

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2022-121

STEPHEN MASON

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 June 2023 meeting, having considered the record, including the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer dated May 8, 2023, 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 13th day of June, 2023.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

Copies hereof this day sent to:

Stephen Mason
Hon. Edward Baylous
Hon. Zach Mowen
Hon. Rosemary Holbrook (Personnel Cabinet)
Rodney Moore

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** ** * * * * *

This matter came on for a pre-hearing conference on January 17, 2023, 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, Stephen Mason, 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. Edward Baylous. The Appellee Personnel Cabinet was present and represented by the Hon. Zachary Mowen.

The purposes of the pre-hearing conference were to determine the specific penalization(s) alleged by Appellant, to determine the specific section of Chapter KRS 18A that 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.

FINDINGS OF FACT

1. The Hearing Officer notes the Appellant filed his appeal with the Personnel Board on August 25, 2022, alleging he was penalized by not being allowed to work from home. The Appellant is a Probation and Parole Officer II, who works in the Louisville office. He lives in Charleston, Indiana. He stated that other employees were allowed to work from home two (2) days a week; however, because he lives out-of-state, he has been prohibited from working at home. The Appellant noted that, during the pandemic, he was allowed to work from home without any concerns.

2. Counsel for the Appellee Justice and Public Safety Cabinet, Department of Corrections, stated that they were merely following a state-wide human resources policy, effective August 29, 2022, set by the Personnel Cabinet in a memorandum dated July 28, 2022. Counsel for the Appellee Personnel Cabinet stated that policy does not allow employees who live out-of-state to telecommute. He stated there are problems with local taxes, work and lunch hours, and unemployment, which are all controlled by state law and potentially differ from the requirements applicable in the Commonwealth. Counsel for the Appellee Personnel Cabinet requested time to file a dispositive motion. He pointed out that the ability to telecommute is discretionary to each Agency's Appointing Authority, pursuant to 101 KAR 2:095, Section 6(7). The Appellee Justice and Public Safety Cabinet, Department of Corrections stated they would join in the Personnel Cabinet's motion.

3. Upon review of the documentation submitted with the dispositive motion, the Hearing Officer finds that the Appellant is a Probation and Parole Officer II who lives in Indiana but works in the Louisville, Kentucky Probation Office. His coworkers who live in Kentucky are allowed to work from home two (2) days per week; however, he has been prohibited from this opportunity because he lives in Indiana.

4. The Appellant alleges he has been penalized by the fact that he has been denied the right to telecommute. He alleges that he has received a negative salary adjustment as a result of having to drive to work each day. He also alleged he is being denied a right afforded to other state government employees.

5. After consideration, the Hearing Officer finds that the Appellant has failed to establish that he has been penalized. The Hearing Officer adopts, in part, the language

contained in the Appellees' Joint Reply to Appellant's Response to Appellees' Motion for Summary Judgment, as follows:

In response to the Appellant's arguments, the Appellees reiterate and incorporate by reference their Motion for Summary Judgment filed on February 3, 2023. The Appellees will take this opportunity to address the Appellant's arguments regarding him suffering a penalization. Appellant argues that his salary has been negatively adjusted and that he is being denied a right afforded to other stated employees. Both arguments are simply incorrect. Neither the Personnel Cabinet nor the Justice & Public Safety Cabinet have issued a personnel action against the Appellant (by) lowering his salary, rather, the Appellees created a policy that prohibited the Appellant from telecommuting from outside of the Commonwealth. An important note is that this policy effects all state government employees who live out of state. In no way was the Appellant singled out by this policy or individually considered when the policy was created. Appellant's attempt to allege a penalization regarding a salary decrease is without merit and not supported by any facts, statutes, regulations, or caselaw.

Furthermore, Appellant attempts to allege a penalization by stating he was denied a right granted to other state employees. However, at no point in Appellant's argument does he provide a statute, regulation, or caselaw that states telecommuting is a right granted to state employees. Appellant repeatedly states that the current policy is unfair and arbitrary. However, just by reading the Appellees' Motion for Summary Judgment and the Affidavit from the Deputy Secretary of the Personnel Cabinet, it is abundantly clear that the Personnel Cabinet's Executive Branch Telecommuting Policy is not arbitrary, the policy was well thought out and made after extensive research and consideration.

101 KAR 2:095, Section 6(3) is clear, employees do not have an implied or specific right to telecommute. "Eligibility and selection for participation in a telecommuting program shall be the decision

of the agency, with no implied or specific right to participation being granted to an employee." Appellant's abstract desire to telecommute from out of state does not create a right to telecommute. The Personnel board should follow the ruling in *Edwards v. Environmental and Public Protection Cabinet*, Kentucky Personnel Board Appeal No. 2006-361, 2007 WL 7689172. In that appeal, a state employee challenged an agency's telecommuting policy, and the Personnel Board ruled "as a matter of law that the action which Appellant claims is a penalization is actually a discretionary decision, which can be made by (and in) the sound judgment of the Agency." *Id.*

6. The Hearing Officer finds that there are no genuine issues of material fact remaining in this appeal and this appeal can be decided as a matter of law based on the appeal form, including the attachments, the statements of the parties at the pre-hearing conference, the Appellees' Motion for Summary Judgment, including attachments, the Appellant's Response to the Appellee's Motion for Summary Judgment, and the Appellees' Reply to the Appellant's Response to the Appellees' Motion for Summary Judgment.

CONCLUSIONS OF LAW

1. The Appellant has failed to allege a penalization as that term is defined at KRS 18A.005(24). This definition reads 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.

2. The fact that the Appellant has been denied telecommuting two (2) days a week does not constitute a "salary adjustment" as that term is used in the definition of penalization. While the Appellant may have been inconvenienced, his salary has not

been affected in any way. Although commuting to work may require the Appellant to incur cost, this does not constitute a salary adjustment.

3. Likewise, the Appellant alleged that he was penalized by being denied "other rights granted to state employees." As has been stated in the Findings of Fact, there is no right to telecommute and this privilege is completely discretionary with the Agency's Appointing Authority. The telecommuting policy, as established by the Personnel Cabinet on July 28, 2022, and followed by Justice and Public Safety Cabinet, Department of Corrections, constitutes a proper exercise of authority. 101 KAR 2:095, Section 8(3) and *Edwards v. Environmental and Public Protection Cabinet*, Kentucky Personnel Board Appeal No. 2006-361, 2007 WL 7689172.

4. The fact that the Appellant was able to telecommute during the COVID-19 pandemic does not give him a continuing right to telecommute. The regulation that authorizes the policy and the policy itself make clear the decision to allow or deny telecommuting is a decision within the Agency's discretion. The denial of telecommuting privileges previously granted to an employee does not constitute a penalization.

5. There are no genuine issues of material fact, and this appeal can be decided as a matter of law based on the appeal form, including the attachments, the statements of the parties at the pre-hearing conference, the Appellees' Motion for Summary Judgment, including attachments, the Appellant's Response to the Appellee' Motion for Summary Judgment, and the Appellee's Joint Reply to the Appellant's Response to the Appellees' Motion for Summary Judgment. KRS 13B.090(2) and KRS 18A.095(18)(a).

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **STEPHEN MASON VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2022-121)** 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 fifteen

(15) 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).

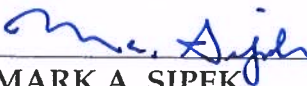
Any document filed with the Personnel Board shall be served on the opposing party.

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 Mark A. Sipek this 8 day of May, 2023.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK,
EXECUTIVE DIRECTOR

A copy hereof this day emailed and mailed to:

Stephen Mason
Hon. Edward Baylous
Hon. Zachary Mowen
Hon. Rosemary Holbrook (Personnel Cabinet)