

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NOs. 2017-061 and 2017-130

DAVID TATE

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

APPELLEE

*** **

The Board, at its regular March 2018 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated February 7, 2018, 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 appeals are 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 14th day of March, 2018.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Angela Cordery
Mr. David Tate
Mr. Rodney E. Moore

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
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**V. FINDINGS OF FACT, CONCLUSIONS OF LAW
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**JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF CORRECTIONS**

APPELLEE

** ** * * *

This matter came on for an evidentiary hearing on December 7, 2017, 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, David Tate, was present at the evidentiary hearing 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. Also present as Agency representative was Warden Aaron Smith.

Appellant filed two appeals against the Department of Corrections regarding his non-selection for promotions to Classification and Treatment Officer (CTO) positions. These appeals, Appeal Nos. 2017-061 and 2017-130, were consolidated. The issue presented by both appeals is whether Appellee followed the requirements of KRS 18A.0751(4)(f) and 101 KAR 1:400 in selecting Classification and Treatment Officers at the Kentucky State Reformatory (KSR). The additional claims include Appellant's claims of age discrimination and retaliation. The burden of proof was on the Appellant to prove his case by a preponderance of the evidence with respect to all issues.

Pursuant to Interim Order dated May 31, 2017, the Appellee was ordered to serve a copy of the order upon each successful candidate, informing them of their right to intervene in this appeal. Appellee filed a Notice of Compliance on June 26, 2017, stating that Appellee had notified the successful candidates, Vanessa Brown and John Lindeman, of their right to intervene in Appeal No. 2017-061.

With respect to Appeal No. 2017-130, Appellee was ordered to serve a copy of the order upon the successful candidate, Jamie Huff, informing him of his right to intervene in this appeal. Appellee filed a Notice of Compliance on October 5, 2017, stating that Appellee had notified Huff of his right to intervene.

BACKGROUND

1. Appellant, **David Tate**, testified on his own behalf. He is a Correctional Officer at Kentucky State Reformatory (KSR). He began his employment with the Department of Corrections (DOC) in January 2007.

2. Appellant first addressed the selection of Vanessa Brown and John Lindeman to the Classification and Treatment Officer (CTO) positions, positions he had also applied for in the Fall of 2016. In Appellant's estimation, his job experience, educational background and the answers he gave to interview questions were superior to that of Brown and Lindeman. In his opinion, his failure to be promoted to CTO was a result of "systemic age discrimination."

3. Appellant testified that he is sixty-four years of age.

4. Appellant stated that, according to Lindeman's and Brown's state applications, Lindeman had a B.A. degree in Psychology from the University of Louisville; Brown had a B.A. degree in Psychology from Liberty University. Appellant, by contrast, had a B.S. degree in Engineering from the United States Military Academy, and a Master's degree in Business Administration from the University of Louisville.

5. Introduced into the record as Appellant's Exhibits 1 and 2 were the Internal Mobility Applicant Interview Forms and state employment applications of both Lindeman and Brown, as well as the handwritten notation of Lindeman's answers to interview questions, recorded by James Ford, and the handwritten notation of Vanessa Brown's answers, recorded by Danny Perry. (**Hearing Officer Note:** These documents were received by Appellant through discovery and were introduced into the record without objection from Appellee.)

6. In Appellant's opinion, his answers to the questions asked at the interview were better than the answers given by Brown and Lindeman. He noted specifically that Brown and Lindeman answered respectively, "No" and "I don't know" when questioned as to what policy covers the classification of an inmate.

7. Appellant also took issue with Brown's and Lindeman's answer to the question: "What does Classification mean to you?" In Appellant's estimation, Brown and Lindeman both answered incorrectly, while he answered that classification is primarily used to put inmates in the appropriate institution.

8. Appellant also felt he gave a better answer to the question: "What are some of the goals of the classification process?" Appellant responded that the primary goal is to get an inmate in the appropriate environment. Conversely, Brown answered, "Assist an inmate in living in a new situation, and rehabilitate back into society." Lindeman answered, "Programs and assessment." In Appellant's opinion, both those answers were unsatisfactory.

9. Appellant addressed his level of experience in relation to that of the successful applicants. While Appellant had worked in the Department of Corrections for almost ten years,

Brown had only one year experience as a Correctional Officer; Lindeman had 7 months experience as a social worker.

10. In Appellant's opinion, he had more education, experience, and did better in the interview than Brown and Lindeman. Consequently, he felt that the only explanation for his not being selected for the CTO position was the fact that he was older than the successful applicants. Appellant added, "Age discrimination is typical of my experience at DOC." [**Hearing Officer Note:** According to their state employment applications, Brown is 29 years of age; Lindeman is 41 years of age. Appellant's Exhibits 1 and 2.]

11. On cross-examination, Appellant was asked if he had any documentation to offer, or a statement to make, regarding the selection of Jamie Huff to the CTO position (Appeal No. 2017-130). Appellant answered, "I am only objecting to Lindeman and Brown." Appellant was asked if he was then no longer appealing the hiring of Mr. Huff. Appellant responded, "I don't want to take it off, but I am not presenting any evidence regarding Huff."

12. Appellant acknowledged that he had been previously disciplined. He also acknowledged that he had been promoted twice before during his tenure with DOC.

13. Appellant was asked to describe his work experience. He stated that after graduating from the U.S. Military Academy in 1975, he worked for the Army for five years. He received his M.B.A. degree from the University of Louisville in 1982, and after that worked for approximately ten years at Merrill Lynch as an account executive. From 1992 to 1997, Appellant was an account executive and sales manager at Prudential Securities. He worked at Morgan Stanley for five years as a producing sales manager. He was employed by Stifel Nicolaus from 2002 to 2004. He then became a contractor and removed demolition debris in Biloxi, Mississippi, and New Orleans, Louisiana. He worked in that capacity for one and a half years.

14. Appellant began his employment with DOC in 2007 when he was hired as a Correctional Officer, grade 9, at KSR. He was promoted to Sergeant, grade 10, two years later. In 2010, Appellant was promoted to Classification and Treatment Officer, grade 12, at Kentucky Correctional Institute for Women (KCIW), but he did not successfully complete his promotional probation. He transferred back to KSR as a Correctional Sergeant. Three years ago, he was demoted to Correctional Officer. Appellant stated that he did not remember the exact dates of these employment actions.

15. Through his testimony, the following documents were introduced into the record: a March 2, 2011 letter informing Appellant that he was being reverted from CTO at KCIW to Correctional Sergeant at KSR for having failed to satisfactorily complete his promotional probationary period (Appellee's Exhibit 3); an August 10, 2012 written reprimand for poor work performance (Appellee's Exhibit 1); and an October 16, 2013 letter informing Appellant he was being demoted from Correctional Sergeant to Correctional Officer. (Appellee's Exhibit 2).

16. Appellant admitted that when he was promoted to the CTO position, he was "close to 60."

17. On re-direct examination, Appellant stated, "I still want this position. I didn't pass probation the first time because of a medical issue, which has been corrected. This situation is an issue of age discrimination."

18. At the end of his testimony, Appellant rested his case. Appellee made a motion for a Directed Verdict on both appeals. The Hearing Officer **GRANTED** the motion regarding the promotion of Jamie Huff (Appeal No. 2017-130), but **OVERRULED** the motion regarding the promotion of John Lindeman and Vanessa Brown (Appeal No. 2017-061).

19. Appellee called its first witness. **Teresa Kidwell** is a Human Resource Administrator Institutional at KSR, a position she has held since 2014. Her job duties include oversight of payroll and all personnel actions. She also explained her role in the promotional process. First, she requests the register and reviews the applications, which she forwards to the interview panel. The panel determines which applicants they wish to interview. If the applicant meets the minimum qualifications for the position, Kidwell contacts the candidate to set up an interview. Once the successful applicant is chosen by the panel, Kidwell submits his or her name to the Warden for approval. If approved, the candidate's name is sent to the Commissioner, and then to the Personnel Cabinet for final approval.

20. Through Kidwell's testimony, the following documents were entered into the record: "Request for Personnel Action," requesting a register for the CTO position (Appellee's Exhibit 4); an email approval of the request from Ashlee Skillern, Human Resource Administrator (Appellee's Exhibit 5); and the job posting of the CTO position (Appellee's Exhibit 6).

21. On November 21, 2016, Kidwell requested a "Minimum Qualifications" review of eighteen applicants. Appellant's name was included in this list. (Appellee's Exhibit 7).

22. On November 23, 2016, Kidwell informed Deputy Warden Anna Valentine of the list of applicant names that had been approved to interview. Appellant's name was included in the list. (Appellee's Exhibit 8).

23. **Danny Perry** is a Unit Administrator II at KSR, where he has been employed since 2001. His duties include the oversight of maintenance and operations of a 750-bed unit. Perry acts as a supervisor for the CTO staff in his unit, and was appointed chair of the interview panel for the vacant CTO positions.

24. Perry described the CTO position as managing a caseload of inmates contained in a dormitory or housing unit. A CTO's duties include the performance of bi-annual assessments of inmate classifications; assessments of inmates according to criteria established by The Prison Rape Elimination Act (PREA), and ensuring that inmates are enrolled in appropriate programs, such as anger management or a substance abuse program. Perry noted that KSR has more inmates with special needs than other institutions in the Commonwealth.

25. Perry stated that the average caseload for a CTO at KSR is 75 inmates per staff member. At other institutions, the caseload is typically around 45 inmates. Perry added that a new policy had been implemented that requires inmates to be assessed twice yearly, rather than once per annum, which has increased the KSR CTOs' workload even more.

26. Perry was asked what he looked for during the applicant selection process. He answered, "Qualifications, performance, work history, how long there, and any prior disciplinary actions." The interview panel considered the applicants' interviews, resumé, and internal mobility forms.

27. Perry testified that he selected John Lindeman and Vanessa Brown over Appellant for the CTO position because, in part, they both have a "mental health background—which helps at KSR." Perry noted that Lindeman also had case management experience as a social service worker.

28. In Perry's opinion, Appellant also did not answer the interview questions as well as he would have expected, considering that Appellant had been a CTO earlier in his career. For instance, Appellant's answer to the question "What are some of the goals of the classification process?" included "Furlow?" (sic) Perry stated that inmates at KSR do not receive furloughs. And as for the question, "What factors do we use to determine an inmate's custody?", Appellant's answer included "health." Perry noted that "health does not factor in—being a prior CTO I would have expected [Appellant] to know that."

29. Perry stated that while the successful candidates, Lindeman and Brown, had never been a CTO before, "they still answered pretty well."

30. Through Perry's testimony, his handwritten notes summarizing John Lindeman's and Appellant's answers to interview questions were introduced into the record as Appellee's Exhibits 10 and 11, respectively. [**Hearing Officer Note:** Perry's notes regarding Vanessa Brown's answers were entered into the record as Appellant's Exhibit 2.]

31. Perry and the other interview panel member, James Ford, selected Lindeman, Brown, and Colin Smith, who ended up declining the position. Perry stated that age discrimination did not play a factor in his decision not to select Appellant for the CTO position.

32. On cross-examination, Perry was asked wasn't it true that KSR "lets guys who are dying get furloughed?" Perry answered, "That is not a furlough."

33. On re-direct examination, Perry was asked if he considered the applicants' record of performance during the interview process. He stated that he did, adding, "I have interviewed [Appellant] four or five times. He got demoted from both the CTO and Sergeant positions...when you worked at a facility like KCIW, that has half the work load of KSR, and you weren't successful, how are you going to be successful here."

34. Perry denied that Appellant's age, or the fact that Appellant had filed prior appeals, ever came up during the applicant selection process.

35. **James Ford** is a Corrections Unit Administrator I for Dormitories #1 and #3 at KSR. The unit he manages houses approximately 350 inmates. Ford participated in the December 8, 2016 interview panel for the CTO positions. Ford stated that the panel chose the selected candidates based on the criteria of 101 KAR 1:400, namely, the applicants' qualifications, record of performance, conduct, seniority and performance evaluations.

36. Ford was asked why he did not choose Appellant for the CTO job. Ford answered, "We knew he was demoted from Sergeant, and that he was a CTO at KCIW, but didn't make it off probation." Ford added that some of the answers Appellant answered at the interview did not reflect the knowledge someone who had been employed by DOC for a while should have had. Furthermore, in Ford's opinion, Appellant's education and work experience prior to joining DOC did not pertain to case management: "He has a degree in engineering, an M.B.A., was a heavy equipment operator, and worked for brokerage firms."

37. In contrast, Ford noted, Vanessa Brown had a B.A. degree in Psychology, and had been a Correctional Officer at Kentucky Correctional Psychiatric Center (KCPC) for a year. "For someone outside our organization, not knowing what the job exactly entailed, her answers showed she knew—somewhat—what she would be getting into." Ford added that her Psychology degree would be helpful. "Within KSR we have a lot of inmates with health and medical issues—that is the majority of our population. It could help her better understand some of the diagnoses our inmates have."

38. Through Ford's testimony, his handwritten notes summarizing Appellant's and Vanessa Brown's answers to interview questions were entered into the record as Appellee's Exhibits 12 and 13 respectively. [**Hearing Officer Note:** Ford's notes regarding John Lindeman's answers were entered into the record as Appellant's Exhibit 1).

39. Ford denied that Appellant's age was ever discussed during the applicant selection process.

40. **Anna Valentine** has been employed by DOC for the past fifteen years. She worked her way up the ranks from Correctional Officer to Deputy Warden of KSR, the position she currently holds. Her job duties include the oversight of Programs and Operations.

41. Valentine addressed her involvement in the selection process for the CTO positions. She stated that she selected the chair of the interview panel, Danny Perry, and he selected the other panel member, James Ford.

42. After the candidates were selected by the panel, Valentine prepared a memorandum, dated December 8, 2016, to the attention of Warden Aaron Smith, informing him of the candidates the panel selected for the CTO position. This memorandum named the

following individuals: John Lindeman, Vanessa Brown, and Colin Smith. (Appellee's Exhibit 14).

43. Valentine's only other involvement in the selection process was offering the candidates the position and informing them of their start date. [**Hearing Officer Note:** Smith was offered the position, but he declined it.]

44. Valentine denied that Appellant's age was ever discussed or considered during the selection process. She denied having knowledge of any retaliation against Appellant for his having filed prior appeals with the Personnel Board.

45. **Warden Aaron Smith** is the Warden of KSR, and has been with DOC since 1993. He is responsible for the oversight of the entire institution.

46. Warden Smith described KSR as the largest correctional facility in the DOC. It houses 2,000 inmates and employs 600 staff members. In addition to serving as a mental health/medical department of DOC, it also houses "general population" inmates. Some of these inmates work in the food service and maintenance departments of the institution as well as in "Correctional Industries," which is tasked with metal fabrication and car license production. Smith noted, however, that the DOC is preparing for an upcoming reorganization that will effectively downsize KSR's inmate population to 1000 inmates. This will be accomplished by removing a large portion of the general population. Consequently, KSR "will become more specifically a mental health and medical facility." Smith stated.

47. Smith testified that KSR currently employs staff members who are in a wide variety of age groups: "Two employees are over 70 years of age. There are also quite a few employees 50 or over, and quite a few employees 25 years old or younger."

48. Smith was asked what role he generally plays in the promotional process. He stated that the name of the recommended applicant is forwarded to him for approval or denial. He added that his typical response to these recommendations is to approve them.

49. Smith testified that he had no knowledge of the applicants' age playing any role in the selection process for the CTO position. He also denied that the decision not to promote Appellant was done in retaliation for Appellant having filed prior appeals.

50. At the end of Warden Smith's testimony, the Appellee rested its case.

51. The Appellant testified in rebuttal. He stated: "If you look at who was hired, they were younger than me... The proof is in the pudding."

52. 101 KAR 1:400, Section 1(1), states as follows:

Section 1. Promotion.

- (1) Agencies shall consider an applicant's qualifications, record of performance, conduct, seniority and performance evaluations in the selection of an employee for a promotion.

FINDINGS OF FACT

1. Appellant is a classified employee with status, employed by the Justice and Public Safety Cabinet, Department of Corrections, as a Correctional Officer at Kentucky State Reformatory ("KSR").

2. On December 8, 2016, Appellant interviewed for one of the vacant Classification and Treatment Officer (CTO) positions at KSR. At the completion of the applicant selection process, the successful candidates were Vanessa Brown, John Lindeman, and Colin Smith (who declined the position).

3. Appellant timely filed an appeal alleging age discrimination and retaliation after he was notified that he had not been selected for the position.

4. Appellant, who is 64 years of age, alleges that his failure to be promoted to CTO was the result of "systemic age discrimination." In his opinion, his job experience, education, educational background, and answers to interview questions were superior to that of Brown and Lindeman.

5. The applicants were interviewed by a panel of two Corrections administrators, Danny Perry and James Ford.

6. The Hearing Officer finds that Appellant had previously held the position of CTO, but was returned to his former position on March 2, 2011, when he failed to successfully complete his probationary period. (Appellee's Exhibit 3). He was also demoted from Correctional Sergeant, grade 10, to Correctional Officer, grade 9, on October 16, 2013, due to misconduct. (Appellee's Exhibit 2).

7. The Hearing Officer finds that in deciding not to select Appellant for the CTO position, the panel members took into consideration Appellant's educational degrees, which were in engineering and business, and did not pertain to case management or mental health issues; his conduct in responding to interview questions, some of which were incorrect; and his evaluations and seniority in the Department, including his unsuccessful performance as CTO and Sergeant which resulted in his removal from both positions. (Testimony of Danny Perry and James Ford).

8. Appellant had been promoted to the CTO position when he was, by his own admission, "close to 60" years of age. What was developed at the evidentiary hearing is that

KCIW is a smaller, all-female institution with a workload less strenuous than that of KSR, which houses many inmates with medical or mental health issues. The Hearing Officer finds that it was a reasonable assumption to make that Appellant's poor performance as CTO would not be improved by working at a more challenging facility. (Testimony of Danny Perry and James Ford).

9. The Hearing Officer finds that Appellee has provided evidence of legitimate non-discriminatory reasons for its decision to hire other candidates, and that Appellant's age, or the fact that he had filed a previous appeal, was not a factor in his non-selection for the CTO position.

CONCLUSIONS OF LAW

1. Appellant, David Tate, has failed to meet his burden of proof to show that the Appellee failed to comply with 18A.0751(4)(f) and utilize the five factors outlined in 101 KAR 1:400 in considering him for promotion to the position of CTO.

2. Appellant, David Tate, has failed to meet his burden of proof to show that the Appellee's decision to hire Vanessa Brown and John Lindeman was a discriminatory act against him based upon his age, over 40, or that it was done in retaliation for his having previously filed an appeal with the Personnel Board.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeals of **DAVID TATE V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NOs. 2017-061 and 2017-130)** 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 17th day of February, 2018.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Angela Cordery
Mr. David Tate