

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-066

FRANK E. TEDFORD, III

APPELLANT

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

**EDUCATION AND WORKFORCE DEVELOPMENT CABINET
THOMAS O. ZAWACKI, APPOINTING AUTHORITY**

APPELLEE

** **

The Board at its regular December 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated November 19, 2014, 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 December, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. James Maxson
Frank E. Tedford, III

**COMMONWEALTH OF KENTUCKY
KENTUCKY PERSONNEL BOARD
APPEAL NO. 2014-066**

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APPELLANT

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

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APPELLEE

* * * * *

This matter came on for evidentiary hearing on October 14, 2014 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, Frank Tedford, III, was present at the evidentiary hearing and was not represented by legal counsel. The Appellee, The Education Workforce and Development Cabinet, was present and was represented by the Honorable James Maxson. Also present was agency representative Beth Steinle.

The issue at the evidentiary hearing was whether the Appellant was entitled to retroactive pay for a previously awarded reclassification. The Appellant was classified as a Workforce Development Specialist I (Grade 10) and he claims that in 2008, 2010 and 2011 he was assigned duties of a Workforce Development Specialist II (Grade 12). He asked several times about being reclassified, and ultimately filed two grievances seeking reclassification and back pay. He was reclassified effective February 1, 2014, but did not receive back pay. The burden of proof was upon the Appellant to demonstrate by a preponderance of the evidence that he was penalized and was entitled to back pay.

The Appellee filed a Motion to Dismiss or for a Directed Verdict based upon the contention that the Appellant failed to file his appeal within the limitation period provided in KRS 18A.095(29). However, the Appellee filed the Motion more than one month after the deadline established by the August 11, 2014 Interim Order. The Hearing Officer reserved ruling on the motion and allowed the hearing to proceed. She also ruled that evidence in support of or in opposition to the motion could be presented during the hearing. At the conclusion of the hearing, the Hearing Officer granted the Appellant ten days within which to file a written response to the motion, and granted the Appellee five days to file a reply.

BACKGROUND

1. The Appellant filed his appeal with the Personnel Board on March 31, 2014, claiming that he had filed a grievance on September 19, 2013, regarding a reclassification and back pay. According to his appeal, he received the reclassification, but did not receive the back pay.

2. At the commencement of the hearing, both parties waived opening statements. The Appellant, **Frank Tedford, III**, testified on his own behalf. He stated that he was hired as a Workforce Development Specialist I on July 16, 2007, and was assigned to the Preston Highway Office of Employment Training (OET) in Louisville. In this position, he was responsible for providing re-employment training for customers to include job matching and other duties to assist an individual in finding work.

3. He stated that in April 2008, he was assigned to the RiverPort satellite office in Southwest Louisville when the Workforce Development Specialist II assigned to that office left OET. He stated that all satellite offices in Louisville are staffed with only one OET employee, a Workforce Development Specialist II. Despite the fact that he was a Workforce Development Specialist I, he was assigned to handle the satellite office alone and perform all of duties of the higher position until December 2008 when he returned to the Preston Highway office and resumed his regular duties. He stated that while at the RiverPort Office he asked his office manager for a reclassification, to no avail.

4. Mr. Tedford testified that in November 2010, his supervisor asked him to be a part of the Rapid Response Team to assist Trade employees who were displaced because their companies had outsourced their jobs overseas. Mr. Tedford stated that in April 2011, he was assigned even more duties. This time, his supervisor Steve Bodner assigned him duties as a KEWES Super User, responsible for reviewing all Help Desk tickets for the office before they were submitted to the Help Desk. He stated that he asked Bodner to be reclassified because of these additional duties and was told that they would consider it in a couple of months. He testified that later, Bodner told him no reclassifications were being accepted.

5. Mr. Tedford stated that in July 2011, he filed a grievance seeking re-classification because he had been performing the Trade duties for more than six months and the KEWES Super User responsibilities for three months. Mr. Tedford testified that Connie Schnell, his regional manager approved his grievance. The Appellant tendered a copy of the final page of the July 2011 grievance for entry into evidence. The Appellee objected to the document's entry into the record because the Appellant failed to submit an exhibit list as required by the Interim Order. The objection was SUSTAINED and the document was not entered into the record. Mr. Tedford testified that despite winning his grievance, the reclassification never materialized.

6. Mr. Tedford testified that in September 2013, Schnell came to his office and met with him and other employees. During the meeting, she stated that employees of the OET office located at 6th and Cedar had been reclassified. The Appellee objected to the Appellant's testimony regarding Schnell's statement as hearsay. The objection was SUSTAINED. Mr. Tedford testified that the reclassification of the other staff prompted him to file another grievance seeking reclassification and back pay several days later.

7. Mr. Tedford then testified regarding his September 2013 grievance that he attached to his Personnel Board Appeal. He stated his first line supervisor, Gary Wise denied his request for reclassification and back pay and wrote on the grievance, "It doesn't appear there has been a material and/or permanent change in duties, therefore your request is denied." Mr. Tedford appealed that decision to his second line supervisor, Ms. Schnell, who wrote that she concurred with Wise's decision.

8. Mr. Tedford appealed Ms. Schnell's decision to the next level supervisor, and on October 20, 2013, his third line supervisor wrote on the grievance a request for Mr. Tedford to provide documentation of the duties he was performing relative to the higher class.

9. Mr. Tedford testified that he never received a formal response to his grievance from his third line supervisor. Instead, at some point later he received an undated letter notifying him that he was being re-classified to a Workforce Development Specialist II effective February 1, 2014. A copy of the reclassification letter was also attached to Mr. Tedford's Personnel Board Appeal. Mr. Tedford testified that because the Appellee failed to address his back pay, he filed the instant appeal.

10. On cross examination, Mr. Tedford admitted that he was aware that he was performing the duties of a Workforce Development Specialist II in 2008, 2010 and 2011 and stated that he did not believe he was entitled to pay for 2008 and 2010 because he did not file a grievance.

11. He further stated that he waived his claim for back pay for 2008 and 2010 and testified that he believed he should receive back pay beginning July 2011 because that was when he filed his first grievance notifying his employer that he was performing the higher level duties without the appropriate pay.¹

12. The end of Mr. Tedford's testimony marked the end of his case in chief. The Appellee called no witnesses and rested.

¹ The facts surrounding Appellant's knowledge that he was performing duties outside his assigned pay grade in 2008 and 2010 are relevant to this claim, but for purposes of analysis, the claim for back pay will be limited to a beginning date of July 2011.

13. The Appellee then renewed its Motion to Dismiss or for a Directed Verdict, arguing that Mr. Tedford failed to file his appeal within the one year limitations period. Alternatively, the Appellee argued that Mr. Tedford failed to show that there was a material and permanent change in his duties.

14. The Appellee waived closing argument. Mr. Tedford made a closing argument and submitted a post hearing Response to the Motion to Dismiss. No Reply was filed by Appellee.

15. The Hearing Officer considered the entire administrative record.

FINDINGS OF FACT

1. The Appellant, Frank Tedford, III, was initially classified as Workforce Development Specialist I, Grade 10.

2. He alleges that from November 2010 to July 2011 he performed the Trade duties of a Workforce Development Specialist II without additional compensation, and that beginning in April 2011, KEWES Super User duties had also been added without a pay increase.

3. In July 2011, he filed a grievance seeking a reclassification and back pay for performing these duties. He won the grievance, but the reclassification and back pay were not granted.

4. In September 2013, Appellant filed a second grievance arising from the same facts and circumstances and making the same claims as his July 2011 grievance. He was reclassified February 1, 2014, without back pay.

CONCLUSIONS OF LAW

1. KRS 18A.095(24) provides that an increase in responsibility without cause or authority constitutes a penalization.

2. KRS 18A.095(29) provides:

[A]n employee that has been penalized, but has not received a written notice of his or her right to appeal as provided in this section, shall file his or her appeal with the Personnel Board within one (1) year from the date of the penalization or from the date that the employee reasonably should have known of the penalization.

3. Appellant began performing Trade duties in November 2010 and KEWES duties in April 2011 and was aware by the time he filed his July 2011 grievance that he was being penalized by performing additional duties without compensation.

4. He failed to file an appeal with the Personnel Board to appeal that penalization within one year as required.

5. The filing of an identical grievance in September 2013 two years later, does not revive Mr. Tedford's cause of action.

6. Having failed to timely file his appeal, the Personnel Board lacks jurisdiction over this case under the provisions of KRS 18A.005 *et. seq.* and the case of *Com. Dept of Revenue, Finance and Administration Cabinet v. McDonald*, 304 S.W. 3d 62 (Ky. App. 2009).

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the case of **FRANK TEDFORD, III vs. DEPARTMENT OF WORKFORCE DEVELOPMENT (APPEAL NO. 2014-006)** 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 19th day of November 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

Copies this date mailed to:

Hon. James Maxson
Mr. Frank E. Tedford III