

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2021-125

HERBERT WEBB

APPELLANT

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

TRANSPORTATION CABINET

APPELLEE

*** **

The Board, at its regular February 2023 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated January 4, 2023, and being duly advised,

IT IS HEREBY 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 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 14th day of February, 2023.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

Copies hereof this day sent to:

Herbert Webb
Hon. William Fogle
Hon. Rosemary Holbrook (Personnel Cabinet)
J. R. Dobner

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2021-125**

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

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APPELLEE

** ** * * *

This matter came on for a pre-hearing conference on April 18, 2022, at 10:00 a.m. ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Stafford Easterling, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Herbert Webb, was present by telephone and was not represented by legal counsel. The Agency/Appellee, Transportation Cabinet, was present and represented by the Hon. Will Fogle, who also appeared by telephone.

The purposes of the pre-hearing conference to determine the specific penalization(s) alleged by the Appellant, the specific section of KRS 18A that authorizes this appeal, to determine the relief sought by the Appellant, to define the issues, to address any other matters relating to this appeal, and to discuss the option of mediation.

The Hearing Officer notes this appeal was filed with the Personnel Board on October 18, 2021. On the appeal form and during the pre-hearing conference, the Appellant, a classified employee with status, indicated he was appealing a penalization in that "\$5.00[hr.] locality premium awarded to other counties, granting employees on lower pay grade/ position to earn more. Unfair pay." The Appellant further explained his claims in the narrative portion of the appeal form wherein he states, in full:

On 10/6/21, I was made aware of a job posting in Kenton County, Kentucky for Highway Technician Assistant I. I have already moved past this position, but learned it was offered with a \$5.00/hour premium over the \$13.27 starting rate. On 10/13/21, I learned it applies for Boone County as well. This brings a new employee to make \$18.27/hour to my \$15.65/hour. With almost 3 years of time in plus CDL Load Master, Road Scholar, and other qualifications for Highway Technician Assistant II. This is unacceptable and unfair, especially considering the job market.

Pursuant to the agreed-upon briefing schedule, the Agency submitted a Motion for Summary Judgment on May 11, 2022. The Appellant was given an opportunity to respond but failed to do so. This matter now stands submitted to the Hearing Officer for a ruling on the Agency's Motion for Summary Judgment.

FINDINGS OF FACT

The Hearing Officer makes the following findings of fact based on the appeal form and attachments, the Agency's Motion for Summary Judgment and attachments, the statements made by the Appellant during the prior pre-hearing conferences, and the evidence of record.

1. The Appellant, a Highway Technician Assistant II, is employed by the Agency in the Bullitt County Maintenance Facility. The Appellant argues that he should receive a salary increase because employees who are employed in the same job classification in Kenton and Boone Counties received a higher rate of pay due to their receipt of a five dollar per hour (\$5/hour) locality premium.

2. During the pre-hearing conference and in the documentation submitted by the Appellant, he specifically acknowledged that he was comparing his salary with the salary received by similar employees in a different work county. The Appellant argued that the locality premium was unfair and that he deserved equal pay.

3. Following the pre-hearing conference, in accordance with the agreed-upon briefing schedule, the Agency filed a Motion to Summary Judgment. In its motion, the Transportation Cabinet argued that the Appellant's salary conformed with the applicable statutes and regulations and that, although the employees with whom the Appellant seeks to compare himself work in the same job classification as the Appellant, they do not work in the same county. As a result, the Agency argued the Appellant had not alleged an appealable penalization based on 101 KAR 2:034, Section 1.

4. In its motion, The Agency also argued that the Appellant had not stated an actionable penalization through the application of the locality premium, given the Agency's difficulties in hiring and retention issues occurring in Northern Kentucky. In addition, the Agency attached certain documentation relevant to the setting of the Appellant's salary, including the Agency's Request for Locality Premium submitted to the Personnel Cabinet for certain positions in the Boone and Kenton County facilities.

5. Although given an opportunity to respond to the Agency's motion, the Appellant has not filed a response.

6. The Appellant is a merit employee with status who is employed as a Highway Technician Assistant I position in Bullitt County, with a salary equivalent to approximately

\$15.65/hour. Due to the application of a properly authorized locality premium, Highway Technician Assistant Is employed in Kenton and Boone County received a premium of \$5/hour, resulting in newly hired employees who work in either Kenton or Boone Counties receiving a higher rate of pay than the Appellant, a classified employee with a number of years in the state service.

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

‘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.

8. 101 KAR 2:034, Section 1(2) provides:

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

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

CONCLUSIONS OF LAW

1. Because the Appellant cannot establish that the Agency misapplied the provisions of 101 KAR 2:034, Section 1, to his detriment, the Appellant has failed to articulate a penalization as defined by KRS 18A.005(24). This is because the Appellant’s claims do not implicate any right afforded to merit employees by KRS Chapter 18A. The Appellant was not penalized in the Agency correctly applying the relevant statutes and regulations, up to and including the application of a locality premium in only certain work counties, even though such application resulted in what may appear to be an unfair result. Therefore, pursuant to KRS 18A.095(18)(a), the Personnel Board lacks jurisdiction to consider this appeal as the Board is unable to grant relief.

2. The Hearing Officer would note that, across the merit system, each job classification, employment position, and individual salary is analyzed to determine whether they are in compliance with the applicable provisions of statute and regulation, including KRS Chapter 18A and the 101 KAR series, even though it sometimes results in salaries that cause confusion and frustration by employees. This approach, which was mandated by the General Assembly, can sometimes produce results that appear unfair when comparing salaries across job classifications,

across agencies, across county lines, and across individual employee's competence. Nonetheless, no matter how reasonable or seemingly unfair, such frustration does not give rise to an actionable penalization. For the reasons set out above, the Appellant has failed to articulate an actionable penalization.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **HERBERT WEBB V. TRANSPORTATION CABINET (APPEAL NO. 2021-125)** 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 fifteen (15) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal, a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

Any document filed with the Personnel Board shall be served on the opposing party.

The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

Each party has thirty (30) days after the date the Personnel Board issues a Final Order in which to appeal to the Franklin Circuit Court pursuant to KRS 13B.140 and KRS 18A.100.

ISSUED at the direction of **Hearing Officer Stafford Easterling** this 7 day of January, 2023.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK,
EXECUTIVE DIRECTOR

A copy hereof this day e-mailed and mailed to:

Herbert Webb
Hon. William Fogle
Hon. Rosemary Holbrook (Personnel Cabinet)