013 and 796 inspections in 2014. He pointed out that the statistics include one category called "No Access Inspection" and another category entitled "Consultation." He explained that "No Access" is a circumstance wherein the inspector could not enter the premises for the reason that it was either unoccupied, closed, or otherwise out of service. He noted that this is a somewhat loose grouping for the reason that the inspector might confirm the "no access" by phone and never travel there or he could have made the trip for no reason. It nonetheless counts, since it requires a report. Similarly, the "Consultation" category might simply be a phone conversation but, again, a report is generated. He noted that inspectors are not assigned a minimum number of inspections or trips for any specified timeframe.

8. The witness further discussed Appellant's 2013 and 2014 Performance Evaluations, explaining that they very extensively define his duties and expectations and responsibilities and the levels of importance assigned thereto. He confirmed that he prepared both years as the evaluator and routinely discussed their contents with Appellant at the time, who acceded thereto and signed off, as did the witness. He reiterated that Appellant is an excellent employee and received high ratings in both years.

9. The witness continued that the inspectors all work interchangeably and might be assigned out of territory to help others in cases of excess volume or illness. No overtime is pre-assigned and he was unaware whether Appellant ever sought any compensatory time within the timeframes under scrutiny.

10. Under various redirect and re-cross-examination, the supervisor noted that apparently Appellant travels the miles reported and conducts the inspection for which reports were received within a 37.5 hour work week. He acknowledged that if Appellant requested compensatory time from time-to-time it would be approved, but if it were being requested upon a regular basis certain adjustments might be made to diminish the need. He reiterated that within the last year three more distant counties were removed from Appellant's territory and a portion of Jefferson County substituted therefore as being closer to his home. He viewed that, notwithstanding the changes, Appellant's actual number of units to be inspected remain approximately the same. Appellant has no office in Frankfort; he is supplied a state-owned computer for his home and operates from there. The witness ratified that he has no input as to salaries, which are determined by others.

11. Appellant, **Ronald Voils**, is a seventeen-year employee of the Agency, holding the position of Elevator Inspector III. He resides in Nelson County, Kentucky. He confirmed that his officially assigned inspection territory is that previously reported by the supervisor and as depicted by a map which was updated in November 2014. However, he pointed out, he was assigned additional duties in Fayette County and in Jefferson County in 2013 which were added to his already existing workload and which approximated an additional 200 inspections. This occurred because there existed at that time a backlog of sites which had fallen behind. He insisted that his volume for 2014 would have been similar except that he was off for approximately one month to deal with an illness suffered by his father. He surmised that had he worked the entire 2014 year, he would have produced more completed inspections than any other coworker.

12. Appellant discussed at some length the variety of duties, the requisite mileage, and the length of time ordinarily required for inspections of new installations as compared to annual inspections of existing installations. He noted, for example, that high-rise structures require more time and a new installation in such situations is a minimum of two days. He pointed to new construction at the University of Kentucky Medical Center, which contains a number of high-rise units with new installations. He asserted that as these units have come into service management has sent him there to conduct the inspections but did not relieve him of his obligations in his regular territory. He depicted a typical day, when performing the work at the University of Kentucky, as departing from home in Nelson County at 7:30 a.m. and arriving home around 5:30 p.m. most days, with at least one-hour travel in each direction.

13. Appellant continued that with his workload he is unable to fulfill his assigned duties in the standard 37.5 hour workweek. However, he does not claim compensatory time or overtime for the reason that, he urged, several years previously management advised the inspectors that no funds exist for such and they should not either work over or claim time in excess of the 37.5 hours. Consequently, despite the fact that he routinely exceeds the time, he does not seek compensation for the excess.

14. Appellant disputed the testimony by his supervisor that he and his coworker inspectors are evenly and equally assigned where and when needed. He insisted that he has been routinely singled out and sent to locations that were past due or urgent because management is aware that he will attend thereto without question and is entirely dependable to accomplish the task. He noted as an example that, despite the fact that the supervisor himself is also assigned a portion of the territory in Jefferson County, it is Appellant who often takes care of these so that the manager will be able to remain in his office and complete administrative and management requirements. Appellant essentially depicted himself as the "go-to" person and, based thereon, performs considerable extra duties and responsibilities. He pointed to his performance evaluations wherein he was rated as "Exceeds Expectations," noting that management clearly recognizes that he performs dependably and consistently beyond what is required. What he specifically seeks is that he be compensated accordingly, at least at the same level as those coworkers having work experience similar to his; he pointed out that actually some inspectors with less time and experience with the Agency receive a salary equal to or greater than his.

15. Under examination by the Agency, Appellant further discussed the charting of the statistics of completed inspections previously introduced. He was unable to address or comment concerning whether other inspectors who may have completed more inspections than he for particular timeframes should receive more salary, noting that in some instances the salary of some coworkers already exceeds his. He pointed out, or reiterated as the case may be, that the mix and types of inspections have impact upon the workload. The "consultation" category, for example, might not need a trip but would require a report.

16. Appellant urged that his workload has increased but conceded that the specific duties have not remarkably changed other than as new regulations or code book updates are implemented. He confirmed that the specific duties outlined in his various performance evaluations have remained constant throughout the referenced time period. He acknowledged that the Position Description which outlines his job requirements requires performing whatever duties are assigned within his expertise and wherever he is directed to travel, whether in or out of his assigned territory.

17. Appellant undertook to address his handling of compensatory time and overtime, or lack thereof, as the case may be. He insisted that he routinely exceeds 37.5 hours most weeks, when including the requisite travel time to and from inspection sites. This is "logged" but uncompensated since he does not claim it. He urged that his work ethic is whatever is required to "do the job" and quite often, especially in dealing with the University of Kentucky Medical Center equipment, he works well in excess of the allotted work week. He reiterated that several years previously management circulated a "letter" informing the inspectors that they should not seek compensatory time or overtime and he consequently has never done so. He acknowledged that the current manager, Mr. Tokarchick, has just testified that if he or any other inspector sought specified overtime, it would ordinarily be granted, at least upon a spot basis if deemed necessary.

18. Under brief re-direct examination, Appellant again ratified that he has endured an increased workload and, very simply, should be compensated therefor. He recalled that upon at least one occasion previously the Agency came under criticism by one or more entities due to a backlog of past due inspections. The supervisor called upon Appellant at the time to attend to this, which he was able to effectively accomplish; however, his perception was that management simply treated it as part of his job and ignored his request to consider additional compensation.

19. Appellant having completed his proof in chief, the parties respectively moved for the relief sought, which was passed to the merits by the Hearing Officer. The Agency thereupon offered the testimony of **Sherry Butler**, who holds the position of Staff Assistant for the Department of General Administrative and Program Support (GAPS) and also serves as Assistant Director for Human Resources with the Agency. She briefly recited her history in the area of Human Resources and includes among her duties, as Staff Assistant, involvement with disciplinary cases, personnel appeals, grievances, harassment claims and related areas. Also included are matters of salary issues, which are presented ordinarily through the grievance process. It was in that connection that she has reviewed the circumstance raised by Appellant.

20. The witness explained that upon receipt of his grievance or complaint, her office reviewed his personnel file, his position description, the specifications of his classification, and his performance plan. The intent was to discern whether there might be a remedy or mechanism available to grant him a salary increase. She elaborated that ordinarily this must be accomplished through either a reclassification or a promotion, since there does not exist any other mechanism within the merit system structure to independently alter the salary of a merit employee based solely upon the employee's request or when the employee is deserving of such. She noted that Appellant, holding the position of Elevator Inspection III, is at the peak of his classification and no vacant position above him exists into which he might be moved to receive an increase. Further, no supervisory position is available to which he might be promoted.

21. The witness continued that the option of a reclassification was also examined. However, while the volume of his duties may have increased from year-to-year, the nature thereof, i.e. inspection of elevator and escalator equipment, has not changed. According to all information provided, Appellant has performed the same services, and performed them well, throughout his career as an inspector and accordingly reclassification would not be proper for purposes of granting him a salary increase. She elaborated that performing more of the same duties does not support reclassification, noting that there is no statutory provision or regulation for compensating an increase in the quantity of duties performed.

22. The witness addressed a consideration that the duties no longer match the Position Description. She cited as an example that if Appellant were being assigned inspection of plumbing or electrical installations, either in addition to or as a substitute for the elevator equipment, this could be grounds for reclassifying his position. She noted that her office and the Agency routinely hear from personnel whose volume of duties have increased for one reason or another, but management is powerless to grant those personnel additional salary for the additional work. Accordingly, the circumstances depicted by Appellant do not, within the ability of her office, bring his treatment within the definition of a penalization under the statute.

23. Under cross-examination, the witness further discussed "material and permanent change" aspects and their application in a reclassification circumstance. She reiterated that no statutory mechanism exists to grant raises upon the basis of greater quantity or volume of duties even though in most instances the employee is deserving. She explained that in matters of personnel classifications, in most instances the words "duties" and "responsibilities" appear to be used interchangeably wherever they occur in the statute and seem for most purposes to equate to the same thing. However, she reiterated, despite the fact that Appellant asserts that his volume or quantity of work has drifted upward or increased from one year to another, management is powerless to reclassify his position and, since promotion is likewise unavailable, the Agency has no statutory or regulatory platform upon which it could legitimately rely to grant him a salary increase. The sworn testimony thereupon concluded and, following closing arguments by respective parties, the matter stood submitted for a recommended order.

24. KRS 18A.095(1) requires that "A classified employee with status shall not be dismissed, demoted, suspended, or otherwise penalized except for cause."

25. KRS 18A.005 sets forth the definitions applicable to the Commonwealth of Kentucky Merit System. The testimony appears to reference the following and may be germane:

- (2) "Base salary or wages" means the compensation to which an employee is entitled under the salary schedules adopted pursuant to the provisions of KRS 18A.030 and 18A.110. Base salary or wages shall be adjusted as provided under the provisions of KRS 18A.355 and 48.130;

...

- (7) "Classified employee" means an employee appointed to a position in the classified service whose appointment and continued employment are subject to the classified service provisions of this chapter;

...

- (24) "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;

...

- (26) "Promotion" means a change of rank of an employee from a position in one (1) class to a position in another class having a higher minimum salary or carrying a greater scope of discretion or responsibility;

...

- (30) "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.

FINDINGS OF FACT

1. As of February, 2014 Ronald E. Voils was a seventeen-year, classified employee with status in the Public Protection Cabinet, serving in the position of Elevator Inspector III. By all accounts, he performed his duties well in excess of the minimum requirements and made himself available for assignments where and when needed without question. He is also quite competent in the performance of his assignments.

2. The level of duties bestowed upon Appellant has varied over the years, more recently drifting upward. He works from his home in Nelson County, Kentucky. During the relevant period, three of his more distant counties were removed from his territory and a portion of Jefferson County added. Management surmised that this trade was about even for the number of inspections required. However, there was also added a number of equipment inspections at the University of Kentucky Medical Center, Lexington, Kentucky; this group is outside Appellant's specific territory and in his view has added greatly to his workload.

3. The mix of types of assignments and inspections varies, but the nature of the responsibilities remains essentially level, i.e. inspection and certification of the operability of elevators, escalators, and related equipment. The proof is that the volume and assignments of duties may have fluctuated, but the nature thereof has not changed throughout Appellant's tenure other than within the regulatory scheme. Commensurate therewith, although his official workweek consists of 37.5 hours, the un-refuted proof is that he ordinarily exceeds this time when including the requisite travel between the particular jobsite and his home. Appellant is furnished with a state vehicle and fuel, but he has never applied for overtime or compensatory time due to a perceived directive not to do so. Notwithstanding his perception, there is no proof that properly sought and adequately documented overtime and/or compensatory time would not be routinely paid.

4. The testimony indicates that Appellant's monthly salary lags behind several coworkers holding the same position as he. Some of these personnel enjoy considerable less longevity with the Agency than he. The basis for this is that he is the only elevator inspector residing in and working out of Nelson County, Kentucky. Since the Agency has not obtained any newer hires for this position in that locality, with a higher starting salary which would necessitate raising his to that level, his income has lagged. His position is not amenable to a reclassification, and no position exists in his field to which he might be promoted with a resultant increase.

5. The Hearing Officer finds the testimony of all witnesses and of Appellant to be credible.

CONCLUSIONS OF LAW

1. Under his assigned burden of proof, Appellant abundantly makes his case that he is a well regarded and dependable career employee of his Agency who is regularly called upon to step up. However, and perhaps unfairly, no provision of KRS Chapter 18A or the relevant regulations provide any platform for enhanced salary solely based upon volume. Management has looked into, without success, whether he might be eligible for a promotion or a reclassification, either of which would ordinarily enable management to properly increase his salary. However, his circumstances do not meet either definition set forth in KRS 18A.005(26) or (30). The voluntary options are therefore unavailable.

2. Given the foregoing, what remains is whether Appellant can somehow bring his plight within the definition of KRS 18A.005(24), i.e. a penalization and that he is "... otherwise penalized ..." in violation of KRS 18A.095(1). Put another way, the question becomes whether an increase in volume of similar duties amounts to an actionable elevation of responsibility without proper cause which could be deemed a penalization and, if so, what is the remedy?

3. Appellant's Position Description requires that he attend to any assignments wherever and whenever made, and it provides no cap for the volume thereof. Similarly, increase in volume does not equate to increase in responsibilities under the statute. It would therefore appear that the assignment of added but similar duties, whether under Appellant's Position Description or measured within the definition of a penalization, is not without proper cause and is within the discretion and authority of management.

4. Finally, the jurisdictional authority afforded the Personnel Board extends to rectifying instances of, in most cases, a positive act by an agency toward an employee which is violative of a statute or relevant regulation. It is afforded no statutory authority to issue a binding order requiring an agency to grant even a deserving employee enhanced benefits such as an increase in salary based solely upon longevity or upon increased volume.

5. Appellant has not met his burden to establish that an actionable penalization of him has occurred without proper cause.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **RONALD E. VOILS VS. PUBLIC PROTECTION CABINET (Appeal No. 2014-032)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

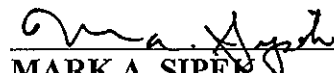
Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are 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).

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 John C. Ryan this 1st day of May, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPER
EXECUTIVE DIRECTOR

A copy hereof mailed to:

Hon. Cannon Armstrong
Hon. Douglas Howard