

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-024

RICHARD A. GRAY

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

AND

PERSONNEL CABINET

APPELLEES

** **

The Board at its regular December 2015 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated November 17, 2015, 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 **SUSTAINED to the extent** therein.

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 15th day of December, 2015.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Edward Baylous
Hon. Rosemary Holbrook
Hon. Stephen Emery
Bobbie Underwood

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-024**

RICHARD A. GRAY

APPELLANT

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

**JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF CORRECTIONS,
J. MICHAEL BROWN, APPOINTING AUTHORITY**

AND

**PERSONNEL CABINET,
DINAH BEVINGTON, ACTING SECRETARY**

APPELLEES

** ** ** ** **

This matter came on for a pre-hearing conference on March 27, 2015, at 10:00 a.m., ET, at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Boyce A. Crocker, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Richard A. Gray, was present and was represented by the Hon. Stephen Emery. Appellant and his counsel both appeared by telephone. The Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Edward Baylous. The Appellee, Personnel Cabinet, was present and represented by the Hon. Dinah Bevington.

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

The Hearing Officer notes this appeal was filed with the Personnel Board on February 13, 2015. Appellant seeks, pursuant to KRS 196.076, to be given credit towards the "career ladder" for Probation and Parole Officers. The dispute between the parties (primarily between the Appellant and the Personnel Cabinet) is that the Appellant wishes to have pre-retirement service as a Probation and Parole Officer counted towards calculation of the career ladder, and the Personnel Cabinet takes the position that such pre-retirement credit does not count, and any accumulations must begin anew in the subsequent employment.

The parties agreed essentially there were no factual issues, and the matter could be briefed. The parties also discussed stipulations of fact. The parties agreed to a briefing schedule.

The parties timely filed briefs in this matter, along with stipulations of fact. At the conclusion of the briefing schedule, the parties also gave notice to the Hearing Officer that the parties have stipulated to the salient facts, and the matter is ready for a ruling without need for evidentiary hearing.

STIPLUATIONS OF FACT

On May 7, 1984, Richard A. Gray (hereinafter, "Rick") began working as a Corrections Officer I. He then transferred to Probation and Parole on November 16, 1998 as a Probation and Parole Officer I in Louisville, Kentucky. He was then promoted to a Corrections Unit Administrator I at the Kentucky Correctional Institute for Women on October 1, 2002. He eventually retired August 1, 2004 from the Department of Corrections from the same position, Corrections Administrator I. On December 29, 2005, he returned to work at Luther Lockett Correctional Complex as a Training Instructor Coordinator I. Rick continued working there until November 1, 2008, at which time he took a voluntary demotion to Probation and Parole Officer I in La Grange, Kentucky. He has continued in that position, to date. On January 1, 2010, he was granted a 5% salary improvement under KRS 196.076(2), which the Personnel Cabinet now asserts was in error. On January 5, 2015, Rick inquired of Assistant Supervisor, Tim Perkinson, "Can you check and see if my career ladder has been submitted or however that is supposed to take place." On January 6, 2015, Ashlee Skillern with the Department of Corrections notified Tim Perkinson that Rick's "career ladder was effective 1/1/2015. He should see the raise on the 30th check. Let me know if you need anything else." On January 27, 2015, Rick was informed by Chris Copenhaver, Probation and Parole Supervisor for District 12, that he would not be receiving the 10 year career ladder increment. On January 30, 2015, Diana Eades with the Department of Corrections responded to an inquiry from Rick. He had asked "who it was that determined that he was not eligible for the 10 year career ladder?" Ms. Eades said, "The action was sent to [sic] Personnel Cabinet. Upon reviewing it their legal department determined that once a returning retiree comes back into the Probation & Parole Officer title, months of service prior to returning shall not be included." Rick then prepared and submitted a grievance on January 31, 2015, stating:

As of January 1, 2015, I had 120 months of past service as a probation and parole officer. All of my service was with the Kentucky Department of Corrections. Pursuant to KRS 196.076, my salary should have been increased by 10% effective January 1, 2015. On January 6, 2015, Ashlee Skillern (DOC employee) notified me by email that the increase was "effective" January 1, 2015, and that I would "see the raise" on my January 30th paycheck. Then, on January 27, 2015, Chris Copenhaver (DOC

employee) told me that the salary increase had not been approved. On January 30, 2015, Diana Eads (DOC employee) notified me by email that the Personnel Cabinet's legal department determined that pre-retirement service, of which I had about 48 months, does not apply.

After being denied at the first level, and within the 30 day deadline for appeal, Rick did timely file an appeal form to the Personnel Cabinet, which was mailed on February 11, 2015.

At a prehearing conference conducted on March 27, 2015, counsel for Rick Gray and counsel for the Office of Legal Services with the Kentucky Personnel Board agreed to prepare this stipulation of facts.

BACKGROUND

1. Counsel for the Appellant presents his argument as follows: "When an employee works for Probation and Parole from November 16, 1998, until October 1, 2002, as a Probation and Parole Officer, and then leave the Department of Corrections, and then returns to work as a Probation and Parole Officer on November 1, 2008, how is his career ladder pay promotion service time to be calculated as of January 1, 2015 according to KRS 196.076?"

2. Counsel notes that KRS 196.076 is the controlling statute, and argues it must be given its plain and ordinary meaning, and not read into it something that is not there.

3. KRS 196.076 states:

196.076 Probation and parole officer salary improvement program.

The department shall establish a probation and parole officer salary improvement program consisting of the following elements:

(1) Probation and parole officer I with less than five (5) years of service shall receive no salary improvement.

(2) Probation and parole officer II with five (5) but less than ten (10) years of service shall receive a salary improvement of five percent (5%).

(3) Probation and parole officer III with ten (10) but less than fifteen (15) years of service shall receive a salary improvement of ten percent (10%).

(4) Probation and parole officer IV with fifteen (15) or more years of service shall receive a salary improvement of

ten percent (10%) or two thousand five hundred dollars (\$2,500), whichever is less.

(5) Salary improvements under this section shall be in addition to all other increments or other salary increases authorized by law but shall only be paid if the probation and parole officer has attained a favorable work-performance rating for four (4) of the previous five (5) years.

(6) The service requirement shall be satisfied only by service as a Kentucky probation and parole officer.

(7) At the time of implementation, officers who already meet the performance rating and service time requirements shall be awarded the respective position title and salary improvement. Officers who have not yet met those requirements shall be awarded the position title and salary improvements only upon meeting the requirements.

(8) Probation and parole seniors, coordinators, and supervisors shall be included in the appropriate progression series level for salary improvement based upon the work performance rating and respective service time requirement attained. However, the progression series titles shall not apply to probation and parole seniors, coordinators and supervisors.

(9) The department shall make the administrative regulations necessary for the administration of this section.

4. Counsel argues that no Kentucky Administrative Regulation (KAR) has been promulgated by the Department of Corrections that would give other guidance as to the interpretation of KRS 196.076. Counsel contends that the Appellant is entitled to the 10 percent "salary improvement" (also known as "career ladder") as envisioned by KRS 196.076(3). Counsel calculates that Appellant would have been due to receive this 10 percent salary improvement on January 1, 2015, that being when he would have achieved 10 years of service. Counsel argues that the Personnel Cabinet had no right to have denied Appellant's 10 percent career ladder salary improvement increase in his pay as a Probation and Parole Officer, and as relief, seeks to have the 10 percent salary improvement awarded to him with back pay from when it should have begun on January 1, 2015.

5. The Appellee, Personnel Cabinet, filed a timely brief stating its position. As was noted in the Stipulations of Fact (reprinted above), Appellant had approximately 46 months as a Probation and Parole Officer prior to his retirement, and beginning his second term of employment as a Probation and Parole Officer on November 1, 2008. Counsel for the Personnel

Cabinet succinctly summarizes the issue as “the only issue before the Personnel Board is whether Mr. Gray’s pre-retirement service should count towards the calculation of his years of service for purposes of KRS 196.076.”

6. Counsel for the Personnel Cabinet counters Appellant’s argument that pre-retirement service should count towards the career ladder calculation by citing the regulation 101 KAR 2:102, Section 1(1)(f), which states, in pertinent part: “[a]n employee, who is retired from a position covered by a state retirement system, is receiving benefits and returns to state service, shall not receive credit for months of service prior to retirement.” Counsel also cites another administrative regulation which deals with employees who are known as “returning retirees” who re-enter the classified service, and they should be appointed in accordance with the provisions for new appointments. Counsel continues by arguing that the Personnel Board should grant deference to the Personnel Cabinet’s interpretation of KRS 196.076, citing, most importantly, the *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), Supreme Court decision. Counsel argues the Personnel Cabinet’s interpretation that retirees re-entering employment with the Commonwealth be treated as new appointees is a reasonable one, and they should not be given credit for prior service.

7. The Appellant filed a reply brief in which he notes that the regulations cited by Counsel for the Personnel Cabinet deal with how to calculate a returning retiree’s leave balances upon his beginning another term of employment with the Commonwealth, and also deals with how to calculate an employee’s salary upon initially coming to work with the Commonwealth, if the employee is a returning retiree. Counsel notes that these regulations do not, in any way, address KRS 196.076.

8. Finally, Counsel for the Personnel Cabinet filed a surreply brief and states that the real issue is not as Appellant states it, but is “...that the General Assembly has been silent in statute with regard to how retirement impacts service time computation when determining a post-retirement employee’s compensation.” Counsel states that instead of adding language that would address this, the legislature allowed the Personnel Cabinet, through its Secretary and through the promulgation of regulations, to address such matters. Counsel for the Personnel Cabinet contends that if the statute is silent or ambiguous with respect to a specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute. This cites the case of *Commonwealth, ex rel. Stumbo v. Kentucky Public Service Com’n*, 243 S.W.3d 374, (Ky. App. 2007).

9. Counsel states KRS Chapter 18A and KRS Chapter 196 are both silent as to the effect retirement has on post-retirement employee’s time in service calculation, and that, given that gap, the Personnel Cabinet’s regulations cited in its primary brief (i.e. that pre-retirement service should not be used to calculate matters related to compensation) should prevail. Counsel contends calculating pre-retirement service such that it would allow Appellant to receive the career ladder using that pre-retirement service would lead to an absurd result. Perhaps interestingly, Counsel for the Appellee then posits two hypotheticals (which Appellant, in his Notice indicating the matter is ready for submission, disavows) attempting to show that allowing such pre-retirement service to be calculated for Appellant’s benefit herein would be unfair and manifestly unjust.

10. The Hearing Officer notes for the record that the Appellee, Department of Corrections, did not participate in the briefing process.

11. 101 KAR 2:102, Section 1(1)(f) states:

Section 1. Annual Leave.

(1) Accrual of annual leave.

(f) An employee, who has retired from a position covered by a state retirement system, is receiving retirement benefits, and returns to state service, shall not receive credit for months of service prior to retirement.

12. 101 KAR 2:034, Section 2 states:

Section 2. Reentrance to Classified Service.

(1) Returning retirees. An employee who was formerly employed under KRS Chapter 18A and who is appointed to a position covered by the provisions of KRS Chapter 18A while receiving retirement payments through the Kentucky Retirement Systems or Kentucky Teachers Retirement System shall be appointed in accordance with the provisions for new appointments.

(2) Other reentering employees.

(a) Former classified employees. An appointing authority shall set the salary of a former classified employee, other than a returning retiree, who is being reemployed, reinstated, or probationarily appointed in one (1) of the following ways:

1. In accordance with the standards used for making new appointments; or

2. Up to the same salary as that paid at the time of separation from the classified service, if that salary does not exceed the midpoint salary plus the difference, in dollars, between the entry level salary and the midpoint salary.

(b) Former unclassified employees with prior classified service. An appointing authority shall set the salary of a former classified employee who moved to the unclassified

service and who is reinstated, reemployed or probationarily appointed to a position in the classified service in one (1) of the following ways:

1. In accordance with the standards for making new appointments;

2. Up to the same salary as that paid at the time of separation from the classified service, if that salary does not exceed the midpoint salary plus the difference, in dollars, between the entry level salary and the midpoint salary;

3. At a salary that is the same as the salary the employee last received in the classified service with adjustments for increases that would have been received if the employee had remained in the classified service prior to resignation if the salary does not exceed the midpoint salary plus the difference, in dollars, between the entry level salary and the midpoint salary; or

4. At a salary up to five (5) percent above the grade entry level wage for each year of service in the KRS Chapter 18A system, if the salary does not exceed the midpoint salary plus the difference, in dollars, between the entry level salary and the midpoint salary.

(c) Former unclassified employees with no previous classified service. An appointing authority shall set the salary of a former unclassified employee with no previous classified service, who is probationarily appointed or reemployed, in one of the following ways:

1. In accordance with the standards for making new appointments; or

2. At five (5) percent above the minimum salary for each year of service in the unclassified service, if the salary does not exceed the midpoint salary plus the difference, in dollars, between the entry level salary and the midpoint salary.

(d) Laid off employees. A former employee, separated from the classified service by layoff and reinstated or

reemployed in the same or similar job classification within five (5) years from the date of layoff, may receive the salary they were receiving at the time of layoff, even if the salary is above the maximum of the pay grade.

(3) Probationary increments upon reentrance to state service.

(a) A former employee who is probationarily appointed at a salary below the midpoint of the pay grade shall receive a probationary increment upon successful completion of the probationary period.

(b) A former employee who is probationarily appointed at a salary that equals or exceeds the midpoint of the pay grade may, at the discretion of the appointing authority, receive a probationary increment at the time of successful completion of the probationary period. If the employee is not granted a probationary increment at the time of completion of the probationary period, an increment shall be awarded at the beginning of the month following completion of twelve (12) months of service from the date of appointment.

FINDINGS OF FACT

1. The Hearing Officer adopts the stipulated facts made between the parties as reprinted above.

2. The Hearing Officer finds that the Appellant did, as noted in the stipulated facts, on or about January 1, 2015, possess the 10 years (or 120 months) of service as a Probation and Parole Officer which would have otherwise entitled him to consideration for an awarding of the 10 percent salary adjustment as called for in KRS 196.076(3).

3. The Hearing Officer finds that but for Appellant having retired, that his service from November 16, 1998, until October 1, 2002, as a Probation and Parole Officer would have been counted in the time under KRS 196.076 required for awarding of the 10 percent salary adjustment. Thus, the Hearing Officer finds that the only factor in denying Appellant this 10 percent salary increase which he otherwise would have been entitled to on January 1, 2015, was the intervening retirement that occurred between periods of service as a Probation and Parole Officer: October 1, 2002 and November 1, 2008.

4. The Hearing Officer finds that Appellant's pre-retirement service as a Probation and Parole Officer should be considered in the calculation of when he would be eligible to receive the 10 percent salary increase per KRS 196.076(3).

CONCLUSIONS OF LAW

1. The Hearing Officer concludes as a matter of law that the plain reading of KRS 196.076 does not differentiate between service as a Probation and Parole Officer that occurred pre-retirement or post-retirement; it only references the service.

2. The Hearing Officer concludes as a matter of law that the Appellee Personnel Cabinet's denial of Appellant's pre-retirement service as a Probation and Parole Officer for purposes of calculating whether or not he is entitled to the salary increase per KRS 196.076(3) amounts to a penalization, and has no basis in law.

3. The Hearing Officer agrees with Counsel for the Personnel Cabinet that normally the Personnel Cabinet should be granted a *Chevron*-type deference when considering its interpretation and enforcement of its own properly promulgated regulations. That, however, does not help the Personnel Cabinet here, as the regulation cited by Counsel for the Personnel Cabinet relates to calculating leave balances for a returning retiree, and also calculating what salary may be offered a returning retiree, both instances for returning retirees re-entering the classified service under KRS Chapter 18A.

4. The Hearing Officer concludes that no manifest injustice or absurd result will occur by merely including in its calculation Appellant's pre-retirement service as a Probation and Parole Officer to determine whether he is entitled to the 10 percent salary increase per KRS 196.076. The hypotheticals proposed by Counsel for the Appellee in her surreply brief also do not aid the Appellee's argument that allowing this Appellant's pre-retirement service time to be calculated for purposes of KRS 196.076 would result in a manifest injustice. The statute says what it says; it does not make reference to pre- or post-retirement service, only to service as a Probation and Parole Officer as being considered in the calculations of whether an employee meeting those time and service requirements is entitled to the salary increase.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **RICHARD A. GRAY V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS, AND PERSONNEL CABINET, (APPEAL NO. 2015-024)** be **SUSTAINED to the extent** that the Appellees properly give consideration to Appellant's pre-retirement service as a Probation and Parole Officer, which occurred (as stated in the Stipulated Facts) from November 16, 1998, until October 1, 2002, for purposes of calculating whether Appellant is entitled to the 10 percent salary increase per KRS 196.076(3). Should such consideration of Appellant's pre-retirement Probation and Parole service indicate he is entitled to such 10 percent pay increase, such should be retroactive to the date it would have initially been effective, that is, on or about January 1, 2015. The Appellant should also receive credit for any leave time spent attending pre-hearing conferences at the Personnel Board, any other benefits due him, and otherwise be made whole. [KRS 18A.095(26), KRS 18A.105 and 200 KAR 12:030.]

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).

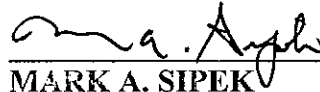
Any document filed with the Personnel Board shall be served on the opposing party.

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 Boyce A. Crocker this 17th day of November, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Edward Baylous
Hon. Rose Holbrook
Hon. Stephen Emery