COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2016-016

MICHAEL R. ALEXANDER **APPELLANT**

VS.

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

JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF CORRECTIONS

AND

PERSONNEL CABINET **APPELLEES**

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

The Board, at its regular October 2016 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated September 16, 2016, and being duly advised,

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 3rd day of November, 2016.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:
Hon. Stafford Easterling
Hon. Gregory Ladd
Hon. Rosemary Holbrook
Mr. Michael R. Alexander
Mr. Rodney E. Moore

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2016-016

MICHAEL R. ALEXANDER **APPELLANT**

VS. **FINDINGS OF FACT, CONCLUSION OF LAW AND RECOMMENDED ORDER**

JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS

AND

PERSONNEL CABINET **APPELLEES**

** ** ** ** **

This matter came on for a pre-hearing conference on May 23, 2016, at 10:00 a.m., ET, at 28 Fountain Place, Frankfort, Kentucky, before Boyce A. Crocker, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Michael R. Alexander, was present by telephone, was not represented by legal counsel and was accompanied by his father. The Appellee Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Stafford Easterling. The Appellee Personnel Cabinet was present and represented by the Hon. Gregory Ladd, accompanied by the Hon. Rosemary Holbrook.

This appeal was the subject of an earlier pre-hearing conference held on April 19, 2016. Subsequent to the first pre-hearing conference, the Personnel Cabinet was added as a party by Order of the Hearing Officer. The Appellee Personnel Cabinet filed a Motion to Dismiss.

This matter is now assigned to Mark A. Sipek, Hearing Officer, for a ruling on the Personnel Cabinet's Motion to Dismiss.

BACKGROUND

1. The Hearing Officer notes that Appellant, Michael Alexander, filed his appeal with the Personnel Board on February 5, 2016, stating he was appealing from a penalization which he described as "wage discrimination due to lateral transfer." In support of his appeal, Appellant made the following statement:

> I recently transferred laterally to Kentucky State Penitentiary. I am a merit employee with 9 months prior experience at KSP. I completed my probationary term at the Penitentiary and then transferred to the Department of Juvenile Justice. After 9.5 months with DJJ, I chose to transfer back to the Penitentiary. While I was gone, the base-pay for Correctional Officers was increased. As a result, when I came back, my pay was increased to the new 'base-pay.' Because I had already completed a probationary period with the penitentiary, Frankfort made the decision not to put me back on probation. Due to this decision, I will not be given the 5% pay raise that new officers of the same rank and status receive after coming off probation. This could have lasting effects, including effecting future pay increases because I will never be afforded the opportunity to make up that initial 5% raise that new employees are given when they come off probation.

2. At the first pre-hearing conference, Appellant stated he was hired at the Kentucky State Penitentiary making base pay for a Correctional Officer. After completing a probationary period (which at that time was eight months), the Appellant stated he received a 5% pay increase.

3. Appellant stated he transferred laterally to the Department of Juvenile Justice and then transferred back to the Department of Corrections as a Correctional Officer after a special rate of $2,200 a month had been instituted for Correctional Officers.

4. The Appellant's claim is that new Correctional Officers receive $2,200 per month and then a 5% increase after they come off initial probation. The Appellant states his pay is $2,200, and since he is not serving probation, he will not receive a 5% increase. As relief, Appellant seeks to receive a 5% pay increase or to be placed back on probation so that when he comes off probation he can be awarded a 5% pay increase.

5. At the first pre-hearing conference, counsel for the Department of Corrections stated his Agency did not believe it should be a party to this appeal. He stated that when Appellant came back to the Department of Corrections, he was brought back as a lateral transfer

without receiving any pay increase. Counsel for the Department of Corrections filed an Affidavit of Mary Elizabeth Bailey from the Personnel Cabinet. Ms. Bailey is employed as the Commissioner of the Department of Human Resources Administration within the Personnel Cabinet. In her Affidavit, she stated that Appellant was initially appointed on June 30, 2014, as a Correctional Officer at a salary of $1,945.50. After completing his initial probation, Appellant received a probationary increase on March 1, 2015, from 1,945.50 to 2,042.78. Appellant transferred to the position of Youth Worker I with DJJ on March 30, 2015, at a salary of $2,042.78. While Appellant was serving in the Youth Worker I position, a special entrance rate of $2,200 was established for Correctional Officers. When Appellant transferred back to the position of Correctional Officer on January 16, 2016, his salary was set at $2,200, pursuant to 101 KAR 2:034, Section 3(8). Because Appellant laterally transferred back to a Correctional Officer, he was not entitled to receive an additional probationary increase as a result of a transfer pursuant to 101 KAR 2:034, Sections 3(7)(a) and Section 4(1) and (2). Appellant is not permitted by statute or regulation to receive a second probationary increase.

6. At the conclusion of the pre-hearing conference, the Hearing Officer entered an Order joining the Personnel Cabinet as a party and inviting further explanation of the Personnel Cabinet's position.

7. Prior to the second pre-hearing conference, the Personnel Cabinet filed a Motion to Dismiss setting forth the facts as set forth in Ms. Bailey's Affidavit. In its Motion to Dismiss, the Personnel Cabinet stated Appellant had already completed his probationary period as a Correctional Officer pursuant to KRS 18A.111 and had received his probationary pay increase pursuant to 101 KAR 2:034, Section 4. The Personnel Cabinet's position was that the Kentucky Administrative Regulations do not allow for a second probationary period or a second probationary increase based on the facts of this appeal.

8. At the second pre-hearing conference, Appellant stated it would be difficult for the Department of Corrections to retain employees when people with less experience are making more than he does.

9. The Appellant was given a chance to file a written response to the Motion to Dismiss which he did on June 22, 2016. The Appellant stood by his statements at the pre-hearing conference. He described the pay discrepancy between his salary and Correctional Officers hired after him as immoral and unjust. He stated that at the end of June 2016 when he hit the two year mark, his current salary would be $26,664. Officers with the same hire date as

he are currently making $29,748.72. He was not asking to be raised to their salary, however, he was asking to be increased to what Officers hired a year or more after him are now making, which is $27,720. Appellant asked how is it right for someone with six months' experience to be paid more than someone with four times that amount of experience.

10. Appellant pointed out that the special entrance rate for Correctional Officers was set forth to help correct the retention problem the Department of Corrections was having. He stated the Kentucky State Penitentiary still had employees from other facilities and Officers volunteering to work overtime at its institution. He stated that some of these employees were making considerably more than any of the Correctional Officer's salaries. He did not understand the hesitation to increase his salary this small amount.

11. Appellant stated he understood he could quit his job and come back and receive the new entrance rate, however, he felt like he was just asking for what was fair.

FINDINGS OF FACT

The Hearing Officer makes the following findings by a preponderance of the evidence:

1. The Hearing Officer finds there are no material facts in dispute and this matter can be decided based on the statements on the Appellant's appeal form, the Affidavit from Commissioner Bailey (with attachments), the Motion to Dismiss filed by the Personnel Cabinet, the statements of the parties at the pre-hearing conferences, and the Appellant's response to the Motion to Dismiss.

2. The Appellant was appointed as a Correctional Officer on June 30, 2014, at a salary of $1,945.50.

3. Upon completion of his initial probationary period, the Appellant received a probationary increase on March 1, 2015, from $1,945.50 to $2,042.78.

4. Appellant transferred to the position of Youth Worker I with the Department of Juvenile Justice on March 30, 2015, at a salary of $2,042.78.

5. While the Appellant was working as a Youth Worker I, a special entrance rate for Correctional Officers was established at $2,200.

6. The Appellant transferred back to his position as a Correctional Officer on January 16, 2016, at a salary of $2,200.

7. Pursuant to regulation, Appellant is not entitled to second probationary period or second probationary increase as a Correctional Officer.

CONCLUSIONS OF LAW

1. The Appellant has not been penalized as the term is defined at KRS 18A.005(24).

2. The Appellant's pay has been set in accordance with the appropriate regulations throughout his employment. When he completed his initial probationary period, he received an increase pursuant to 101 KAR 2:034, Section 4. When he transferred back to his position as a Correctional Officer (after a special entrance rate had been established) his pay was raised to the level of the new special entrance rate pursuant to 101 KAR 2:034, Section 3(8). Appellant is not entitled to a second probationary increase as a result of his transfer action pursuant to 101 KAR 2:034, Section 3(7)(a) and Sections 4(1) and (2).

3. Lastly, there are no facts in dispute, there is no relief that can be granted the Appellant and this matter is ready to be decided as a matter of law. KRS 13.B.090(2) and KRS 18A.095(18)(a).

RECOMMENDED ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Kentucky Personnel Board that the appeal of **MICHAEL R. ALEXANDER VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS, AND PERSONNEL CABINET (APPEAL NO. 2016-016)** be **DISMISSED.**

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13.B.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 Mark A. Sipek** this 16th day of September, 2016.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Stafford Easterling
Hon. Gregory Ladd
Hon. Rosemary Holbrook
Mr. Michael R. Alexander