

**COMMONWEALTH OF KENTUCKY
KENTUCKY PERSONNEL BOARD
APPEAL NO. 2016-245**

DAVID TATE

APPELLANT

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

**JUSTICE AND PUBLIC SAFETY CABINET
DEPARTMENT OF CORRECTIONS**

APPELLEE

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This matter came on for evidentiary hearing on January 26, 2017, at 9:30 a.m. at 28 Fountain Place, Frankfort Kentucky before Brenda D. Allen, 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 was represented by the Honorable Angela Cordery. Also present was Aaron Smith, Warden of Kentucky State Reformatory.

The issues before the Hearing Officer were whether the Justice and Public Safety Cabinet, Department of Corrections, failed to comply with the statutory requirements set forth in KRS 18A.0751(4)(f) and 101 KAR 1:400 when Appellant was not selected for the position of Classification and Treatment Officer at the Kentucky State Reformatory. An additional issue is whether the Appellant was subjected to age discrimination. The burden of proof was upon the Appellant as to both issues, by a preponderance of the evidence.

BACKGROUND

1. David Tate filed his appeal with the Personnel Board on September 2, 2016. On the appeal form, he advised that he was being discriminated against. In the narrative, he elaborated that he applied for the position of Classification and Treatment Officer and did not believe that Matthew Brown, the incumbent, was better qualified than he was.

2. A pre-hearing conference was held on September 14, 2016, at 10:00 a.m., at 28 Fountain Place, Frankfort, KY in order to define the issues before the Hearing Officer. At the pre-hearing, it was determined that the Appellant's appeal was based upon his contention that the hiring of Matthew Brown to the position of Classification and Treatment Officer I (hereinafter "CTO") was an act of age discrimination against the Appellant, who is over the age of forty. Appellant also contended that the Appellee failed to follow the dictates of KRS 18A.0751(4)(f) and the regulations outlined in 101 KAR 1:400. During the pre-hearing, it was determined by the Hearing Officer, with no objection from either party, that the successful candidate, Matthew Brown, should have the opportunity to intervene to defend his position. Accordingly, a copy of the Interim Order was provided to Mr. Brown. In accordance with the Interim Order, the failure

of Mr. Brown to intervene may constitute a waiver of his right to defend his position in accordance with *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W. 2d 406 (KY. App. 1994).

3. On the day of the hearing, the parties waived opening statements. **David Tate** then took the stand as his only witness. Mr. Tate testified in the narrative and under questioning by the Hearing Officer that he is currently classified as a Correctional Officer, Grade 9, and has been in the position for ten years at the Kentucky State Reformatory at LaGrange. He also worked for some period of time at the women's prison as a CTO. He testified that he has a Bachelor of Science in Engineering from the U.S. Military Academy and a Master's in Business Administration from the University of Louisville. He testified that he has been passed over multiple times for promotion and each time, it was in favor of a younger candidate. He testified that he is 64 years of age.

4. **Appellant's Exhibit 1** was identified as Matthew Brown's application for employment. The Appellant testified that upon review of the application, Mr. Brown, the successful candidate, had no work experience in Corrections and that his experience was as a Transportation Security Officer with Transportation Security Administration ("TSA"). Mr. Tate testified that his own ten years of experience in Corrections was significant, and Mr. Brown had none. **Appellant's Exhibits 2, 3, 4 and 5** were identified as the interview questions and accompanying notes that the interviewers, Mr. Ward and Mr. Thomas, completed as a result of the interviews they conducted of both the Appellant and Mr. Brown. **Appellant's Exhibit 6** was identified as the Appellant's job application. Appellant's Exhibits 1 through 6 were entered into the record without objection.

5. Appellant testified that the CTO's responsibility is to classify the inmate into a security classification which determines facility assignment. Secondly, the role of this position is to place the inmate into the appropriate program to assist him, establish a visitor's log and take care of needs outside of the security of the inmate.

6. Upon cross-examination and questioning from the Hearing Officer, the Appellant admitted that he had no evidence he was not selected due to his age, but he did contend that he was better qualified for the position that Brown obtained.

7. The Appellant then discussed his own work history and testified that when he formerly held the position of CTO at the Kentucky Correctional Institution for Women in Pee wee Valley, he had worked for four months, but did not make probation. He also testified that he formerly held the position of Sergeant, but was demoted in approximately 2014.

8. He stated that he did not make probation due to a medical issue, falling asleep. After failing to make probation, he went back to being a Sergeant and was later demoted to Correctional Officer, because he drove a mechanized scooter into a birdhouse, by accident. The witness testified that he has not received any other discipline during his career in Corrections. He also testified that his evaluations were good.

9. Upon re-cross, the Appellant continued to insist that the minor scooter accident formed the only basis for his demotion. **Appellee's Exhibit 1**, the October 2013 Letter of Demotion was identified by the Appellant. While Mr. Tate refused to admit that there were additional basis for the demotion listed in the letter, the Appellee moved for entry of the document so that it would speak for itself. The document was entered into the record for rebuttal, without objection.

10. Upon review of the Demotion Letter, the Hearing Officer noted that it referenced a prior written reprimand given to the Appellant in 2012. The Hearing Officer asked the Appellant why he had just testified that he had not been the subject of any other disciplinary action when, this document indicated a reprimand in addition to the demotion. Mr. Tate claimed that he misunderstood the question when it was previously asked.

11. The Appellee tendered to the Appellant **Appellee's Exhibit 2**, the 2012 Written Reprimand, which was identified by the Appellant and entered into the record for rebuttal, without objection.

12. The Appellee then questioned the Appellant about his evaluations, which he contended were good. Copies of several evaluations were tendered to the Appellant to review to refresh his memory and he testified regarding them, but they were not entered into the record.

13. The Appellant rested.

14. The Appellee made a **MOTION FOR A DIRECTED VERDICT**, arguing that the Appellant had failed to make out a *prima facie* case of age discrimination. The Appellant argued in opposition, and the Hearing Officer **RESERVED RULING** on the motion.

15. As its first witness, the Appellee, called **Ashlee Skillern** who serves as the Department of Corrections' Human Resource Administrator. She stated that her job is to process new hires, disciplinary actions, and to make job postings, among others. She outlined the process for posting, obtaining the register and interviewing candidates. She then identified **Appellee's Exhibits 3, 4 and 5** and testified regarding them. She outlined the five factors that are utilized when considering applicants. The witness identified **Appellee's Exhibit 6**, a copy of 101 KAR 1:400, which outlines that in considering an applicant's qualifications for a promotion, the agency must look at qualifications, record of performance, conduct, seniority and performance evaluations. She testified that these factors should be undertaken with all hires. Appellee's Exhibit 6 was entered into the record without objection.

16. The next witness to be called was **Brian K. Ward**. After being sworn, Mr. Ward testified that he has thirteen years of service at Corrections and now serves as the Unit Director over CTOs. He stated that the position at issue was for a caseworker to be placed at the Corrections Psychiatric Treatment Unit, for which he was responsible. He stated that he was one of two people on the panel who interviewed the candidates for the position. He stated that two

candidates stood out, Ms. Obst and Mr. Brown as the top two candidates. He stated that Ms. Obst declined the offer and Mr. Brown was selected and ultimately assumed the position.

17. The witness testified that in making his determination on who to select, he found that while Mr. Brown's experience at TSA was different, it did give him relevant experience dealing with a structured program and they felt they could get him trained for the position easily. He stated that Mr. Brown's Bachelor's Degree in Criminal Justice was relevant and important and he had done some studies in the Department of Corrections in Criminal Justice during his studies at Eastern Kentucky University.

18. He stated that Mr. Tate had a Bachelor's Degree and a Master's and also testified that Mr. Tate had admitted during the interview that he had formerly served as a CTO, but was not able to answer some of the questions regarding the position, specifically Question Number 1: "What policy covers the classification of an inmate?" The witness testified that Mr. Tate should have known the answer to this question if he had served in the position before, but he did not. The witness stated that he was also aware that Mr. Tate had been a ranking officer before and that he no longer was. He stated that Mr. Tate's demotion did not play a role in his decision not to select him.

19. On cross-examination, Mr. Ward testified that he found Mr. Brown to be the better candidate for the job. Even without experience in Corrections, Mr. Brown's background work in criminology and in gang-related matters made him the better candidate.

20. Upon questioning from the Hearing Officer, the witness testified that as it relates to the actual duties of the position and how it differs from the position the Appellant currently holds, Mr. Ward explained the CTO performs a folder review of each inmate to see what charges the inmates have and what programs should be recommended to them. He stated, the CTO also checks classification documents and disciplinary history and makes rounds to see what the inmates need. He stated that he is looking for people he thinks will do a good job and who they can train.

21. The witness testified that Mr. Tate had some familiarity with KOMS (Kentucky Offender Management System) that houses all records electronically, but because the program changes routinely, he felt it would be no problem to train Mr. Brown. He also stated that he was impressed that Mr. Brown had researched the position and was better able to answer the questions, despite being an outsider coming into an entry level position.

22. Mr. Ward stated that after the interviews were complete, he and the other member of the panel, Mr. Thomas, discussed the candidates to see who they thought would be a good fit. He stated they never discussed the age of the candidates. He testified that there are currently 15-18 CTOs of varying ages at KSR. He denied that age was a factor in his decision.

23. The next witness to testify was **Everett Michael Thomas** with the Department of Corrections at Kentucky State Reformatory. He stated that he formerly served as a CTO, then was an Assistant Unit Administrator over Psychiatric Treatment at the time of the interviews. His duties included oversight of CTOs and their work in the areas of recreation, medical, treatment and food service.

24. Mr. Thomas stated he was the second person to serve on the panel that interviewed the candidates. He testified that Ms. Obst and Mr. Brown were the top candidates. The witness stated that the CTO is an entry level position.

25. He testified that in comparing Mr. Brown and Mr. Tate, he noted that Mr. Brown has a Bachelor's Degree in Criminal Justice which was more relevant than Mr. Tate's degrees. In terms of experience, Mr. Brown had no experience, but the witness noted that it was an entry level position, so that was not problematic. He stated that Mr. Tate had been with the Department for ten years and, during the interview, admitted to previously having been in the position of CTO, but failed to complete probation.

26. Mr. Thomas stated, having worked with Mr. Tate at the same institution, he was aware that the Appellant had been demoted from a Sergeant to an Officer. The witness reviewed Appellant's Exhibits 3 and 4 and testified that in comparing the candidates, he found that Mr. Brown gave a more well-rounded answer to Question Number 3 during the interviews, even without familiarity with working in Corrections.

27. Mr. Thomas stated that as for Question Number 6, Mr. Tate gave the wrong answer. The job of the Committee is not to endorse the work of the CTO. Mr. Brown got the answer correct, as the role of the Committee is to discuss recommendations of the CTO and implement them, if appropriate.

28. The witness stated that after the interviews were complete, they looked at job applications and evaluations and took note of past performance issues. He said there was no discussion of the age of the applicants, nor did the age of the applicants enter into his decision making.

29. The witness testified that eight candidates were interviewed. He identified **Appellee's Exhibit 7** as the interview schedule and stated that the individuals who were marked as no call/no show were denoted and the remainder were interviewed. Appellee's Exhibit 7 was entered into the record without objection.

30. The next witness to testify was **Deputy Warden Anna Valentine**, who is assigned to Kentucky State Reformatory. She advised that she oversees Programs and Operations, including medical and mental health. She stated that she serves as a facilitator for hiring by selecting the panels for interviews. She stated that she picked Mr. Ward and Mr. Thomas, the unit management for the position, to conduct the interviews. They reported back to her after conducting the interviews, and she sent a memorandum to the Warden notifying the Warden of their decision.

31. The witness identified **Appellee's Exhibits 8 and 9** and testified regarding them. Both exhibits were entered into the record without objection. The witness testified there was no discussion with the panel regarding why they chose the top two candidates that they did and there was no discussion regarding the age of the candidates. She stated that this was an open competitive, entry level position.

32. The final witness to testify was **Warden Aaron Smith**. After being sworn, he stated that he has been in the position of Warden since May 2014 and, prior to that, he held a variety of positions in the Department, back to 1988. He testified that he played no active role in determining who to select for the CTO position. He said the interview panel makes the recommendation. He testified that, if he had reason to, he could reject a candidate, but he has never done so. He had no issue with the process or the candidates whose names were put forward in this case. He also stated there are a wide range of ages among the employees at the Department, some nearing retirement, some just out of high school or college.

33. The Appellee rested.

34. Each of the parties made a closing statement.

FINDINGS OF FACT

1. The Appellant, David Tate, was employed in the position of Correctional Officer with the Kentucky Department of Corrections, Grade 9. He timely filed an appeal alleging age discrimination after being notified that he was unsuccessful in seeking a promotion to CTO. (Testimony of Appellant, Appeal form).

2. KRS 18A.095(12) provides:

Any classified employee may appeal to the board an action alleged to be based on discrimination due to race, color, religion, national origin, sex, disability, or age forty (40) and above. . . .

3. The Appellant applied and was interviewed for the position of CTO, Grade 12, a promotional opportunity and was interviewed by a panel of two Corrections administrators who would supervise the candidate selected. (Testimony of Thomas, Ward).

4. The Hearing Officer finds that during his July 1, 2016 interview, the Appellant revealed that he had previously held the position of CTO, but was returned to his former position when he failed to successfully complete his probationary period. (Testimony of Ward, Thomas).

5. The Hearing Officer finds that the members of the interview panel, who had worked with the Appellant for several years, were also aware that the Appellant had been demoted from the position of Sergeant to Officer prior to applying for the CTO Position. (Testimony of Ward, Thomas)

6. The Hearing Officer finds that, during the interview, the Appellant failed to correctly answer two of the ten questions, despite having previously served in the position of CTO and despite having worked in the Department of Corrections for many years. (Testimony of Ward, Thomas)

7. 101 KAR 1:400 provides:

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

8. The Hearing Officer finds that in considering Mr. Tate for promotion to the CTO position, the panel members took into consideration his educational degrees, which were not in the field of criminal justice; his conduct in responding to questions, some of which were incorrect; his evaluations and his seniority in the Department, including his unsuccessful performance as both a CTO and a Sergeant, resulting in his removal from both positions. (Testimony of Ward, Thomas)

9. The Hearing Officer finds that the Appellee has provided evidence of legitimate non-discriminatory reasons for its decision to hire another candidate, and that the Appellant's age, over forty, was not a factor in hiring for the CTO position.

CONCLUSIONS OF LAW

1. The 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. The Appellant, David Tate, has failed to meet his burden of proof to show that the Appellee's decision to hire Matthew Brown was a discriminatory act against the Appellant based upon his age, over forty.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the case of **DAVID TATE VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2016-245)** BE DISMISSED.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen 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 exception 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 the 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 Brenda D. Allen this 28th day of April, 2017.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy this day mailed to:

Hon. Angela Cordery
David Tate