COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-271

SHAWN L. CARY **APPELLANT**

VS.

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

KENTUCKY TRANSPORTATION CABINET **APPELLEE**

*** *** *** *** ***

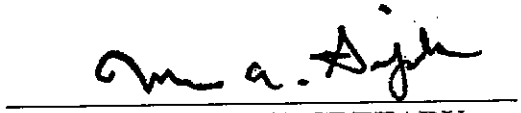
The Board, at its regular May 2016 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated April 6, 2016, and being duly advised,

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 19th day of May, 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. William Fogle
Hon. Paul F. Fauri
Mr. J. R. Dobner

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

KENTUCKY TRANSPORTATION CABINET **APPELLEE**

** ** ** ** **

This matter came on for an evidentiary hearing on February 4, 2016, 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, Shawn Lee Cary, was present and represented by the Hon. Paul F. Fauri. The Appellee, Kentucky Transportation Cabinet, was present and represented by the Hon. William H. Fogle. Also present as agency representative was Ms. Michele Barnes.

The issue in this case is the Appellant's contention that the statutory requirements of KRS 18A.0751(4)(f) and the regulatory requirements of 101 KAR 1:400 were not met when the Appellee selected Richard Meeks for the position of Superintendent I for the Agronomy Crew in Warren County. The burden of proof is on the Appellant to show by a preponderance of the evidence that such statutory and regulatory requirements (the "five factors") were not given appropriate consideration in the selection of Richard Meeks to the position of Superintendent I. Appellant also contends Mr. Meeks was pre-selected to the position.

Also to be considered are possible factual distinctions to determine whether the Personnel Board ruling in the case of *Shoemaker v. Transportation Cabinet* applies. Such determination shall be resolved after hearing the evidence.

The Hearing Officer noted that the successful candidate, Richard Meeks, did not file a request to intervene in this appeal. The rule separating witnesses was invoked and employed throughout the course of the proceeding. Each party presented their respective opening statements. Appellee presented a Motion to Dismiss, which motion was taken under advisement.

BACKGROUND

1. The first witness for the Appellant was **Daryl Price**. Mr. Price, who has known Appellant for seven to eight years, has been employed 30 years with the Transportation Cabinet. For the past three years he has served as Transportation Branch Manager, Engineer Support, District 3. He supervised Appellant for three years. Appellant holds the position of Superintendent II over Maintenance in Simpson County.

2. Mr. Price currently supervises a number of groups, including the Agronomy Crew. The subject Superintendent I position is currently occupied by Richard Meeks. Kent Anderson is Mr. Meeks' first-line supervisor, while Mr. Price is his second-line supervisor.

3. He identified Appellant's Exhibit 1 as a copy of the Certified Register Report received upon notification of the vacancy of the position. He signed the document on May 8, 2015, as hiring manager, although he was unable to reconcile that date with the date the register was generated. The position had been formerly occupied by Paul Keith who, in June 2015, made known his intent to retire. Mr. Keith left the position in August 2015.

4. He identified Appellant's Exhibit 2 as General Administration and Personnel, Employment Procedures, GAP-202. He acknowledged that document identifies a "Hiring Manager" as the employee who will supervise the new employee. He noted such policy did not make a distinction between a first or second-line supervisor.

5. The interview panel consisted of Mr. Price, Kent Anderson, and Jill Harmon.

6. The position vacancy was advertised. A register was requested and received. He contacted the three people on the register and pulled their online applications. He asked each of the individuals if they wanted to participate in an interview. He then corrected his statement, believing that Mr. Anderson may have called Mr. Cary.

7. Chief District Engineer Meredith told Price that Cary was needed in Simpson County and was probably "over-qualified" for the vacant Superintendent I position. Price had mentioned to Cary that Meredith would probably want him to stay where he is; that it was probably not a good thing for him to come to Warren County. Both applicants were "strong-willed" and Price did not think it would be the best fit for Cary. Appellant said he wanted to come and interview anyway. Price did not want two people who did not get along to be on the same crew, particularly since they had a prior history. Appellant told him he could get along. This was an internal mobility hiring process.

8. The interview panelists interviewed Mr. Cary and Mr. Meeks on September 4, 2015. Mr. Bradford declined to be interviewed.

9. He identified Appellant's Exhibit 3 as the Selection Summary Instructions with attached Selection Summary data. Each panel member had possession of these forms and signed off on them at the conclusion of the interviews. Mr. Price described the beginning of the interview process.

10. He identified Appellant's Exhibit 4 as the Interview Questionnaire Worksheet he filled out during the interview of Richard Meeks, and Appellant's Exhibit 5 as the Interview Questionnaire Worksheet he had filled out during the interview of Shawn Cary.

11. He identified Appellant's Exhibit 6 as the Position Description for the Highway Superintendent I position, currently occupied by Richard R. Meeks.

12. The Internal Mobility Applicants Form listed each candidate's performance evaluation scores for the past three years. He did not think they had examined the actual evaluation forms.

13. Mr. Anderson sent Mr. Price a list of questions pertinent to the Agronomy Crew. Price changed them a bit to make them "behavioral questions." Question Three was specific to this Agronomy Crew, identifying the chemicals they used when spraying herbicides. The Agronomy Crew employees were required to have a Category 6 chemical license.

14. At the end of Appellant's interview, Cary was asked if he had any additional information to provide. At the end of each interview, the panelists got together to review and discuss all the documents and the interview.

15. He identified Appellant's Exhibit 7 as the Internal Mobility Applicants Form provided by Shawn Cary, and Appellant's Exhibit 8 as the Internal Mobility Applicants Form provided by Richard Meeks.

16. The panelists filled in a new, blank Selection Summary Sheet during the course of their discussion and confirmation of information on hand. They discussed how certain job experiences may have met the work experience pertinent to the vacancy. They then decided which candidate best met the five criteria that they considered. The summary was typed up and Price finished it about September 10, 2015, when he turned it in to Human Resources.

17. Mr. Meeks was a Highway Equipment Operator IV, and thus, his appointment to the Superintendent I position was a promotion for him.

18. When Paul Keith retired, Meeks became Acting Superintendent. Cary had a suspension and written reprimand. Both applicants had shown they were good supervisors.

19. Price was aware Appellant had requested a demotion to Highway Equipment Operator IV prior to the current application. He knew Cary was trying to get out of his Supervisor II position.

20. He identified Appellant's Exhibit 9 as the Application of Richard R. Meeks, and Appellant's Exhibit 10 as the Application of Shawn Cary.

21. He identified Appellant's Exhibit 11 as the Request for Requisition to fill the Highway Superintendent I position. That document identifies some of the general duties of the position.

22. He identified Appellant's Exhibit 12 as the September 9, 2015 letter from Greg Meredith, Chief District Engineer from District 3, to the Office of Human Resource Management. This letter was prepared by Mr. Price and approved by Mr. Meredith. It constituted the justification letter recommending Mr. Meeks as the most qualified candidate for the position and that he, therefore, be promoted to Highway Superintendent I in the Roadside Environment Section.

23. The panelists interviewed Cary and did consider the five criteria. Meeks had more seniority than Cary. Educational levels were equal. On work experience, Cary was given full credit for all work experience when he was employed by the city of Bowling Green and for his employment time at the Kentucky Transportation Cabinet. Meeks was given credit for his time as an employee of the Kentucky Transportation Cabinet.

24. The panelists examined each candidate's training and experience. They considered the Internal Mobility Applicants Forms each had submitted, as well as other documents. They considered it important that Meeks had vegetation experience, as this vacancy was a vegetation position. It was very appropriate to ask candidates about vegetation experience.

25. Both applicants had been employees of Price, so Price did not conduct reference checks. Reference check forms had been submitted from each candidate.

26. Meeks had three "Outstanding" ratings on his Performance Evaluations. Cary had two "Outstanding" ratings and one "Highly Effective." In Record of Performance, Meeks showed his progression of promotions from Highway Equipment Operator I through IV and receipt of an ACE Award. Cary had been hired in at the Superintendent II level. Meeks had no conduct history. Cary had a three-day suspension, a written reprimand, and a verbal card warning.

27. Based on all of the above information, the panelists determined that Meeks was the best candidate. Mr. Price had prior knowledge of problems Appellant had encountered with another employee, however, this was not a consideration for him during this process. Price testified he considered the five factors and discussed same with the two other panelists. Appellant's previous problems were not discussed among the panelists, nor was the desire of the Chief District Engineer to keep Cary in Simpson County. Meeks' prior experience on the Agronomy Crew was important, as he had done the job and had knowledge of it. "It meant a lot to me." It very definitely related to the experience portion of the five factors.

28. The next witness was **Jill Harmon**. For the past six and a half years, Ms. Harmon has been employed by the Kentucky Transportation Cabinet as Administrative Coordinator in District 3, Bowling Green. She served as one of the interview panelists. If a leadership position becomes vacant, policy requires a member of Human Resources participate on the panel.

29. She described her participation. Her assistant worked with the subject branch and put together the necessary paperwork. That paperwork came to her and was then passed on to the Chief District Engineer. The retirement of Paul Keith prompted this vacancy.

30. A request to fill the vacancy is sent to the State Highway Engineering office for review. It is then passed on to OHRM and then to the Personnel Cabinet. If the vacancy is approved, it is posted for ten days. A register is generated. The hiring manager reviews the register and determines if those listed meet the Minimum Qualification Requirements (MQR) of the position. Interviews are then scheduled.

31. At the interviews, Ms. Harmon had access to and reviewed the register, each applicant's job application, and disciplinary records. She received a list of interview questions from the hiring manager, as well as a copy of the Position Description.

32. She identified Appellant's Exhibit 13 as the Interview Panelist Conflict of Interest Statement she had signed for this process.

33. She identified Appellant's Exhibit 14 as the Interview Questionnaire Worksheet she had completed during the interview of Shawn Cary, and Appellant's Exhibit 15 as the Interview Questionnaire Worksheet she had completed during the interview of Richard Meeks.

34. Questions three, four and five were revised prior to the interviews to make them more "behavioral-based," meaning, how the applicant acted or reacted in the past when placed in a particular situation. The purpose was to show their prior behavior. She recorded notes on each applicant's answers to each question. She then scored each response following the interview.

35. Ms. Harmon was asked if she knew how to set up a crew for use of the hydro-seeder. She answered, "No." She was then asked how it is she could know whether an applicant's answer was valid, particularly with the use of chemical ratios, if she did not know the subject matter. She stated she concentrated on whether they said they had experience regarding what was asked of them, and how they would act in that situation.

36. Following the interviews, the panelists reviewed the Selection Summary. They took the information from the Internal Mobility Applicants Forms and transferred it to a new Selection Summary Form. They reviewed each job application to determine the applicants' work experience and training, and took into consideration information that had resulted from the interviews, particularly with reference to their experience, awards and education.

37. Harmon did not know what vegetation certification was or how it was relevant to the job. She looked at the evaluation scores, but did not have possession of the evaluations themselves. She did not review the evaluations to determine whether either had been evaluated in their respective supervisory skills. She had viewed Cary's attachment to the Internal Mobility Applicants Form, which described his disciplinary history. While the applicants did provide references, a reference check was not conducted, as they were internal mobility candidates and already had their annual job performances evaluated.

38. She reviewed each applicant's seniority, education, work experience and considered the data that appeared on the Internal Mobility Applicants Forms, the performance evaluation ratings and the interviews. She examined the evaluation scores and past conduct. She had taken into account that Cary had served as a supervisor for a number of years.

39. The next witness was **Richard Kent Anderson**. For more than 12 years, Mr. Anderson has been employed by the Kentucky Transportation Cabinet as a Roadside Environment District Coordinator. He served on the interview panel. He was the individual who would be the direct supervisor to the new Superintendent I. He was not considered the "hiring manager" during this process.

40. He acknowledged his signature appeared on the register (Appellant's Exhibit 1), although he does not know why the date that appears there was placed on the document. He does not recall why he signed the register.

41. He and Mr. Price had discussed the individuals who were going to be interviewed and what days would be available for interviews. He was also advised that Ms. Harmon would serve on the interview panel. There was no discussion whether Anderson had any problems with Appellant or vice versa. The panelists interviewed Cary and Meeks. Mr. Bradford did not participate in the interviews.

42. Prior to the interviews, Mr. Price asked Anderson whether he had any questions to add to the interview questionnaire. He specifically requested questions pertaining to herbicides, which Anderson contributed. The interviews were held on September 4, 2015.

43. He identified Appellant's Exhibit 16 as the Interview Questionnaire Worksheet he had completed during the interview of Richard Meeks, and Appellant's Exhibit 17 as the Interview Questionnaire Worksheet he had completed during the interview of Shawn Cary. During the interview, Mr. Anderson had a copy of each applicant's application, Internal Mobility Applicants Form, and performance evaluation scores. The questions were posed by Mr. Price. Anderson did not score the answers to the questions during the interview, although he acknowledged the instructions required that he do so. He merely looked back at his notes, recalled what the applicants had said, and engaged in a post-interview general discussion with the other panelists. There was a "group collection of what we thought." From the interviews, Anderson believed Meeks had more roadside experience, particularly with herbicide application.

44. At the conclusion of Appellant's interview, the panelists reviewed all the questions, his answers and what they thought about those answers. They reviewed all the documents and filled out information for the Selection Summary.

45. He believed chainsaw training was relevant to the position. One appointed to the position would be required to have a Category 6 Non-Commercial Pesticide License.

46. When Mr. Keith took leave time, and thereafter retired, Anderson had designated Mr. Meeks, who was a Highway Equipment Operator IV Crew Leader, as leader of the Agronomy Group.

47. He identified Appellant's Exhibit 18 as the Annual Employee Performance Evaluation for Richard Meeks for calendar year 2014. Anderson was Meeks' second-line supervisor. Meeks had been evaluated as a Crew Leader and served in that position at least 12 years. It did not appear the panelists recorded anything about Cary having been a supervisor. Cary had stated he was familiar with other herbicides and how to apply them according to their respective labels.

48. Anderson identified Appellant's Exhibit 19 as the Interview Panelist Conflict of Interest Statement he had signed.

49. A roadside unit focuses primarily on vegetation and the control of noxious species. The Agronomy crew covered ten counties. They performed seeding and erosion control. Meeks had over 13 years roadside experience. Cary had supervised one or two employees who had sprayed chemicals in Simpson County.

50. The next witness was **Shawn Cary**, the Appellant. Mr. Cary had worked eight years for the Transportation Cabinet, the last four as a Superintendent II in Simpson County.

51. He identified Appellant's Exhibit 20 as the August 12, 2015 email he received notifying him that he had successfully submitted his application to the vacant position.

52. He thereafter called Mr. Price and asked when the interviews would occur. Price confirmed that his name was on the register, but told him "they are not going to let me interview you." Appellant asked who would not let them interview him. Price indicated Mr. Meredith, as Meredith stated Appellant was too important to leave the Simpson County crew, and that he was over-qualified for the vacant position. Appellant told Price he would do what he could to obtain an interview. He wrote and dispatched an email on August 26, 2015, to Amanda Reid, setting out his concern that he might not be offered an interview (Appellant's Exhibit 21). That email was forwarded by Kathy Marshall, Human Resource Manager, to Tracy Young and Emily Wooldridge.

53. Within a week, Appellant received an email from Daryl Price telling him to be at the interview on September 4, 2015, at 9:00 a.m.

54. Subsequent to the interview date, Appellant received an email advising he had not been selected for the vacancy. (Appellant's Exhibit 22.) He thereafter filed his appeal with the Kentucky Personnel Board.

55. He had completed his Internal Mobility Applicants Form (Appellant's Exhibit 7) and took it with him to the interview. He was handed a Position Description to examine. He testified that at the time, in his position, he was a foreman over the Superintendent I of the Transportation Crew. He is familiar with what the Agronomy Group does. His six crew members and he all have a Category 6 license, and they spray different chemicals in Simpson County for different vegetation. He has worked on their spray truck. He has never operated a hydroseeder.

56. The Road Superintendent Class is a class separate from those offered for the Road Master and Road Scholar programs. He has 20 years' experience working with highway equipment.

57. He identified Appellant's Exhibit 23 as his own Annual Employee Performance Evaluation for 2014. He received ratings of 5 for his supervisor experience; he received similar ratings in 2012 and 2013. He also received a rating of 4 for his evaluation skills.

58. At the end of the interview, he was handed three forms to fill out including a supervisory reference check. He believes Mr. Meeks was pre-selected, in that they had first attempted to prevent him (Appellant) from obtaining an interview. This would have left one candidate, Meeks, to interview for the job, or to have been automatically selected. Appellant was also told that CDE Meredith wanted him to stay in Simpson County.

59. Appellant's current pay grade is 13. The vacant position was a pay grade 12, and would have been a pay cut for him. Mr. Cary, in applying for the position, wanted to be closer to home, particularly since he currently has children in school who he could help get off the school bus. He acknowledged he also had some personnel issues with members of the Simpson County crew, and wanted a new environment. Complaints had been filed against him by Raymond Ools, Douglas Eidson, David Webb and James Stanley.

60. The Appellant's case-in-chief was closed. The Appellee renewed its motion for a directed verdict, which was taken under advisement by the Hearing Officer.

61. The first and sole witness for the Appellee was **Michele Barnes**. Ms. Barnes has been employed in Human Resources for 16 years, and for the past two years has served in the Office of Human Resource Management as Assistant Director of Personnel Management. She described her duties, which included review of promotional requests.

62. After reviewing all documentation following the interviews, Ms. Barnes, in her capacity as Appointing Authority, approved the appointment of Mr. Meeks (Appellant's Exhibit 3). The vacancy was a supervisory position and a promotional opportunity, therefore, the promotional process had been employed. The merit act favors filling vacancies by promotion.

63. They were charged with finding the best candidate for the position. Interview questions should be geared to be relevant to the position. In this case, such questions were to pertain to supervision of the Agronomy Crew.

64. In conducting her review, she examined the Selection Summary first without looking to see who the panelists had recommended. She wanted to determine, from her own review of the information, who the best candidate was. She worked backward and made sure all documents were present and properly filled out. She pulled and examined the applicants' personnel files, checked all numbers inserted on the forms to make sure they were correct, and looked at the actual performance evaluations. OHRM does not require reference checks of applicants who have been a past manager or supervisor.

65. After her review, Ms. Barnes concluded Richard Meeks was the best candidate for the position based on the five criteria. Meeks had higher seniority, a better interview rating, had agronomy experience, no conduct problems, and slightly higher performance evaluations.

66. Appellee called no further witnesses. Appellant called no rebuttal witnesses. A schedule was set out for the submission, in writing, of Appellee's motion and the parties' respective briefs, which schedule appeared in a separately issued Interim Order.

FINDINGS OF FACT

1. Shawn Lee Cary, the Appellant, was a classified employee with status at all times during the events that gave rise to this appeal. He was employed by the Appellee, Kentucky Transportation Cabinet, as a Superintendent II over Maintenance in Simpson County.

2. Paul Keith, who held the position of Highway Superintendent I for the Agronomy Crew in Warren County, retired and left that position on July 31, 2015. A Request for Requisition was submitted in late July 2015 (Appellant's Exhibit 11). Permission was granted to advertise the vacancy and have it filled.

3. The vacancy was advertised and a Certified Register Report was generated (Appellant's Exhibit 1). The report listed Jonathan Bradford, Shawn Cary, and Richard Meeks. This vacancy was a supervisory position, and a promotional opportunity. The merit act favors filling vacancies by promotion. Therefore, the promotional process was employed by the Appellee.

4. Daryl Price, Transportation Branch Manager, Engineer Support, District 3, contacted Bradford and Meeks to arrange interviews. He believed Kent Anderson contacted Cary to arrange his interview. Bradford declined to be interviewed. Price also obtained each applicant's applications.

5. Prior to the interview date, Price spoke with Appellant and told him the Chief District Engineer, Mr. Meredith, was not going to let him (Price) interview Cary; Meredith would probably want Cary to stay where he was, believed Cary was "over-qualified" for the Superintendent I position, and was needed in Simpson County. Price himself thought it was probably not a good thing for Cary to work with the Agronomy Crew.

6. Cary sent an email on August 26, 2015, to Amanda Reed stating concerns that he might not be offered an interview (Appellant's Exhibit 21). The email was forwarded by Human Resource Manager Kathy Marshall to Tracy Young and Emily Wooldridge.

7. A week later, Appellant received an email from Daryl Price instructing him to come to an interview at 9:00 a.m. on September 4, 2015.

8. The interview panelists were Daryl Price, Jill Harmon (Administrative Coordinator in District 3), and Richard Kent Anderson (Roadside Environment District Coordinator). Mr. Cary and Mr. Meeks were separately interviewed on September 4, 2015.

9. Each interview panelist had been provided a blank Selection Summary with instructions, and a signature page. The interview panelists filled out their respective Interview Questionnaire Worksheet for each of the two applicants (Appellant's Exhibits 4, 5, 14, 15, 16 and 17). At the end of each interview, the panelists reviewed and discussed the interview and the documents in their possession. The documents included each applicant's Internal Mobility Applicants Form (Appellant's Exhibits 7 and 8), Application for Employment (Appellant's Exhibits 9 and 10), and Annual Employee Performance Evaluation scores.

10. The interview panelists reviewed information provided by, as well as pertinent to, each applicant, including seniority, qualifications, performance evaluations, record of performance, conduct, and ratings for the interview.

11. The interview panelists recommended Richard Meeks be appointed to the position. This information was given to Greg Meredith, Chief District Engineer for District 3. On September 9, 2015, Mr. Meredith approved a memorandum recommending Meeks, which was sent to the Office of Human Resource Management (Appellant's Exhibit 12).

12. Michele Barnes, Assistant Director in the Office of Human Resource Management, in her capacity as Appointing Authority, independently reviewed the recommendation of the interview panel, as well as all documents examined during this promotional process. She then approved the appointment of Richard Meeks (Appellant's Exhibit 3, page 2).

13. Richard Meeks, a Highway Equipment Operator IV, was promoted to Superintendent I. Shawn Lee Cary received a memorandum from Tracy Young, Human Resource Branch Manager, advising him he was not the successful candidate (Appellant's Exhibit 22).

14. Had Appellant been the successful candidate, he would have been demoted from Pay Grade 13 to Pay Grade 12.

15. Appellant timely filed his appeal with the Kentucky Personnel Board.

CONCLUSIONS OF LAW

1. The Personnel Board shall promulgate comprehensive administrative regulations for the classified service governing promotion. KRS 18A.0751(1)(f). Such administrative regulations dealing with promotions shall give **appropriate consideration** to the applicants' qualifications, record of performance, conduct, and seniority. KRS 18A.0751(4)(f). [emphasis added.] Agencies are required to consider an applicant's qualifications, record of performance, conduct, seniority and performance evaluations in the selection of an employee for promotion. 101 KAR 1:400, Section 1(1).

2. "Qualifications" is defined as "[a]ny quality, knowledge, ability, experience or acquirement that fits a person for a position, office, profession, etc." *Cabinet for Human Resources v. Kentucky State Personnel Board, et al.*, 846 S.W.2d 711, 715 (Ky. App. 1992).

3. "Seniority" means the total number of months of state service. KRS 18A.005(36).

4. "Record of Performance" to have been considered by the interview panelists, in this case included, "recognition related to job performance; service awards; promotions; accomplishments; details to special duty; etc." (Appellant's Exhibit 3.)

5. "Performance Evaluations" to have been considered by this interview panel, included the "last three completed year-end ratings." (Appellant's Exhibit 3.)

6. A position vacancy for Superintendent I over the Agronomy Crew in Warren County was posted when Paul Keith, the position holder, retired. Appellant, Shawn Lee Cary, and Richard Meeks applied for the position.

7. The Appellee, Transportation Cabinet, filed a renewed Motion to Dismiss the appeal, asserting the Kentucky Personnel Board lacked jurisdiction to consider the appeal under its holding in the case of *Shoemaker v. Transportation Cabinet, et al.*, Appeal 2012-044, 2013

WL 6989765 (Ky. PB). Appellant filed a brief in response to the arguments posed by the Cabinet.

8. The facts in the *Shoemaker* case, as well as the Findings of Fact issued by the Hon. Boyce A. Crocker, Hearing Officer, make clear that *Shoemaker* is indeed distinguishable from the case at bar.

9. Michele Barnes, the Appointing Authority, testified that the Superintendent I position was a promotional opportunity and, therefore, the Cabinet utilized the promotional process. The evidence supports that statement, as the full procedural process of filling a promotion was utilized by Appellee. As stated by Ms. Barnes, policy favored the use of that process in this situation. The vacancy was advertised, two applicants were interviewed, the "five factors" were considered, and a recommendation made to name Richard Meeks as the successful candidate.

10. In *Shoemaker*, Hearing Officer Crocker stated, in his Findings of Fact #4:

> The Hearing Officer finds that as this position was filled by a voluntary demotion, that the provisions of 101 KAR 1:400 and KRS 18A.0751(4)(f) do not apply, and that Appellant has no right to challenge whether the factors set forth in the regulations and statute **were applied** in the selection of Intervenor, Amber Hale, for this voluntary demotion. (emphasis added.)

11. In his Finding of Fact #5, Hearing Officer Crocker stated:

> The Hearing Officer finds that, much like a transfer, if an agency determines it can fill a position by demotion, that such is allowable; and that a person in the position of Appellant, for whom filling that position would have been by demotion, cannot challenge the action by relying on 101 KAR 1:400 or KRS 18A.0751(4)(f).

12. In Conclusion of Law #1, Hearing Officer Crocker stated:

> ...Appellant does not have the right to challenge the demotion of Intervenor...by referencing the promotional factors set out at 101 KAR 1:400 or KRS 18A.0751(4)(f) as this also would have been a demotion for the Appellant. That statute and regulation clearly refer to promotions. As this would not have been a promotion for the Appellant, she cannot utilize those factors to challenge the selection of the Intervenor.

13. In reviewing the Background, Findings of Fact and Conclusions of Law issued by Hearing Officer Crocker, this Hearing Officer does not agree to same in the entirety. It appears even though Ms. Hale executed a voluntary demotion, in *Shoemaker* the entirety of the

promotional process was employed and resulted in the selection of Ms. Hale. As she was selected on the basis of utilization of 101 KAR 1:400 and KRS 18A.0751(4)(f), any unsuccessful candidate would have the right to appeal whether such selection was made after appropriate consideration of the "5 factors." The position in *Shoemaker* was not filled by the hiring agency having employed a demotion process.

14. If one were to accept the Cabinet's argument that the *Shoemaker* ruling applies here, then there would have been no viable reason for the Cabinet to have given appropriate consideration to the five factors when it utilized the promotional process in the instant case. If Mr. Cary had no way to appeal his non-selection, the Cabinet, knowing it would have been a demotion for Appellant, could have merely given scant consideration or sham consideration to the five factors, knowing Cary had no viable avenue of redress.

15. The Cabinet cites KRS 18A.005(24) to support its position that a "demotion" is defined as a penalization and, therefore, there is no statutory or regulatory right to be considered for a demotion. The Cabinet has forgotten that an employee may seek a voluntary demotion, and the nature of same, being voluntary, does not make the act of demotion, in that instance, a "penalization." Furthermore, an allegation that one was not given the same consideration given all other applicants to a position, would constitute an "...abridgement or denial of other rights granted to state employees" and, therefore, be a penalization giving Mr. Cary another avenue of appeal.

16. The Appellee's Renewed Motion to Dismiss is denied.

17. The Appellee, Transportation Cabinet, was required by statute and regulation to give appropriate consideration to each applicant's qualifications, record of performance, conduct, seniority, and performance evaluations (hereinafter referred to as "the five factors"). *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406, 410 (Ky. App. 1994).

18. In all administrative hearings, the party proposing that the agency take action or grant a benefit has the burden to show entitlement to the benefits sought. The party with the burden of proof on any issue has the burden of going forward, and the ultimate burden of persuasion as to that issue. The ultimate burden of persuasion in all administrative hearings is met by a preponderance of evidence in the record. Failure to meet the burden of proof is grounds for a recommended order from the hearing officer. [KRS 13B.090(7).] The Appellant, Shawn Lee Cary, had the burden to show, by a preponderance of the evidence, that the statutory and regulatory requirements were not given appropriate consideration by the Appellee during this promotion process.

19. The evidence showed that all three interview panel members, Daryl Price, Jill Harmon, and Richard Kent Anderson, were cognizant before, during, and after this particular promotion process that they were required to give appropriate consideration to, and examine how, the five factors for each of the applicants compared. It was also equally clear from the

testimony of the interview panelists that they, after concluding the interviews, reviewed the five factors and recorded same on the Selection Summary sheet. They discussed each candidate's qualifications, and gave a thorough review to the five factors. Based on their review, they recommended Richard Meeks be appointed to the vacant position.

20. The evidence also showed that the five factors were considered independently at the next level of the process. After the interview panel completed its duties, the entire packet of information was submitted by Chief District Engineer Meredith to Michelle Barnes, Assistant Director of Personnel Management. Without examining the documents to see who the panelists recommended, Ms. Barnes examined the Selection Summary. She determined on her own from all the information who the best candidate would be. She examined each applicant's personnel files, checked all numbers inserted on the forms to ensure their accuracy and examined the actual performance evaluations. From her own independent examination, Ms. Barnes concluded that Richard Meeks was the best candidate for the position based on the five factors. She believed Meeks had higher seniority, a better interview rating, had agronomy experience, no conduct problems, and slightly higher performance evaluations. There was no evidence that Ms. Barnes' consideration of the five factors was in any way influenced by discussions Daryl Price had prior to the interviews with Chief District Engineer Meredith pertaining to retention of Appellant in Simpson County. Nor was there any evidence that Ms. Barnes, for any reason, "pre-selected" Mr. Meeks or used the promotional process in any improper manner.

21. The evidence strongly supports that the statutory and regulatory requirements set forth in KRS 18A.0751(4)(f) and the 101 KAR 1:400 had been given appropriate consideration by the Appellee during the promotion process. Appellant has failed to meet his burden of proof on this issue by a preponderance of the evidence.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the Appellee's Renewed Motion to Dismiss be **DENIED**.

Furthermore, the Hearing Officer recommends to the Personnel Board that the appeal of **SHAWN LEE CARY V. KENTUCKY TRANSPORTATION CABINET, (APPEAL NO. 2015-271)** 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 Merkel** this 6th day of April, 2016.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. William Fogle
Hon. Paul F. Fauri
Mr. J. R. Dobner