

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2018-229

KEVIN LEWIS

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 May 2019 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated April 9, 2019, 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 7th day of May, 2019.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:
Hon. Scotty McFarlan
Hon. Catherine Stevens
Mr. Kevin Lewis
Mr. Rodney Moore

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This matter came on for a pre-hearing conference on January 7, 2019, 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, Kevin Lewis, was present by telephone and was not represented by legal counsel. The Appellee Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Scotty McFarlan. The Appellee Kentucky Personnel Cabinet was present and represented by the Hon. Catherine Stevens.

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 Appellant, Kevin Lewis, filed his appeal with the Personnel Board on November 13, 2018. The Appellant alleged he was penalized by being denied a promotional opportunity. On his appeal form and at the pre-hearing conference, the Appellant explained that he is employed as a Corrections Training Instructor/Coordinator I. Sometime in late 2017, he was informed that Corrections Training Instructor/Coordinator II positions were being phased out and were not going to be filled.

2. On September 14, 2018, a Corrections Training Instructor/Coordinator II was posted in the weekly job announcements at the Little Sandy Correctional Complex. Though the posting was for the Little Sandy Correctional Complex, the Appellant understood that the job was filled at the Eastern Regional Training Center.

3. The Appellant stated he was appealing the promotional opportunity taken away from him and his coworkers when the vacated Corrections Training Instructor/Coordinator II position at the Western Regional Training Center was converted to a Corrections Training Instructor/Coordinator I position.

4. The Appellant also alleged that the Director of Training was retaliating against the Western Regional Training Center because she did not get to select the Branch Manager she wanted for the position.

5. Counsel for the Department of Corrections indicated that he wished to file a Motion to Dismiss, and a schedule was set. Counsel for the Personnel Cabinet state she would join in that process.

6. In its Motion to Dismiss the Department of Corrections argued the Appellant did not suffer a penalization. He has not alleged a retaliation claim and the Board lacks jurisdiction to grant the relief he has requested. In its Motion, the Department of Corrections conceded that the Instructor II position was abolished and replaced with another Instructor I position due to budgetary reasons. The Appellee also argued that the Appellant could not assert a retaliation

claim on behalf of the Western Regional Training Center. In addition, the Appellant did not allege that he had engaged in any protected activity. Lastly, the Appellee argued that the Appellant could not be granted the relief he was requesting in this case, to have the Instructor II position reestablished with an impartial interview panel and one year of back pay for the Instructor II position.

7. The Appellant filed a response to the Motion to Dismiss and stated:

I am writing this in regards to the grievance and personnel board claim I filed several months ago. There is no doubt that I feel like our office here at WRTC has been done wrong as far as the Instructor II position being done away with. It does not make sense that the Instructor II position would be taken away from a facility that does more work than the smallest Regional Training Center; however, because of the good old boy system we all know that it is political and pretty much there is nothing that can be done. I wish there was more I could do but it seems there is nothing else to do.

8. The Department of Corrections filed a Reply in Support of Motion to Dismiss.

FINDINGS OF FACT

1. The Appellant is a Corrections Training Instructor/Coordinator I employed at the Western Regional Training Center. He was informed in late 2017 that the Corrections Training Instructor/Coordinator II positions were being phased out and were not going to be filled. Based on a job announcement, he learned a Corrections Training Instructor/Coordinator II position was posted for the Little Sandy Correctional Complex on September 14, 2018, and the Appellant understood the job was going to be filled at the Eastern Regional Training Center.

2. The Appellant argued that he was penalized when this promotional opportunity was taken away from him. He also alleged that this action was taken in retaliation against the

Western Regional Training Center. Lastly, the Appellant requested that the Corrections Training Instructor/Coordinator II position be reestablished at the Western Regional Training Center, that an impartial interview panel be established and that the Appellant be awarded one year's back pay.

3. The facts in this matter are not in dispute, and this matter can be decided as a matter of law based on the appeal form, the statements made at the pre-hearing conference, the Motion to Dismiss, the response, and the reply.

CONCLUSIONS OF LAW

1. The Appellant has not been penalized by the abolishment of a Corrections Training Instructor/Coordinator II position at the Western Regional Training Center. The abolishment of a position, even if it would have been a promotional opportunity for the Appellant, does not constitute a penalization as that term is defined at KRS 18A.005(24).

2. The Appellant's claim does not become a penalization because a Corrections Training Instructor/Coordinator II position was filled at the Easter Regional Training Center. The fact that the Department of Corrections abolished one position and filled another does not constitute a penalization.

3. The Appellant has not stated a claim for retaliation for himself when he alleges the Western Regional Training Center has been retaliated against. In addition, the Appellant has not alleged that he pursued any legal right or was engaged in any protected activity for which he was retaliated against.

4. The relief the Appellant requests: the reestablishment of the Corrections Training Instructor/Coordinator II position, the establishment of an impartial interview panel and one years back pay is beyond the authority of the Personnel Board to grant under the facts of this case. For this reason, this appeal may be dismissed against the Justice and Public Safety Cabinet, Department of Corrections and the Kentucky Personnel Cabinet. KRS 18A.095(18)(a).

5. This appeal may be dismissed as a matter of law based on the undisputed facts. KRS 13B and KRS 13B.090(2).

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 **KEVIN LEWIS VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS, AND KENTUCKY PERSONNEL CABINET (APPEAL NO. 2018-229)** 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).

[Hearing Officer Note: Any document filed with the Personnel Board shall also 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 Mark A. Sipek** this 9th day of April, 2019.

KENTUCKY PERSONNEL BOARD



**MARK A. SIPEK
EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:

Hon. Scotty McFarlan
Hon. Catherine Stevens
Mr. Kevin Lewis