

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2016-023

DAVID CARR

APPELLANT

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

TRANSPORTATION CABINET

APPELLEE

*** **

The Board, at its regular August 2017 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated June 22, 2017, Appellant's Exceptions and Request for Oral Argument, Appellee's Response to Exceptions, Oral Arguments 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 16th day of August, 2017.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. William Fogle
Hon. Kyle Stevie
Mr. J. R. Dobner

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2016-023**

DAVID CARR

APPELLANT

VS.

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

TRANSPORTATION CABINET

APPELLEE

** ** ** ** **

This matter came on for a pre-hearing conference on February 9, 2017, at 1:00 p.m., ET, at 28 Fountain Place, Frankfort, Kentucky, before Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, David Carr, was not present, however, he was represented the Hon. Kyle Stevie, appearing by telephone. The Appellee, Transportation Cabinet, was present and represented by the Hon. William Fogle.

The purpose of the pre-hearing conference was to discuss the status of the appeal.

BACKGROUND

1. The Appellant, David Carr, filed his appeal with the Personnel Board on February 10, 2016, alleging he was penalized. The Appellant stated that in 2009 another employee, Brian Cox, was hired in the same work county with the same title, Transportation Engineering Technologist II (TET II) and was paid more than the Appellant. Appellant states he was told that his salary would be raised to match Mr. Cox, however, approximately a week later he was told that this would not happen. At the pre-hearing conference, Appellant indicated he was told Frankfort decided not to do it because Mr. Cox may have had more experience.

2. At the pre-hearing conference, the Appellant stated he only became aware of 101 KAR 2:034 sometime during 2015 when he was given a raise when someone else was hired into the same county at the same job title, at this time a TET III. Appellant filed a grievance requesting the 2009 raise. His grievance was denied for being filed outside the allowed timeline.

3. As relief on his appeal, the Appellant seeks to have his pay raised to what it should have been had he been given the raise he was due in 2009, and to receive any back pay due.

4. Following the first pre-hearing conference, the Transportation Cabinet filed a Motion to Dismiss alleging that the appeal was not timely filed. Transportation argued Appellant knew that Mr. Cox was hired in 2009 at a higher salary and that the Appellant was considered for a salary increase and rejected. Transportation also noted that the Appellant stated he was not aware of 101 KAR 2:034 at the time and thus did not file his appeal. Transportation argued that ignorance of the law is not an exception to the one-year statute of limitations contained at KRS 18A.095(29).

5. The Appellant responded by stating in part as follows:

“Where the Appellant’s account differs from what is mentioned in the Motion is in the actions taken by the Appellant’s direct supervisor. The Appellant’s supervisor informed the Appellant that he would take Appellant’s case for a pay raise to ‘Frankfort’. The Appellant then approached his supervisor a couple of weeks later to ask about the status of his request. He was informed that ‘Frankfort’ has denied it. They stated that the new hire had higher qualifications. Further, the Appellant was informed that that was all that the supervisor could do.”

6. Appellant argues that, when his direct supervisor agreed to take Appellant’s “appeal” to Frankfort to request a pay raise, an agency relationship was created.

7. The Appellant also argues that the actions taken by his supervisor and the responses are missing from Appellant’s personnel files as required under KRS 18A.020 and KRS 18A.165. The Appellant argues that the supervisor may not have taken his appeal to Frankfort, however, the statute of limitations was tolled based on his supervisor telling him there was nothing further that could be done.

8. The Transportation Cabinet filed a reply stating that the Appellant implies that his supervisor was obligated to timely file a Personnel Board appeal on his behalf in 2009. Transportation argues that nothing in KRS Chapter 18A or the regulations would permit such an action or toll the statute of limitations.

9. In an Interim Order dated June 23, 2016, Hearing Officer Andy Crocker denied the Motion to Dismiss stating:

Appellee raises a persuasive argument that the Appellant’s appeal was untimely filed pursuant to KRS 18A.095(29). However, based on Appellant’s response as to when he became aware he had been penalized,

(that is after the 2015 salary adjustment) and also based on the undisputed contention that the Transportation Cabinet undertook some investigation to see whether he could receive a salary adjustment in 2009. The Hearing Officer out of an abundance of caution, will send this matter on for an evidentiary hearing.

10. Two additional pre-hearing conferences were held and the Transportation Cabinet filed a Motion for Summary Judgment.

11. In its Motion for Summary Judgment, the Transportation Cabinet argued again that the appeal is clearly barred by the applicable statute of limitations. The Transportation Cabinet attached email correspondence to its motion showing that the Appellant's supervisor, Robert Yeager, and the District 6 Administrative Coordinator, Candace Link, requested that a potential salary adjustment for the Appellant be considered. In reply, the Transportation Cabinet's Human Resource Department stated that the Appellant would not be eligible for a salary adjustment since he had far less experience than Cox and was ineligible under the provisions of 101 KAR 2:034. The Cabinet contended that, under KRS 18A.095(29), the Appellant had one year from the date of the penalization or from the date the employee should have reasonably known of the penalization. The Cabinet argues that the Appellant knew of the action in 2009 and the time for filing an appeal has long since run and the appeal should be dismissed.

12. The Appellant argued that this motion, like the previous Motion to Dismiss, must be overruled. The Appellant's response to the Motion for Summary Judgment included the following paragraph:

iii. Notification and Assurances given to Mr. Carr.

On September 9, 2009, the email was forwarded to John Eckler, Robert Hans, and Robert Yeager. Mr. Yeager, the Transportation Engineering Branch Manager then approached Mr. Carr and notified him. (Carr affidavit). According to the Appellant, Mr. Yeager instructed him to update his resume and application and that Mr. Yeager would "take it to Frankfort" for him. (Carr Appeal attached as Exhibit C). This assurance and effort appeared to be outside of Mr. Yeager's scope of duties as described by the headings "Characteristics of the Job," and "Examples of Duties or Responsibilities of the Job Classification."

<https://hr.personnel.ky.gov/Class%20Documents/20001430.pdf>. As a result, Mr. Carr updated his resume and application and presented them to Mr. Yeager to take his case. Mr. Carr interpreted Mr. Yeager's communications and efforts as signifying that he would act on Mr. Carr's behalf to the fullest that procedure would allow. (Carr affidavit). Mr. Yeager emailed Candace Link with a professional summary of Mr. Carr's

qualifications for the salary adjustment. (Email at 1 and 2). The email was forwarded to Jennifer Wright on October 9, 2009. Mr. Yeager's request was rejected the same day. (Email at 1). Mr. Yeager approached Mr. Carr a "couple of weeks" later to inform him that "Frankfort" rejected his raise due to having less experience than Mr. Cox. Mr. Carr thanked Mr. Yeager and then asked if that was all that "they could do." (Carr affidavit). Mr. Yeager stated that it was. (*Id.*).

13. The Appellant then discussed receiving a raise pursuant to 101 KAR 2:034 when another employee was hired in late 2015. The Appellant asked why he did not receive a similar raise when Mr. Cox was hired in 2009, the Appellant was told that that was not known, but he should have appealed. Following that statement, this appeal was filed.

14. The Appellant contends that he detrimentally relied upon the belief that his supervisor had redressed the compensation issues in a representative capacity and that if the reliance was justified, it tolled the applicable statute of limitations. The Motion for Summary Judgment includes an affidavit from Appellant showing that in 2009 his supervisor requested a raise following the hiring of Mr. Cox but that he learned it was rejected by Frankfort because Mr. Cox had more experience.

15. The Appellee, Transportation Cabinet, filed a reply contending that negligent representation does not apply in this case nor was the statute of limitations tolled.

FINDINGS OF FACT

1. In 2009 the Appellant, David Carr, was employed as a Transportation Engineering Technologist II. In 2009, the Transportation Cabinet hired Brian Cox as a TET II in the same county as the Appellant. At the request of the Appellant's supervisor, Robert Yeager, and Candice Link, a review of the Appellant's education and experience was conducted to compare the Appellant to Mr. Cox.

2. In 2009, the Transportation Cabinet determined that Mr. Cox had more experience than the Appellant and the Appellant was not eligible for a salary adjustment.

3. According to the Appellant's Affidavit, Mr. Yeager asked him to update his résumé and told the Appellant he would send it to Frankfort. The Appellant stated that Mr. Yeager also told him that he would get his salary up to what Mr. Cox was receiving. A couple of weeks later, Yeager told the Appellant Frankfort had rejected the pay raise because Mr. Cox had more experience.

4. The Appellant thanked Mr. Yeager for trying and asked, "Is that all we can do?" Mr. Yeager stated that was all they could do. The Appellant took no further action because he believed that was as far as he could take it.

5. In 2015, the Appellant received a pay raise when a new hire was brought in and he became aware of 101 KAR 2:034, Section 1. As a result, the Appellant filed a grievance regarding his 2009 request for a raise, which was denied by the Transportation Cabinet. When that failed he filed this appeal.

6. Based on the undisputed record, the Appellant became aware he was penalized in 2009 when his supervisor told him that he was not getting the raise because his experience was deemed to be less than that of Mr. Cox. There is no allegation that the Appellant ever requested whether or not he could file an appeal to the Personnel Board over this matter.

7. The Appellant filed his appeal with the Personnel Board on February 10, 2016.

CONCLUSIONS OF LAW

1. KRS 18A.095(29) reads as follows:

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.

2. The Appellant knew, or should have known, he had been penalized in 2009 when Mr. Yeager told him that he was not going to get a raise when Mr. Cox was hired. Pursuant to KRS 18A.095(29), the Appellant had one year from that date to file his appeal with the Personnel Board. This appeal was filed well beyond that timeframe and is untimely.

3. As an administrative agency, the Personnel Board has limited powers; because the appeal was filed outside of the time limitations set forth in KRS Chapter 18A, the Board lacks jurisdiction to grant any relief to the Appellant.

4. Counsel for the Appellant has argued that Mr. Yeager was the Appellant's "agent," that the Appellant detrimentally relied on statements made by Mr. Yeager, and that the statute of limitations should be tolled. The Hearing Officer is not convinced by any of the arguments. The Appellant had the right to appeal to the Personnel Board. Any actions taken

within the Transportation Cabinet were not a substitute for an appeal to the Personnel Board. See KRS 18A.005(24), KRS 18A.095(1) and 101 KAR 2:034(1).

5. In addition, Mr. Yeager was not the Appellant's "agent" he was merely acting as many supervisors do, seeing if they can get a raise for one of their employees. No action or inaction, or statement of Mr. Yeager extends the statute of limitations. KRS 18A.095(29).

6. There are no material facts in dispute with respect to the timeliness of this appeal and this appeal can be dismissed as untimely as a matter of law. 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 **DAVID CARR VS. TRANSPORTATION CABINET (APPEAL NO. 2016-023)** 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 Mark A. Sipek this 22nd day of June, 2017.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. William Fogle
Hon. Kyle Stevie
J. R. Dobner