

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD**

**SONYA WRIGHT (2021-151)
MARK NOBLE (2022-006)
ANTHONY WHEELER (2022-008)**

APPELLANTS

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

VS.

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

APPELLEE

*** **

The Board, at its regular February 2024 meeting, having considered the record, including the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer dated January 11, 2024, Appellants' exceptions, Appellee's response to exceptions, 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 Appellants' 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 February, 2024.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

Copies hereof this day emailed and mailed to:

Sonya Wright

Mark Noble

Anthony Wheeler

Hon. Jesse Robbins

Hon. Rosemary Holbrook (Personnel Cabinet)

Rodney Moore

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**SONYA WRIGHT (2021-151)
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APPELLANTS

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

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DEPARTMENT OF CORRECTIONS**

APPELLEE

*** **

This matter came on for a pre-hearing conference on July 17, 2023, at 11:30 a.m. ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellants, Sonya Wright, Mark Noble, and Anthony Wheeler were present and were not represented by legal counsel. The Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and was represented by the Hon. Jesse Robbins.

The purposes of the pre-hearing conference were to discuss the status of the appeals.

BACKGROUND AND FINDINGS OF FACT

The Hearing Officer largely adopts the Parties' following Specific Factual Stipulations 1 through 30:

1. The Appellant Sonya Wright (Wright) is currently retired but was formerly a classified employee with status within the Justice and Public Safety Cabinet, Department of Corrections (Appellee) working at the Eastern Kentucky Correctional Complex (EKCC).

2. The Appellants, Anthony Wheeler (Wheeler) and Mark Noble (Noble), were and are classified employees with status within the Justice and Public Safety Cabinet, Department of Corrections, working at the Eastern Kentucky Correctional Complex (EKCC) and/or Kentucky Correctional Industries (KCI).

3. Wright was employed as an Offender Information Supervisor during the Covid-19 pandemic. Her normal work location was the EKCC administrative building.

4. Wheeler was employed as a Correctional Industries Production Coordinator during the Covid-19 pandemic. His normal work location was at the end of the Vocational Shop Wing of EKCC.

5. Noble was employed as Correctional Operations Manager during the Covid-19 pandemic. His normal work location was at the end of the Vocational Shop Wing of EKCC.

6. During the Covid-19 pandemic, the Appellants were working in their positions as mentioned above.

7. Wright did not work a security post. However, she had extra duties placed on her during the Covid-19 pandemic including that she did initial reviews of inmates and ran NCIC background checks for prisoners for Central Office (due to the Governor's Covid-19 pardons); and she worked around inmates such as talking to them and doing release paperwork and serving warrants on them.

8. Wright's position was deemed an essential emergency responder position for DOC during the Covid-19 pandemic.

- a) Either party can argue whether this fact should have been considered in granting or denying her the Covid-19 Bonus.
- b) Either party can argue the effect this fact had or did not have on the decision to give Wright the Covid-19 Bonus including whether it was considered or should have been considered.

9. Noble and Wheeler had to work security in their assigned work location.

10. Wright received the Covid-19 vaccine on February 21, 2021, and March 22, 2021. She received the Moderna vaccine and reported it to EKCC human resources.

11. Wheeler received the vaccine on February 22, 2021, and March 22, 2021. He received the Moderna vaccine and reported it to EKCC human resources.

12. Noble received the Covid-19 vaccine on April 9, 2021. He received the Johnson and Johnson vaccine and reported it to EKCC human resources.

13. Exhibit 1 is a fair and accurate representation of the template of the letter with the attached criteria that was sent to employees who received the Bonus. See Attached Exhibit 1.

14. The Appellee's criteria for deciding who would receive the Covid-19 Bonus was the following:

- a) The Covid-19 Bonuses were one-time payments.

- b) It was not mandatory that employees received a Covid-19 vaccine and participation was 100% voluntary.
- c) However, DOC employees had until midnight on December 7, 2021, to voluntarily receive the vaccine and submit proof of completed vaccination to receive one of the larger one-time payment amounts.
- d) An individual with an employment start date on or before March 6, 2020, who worked a security post in a state correctional facility or due to staff shortages assisted by working in a security post in a state correctional facility and had provided proof of completed Covid-19 vaccination was eligible to receive a one-time payment in the amount of \$5,000.
- e) An individual with an employment start date on or before March 6, 2020, who worked a security post in a state correctional facility or due to staff shortage assisted by working a security post in a state correctional facility and who choose to not receive the Covid-19 vaccine is eligible to receive a one-time payment in the amount of \$2,500.
- f) An individual with an employment start date between March 7, 2020, and February 1, 2021, who worked a security post in a state correctional facility or due to staff shortages assisted by working a security post in a state correctional facility and had provided proof of completed Covid-19 vaccination was eligible to receive a one-time payment in the amount of \$2,500.
- g) An individual with an employment dated between March 7, 2020 and February 1, 2021, who worked a security post in a state correctional facility or due to staff shortage assisted by working a security post in a state correctional facility who choose to not receive the Covid-19-19 vaccine was eligible to receive a one-time payment in the amount of \$1,250.

15. The Appellee further delegated the authority to decide the specifics of who met the criteria between Deputy Commissioner Randy White (White), Rodney Moore (Moore), and/or the Wardens of each institution.

16. After reviewing an initial list of potential eligible EKCC employees made by EKCC Deputy Warden Whitt, White and Moore had concerns that the list was unusually large perhaps because the recommended employees' eligibility had not been verified.

17. At the direction of White and Moore, Deputy Warden Whitt was to review the eligibility of those on his list and apply the eligibility criteria to make sure they were in line with the criteria established by the Appellee.

18. Exercising his discretion, EKCC Warden Green submitted a revised list and many employees had been removed as not meeting the criteria, including the Appellants.

19. The Appellee made a discretionary decision to award certain EKCC and KCI employees the Covid-19 Bonus.

20. The Appellee made a discretionary decision to not award all EKCC and KCI employees the Covid-19 Bonus.

21. The Appellee made a discretionary decision to not award Appellants the Covid-19 Bonus.

22. The Appellants used the employee grievance process claiming they should have been awarded the Covid-19 Bonuses.

23. The Appellee denied the Appellants' grievances.

24. Wright appealed the denial of her grievance on December 16, 2021, to the Personnel Board (PB).

25. Noble appealed the denial of his grievance on February 2, 2022, to the PB.

26. Wheeler appealed the denial of his grievance on February 7, 2022, to the PB.

27. Wright's Appeal Form is a fair and accurate representation of Sonya Wright's Appeal Form and attachments she filed. See attached Exhibit 2. See also attached Exhibit 3 and 4, which are fair and accurate representations of her job classification effective 6-16-2019 (Exhibit 3) and then 10-16-2020 (Exhibit 4).

28. Noble's Appeal Form is a fair and accurate representation of Mark Noble's signed Appeal Form and attachments he filed. See attached Exhibit 5. See also attached Exhibit 6, which is fair and accurate representation of his job classification effective as of 4-16-2015.

29. Wheeler's Appeal Form is a fair and accurate representation of Anthony Wheeler's signed Appeal Form and attachments he filed. See attached Exhibit 7. See also attached Exhibit 8, which is fair and accurate representation of his job classification effective as of 12-16-2018.

30. There is no evidence that the Appellee's decision to deny the Appellants a Covid-19 Bonus was based on discrimination due to race, color, religion, ethnic origin, sex, disability, political, or age (over 40).

The Hearing Officer enters the following **Findings of Fact**:

31. The Appellee filed a Motion to Dismiss Appeal for Failure to State a Claim that May be Heard by the Board alleging the Personnel Board lacked jurisdiction because the Appellants failed to state a claim upon which the Board may grant relief. The Appellee pointed out that the Appellants have not identified any statutory or regulatory violation or any legal obligation with which the Appellee has failed to comply.

32. The Appellee's Motion to Dismiss for Failure to State a Claim that May be Heard by the Board reads in part as follows:

On March 11, 2021, the American Rescue Plan Act of 2021 ("ARPA") became federal law and provided for funds for a variety of purposes including COVID-19 mitigation. Kentucky's General Assembly allocated some of Kentucky's ARPA funds to be used to mitigate the spread of COVID-19 in congregate settings. Those funds were approved for mitigation efforts within DOC's prisons. DOC (through its Commissioner Cookie Crews) determined that the funds would be used for multiple reasons including to mitigate staff shortages by providing a one-time bonus to eligible employees. DOC determined eligibility criteria for the bonus and included that criteria in letters sent to those employees who would receive the bonus. It is undisputed that DOC never made a statement or promise that all employees would receive the Covid bonus. It is undisputed that not *every* employee would receive the bonus. The very fact that eligibility criteria was set envisioned there would be employees who were ineligible.

The Commissioner delegated Dep. Commissioner Randy White, Rodney Moore, and the institutional wardens to determine who would receive the bonus. Acting for DOC, Deputy Commissioner White, Rodney Moore, and Warden Green (EKCC's Warden) consulted regarding which EKCC employees would receive the bonus. They determined that some employees would receive the bonus, and some would not.

Eventually, DOC through these delegates, determined that the Appellants would not receive the bonus. There is no evidence that DOC denied the Appellants the bonus due to any form of discrimination. A review of the Appellants' appeal forms indicates there is no claim regarding discrimination nor retaliation.

The Appellants realized they were not going to receive the bonus, then filed a grievance with the Warden. Warden Green denied their grievances. When they appealed to Dep. Commissioner White, he supported the

Warden's decision. Following this denial of their grievances, they filed these appeals.

On Wright's appeal form under the "I am appealing the following actions" section, Wright did not check any box. In the next section, she explained the basis of her appeal as "I have been treated unfairly and I feel I deserve the Covid-19 bonus and I feel all the things that is wrong need to be dealt with properly."

Noble checked the box for "other penalization" and explained his appeal basis as "the decision of the grievance process for Covid-10 award." In the next section, he explained that he is appealing because other non-uniformed security staff received the bonus and so should he. He further reasoned he should have received the award because his work area was not supplied with security, and he had to perform security duties.

Wheeler checked the box for "other penalization" and explained "Grievance was denied." In the next section, he also reasoned he should have received the award because his work area was not supplied with security, and he had to perform security duties.

Following their appeal filings, DOC, through their counsel, and the Appellants went through the discovery process and an extensive discussion negotiating stipulations and agreed to stipulations and exhibits, which were entered into the record.

What had become clear is that there has been no affirmative action taken against the Appellants by DOC. Rather, the Appellants filed their appeals claiming they disagreed with DOC's decision determining that other employees were eligible for the discretionary Covid bonus while the Appellants were ineligible. They have argued either it was unfair or that they should be treated the same. However, such claims are not reviewable by the Personnel Board and their Appeals should be dismissed.

33. The Appellants filed an Argument Against Dismissal Filed August 18, 2023, for Sonya Wright, Mark Noble, and Tony Wheeler, which reads as follows:

During the month of October 2021, certain Department of Corrections employees began receiving letters from the Justice and Public Safety Cabinet (JPSC) that stated, "You will receive a one-time payment on December 17, 2021. Your payment will be calculated according to the attached criteria." The Covid-19 eligibility criteria outlined that the only employees that should receive the stipend were those working a security post. Warden Green chose not to follow the eligibility criteria and with the

approval from the Deputy Commissioner, Randy White, and H.R. Director, Rodney Moore, agreed to give this Bonus to persons that were not eligible based on the eligibility criteria.

The people that were given this award did not work in security but were selected because they had to perform their job without inmate help during the Covid-19 lock-down. Following the distribution of the Bonuses to selected employees, per the Warden Green's new criteria, those that felt they should have been eligible, but did not make the list, asked Warden Green to attend a meeting to discuss the rationale behind his choices. Not only did he not adequately address the concerns of those in the meeting, but he also went on to say that he would, in fact, be giving the award to his maintenance employees as a contribution to their hard work. While the Appellants certainly commend the hard work of the maintenance staff, they were not eligible per Warden Green's newly set criteria. Wright attached her grievance with photos of some of the hard work the maintenance workers completed in Morgan County that was ultimately not institution related and, therefore, does not qualify for the award. Also attached was a citation of the arrest of a prior Deputy Warden Terry Wallace that stated he was intoxicated at work. Wallace did not receive any disciplinary action. The Appellants believe this was directly relevant as it demonstrates that Warden Green had shown disregard for policy in the past and in the case of the Covid-19 eligibility criteria, did not follow directions from Commissioner Crews. This was not addressed at all by anyone.

With eligibility criteria set in place by the JPSC, guidelines were to be followed by the Department of Corrections on awarding the Covid-19 Bonus for mitigation. It was understood that discretionary decisions had to be made, but the first step in making a discretionary decision was appropriate verification of who was eligible based on the valid reasoning along with the predetermined criteria. Taking into consideration the statement made by Warden Green and evidence that certain individuals not meeting eligibility criteria were awarded the Covid-19 mitigation while others in similar positions also not meeting eligibility criteria were not, demonstrates that proper judgment was not utilized in the discretionary decision-making aspect of this Bonus selection. Wheeler and Noble both worked security in their assigned areas as described in their job class specification. They also assisted and performed duties of the Vocational Wing Officer Post in his/her absence during the pandemic. It seems that Wheeler and Noble both met the criteria in a variety of aspects. They both worked in an area where no security is provided and are required to perform security duties themselves. They also completed security duties for the Vocational Wing Post when there was an officer pulled to cover other posts. Per Warden Green, the reason the maintenance staff received the mitigation

was because they completed a lot of work without the help of inmates while the inmates were in lockdown, however, Wheeler and Noble both worked in Coupons without inmate labor in the attempt to meet the obligation of the customers. Coupons is normally a job completed solely by the inmates.

In the Appellee's motion to dismiss, it states that it was determined through Commissioner Crews that the Bonus funds would be used to mitigate staff shortages. This was not stated in the letter given to everyone who received the Bonus. It was delegated through Deputy Commissioner Randy White, Rodney Moore, and the institutional wardens. It also states that the Appellants failed to articulate that the DOC took any action against them akin to penalization. While Wright may not have been discriminated against or had disciplinary action taken against her, she feels that the discussion that took place between herself and Warden Green on October 27, 2021, influenced his decision against her not receiving the Bonus. An occurrence report was attached to her grievance, and she believes it was overlooked. During the discussion between her and the Warden Green, he appeared to become angry when discussing the Bonuses, using a harsh and unnecessary tone. Warden Green was not contacted to see if the occurrence she reported was true or false, therefore, giving rise to the assumption that it must have been overlooked.

Security correctional officers were not the only staff shortage. Wright's records department functioned on 50 percent staff due to employees being sent home to work. A lot of staff that were sent home to work could not adequately do their job as was required of them at the institution but still received the Bonus. Wright signed a paper that she was considered an essential employee and was required to be there during the pandemic. She performed extra work duties assigned to her from central office due to the pardoning of inmates by Governor Beshear and extra work duties because some of the staff working from home could not complete their assigned duties.

When the Appellants argued that others received the Bonus besides security staff, such as all maintenance workers, re-entry, and warehouse supervisor, then they were informed that the maintenance workers received the Bonus because of them having to work without inmates. There are no job descriptions in the Department of Corrections that state one must have inmates to assist them to perform their duties. One employee mentioned was Sarah Potter, Re-entry Coordinator. Wright sent JPSC Counsel Jessie Robbins an email informing him that Potter stated to her that she did not work security and received the mitigation award and Correctional Training Officer, Amy Ferguson witnessed her stating this, but Robbins did not reach out to them to follow up on this information. This was part of Wright's

argument that more than just security staff or individuals who worked security received the award. The Appellants believe this is a valid concern and should have been addressed.

The letter given to those who received the Bonus states that the Bonus was for mitigation of Covid-19, not mitigation of staff shortages as Robbins stated in his motion to dismiss. The Appellants state they did their part with mitigation by wearing masks, receiving immunizations, and abiding by the recommendation to remain six (6) feet away from others, if possible. Furthermore, they reported to work, took on additional responsibilities, and did not work from home. The Bonus given was not a law, a statute, or right, so how could it be stated that some would or would not receive it, especially when the guidelines set forth were not followed and proof was provided. Additionally, the discretionary decisions made following the release of the eligibility criteria were not impartial, as individuals in the same positions were treated differently, with some receiving the mitigation Bonus while others did not.

34. The Appellee filed a Reply to Appellant's Response to Motion to Dismiss Appeal For Failure to State a Claim. The Appellee pointed out that the Appellants have not alleged that they have been penalized by any actions taken by the Appellee. The Appellee contends that, even if its actions were unfair or unreasonable, they are not reviewable by the Personnel Board.

35. The Covid-19 Bonuses in question, in this case, are not a right granted to state employees.

36. The decision to grant Covid-19 Bonuses to some employees were discretionary decisions made by the Appellee.

37. There are no genuine issues of material fact and this case can be decided as a matter of law based on the written materials submitted by the parties.

CONCLUSIONS OF LAW

1. KRS 18A.095 authorizes appeals to the Personnel Board who have been disciplined or otherwise penalized without cause. KRS 18A.005(24) defines "penalization" as:

"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. In these cases, the Appellants argue they were penalized by not receiving the Covid-19 Bonus that some other employees received. Their argument does not meet the standard of an abridgement or denial of other rights granted to state employees because the Covid-19 Bonus was not a “right” granted to the Appellants or any other state employees. Thus, the Appellants have not presented an allegation of having been penalized.

3. Likewise, any claim that the Appellants have been denied compensation does not constitute a penalization because subjective expectations of compensation that are not clearly based on a statute or regulation are not actionable. In Board of Regents of State Colleges vs. Roth, 408 US 564, 577, 92 S.Ct. 2701 (1972), the Supreme Court stated:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

The Appellants do not cite to any legal entitlement to the Covid-19 Bonus in this case.

4. The Appellants do not have a legitimate claim of entitlement to a discretionary decision. Richardson vs. Township of Brady, 218 F.3d 508 (6th Cir. 2000). Kentucky's public employees are limited in their property rights by the rules created by the General Assembly, therefore, an Agency's discretionary decision to not grant to some employees additional compensation or Bonuses that has been given to other employees does not constitute a penalization. KRS 18A.005(24).

5. The Personnel Board lacks jurisdiction over claims that discretionary decisions by the Appellee were unfair or unreasonable to the Appellants.

6. There are no genuine issues of material fact and this appeal can be decided as a matter of law based on the written materials in the record. The Appellee's Motion to Dismiss Appeal for Failure to State a Claim is **GRANTED**. KRS 13B.090(2) and KRS 18A.095(18)(a).

7. Because all of the events underlying this appeal occurred before the effective date of Senate Bill 153, all references to KRS Chapter 18A are to the sections in effect at the time of the events associated with this appeal.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeals of **SONYA WRIGHT (APPEAL NO. 2021-151), MARK NOBLE (APPEAL NO. 2022-006), AND ANTHONY WHEELER (APPEAL NO. 2022-008) V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS** 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)

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.

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

ISSUED at the direction of Hearing Officer this 11 day of January, 2024.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day emailed and mailed to:

Sonya Wright
Mark Noble
Anthony Wheeler
Hon. Jesse Robbins
Hon. Rosemary Holbrook (Personnel Cabinet)