COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-242

THOMAS A. SMITH **APPELLANT**

VS.

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

CABINET FOR HEALTH AND FAMILY SERVICES
J. P. HAMM, APPOINTING AUTHORITY **APPELLEE**

AND

TANYA DICKINSON **INTERVENOR**

** ** ** ** **

The Board at its regular June 2015 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated May 18, 2015, Appellant's motion to file late exceptions, Appellee's response and being duly advised,

IT IS HEREBY ORDERED that the Appellant's Motion to File Late Exceptions is **DENIED**.

IT IS FURTHER 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 24th day of June, 2015.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Jennifer Wolsing
Hon. Ed Dove
Tanya Dickinson
J. P. Hamm

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This matter came on for evidentiary hearing on March 16, 2015, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Roland P. Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Thomas A. Smith, was present and represented by the Hon. Edward E. Dove. The Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Jennifer Wolsing. Also present as Agency representative was Ms. Sarah McCoun. The Intervenor, Tanya Dickinson, was present and not represented by legal counsel.

The issues in this case are:

1. Appellant's contentions that the statutory and regulatory requirements set forth at KRS 18A.0751(4)(f) and 101 KAR 1:400 were not met when the Cabinet for Health and Family Services did not select Appellant for an interview for the position of Program Administrator. The burden of proof is on the Appellant to demonstrate by a preponderance of the evidence that the laws and regulations applicable to promotions within the state service were not followed when he was not given consideration and thereby not selected for an interview for the position of Program Administrator.

2. Appellant's allegation that the Cabinet for Health and Family Services failed to consider Appellant's application for the position of Program Administrator due to discrimination based on race. The burden of proof is on the Appellant to demonstrate by a preponderance of the evidence that he was subjected to racial discrimination.

The rule separating witnesses was invoked and employed throughout the course of the proceeding. The Appellant and the Intervenor waived presentation of an opening statement. An opening statement was presented by the Appellee.

BACKGROUND

1. The first witness for the Appellant was the Appellant, **Thomas A. Smith**. Mr. Smith, for the past year, has been employed as an Investigator II with the Office of Inspector General. He is an African-American gentleman who possesses a BS degree in Recreation from Western Kentucky University. He has undergone training at the Federal Medical Center in audits and on-site investigations, program compliance, policy compliance and revisions, and national policy compliance. He has experience in having reviewed contracts and interviewing contractors with regard to memoranda of work. This experience spans 17 years.

2. Mr. Smith gave a recitation of his employment history. In 1985 he began work for Kentucky Probation and Parole. He supervised a caseload of 125, made parole recommendations, and received training in interview techniques and Cabinet sentencing recommendations. He served in that position for about 4.5 years before moving on to a position with the Federal Medical Center in Lexington, Kentucky.

3. After working at the Federal Medical Center he retired. He came out of retirement and became a Tax Fraud Investigator for the Kentucky Revenue Cabinet. For about 1.5 years he investigated corporate and individual tax concerns.

4. In his current position with the Office of Inspector General, Mr. Smith investigates any recipient or provider, for alleged exploitation of disadvantaged children, as well as tax fraud.

5. In September 2014, Mr. Smith became aware of an employment vacancy for the position of Program Administrator. He identified Joint Exhibit 1 as the BH/DID Program Administrator job description posting that appeared on-line. He determined after reviewing the posting that he possessed quite a few of the qualifications as he was experienced in many of the duties and activities listed therein. He completed and submitted his application for the position (Joint Exhibit 2).

6. On September 30, 2014, Appellant received an e-mail from Meg Link advising he had been selected for an interview, and asking if he would be available for that interview October 7, 2014 (Joint Exhibit 3). He pointed out that his unusual e-mail address appears at the top of the e-mail. The following day, he telephoned the Cabinet and left a voice message to thank them for considering him and advised he wished to participate in the interview. He also sent an e-mail confirming he would come in for the interview on October 7. That e-mail is shown as part of Joint Exhibit 4.

7. Mr. Smith did not hear anything further in response and surmised that from hearing his voice on the telephone message, Ms. Link concluded he was an African-American; that they were therefore no longer interested in him or in having an African-American male in that department.

8. In reviewing Joint Exhibit 4, Mr. Smith pointed out the September 29, 2014 e-mail from Sarah McCoun, Assistant Director to Meg Link. That e-mail identifies seven individuals whom McCoun asked be scheduled for interviews. Mr. Smith's name is not listed among those individuals. However, Mr. Smith's e-mail address and telephone number are listed next to "Salyers, Larissa." He received a telephone message from Ms. McCoun indicating he had not been selected for an interview and that another candidate had been selected instead.

9. On October 6, 2014, Mr. Smith received an e-mail from Sarah McCoun (Joint Exhibit 5). That e-mail advised Mr. Smith the Department had made an error listing Smith's contact information next to the name of another applicant; that it was the other applicant they intended to interview and Smith had not been selected for an interview.

10. Appellant himself has now reviewed the applications of the persons who were interviewed for the Program Administrator position. Based on his own background and experience, he gave his opinion whether he would have offered an interview to each of those individuals. In his past employment, Appellant had experience hiring and firing employees. He identified the following exhibits and whether he would have offered the individual an interview for the position, based on each applicant's qualifications and experience listed in their respective applications:

- Appellant's Exhibit 1: Michelle DeJohn: He believed his qualifications were comparable to those of Ms. DeJohn.
- Appellant's Exhibit 2: Nicole F. Greenwood: Based on qualifications and experience alone, he would not have offered her an interview.
- Appellant's Exhibit 3: Michelle O'Bryan: He would not have offered her an interview.
- Appellant's Exhibit 4: Rona L. Dawson: He would not have offered her an interview.

- Appellant's Exhibit 5: Jeffrey Jagnow: He would not have offered him an interview.
- Appellant's Exhibit 6: Tanya L. Dickinson: He would have offered her an interview.
- Appellant's Exhibit 7: Larissa Salyers: He would have offered her an interview.

11. Mr. Smith believed he was qualified, had relevant prior experience, and could meet the public speaking and contract review requirements. He believed all of his background and experience would have warranted an invitation for an interview.

12. Upon his review of Joint Exhibit 1 and the position's minimum requirements, Mr. Smith testified he possesses a Bachelor's degree. He also has professional experience particularly in institutional activities; has been a manager from 15-17 years in the Federal Medical Center; and had been required to write mandates and ensure compliance with National Standards and Policies.

13. Appellant rested his case. Appellee presented a Motion for Directed Verdict on both issues. The motion was **OVERRULED**.

14. The first witness for the Appellee was **Meg Link**. Ms. Link is currently employed by the Kentucky Infrastructure Authority. She had previously been employed as an Office Coordinator and Administrative Assistant with the Department for Behavioral Health. She had assisted Sarah McCoun and others in the Outcome Transformation and Education Branch.

15. With reference to the subject Program Administrator position, Ms. McCoun requested she schedule interviews for certain applicants. She received an e-mail on September 29, 2014, listing the candidates McCoun wanted to interview (Joint Exhibit 4). Mr. Smith's name was not on that list, but Larissa Salyers' name was on the list. She testified she now understands she apparently was given the wrong contact information for Ms. Salyers, having later discovered the e-mail address and telephone number belonged to Mr. Smith. She assumed Salyers was the one to be interviewed as her name was listed in McCoun's e-mail.

16. On September 30, 2014, she sent e-mails to the e-mail contact information on the list and asked whether those contacted were still interested in the position. She identified Joint Exhibit 3 as the e-mail she had intended to send to Larissa Salyers. This e-mail was sent to, what she discovered later to have been, the e-mail address of the Appellant.

17. On October 1, 2014, she reported to work and discovered a voice message from a gentleman who said he would be delighted to interview at the appointed date and time. This confused Ms. Link, "Since I had contacted a female."

18. She contacted HR person Terry Tindle to confirm the e-mail address. He told her that e-mail address was not correct for Ms. Salyers. She then sent an e-mail to Ms. McCoun and asked how to proceed (Joint Exhibit 4). Ms. Link was directed to call the listed telephone number.

19. Link called the telephone number listed next to Salyers' name. A gentleman answered and told her she had the wrong number. She then spoke again to Ms. McCoun and was told McCoun would take care of the matter and contact the gentleman directly.

20. Upon her review of Joint Exhibit 2 she acknowledged that the e-mail address listed on Appellant's application was. Upon her review of Appellant's Exhibit 7, she confirmed that Ms. Salyers' e-mail address was listed correctly.

21. The next witness was **Sarah McCoun**. For the past year Ms. McCoun has been the Assistant Director for the Department for Behavioral Health, Developmental and Intellectual Disabilities. She briefly described her job duties. With regard to the Program Administrator vacancy she was the lead interview panel member.

22. She identified a portion of Joint Exhibit 4 as the e-mail she had sent to Meg Link requesting Ms. Link set up interviews. McCoun intended to offer an interview to Salyers and not Smith. She acknowledged the contact information provided was her own error in that upon her examination of the certified register, with Salyers and Smith being alphabetically together on that list, she accidentally clicked on the Appellant's application and erroneously inserted his contact information for Ms. Salyers'.

23. The Program Administrator was to be the Department's regulation coordinator and legislative liaison. As a legislative liaison that person would coordinate all the Department's reviews for proposed legislation during the session. This included reviewing and writing proposed legislation on behalf of the Department. As regulation coordinator, that person would review existing departmental regulations, as well as write and revise regulations as required.

24. The job duties listed on Joint Exhibit 1 show a required knowledge of legislative regulations. The minimum requirements detail the minimum education and experience required to qualify for the position. She read those items into the record.

25. The Office of Human Resource Management (OHRM) then reviews an applicant's application to determine whether they have met the position's minimum requirements. That review (MQR) takes place after the list of applicants for the position has been received and the applications have been screened.

26. It was Ms. McCoun who developed the screening criteria for this position. Screening criteria are developed to help "focus down" the number of applicant's qualities to determine which ones would be successful in the position. It narrows the search to the experience the Department is looking for in a successful candidate. All the applications were reviewed and screened.

27. Ms. McCoun developed the screening criteria for this position prior to the closing date. Those criteria are shown on Appellee's Exhibit 1, the Screening Criteria Worksheet she developed and used in that process. She reviewed each application to determine whether the applicant met the screening criteria. She read the four criteria into evidence and explained the importance of each. These criteria had not been publicly posted.

28. Thirty-nine applications for the position had been reviewed. She conducted the screening to determine which candidates met three of the four criteria. She then sent that list to Donna Parker, the Human Resource point of contact. Also included on that list was an indication whether an applicant was a veteran. Salyers and Greenwood were listed as veterans, in compliance with KRS 18A.150.[1] She determined Mr. Smith did not meet any of the screening criteria, nor was he a veteran.

29. She testified that an individual who spoke at court hearings had been counted by her as meeting the public speaking criteria. At the hearing and upon further review of Appellant's application, she stated Appellant "definitely" met that criteria and that it was a mistake on her part to not have given him credit in that area. She also examined pages 3 and 4 of Joint Exhibit 2 and after such examination testified Appellant, having arranged an annual conference, should have been given credit for experience in facilitation of workgroups. She acknowledged at hearing that Appellant met two of the four criteria.

30. At the time of screening, she did not know the race of any of the applicants. Five candidates were interviewed. Tanya Dickinson was selected for the position. A packet was then sent recommending Ms. Dickinson to the position (Appellee's Exhibit 2).

31. Ms. McCoun was the sole individual who screened the applications. Upon questioning she acknowledged that all the individuals who had been interviewed were white.

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[1] At the request of the parties, the Hearing Officer took judicial notice of KRS 18A.150.

32. If she were to conduct the screening today, Appellant would have qualified in two of the criteria. However, he still would not have been offered an interview as he did not meet three of four criteria. Although his experience was considered, his record of performance, seniority, and performance evaluations, were not considered.

33. She reiterated that the process included the posting of the position and a request for a register. Mr. Smith was on the register. Applications were then submitted by the applicants. Ms. McCoun then screened the applicants based on the criteria she established. She thereafter submitted a list of those applicants who met three of the four criteria, as well as those who were veterans. OHRM then conducted a Minimum Qualifications Review (MQR).

34. Once the e-mail was sent to Mr. Smith advising him of the error in his selection for an interview, this ended the process for him.

35. The screening process is more stringent than the MQR. She did not know why, if an applicant would not meet the MQR, that they would first have to go through the screening process.

36. The next witness was **Georgianne McCain**, who since December of 2013 has been the Staff Assistant at the Kentucky Department for Behavioral Health, Developmental and Intellectual Disabilities. Her duties include oversight of human resources efforts and she serves as liaison to OHRM.

37. The screening criteria were never posted on-line. They are developed to review one's application once a register is completed. These criteria reflect specific responsibilities associated with the job.

38. Upon her review of Joint Exhibit 1, she testified the job duties indicate a focus around legislation and regulations; that the listed Preferred Skill Questions (PSQ) also refer to those areas.

39. A narrative is found on the Personnel Cabinet's website containing PSQs which identify specific competencies for an applicant. Hiring agencies are encouraged to use those questions that refer to the specific job. There should be some overlap between the PSQs and the screening process. Those questions are listed on Joint Exhibit 6.

40. An applicant must meet the minimum qualifications to be considered for an interview. If there is a heavy volume of applications, the screening criteria allows the hiring manager to "mine" the applications to find those that have the skills needed for the job. It filters the pool of applicants down to a number who will participate in an interview. Before an applicant is interviewed, that person must also meet the minimum qualifications.

41. Upon her review of Appellant's Exhibit 1, she testified the screening criteria used in this case were reasonable for the position. The position requires someone who will run point on all of the Department's legislative functions. The position requires contact with a lot of different individuals, groups, and the public.

42. During the application process, an applicant's race is not identified on any of the documents, and is generally not known until that person shows up for an interview.

43. Appellee rested its case. The Intervenor, Tanya Dickinson, waved presentation of any testimony or evidence. The Appellant called one rebuttal witness.

44. **Sarah McCoun** was called to testify in rebuttal by the Appellant. She had reviewed the PSQs that applied to this job vacancy. She considered those questions when she developed the screening criteria.

45. There were no further witnesses. Appellee presented a Motion to Dismiss the claim of racial discrimination. The Hearing Officer held a ruling on the motion in abeyance pending receipt of the parties' respective briefs. A briefing schedule was set by separate order.

FINDINGS OF FACT

1. At the time of this hiring process, the Appellant, Thomas A. Smith, was a classified employee with status.

2. The vacant position of BH/DID Program Administrator, with a worksite in Frankfort, Kentucky, was posted on-line about August 30, 2014 (Joint Exhibit 1). A register was requested and obtained. Appellant's name appeared on the register.

3. Appellant timely tendered his application for the position with supporting documents (Joint Exhibit 2). A total of thirty-nine applications had been received by the Appellee, including Appellant's.

4. Sarah McCoun, Assistant Director for the Department for Behavioral Health, Developmental and Intellectual Disabilities, who was the lead interview panel member, developed certain screening criteria. She used the screening criteria to narrow the number of applicants who would be invited for an interview. She developed the screening criteria after having reviewed the minimum requirements for the position and the major job duties. The screening criteria were:

- Experience in reviewing and writing regulations and legislation;
- Experience in facilitation of workgroups;
- Experience developing legislative and regulatory presentations; and
- Experience in public speaking.

(Appellee's Exhibit 1)

5. Ms. McCoun examined all thirty-nine applications, including those of Appellant (Joint Exhibit 2), Michelle DeJohn (Appellant's Exhibit 1), Nicole Greenwood (Appellant's Exhibit 2); Michelle O'Bryan (Appellant's Exhibit 3), Rona Dawson (Appellant's Exhibit 4), Jeffrey Jagnow (Appellant's Exhibit 5), Tanya Dickinson (Appellant's Exhibit 6), and Larissa Salyers (Appellant's Exhibit 7).

6. Ms. McCoun determined that any applicant who was either a veteran, or who met three of the four screening criteria, would be invited for an interview. She completed the Screening Criteria Worksheet (Appellee's Exhibit 1) and determined five applicants had met three of the four criteria. She did not credit Appellant with having met any of the criteria. At that point, this effectively ended the process for the Appellant. She did credit Tanya Dickinson, the Intervenor, to have met all four criteria. During the screening she did not know the race of any of the applicants.

At the hearing, and upon review of Appellant's qualifications, she testified she now believed Appellant met two of the four screening criteria: Experience in facilitation of workgroups; and Experience in public speaking. She also testified Appellant's record of performance, seniority, and performance evaluations were not considered.

7. Ms. McCoun submitted her list of applicants who met three of the four screening criteria, as well as those applicants who indicated they were veterans, to the Office of Human Resource Management for a Minimum Qualification's Review (MQR). The screening process was more stringent than the MQR.

8. Following completion of the MQR, Ms. McCoun sent an e-mail on September 29, 2014, to Meg Link, Office Coordinator and Administrative Assistant with the Department for Behavioral Health, requesting she schedule interviews for seven applicants. Appellant's name was not on that list. Appellant's e-mail address and telephone number, however, did appear next to the name "Salyers, Larissa" (Joint Exhibit 4).

9. On September 30, 2014, Ms. Link sent e-mails to all seven listed e-mail contacts, inquiring whether that applicant was still interested in the position and would be available for an interview on October 7, 2014. Such an e-mail was sent to Appellant's e-mail address (Joint Exhibit 3).

10. About October 1, 2014, Appellant telephoned the Cabinet and left a voice-mail message advising he accepted the invitation to participate in an interview. He followed up with an e-mail to Meg Link (Joint Exhibit 4).

11. When Meg Link heard Appellant's voice-mail message she was confused. She thought she had sent that particular e-mail invitation to Larissa Salyers. She subsequently learned from Terry Tindle in HR, that the e-mail address listed for Salyers was incorrect.

12. Link contacted McCoun for advice. She was directed to call the listed telephone number. When Link called that number a male answered the telephone and told her she had the wrong number. Link advised McCoun of this result.

13. On October 16, 2014, Ms. McCoun sent an e-mail to Appellant apologizing for the error and informing him he had not been selected for an interview (Joint Exhibit 5).

14. Following conclusion of the interviews, the interview panel decided to recommend Tanya Dickinson to the position. A Personnel Action Request was completed and sent with attachments to the Personnel Cabinet (Appellee's Exhibit 2). Tanya Dickinson was appointed to the position.

15. Thomas A. Smith timely filed his appeal with the Kentucky Personnel Board.

CONCLUSIONS OF LAW

Other Penalization – Unfair Labor Practice

1. This case presents a situation where the Appellant, after having submitted his application for consideration to the position of Program Administrator, was disqualified from consideration after a screening process conducted by Sarah McCoun, Assistant Director for the Department for Behavioral Health, Developmental and Intellectual Disabilities. Complicating the matter, an e-mail invitation to interview for the position sent by Appellee to the Appellant, was withdrawn when Appellee discovered such invitation should have been sent to a different applicant.

2. The November 19, 2014 Interim Order, resulting from the pre-hearing conference, noted Appellant had filed his appeal alleging discrimination and "other penalizations," specifically, "unfair labor practice."[2]

[2] Pursuant to such Interim Order, Appellant subsequently filed a pleading that clarified his discrimination claim was based on racial discrimination.

3. Although the Interim Order identified one issue as an allegation that the statutory and regulatory requirements for promotion had not been followed, Appellant's allegation of "other penalization" is included therein as such order stated, "The burden of proof shall be upon the Appellant to demonstrate the laws and regulations applicable to promotions within the state service were not followed when he was not given consideration when not selected for an interview for the position of Program Administrator."

4. Ms. McCoun testified she, as lead panelist, solely decided what criteria would be examined to determine whether an applicant would be invited for an interview. She developed four specific criteria for this position and decided those who met three of the four criteria would receive an invitation to interview.[3] She then examined the thirty-nine applications and determined Appellant met none of the criteria.

5. Upon further examination of Appellant's credentials at the evidentiary hearing, Ms. McCoun testified she now believed Appellant met two of the four criteria.

6. The Hearing Officer had initial concern whether Appellee had the authority, in view of KRS 18A.0751(4)(f) and 101 KAR 1:400, to inject a screening process prior to a MQR, and whether such screening process could be more stringent than the MQR. The only guidance provided to the Hearing Officer is an unpublished opinion from the Kentucky Court of Appeals in *Mitchell v. Justice and Public Protection Cabinet*, No. 2006-CA-545-MR, 2007WL38668 (January 5, 2007), a copy attached hereto as **Recommended Order Exhibit 1**. In that opinion, of particular significance is the following:

> With the foregoing in mind, we do not believe the legislature in its drafting of KRS 18A.0751(4)(f), nor the agency in its drafting of 101 KAR 1:400(1), intended that each and every factor contained therein was required to be reviewed for each and every application received. For example, if a particular job requires a specific qualification and a particular applicant does not have that threshold qualification, it would serve no purpose nevertheless to require the agency to examine any other factors since it is immediately discernable from the application that the employee is not qualified for the position. In this vein, there was testimony in the record to the effect that for some positions hundreds of applications are received. If certain of these applications can be screened out as patently unqualified, it would be absurd and unreasonable to require the agency to nevertheless undertake the onerous and superfluous task of examining, for example, the unqualified applicants' past performance evaluations.

[3] Those who indicated they were veterans of the armed forces would also receive an invitation to interview.

The court determined that after *Mitchell* submitted his application for a position, and was never contacted regarding that position, the Agency was not required to undertake a review of each of the factors contained in KRS 18A.0751(4)(f) and 101 KAR 1:400(1) for each applicant. It held that the hiring process was not flawed on the basis of the Cabinet having failed to consider all such factors, particularly as applicable to Mr. Mitchell.

7. Appellant has failed to show by a preponderance of the evidence that the laws and regulations applicable to promotions within the state service were not followed when he was not given consideration and thereby not selected for an interview for the position of Program Administrator.

Racial Discrimination

8. Any employee who believes they had been discriminated against may appeal to the Personnel Board. KRS 18A.095(15)(a). Furthermore, any classified employee may appeal to the Board an action alleged to be based on discrimination due to race. KRS 18A.095(13).

9. Federal law prohibits racially discriminatory employment practices:

> It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, work privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .42 USC §20e – 2a.

10. Likewise, in Kentucky, it is an unlawful practice for an employer to discharge any individual or otherwise to discriminate against any such individual because of an individual's race, color, religion, national origin, sex, age 40 and over. KRS 344.040(1).

11. In order to establish a violation of the Kentucky Civil Rights Act, a party must prove the same elements as required for a *prima facie* case of discrimination under Title VII of federal law. *Talley v. Bravo Pitino Restaurant, LTD.*, 61 F.3d 1241 (6th Cir., 1995).

12. In order to establish a *prima facie* case of discrimination under Title VII, a party must demonstrate:

(1) He was a member of a protected class;

(2) He was subject to adverse employment action;

(3) He was qualified for the job;

(4) He was replaced by a person outside of the protected class; or, in disparate treatment cases, this element may be replaced with the requirement that the plaintiff show he was treated differently from similarly situated individuals.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.E.2d 688 (1973); *Policistro v. Northwest Airlines, Inc.*, 297 F.3d 535 (6th Cir., 2002); *Perry v. McGinnis*, 209 F.3d 597, 601 (6th Cir., 2000).

13. As an African-American, Thomas A. Smith is a member of a protected class for the purposes of Title VII.

14. The evidence also shows that Mr. Smith, having made application for an employment position with the Commonwealth of Kentucky, and having been denied an interview for such position, was subject to an adverse employment action.

15. It is undetermined from the facts whether Mr. Smith was qualified for the position. His application never got past the screening process and, therefore, did not go through a Minimum Qualifications Review (MQR). There was also some confusion in the screening process itself, as Ms. McCoun initially gave Mr. Smith no credit for meeting any of the screening criteria, but in her testimony and upon further examination, agreed he should have received credit for meeting at least two of the four criteria. She also testified that only those applicants who met three of the four criteria would be processed through the MQR and, meeting such qualifications, thereafter invited to interview.

16. While the Intervenor, Tanya Dickinson, the individual appointed to the position, was outside the protected class of race, she was certainly in the protected class of sex as a female.

17. It was not unreasonable for the Appellee to establish screening criteria to assist in a determination, based on each applicant's qualifications set out in their respective applications, who would be offered an interview. At the hearing, the evidence established that Appellant would have met two of the four screening criteria. It had been established that applicants must either have had veterans status or met at least three of the four screening criteria, in order to be processed through the MQR and thereafter offered an interview.

18. The evidence also showed that Mr. Smith did not receive disparate treatment nor was he treated differently from similarly situated individuals. The same four criteria were applied to all applicants, regardless of race. There were three other applicants who were given credit for two of the four screening criteria, and not offered an interview. There were twenty-eight applicants who, given credit for meeting one or none of the screening criteria, were not offered interviews. (Appellee's Exhibit 1.)

19. Appellant failed to establish a *prima facie* case of discrimination based on race.

20. Assuming arguendo that Appellant had made a *prima facie* case of racial discrimination, then it would have been up to the Cabinet to articulate a legitimate, non-discriminatory reason why the adverse job action was taken. *Kentucky Center for the Arts v. Handley*, 827 S.W.2d 697 (Ky. App. 1992). Following the Cabinet's articulation of an alternate explanation for its action, the burden of proof then shifts to the Appellant to show that such explanation is "pre-textual." *Williams v. Wal-Mart Stores, Inc.*, 184 S.W.3d 492, 497, (Ky. 2005).

21. Although the evidence showed only white individuals had been invited for an interview, the evidence was silent about whether African-American other than Appellant had not been interviewed. The evidence does show that a large majority of the applicants, whose race was never indicated on their applications, were not invited for an interview because they were either not a veteran, or did not meet three of the four screening criteria. Ms. McCoun testified she did not know Appellant's race at the time she communicated to him by e-mail to withdraw the interview invitation due to mistake. Appellee has met its burden of proving it had a legitimate, non-discriminatory reason for not offering Appellant an interview.

22. Appellant has to show by a preponderance of the evidence that Appellee's explanation for its action was "pre-textual."

23. The evidence disclosed that only Meg Link, Administrative Assistant to Sarah McCoun, had heard Appellant's voice on his telephone message. She testified that when she received Appellant's message, she was "confused" as she believed she had ". . . contacted a female."

24. Ms. McCoun testified that at the time she conducted the screening she did not know the race of any of the applicants. All the individuals who had been interviewed were white.

25. The Hearing Officer believes Appellee sufficiently met its burden to articulate some legitimate, non-discriminatory reason for its action. Both Ms. McCoun and Ms. Link gave credible testimony as to the circumstances of the mistake that had been made when McCoun assembled the contact information for applicants who were to be interviewed. Ms. Salyers and Mr. Smith, being alphabetically close in proximity, Ms. McCoun clicked on Mr. Smith's contact information rather than Ms. Salyers and inadvertently inserted his telephone number and e-mail address next to Ms. Salyers' name. Ms. Link had been directed to send e-mails to the individuals on the list to invite them for an interview. All Ms. Link had was the e-mail address information located next to each applicant's name. Mr. Smith's name did not appear on the interview invitation list provided to Ms. Link.

26. Link testified she believed she had sent an e-mail to a female, that is Ms. Salyers, and was "confused" when a male, that is Mr. Smith, responded and accepted the invitation. She took reasonable action in trying to determine whether the contact information was correct. When told the information was not correct, she immediately contacted Ms. McCoun. Ms. McCoun took over responsibility for the matter, telling Link she herself would contact Mr. Smith.

27. Appellant has failed to prove Appellee's explanation for its action was "pre-textual."

RECOMMENDED ORDER

The Hearing Officer recommends to the Kentucky Personnel Board that the appeal of **THOMAS A. SMITH VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2014-242)** 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).

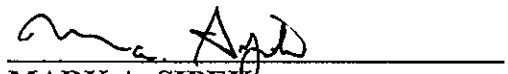
Any document filed with the Personnel Board shall be served on the opposing party.

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 Roland P. Merkel** this 18th day of May, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

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2007 WL 38668
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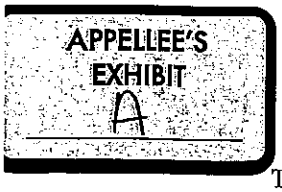

Unpublished opinion. See KY ST RCP Rule 76.28(4) before citing.

Court of Appeals of Kentucky.

Terry Wayne MITCHELL Appellant
v.
JUSTICE & PUBLIC PROTECTION CABINET, Department of Corrections; Kentucky Personnel Board; Richard Lacefield Appellees.

No. 2006-CA-000054-MR. | Jan. 5, 2007.

Appeal from Franklin Circuit Court, Action No. 04-CI-01650; William L. Graham, Judge.

Attorneys and Law Firms

Mark E. Edison, Louisville, Kentucky, for Appellant.

Daniel F. Egbers, Assistant General Counsel, Justice and Public Safety Cabinet, Frankfort, Kentucky, for Appellee Justice and Public Safety Cabinet.

Before TAYLOR, Judge; ROSENBLUM, SENIOR Judge;[1] MILLER, SPECIAL Judge.[2]

1 Senior Judge Paul W. Rosenblum, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

2 Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

OPINION AFFIRMING

MILLER, Special Judge.

*1 Terry Wayne Mitchell appeals from an Opinion and Order of the Franklin Circuit Court affirming a decision of the Kentucky Personnel Board. The Board's decision concluded that the Justice & Public Safety Cabinet[3] had followed applicable hiring procedures in filling the position of Production Coordinator at the Kentucky State Reformatory. We affirm.

3 The Justice & Public Safety Cabinet is also referred to in the record as Justice and Public Protection Cabinet, and is so referred to in the appellant's notice of appeal.

The basic facts are not in dispute. Kentucky State Reformatory is a prison under the administration of the Department of Corrections, a department within the Kentucky Justice & Public Safety Cabinet. Mitchell is a classified employee with status who has been employed as a Correctional Officer at Kentucky State Reformatory since February 1998. Prior to working at the Reformatory, Mitchell worked for 22 years at Henry Vogt in welding and steel fabrication.

Mitchell learned of an opening for the position of Correctional Industrial Production Coordinator at the prison and filled out an application form. On June 6, 2003, Mitchell was placed on the register for the position. The Production Coordinator oversees a metal fabrication unit at the prison. The Coordinator supervises approximately 44 inmates who work in a metal fabrication plant to produce metal beds, storage units, and a variety of metal products. Because of the materials and fabrication machinery available in the unit, an inmate could create a weapon. Accordingly, the Reformatory sought to fill the Coordinator position with someone with strong experience in both metal fabrication and security. After filing his application, Mitchell was never contacted regarding the position.

The record discloses that the procedures utilized by the Cabinet for filling the position were as follows: Correctional Industries Administrative Specialist Gayle Perry sent a list of 29 applicants to the staff who were to conduct the interviews for the position, namely, Jerry Vance, Rick Butts, and Deputy Warden James W. Stephens. Prior to forwarding the applications, Perry did not obtain performance evaluations for the applicants. Butts and Vance together screened the original applicant pool from twenty-nine down to eight who were to be interviewed. In so doing, the eliminated applicants' record of performance, conduct information, and performance evaluations were not reviewed. The eight finalists were interviewed, and Richard Lacefield was eventually hired for the position.

Upon learning of the outcome of the hiring process, Mitchell appealed the hiring decision to the Personnel Board. Following an evidentiary hearing, the Hearing Officer

recommended the Mitchell's appeal be sustained and that a new search to fill the position be conducted. The Personnel Board reversed the Hearing Officer and upheld the hiring decision.

Mitchell subsequently filed an appeal with Franklin Circuit Court. The circuit court affirmed the Personnel Board's decision. This appeal followed.

First, Mitchell contends that the circuit court erred in not upholding the requirements of the applicable statutory law and administrative regulations. Specifically, Mitchell contends that the hiring process followed to fill the Coordinator position violated the procedures prescribed in KRS[4] 18A.0751(4)(f) and 101 KAR[5] 1:400(1).18A. 0751(4)(f) provides as follows:

4 Kentucky Revised Statutes.

5 Kentucky Administrative Regulations.

*2 (4) These administrative regulations shall provide:

(f) For promotions which shall give appropriate consideration to the applicant's qualifications, record of performance, conduct, and seniority. Except as provided by this chapter, vacancies shall be filled by promotion whenever practicable and in the best interest of the service;

The Kentucky Administrative Regulation counterpart of 18A.0751(4)(f) is contained in 101 KAR 1:400(1), which provides 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.

Mitchell, in substance, contends that the plain language of the foregoing statute and regulation requires the qualifications, record of performance, conduct, seniority and performance evaluations of each applicant for promotion to be considered and, since the Department of Corrections admittedly did not review his (nor any of the other twenty applicants who did not receive an interview) record of performance, conduct information, and performance evaluations, the requirements of KRS 18A.0751(4)(f) and 101 KAR 1:400(1) were not complied with.

We do not agree with Mitchell's interpretation of KRS 18A.0751(4)(f) and 101 KAR 1:400(1). First, KRS 18A.0751(f) contains no language at all which could be construed as requiring an agency to consider each of the listed factors for each applicant. Rather, the statute requires only "appropriate" consideration of each factor. Depending upon the circumstances, "appropriate consideration" may be no consideration at all of some of the factors (for example if it is immediately determinable that an applicant is not qualified for the position).

Further, the language of 101 KAR 1:400(1) is ambiguous. The phrasing "Agencies shall consider an applicant's qualifications, record of performance, conduct, seniority and performance evaluations in the selection of an employee for a promotion" does not by its plain language require an agency to review each of the listed factors for each applicant. If so intended, the drafters could have said as much by using the phrasing "each applicant's" or "all applicants'." Instead the phrasing is in the singular. Ironically, since it is phrased in the singular, literally read, the regulation would require an agency to review the qualifications, record of performance, conduct, seniority and performance evaluations of only a single applicant out of a pool of applicants, exactly the opposite of what Mitchell contends. As such, the regulation is ambiguous.

An administrative agency's interpretation of its own regulations is entitled to substantial deference. *Camera Center, Inc. v. Revenue Cabinet,* 34 S.W.3d 39 (KY.2000). A reviewing court is not free to substitute its judgment as to the proper interpretation of the agency's regulations as long as that interpretation is compatible and consistent with the statute under which it was promulgated and is not otherwise defective as arbitrary or capricious. *City of Louisville By and Through Kuster v. Milligan,* 798 S.W.2d 454, 458 (KY.1990).

*3 The same rules of construction or interpretation that apply to statutes also apply to administrative regulations. *Marksberry v. Chandler,* 126 S.W.3d 747, 753 (Ky.App.2003). Where the language of a statute is clear and unambiguous, it must be given effect as written. *McCracken County Fiscal Court v. Graves,* 885 S.W.2d 307 (Ky.1994)."A statute is not open to construction unless it is ambiguous and will bear two or more constructions."*Fayette County v. Hill,* 304 Ky. 621, 201

S.W.2d 886, 889 (1947)."When a statute is ambiguous and its meaning uncertain, the legislative intent should be ascertained by considering the whole statute and the purpose intended to be accomplished."*Lexington-Fayette Urban County Health Dept. v. Lloyd,* 115 S.W.3d 343, 347 (Ky.App.2003). A court's interpretation of a statute should produce a practical and reasonable result. *Id.*"A statute should not be interpreted so as to bring about an absurd or unreasonable result."*Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Co.,* 983 S.W.2d 493, 500 (Ky.1998).

With the foregoing in mind, we do not believe the legislature in its drafting of KRS 18A.0751(4)(f), nor the agency in its drafting of 101 KAR 1:400(1), intended that each and every factor contained therein was required to be reviewed for each and every application received. For example, if a particular job requires a specific qualification and a particular applicant does not have that threshold qualification, it would serve no purpose nevertheless to require the agency to examine any other factors since it is immediately discernable from the application that the employee is not qualified for the position. In this vein, there was testimony in the record to the effect that for some positions hundreds of applications are received. If certain of these applicants can be screened out as patently unqualified, it would be absurd and unreasonable to require the agency to nevertheless undertake the onerous and superfluous task of examining, for example, the unqualified applicants' past performance evaluations.

In summary, we reject Mitchell's argument that an agency is required to undertake a review of each of the factors contained 18A.0751(4)(f) and 101 KAR 1:400(1) for each applicant. As such, the hiring process was not flawed because the Cabinet failed to do so.

Next, Mitchell contends that the decision of the Kentucky Personnel Board was arbitrary, not based upon established facts, and violates the requirements of Section 2 of the Kentucky Constitution. This argument, like the preceding, is based upon the erroneous premise that the hiring process utilized to fill the Coordinator position was violated because all of the factors listed in KRS 18A.0751(4)(f) and 101 KAR 1:400(1) were not examined for each applicant. Because, as previously noted, such is not required, we find this argument to be without merit.

Finally, Mitchell complains that the Cabinet and the circuit court failed to comply with various procedural requirements in the circuit court proceedings. It appears that he argues that the circuit court erred by failing to strike the Cabinet's brief for failing to comply with the briefing schedule. We conclude that the trial court did not abuse its discretion by denying his motion to strike.

*4 For the foregoing reasons the judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

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