

CERTIFICATION OF PERSONNEL BOARD RECORDS

I certify that attached hereto is a true and correct copy of the Findings of Fact, Conclusions of Law and Recommended Order and Final Order in the case of **TAMI BAUER V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS AND CHRISTINE FRANKLIN AND PATRICIA ALLEN (APPEAL NOs. 2018-195 and 2020-034)** as the same appears of record in the office of the Kentucky Personnel Board.

Witness my hand this 17th day of December, 2021.



**MARK A. SIPER, SECRETARY
KENTUCKY PERSONNEL BOARD**

Copy to Secretary, Personnel Cabinet

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NOs. 2018-195 and 2020-034

TAMI BAUER

APPELLANT

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

JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF CORRECTIONS
AND
CHRISTINE FRANKLIN AND
PATRICIA ALLEN

APPELLEE

INTERVENORS

*** **

The Board, at its regular December 2021 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated November 8, 2021, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer are approved, adopted, and incorporated herein by reference as a part of this Order, and the Appellant's appeal is therefore **SUSTAINED to the extent** therein.

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 17th day of December, 2021.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:
Hon. Kristin Wehking
Hon. Jesse Robbins
Tami Bauer
Hon. Rosemary Holbrook (Personnel Cabinet)
Christine Franklin
Patricia Allen
Rodney Moore

4. Pursuant to an Interim Order entered March 22, 2020, these two appeals were consolidated.

5. An Interim Order entered June 17, 2021, established that the issue for the evidentiary hearing was whether Appellee complied with the provisions of 18A.0751(4)(f) and 101 KAR 1:400 in filling the promotion positions of Correctional Captain, Offender Specialist I, and Production Coordinator. The burden of proof on these issues was assigned to Appellant.

6. An additional issue for the evidentiary hearing was Appellant's claim that she was retaliated against for filing a grievance. The burden of proof on this claim was assigned to Appellant.

7. A Notice of Compliance was filed on November 28, 2018, by Appellee, stating it had notified Jessie Jenkins, the successful candidate for the Correctional Captain position, of his right to intervene. Patricia Allen replaced Jenkins in this position. Although she was not appointed through the process Appellant is challenging, Allen was offered the right to intervene in an abundance of caution. Allen filed a Notice of Intervention on May 12, 2021.

8. A Notice of Compliance was filed on March 16, 2021, by Appellee, stating it had notified Christine Franklin, who is currently serving in the Offender Information Specialist I position, and Michelle Weber, the successful candidate for the Production Coordinator position at Kentucky Correctional Industries (KCI), of their right to intervene. Weber did not request to intervene in this proceeding. Franklin filed a Notice of Intervention on March 25, 2021.

9. The parties entered into Agreed Stipulations of Facts on July 30, 2021, which are attached hereto and incorporated herein as **Recommended Order Attachment A**.

10. At the evidentiary hearing, the parties agreed to a final stipulation, which the Hearing Officer summarizes as follows:

There were two postings for the Offender Information Specialist I position after Appellant filed Appeal No. 2020-034. The first was posted in February 2021. Christine Franklin interviewed and was hired for this position. Appellant did not apply for the job at this time. A second posting of this position occurred in May 2021. Appellant did re-apply for the position at this time and was granted an interview.

11. Appellant went first in the presentation of evidence. **Appellant, Tami Bauer**, testified on her own behalf. Appellant is employed as a Postal Technician II at Kentucky State Penitentiary (KSP), where she has been employed for the past twenty (20) years. She started her

career at KSP as a Correctional Officer and was promoted up the ranks to Sergeant and then Lieutenant. In 2015, Appellant suffered a serious brain injury in a car accident. She was off work for sixteen (16) months. When Appellant returned to work, she voluntarily demoted to a Correctional Officer position.

12. In 2019, Appellant transferred to a Postal Technician I position, grade 9, in KSP's mailroom. In 2020, she was promoted to her current position of Postal Technician II, grade 10.

13. In January 2018, Appellant stated that she had to "call in" to work due to bad weather, that is, she called KSP to inform them she could not get to work because of bad road conditions. According to Appellant, the call "went on her record," her pay was withheld for the hours she did not work, and she received a written reprimand for the incident. Appellant felt the consequences for her calling in that day were unfair, and she filed a grievance.

14. A few months later, she applied for the Correctional Captain position.

15. On the day the interviews were held for that position, Appellant was working in the Segregation (Seg) Unit. Appellant stated she knew the day and the time of her interview but was not told where the interviews were being held.

16. Appellant testified that, before she could leave her post, another employee would have to relieve her. She could not immediately find anyone to stand in for her due to a staff shortage at KSP.

17. She was finally relieved of her post by a "Float" Officer. According to Appellant, her interview had been scheduled for 10:30 a.m.¹ She got to the location where the interviews were being held—Deputy Warden Steven Ford's office—at 10:45 a.m. Upon her arrival at Ford's office, she saw another employee, Anthony Hale, waiting for his interview. Appellant asked him if the interview panel was still in Ford's office. He told her that they had gone to the canteen.

18. Appellant went to the canteen herself and saw Major Garyth Thompson whom she knew was on the interview panel. Appellant approached him and explained why she had missed her interview. Appellant stated that Thompson shrugged his shoulders and said, "It is what it is."

19. Appellant added that "there had never been a female Captain at KSP."

¹ While Appellant stated at the evidentiary hearing that her interview was scheduled for 10:30 a.m., subsequent testimony indicated that it was actually scheduled for 11:30 a.m.

20. When asked what relief she was seeking for this claim, Appellant replied that she wants “the process to change.”

21. Appellant filed a grievance after the incident. Several months later, she applied for an Offender Information Specialist I position. When she did not receive an interview for this position, which was scheduled for October 4, 2019, she asked Personnel Supervisor A’Neial Lockhart about it. Lockhart told Appellant that she had been granted an interview, but her office had been unable to reach her.

22. Appellant explained that, a few weeks after she filed a grievance on June 3, 2018, she had been pulled from the Segregation (Seg) Unit and was re-posted on the Eight Wall Stand, which was located in the very back of KSP. Appellant filed another grievance regarding the OIS position, in which she stated that, “Human Resources employees were well aware that there was no phone in that wall stand.”

23. Appellant stated that she felt that her being taken out of the Seg Unit and being put in the Eight Wall Stand was done in retaliation for her having filed a grievance over the Correctional Captain position.

24. Appellant also applied for the Production Coordinator position at Kentucky Correctional Industries (KCI) but did not receive an interview. According to Appellant, Darin Collier, Operations Manager at KCI, who was choosing which applicants to interview, did not pick any veterans or spouses of veterans. After Appellant failed to receive an interview for that position, Appellant filed an appeal with the Personnel Board.

25. In Appellant’s opinion, KCI did not consider the promotional criteria when she was not hired for the Production Coordinator position. Referring to her failure to receive an interview, Appellant asked, “How can you consider it if you don’t look?” The relief Appellant is seeking in this claim is that her position grade be changed from a grade 10 to a grade 13 (the position grade of the Production Coordinator).

26. On cross-examination, Appellant agreed that she had been fifteen (15) minutes late for the interview for the Correctional Captain position. When asked if she had radioed anyone to tell them she could not find another officer to relieve her post, Appellant replied, “Who would I have radioed?” She also stated that she did not notify anyone else because she was not exactly sure who was conducting the interviews.

27. As for the Offender Specialist I position, Appellant stated that she did receive an interview for this position in May 2021. Appellant admitted that she did not apply for the position in February 2021, at which time Christine Franklin, Intervenor, had been hired.

28. Appellant acknowledged that the successful candidate for the Correctional Captain position she applied for is no longer at KSP. When that job was re-posted, Appellant did not re-apply for it.

29. As for the Production Coordinator position, the parties stipulated that “Darrin Collier selected applicants from the candidate pool by choosing those he had seen work at Kentucky Correctional Industries, rather than the required promotional criteria listed in 18A.0751(4)(f). Appellant was not selected for an interview because Darrin Collier had not seen her work at Kentucky Correctional Industries before.” (sic) (Agreed Stipulations of Fact, p.1.)

30. At the conclusion of her testimony, Appellant rested her case.

31. Appellee called its first witness, **DeEdra Hart**. Hart was Warden at KSP from July 1, 2018, until July 31, 2020. During her tenure there as Warden, she investigated and responded to Appellant’s grievance regarding her claim she was improperly denied an interview for the Correctional Captain position on May 8, 2018.

32. Through Hart’s testimony, Appellant’s grievance form regarding this incident, dated June 3, 2018, was introduced into the record as part of Appellee’s Exhibit 1. Appellant attached a typewritten statement to the grievance form, which stated that after being relieved of her post by Officer Walls, she “[W]ent to the office of Deputy Warden Ford where Lt. Hale was waiting for an interview as well. I asked Lt. Hale the time he looked at his watch and stated 11:40 a.m.; he stated D/W Ford had just walked out. I waited a little while then walked to staff canteen due to it being employee week. I approached Major G. Thompson and stated, ‘I couldn’t get relieved due to lack of staffing,’ Major stated after shrugging his shoulders, ‘it is what it is’ nothing else was said so I went back to my assigned post.” (sic) (Appellee’s Exhibit 1.) Appellant added in her typewritten statement, “I feel the ones that did interview I was more qualified and knowledgeable with corrections.” (sic) (Appellee’s Exhibit 1.)

33. On July 13, 2018, Appellant filed an “Information Report” stating that, by late June 2018, she had still not received a response to her June 3, 2018 grievance. According to the report, she contacted Lockhart in KSP’s Personnel Department, who told Appellant she had never received the grievance. On July 11, 2018, Appellant learned that Lt. Wyatt had seen the form. It was tracked down to a sergeant’s office, where it was found lying on a desk. (Appellee’s Exhibit 1.)

34. The grievance form was then forwarded to Lt. Lucas Fraliex who investigated the issue of the misplaced form. He found that management’s failure to respond to the grievance within administrative time limits resulted in the automatic advancement of the grievance to Warden Hart, pursuant to 101 KAR 1:375, Section 4. (Appellee’s Exhibit 1.)

35. Warden Hart investigated Appellant's allegation that she had been improperly denied an interview for the Correctional Captain position. Per her directive, Deputy Warden Steve Ford submitted a written statement that reads, in pertinent part: "Ofc. Bauer was the last interview of the day and was scheduled for 11:30 p.m. At 11:40 p.m. she had not arrived for the interview, called us, or otherwise sent word to us that she would be late. I told MAJ Thompson at that time that we would wait an additional five minutes then we would terminate the interviews. At approx. 11:55 p.m. Ofc. Bauer approached MAJ Thompson, who had gone to the staff canteen, and asked about the interviews. MAJ Thompson made Ofc. Bauer aware that she had missed her interview and added that we had waited an additional 15 minutes either for her to arrive for her review or call. MAJ Thompson then came to my office and briefed me on his conversation with Ofc. Bauer. As stated by Ofc Bauer in her grievance, she was working the post of 3 Cellhouse RHU lower cage on the day in question. It should be noted that the 3 CH lower cage post is equipped with a functioning radio and telephone that could have been used to communicate the fact that Ofc. Bauer was going to be late for her interview. The interviews would then have been kept open." (sic). (Appellee's Exhibit 1.)

36. Warden Hart found Appellant's grievance to be unfounded because Appellant "had access to a radio and telephone." They waited 15 minutes before ending the interview process. (Appellee's Exhibit 1.)

37. On October 28, 2019, Appellant filed a second grievance form. She stated on the form that she had been "Denied interviews for the Records at KSP and Prison Industries. Called Frankfort to see if name was submitted. They was included in the interview per Frankfort. This retaliation has been on going from a grievance filed." (sic). (Appellee's Exhibit 2.) The relief she stated she was seeking was to be promoted to the "highest grade applied for (13)," and for the "retaliation to stop." (Appellee's Exhibit 2.)

38. Lt. Robert Harris was assigned to the second level of review of this grievance. According to his written statement, Harris spoke to KCI Operations Supervisor Darin Collier, who denied that he had prior knowledge of Appellant's having filed a grievance over the Correctional Captain position. He also spoke to Lori Yates, Offender Information Supervisor, who also denied that she had previous knowledge of this grievance. (Appellee's Exhibit 2.)

39. Yates later sent an email to Warden Hart on December 11, 2019, which stated, "During the application selection process for Offender Information Specialist interviews, the applicants were chosen based upon their educational, work, and skills experience that related to the Offender Information Specialist position. Ms. Bauer [Appellant] was not initially chosen due to not having as many educational, work and skills experiences related to the position applied for as the other applicants that were selected. On the day of the interviews Personnel Supervisor, A'Neial Lockhart asked if we could add Ms. Tammy Bauer to the list of applicants to interview.

We did rework the interview times to add Ms. Bauer. Deputy Warden Grief attempted to call Ms. Bauer's post she had been assigned to. There was no answer and Ms. Bauer did not show up to be interviewed." (Appellee's Exhibit 2.)

40. Darrin Collier sent an email to Warden Hart on December 17, 2019, which stated, "This statement is in reference to the grievance filed by Officer Tami Bauer on not getting chosen for an interview for Production Coordinator. I have no certain reason why she was not chosen. My Branch Manager Joe Woods sent me a list of applicants names and ask to send him back a list of names I would like to interview. There were several names that I was interested in interviewing, I sent Mr. Woods those names. Mr. Woods added a couple and made sure all veterans or any other mandatory interviews was added. There were other DOC employees that did not receive interviews." (sic) (Appellee's Exhibit 2.)

41. After reviewing statements made by staff members involved in the hiring process for both positions, in addition to considering Lt. Harris' findings, Warden Hart issued a response to Appellant's grievance on January 2, 2020, in which she concluded: "Both Ms. Yates and Mr. Collier previously stated that they were unaware of any grievances filed by you. Therefore, I find no evidence of retaliation against you due to filing any grievances." Warden Hart also noted that she had advised the Personnel Office that "when current KSP staff are on a register for a KSP position and they qualify for that position, they are to be interviewed. I do not have hiring authority over Kentucky Correctional Industries." (Emphasis in the original.) (Appellee's Exhibit 2.)

42. **Garyth Thompson** is currently a Deputy Warden at KSP, where he has been employed for the past twenty (20) years. Thompson was on the May 8, 2018 interview panel for the Correctional Captain position that Appellant had applied for.

43. Thompson testified that Appellant had been scheduled for an interview for this position but "she did not show." Her post that day was in the lower cage of Cell House 3, where Appellant "had access to a radio and phone," Thompson stated.

44. According to Thompson, the interview panel waited fifteen minutes for Appellant to show up, which she never did, nor did they receive notification that she was delayed or need to re-schedule. "So, we moved on."

45. When asked why Appellant did not appear for the interview, Thompson stated, "I don't know. It was up to her. Interviews are an employee's opportunity, and it is their responsibility to let us know if they can't make it."

46. Thompson could not recall if he had been aware that Appellant filed a grievance regarding this interview. However, he added, "I am a supporter of the grievance system—it wouldn't have made a difference to me."

47. Thompson denied the fact that Appellant is female had any impact on the interview process. In fact, Thompson testified, he "was on the interview panel that promoted the first female lieutenant" at KSP.

48. On cross-examination, Thompson acknowledged that Appellant had approached him at the canteen but added that "it was well past the time of the interview." Thompson added that several people had been scheduled for interviews, but she was the only applicant who missed her allotted time.

49. **Lori Yates** is the Offender Information Specialist Supervisor at KSP. In her role as supervisor, she is responsible for selecting candidates to interview for Offender Information Specialist positions. She testified that, when selecting candidates to interview, she considered their educational, work and skills experience. The specific skills necessary to perform this position included proficiency in computer skills, the ability to do mathematical calculations, experience dealing with the public, and preferably some experience with the court system.

50. Yates stated that Appellant was not as skilled or experienced in these skill areas as the other candidates who were selected to be interviewed on October 4, 2019. Yates testified, however, that Human Resources Administrator A'Neial Lockhart asked if Appellant could be interviewed as a "courtesy." Deputy Warden Grief attempted to contact Appellant to inform her of the interview, but Appellant did not answer the phone at her assigned post.

51. Yates denied that she was aware of any grievance Appellant had previously filed.

52. Yates stated that the Internal Mobility forms, which document an employee's state work experience, and the applicants' state evaluations, are typically reviewed during the actual interview.

53. On cross-examination, Yates was asked if she could elaborate on the specific skill set of any of the candidates chosen to be interviewed. Yates stated that she could recall that Barry Enix had proficiency in mathematical calculations; Amanda Smith had gained relevant administrative experience through her previous work with the court system; Melissa Strobel had previously been employed as an Offender Information Specialist, so she had actually performed the job. Strobel had also worked with the community at large and with the court system. Yates also recalled that another candidate, Wendi Melton, was more qualified than Appellant in her educational background and skill set, but Yates could not remember the details of her resume.

54. As for Appellant's experience with court adjustments in the proofing system, Yates responded that that experience is different from dealing directly with court documents, which the OIS position requires.

55. **A'Neial Bell** (formerly A'Neial Lockhart) is a Human Resources Administrator at KSP. Her job duties include overseeing the hiring process, personnel actions, and workers' compensation insurance. She has been in her current position since January 1, 2009.

56. Bell was asked to address the interviews for the Offender Information Specialist position that were held on October 4, 2019. Bell stated that she had no involvement in the candidate selection process, but she did ask if Appellant could be added to the list.

57. When asked why she made that request, Bell answered, "She was less qualified than the other candidates, but I felt like she would file something, like a Personnel Board appeal, if she was not interviewed."

58. Bell noted that her office sets up the interviews, typically by phone or email.

59. On cross-examination, Bell was asked if her office usually informs applicants of the location of the interviews. Bell answered, "They are supposed to." Bell acknowledged that she was aware of the grievance Appellant filed in 2018.

60. **Scott Jordan** is currently Warden of KSP, a position he has held since August 1, 2020. He began his career with the Department of Corrections (DOC) twenty (20) years ago as a Correctional Officer and was promoted up the ranks to his current position.

61. Warden Jordan stated that he is familiar with the hiring process. He added that, for a typical job posting, KSP may receive fifty (50) or sixty (60) applications. "We can't interview twenty-four (24) hours a day," he noted. "So, we set criteria to select interviewees, such as education and work history. We get the list down to ten (10) or so applicants to interview."

62. Jordan was asked to address the "Eight Wall Stand" post. He explained that KSP is a maximum-security prison. There are several wall stands around the perimeter of the facility. Some "sit way above anything else. They have windows and walks. The employee manning the wall stand has a high-powered rifle and shotgun. They are meant to prevent inmates from escaping." Jordan noted that the post is an important one. "The people I post there, I have to be 100% sure that they will do what it takes to protect the public, including firing their weapon, if necessary."

63. Jordan denied that a wall stand post was a punishment. "I really call it an honor," he stated.

64. During Jordan's tenure at KSP, in late 2020, Appellant did receive a promotion - from Postal Technician I to Postal Technician II. Jordan denied Appellant had been retaliated against for previously having filed a grievance. "A grievance is a good thing," he stated. "It prevents missteps."

65. As for KCI employees being aware that Appellant had filed a grievance, Jordan testified that these employees would only know about a grievance if it had something to do with KCI. KCI does have a workspace at the facility and some KSP inmates work there, making masks and clothing for the state. But, Jordan noted, while KCI is a branch of the Department of Corrections, it functions independently.

66. Appellee rested its case.

67. KRS 18A.0751(4)(f) requires that during a promotional process, the Agency "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."

68. Pursuant to 101 KAR 1:400(1), the Kentucky Administrative Regulations pertaining to promotions, "Agencies shall consider an applicant's qualifications, record of performance, conduct, seniority and performance evaluations in the selection of an employee for a promotion."

FINDINGS OF FACT

Appeal No. 2018-195—Correctional Captain position

1. Appellant, Tami Bauer, was employed in the position of Postal Technician I, grade 9, with the Justice and Public Safety Cabinet, Department of Corrections, Kentucky State Penitentiary. She filed a timely appeal alleging discrimination in the hiring process for the Correctional Captain position on September 24, 2018. (Appeal form No. 2018-195.)

2. Appellant applied for and was offered an interview for the Correctional Captain position on May 8, 2018. (Testimony of Appellant.)

3. According to Appellant, she was unable to find another officer to relieve her of her post, and she arrived fifteen minutes late for the interview, by which time the interview panel had left for lunch. (Testimony of Appellant; testimony of Deputy Warden Garyth Thompson.)

4. Appellant failed to notify any staff member that she would be late for the interview. When she did arrive, the interview process had been concluded. (Testimony of Deputy Warden Garyth Thompson.)

5. Appellant filed a grievance regarding the interview panel's refusal to grant her another opportunity to interview for the Correctional Captain position. (Appellee's Exhibit 1.)

6. Warden DeEdra Hart investigated the grievance. She determined it was unfounded, concluding in relevant part, "On the date of the interviews, Officer Bauer was assigned to 3 Cellhouse lower cage. Officer Bauer had access to a radio and telephone that could have been used to communicate with the interview committee that she was going to be late for the interview. The interview committee waited fifteen (15) minutes past the scheduled start for Officer Bauer's interview before ending the interview process." (Appellee's Exhibit 1.)

7. Appellant, a female, failed to introduce any evidence showing that her denial of a second interview opportunity on May 8, 2018, was done for any reason other than her arriving to the interview fifteen (15) minutes late without calling or alerting anyone to the delay.

8. In the grievance Appellant filed with the Department of Corrections on June 3, 2018, Appellant stated that she felt she was "more qualified and knowledgeable with Corrections," than the other candidates. In her Closing Brief, Appellant stated that her application for the Correctional Captain position showed: "(1) Career employee, (2) My record of performance [outstanding +] (3) Conduct – nothing on record professionally nor private life over 40 years old (4) Seniority and performance evaluations would had showed out of all candidates I had most seniority." (sic) (Appellant's Closing Brief.) Other than those assertions, Appellant provided no additional documentary or testamentary evidence showing that her qualifications were superior to those of the other applicants, or that the promotional factors were not considered during the interview process.

9. The Hearing Officer finds Appellant failed to satisfy her burden of proof to show that Appellee did not comply with the provisions of KRS 18A.0751(4)(f) and 101 KAR 1:400 in filling the position of Correctional Captain.

10. The Hearing Officer finds that there was no discrimination or retaliation against the Appellant by virtue of the fact that she was not interviewed for the Correctional Captain position. Appellant offered no proof which would dispute the testimony of Deputy Warden Thompson that Appellant arrived more than fifteen (15) minutes late for the interview without providing notice of the delay.

Appeal No. 2020-034—Offender Information Specialist position

11. Appellant applied for a promotion to an Offender Information Specialist (OIS) position, the interviews for which were held on October 4, 2019. (Testimony of Appellant and Lori Yates.)

12. Lori Yates, Offender Information Supervisor, reviewed the applications for the OIS position and determined that Appellant was not as qualified as the other candidates, and she did not select Appellant for an interview. (Testimony of Lori Yates.)

13. At the request of Human Resource Administrator A'Neial Bell (Lockhart), however, it was decided that Appellant would be offered an interview, solely as a "courtesy." On the day of the interviews, however, Appellant could not be reached by telephone and, consequently, Appellant was never informed that she had been granted an interview. (Testimony of A'Neial Bell.)

14. At the time the interviews were held, Appellant had been reposted from the Segregation Unit to the Eight Wall Stand. In Appellant's opinion, she was reposted there in retaliation for having filed a grievance regarding the interview process for the Correctional Captain position. Appellant also alleged there was no working phone there.

15. According to Lori Yates, when determining which applicants would be interviewed, she considered the applicants' "educational, work, and skills experience." When asked to compare Appellant's qualifications to some of the other candidates, Yates testified to the specific skills and work experience of certain applicants, which she adjudged to be superior to those of Appellant's. (Testimony of Lori Yates.)

16. While Appellant asserted that she had assisted with a Department of Corrections' computer program, she did not present evidence showing that this experience made her more qualified than any other applicant. In fact, Yates testified that the particular experience Appellant had with computer proofing system was different from dealing directly with court documents, which is what the OIS position requires.

17. Although each of the five regulatory factors could have been explained and compared between the candidates in greater detail, the burden of proof to accomplish this was placed upon Appellant.

18. The Hearing Officer finds that Appellant failed to satisfy her burden of proof to show that Appellee did not comply with the provisions of KRS 18A.0751(4)(f) and 101 KAR 1:400 in filling the position of Offender Information Specialist.

19. The Hearing Officer finds that there was no discrimination or retaliation against Appellant by virtue of the fact that she was not interviewed for the Offender Information Specialist position. Appellant offered no proof which would dispute the testimony of Lori Yates, Offender Information Supervisor, that Appellant was not chosen to be interviewed because her qualifications were not as strong as those of the selected applicants.

20. As for Appellant's claim that she was reposted to the Eight Wall Stand in retaliation for her having filed a grievance regarding the Correctional Captain position, the Hearing Officer finds that Appellant failed to carry her burden of proof on this issue. While Appellant testified that the reposting occurred approximately a month after she filed the grievance, Appellant offered no other evidence corroborating the claim. She also failed to explain why this post was less desirable than working in the Segregation Unit. According to Warden Jordan, the Eight Wall Stand post was not considered a punishment, and Appellant offered no rebuttal testimony to this assertion.

Appeal No. 2020-034—Production Coordinator position

21. Appellant applied for the Production Coordinator position with Kentucky Corrections Industries (KCI) in October 2019. (Appellee's Exhibit 2.)

22. Darin Collier, Operations Manager at KCI, determined which applicants would be interviewed. (Appellee's Exhibit 2.)

23. In accordance with the July 30, 2021 Agreed Stipulations of the parties, it was stipulated that "Appellant was not selected for an interview for the Production Coordinator position with KCI. Darin Collier selected the list of candidates for interview for this position. Darin Collier selected applicants from the candidate pool by choosing those that he had seen work at Kentucky Correctional Industries, rather than other required promotional criteria listed in 18A.0751(4)(f). Appellant was not selected for an interview because Darin Collier had not seen her work at Kentucky Correctional Industries before." (Agreed Stipulation of Facts.)

24. The employee selected for the Production Coordinator position, Michelle Weber, chose not to intervene in this appeal.

25. The Hearing Officer finds that Appellant did satisfy her burden of proof to show that Appellee did not comply with the provisions of KRS 18A.0751(4)(f) and 101 KAR 1:400 in filling the position of Production Coordinator.

26. The Hearing Officer finds that there was no discrimination or retaliation against Appellant by virtue of the fact that she was not interviewed for the Production Coordinator position. Appellant offered no proof which would dispute the agreed stipulation of the parties that Collier chose candidates he had seen perform job duties at KCI.

CONCLUSIONS OF LAW

1. Both statute and regulation only require that all factors be considered, i.e., qualifications, record of performance, conduct, seniority, and performance evaluations, in determining which applicant receives a position. In accordance with KRS 18A.0751(4)(f) and the unpublished decision of Mitchell v. Justice and Public Safety Cabinet, Dept. 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. The Hearing Officer concludes as a matter of law that Appellant failed to carry her burden of proof by a preponderance of the evidence to show that the promotional factors were not adequately considered in the hiring process for the Correctional Captain. Other than making a vague assertion that she was more qualified than the other candidates, Appellant failed to offer any other documentary or testimonial evidence bolstering this claim.

3. The Hearing Officer concludes as a matter of law that Appellant failed to carry her burden of proof by a preponderance of the evidence to show that the promotional factors were not adequately considered in the hiring process for the Offender Information Specialist position. Other than stating that she had experience with a Department of Corrections’ computer program, Appellant failed to offer any other documentary or testimonial evidence bolstering this claim. Nor did she rebut the testimony of Lori Yates, who stated that she was not as qualified as the other candidates for this position

4. The Hearing Officer concludes as a matter of law that Appellant satisfied her burden of proof to show that Darin Collier, Operations Manager at KCI, did not consider the required promotional criteria listed in KRS 18A.0751(4)(f) during the hiring process for the Production Coordinator position. Pursuant to the Agreed Stipulation of Facts, Appellee admitted that “Darin Collier selected applicants from the candidate pool by choosing those that he had seen work at Kentucky Correctional Industries, rather than other required promotional criteria listed in KRS 18A.0751(4)(f).” Furthermore, when then Warden Hart asked Collier why Appellant had not been chosen for an interview, he responded, “I have no certain reason why she was not chosen.”

5. Based on the Agreed Stipulation of Facts and Collier’s written statement to Warden Hart, the Hearing Officer concludes as a matter of law that Appellant satisfied her burden of proof

to show that Appellee violated KRS 18A.0751(4)(f) and 101 KAR 1:400 during the hiring process for the Production Coordinator position.

6. The Hearing Officer concludes as a matter of law that Appellant failed to carry her burden of proof by a preponderance of the evidence to show that her failure to be promoted to Correctional Captain, Offender Information Specialist, or Production Coordinator was a result of discrimination or retaliation.

7. The Hearing Officer concludes as a matter of law that Appellant failed to carry her burden of proof by a preponderance of the evidence to show that her re-posting to the Eight Wall Stand was done in retaliation for her having filed a grievance.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeals of **TAMI BAUER V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS AND CHRISTINE FRANKLIN AND PATRICIA ALLEN (APPEAL NOs. 2018-195 and 2020-034)** be **SUSTAINED to the extent** that the promotion of Michelle Weber to the Production Coordinator position at Kentucky Correctional Industries should be vacated and held for naught, and the promotion process begun anew with the Appellee giving appropriate consideration to the statutory and regulatory requirements set forth at KRS 18A.0751(4)(f) and 101 KAR 1:400. Further, the Appellee shall reimburse the Appellant for any leave time she used attending the hearing and pre-hearing conferences at the Board and otherwise make Appellant whole. [KRS 18A.095(25).]

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 8th day of November, 2021.

KENTUCKY PERSONNEL BOARD



**MARK A. SIPER
EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:

Hon. Kristin Wehking
Hon. Jesse Robbins
Tami Bauer
Hon. Rosemary Holbrook (Personnel Cabinet)

RECEIVED

JUL 30 2021

Personnel Board

COMMONWEALTH OF KENTUCKY
KENTUCKY PERSONNEL BOARD
APPEALS NO. 2018-195 and 2020-034

TAMI BAUER

APPELLANT

V.

AGREED STIPULATIONS OF FACTS

JUSTICE AND PUBLIC SAFETY CABINET
KENTUCKY DEPARTMENT OF CORRECTIONS

APPELLEE

Come the Appellant, Tami Bauer, and Appellee, Justice and Public Safety Cabinet, Department of Corrections, and hereby submit their Agreed Stipulations of Facts in the above-styled appeal:

1. Appellant applied for a Production Coordinator position with Kentucky Correctional Industries (KCI) in 2019.
2. Appellant was not selected for an interview for the Production Coordinator position with KCI. Darrin Collier selected the list of candidates for interview for this position. Darrin Collier selected applicants from the candidate pool by choosing those that he had seen work at Kentucky Correctional Industries, rather than other required promotional criteria listed in 18A.075(4)(f). Appellant was not selected for an interview because Darrin Collier had not seen her work at Kentucky Correctional Industries before.
3. The successful candidate appointed to the position of Correctional Captain for the interview process challenged by Appellant is no longer employed with the Department of Corrections. Although the position was reposted since the time that Appellant did not receive an interview for the position, Appellant did not reapply for the Correctional Captain position when it was reposted.
4. The successful candidate appointed to the position of Offender Information Specialist for the interview process challenged by Appellant is no longer employed with the Department of Corrections. Appellant applied for the Offender Information Specialist position when the position was reposted and received an interview for the position upon reapplication for the position.


RECOMMENDED ORDER ATTACHMENT A

The disputed issues in this matter are:

1. Whether Appellee retaliated against Appellant by not selecting her for an interview for the production coordinator position with KCI.
2. Whether Appellee complied with 18A.075(4)(f) and 101 KAR 1:400 for filling the Offender Information Specialist I position at Kentucky State Penitentiary.
3. Whether Appellee complied with 18A.075(4)(f) and 101 KAR 1:400 for filling the Correctional Captain position.
4. Any other matter at issue in the case that is not stipulated to above.

HAVING SEEN AND AGREED TO:


TAMI BAUER, APPELLANT
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