

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2017-185**

TIMOTHY GORDON

APPELLANT

VS.

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

**JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF CORRECTIONS**

AND

PERSONNEL CABINET

APPELLEES

** ** * * **

This matter came on for a pre-hearing conference on December 4, 2017, at 10:30 a.m., at 28 Fountain Place, 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, Timothy Gordon, 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. Angela Cordery. The Appellee Personnel Cabinet was present and represented by the Hon. Rosemary Holbrook.

The purposes of the pre-hearing conference were to discuss the status of the appeal and to schedule an evidentiary hearing, if appropriate.

The Appellees filed a Joint Motion to Dismiss, the Appellant filed a response, and the Appellees filed a joint reply. This matter now stands submitted to the Hearing Officer for a ruling on the Appellees' Motion to Dismiss.

BACKGROUND

1. The Appellant, Timothy Gordon, filed his appeal with the Personnel Board on September 14, 2017. The Appellant alleged he had been penalized by an "unbalanced rate of pay." The Appellant is a Corrections Training Instructor/Coordinator I (CTI/CI) and he alleges employees with less seniority and less experience in Corrections than he make a higher rate of pay although they have the same job classification. The Appellant stated that he filed a

grievance regarding this matter, however, he did not get a favorable response. The Appellant stated that another employee recently was promoted to CTI/CI who makes \$5,000 annually more than appellant. He stated that he and this employee followed the same career path, however, the other employee was not promoted until recently. As a result, he received salary increases that the Appellant did not. The Appellant requested that he be treated fairly with respect to salary and that he receive some type of increase.

2. An initial pre-hearing conference was held on November 1, 2017. At that pre-hearing conference, counsel for the Department of Corrections requested that the Personnel Cabinet be added as a party and followed this up by written motion. By order dated November 20, 2017, the Personnel Cabinet was made a party.

3. At the second pre-hearing conference, the parties discussed discovery and established a schedule governing the submission of dispositive motions.

4. On February 8, 2018, the Appellees filed a Joint Motion to Dismiss. The Appellees addressed the fact that the Appellant was alleging that there are seven CTI/CIs who make more money than he does. The Appellant was asserting that his salary should be raised to that of the highest paid CTI/CI in Oldham County. In their Joint Motion to Dismiss, the Appellees argued that the Appellant failed to articulate a penalization due to any action by the Appellees. They argued that the Appellant failed to specify a specific statute or regulation that the Cabinets had violated or that entitles him to an alleged salary increase. Thus, the Appellees argue that the Personnel Board is without jurisdiction to grant him any relief and he has failed to allege an appealable penalization. The Appellees argue, as long as the statutes and regulations are followed, uniformity of pay is not required in the merit system.

5. The Appellant filed a response on April 5, 2018. In his response, the Appellant argues that he has followed the same career path as some of the individuals with higher pay and the only difference is that he promoted out of security prior to security staff receiving raises. He points to a salary adjustment in 2015 that he did not receive because he was not in a security position at that time. He also points out that he currently works a security post every Wednesday. He stated he does the same job as the others who make more money than he does and he wishes to be fairly compensated for the work that he does. The Appellant acknowledged that the Appellees have shown that they do not have to give him any adjustment in salary. He states however, it "does not mean it is ethical not to." The Appellant states that it was a hard decision to file this appeal, and he thinks that employees get looked down upon who have filed appeals. He only requests that something be done to correct the unbalanced pay.

6. The Appellees filed a Joint Reply on April 13, 2018. In their reply, they point out the Appellant acknowledged he is not entitled to an adjustment in salary, but merely requests that the Board impose a fair result. The Appellees point out that the Board has, on numerous occasions, pointed out it does not have jurisdiction over every matter an employee may deem “unfair.”

7. KRS 18A.005(24) defines penalization as follows:

‘Penalization’ means demotion, dismissal, suspension, fines, and other disciplinary actions; involuntary transfers; salary adjustments; any action that increases or diminishes the level, rank, discretion, or responsibility of an employee without proper cause or authority, including a reclassification or reallocation to a lower grade or rate of pay; and the abridgment or denial of other rights granted to state employees;

8. KRS 18A.095(18)(a) reads as follows:

The board may deny a hearing to an employee who has failed to file an appeal within the time prescribed by this section; and to an unclassified employee who has failed to state the reasons for the appeal and the cause for which he has been dismissed. The board may deny any appeal after a preliminary hearing if it lacks jurisdiction to grant relief. The board shall notify the employee of its denial in writing and shall inform the employee of his right to appeal the denial under the provisions of KRS 18A.100.

9. KRS 13B.090(2) reads as follows:

All testimony shall be made under oath or affirmation. Any part of the evidence may be received in written form if doing so will expedite the hearing without substantial prejudice to the interests of any party. The hearing officer may make a recommended order in an administrative hearing submitted in written form if the hearing officer determines there are no genuine issues of material fact in dispute and judgment is appropriate as a matter of law.

FINDINGS OF FACT

1. The Appellant, Timothy Gordon, is a Corrections Training Instructor/Coordinator I (CTI/CI), with a monthly salary of \$3,203.20 and an annual salary of \$38,438.40.
2. The Appellant has identified six of the seven CTI/CIs in Oldham County who earn more than the Appellant, with the highest salary being \$3,945.36 per month.
3. The Appellant filed this appeal on September 14, 2017, requesting that his pay be raised to that of the highest CTI/CI in Oldham County or \$3,945.36 per month.
4. The Appellant does not allege that any statutes or regulations were violated in setting his pay. Likewise, the Appellant does not allege that any statutes or regulations were violated in setting the pay of the employees to whom he is comparing his salary. The Appellant acknowledges that the rate of pay is higher, based on the fact that they served in security at a time when there was a special entrance rate for security staff.
5. In his response to the Motion to Dismiss, the Appellant acknowledges that the Appellees have demonstrated that they “do not have to give me any adjustment in salary.” He believes the Justice and Public Safety Cabinet has an ethical obligation to afford him a salary increase and requests that he be treated fairly.
6. The Appellees, in their joint Motion to Dismiss, have established the salary history of the employees in question, including the Appellant. They have demonstrated that these salary actions follow the appropriate statutes and regulations. Most importantly, the Appellant acknowledges that these salaries have been set following the same statutes and regulations.
7. The Hearing Officer finds that there are no material facts in dispute and that this matter can be decided based on the statements made in the Appellant’s appeal form and attachments, the statements made at the pre-hearing conferences, as well as the Joint Motion to Dismiss, response, Joint Reply and attachments.

CONCLUSIONS OF LAW

1. Because the Appellant’s salary and that of the employees he is comparing himself to have been set in accordance with the provisions of KRS Chapter 18A and the provisions of 101 KAR 2:034, the Personnel Board lacks jurisdiction to grant the Appellant relief simply on the grounds of “fairness.”

2. As a result, the Appellant has not stated a penalization as that term is defined at KRS 18A.005(24).

3. This Appeal can be decided as a matter of law based on the facts which are not in dispute. The Personnel Board lacks jurisdiction to grant the Appellant any relief. KRS 18A.095(18)(a) and KRS 13B.090(2).

4. The Appellant had every right to file a grievance regarding this salary situation and to pursue an appeal to the Personnel Board. KRS 18A.095 and 101 KAR 1:375.

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 **TIMOTHY GORDON VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS, AND KENTUCKY PERSONNEL CABINET (APPEAL NO. 2017-185)** 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 12th day of March, 2019.

KENTUCKY PERSONNEL BOARD



**MARK A. SIPEK
EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:

Hon. Angela Cordery
Hon. Rosemary Holbrook
Mr. Timothy Gordon