

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2017-054**

CONNIE JO ZEITER

APPELLANT

V.

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

**TOURISM, ARTS AND HERITAGE CABINET
DEPARTMENT OF PARKS**

APPELLEE

This matter came on for a pre-hearing conference on May 22, 2017, at 11:00 a.m., EST, at 28 Fountain Place, Frankfort, Kentucky, before Hon. Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Connie Jo Zeiter, was present by telephone and not represented by legal counsel. The Appellee/Agency, Tourism, Arts and Heritage Cabinet, Department of Parks, was present and represented by the Hon. William H. Adams.

This matter is before Hearing Officer Stafford Easterling for a ruling on the Agency's Motion to Dismiss filed with the Personnel Board on May 26, 2017. At issue is the Appellant's claim that she had been penalized because another employee was hired into her department and receives a higher hourly wage than she does. The Agency's Motion to Dismiss argues that the Appellant has failed to articulate an actionable penalization because both the Appellant's and the new hire's salary were set by the applicable statutes and regulations. The Appellant was given an opportunity to file a response to the Agency's Motion to Dismiss but has failed to do so. This matter now stands submitted to the Hearing Officer for a ruling on the Agency's Motion to Dismiss.

BACKGROUND

1. The Hearing Officer notes the facts underlying the instant appeal were largely agreed to by the parties during the May 22, 2017 pre-hearing conference. Moreover, the Appellant was given an opportunity to set out an understanding of the facts upon which this appeal is based but has failed to do so. Accordingly, the Hearing Officer accepts the facts as described in the Agency's Motion to Dismiss.

2. During the pendency of this appeal, Appellant, Connie Jo Zeiter, was a classified employee with status with the Tourism, Arts and Heritage Cabinet, Department of Parks.

3. The Appellant was and is employed by the Department of Parks as a Serving Attendant at the Kentucky Dam Village State Resort Park in Marshall County. She began her employment as a Serving Attendant in 2003.

4. In her capacity as a Serving Attendant, as of July 1, 2014, the Appellant was earning an hourly rate of \$3.939 per hour.

5. On June 8, 2015, former Governor Steve Beshear issued an executive order establishing a new special entrance rate for tipped employees, setting a minimum wage of \$4.90 per hour for those employees.

6. Thereafter, on July 1, 2015, the Appellant received a raise to the special entrance rate, resulting in an adjustment of her hourly rate from \$3.939 per hour to \$4.90 per hour.

7. July 1, 2015 was also the Appellant's annual increment date so the Appellant additionally received a 1% increase to her hourly rate from \$4.90 per hour to \$4.949 per hour.

8. On November 16, 2015, a new employee was hired into the same position occupied by the Appellant. In accordance with Gov. Beshear's executive order, the new employee's starting salary was set at the new minimum wage of \$4.90 per hour.

9. Following the successful completion of her probationary period, the new employee was awarded an initial probationary increase of 5%, pursuant to 101 KAR 2:034 Section 4(1). After applying the probationary increase, the new employee was earning an hourly rate of \$5.145 per hour, an amount greater than that paid to the Appellant, a sixteen-year employee.

10. After discovering the new employee's hourly rate was higher than the Appellant's, the instant appeal followed.

11. As noted above, the Agency filed its' brief with the Personnel Board on May 26, 2017, arguing the Appellant's claims are without merit and should be dismissed. The Agency contended that the Personnel Board lacks jurisdiction over this appeal because the Appellant has not been the subject of a penalization as defined by KRS Chapter 18A or KAR Title 101.

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

Notwithstanding any other prescribed limitation of action, an 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.

13. 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.

14. 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.

FINDINGS OF FACT

1. During the pendency of the instant appeal, Appellant, Connie Jo Zeiter, was a classified employee with status within the Tourism, Arts and Heritage Cabinet, Department of Parks. The Appellant began her employment as a Serving Attendant in 2003.

2. It is undisputed that a new employee began working with the Appellant at the Kentucky Dam Village State Resort Park in Marshall County and the new employee was in the same job classification, has the same work county, and has an inferior combination of education and experience relating to service as a Serving Attendant, given the Appellant's then-twelve (12) years of prior service in the position.

3. The Hearing Officer finds that, before July 1, 2015, the Appellant received an hourly rate of \$3.939 per hour and, after a July 1, 2015 raise to the special entrance rate and the application of a 1% annual increment, the Appellant's hourly rate increased to \$4.949 per hour. The Hearing Officer finds the new employee began her state service receiving an hourly rate of \$4.90 per hour and, after completing her probationary period, received a 5% probationary increase bringing her hourly rate to \$5.145 per hour.

4. While perhaps unfair for a twelve-year employee to make less than a relatively new hire, the Hearing Officer finds, however, that the Agency correctly applied the relevant statutes and regulations in setting both the Appellant's hourly rate and the new employee's hourly rate.

CONCLUSIONS OF LAW

1. Identical to the Conclusions of Law reached previously by the Personnel Board in Kathryn Parrish v. Office of the Attorney General, 2012 WL 3059632, the Hearing Officer finds "that a salary comparison, such as that being sought by Appellant in this appeal, is strictly governed

by the administrative regulation found at 101 KAR 2:034, Section 1.” Pursuant to that regulation, “in order to qualify for salary comparisons, the employees must fall squarely within the confines of that regulation.” Here, when the new Serving Attendant was hired, she began state service as a new appointee at a lower salary rate than that being earned by the Appellant, meaning the provisions of 101 KAR 2:034, Section 1, do not apply to the Appellant. This is because she is not “an employee who is earning less than the new appointee’s salary.” To clarify, at the time the new serving attendant was given her “initial probationary increase,” which resulted in her earning slightly more per hour than the Appellant, she was no longer classified as a “new appointee” as required by 101 KAR 2:034, Section 1(2).

2. Because the Appellant cannot establish the provisions of 101 KAR 2:034, Section 1, apply to her appeal, the Appellant has failed to articulate a penalization as defined by KRS 18A.005(24). This is because 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, 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.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **CONNIE JO ZEITER V. TOURISM, ARTS AND HERITAGE CABINET, DEPARTMENT OF PARKS, (APPEAL NO. 2017-054)** 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 Stafford Easterling this 14th day of
September, 2017.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. William H. Adams
Connie Jo Zeiter

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2017-054**

CONNIE JO ZEITER

APPELLANT

V. INTERIM ORDER SETTING BRIEFING SCHEDULE

**TOURISM, ARTS AND HERITAGE CABINET,
DEPARTMENT OF PARKS**

APPELLEE

** ** ** ** ** **

This matter came on for a pre-hearing conference on May 22, 2017, at 11:00 a.m., ET, at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Connie Jo Zeiter, was present by telephone and was not represented by legal counsel. The Appellee, Tourism, Arts and Heritage Cabinet, Department of Parks, was present and represented by the Hon. William Adams. Also present for the Appellee was Gray Grisham.

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

The Hearing Officer notes this appeal was filed with the Personnel Board on February 16, 2017. The Appellant is alleging that she was penalized with respect to wages. The Appellant pointed out that she has been a merit employee since 2003. The Appellant stated that she is a merit employee earning \$4.90 per hour as a Server. She stated that another employee was hired as part-time (and has only been a full-time state employee for a short period of time) and who earns \$5.15 per hour. The Appellant felt this was not fair and that she should be entitled to make as much as the other employee.

Counsel for the Appellee believed this issue was similar to another appeal and that this matter could be decided by briefs. He did not think there were any facts in dispute and a briefing schedule was proposed. The Appellant had no objection to this approach.

Wherefore, the Hearing Officer, having listened to the statements of the parties, having reviewed the file and being duly advised, **HEREBY ORDERS AS FOLLOWS:**

1. The Appellee shall have to and including **May 26, 2017**, to file its brief in support of its position.

2. The Appellant shall have to and including **June 26, 2017**, to file her brief in support of her position.

3. The Appellee shall have to and including **July 7, 2017**, to file a reply.

4. At that time, this matter shall stand submitted to the Hearing Officer for a ruling. If any factual issues remain, this matter may be scheduled for an evidentiary hearing.

[Hearing Officer Note: Any document filed with the Personnel Board shall also be served on the opposing party.]

SO ORDERED at the direction of the Hearing Officer this 31st day of May, 2017.

KENTUCKY PERSONNEL BOARD

A handwritten signature in black ink, appearing to read 'MAS' with a stylized flourish at the end.

**MARK A. SIPEK
EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:

Hon. William Adams
Ms. Connie Jo Zeiter