

RENDERED: APRIL 13, 2018; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000059-MR

PAUL KORDENBROCK

APPELLANT

v. APPEAL FROM LYON CIRCUIT COURT
HONORABLE CLARENCE WOODALL, JUDGE
ACTION NO. 14-CI-00017

KENTUCKY DEPARTMENT
OF CORRECTIONS;

APPELLEES

RICHARD OLIVER, FORMER PLANT MANAGER;
DARRIN COLLIER, PLANT MANAGER;
PHILLIP W. PARKER, FORMER WARDEN;
RANDY WHITE, WARDEN;
SKYLA GRIEF, FORMER GRIEVANCE COORDINATOR;
SHAE HOLLIMAN, GRIEVANCE COMMITTEE CHAIRPERSON;
MICHAEL SPINDLER, GRIEVANCE COMMITTEE MEMBER;
CARSON FENTRESS, GRIEVANCE COMMITTEE MEMBER;
LADONNA THOMPSON, FORMER COMMISSIONER,
DEPARTMENT OF CORRECTIONS;
RODNEY BALLARD, COMMISSIONER, DEPARTMENT OF
CORRECTIONS;
JAMES L. ERWIN, DEPUTY COMMISSIONER,
DEPARTMENT OF CORRECTIONS

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, JOHNSON, AND D. LAMBERT, JUDGES.

LAMBERT, D., JUDGE: Acting *pro se*, Paul Kordenbrock, an inmate of the Kentucky State Penitentiary (KSP), appeals from a Lyon Circuit Court order dismissing his declaration of rights petition. Kordenbrock sought to void certain internal memoranda issued by the Kentucky Department of Corrections (KDOC). According to Kordenbrock, the memoranda, which addressed inmate pay raises, violated Kentucky Revised Statutes (KRS) 13A.130 as well as his constitutional due process rights. After review, we affirm.

I. BACKGROUND

This is the second time Kordenbrock has appealed this matter. The underlying facts are set forth in *Kordenbrock v. Oliver*, 2014-CA-000729-MR, 2016 WL 197120 (Ky. App. Jan. 15, 2016). Essentially, Kordenbrock is a KSP prisoner who works in the prison garment factory. His starting pay rate was \$0.45 per hour, but over time he evidently felt entitled to more. He filed an institutional grievance wherein he claimed that he was owed four quarterly pay raises at \$0.10 each. This grievance was dismissed because the KDOC had issued official memoranda freezing pay raises. One memorandum was issued by Warden Philip Parker and froze all pay raises above \$0.45 per hour. A later memorandum, addressed to all “KCI Inmate Employees” and signed from James Erwin, Deputy Commissioner of the KDOC, echoed the memorandum from Warden Parker and applied to all Office of Adult Institutions (OAI) divisions.

After his grievance was dismissed, Kordenbrock filed a petition for declaration of rights in the Lyon Circuit Court against various KDOC personnel and others employed at KSP. In his petition, Kordenbrock asserted that all inmates enjoyed a property interest in their pay and in pay raises. He further asserted that his due process rights were violated when the pay freeze went into effect because he had a right to a quarterly pay raise of \$0.10 per hour under Kentucky State Penitentiary Institutional Policy and Procedure (IPP) 16-05-01 and Correctional Industries Policy and Procedure (CI) 05-01-04. In pertinent part, IPP 19-05-01 states:

f. The beginning rate of pay for an inmate worker shall be \$0.25 per hour and the maximum base rate shall be \$0.85 per hour. An additional \$0.10 per hour may be paid to key positions.

g. A raise shall be limited to \$0.10 per increase on a quarterly basis calculated from the starting date.

Moreover, CI 05-01-04 provides:

5. (d) Upon successful completion of their probationary and training period, inmates shall receive a \$0.10 per hour pay increase except that “work for time” credit inmates shall receive a \$0.05 per hour increase.

....

9. Inmate employee raises shall be limited to \$0.10 per quarter except that “work for time credit” inmates shall be limited to \$0.05 per quarter. Quarterly pay increase shall be figured from the date the inmate completes the probationary period.

In March 2014, the appellees filed a motion to dismiss wherein they claimed Kentucky law did not guarantee inmates quarterly pay raises. The circuit

court entered an order dismissing the petition one month later. Kordenbrock brought his first appeal from that order.

In *Kordenbrock v. Oliver, supra*, another panel of this Court vacated and remanded the case for a specific determination as to whether the internal memoranda were unlawful as having been issued in contradiction of KRS 13A.130. The circuit court followed the Court's instructions and later concluded the memoranda did not violate KRS 13A.130. The circuit court then dismissed Kordenbrock's declaration of rights petition for a second time, and this appeal followed.

II. STANDARD OF REVIEW

The standard of review in a declaratory judgment action is the same as other civil actions. *Baze v. Rees*, 217 S.W.3d 207, 210 (Ky. 2006). If the circuit court makes factual findings, they should not be set aside unless clearly erroneous and any conclusions of law are reviewed *de novo*. *Reynolds Enterprises, Inc. v. Kentucky Bd. of Embalmers & Funeral Directors*, 382 S.W.3d 47, 50 (Ky. App. 2012). With respect to agency action, a reviewing court assesses whether an administrative agency correctly applied the law under a *de novo* standard of review. *Smith v. Teachers' Ret. Sys. of Kentucky*, 515 S.W.3d 672, 675 (Ky. App. 2017) (citing *Bd. of Comm'rs v. Davis*, 238 S.W.3d 132, 135 (Ky. App. 2007)). While the courts ultimately review issues of law *de novo*, we afford deference to an administrative agency's interpretation of the statutes and regulations it is charged

with implementing. *Com., ex rel. Stumbo v. Kentucky Pub. Serv. Comm'n*, 243 S.W.3d 374, 380 (Ky. App. 2007).

III. DISCUSSION

On appeal, Kordenbrock primarily argues that the KDOC froze inmate wage increases in contravention of KRS Chapter 13.¹ As part of this argument, Kordenbrock claims the internal memoranda were unenforceable because they conflicted with both 501 Kentucky Administrative Regulation (KAR) 6:160 and 501 KAR 6:040. In the alternative, Kordenbrock also argues that Warden Parker and Deputy Commissioner Erwin lacked authority to even issue their respective memoranda. For the following reasons, we disagree.

In accordance with KRS 197.070(1), the KDOC must provide employment for all confined prisoners. These prisoners must receive payment for their work, and the KDOC has the authority to promulgate administrative regulations regarding their payment. KRS 197.110(4). This authority is limited; it does not permit the KDOC to modify, expand, or limit a statute or other administrative regulation via internal policy, memorandum, or other action. *See* KRS 13A.130(1). “Intradepartmental memoranda” that do not conflict with KRS 13A.130, however, are acceptable. KRS 13A.010(2)(c).

¹ Kordenbrock has also raised this argument with respect to an alleged freeze on holiday pay due to Warden Parker’s memorandum, but he failed to raise that issue in his grievance in the administrative proceeding, and therefore waived it for purposes of judicial review. *See O’Dea v. Clark*, 883 S.W.2d 888, 891-92 (Ky. App. 1994) (failure to raise an issue before an administrative body precludes a litigant from asserting that issue in an action for judicial review of the agency’s action).

Here, the two KDOC policies at issue, IPP 19-05-01 and CI 05-01-04, which 501 KAR Chapter 6 incorporates by reference, address correctional workers' payment both in permissive and mandatory terms. The permissive term "may" is used when referring to a potential \$0.10 increase for worker in a "key position." The mandatory term "shall" is employed when establishing an overall salary range between \$0.25 and \$0.85 per hour, when authorizing a one-time pay increase once an inmate completes an initial probationary period, and when setting an upper limit of \$0.10 on any quarterly pay increase. Despite this mixed language, one thing is clear. The policies do not, by any means, mandate a \$0.10 pay raise for every inmate, every quarter. On the contrary, the policies merely guide the KDOC's discretionary authority in the event a pay raise is awarded. Such guidance is precisely the type of administrative latitude granted to the KDOC under KRS 13A.010(2)(c), and does not conflict with 501 KAR Chapter 6 simply because it adds flesh to a regulatory skeleton. Moreover, as the nature of Kordenbrock's entitlement to a pay raise was a subjective expectancy at best, the internal memoranda were properly issued without offending Kordenbrock's constitutional rights. *See Romero v. Administrative Office of Courts*, 157 S.W.3d 638, 641 (Ky. 2005) (subjective expectancy not enough to create a property interest for due process purposes).

As for Kordenbrock's argument that Warden Parker and Deputy Commissioner Erwin did not have the authority to issue the internal memoranda in the first place, KRS 196.026 is instructive. That statute, which sets forth the

KDOC's overall structure, confirms that both the Division of Kentucky State Penitentiary and the Division of Correctional Industries fall within the OAI. Therefore, Erwin, as Deputy Commissioner over the OAI, had the authority to issue his memorandum, which effectively superseded Warden Parker's.

For the foregoing reasons, we affirm the Lyon Circuit Court's judgment.

ALL CONCUR.

BRIEF FOR APPELLANT:

Paul Kordenbrock, *pro se*
Eddyville, Kentucky

BRIEF FOR APPELLEES:

Brenn O. Combs
Frankfort, Kentucky