

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD**

**DONALD E. ARVIN (Appeal No. 2014-109)
MICHAEL GRUBBS (Appeal No. 2014-095)**

APPELLANTS

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

**TRANSPORTATION CABINET
MIKE HANCOCK, APPOINTING AUTHORITY; AND**

**PERSONNEL CABINET
DINAH BEVINGTON, ACTING SECRETARY**

APPELLEES

AND

CLARENCE LAWSON

INTERVENOR

** ** *

The Board at its regular October 2015 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order on Remand of the Hearing Officer dated July 28, 2015; having noted Intervenor's exceptions, Appellee Transportation Cabinet's exceptions, Appellant Grubb's response to exceptions, oral arguments, and being duly advised.

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer on Remand be altered as follows:

A. **Delete** Findings of Fact numbers 12, 13, 14, and 15 and substitute the following:

12. The Board finds that the Commercial Driver's License Section of the Division of Driver Licensing within the Transportation Cabinet failed to identify the Intervenor, Clarence Lawson, as a CDL holder who had not submitted a valid and "in force" medical certificate. Thus, Intervenor Lawson was never notified that his medical certificate had expired.

13. A review by the Commonwealth Office of Technology failed to identify Intervenor Lawson as an individual who was not in compliance with 49 C.F.R. 383.73.

14. The Board finds that the official database maintained by the Transportation Cabinet showed that Intervenor Lawson's CDL was active at the time he applied for the position and when he was promoted to the position. The Personnel Cabinet relied upon this official database to determine that Intervenor Lawson met the minimum qualifications for Highway Superintendent I.

15. The Board finds that Intervenor Lawson complied with federal mandates by submitting his medical certificate within a short timeframe after he was notified that his medical certificate had expired.

16. The Board finds that Intervenor Lawson met the minimum qualifications for Highway Superintendent I because the official database maintained by the Transportation Cabinet demonstrated that his CDL was valid and in force and no problem with his medical certificate was noted. The Board finds from the totality of the testimony that it would be unfair to Intervenor Lawson to determine that he did not meet the minimum qualifications when the official database showed that his CDL was in force and that he was not provided notice by the Transportation Cabinet in accordance with their own procedures.

B. Delete Conclusions of Law numbers 2 and 3 and substitute the following:

2. The Board concludes that the Appellee Transportation Cabinet complied with KRS 18A.0751(4)(f) and 101 KAR 1:400 in appropriately considering the factors at the time of the promotion. Specifically, the Board concludes that the Transportation Cabinet gave appropriate consideration to Intervenor Lawson's qualifications which met the minimum requirements for Highway Superintendent I.

3. The Board rejects the argument by the Appellee Transportation Cabinet that the Hearing Officer acted inappropriately in calling and questioning witnesses regarding the validity of Intervenor Lawson's CDL and medical certificate. The Board finds that the Hearing Officer acted appropriately in inquiring regarding legitimate issues raised by the Appellants concerning whether or not Intervenor Lawson met the minimum qualifications for Highway Superintendent I. [KRS 18A.010(1), KRS 18A.075, KRS 13B.080(1) and (3)].

C. **Delete** the Recommended Order and substitute the following:

IT IS HEREBY ORDERED that the appeals of **DONALD ARVIN (APPEAL NO. 2014-109) AND MICHAEL GRUBBS (APPEAL NO. 2014-095) VS. TRANSPORTATION CABINET, PERSONNEL CABINET, AND CLARENCE LAWSON** are **DISMISSED**.

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer on Remand as Altered be, and they hereby are, approved, adopted and incorporated herein by reference as a part of this Order and the Appellants' appeals are **DISMISSED**.

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this 14th day of October, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof mailed this date to:

Hon. William Fogle
Hon. Dinah Bevington
Mr. Donald Arvin
Mr. Michael Grubbs
Mr. Clarence Lawson

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD**

**DONALD E. ARVIN (Appeal No. 2014-109)
MICHAEL GRUBBS (Appeal No. 2014-095)**

APPELLANTS

VS.

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

**TRANSPORTATION CABINET
MIKE HANCOCK, APPOINTING AUTHORITY; AND**

**PERSONNEL CABINET
TIM LONGMEYER, SECRETARY**

APPELLEES

AND

CLARENCE LAWSON

INTERVENOR

** ** *

This matter came on for an evidentiary hearing on October 8, 2014, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before Colleen Beach, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellants, Donald Arvin and Michael Grubbs, were present and not represented by legal counsel. Appellee Transportation Cabinet was present and represented by the Hon. William Fogle. Appellee Personnel Cabinet was present and represented by the Hon. Whitney Meagher. The designated Intervenor, Clarence Lawson, was also present and not represented by legal counsel.

The Personnel Board, at its regular January 9, 2015 meeting, after considering the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated December 11, 2014, ordered that this matter be remanded to the Hearing Officer Colleen Beach for a determination as to whether the Intervenor met the minimum qualifications for Highway Superintendent I, despite his expired medical certificate.

A remand hearing was held on April 30, 2015, and May 22, 2015. The Appellants, Donald Arvin and Michael Grubbs, were present at the remand hearing and not represented by legal counsel. The Appellee, Transportation Cabinet, was present and represented by the Hon. William Fogle. The Appellee, Personnel Cabinet, was present and represented by the Hon.

Dinah Bevington. The Intervenor, Clarence Lawson, was also present and not represented by legal counsel.

BACKGROUND

1. Appellant, Michael Grubbs, is a classified employee with status, employed by the Transportation Cabinet as a Highway Equipment Operator IV. Appellant Grubbs filed an appeal with the Personnel Board on May 6, 2014, citing "Other penalization." He further alleged in his statement of facts: "Person that was awarded Super I did not meet requirements." (Sic).

2. Appellant, Donald Arvin, is a classified employee with status, employed by the Transportation Cabinet as a Highway Equipment Operator IV. Appellant Arvin filed an appeal with the Personnel Board on May 19, 2014, citing "Applicant Rejection" and "Other Penalization." He further alleged in his statement of facts:

The interview was not conducted according to regulation and members of the interview committee were bias in selection of candidate at the district office on Wed. March 19, 2014. Applicant Clarence Michael Lawson was upgraded from Operator I to Operator 2 and then from Operator 2 to Operator 3 with an incomplete application within a 3 year span. Promoted to Supervisor I with an invalid CDL medical card (sic)."

3. By Interim Order, dated July 9, 2014, the appeals of Donald Arvin and Michael Grubbs were consolidated. The order put Clarence Lawson on notice that his promotion is being challenged in this appeal. It was established that at issue in the evidentiary hearing were the Appellants' contention that the statutory requirements set forth in KRS 18A.0751(4)(f) and the regulatory requirements set forth in 101 KAR 1:400 were not met when the Appellee Transportation Cabinet selected Clarence Lawson for the position of Superintendent I. The Appellants also contend that the Appellee Personnel Cabinet did not properly certify Mr. Lawson as having met the minimum requirements for the position. The burden of proof was placed on the Appellants.

4. Clarence Lawson filed a Petition to Intervene on July 24, 2014.

5. The Appellant, **Michael Grubbs**, went first in the presentation of proof, and testified on his own behalf.

6. Appellant Grubbs stated that he is contesting the promotion of Clarence Lawson to the position of Highway Superintendent I, Harlan County.

7. Grubbs addressed Lawson's career at the Kentucky Transportation Cabinet: Lawson was reclassified from a Highway Equipment Operator I to a Highway Equipment Operator II sometime in October, 2011. He was reclassified from a Highway Equipment Operator II to a Highway Equipment Operator III in September, 2012. Grubbs stated that, according to both applications Lawson filed with the Personnel Cabinet pursuant to these

promotions, he did not have his “tank vehicle endorsement” during the time of these two reclassifications.

8. Grubbs explained that to work as a Highway Equipment Operator with the Kentucky Transportation Cabinet, an employee needs a valid driver’s license, a commercial drivers’ license (CDL), and a tanker vehicle endorsement, which is mandatory for the operation of a vehicle hauling in excess of 1,000 gallons. A new hire with the Transportation Cabinet has 6 months to acquire the endorsement, Grubbs stated. After that period, every Highway Equipment Operator must have a valid tank vehicle endorsement for the duration of his employment.

9. Through an Open Records request, Grubbs procured an email dated September 21, 2012 from Katie Wright, Human Resource Specialist in the Kentucky Transportation Cabinet, inquiring if Lawson had his tank vehicle endorsement. The email was sent to Mark Hoskins in District 11, and his reply is: “It does not appear he does.”

10. Grubbs testified that when Lawson was promoted to the position that is the subject of this appeal—Highway Superintendent I—Lawson was not qualified for the position because he did not have a valid CDL. His CDL was invalid because he did not have a current medical certificate. Grubbs explained that a medical certificate is obtained when a physician certifies that the employee is healthy enough to operate a large vehicle on the highway. Grubbs added that an employee does have a “grace period”—he estimated that it could possibly be up to 6 months, in which to update the medical certificate once it has expired.

11. Through an Open Records request, Grubbs obtained the “Medical Examiner’s Certificate” under the signature of Clarence Lawson. The certificate states that the exam was held on 4/23/14 and the certificate expires 4/23/15.

12. Through an Open Records request, Grubbs procured an email dated April 22, 2014, from Barbara Kay Morgan, Personnel Department, Division of Highways District 11. The email, sent to Mike Middleton, District 11, states: “I need a copy of Clarence Lawson’s medical card.”

13. Grubbs testified that he felt the promotion of Clarence Lawson to Highway Superintendent 1 should have gone to him instead. Grubbs stated that he met the minimum requirements of the job, and he had five more years experience than Lawson. Grubbs added that he has had a tank vehicle endorsement and a valid medical certificate for the duration of his employment. Grubbs added: “The Personnel and Transportation Cabinets need to check this information. Somebody dropped the ball. You can’t have a valid CDL without a current medical card.” He added that a CDL is valid for 3 years, but the medical certificate is valid for only one or two years. “They expire at different times,” he stated.

14. On cross-examination, Grubbs stated that he was interviewed by a three-member interview panel. He stated that he was not contesting whether the “five promotional factors”

were properly considered. "I'm only contesting that Lawson didn't have a valid CDL" at the time of the promotion, Grubbs stated.

15. Appellant, **Donald Arvin**, testified on his own behalf. Arvin stated that he was in the room when a discussion was held regarding Clarence Lawson's lack of a valid medical certificate at the time of his promotion to Highway Superintendent 1.

16. On cross-examination, Arvin stated that he was not alleging that the five promotional factors were not appropriately considered; he was only contesting Lawson's lack of a valid medical certificate when he was promoted.

17. The Appellants rested their case. The Transportation Cabinet moved for a directed verdict, which was **DENIED**.

18. The Personnel Cabinet called its first witness. **Karen Mixson** is the Director of the Division of Career Opportunities. Her job duties include the oversight of the employment register, applicant services, and Human Resource certification (the review of applicants' job credentials).

19. Mixson stated that when a job vacancy opens, the state agency will ask her division to post the job. A staff member in her office will certify a list of eligibles, from which the agency has 90 days to select whom they wish to "move forward with." That list then goes back to an analyst in her office who reviews the credentials for each applicant to ensure that the individual meets the job's minimum requirements. These minimum requirements are found in the class specification for the job in question.

20. After the agency narrows down the applicant field to a few finalists, her office begins a "quality assurance process," which includes background checks for each applicant. If there is a licensing requirement, her office checks with the Kentucky Drivers Information System (an on-line database) to make sure the individual has met the applicable requirements.

21. Mixson was asked to address the job posting for "9068 Highway Superintendent I." Mixson stated that the special requirements for this position are a valid Class A commercial drivers' license with tank vehicle endorsement. On Clarence Lawson's job response filed with the Commonwealth Career Opportunities website, Lawson stated "Yes" that he had a valid commercial driver's license, and "N" under the question "What endorsement?" Mixson explained that "N" was the letter designated for "tank vehicle endorsement." An analyst, Debbie Hatfield, accessed the Kentucky Drivers' Information System and confirmed that Lawson had a valid CDL. On April 16, 2014, Lawson was promoted to the Highway Superintendent I position.

22. Mixson stated that the Personnel Cabinet does not make independent decisions regarding licensure. "We rely on the licensing boards." Mixson saw no reason to question Lawson's application.

23. On cross-examination, Mixson was asked if she checked Lawson's "medical card." She re-stated that her office relies solely on the KY Drivers Information System: "If the CDL is valid, we assume the medical certificate is also current." Mixson added: "Ensuring that the medical card is valid is the responsibility of the licensing authority---the Transportation Cabinet."

24. **Debbie Hatfield** is a Personnel Program Consultant in the Division of Human Resource Certification in the Personnel Cabinet, where she has worked for the past seven years. Her duties include the review of job applications to see if applicants meet the minimum requirements for the jobs they have applied for.

25. Hatfield conducted the "Quality Assurance" review of Lawson's application. She looked at his application to make sure he met the minimum requirements for the Highway Superintendant I position. She saw that Lawson possessed the required level of experience and education for the position. She next reviewed the Kentucky Drivers Information System to document the status of Lawson's CDL. This database showed that Lawson's current CDL was issued on September 26, 2012, and expires on January 17, 2016. The database also noted under the category of endorsement, an "N", which is the code for "tank vehicle endorsement." In the categories of "status of driver's license" and "status of commercial driver's license", the database noted: "In force."

26. Hatfield testified that there was nothing in the Kentucky Drivers Information System database to indicate that Lawson did not have a valid CDL at this time.

27. Hatfield stated that she had also been involved in approving Lawson's past two reclassifications. When Lawson was promoted from the position of Highway Equipment Operator II to Highway Equipment Operator III, in the fall of 2012, she noticed that he did not have a tank vehicle endorsement. Hatfield brought the matter to the attention of Katie Wright, who worked in the Transportation Cabinet's Human Resource division. In October 2012, Lawson's promotion was approved after he obtained the endorsement. As to why Lawson's earlier reclassification from Highway Equipment Operator I to Highway Equipment Operator II had been approved without his possessing the tank vehicle endorsement, Hatfield admitted that it was an oversight on her part.

28. The Personnel Cabinet rested its case. The Transportation Cabinet rested its case. The Hearing Officer called Clarence Lawson to the witness stand.

29. **Clarence Lawson** is employed as a Highway Superintendant I for the Transportation Cabinet, a position he has held for the past six months. He began his employment with the Transportation Cabinet approximately four years ago.

30. Lawson stated that the medical certificate, required to have a valid CDL, is normally valid for two years, but "if you take high blood pressure medication, it is knocked down to a year." Lawson's medical certificate was expired at the time of his promotion to Highway Superintendent I, but only for three or four months, to the best of his recollection. He

testified that he did not know the exact date his medical certificate had expired. The matter was brought to his attention when the District Office told him that it had expired. He immediately went to the doctor's office to get the certificate updated. Referring to Personnel's Cabinet Exhibit #3, Lawson noted that the date of his exam was April 23, 2014, seven days after his promotion became effective. It was Lawson's understanding that there was a grace period during which a driver could have his medical certificate updated before his CDL was declared invalid.

31. Following the evidentiary hearing conducted on October 8, 2014, the Board remanded this matter to the Hearing Officer for more information pertaining to the validity of the medical certificate to Mr. Lawson's CDL. A pre-hearing conference was held on February 24, 2015, to discuss the matter and how the Hearing Officer would proceed in obtaining the information that the Board requested. By Interim Order dated March 2, 2015, the parties were informed that the issues that needed to be addressed at the remand hearing were as follows:

- a) On what day did Mr. Lawson's medical certificate expire?
- b) What effect did its expiration have on the validity of Mr. Lawson's CDL between the date of its expiration and the date of Mr. Lawson's promotion to Highway Superintendent I?
- c) Is there a "grace period" following the expiration of a medical certificate?

On remand, the Transportation Cabinet called **Judy Wolf**. Wolf is the Administrative Section Supervisor in the Commercial Driver License Section of the Division of Driver Licensing, where she has been employed for the past ten years.

32. Wolf explained the process a Kentucky driver must follow to get his Commercial Driver's License (CDL): First, the driver obtains his Commercial Learner's Permit by passing a physical exam, then goes to the Circuit Clerk's office to take written and vision exams. After six months have passed, the driver is eligible to take a skills test with the Kentucky State Police. After that test is passed, the CDL is issued.

33. Besides obtaining a CDL, the commercial driver must also obtain medical certification by a physician to certify that the driver is mentally and physically fit to operate a commercial vehicle according to federal guidelines. This medical certification must be renewed, but the renewal period varies in length according to the driver's physical condition, Wolf stated. For example, a CDL holder who has high blood pressure or diabetes may have to renew his medical certification every few months, while a completely healthy driver has to renew his medical certification every two years.

34. Prior to January, 2012, CDL holders would keep their medical certificate or "medical card" in their wallet. The driver showed the certificate to the Circuit Clerk when he renewed his CDL. In January, 2012, a new federal regulation, 49 CFR 383.73 (Federal Motor Carrier's Safety Regulations) went into effect, mandating that "medical certificates" be sent to,

and kept by, the Transportation Cabinet, Division of Driver Licensing, CDL Section. Under this new regulation, the driver also keeps a copy of the medical card with his license.

35. Wolf stated that the implementation of this federal regulation was "ongoing." While a number of Kentucky CDL holders had complied with the regulation, many had not. By the spring of 2014, 9,700 CDL holders (of the 145,000 total CDL holders in Kentucky) had not complied with the regulation. The Cabinet's CDL section took steps to address CDL holders who had not yet submitted their medical certificates. Wolf stated that a list of non-compliant drivers was compiled by the Commonwealth Office of Technology (COT). A letter was sent to these drivers on April 10, 2014, informing them that because they had not turned in their medical certificate they were "no longer eligible to operate a commercial motor vehicle" and as of the date of the letter, their CDL was "not active." (Hearing Officer Exhibit A).

36. Wolf stated that under this provision, there is a new process called a "downgrade." This occurs when a CDL holder's medical certificate expires, or when a CDL holder has not initially turned in his medical card to the Cabinet, pursuant to 49 CFR 383.71.

37. Wolf explained the "downgrade" process for CDL holders with expired medical certificates: Sixty days prior to a CDL holder's medical certificate expiring, a letter is sent to the driver informing him that his certificate is about to expire. If the driver has not renewed the certificate, a letter is sent on the day it expires informing the driver that his CDL status is now "not active." Fifty days after the expiration, a letter is sent informing the driver that his license will be suspended in ten days if his medical certificate is not renewed. Sixty days after the medical card has expired (and if the driver has not renewed it), a letter is sent informing the driver that his CDL license has been suspended.

38. Wolf was asked to explain what a "not active" license means. Wolf stated that means your license will appear as "eligible" on the Commercial Drivers Licensing Information System or the National Driving Registry. "Not eligible," on the other hand, means your license has been suspended.

39. Wolf stated that the "eligible" status allows the CDL holder to change his license status to "valid" if he renews his medical certificate within 60 days. If your license is "not eligible" you can also change your license status to "valid" if you renew your medical card within one year. After one year (but no more than 5) of being declared "not eligible," the driver can change his CDL license to "valid" only if he renews his certificate and takes a written and visual test.

40. Wolf was asked to consider the hypothetical of a CDL holder with an expired medical certificate being pulled over by law enforcement. Wolf stated that, technically, the driver does not have a valid CDL license at "eligible" status, so he should not be driving. Law enforcement would probably issue a citation. For a driver in "not eligible" status, the citation would be of a more serious nature.

41. A similar “downgrade” process occurs when the CDL holder has not turned in his medical certificate to the Cabinet in accordance with 49 CFR 383.73. Wolf stated that when a driver is identified by the CDL section as not having turned in his medical card, her office will create an entry on the CDL holder’s driving record. (A “MC2” notation on the driving record indicates that the certificate has not been turned in.) This entry, in turn, generates a letter that informs the CDL holder that his license is “not active.” Fifty days after the first letter was sent, a letter is mailed to the driver informing him that his license will be suspended in 10 days. Ten days after this letter is issued (assuming the driver has still not submitted his medical certificate), the license is suspended.

42. Wolf was asked how Kentucky CDL holders were informed of the new federal regulation requiring them to submit their medical certificate to the Transportation Cabinet. She replied that the Cabinet issued a press release regarding this matter which appeared on television; the information was posted on the Cabinet’s website; every Kentucky CDL holder was sent a letter informing him of the new procedure; and the Cabinet relayed the information to certain trucking organizations.

43. Wolf was asked how CDL holders were alerted to their medical certificate’s impending expiration prior to the new system. She stated that a valid medical certificate was only needed when the driver renewed his CDL. It was the driver’s responsibility to keep the medical card up to date, and to monitor its expiration. The expiration dates of the medical certificates were not noted on the driving record, so even if a CDL holder had an expired medical card, their driving record would still say that their license was “in force.”

44. As of the date Clarence Lawson was promoted, on April 16, 2014, Lawson still had not turned in his medical certificate to the Cabinet, pursuant to the federal policy. However, for some reason that Wolf could not explain, Lawson’s name did not appear on the list COT compiled of non-compliant CDL holders. Therefore, he did not receive the letter Wolf’s office sent on April 10, 2014.

45. Through Wolf’s testimony, the driving record of Clarence Lawson was introduced into the record as Appellee-Transportation Cabinet’s Exhibit 2. Wolf testified that nothing in his record showed that his medical certificate was “not active.” This meant that, according to his driving record, Lawson’s CDL was considered “in full force and effect” at the time of his promotion.

46. Wolf stated that she had no information available to her to indicate when Lawson’s medical certificate had actually expired. The records that the Circuit Clerk’s office had kept in the past could no longer be accessed, to the best of Wolf’s knowledge. The only information directly available to Wolf regarding Lawson’s medical card was the notation in the driving record that the CDL Section “keyed in” receipt of Lawson’s medical card on May 5, 2014. Wolf estimated that the card was probably actually received a few days before that, approximately sometime in late April, 2014, because her office has up to ten days to input that information. Wolf reiterated that there was no other existing evidence regarding Lawson’s prior medical certificates and their expiration dates.

47. On cross-examination by Appellant Michael Grubbs, Wolf stated that when a police officer pulls over a commercial vehicle, the CDL holder must show his license and his medical certificate. A CDL holder with an expired medical certificate should not be driving, Wolf stated. Wolf was asked to consider the following hypothetical: if Lawson's CDL had been "valid," but his medical card was expired, and he had been in accident, would Lawson have been "cited?" Wolf answered, "That is a possibility."

48. The Transportation Cabinet called its next witness. **Jennifer Wright** is a Human Resource Branch Manager. She oversees personnel requests, as well as payroll and benefits issues. She acts as Appointing Authority for select issues, including promotions.

49. Through Wright's testimony, the Selection Summary for the four applicants to the position of Highway Superintendent I was introduced as Appellee-Transportation Cabinet Exhibit 3. The four applicants were Michael Grubbs, Brandon Kelly, Clarence Lawson and Donald Arvin. The Selection Summary scored each applicant on: Seniority; Qualifications (including Education, Work Experience, Training/Work Experience Unique to Position; and Interview Rating); Performance Evaluations; Record of Performance and Conduct.

50. Wright testified that the interview panel considered the five promotional factors as set out by state statute and regulation.

51. Mark Hoskins, Administrative Coordinator, informed Wright's office that he recommended Clarence Lawson for the promotion. Hoskins conveyed this recommendation through an inter-office memorandum dated March 19, 2014, introduced as Appellee-Transportation Cabinet's Exhibit 4.

52. **Chris Lindsey** was called by the Hearing Officer. Lindsey is Branch Manager of the Commonwealth Office of Technology, a position he has held for the past three or four years. He oversees a team of software programmers who maintain software programs for the Cabinet.

53. Lindsey stated that he frequently is asked by the Cabinet to compile lists of drivers who meet certain criteria. He may have participated in compiling the list of CDL holders who had not turned in their medical certificates, but he did not remember compiling this list specifically.

54. Asked why Clarence Lawson did not appear on that list, even though he had not turned in his certificate, Lindsey re-iterated that he compiles lists of drivers who meet certain criteria. If a particular driver does not appear to meet those criteria, according to his driving record, his name would not be pulled.

55. Lindsey had no documentation regarding why Lawson's name was not pulled, or when Lawson's medical certificate had expired.

56. KRS 18A.0751(4)(f) states:

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;

57. 101 KAR 1:400 states:

101 KAR 1:400. Promotion.

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.

(2) Promotions may be interagency or intra-agency.

(3) (a) An employee in the classified service, other than a career employee, may be promoted to a position in the unclassified service.

(b) He shall not have reversion rights to a position in the classified service.

(c) An employee who was promoted or changed as a result of other action, with no break in service, from a position in the classified service to a position in the unclassified service prior to July 15, 1986, shall retain the reversion rights he held at the time of promotion or other action.

FINDINGS OF FACT

1. The Appellants, Donald Arvin and Michael Grubbs, are classified employees with status. Both Appellants are employed by the Transportation Cabinet in the position of Highway Equipment Operator III. Both Appellants applied for the position of Highway Superintendent I, which was awarded to Clarence Lawson, Intervenor.

2. The Appellants timely filed these appeals, appealing Lawson's promotion from Highway Equipment Operator III to Highway Superintendent I on April 16, 2014.

3. According to the Job Specifications for the position of Highway Superintendent I (Personnel Cabinet's Ex. 2), the job requirements for the position are a high school diploma, six

years of highway road maintenance or construction trades experience, a valid drivers' license, and a valid Class A Commercial Driver's License with a "tank vehicle endorsement."

4. Debbie Hatfield, Personnel Program Consultant in the Division of Human Resource Certification in the Personnel Cabinet, conducted the quality assurance review of Lawson's application for the promotion to Highway Superintendent I. She testified that her review of the Kentucky Drivers Information System database documented that Lawson's driver's license and CDL were both valid (noted as "in force" in the system), and that Lawson has a valid tank vehicle endorsement.

5. The crux of Appellants' position that Lawson was improperly promoted to Highway Superintendent I is their contention that the expiration of Lawson's "medical examiner's certificate" rendered his CDL invalid, and consequently he did not meet the requirements of the position. While Lawson admitted that his medical certificate had in fact expired "three or four months" before his promotion, he acquired a new medical certificate shortly thereafter, on April 23, 2014.

6. July Wolf, Administrative Section Supervisor of the Commercial Driver License Section of the Division of Driver Licensing, testified that in January, 2012, a new federal regulation, 49 CFR 383.73 (Federal Motor Carrier's Safety Regulation) went into effect. That regulation mandated that all CDL holders submit their medical certificates to the Transportation Cabinet, Division of Driver Licensing, CDL Section. According to the regulation, if a CDL holder failed to send in his certificate, a "downgrade" process would be implemented by Wolf's office as follows: the CDL section generates a letter which informs the driver that his license is "not active"; 50 days after that letter is sent (assuming the medical certificate has not been turned in), a second letter is generated which informs the driver that his license will be suspended in 10 days. Ten days later, the license is suspended.

7. Judy Wolf addressed how medical certificates were handled prior to the implementation of 49 CFR 383.73. She testified that CDL holders used to keep their medical certificate in their wallet. The driver would show his certificate to the Circuit Clerk when he renewed his CDL to show that his medical certificate was valid. It was the driver's responsibility to keep the medical card up to date, and monitor its expiration, Wolf testified.

8. No evidence regarding the exact expiration date of Clarence Lawson's medical certificate was submitted, despite the Hearing Officer's attempts to procure that information on remand. Clarence Lawson had testified that he "could not recall" when it had expired. Judy Wolf testified that no documentation existed regarding the expiration of medical certificates for those CDL holders who had not complied with 49 CFR 383.73, because those records were not kept permanently by the Circuit Clerks.

9. In the Spring of 2014, Wolf's office asked the Commonwealth Office of Technology (COT) to compile a list of all CDL holders who had not yet turned in their medical certificates, and were, consequently, not in compliance with 49 CFR 383.73. For reasons that

neither Judy Wolf or Chris Lindsey (COT Branch manager) could explain, Lawson's name was inadvertently left off this list, even though he was not in compliance with the regulation.

10. Wolf's office issued a letter on April 10, 2014, to all CDL holders identified by COT as not having turned in their medical certificate. The letter informed these CDL holders that they "are no longer eligible to operate a commercial motor vehicle." The letter also states, "As of the date of this letter, your CDL is "not active." (Hearing Officer Exhibit 1, attached as Recommended Order Exhibit 2).

11. According to Wolf, a "non-active" CDL means, essentially, that the driver has 60 days in which to comply with the regulation (by turning in his medical certificate to the Transportation Cabinet) in order to change his license back to "valid." Technically, a CDL holder should not be driving a commercial motor vehicle when his license is in "non-active" status.

12. At the time of Lawson's promotion, April 16, 2014, his driving record stated that his license was "in force." However, if he had been correctly identified as a CDL holder who was not in compliance with 49 CFR 383.71, his CDL would have been declared "non-active," and he would have no longer been eligible to operate a commercial motor vehicle as of April 10, 2014.

13. Lawson did finally comply with the federal mandate by submitting his medical certificate sometime between April 25, 2014 and May 5, 2014. (Wolf testified that the notation on Lawson's driving record of his submission of his medical card was "keyed in" on May 5, 2014, but Wolf could not say what day specifically he sent his medical card in, because her office has up to ten days after its receipt to enter this information into the record).

14. At the time of his promotion, April 16, 2014, Clarence Lawson had not yet submitted his medical certificate to the Transportation Cabinet. Consequently, Lawson was not in compliance with 49 CFR 383.73. Therefore, the Hearing Officer finds that Lawson was technically not eligible to operate a commercial motor vehicle at the time of his promotion.

15. While Lawson's driving record incorrectly stated that his license was "in force," this error does not change the fact that his CDL was technically "not active" at the time of his promotion. Consequently, Clarence Lawson did not meet the minimum qualifications of the Highway Superintendent I position at the time of his promotion.

CONCLUSIONS OF LAW

1. Both statute and regulation require only that all promotional factors be considered, that is, qualifications, record of performance, conduct, seniority, and performance evaluations in determining which applicant receives a position. In accordance with KRS 18A.075194)(f) and the unpublished opinion of *Mitchell v. Justice and Public Safety Cabinet, Department of*

Corrections; 2006-CA-000054-MR, no weight is assigned to any particular category that must be considered, only “appropriate consideration” of each factor is required.

2. Appellee Transportation Cabinet failed to comply with KRS 18A.0751(4)(f) and 101 KAR 1:400 by “appropriately considering” the mandatory factors, specifically Lawson’s “qualifications.”

3. In this case, the evidence of record established that at the time of his promotion (April 16, 2014), Clarence Lawson had not submitted his medical certificate in compliance with 49 CFR 383.73. Therefore, his CDL was technically “not active.” Without an active CDL, Lawson did not meet the minimum qualifications for the Highway Superintendent 1 position.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeals of **DONALD ARVIN (APPEAL NO. 2014-109) AND MICHAEL GRUBBS (APPEAL NO. 2014-095) VS. TRANSPORTATION CABINET, PERSONNEL CABINET, AND CLARENCE LAWSON** be **SUSTAINED TO THE EXTENT** that Lawson’s appointment to the position of Highway Superintendent I be rescinded and a new search to fill the position be conducted, giving appropriate consideration to each applicant’s qualifications, record of performance, conduct, seniority and performance evaluations as required by 101 KAR 1:400, Section 1, and KRS 18A.0971(4)(f).

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 Colleen Beach** this 28th day of July, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof mailed this date to:

Hon. William Fogle
Hon. Dinah Bevington
Mr. Donald Arvin
Mr. Michael Grubbs
Mr. Clarence Lawson