

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2013-027

ROBERT BRAY

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
J. MICHAEL BROWN, APPOINTING AUTHORITY

APPELLEE

** ** *

The Board at its regular January 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated December 18, 2013, 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 14th day of January, 2014.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Angela Cordery
Hon. John G. Prather, Jr.
Stephanie Appel

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This matter came on for evidentiary hearing on October 16, 2013, at 9:40 a.m. at 28 Fountain Place, Frankfort, Kentucky, before John C. Ryan, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by KRS Chapter 18A.

Appellant, Robert Bray, was present and was represented by the Hon. John G. Prather, Jr. The Agency, Justice and Public Safety Cabinet, Department of Corrections, was also present and represented by the Hon. Angela Cordery.

This matter was the subject of one or more pre-hearing conferences and/or written arguments presented by the parties dealing with whether or not statutory discrimination occurred when Appellant was reverted while on promotional probation. The Hearing Officer ultimately ruled that evidentiary hearing should ensue in order to develop all aspects surrounding Appellant's treatment, specifically whether he was reverted due to his age.

BACKGROUND

1. Appellant, Robert Bray, commenced employment at Northpoint Training Center (NTC) near Burgin, Kentucky, on October 1, 2009 serving as a Correctional Officer. Nearly three years later, officially effective on August 12, 2012 he was afforded a promotion to Classification Treatment Officer (CTO) and began serving the mandatory promotional term. However, by written notice issued on November 14, 2012 he was reverted to his prior position as Correctional Officer and, commensurate with the statute, was provided little or no immediate explanation. He was also informed that he was afforded no right of appeal, absent the presence of the rather narrow ground of discrimination.

2. Mr. Bray filed a *pro se* appeal before this Board on February 4, 2013 under the allegation of "demotion," wherein he wrote:

I was hired in as a security officer at Northpoint Training Center, which is a prison. I was promoted to position of a CTO. I performed the job well and was pretty much found to train myself. During the probationary period, I was complimented & received no complaints from anyone in management. Before the end of my probationary period, I was demoted back to security officer position.

The only reason given for the demotion was that I did not complete my probationary period. I never received any complaints during my probationary period and was even told that the person who demoted said it should not have been done.

3. Appellant did not initially identify whether or not he would be represented, but in due course retained counsel before or during pendency of the Agency's efforts to have the appeal dismissed for lack of grounds to support it. There then ensued a series of arguments relative to whether or not a sufficient cause of action exists. Evidentiary hearing was assigned, with Appellant to bear the burden of proof.

4. Upon convening the hearing Appellant, **Robert Bray**, presented his own testimony. He established that he is 54 years of age. He verified his current position as a Correctional Officer at NTC and recited the sequence of his promotional probation from Correctional Officer to Classification Treatment Officer there in August 2012. He has received a Bachelor of Science Degree from Campbellsville University, apparently earned while serving as Correctional Officer.

5. Appellant urged that at least three other personnel have been promoted and successfully completed the requisite probation either during or following his own probationary term. He was of the understanding that at least two of these coworkers are under 40 years of age, but he was unclear as to the educational background of one or more of them. He recalled that on November 15, 2012 he was summoned to the Warden's office and handed a brief letter informing him that he would be reverted which, in his view, was a demotion. He pressed as to the reason he was being sent back, receiving little or no response at the time except to be informed that no explanation was required. He was unaware of any disciplinary actions or "failings" during his promotional term and remained unclear as to the reason that his promotion failed.

6. Appellant continued that he has regularly applied for several other open positions within the Agency as he becomes aware of them and he has received two interviews, both in the area of Probation and Parole out of Somerset, Kentucky. He noted that another worker was promoted into the CTO position following his reversion, whom he believes is under the age of 40. Appellant also undertook to identify other personnel who have received permanent positions

following probationary promotion under 40 years of age. He presented the reversion letter and a menu of positions for which he has applied as part of his testimony.

7. Under cross-examination, Appellant viewed that his age of 54 was “part of the reason” that his promotion was cancelled. The Agency produced a grievance which he filed on or about November 30, 2012 to which he had attached a lengthy summary detailing his dissatisfaction with the reversion and urging, among other things, that he did not feel that he was afforded adequate time to learn the new position. He also urged in the written summary, which he reiterated in his testimony, that a shortage of Correctional Officer staff exists at the facility and that at least twice weekly he served double shifts, performing one eight-hour session as a probationary CTO and another eight-hours session as a Correctional Officer. He insisted that the arrangement did not curtail or impact his service as CTO and felt that he performed the duties of the position at least adequately and was able to “keep up” with the requirements thereof. He experienced no difficulties in learning the new job and, although afforded only two days training, he made inquiry concerning the duties as events occurred which he did not understand. The Agency presented the Grievance Form and its attachment as part of his testimony.

8. Under re-direct examination, Appellant acknowledged that the CO shift, which came immediately following the CTO shift, was voluntary, but he viewed the service as mandatory due to the staff shortage and felt that he was compatible with everyone with whom he worked. He insisted that his performance of the double shifts did not adversely affect his effectiveness as to either. He recalled that during the course thereof an audit was conducted and one or more personnel involved with it, actually from outside the facility, commended him for taking on the extra work.

9. **[Hearing Officer Note:** Appellant undertook to thereupon present the testimony of another witness, whereupon the Agency pointed out that no witness list was filed, and objected to further testimony as proof-in-chief. Appellant insisted that, if the Agency intended to move for dismissal of the appeal, i.e. a directed verdict, he should be permitted to present the testimony by avowal. Following arguments and the anticipated motion, wherein the Agency urged that a claim of age discrimination was not initially raised but only came following its motion to dismiss for lack of statutory grounds and, further, that the Agency was fully aware of Appellant’s age at the time of his promotion and did not consider it then or anytime thereafter, the Hearing Officer made no ruling thereon and requested that the Agency present its proof. Appellant would thereupon be afforded the opportunity to cross-examine the desired personnel, thus resolving the issue.]

10. The Agency offered the testimony of **Mendalyn Cochran**, who addressed her role in both the promotion and reversion of Appellant. She has been a Correctional Unit Administrator at NTC for 2.5 years and holds 17 years of service with the Agency. She presented a chart depicting the management structure specific to her office, evidencing four separate areas under her supervision. Included among these are three CTO positions assigned to specific dormitories, of whom she is second-line supervisor. She recited the duties required of CTO personnel and ratified her oversight over their work product. She pointed out that the duties of a CTO vary significantly from those of a Correctional Officer. For that reason, the CTO position requires a college degree.

11. The witness was one of three management personnel composing the panel which conducted interviews of the CTO candidates. Appellant was selected from a total of five applicants, based upon his prior experience at NTC and his having obtained his degree while employed full-time. She asserted that age had no bearing in the screening process.

12. During Appellant's probationary term this witness, as a supervisor, had regular reports of his performance. She also detailed several other CTO personnel to aid him in his training. She observed and reported in due course that his assigned tasks were seldom completed and he appeared unable to multi-task as the job required. Many of the duties involved firm deadlines which he did not meet. Also, he did not approach management when he encountered problems unfamiliar to him or that a deadline was missed. In due course, she came to realize that his abilities did not mesh with what was required. She prepared detailed notes summarizing the issues involved. Following a conference with the Deputy Warden, she presented her concerns to the Warden, who possesses sole authority to revert personnel within the institution. At that time, Warden Bottom had recently assumed command and urged that Appellant be afforded more time to become acclimated, which was implemented. Appellant's work product did not improve and in November she again presented the difficulties being encountered, to which the Warden then acceded. The witness filed the documents referenced in her testimony, including her prepared notes documenting the issues. She also offered a series of e-mails between herself and one or more CTOs evidencing the day-to-day concerns encountered with Appellant's work product.

13. The witness continued that numerous duties are assigned to the CTO position, reiterating that many of them carry hard deadlines which impact the actions of numerous other personnel or bodies, such as the Kentucky Parole Board. Appellant appeared unable to grasp these requirements. In a conference with him he demonstrated a somewhat dismissive attitude, insisting that he understood what was required and did not require further instructions or training. He also appeared to reject or resent constructive criticism. Given the overall circumstances, the reversion was implemented. In due course, she was presented with his grievance which contained arguments that she viewed were not persuasive, particularly an asserted lack of training or lack of opportunity to obtain same. She intimated that his tasks had

been thrust upon others in order to meet the deadlines and properly complete the requisite workups which the position demanded.

14. Under cross-examination, the witness confirmed that at the time Appellant was presented with the reversion notice he requested the reasons and none were given. She was aware of the audit which Appellant referenced in his testimony but did not hear the compliment attributed to his performance. She was also aware that the institution was short-staffed; some overtime was assigned and personnel were encouraged to voluntarily fill-in where possible. She discussed and explained the series of e-mails which she introduced, which range from September through mid-November 2012 among and between herself, Appellant's immediate supervisor, and Appellant. She acknowledged that some of the e-mails were not sent to Appellant. She confirmed that no official training record is maintained for personnel moving into another position at the facility, and she had no knowledge as to the age of any persons which may have been appointed to either replace Appellant as CTO or to other positions.

15. Under brief redirect examination, the witness further addressed the content of one or more of the e-mails and expanded upon the method of training, which she characterized as essentially on-the-job. Specifically, personnel who are promoted are placed with seasoned, existing holders of the position and instructed according to the need and their level of competence. She noted that ordinarily "a week or two" usually suffices to get them acclimated, but in the case of Appellant some aspects were never accomplished in his time in the position despite hands-on management and follow-up, depicted in the e-mail material.

16. **Pam Coffman** commenced as Human Resources Administrator at NTC in December, 2012; she was promoted from a prior position, also in Human Resources. She is 46 years of age. She depicted her duties as supervision of payroll, benefits, and the general processing of personnel actions including oversight of employment registers and hiring. She offered a series of documents as part of her testimony, primarily of an administrative nature, pertaining to the hiring, probationary promotion, and reversion of Appellant. Among the material was a chart listing the interviewees and their dates of birth for the position which Appellant attained; the youngest was 28 years of age and Appellant was the oldest. Appellant was chosen from this list.

17. The witness also produced a chart which she prepared summarizing all personnel who filled CTO positions at the facility commencing in June, 2012 through October, 2013 including those appointed, resigning, or currently occupying the position. She noted that one individual is 27 years of age and three were, or now are, over 40.

18. Under brief cross-examination, Appellant quizzed the witness relative to the specifics of five of the personnel in the CTO chart and their status, expressly focusing upon their hire date and/or whether they were over 40 at the time they either came in or left.

19. **Julie Thomas** is Deputy Warden of Operations at NTC. She has served the agency since 1987 and started as a Correctional Officer, rising through the ranks in a variety of locations either within or outside the Agency. She was initially assigned to NTC in May 2010 and ultimately assumed her current position.

20. This witness was a member of the panel which interviewed the candidates for the position to which Appellant was promoted. She viewed him to be qualified and deserving of consideration for having attained his college degree while employed full-time. She was unaware of his age until initiation of this appeal. She noted in the course of her testimony that the position of CTO is one of the most diverse and difficult within the institution, with its many and varied duties and the deadlines imposed. Not all personnel appointed thereto are able to adapt to the requirements, and thus it was, in her view, with Appellant. She commenced hearing about problems with his performance approximately thirty days following his assumption of the job, primarily from his second-line supervisor, Ms. Cochran. As time passed, Cochran related a variety of shortcomings with his performance and the witness instructed her to continue to monitor his work and document her concerns. Finally, there being no improvement, the witness met with and discussed the concerns with Warden Bottom. The Warden requested that Appellant be allotted additional time to learn the job and that staff report back to him for re-evaluation at a later date. Approximately two to three months into the appointment no improvement was observed and the consensus among those monitoring the progress was that Appellant was not a good fit for what was required. She ratified that this particular position is critical in institutional operations since the information developed by that employee directly impacts the status of each inmate, including his placement and any Probation and Parole Board reviews.

21. This witness was unaware that Appellant has also applied for a lengthy series of correctional-related positions. In reviewing the list thereof previously presented by Appellant in his testimony, she observed therefrom that, while many of the possible openings would have been for NTC, some would have been out of reach for him due to the required qualifications, and others would have required more experience than he possesses and/or more education credits in special areas, such as electrical and mechanical.

22. Under cross-examination, the witness confirmed that she was present when Appellant received his reversion notice and was aware that he questioned the reasons and that none were given. She recalled being present for an audit meeting, but did not recall overhearing any commendation for Appellant having volunteered for extra duty. She insisted, however, that no employee is ever penalized for volunteering and that this is never a factor in any reversion situation. This witness had no awareness of whether training records are maintained, nor is she privy to all communications among supervisors and personnel. She was unaware of whether

Appellant's supervisor ever informed him that the Warden directed that he be afforded additional time to learn the job.

23. Under brief redirect examination, the witness explained that the purpose of promotional probation is to afford an opportunity to monitor the progress, learning curve, and work product of the appointee. Probationary personnel are more closely monitored for that reason rather than have them in a position permanently which they are unable to perform satisfactorily. She reiterated that any employee who assumes the CTO duties should come to realize, or management realizes, that they are not suitable for what is required.

24. **Jann Edington** holds the position of CTO at NTC, having assumed those duties in 2007. She presented a summary of the varied requirements of the position, recalling that her own training was on-the-job and consumed approximately two weeks. She recalled experiencing no permanent problems learning the requirements, noting that the position and its multiple duties is unique within the system.

25. This witness was among those assigned to train Appellant, having performed similar oversight of several new appointees over the years. From her observation, Appellant's short-comings in the job were that he made no written notes and posed the same questions somewhat repeatedly. One or more supervisors sought her feedback as to his progress, although her opinion was never solicited nor did she supply it as to whether he was a good fit.

26. Under brief cross-examination, this witness ratified that no formal training record in the circumstance is generated or maintained while orientating an appointee. She did not recall there to be a specific number of days or hours of formal training, although Appellant was rotated among CTOs as time progressed to enable him to observe all facets of the job.

27. **Don Bottom** has served as Warden at NTC since mid-2012. Appellant was already in probationary promotion for the CTO position when he assumed command. Approximately two weeks after he came, supervisors Cochran and Thomas conferred with him and indicated that Appellant did not appear to be working out in the position. He confirmed that he recommended that they afford Appellant additional time for further orientation and ratified the testimony of the prior witnesses as to the sequence.

28. The Warden continued that no employee is ever penalized for voluntary service on additional shifts. NTC was consuming extensive overtime upon his arrival and he welcomed curtailment thereof by volunteers. He was not involved with their assignments, which were and are managed by the shift captains, from whom he receives daily reports. Neither Appellant's extra shift nor his age were ever factored into any treatment of his circumstances.

29. Under brief cross-examination, the witness further addressed the handling of Appellant's reversion, recalling his exact response to the request for a reason to be, "you failed to complete probation" without additional comment at the time. He was familiar with Appellant's grievance thereafter presented and of his assertion therein that he was not afforded sufficient training. He urged that this aspect was not within his purview other than to have instructed the supervisors to provide such and was informed that this was accomplished. He disavowed personal knowledge of the remainder of the recited claims raised in the grievance.

30. Under brief redirect examination, the Warden addressed the matter of Appellant's having applied for several positions both within and without the Agency. He explained that any person can apply for any position within state government, whereupon a structured screening process is then conducted to determine whether the applicant is qualified by education, training, and/or experience before interviews are authorized. He was uninformed as to Appellant's qualifications, but cited as an example that it would be very doubtful that a Correctional Officer with four years experience, standing alone, would be deemed qualified for a position such as Deputy Warden.

31. The sworn testimony was thereupon concluded and the appeal stood submitted for recommended order.

32. KRS 18A.005(27) defines "Promotional probation" as "... the period of service, consistent with the length of the initial probationary period, following the promotion of an employee with status which must be successfully completed in order for the employee to retain the position to which he has been promoted. If the employee is granted leave in excess of twenty (20) consecutive work days during this period, his promotional probation shall be extended for the same length of time as the granted leave to cover such absence."

33. KRS 18A.005(35) defines "Reversion" as "... either the returning of a status employee to his or her last position held in the classified service, if vacant, or the returning of a status employee to a vacant position in the same or similar job classification as his or her last position held in the classified service. Reversion occurs after a career employee is terminated other than for cause from the unclassified service or after a status employee fails to successfully complete promotional probation. Reversion after unsuccessful completion of promotional probation, or in the case of a career employee after termination from the unclassified service, may only be appealed to the Personnel Board under KRS 18A.095(12)."

34. KRS 18A.095(12) provides that: "Any classified employee may appeal to the board an action alleged to be based on discrimination due to race, color, religion, national origin, sex, disability, or age forty (40) and above."

35. 101 KAR 1:325, Section 2, is the regulation created to address the processing of a Promotional Probationary term. For purposes of completeness, the entire section is set out below:

- (1) An employee who satisfactorily completes the promotional probationary period shall be granted status in the position to which he has been promoted. Unless an employee receives notice prior to the end of his promotional probationary period that he has failed to satisfactorily complete the promotional probationary period and that he is being reverted, the employee shall be deemed to have served satisfactorily and shall acquire status in the position to which he has been promoted.
- (2) An employee who fails to satisfactorily complete a promotional probationary period shall be reverted to his former position or to a position in the same job classification as his former position. A written notification shall be sent to the employee to advise the employee of the effective date of reversion. A copy of the notice of reversion shall be forwarded to the Secretary of Personnel on the same date notice is delivered to the employee.
- (3) The promotional probationary period shall be computed from the effective date of promotion to the corresponding date in the appropriate month following promotion, as required by KRS 18A.005(27), except as provided in KRS 18A.111.
- (4) The promotional probationary period shall be the same length as the initial probationary period for each job classification.

FINDINGS OF FACT

1. At all times germane to this appeal Appellant, Robert D. Bray, was a classified employee with status, holding the permanent position of Correctional Officer at the Northpoint Training Center (NTC). For purposes of this appeal, he was a four-year employee and, in August 2012 he sought and received a promotion, having been selected from a list of eligible personnel, to the position of Classification and Treatment Officer (CTO). He commenced training in the position and service of the requisite probationary term while also volunteering for extra Correctional Officer shifts due to a staff shortage. CTO training is conducted almost entirely on-the-job, ordinarily served under seasoned coworkers already holding the same position, with overall supervision by upper management. No evidence is presented disputing that Appellant met the qualifications for the new position. He held the requisite college degree, earned while employed full-time.

2. Approximately thirty days into the probationary term, signs were increasingly clear to management that Appellant was not grasping the requirements for the job which, by all accounts, demands multi-tasking and compliance with deadlines. Appellant, however, seemed oblivious to the lack of progress, reflecting the impression that he viewed that he was progressing satisfactorily. In due course, despite an extended opportunity to show progress, after about ninety days he was reverted to his position of Correctional Officer.

3. Having initially received no direct explanation for the reversion, Appellant first filed a grievance detailing his dissatisfaction and requesting an explanation. Being still dissatisfied with the response, he took appeal to the Personnel Board, alleging demotion but no other grounds. In response thereto, the Agency challenged the appeal as without legal basis and in the course thereof Appellant raised the question of discrimination due to his age, namely that he is over 40 years of age and therefore his appeal should proceed.

4. The proof unequivocally demonstrates that Appellant was well in excess of 40 years of age when he was promoted and that he was in fact the oldest candidate who interviewed for the position to be filled at the time. The proof also indicates that most of the management personnel conducting the interviews were not aware of, and did not give any consideration to, Appellant's age either at the time of his promotion or at the time of reversion.

5. The Hearing Officer finds the testimony of all those testifying to be credible.

CONCLUSIONS OF LAW

1. Promotions of status employees are governed by statutory definition and the relevant regulations. The procedure is logically implemented to determine whether the candidate is suitable for the duties and responsibilities of the position sought and, consequently, requires a probationary term for screening purposes for the benefit of both the Agency and the employee. In the event that the duties or overall requirements do not match the abilities of the candidate, it is the inherent right of the Agency during the probationary term to revert the employee to his or her prior position. The action is not a penalization but, rather, a determination to be made in the best interests of all concerned. An individual so reverted enjoys no right of appeal of the action, nor does the statute or regulation demand that anyone be supplied with a detailed explanation.

2. The sole "right" of appeal of a reversion lies in the narrow area of possible discrimination of one or another form expressly set forth in the statute, including age. Appellant did not initially allege his age to be a factor, but has belatedly raised it to preserve his appeal. However, he has not established, by a preponderance of the evidence, that any member of management or that any coworker ever considered or was aware of his age at any time

throughout the term of his service in the CTO position. He has not, consequently, met his burden of proof and for that reason his appeal must fail.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **ROBERT D. BRAY VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS** (Appeal No. 2013-027) be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

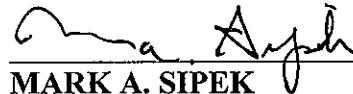
Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are 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).

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 John C. Ryan** this 18th day of December, 2013.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof mailed to:

Hon. Angela Cordery
Hon. John G. Prather, Jr.