

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2021-024

WES WHITWORTH

APPELLANT

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

**EDUCATION AND LABOR CABINET (formerly known as
EDUCATION AND WORKFORCE DEVELOPMENT CABINET)**

and

PERSONNEL CABINET

APPELLEES

*** **

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:
Wes Whitworth
Hon. Catherine Stevens
Hon. Joshua Hurley
Hon. Andrew Bryson
Hon. Rosemary Holbrook (Personnel Cabinet)
Leslie Tindall

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** ** * * **

This last matter came on for a pre-hearing conference on January 5, 2022, at 11:00 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, Wes Whitworth, was present by telephone and was not represented by legal counsel. The Agency/Appellee Education and Workforce Development Cabinet was present and represented by the Hon. Adrian Jacob, who appeared by telephone. The Agency/Appellee Personnel Cabinet was present and represented by the Hon. Catherine Stevens, who also appeared by telephone.

The purposes of the pre-hearing conference were to discuss the status of the appeal and to schedule an evidentiary hearing, if appropriate.

Pursuant to the agreed-upon briefing schedule, the Appellees submitted a Joint Motion for Summary Judgment on February 1, 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 Appellees' Joint Motion for Summary Judgment.

BACKGROUND/FINDINGS OF FACT

The Hearing Officer makes the following findings of fact based on the appeal form and attachments, the Appellees' Joint 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, Wes Whitworth, was employed by the then-Education and Workforce Development Cabinet (EWDC) as a Vocational Rehabilitation Counselor with the Department of Workforce Investment. He submitted an appeal form on March 4, 2021, seeking review of his internal Agency grievance regarding his salary. At the core of his grievance and Personnel Board appeal is his belief that he, a classified employee with over fifteen (15) years of service, was penalized through EWDC hiring at least two (2) brand new employees in a different work county than the Appellant's and at a higher salary than the Appellant earns, after they received a five percent (5%) salary increase upon their completion of initial probation (\$37,009.20 v. \$35,246.64).

2. The Appellees submitted a Joint Motion for Summary Judgment, filed with the Personnel Board on February 1, 2022. In their Motion, the Appellees set out the salary history of the two (2) employees with whom the Appellant compares himself and explained how their salaries were set in compliance with the applicable statutes and regulations, including 101 KAR 2:034. As such, the Appellees maintain that the Personnel Board has no jurisdiction to hear this appeal as "there is no provision in statute or regulation that would entitle Appellant to an additional salary increase due to another employee's receipt of an initial probationary increase."

Essentially, a new employee was hired into the same job as the Appellant in the same work county as his at a salary (\$2,937.22/month) higher than the Appellant's prior salary (\$2,855.76/month); as a result, the Appellant's salary was increased to the higher amount to match the new hire's salary. Then, after successfully completing their probationary period, the new hire received a five percent (5%) salary increase, raising their salary to \$3,084.10/month. Similarly, a second new hire was appointed to the same job as the Appellant and received the same salary increase as the Appellant did; however, they were also serving their initial probationary period and, upon completion, also received an additional five percent (5%) salary increase.

3. The Appellant was given an opportunity to explain how the two (2) new hires receiving a five percent (5%) salary increase after the completion of their initial probationary periods penalized him and/or to advance any argument that the Personnel Board would have jurisdiction over his claim(s), but he did not submit any further explanation.

4. Given the requirements of 101 KAR 2:034, the Hearing Officer finds that it is inevitable that, in any circumstance where a new hire is brought into state service at the same standard salary paid to existing employees, the new hire(s) would ultimately receive a higher salary than the existing employee's, following the completion of their

initial probationary periods. This is because with any such salary leveling, here, through the application of 101 KAR 2:034, while the application of the leveling provision of 101 KAR 2:034 initially increased the Appellant's monthly salary to equal that of the new hire, it also ensured that newly hired Vocational Rehabilitation Counselors would make the salary established by 101 KAR 2:034 plus 5%, once the new hire completed their probationary period and receives the accompanying five percent (5%) salary bump.

5. While perhaps unfair for experienced, highly skilled employees like the Appellant to make less than relatively new hires, the Hearing Officer finds, nonetheless, that the Agency correctly applied the relevant statutes and regulations in setting both the Appellant's salary and the new employees' salaries.

6. 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.

7. 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.

8. 101 KAR 2:034, Section 4(1) provides:

Initial probation increase. A full-time or part-time employee who completes an initial probationary period shall be granted a five (5) percent salary advancement on the first of the month following

completion of the probationary period, except as specified under Section 2(3) of this administrative regulation.

CONCLUSIONS OF LAW

1. Because the Appellant cannot establish that the Appellees 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 Appellees correctly applying the relevant statutes and regulations, even though such application resulted in what appears to be, at least on its face, 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 **WES WHITWORTH V. EDUCATION AND LABOR CABINET (FORMERLY EDUCATION AND WORKFORCE DEVELOPMENT CABINET) AND PERSONNEL CABINET (APPEAL NO. 2021-024)** 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).

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.

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

SO ORDERED at the direction of **Hearing Officer Stafford Easterling** this 4 day of January, 2023.

KENTUCKY PERSONNEL BOARD



**MARK A. SIPEK
EXECUTIVE DIRECTOR**

A copy hereof this day emailed and mailed to:

Wes Whitworth
Hon. Joshua Hurley
Hon. Catherine Stevens
Hon. Rosemary Holbrook (Personnel Cabinet)