

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2022-146

VICKI ALLEN

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

APPELLEE

*** **

The Board, at its regular June 2023 meeting, having considered the record, including the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer dated May 11, 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 13th day of June, 2023.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Vicki Allen
Hon. Jonathan Gifford
Hon. Rosemary Holbrook (Personnel Cabinet)
Rodney Moore

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
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VS.

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
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**JUSTICE AND PUBLIC SAFETY CABINET,
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APPELLEE

** ** * * *

This matter last came on for pre-hearing conference on January 17, 2023, at 10:00 a.m., ET, at 1025 Capital Center Drive, Suite 105, 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, Vicki Allen, was present and was not represented by legal counsel. The Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Jonathan Gifford.

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

FINDINGS OF FACT

1. The Hearing Officer notes the Appellant filed her appeal with the Personnel Board on October 14, 2022, alleging that she was penalized by unfair practices awarding salary increases by the Department of Corrections (DOC). The Appellant is a Grade 14 Human Resource Administrator who has been employed by the DOC at the Green River Correctional Complex (GRCC) for approximately fifteen (15) years. As to the allegations of unfair salary increases, the Appellant noted that, because of the DOC's award of discretionary salary adjustments in certain

hard-to-fill job classifications, there are Grade 10, 11, and 12 employees working at GRCC in other sections who make more than she does as a Grade 14 employee and who are not supervisors. She pointed in particular to raises that had been awarded to Correctional Officers, Social Service Clinicians, Classification and Treatment Officers, Librarians, and Chaplains over the last few years, while her section has been excluded from the award of those discretionary raises. She also noted that the DOC's use of discretion in setting salary meant that certain departments, such as maintenance, were permitted to start all employees at midpoint, while her section cannot.

2. On her appeal form, the Appellant alleged "[t]he following departments appear to be getting left behind in pay Human Resources, Administrative Specialists, Fiscal Recreation and Records. Two of which are female dominant departments."

3. Following the January 17, 2023, pre-hearing conference, the Appellee filed a Motion to Dismiss this appeal as a matter of law. In its motion, the Appellee argues that the Appellant failed to state a claim over which the Personnel Board has jurisdiction, that she lacked standing to bring this appeal, and that it was entitled to summary judgment.

4. The Appellant filed a response to the Appellee's Motion to Dismiss. She alleged that she was injured when it was determined that her job classification, Human Resource Administrator Institutional, was not important or worthy of receiving a salary increase. She noted that security positions, maintenance positions, Classification and Treatment Officers, Unit Administrators, Librarians, Chaplains, Social Service Clinicians, Justice Program Supervisors, Instructors, and Education Specialists were all awarded discretionary salary increases, while her section did not. She argued that she and her section were penalized when the DOC awarded salary increases based on particular positions allegedly being difficult to fill. She asked, "[w]hy did not all job classifications across the board receive a salary increase?" She also questioned why maintenance positions at GRCC were granted permission to start their employees' salary at midpoint. The Appellant outlined her work experience over the last twenty (20) years, including eight (8) years in Human Resources, six (6) years as a Recreational Leader, and one (1) year as an Office Support Assistant.

5. The Appellant alleged that female dominant departments, including Human Resources, did not receive raises. She noted that GRCC employs twenty-nine (29) full-time female staff versus one hundred and two (102) full time male staff. She further noted that, of the GRCC employees not receiving any additional raises on top of the statutorily-mandated eight percent raise (8%) raise awarded to all Executive Branch employee by the 2022 budget, fourteen (14) were

female and only one (1) was male. She also pointed out that, of the GRCC employees receiving raises, eighty-eight (88) months was the average months of service, while she has one hundred ninety (190) months of service. She noted that, while Correctional Officer positions may be difficult to fill, those positions only require a high school education or its equivalent. She argued that she was penalized when other members of GRCC staff - who have less experience than she does, who, on average, have less years of service than she does, and who are all in pay grades lower than her Grade 14 position - receive higher pay than she does.

6. The Appellant described herself as a gay 56-year-old female.

7. As to her requested remedy for this alleged penalization, the Appellant requested that she received a salary increase of one percent (1%) per year for a total of fifteen percent (15%) like she was promised she would receive as an annual increment when she began her state government career in 2007. In the alternative, she asks that her salary be raised to midpoint, due to her experience.

8. In its reply in support of its Motion to Dismiss, the Appellee argued that the Appellant was not legally entitled to a raise, pursuant to 101 KAR 2:034, Section 1, because she did not meet the criteria established by this regulation for a mandatory salary increase.

9. The Appellee also pointed out that 101 KAR 2:034, Section 3(8) allows for the establishment of a special entrance rate and for increases associated with this determination. Here, the Appellant has not alleged that she was excluded from a special entrance rate authorized for her job classification, Human Resources Administrator Institutional. Instead, without the support of any applicable statute or regulation, the Appellant argues that the Appellee should authorize her job classification to receive a discretionary salary adjustment.

10. The Appellee also argued that the Appellant has not made a *prima facie* case of sex discrimination. The Appellee contended, "what this data shows is that men and women in the same job classification and with the same number of months in service received the same pay. If Allen is arguing that GRCC intentionally pays women less than men, the data does not support her assertion."

11. Upon review of all materials and arguments submitted by the parties, the Hearing Officer finds that the Appellant has failed to establish that she has been subjected to an adverse employment action.

12. The Hearing Officer also finds that the Appellant has failed to establish that any similarly situated male employees were treated differently than she was.

13. The Hearing Officer finds that the Appellee is correct that the Appellant is not entitled to a salary increase pursuant to any of the provisions of 101 KAR 2:034. She is not entitled to a salary increase as a result of any new appointments or because any special entrance rate has negatively impacted her.

14. The Appellant has failed to establish she has been negatively impacted as a result of sex discrimination. More importantly, she has failed to allege a claim of actionable sex discrimination based on any similarly situated male employees.

15. For the same reasons, the Appellant has also failed to establish any actionable claim of discrimination based on sexual orientation or age.

CONCLUSIONS OF LAW

1. A motion to dismiss for failure to state a claim should only be granted if it appears that the Appellant would not be entitled to relief under any set of facts that could be proved in support of their claim. *Pari-Mutuel Clerk's Union, Local 541 v. Kentucky Jockey Club*, 551 S.W.2d 801 (Ky. 1977). All allegations on the appeal form are accepted as true for purposes of ruling on the motion. *Pike v. George*, 434 S.W.2d 626 (Ky. 1968). The appeal form, like a complaint in a civil action, should be liberally construed in a light most favorable to Appellant. *Gall v. Scroggy*, 725 S.W.2d 867 (Ky. App. 1987).

2. The prevailing case law to determine a Motion for Summary Judgment is *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991), which holds that any doubts in a motion for summary judgment must be resolved in favor of the non-moving party. Pursuant to *Steelvest, Inc.* in order for a summary judgment motion to succeed, there must be no genuine issue of material fact and the moving party must be entitled to judgment as a matter of law.

3. Here, the Appellant has failed to state an allegation that she has been penalized by the Appellee in the setting of her salary. Penalization is defined by KRS 18A.005(24) as follows:

(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;

4. The Appellant has not alleged that the Appellee violated any provisions of KRS Chapter 18A or any of the regulations thereunder in setting her salary or in setting the salaries of any of the employees at GRCC. Instead, she alleges that her compensation is unfair because she received less pay than those who are at a lower pay grade, who have fewer years of seniority, who have less education, or who have not performed as well as she has. She has not alleged that any of the provisions of 101 KAR 2:034 have been violated in setting her salary or for the salaries of any of her coworkers. Even accepting all the Appellant's allegations as true, which the Hearing Officer must do at this stage of the proceedings, the Appellant has not stated a case that she has been penalized as that term is defined by KRS 18A.005(24).

5. Further, the Appellee has demonstrated that it is entitled to summary judgment on the Appellant's claims of sex discrimination. Although the Appellant has established that she is a member of a protected class and that she is qualified for her position, she has failed to establish that she was subjected to an adverse employment action or that any similarly situated male employee has been treated differently. *See Commonwealth of Kentucky vs Solly*, 253 S.W.3d 537 (Ky. 2008).

6. For the same reasons, the Appellee is entitled to summary judgment on any claims to the Appellant is making regarding discrimination based on sexual orientation or age discrimination.

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 **VICKI ALLEN VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2022-146)** 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).


[Hearing Officer Note: Any document filed with the Personnel Board shall also 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 Mark A. Sipek** this 11th day of May, 2023.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day emailed and mailed to:

Vicki Allen
Hon. Jonathan Gifford
Hon. Rosemary Holbrook (Personnel Cabinet)