

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2019-281

CHRISTOPHER DEAN

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 May 2021 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated April 20, 2021, 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 12th day of May, 2021.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Kristin Wehking
Christopher Dean
Rodney Moore

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This matter came on for a pre-hearing conference on February 19, 2020, at 11:00 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, Christopher Dean, 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. Kristin Wehking.

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

BACKGROUND

1. The Hearing Officer notes the Appellant filed his appeal with the Personnel Board on December 16, 2019. The Appellant alleged he was penalized through the Agency's denial of his request for a salary increase despite the fact that several others in the same job classification make considerably more than him. For example, the Appellant stated that he is employed as a Correctional Industries Production Coordinator, grade 13, and earns \$35,111.28 per year. He stated that another Correctional Industries Production Coordinator, Jerrod Milan, earns \$47,279.28 per year while also in a grade 13 position. The Appellant stated that his pay should be raised to the mid-point for a grade 13, which is \$54,687.36 per year. The Appellant works a 40-hour week.

2. The Appellant stated he also deserves additional compensation because he is currently performing the duties of an Office Coordinator as well as those for the Correctional Industries Production Coordinator. The Appellant previously held this position and after he was promoted to Correctional Industries Production Coordinator, he has not been replaced. He has been asked to perform the duties of both positions and said he has done so.

3. The parties discussed discovery; the Appellant stated he would like to see all of the PANs for all Correctional Industries Production Coordinators. Counsel for the Appellee requested that any such discovery request should be put in writing.

4. Following the pre-hearing conference, the Appellee filed a Motion to Dismiss. The Appellant filed a response, and the Appellee has filed a reply.

5. In its Motion to Dismiss, the Appellee argued that the Appellant failed to articulate a penalization due to any action by the Appellee. The Appellee argued the Appellant's salary was properly calculated and he was not entitled to an increase based on his comparison with other employees. The Appellee argued that the Appellant received a ten (10) percent increase when he was promoted from a grade 10 Office Coordinator to a grade 12 Correctional Industries Production Coordinator. He received another five (5) percent increase six months later when he completed promotional probation. He received an additional increase when the pay grade for Correctional Industries Production Coordinator was raised from grade 12 to grade 13.

6. The Appellee also argued the Appellant is not entitled to a salary comparison with Jerrod Milan. Milan was promoted from his position as a Correctional Lieutenant to Correctional Industries Production Coordinator. He received a five (5) percent increase on his promotion and five (5) percent more when he completed promotional probation. The Appellee argued that both employees were treated properly under 101 KAR 2:034. Milan had a much higher salary before the promotion, and it remains so afterwards.

7. The Appellee also asserted that the Appellant's claims seeking salary comparison with Jerrod Milan and for additional compensation for performing duties as a Correctional Industries Production Coordinator and Office Coordinator were barred by the statute of limitations.

8. The Appellee argued that uniformity of pay is not required in a merit system and the Personnel Board lacks jurisdiction to grant relief on the ground of fairness. The Appellee also argued that the merit system acknowledges that there will be differences in pay and that does not automatically constitute a penalization.

9. The Appellee argued the Appellant was not penalized by not receiving a five (5) percent raise also known as the “annual increment.” The Appellee argued that the legislature has suspended the application of KRS 18A.355(1) for the years in question.

10. In his response, the Appellant argued he was entitled to an additional five (5) percent increase after the pay grade for Correctional Industries Production Coordinator was increased from grade 12 to grade 13.

11. With respect to the salary comparison to Jerrod Milan, the Appellant argued that, pursuant to 101 KAR 2:034, Section 3, the appointing authority may adjust his salary up to midpoint if sufficient funds are available. The Appellant argued that sufficient funds were available based on the fact that Jerrod Milan made over \$12,000 per year more than he. He also stated that the statute of limitations did not bar this claim as he had no reason to inquire as to Milan’s rate of pay.

12. With respect to his claim for additional compensation for performing the job duties of two positions, the Appellant argued he should get five (5) years to file his claim based on the statute of limitations for filing claims based on a contract under KRS 413.120. He claimed there was a verbal contract that the Office Coordinator position would be filled. He alleged that because he is performing the duties of both positions, his level of responsibility and duties are more than other Correctional Industries Production Coordinators.

13. The Appellant argued that he is entitled to uniformity of pay under the merit system. The Appellant cited KRS 212.636. He argued that because the salary schedule was not updated between 2007 and 2019, this compression of salaries and the salaries of employees with seniority have not kept pace with new hires. He also argues that Correctional Officers are making over \$40,000 per year and, thus, he is entitled to an increase.

14. Lastly, the Appellant argued that if the General Assembly has suspended the operation of KRS 18A.355, there should be a statute of limitations on this suspension of statute.

15. In its reply, among other things, the Appellee pointed out that KRS 212.636 applies to the Board of Health and is not applicable in this appeal.

FINDINGS OF FACT

1. The Appellant, Christopher Dean, was a merit employee with status with the Justice and Public Safety Cabinet, Department of Corrections. On April 16, 2018, he was promoted from an Office Coordinator, grade 10, to a Correctional Industries Production Coordinator, grade 12. He received a ten (10) percent salary increase.

2. On November 1, 2018, at the completion of his probationary period, he received a five (5) percent increase.

3. On December 16, 2018, the Appellant received another five (5) percent increase when the pay grade for Correctional Industries Production Coordinators was changed from a grade 12 to a grade 13.

4. The Appellant was not serving a probationary period at the time of the pay grade change from grade 12 to grade 13, and he did not receive an increase six (6) months later.

5. Jerrod Milan was promoted from a Correctional Lieutenant, grade 11, to a Correctional Industries Production Coordinator, grade 12, on October 16, 2018.

6. For purposes of ruling on this motion, following his promotion to Correctional Industries Production Coordinator, the Hearing Officer finds that the Appellant performed the duties of his position as well as the duties of the Office Coordinator.

7. Likewise, for purposes of ruling on this motion, it is found that, at the time the Appellant filed his appeal on December 16, 2019, he was earning \$35,111.28 per year and Jerrod Milan was earning \$47,279.28 per year.

8. After finding out that Correctional security staff would be receiving a retention/locality raise, the Appellant learned of Milan's salary.

9. The Appellant did not receive a five (5) percent increment pursuant to KRS 18A.355(1), as the legislature has routinely suspended operation of this statute each biennium in the Budget Bill.

10. There are no material issues of fact and this appeal can be decided as a matter of law based on the Appellant's appeal form, the statements of the parties at the pre-hearing conference, the Appellee's Motion to Dismiss, the response to the motion to dismiss, the reply to the motion to dismiss, and attachments.

CONCLUSIONS OF LAW

1. A motion to dismiss for failure to state a claim should only be granted if it appears that Appellant would not be entitled to relief under any set of facts that could be proved in support of his 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). All of Appellant's factual allegations are accepted as true for purposes of ruling on this motion.

2. All of Appellant's salary increases from the Justice and Public Safety Cabinet, Department of Corrections, were in compliance with the provisions of 101 KAR 2:034. Appellant appropriately received a ten (10) percent increase when he received a two-grade promotion. He received his five (5) percent increase when he completed his promotional probation. He also received an additional five (5) percent increase when the pay grade for Correctional Industries Production Coordinator was increased from a grade 12 to a grade 13.

3. The Appellant was not entitled to a five (5) percent increase after he received the increase due to the grade change for his classification. The compensation regulations do not allow for such an increase and the Appellant was not serving any type of probationary period. 101 KAR 2:034.

4. Jerrod Milan received an appropriate five (5) percent increase when he was promoted to Correctional Industries Production Coordinator from Correctional Lieutenant. He also correctly received a five (5) percent increase when he completed his promotional probation. Milan received a much higher salary as a Correctional Industries Production Coordinator based

on his previous salary as a Correctional Lieutenant. All of his pay increases were in compliance with 101 KAR 2:034.

5. The Appellant was not entitled to a salary increase based on a comparison between his salary and that of Jerrod Milan's. The promotion of Jerrod Milan to Correctional Industries Production Coordinator did not require a review of the Appellant's salary as Milan's promotion was not a new appointment and they were not in the same work county.

6. There is no other provision in KRS Chapter 18A or the applicable administrative regulations that call for a salary increase based on a comparison with other employees. 101 KAR 2:034, Section 1, and Kathryn Parrish v. Office of the Attorney General, 2012 WL 3059632 (Ky. PB Appeal 2011-189).

7. The Hearing Officer does not conclude that the Appellant's claim was untimely. For purposes of ruling on the motion, the Hearing Officer concludes that the Appellant did not learn of Milan's salary until after September 13, 2019. It is impossible from this record to conclude when the Appellant should have known of this increase. Thus, there is no finding of untimeliness based on KRS 18A.095(29).

8. Although the Appellant performed the duties of an Office Coordinator after he was promoted to Correctional Industries Production Coordinator, these duties do not entitle him to any additional compensation. The Office Coordinator position is a grade 10 position, lower than the Appellant's position as a Correctional Industries Production Coordinator. Performing duties of a lower graded position would not entitle the Appellant to any additional compensation. It should be noted that the Appellant does not claim he is improperly classified and, since he is serving as a Correctional Industries Production Coordinator, grade 13, and performing duties associated with that position, he is not entitled to any additional compensation.

9. Because the Hearing Officer concludes that the Appellant has no claim for additional compensation, no conclusion is reached as to the timeliness of the Appellant's claim on this issue.

10. Uniformity of pay is not required in the merit system and the Appellee is correct that the Personnel Board lacks jurisdiction to grant relief on the grounds of fairness. The purpose of KRS Chapter 18A is to establish a system of personnel administration based on merit and fitness. KRS 18A.010 and Martin v. Corrections Cabinet of Commonwealth, 822 SW2d 858

(Ky. 1991). These principles are implemented through the provisions of KRS Chapter 18A and the regulations thereunder. There is no claim that an employee is entitled to a salary increase simply because someone else in the same classification makes a different salary. Employees reach the same classification by different routes and at different times. As long as their salary increases are based on the statute and regulations, they do not constitute penalizations. Further, 101 KAR 2:034 leaves a lot of discretion with the appointing authority at various times throughout an employee's history. Upon initial appointment, their salary can be anywhere from entry level to midpoint. Appointing authorities now have more discretion with setting salaries upon other employee actions, including promotions and reclassifications. The Hearing Officer concludes that the Appellee is correct that the Personnel Board lacks jurisdiction to resolve every dispute regarding salaries that may be perceived as being unfair.

11. The Appellant was not penalized by not receiving a five (5) percent raise consistent with KRS 18A.355(1) as the legislature has suspended the provisions of this statute. See Baker v. Fletcher, 204 SW3d. 589 (Ky. 2006).

12. The Hearing Officer concludes that the Appellant has not been penalized by any of the allegations in this case. KRS 18A.005(29).

13. The Hearing Officer concludes that the Appellant is not entitled to have his pay raised to a midpoint salary for his classification of \$54,687.36. The Appellant's subjective expectation of salary adjustments did not entitle him to relief before the Personnel Board. Bishop v. Wood, 426 U.S. 341 (1976) and Board of Regents v. Roth, 408 U.S. 564 (1972).

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **CHRISTOPHER DEAN V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2019-281)** 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 the Hearing Officer this 20th day of April, 2021.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Kristin Wehking
Christopher Dean
Hon. Rosemary Holbrook (Personnel Cabinet)