

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-263**

DAVE JORDAN

APPELLANT

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

**TOURISM, ARTS AND HERITAGE CABINET,
DEPARTMENT OF PARKS**

APPELLEE

*** **

The Board, at its regular June 2016 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated May 6, 2016, 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 17th day of June, 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. William H. Adams
Mr. Dave Jordan

**COMMONWEALTH OF KENTUCKY
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VS.

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APPELLEE

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This matter came on for an evidentiary hearing on February 17, 2016, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Colleen Beach, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Dave Jordan, was present at the evidentiary hearing and was not represented by legal counsel. The Appellee, Tourism, Arts and Heritage Cabinet, Department of Parks, was present and represented by the Hon. William H. Adams.

BACKGROUND

1. The Appellant, Dave Jordan, is currently the Park Manager of General Butler State Resort Park. He began his tenure with the Department of Parks as the Park Manager of Cumberland Falls State Resort Park. His past work experience includes 30 years as a hotel manager, three years as Director of Hotel Operations at Calloway Gardens, and three years as General Manager of the Highland Country Club in Georgia.

2. Sometime in the summer of 2012, Commissioner Elaine Walker told Appellant what a good job he was doing at Cumberland and asked him if he had ever seen the house at General Butler State Resort Park. She told him that the house at General Butler was the nicest in the park system. Appellant answered that he had "zero interest" in transferring to General Butler.

3. Appellant stated he was aware that General Butler had multiple Interim Directors and had gone through many Park Managers. Appellant described the park where he was located, Cumberland Falls, as the "most visited park in the system. It has waterfalls, hiking trails and is in a rural community. The employees want to be there." Appellant characterized General Butler, in comparison, as having a "bad reputation in the community, and a serious morale problem among the staff." Both parks are designated Class II, and are of similar size.

4. In late 2012, Commissioner Walker visited Cumberland Falls and brought up General Butler to Appellant again. He declined to consider moving, but offered to "babysit" it for a few months. Director of Resorts, Monica Conrad, and David Thacker, Assistant Director of Resorts, called him the next day, and stated they had determined his offer to oversee General Butler on a temporary basis was not a good idea.

5. In August 2013, Commissioner Walker asked Appellant to visit General Butler in person. She characterized his visit as "a personal favor to her." Appellant answered that he would think about it. The next day, Edwards and Thacker called Appellant and told him to go look at it. Appellant acquiesced and visited the property. The next day, he told Edwards and Thacker he did not want to transfer there.

6. Four days later, Edwards and Thacker asked Appellant to go look at the house at General Butler (where the Park Manager lives). Appellant did so, and then informed Edwards and Thacker that the house was not suitable – the basement was not finished, and the kitchen was too dated. Later Thacker told Appellant, "We will renovate it for you."

7. Appellant asked for more money if he transferred. Thacker told him, "I have been told to do whatever it takes to get you there, but I cannot offer more money." Appellant testified Thacker stated instead that he would allow Appellant to "take two Block 50s." Appellant explained that when a state employee's accrued compensatory time reaches 240 hours, the agency (by regulation) must pay the employee for 50 hours of it. In Appellant's opinion, Thacker offering him two Block 50s was improper. He characterized the offer as "illegal," based on the email he received on October 23, 2015, from Kevin Main, an Assistant Director of Resort Parks. The email from Main stated "At the end of pay period 10/15 you were 1 ½ hours away from a Block 50. You need to take additional time off to reduce your comp time down to keep you from getting a Block 50. Please do so immediately. Thanks." (Appellant's Exhibit 1.)

8. On October 1, 2013, Appellant made the lateral transfer to General Butler State Resort Park. The agency paid for his rental van to move his household goods. Once he got there, he addressed the park's staffing issues, including "getting rid of a 'terrible' employee within the first 60 days."

9. Appellant stated he was doing "fine" in his new position until August 2015, when he learned that Ryan Stallons received a \$10,000 pay increase for his lateral transfer to another park. Appellant stated that upset him because he had never wanted to transfer to General Butler in the first place.

10. On cross-examination, Appellant admitted that he voluntarily made the transfer to General Butler. A copy of the "Voluntary Transfer Agreement Form," signed by Appellant on October 13, 2013, was introduced into the record as Appellee's Exhibit 1. According to the

form, Appellant's class title (Resort Park Manager II), as well as his pay grade (17) and salary (\$4,812.52), remained the same after his transfer to General Butler.

11. Appellant testified that beside the Voluntary Transfer Agreement Form, there were no other written agreements regarding his lateral transfer.

12. When asked if he "accepted the transfer" Appellant answered, "Yes, trusting that Parks' employees were telling me the truth that I could not have an increase in pay."

13. When asked at what point he decided that he was no longer happy with the transfer, Appellant responded, "I was never unhappy with the transfer. I was just unhappy I did not get more money."

14. At the end of his testimony, Appellant rested his case. The Appellee, Department of Parks, made a Motion for Directed Verdict, which the Hearing Officer **OVERRULED**.

15. The Appellee called **Barbara Atwood** as its first witness. Atwood was Acting Deputy Commissioner in October 2013, when Appellant laterally transferred to General Butler. Atwood's job responsibility at that time was to assist the Commissioner in managing the operations of the Department of Parks, including personnel issues.

16. Atwood was asked when she became aware of Appellant's transfer. She stated that she was aware there had been a series of Parks Managers at General Butler who had not worked out, and learned sometime in late 2013 that Appellant had transferred into the Park Manager position there.

17. Atwood stated that she was not directly involved in Appellant's transfer, but she was aware that Appellant had filed a grievance, asking to resign and reinstate into the position at General Butler, in order to receive an increase in salary.

18. Atwood was asked if there was any way Appellant could do that "retroactively." She answered that she consulted with Laurie Googe, Assistant Director for Human Resources, who said that it was not possible.

19. Atwood explained it was her understanding that an employee can resign and then get reinstated into the same job classification if there has been "some material change in their duties."

20. Atwood was asked what additional duties were given to Ryan Stallons that justified his "resign and reinstatement." She responded that he was a Business Manager at Kentucky Dam Village and was transferred to Lake Barkley. At Lake Barkley, he also assumed the duties of Front Desk Operations Supervisor.

21. On cross-examination, Atwood was asked if the Business Manager is normally responsible for front desk operations anyway. She responded that she was not sure.

22. **David Thacker** is the Assistant Director of Resort Parks for the Department of Parks, a position he has held for the past six years. He is Appellant's first-line supervisor.

23. Thacker stated he was involved with Appellant's transfer to General Butler. When the position first became open, he and Monica Conrad approached Appellant, but he was not interested. They hired another applicant, who did not work out. Again, they asked Appellant again if he would consider the move. "He looked at the park and the housing, and subsequently he decided to make the lateral transfer."

24. Thacker directed maintenance to make some improvements to the house at General Butler for Appellant: new kitchen cabinets were installed, and carpeting replaced. Thacker characterized these changes as "not unusual. It's done for every Park Manager."

25. Thacker was asked if Appellant ever said he did not want to re-locate to General Butler. Thacker answered, "I think there were some reservations. He liked Cumberland Falls. But he never said he did not want to go."

26. Thacker denied he would have forced Appellant to go to General Butler by involuntarily transferring him.

27. Thacker was asked if "resign and reinstate" was an option for Appellant to get him more money when he transferred. Thacker answered that someone told him – probably Laurie Googe – that they were not allowed to do that.

28. Thacker had no involvement in Ryan Stallons' transfer from Kentucky Dam Village to Lake Barkley.

29. On cross-examination, Thacker denied he ever told Appellant he "had been told to do whatever it takes" to get Appellant to voluntarily transfer to General Butler.

30. **Laurie Googe** is Assistant Director for Human Resources for the Department of Parks. She is the senior-most employee in Human Resources, and serves as Appointing Authority for all types of personnel actions.

31. Googe became involved in Appellant's transfer when Monica Conrad informed her that Appellant would be making a lateral transfer – same grade, same title – to General Butler. Googe could not remember anyone asking if they could get Appellant more money. Googe added, "On a lateral transfer there is no increase in pay."

32. Googe was asked to explain how an employee is resigned and reinstated. Googe stated, "It is a unique situation we have done a minimal number of times. It is within regulation. It is not a right of an employee, but a privilege. The Cabinet Secretary makes the recommendation, and sometimes it has to be approved by the Governor's office." Googe added that in 2013, when Appellant was laterally transferred, "R and Rs (resign and reinstatements) were not to be done. Stallons' 'R and R' took place in 2015." Googe testified that resign and reinstatements are used when "it is in the best interest of the Department of Parks, and when an agency head wants to increase a particular employee's salary."

33. In the case of Ryan Stallons, Googe testified that Stallons had been a 15-year employee. Because he started so long ago, his salary was considerably lower than some of the other Business Managers. When he transferred to Lake Barkley, there "was an opportunity to bring his salary up." Googe added that at the time of Stallons' transfer, there was no leadership at Lake Barkley – no Park Manager or Business Manager.

34. At the time of Appellant's grievance, he had already been at General Butler State Resort Park for two years. "We could have done an R and R," Googe stated, "but that would have been circumventing the spirit of the Governor's Executive Order."

35. The Governor's Executive Order, dated January 4, 2008, directs all program cabinets and agencies of the Commonwealth of Kentucky to "reduce the state workforce through attrition...All personnel actions must be justified and approved by the Secretary of the Governor's Executive Cabinet prior to submission to the Personnel Cabinet for processing. This includes approval of actions that increase costs for existing personnel." (Appellee's Exhibit 2.)

36. On cross-examination, Googe stated that management never approached her regarding Appellant's transfer or seeking to find a way to give him a salary increase. In the case of Stallons, management came to her and said, "We want to give this employee more money – we want to do something different." Googe added that Lake Barkley is currently classified as a Resort Park III, but could probably be reclassified to a Resort Park IV. It is the largest resort park, and a very challenging park. As for Stallons' responsibilities, he was going to be the Business Manager and was tasked with the "temporary oversight of the front desk."

37. Googe concluded, "To do an R and R, management has to make a recommendation and write a justification for this action. Then I process it. If they are not willing to do that, it will not happen." In Appellant's case, management did not initiate an "R and R" for him.

38. On re-direct, Googe stated that the process of resign and reinstatement can get an employee into a new position quickly. "If someone had not been transferred to Lake Barkley, there would have been a vacuum of leadership there."

39. KRS 18A.095(1) states:

A classified employee with status shall not be dismissed, demoted, suspended, or otherwise penalized except for cause.

40. KRS 18A.005(24) states:

"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;

41. 101 KAR 2:034, Section 1, states:

Section 1. New Appointments.

(1) An appointing authority shall appoint a new employee at a salary not to exceed the midpoint of the pay grade.

(2) The appointing authority shall adjust to that salary an employee who is earning less than the new appointee's salary, if the appointing authority determines that the incumbent employee:

(a) Is in the same job classification;

(b) Is in the same work county; and

(c) Has a similar combination of education and experience relating to the relevant job class specification.

FINDINGS OF FACT

1. Appellant had been employed as a Resort Park Manager II at Cumberland Falls State Resort Park. On October 1, 2013, Appellant voluntarily transferred to the Resort Park Manager II position at General Butler State Resort Park.

2. A copy of the "Voluntary Transfer Agreement Form" Appellant signed on October 13, 2013, was introduced into the record as Appellee's Exhibit 1. According to the form, Appellant's Class title (Resort Park Manager II), as well as his grade (17) and salary

(\$4,812.52 per month), remained the same after the transfer. By Appellant's own admission, there were no other written agreements regarding his transfer.

3. At the evidentiary hearing, Appellant's description of why he agreed to voluntarily transfer was not entirely clear. He testified that Commissioner Elaine Walker and David Thacker, Assistant Director of Resorts, repeatedly entreated him to transfer to General Butler, which he repeatedly declined. According to Appellant, what seemed to finally convince him to make the move was Thacker's promise that the house there would be renovated, and Appellant's assertion that he had been promised "two Block 50s." By Appellant's own admission, he was never promised an increase in salary.

4. In his "Written Closing," Appellant explained his decision to voluntary transfer this way: "I was requested on numerous occasions to go to General Butler State Resort Park. I turned them down three times before I feared I might be jeopardizing my job if I did not transfer."

5. David Thacker testified that Appellant decided to transfer after he had seen the park and the housing there. Thacker described Appellant's feelings regarding the move as "having some reservations...But he never said he did not want to go." Thacker denied that he would have involuntarily transferred Appellant to General Butler if he had not agreed to move.

6. Appellant stated he was doing "fine" in his position at General Butler until he learned that Ryan Stallons received a \$10,000 pay increase when he laterally transferred to another park.

7. When asked if he had "accepted" the transfer, Appellant answered, "Yes, trusting that Park employees were telling me the truth that I could have no increase in pay." As for not being happy with the transfer, Appellant clarified that he was "never unhappy with the transfer. I was just unhappy I did not get more money."

8. Barbara Atwood, who was Acting Deputy Commissioner in the fall of 2013, was not directly involved in Appellant's transfer, but was aware that he had requested to resign and reinstate back into his Park Manager position in hopes of increasing his salary. (Appellant made the request after learning that Stallons had been allowed to do this.) Atwood consulted Laurie Googe, Assistant Director of Human Resources, who informed her that this personnel action could not be done retroactively.

9. Ryan Stallons, Business Manager at Kentucky Dam Village, was allowed to make a lateral transfer to Lake Barkley via a personnel action described as a "resign and reinstate." This move resulted in a salary adjustment to a midpoint level for Stallons, pursuant to 101 KAR 2:304, Section 1. Stallons' transfer occurred two years after Appellant transferred to General Butler State Resort Park.

10. The Hearing Officer finds that Appellant asked for an increase in salary upon his transfer to General Butler State Resort Park, but, David Thacker, declined to authorize such. Thacker did agree to make certain renovations to the Park Manager's house, in accordance with Appellant's request.

11. The Hearing Officer finds that Appellant made no further inquiry, believing the matter closed, and ultimately agreed to transfer at his current pay grade and salary. While Appellant certainly had reservations about making the transfer, no evidence was presented at the evidentiary hearing that he was threatened with any kind of negative consequence if he failed to do so. Appellant stated he felt his job would be jeopardized if he didn't transfer, but nothing in the record indicated that this feeling was grounded in fact.

12. The Hearing Officer finds credible Thacker's testimony that he did not tell Appellant he had been instructed to do "whatever it took" to get Appellant to agree to the transfer.

13. The Hearing Officer finds that though the agency apparently allowed Stallons to resign and reappoint to the Business Manager position at Lake Barkley at the midpoint salary range, such action was not required of Appellant. The Hearing Officer finds that the decision to allow one employee to resign and reinstate at a higher salary and to not make the offer to allow another employee to do so is at the agency's discretion.

CONCLUSIONS OF LAW

1. The Hearing Officer concludes as a matter of law that Appellant did not prove a penalization.
2. The Hearing Officer concludes that the appeal should be dismissed.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **DAVE JORDAN V. TOURISM, ARTS AND HERITAGE CABINET, DEPARTMENT OF PARKS, (APPEAL NO. 2015-263)** 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 Hearing Officer Colleen Beach this 16th day of May, 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. William H. Adams
Dave Jordan