

Hon. Morgan Ransdell
George A. Bean

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2011-188**

GEORGE A. BEAN

APPELLANT

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

**OFFICE OF THE ATTORNEY GENERAL,
CARLA VINEGAR, APPOINTING AUTHORITY**

APPELLEE

** ** *

This matter came on for an evidentiary hearing on October 9, 2012, at 9:30 a.m., ET, at the office of the Personnel Board, 28 Fountain Place, Frankfort, Kentucky, before the Hon. Geoffrey Greenawalt, Hearing Officer. The proceedings were recorded on audio/video equipment pursuant to KRS Chapter 18A. The parties' briefing was completed on December 27, 2012.

The Appellant, George A. Bean, was present at the evidentiary hearing and was not represented by legal counsel. The Appellee, Office of the Attorney General, was present and was presented by the Hon. Morgan Ransdell.

The issue at the evidentiary hearing was the Appellant's contention that his salary should match that of Dennis Spalding, who was hired subsequent to him. The regulation in question which controls such salary comparisons is 101 KAR 2:034, Section 1. The burden of proof on this issue, by a preponderance of the evidence, was upon the Appellant, as he is the person seeking the benefit.

The Appellant, George A. Bean, timely filed his appeal with the Personnel Board on August 31, 2011, appealing from the failure of the Appellee to adjust his salary to that of a new appointee, Dennis Spalding. It should be noted that this particular appointment was made back in 2003. As such, the Appellee argues that the Appellant's Personnel Board appeal is time-barred. However, as the Appellant's first written notification that his salary would not be adjusted as requested came in response to his grievance filed in 2011, the Appellee's argument fails and the Appellant is entitled to proceed with his appeal.

The only determination to be made at hearing was whether the Appellant had a similar combination of education and experience relating to the job classification as the appointee, Dennis Spaulding, at the time of the appointment. Whether the Appellant and Dennis Spaulding were in the same job class or worked in the same county was not at issue.

BACKGROUND

1. First to testify was **Ms. Tonjua Casey**, who is currently an Internal Policy Analyst III with the Office of the Attorney General (OAG), and has been employed by the OAG since 1999. Ms. Casey explained that Mike Duncan was the Director of Special Investigations at the time in question, and was the contact person for new hires. Until his departure from the OAG, Mr. Duncan handled all hirings within the division, including that of the Appellant.

2. Once Mr. Duncan left the OAG, Ms. Casey began handling the investigator hirings. According to Ms. Casey, she kept an informal personnel file on the various employees within the division. As such, the Appellant asked her to review his file to see if she could locate his resume. According to Ms. Casey, a copy of said resume was not in his file. Ms. Casey made additional efforts to locate the Appellant's resume, but could not find same.

3. Ms. Casey explained that in 2001, when the Appellant first applied for an Investigator II position, he more than met the minimum requirements.

4. On cross-examination, Ms. Casey explained that the Personnel Cabinet maintained the official employee files for the OAG. In addition, she was unable to explain why the Appellant's resume was not in his official personnel file.

5. According to Ms. Casey, as an Analyst, the information regarding experience and education set forth on their applications, located in their official personnel files, is utilized when attempting to compare salaries between an existing employee and a new appointee. Ms. Casey thought it was possible an Analyst could ask for additional material or information for comparison purposes but didn't think it was required.

6. Next to testify was **Mr. Dennis Goss**, who is a Branch Manager at the OAG, and has been since June, 1999. At the time of the Appellant's hire, he was the Branch Manager for the Welfare Fraud Division and was one of the Interviewers, along with Mr. Lee Wise, at the Appellant's interview. The Director of Special Investigations, Mr. Mike Duncan, was not involved in the interview process.

7. Mr. Goss had no problem with the Appellant meeting the minimum requirements of an Investigator II. According to Mr. Goss, the Appellant was well-qualified and he knew of the Appellant's experience from his days of service with the Kentucky State Police. Mr. Goss recommended that the Appellant be hired. Keeping in mind that the Appellant's interview took place some twelve years earlier, he could not recall whether he needed any additional documents or whether any were requested from the Appellant. He could also not recall if the Appellant had his resume with him at the interview. In fact, Mr. Goss could not recall many of the details on the Appellant's application, especially any detailed knowledge regarding the Appellant's private investigation work.

8. Next to testify was **Mr. Lee Wise**, who began his employment with the OAG in June, 1995 as a Criminal Investigator. Like Mr. Goss, Mr. Wise was also one of the Interviewers

when the Appellant was first hired at the OAG. He did not know the Appellant prior to the interview. He also could not recall anything about the Appellant's experience as a Private Investigator. Mr. Wise testified he thought he saw some resumes from some of the interviewees during the interview process, but could not recall any details, as he was more focused on the Applicants' applications.

9. According to Mr. Wise, he considered resumes as typically being doctored-up, and since the application was signed and sworn to, it was more reliable.

10. **Ms. Kathryn Reed**, is an Investigator with the Cyber Crime Section at the OAG and has been for 15+ years. Ms. Reed testified that she successfully filed a Grievance over a salary comparison analysis in the past. Appellant's Exhibit 1 was introduced into the record through the witness, and speaks for itself.

11. Relative to her successful grievance, Ms. Reed recalled that she did not ask anyone to review anything other than the information contained on her application which she thought included all of her education and work experience.

12. **Mr. Sandy Hockensmith** held various Investigator positions between 1989 and 2007 with the OAG. Mr. Hockensmith filed a Grievance with the OAG and eventually filed an appeal with the Personnel Board. That matter was settled. Appellant's Exhibit 2 was introduced into the record over the objection of the Appellee.

13. According to Mr. Hockensmith, he believed he listed all his experience on his application and did not recall having to provide any additional documentation to be reviewed.

14. **Ms. Kelly Hensley**, is currently a Medicaid Fraud Control Unit Investigator with the OAG and has been since June, 2006. Ms. Hensley testified that Keith Howard was hired in at the same time she was, at the same position and in the same class specification but at a higher salary. Someone in management told her this was because Mr. Howard had more experience than her. This information came to light after another employee, Michael Fortney, made an open records request. Ms. Hensley testified she provided the OAG with her resume when she interviewed for the position. She has not reviewed her own personnel file and does not know if her resume is contained therein.

15. **Mr. James Cox** has been in the Medicaid Fraud Control Unit as an Investigator II since October, 2007, and testified that, although it has been several years, he thought he listed all his experience on his job application. He also thought he had presented his resume to the interview panel at the time of his interview. Mr. Cox could not testify as to what happened to his resume and stated he had no clue what was contained in his personnel file.

16. **Mr. Dennis Spalding** was hired as an Investigator II in December, 2003, in the Medicaid Fraud Control Unit. Prior to his hiring, Mr. Spalding had 26 years of experience with the Jefferson County Police Department and seven more months with the Jefferson County/Louisville Metro Police Department. Mr. Spalding has his B.S. Degree and his Master's in Criminal Justice from Eastern Kentucky University.

17. According to Mr. Spalding, he placed all his law enforcement experience on his application, and had no other investigative experience to list. He also thought he submitted a resume with his application, but was not sure to whom that might have gone.

18. **Ms. Kathy Parrish**, is an Investigator with the OAG and has been since 1998. Ms. Parrish testified that she asked the Appellant to review some P-1s she had requested and received. To the best of her knowledge, this was when the Appellant first saw Mr. Spalding's P-1, and noticed the difference between their salaries. This review was done in late 2011. Appellant's Exhibit 3 was introduced into the record.

19. According to the information set forth on the spreadsheet marked as Appellant's Exhibit 3, it looked to Ms. Parrish as though she had been given credit for all her time as an Investigator and as a Paralegal. She also testified she listed all her relevant work experience on her job application. Ms. Parrish testified she submitted her resume to her interview panel and that she has not looked at her personnel file to determine if it is contained therein.

20. **Ms. Carla Vinegar**, is the Executive Director of Administrative Services with the OAG and routinely deals with personnel issues, payroll, etc.. In 2003, Ms. Vinegar was a Personnel Administrator with the OAG and was responsible for handling all personnel issues, including hiring and firing, and was also the custodian of the employees' personnel files.

21. Ms. Vinegar explained that when performing salary comparisons, the only thing to consider is the information contained on the official application.

22. Ms. Vinegar testified that she, Bonnie Howell and Larry Clarke are the only people who do salary comparisons at the OAG. According to Ms. Vinegar, there was nothing contained in the Appellant's personnel file regarding his military service. She even contacted the Personnel Cabinet to see if they had any more information in the Appellant's duplicate file and they did not. She was specifically looking for his military experience. She did not recall looking for the Appellant's resume because the application is the only official document she needed.

23. Appellee's Exhibit 1 was introduced into the record, and is a copy of the Appellant's applications, which were both used for his initial appointment as an Investigator II. Ms. Vinegar pointed out that the application directs the applicant to list their complete job history.

24. Ms. Vinegar walked through the process of counting the number of months of experience used during a comparison process. Appellee's Exhibit 2 was introduced into the record and is utilized in translating levels of education into months or years of experience. To that end, the Appellant was given credit for four years of experience based upon his Bachelor of Science degree. Ms. Vinegar then relied on the work history set forth on the Appellant's application and looked specifically for any investigative experience. She noted that the Appellant's Air Force history made no mention of any investigative duties. As such, the Appellant received no credit for his military work experience. Ms. Vinegar gave the Appellant credit for his work at the Kentucky State Police, which totaled 20 years and six months. She also added the years and months the Appellant worked prior to Mr. Spalding being appointed.

According to Ms. Vinegar, the Appellant was appointed on August 16, 2001, and Mr. Spalding was appointed on December 1, 2003, thus there was a two year and three month experience difference. When added together with the Appellant's educational background, his total experience utilized for the subject salary comparison added up to 26 years and eight months. Appellee's Exhibit 3 was introduced into the record and is a copy of the Appellant's P-1s.

25. Appellee's Exhibit 4 was introduced into the record and is a copy of Dennis Spalding's application from 2003, which was his appointment application. There was also an updated application included and, according to Ms. Vinegar, she considered both for purposes of the subject salary comparison. Appellee's Exhibit 5 was introduced into the record and is a copy of Mr. Spalding's P-1s which demonstrates that Mr. Spalding was first appointed into his Investigator II position on December 1, 2003.

26. Ms. Vinegar explained how she calculated Mr. Spalding's experience. She first gave him four years credit for his Bachelor of Science degree and two years credit for his Master's work. At this point the Appellant pointed out that Mr. Spalding's application showed he had 36 hours toward a Master's degree which, when comparing the same to the chart contained in Appellee's Exhibit 2, should have translated into only 21 months of experience. Ms. Vinegar gave Mr. Spaulding 36 months of credit between January, 1977 and 1979; 120 months of credit between January, 1980 and December, 1989; 120 months of credit between January, 1990 and through 1999; 36 months of credit between 2000 and December, 2002; and, seven months of credit during 2003 for a total of 286 months or 26 years and eight months of experience. After adding six years for his education attainment, Mr. Spalding had a total experience level of 32 years and five months.

27. According to Ms. Vinegar, the Appellant would not be entitled to the adjustment even if Mr. Spalding had not given credit for his education. Ms. Vinegar acknowledged that had the Appellant been given the full credit for his four years as a Private Investigator and four years in the Air Force, he would have had 34 years and eight months of experience (or two years more experience than Mr. Spalding) and would have been eligible for a salary adjustment.

28. Ms. Vinegar testified that these salary comparisons are prepared before every new hire for budgeting concerns. It is also utilized to determine the highest salary the OAG can offer a new employee.

29. **Mr. Larry Clarke** was hired in May, 2011, as the OAG's Executive Director of Administrative Services. Mr. Clarke was the final reviewer concerning the Appellant's Grievance filed in late 2011. These Grievances are first reviewed by the Appellant's immediate supervisor, then his second-line supervisor, and finally, passed on to him. Mr. Clarke testified that the Appellant could have found out about Mr. Spalding's starting salary by making an open records request. He stated that new hires are always announced, so if the Appellant was curious he could have easily made this request.

30. According to Mr. Clarke, he met with the Appellant in October, 2011, regarding his Grievance. At that time he reviewed the Appellant's response; he went over his response to

the Appellant's Grievance, which response is attached to the Appellant's Personnel Board appeal form.

31. Mr. Clarke stated that he agreed with Ms. Vinegar's calculations utilized during the subject salary comparison.¹ According to Mr. Clarke, the applicable regulation is interpreted to mean that in order to have a salary adjusted upward, the incumbent's experience must be equal to or greater than that of the new hire. Mr. Clarke stated that there was no resume or military service file contained in the Appellant's personnel file, and that the same were never provided to him.

32. Mr. Clarke testified that he prepared the chart marked as Appellant's Exhibit 3 for the sole purpose of comparing the salaries of incumbents to a Mr. John Wolf, who at the time, was a new hire. The whole point of preparing this spread sheet was to determine whether Mr. Wolf's salary was justifiable and it was not meant to be used to compare anyone other than Mr. Wolf to Mr. Hensley, who was the only other Investigator making less than Mr. Wolf at the time.

33. **Ms. Dinah Bevington** is the General Counsel for the Personnel Cabinet and is the official records custodian with regard to open records requests. Appellee's Exhibit 6 was introduced into the record and demonstrates that the Appellant made an open records request requesting the salaries of all sworn personnel in the Attorney General's Office of Investigation. Ms. Bevington explained that Appellee's Exhibit 6 is an electronic log maintained by the Personnel Cabinet which documents when requests have been made, by whom, etc.. Ms. Bevington stated this particular request only sought salary information and did not request P-1s. However, Ms. Bevington explained that the applicable or current P-1s are typically sent in response to the open records request.

34. Appellant, **George A. Bean**, testified he is currently an Investigator III with the Medicaid Fraud Control Unit at the OAG. Mr. Bean was asked to review Appellee's Exhibit 6 and asked why he made this open records request. Mr. Bean could not recall, and stated it could have been made on someone else's behalf, as he did this for other people on occasion.

35. Mr. Bean stated that his Personnel Board appeal is based on fairness, and that had he been advised by the administrative or personnel staff at the time he first made his application that future salary comparisons would be made only upon the information contained therein, he would have been more thorough. Instead, after being advised by a counselor back in 2001, when he filled out his application, that he qualified for positions all the way up to a Branch Manager, he only put down the experience he thought would be necessary to qualify for the position he was seeking (the same being an Investigator II). Mr. Bean stated that he also provided a resume and his military discharge form, DD214, at the time of his application. He stated he would like to have some trust in the people he works for and he would not ask for an open records request every time someone was hired.

¹ As the agency representative, Mr. Clarke was present for all testimony given at the hearing.

36. Appellant's Exhibit 4 was introduced into the record and demonstrated that the Appellant incorporated a private investigation business in Kentucky. This was allowed into the record over the objection of the Appellee, who argued the same was not found in the Appellant's personnel file and that the Attorney General's office had no duty to investigate or consider anything not contained therein for purposes of making a salary comparison.

37. The Appellant testified he worked his private investigation firm hard for the first two and one-half to three years, and then slacked off towards the end. As for his military service in the Air Force, he stated that any time an alarm at a nuclear missile site went off, he was required to investigate the same and arrest or detain anyone who might have been involved. He went to police school while serving in the Air Force, and stated that reacting to an alarm was the same thing as making an investigation.

38. Appellant's Exhibit 5 was introduced into the record and is a copy of the Appellant's DD214 Military Discharge document. This was entered into the record over the objection of the Appellant, who argued against its relevance and authenticity. This document indicates the Appellant was discharged as a Security Specialist which is the civilian occupation equivalent of being a guard.

39. On cross-examination, the Appellant was asked to review Appellee's Exhibit 1 (his application) and confirmed that his signature was contained thereon. The Appellant again stated he only listed the minimum job experience he thought was necessary to procure the job position he was applying for and didn't think he needed to include his private investigation experience. Although #14 on the application was incomplete, the Appellant stated that he gave a copy of his resume to Mike Duncan, which set forth his private investigation experience.

40. The Appellant explained he first learned about the regulation regarding salary comparisons in 2004, when he got a salary adjustment after Bill Stewart was hired. According to the Appellant, he feels the OAG doesn't want employees to know anything about the possibility they could have their salary adjusted. Until recently, he was also not aware that an employee could get credit for his military or private investigation experience. He also said that it has become apparent that the OAG did not consider his KSP certificate, his transcript, his resume or his DD214, which he provided to the OAG previously but for reasons unknown, were not contained in his personnel file.

41. Finally, the Appellant acknowledged that had he received a salary adjustment in December, 2003, he would not have been eligible for his March, 2004 adjustment and that his entire Personnel Board appeal boils down to being underpaid for a total of three months. Appellee's Exhibit 7 was introduced into the record and is a copy of the Appellant's 2009 application. Again, the Appellant's private investigation work was not included on this application, nor were there any duties set forth regarding his military service.

42. This matter is governed by 101 KAR 2:034, Section 1(2):

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 class;

(b) Is in the same work county; and

(c) Has a similar combination of education and experience relating to the job classification.

43. The Hearing Office has considered the entire administrative record, including the testimony and statements therein.

FINDINGS OF FACT

1. The Appellant, George A. Bean, appeals from the denial of his Grievance filed with the OAG on or about August 11, 2011, regarding the failure to have his salary adjusted upon the hiring of Dennis Spalding on December 1, 2003. (See Appellant's appeal form and attachments thereto.)

2. Larry Clarke, the Executive Director of Administrative Services for the OAG, and in his capacity of final reviewer and Appointing Authority, made the final determination that the Appellant's Grievance was not based upon merit and his request for back pay owed was denied. This denial was dated August 29, 2011 (see Appellee's appeal form and attachments thereto). As such, despite the fact that the Appellant's requested salary adjustment dates back to December 2003, he did not receive written notice of the denial of his Grievance until August 29, 2011, and he, being a classified employee with status, timely filed his appeal with the Personnel Board on August 31, 2011, appealing from the denial of his Grievance.

3. The Appellant was hired as an Investigator II with the OAG on August 16, 2001 based upon the contents of his application entered into the record together as Appellee's Exhibit 1. A review of this application (as well as the application marked as Appellee's Exhibit 7) demonstrates that the Appellant listed his military service and his Kentucky State Police employment history thereon. The Appellant testified that because he was already well qualified for the position he was seeking (Investigator II) he only put down on his application what he thought he needed to procure the job. Importantly, neither one of the Appellant's applications contain information upon which one could conclude that his main job duties while in the Air Force were similar to or equal to those of an Investigator. In fact, the Appellant's DD214, marked as Appellant's Exhibit 5, plainly states that the Appellant had been a Security Specialist which is the equivalent to the civilian occupation of being a guard (and not an investigator). Although the Appellant may have been required to investigate nuclear missile alarms on occasion during the course of his four-year military career, that alone does not justify allowing him credit for a full 48 months of investigative experience and Carla Vinegar correctly excluded

the Appellant's military history when she calculated his overall investigations experience for purpose of making the subject salary comparison.

4. In addition, the Appellant's application did not contain any information regarding his experience as a private investigator (see Appellee's Exhibit 1 and 7). The Appellant testified he worked his private investigation firm hard for the first two and one-half to three years before slacking off. He also claimed that although he left this work experience off his application(s), the same was included on his resume, which he provided to Mr. Mike Duncan, and should have been considered. However, the Appellant's resume was not contained in his official or unofficial personnel file. As such, the Appellee did not consider the Appellant's private investigation experience when performing the subject salary comparison.

5. Ms. Carla Vinegar testified she performed the salary comparisons between the Appellant and Dennis Spalding. She looked at the job duties contained on both the Appellant's applications for any investigative experience. She did not give him credit for his stint in the Air Force as no investigative experience was noted under his job duties. She allowed him 20 years and six months for his experience with the Kentucky State Police. She further allowed him four years for obtaining his Bachelor of Science degree. In addition, she credited him for two years and three months experience as an Investigator II which he acquired prior to Mr. Spalding's appointment. The Appellant was credited for 26 years and nine months of total experience at the time Mr. Spalding's appointment.

6. Mr. Spalding was appointed on December 1, 2003. His investigative experience was also calculated by Ms. Vinegar who allowed him four years credit for his Bachelor of Science degree and two years for his Master's of Education. It is noted that Mr. Spalding's application states that he had 35 hours of credit towards his Master's degree, which should have equated to 21 months of experience rather than 24 (see Appellee's Exhibits 2 and 4). Ms. Vinegar stated that Mr. Spalding had solid investigative experience between January 1977 and July 2003, thus she calculated 286 months of investigative experience. That equates to 26 years and eight months of straight investigative experience, and when the credit for his education was added, his total experience for purposes of performing the subject salary comparison was 32 years and five months.

7. In this instance, had the Appellant been given full credit for his private investigation work (48 months) and Mr. Spaulding's educational experience been reduced by three months, the Appellant's total years of experience would have remained below that of Dennis Spalding at the time of his appointment and even if the Appellee had been required to go outside the Appellant's official personnel file and consider information other than was contained on his application, as suggested by the Appellant, the Appellant would not have been qualified for a salary adjustment.

CONCLUSION OF LAW

The Appellant has failed to demonstrate by a preponderance of the evidence that he was due a salary adjustment upon the hiring of Dennis Spalding on December 1, 2003.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **GEORGE A. BEAN V. OFFICE OF THE ATTORNEY GENERAL** (Appeal No. 2011-188) 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 Geoffrey B. Greenawalt** this 29th day of March, 2013.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Morgan Ransdell
Mr. George A. Bean