

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2021-094

ROSEMARY BEBE

APPELLANT

vs.

FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND RECOMMENDED ORDER

KENTUCKY PUBLIC PENSIONS AUTHORITY

APPELLEE

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This matter came on for an evidentiary hearing on July 13 and 14, and August 18, 2022, at 9:30 a.m. ET. each day, at the offices of the Kentucky Personnel Board at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Mark Sipek, Hearing Officer. The Appellant, Rosemary Bebe, was present and represented by the Hon. Paul Fauri. The Appellee, Kentucky Public Pensions Authority, was present and represented by the Hon. Leigh Ann Jordan Davis. Also present was the Agency representative, Rebecca Adkins.

The Appellant filed her appeal on August 19, 2021, alleging that she was denied two (2) promotions for the positions of Assistant Director and Branch Manager, both in the Division of Procurement and Office Services. Anne Baker received the promotion to Assistant Director and Tara Tucker received the promotion to Branch Manager. Neither Baker nor Tucker chose to intervene in this action. The burden of proof was placed upon the Appellant to show, by a preponderance of the evidence, that the Appellee failed to comply with the provisions of KRS 18A.0751(4)(f) and the requirements set forth at 101 KAR 1:400 when Baker and Tucker were selected for the positions in question.

With regard to the Assistant Director position, the Appellant notably stated at the conclusion of the testimony on July 13, 2022, that her only argument with the Assistant Director hiring process is the issue of pre-selection and not anything else. (Hearing 7/13/22 3:53 pm). At the onset of the second day of testimony, however, the Appellant amended her statement to include the consideration of the five (5) factors as her challenge to the hiring of Baker.

BACKGROUND

The Appellant's challenge to the hiring process of both of the positions in question were included in a single appeal. The parties agreed to proceed with the entirety of the testimony and arguments regarding the Assistant Director position before proceeding to the Branch Manager position.

Assistant Director of Procurement and Office Services

1. The Appellant, Rosemary Bebe, did not testify on her own behalf about the disputed Assistant Director hiring process. The Appellant's Appeal Form in this matter states that her challenge to the hiring of Baker for the Assistant Director position was based on her belief that Baker was pre-selected for the position after previously having filled that position in an interim capacity.

2. The Appellant called **Rebecca Adkins** as her first witness. Adkins is the Deputy Executive Director for Kentucky Public Pensions Authority (KPPA) and was the hiring manager and a panel member for the Assistant Director position. Adkins stated that the previous Director of Procurement and Office Services retired, and the disputed Assistant Director position was newly created to fill the void caused by their retirement. Adkins testified that she wanted to hire an Assistant Director instead of filling the Director position because she did not want to hire someone in the non-merit position of Director and then have them fail. She did not intend to fill both the Director and Assistant Director positions. Her primary concern was due to the large number of duties related to facilities management. This was an area with which the previous Director had a lot of experience, but Adkins did not know if any of the potential internal applicants would be able to handle those tasks.

3. Adkins decided to detail someone to the position of Assistant Director for a period of time before going through the hiring process to fill the position. When asked why she chose to go the route of detail to special duty prior to hiring someone to permanently fill the position, Adkins indicated that several things were going on at the KPPA that required immediate attention, including the need to cover the job duties of the Director following his retirement, the short notice given prior to the retirement of the Director, unique challenges arising from the Covid-19 State of Emergency, contracts that had to be renegotiated, and a need to have someone who could address emergency calls related to facilities' issues rather than those calls being routed directly to her as Deputy Executive Director of the KPPA. She further indicated that the detail to special duty was a stopgap measure to keep everything in the Division of Procurement and Office Services (the "Division") functioning because they anticipated it could take three (3) months to get through the hiring process and there was an immediate need for someone in that position.

4. Adkins was not required to do so, but she first met with the three (3) existing Branch Managers within the Division, both together and individually, to see if they would be interested in being detailed to special duty to the Assistant Director position. She asked each Branch Manager what they saw as the challenges or concerns for the Division and for any ideas of what they would like to do within the Division to make improvements. Importantly, both the Appellant and Baker were included in the group of Branch Managers with whom Adkins met. Adkins documented her conversations with the three (3) Branch Managers in a series of handwritten notes. (**Appellee's Exhibit 1**). Adkins recalled that the Appellant had several ideas on how to make improvements but did not have a plan on how she would carry those out. Adkins further noted that the Appellant's

suggestions were limited to a particular project she had been working on for some time and her ideas did not show any additional insight on correcting that issue, even after the Information Technology (IT) Department had been involved to help define the process. Regarding her conversation with Baker, Adkins indicated that she liked Baker's answers regarding goals for the entire Division, including improving the efficiency of the mailroom. After consideration of all who showed interest, on August 7, 2020, Adkins submitted a Detail to Special Duty Recommendation requesting Baker be detailed to special duty into the Assistant Director position, effective August 1, 2020. (**Appellant's Exhibits 3 and 4**).

5. Adkins indicated that her concerns regarding the position were, in large part, related to the facilities management portion of the position. She testified that the Division was fortunate as they had a new Facilities Manager who had worked out well, lessening the need for the individual permanently hired into the Assistant Director position to have that experience initially. She additionally noted that the Division had some angst due to the ongoing uncertainty with the position, so she determined that she should move forward with hiring a permanent employee for the Assistant Director position. She testified explicitly that the determination to move forward with permanently filling the Assistant Director position was not due to Baker's ability to do the job duties in the Detail to Special Duty assignment. Adkins affirmed that the selection of a new Facilities Manager had lessened the need for the Assistant Director to have experience in working with facilities and that whoever was selected to be the Assistant Director could grow into the duties of the position. After deciding to permanently hire someone into the Assistant Director position, Adkins then worked with the Human Resources ("HR") Department to end Baker's Detail to Special Duty in that position. Adkins stated that, to hire someone for a position, the position must be vacant and the Detail to Special Duty employee's assignment must end. Here, Baker's Detail to Special Duty in the Assistant Director position ended on January 31, 2021, and she reverted to her previous position as Branch Manager, effective February 1, 2021. (**Appellant's Exhibit 5**).

6. Adkins believed that KPPA followed the appropriate procedures in conducting the hiring for the Assistant Director position. She attended training on hiring and noted that KPPA's HR is very involved in all hiring processes. She indicated that, to the extent possible, HR likes to have a representative on each hiring panel. Lori Casey from HR served on this hiring panel. Seven (7) individuals were selected for interviews for the Assistant Director position and six (6) were actually interviewed after one (1) candidate declined. The Appellant was one of the six (6) candidates interviewed. Following the interviews, the hiring panel discussed each applicant and all documentation submitted by the applicants, including the applications, evaluations, and internal mobility forms. The panelists each scored their own interview sheets individually and they then discussed the applicants together. Adkins testified that they prefer to discuss each applicant after their interview if time allows. At the end of all interviews, she indicated that the panel discussed all of the applicants together.

The panel examined the applicants' seniority, conduct, education, experience, and qualifications, as set forth in the submitted materials, including the internal mobility forms. She confirmed that the panel looked at seniority, however, it was not a deciding factor. Conduct was listed on the internal mobility forms and the panel talked about it. Education, experience, and

qualifications were all included on the applications and reviewed. Evaluations were considered, and she noted that the range was very similar among the applicants, with the exception of one applicant who did not have evaluations to submit. The panel deliberated on all criteria and made notes in their individual interview questionnaires. Moreover, upon cross-examination, Adkins clarified that the interview questions elicited additional information regarding each applicant's previous performance and background. Specifically, she noted that the first question asked about their experience. At the end of the interview, the applicants are offered the opportunity to add anything else. Adkins testified that there was no selection worksheet completed to compare the different applicants interviewed. It was her understanding that the Selection Summary Form is no longer used and that, if the form were required, the HR director would have made sure that Adkins completed it.

7. Adkins stated there were errors on the hiring memo submitted to the KPPA's Executive Director, noting that she had apparently reused a previous memo as a template and had erred in listing Dominique McKinley instead of Connie Davis as being on the hiring panel. She further admitted that the memo submitted did not reference 101 KAR 1:400 or KRS 18A.0751(4)(f). Adkins compiled the selection packet for submission with the hiring memo to the Executive Director and stated that the memo is the document that the Personnel Cabinet requires. (**Appellant's Exhibit 6; Appellee's Exhibit 2, Section A, Page 3**).

8. At the conclusion of Adkins' testimony, the Appellant rested with regard to the Assistant Director position. The Appellee then made a Motion for a Directed Verdict on the Assistant Director position, which was denied.

9. The Appellee called **Lori Casey** as its first witness. Casey is the newly appointed Division Director of Human Resources and served on the hiring panel for the Assistant Director position. At the time the Assistant Director position was being filled, she was the Assistant Director for HR and was selected for the Assistant Director hiring panel because many managers request a HR representative to be on the hiring panels. Casey testified that, due to the relatively small size of KPPA, HR at KPPA is more involved in hiring processes than some agencies.

10. Casey pointed out that, while she was not involved in the process of detailing Baker to the Assistant Director position, she is aware of the requirements for detailing an employee to special duty into a vacant position as set forth in 101 KAR 2:076. Casey testified that detail to special duty is appropriate when a position needs to be filled immediately. Notice of the Detail to Special Duty is only required for the employee being detailed, and the agency does not have to tell other employees about the possibility for Detail to Special Duty. There is not an application process for being detailed to special duty, nor must the agency offer other employees a chance to be detailed to special duty. Casey indicated that a Detail to Special Duty could last up to one (1) year and, in order to fill the position permanently, the employee who has been detailed to special duty must be reverted to their previous position. The position previously filled by special detail must be vacant in order for it to be permanently filled. She additionally testified that the person who was detailed to special duty is not prohibited for applying for the position, as anyone can

apply, and there are no prohibitions against the agency being able to hire that person for the position permanently.

11. Casey served on the hiring panel for the Assistant Director position. As part of her role in HR, she serves on hiring panels for the agency. She testified that the interview panel reviewed applications, resumes, internal mobility forms, and performance evaluations. In addition to applications and documentation submitted by the applicants, the panel also completed interview questionnaires. She recalled the interviews of Baker, the Appellant, and one other applicant who stood out, and noted that the panel reviewed the applicants individually then discussed the group as a whole at the end. She noted that the panel would have reviewed all information, including the documentation provided to the panel. She does not specifically recall talking about the applicants' service with the state but stated that the panel typically discussed those items. She remembered discussing the applicants' education and training as well as any awards received. She testified that this position has very specific duties that are quite varied in different areas and recalled discussing those things in discussing the applicants' experience. She recalled having concerns from an HR perspective during the Appellant's interview, when the Appellant discussed her experience; it sounded like she was discussing employee performance issues from one employee to another employee and a lot of comments on secondhand information. She further believed the Appellant's experience as being isolated in one area. Casey does not believe the panel relied on the interview responses as the main basis for its decision. She stated the panel would have used all the criteria information when making its decision. (**Appellee's Exhibit 2 generally**).

12. Casey noted that Baker had 207 months of total state service compared to the Appellant's 177 months. Under qualifications, Baker listed an undergraduate degree as well as a list of specific programs and training she has attended or led. Under the same section, the Appellant had a graduate degree but did not list any additional classes or trainings. Under evaluation scoring, Baker had "exceptional" listed for 2020 and "outstanding" for 2019. The Appellant listed "distinguished" for 2020 and "highly effective" for 2019. Under record of performance, Baker listed her Detail to Special Duty in the Assistant Director position, an ACE award in 2019, an expansion of duties and trainings for her area, benefits trainer for counselors, member outreach offsite, work with the Communications Division, and volunteer time with two (2) other areas of the KPPA. Under the same section, the Appellant did not list anything. Neither candidate listed anything under conduct. (**Appellee's Exhibit 2(B)(15-16) and (C)(15)**). Casey acknowledged that this information was reviewed, discussed, and considered by the panel when they were discussing and weighing the applicants after the interviews.

13. Casey testified that she would have had the applications, interview questionnaires, and any other documents provided by the applicants, such as evaluations and internal mobility forms. When questioned by counsel regarding the absence of the Appellant's evaluations in the documents provided, Casey stated that if the Appellant had provided them, the panel would have had them, but each applicant is responsible for providing the documents requested. She confirmed that, at the beginning of the interview, in the introductory comments, Casey would have reminded the applicants about the need for their internal mobility forms and evaluations.

14. Casey confirmed that the panel did not use a Selection Summary Form and has not used that form since KPPA came under KRS Chapter 18A in 2016. She later confirmed that the Personnel Cabinet's checklist does not require a Selection Summary Form and that such a form is not presently in use. (**Appellant's Exhibit 8(a) and (b)**).

15. On redirect, Casey also confirmed that she completed the conflict-of-interest form, which certified that she had no knowledge of pre-selection of any applicant for the Assistant Director position and that no one had pressured her to recommend a particular candidate. (**Appellee's Exhibit 2(A)(17)**). She specifically testified that no one ever stated that a certain applicant had been chosen beforehand and that no one ever told her to give Baker good scores in her evaluation.

16. Upon questioning by the Hearing Officer, Casey testified that Baker was the best candidate for the position because she had a great interview, she had the experience in KPPA and specifically with the Division of Procurement and Office Services, and she had made good changes in the Division when she was detailed to special duty. Casey's experiences with Baker have been that she is very efficient and her evaluations were good. She stated that all three (3) members of the hiring panel agreed that Baker was the best applicant. When asked about the Appellant's interview, Casey stated that her opinion was that, taking all things into consideration, she would not have been as good an employee for the position. She stated that the Appellant's interview answers were concerning, and she had less experience in some areas than some of the others. Casey was troubled about her management experience and style. She did not remember the other panel members' opinions but did recall that the Appellant's interview was not a good interview.

17. The Appellee next recalled **Rebecca Adkins**, Deputy Executive Director at KPPA, to the stand. She began by testifying that most people provide their Annual Employee Performance Evaluations ("evaluations") prior to the interview. If the applicants do not have a copy of their evaluations, they would go to their HR department to get copies. Most people are familiar with that process, and it would be unusual for someone to not provide their Annual Employee Performance Evaluations. She stated that she would have reviewed the Annual Employee Performance Evaluations and the internal mobility forms but that the internal mobility forms are more memorable and are a better summary to her. She specifically recalled reviewing the internal mobility forms and that they are a bulleted summary of the important criteria. Adkins remembered reviewing and discussing the information on the internal mobility forms with the hiring panel.

18. Adkins testified that the previous Director of Procurement and Office Services would have completed Baker's 2020 Employee Performance mid-year review, but that she would have completed the Annual Employee Performance Review. In 2019, she was Baker's second-line supervisor and reviewed the Annual Employee Performance Evaluation in that role. Adkins testified that she did not complete the Appellant's Annual Employee Performance Evaluations in 2019 or 2020, but she had been Appellant's second-line supervisor. She has never been the Appellant's first-line supervisor. She would have seen the Appellant's evaluations either when they were completed or at the interview. Her ratings were listed on the internal mobility forms.

19. Upon questioning by the Hearing Officer, Adkins also testified that Baker was the best applicant for the position based upon her ability and experience finishing projects, conducting training, and getting things done. Her experience as a retirement counselor was helpful because she understood other divisions' responsibilities. Most of the service that the Division of Procurement and Office Services provides is to other areas of KPPA, and more than half of KPPA employees are counselors, so Baker has a good understanding of what they need and the timeframes when they are needed. Adkins believed that Baker could take and finish a project independently; she believed Baker would update Adkins if there were roadblocks but would not need Adkins' oversight all the time. The other panel members also agreed that Baker was the best applicant for the position. With regard to choosing the Appellant for this position, Adkins' opinion was that the Appellant was not ready to independently control the Division. The Appellant's answers to some of the questions regarding project management demonstrated that she did not know where to start, so Adkins could not give her a task to work on independently. Baker's answer was complete and thought out with fewer errors.

20. Adkins testified that, going into the interviews, she did not have an opinion as to who was the strongest applicant other than selecting those she felt were strongest to interview. Based on applications, she felt Baker was the strongest applicant and was pleasantly surprised by Thomas's interview.

21. At the conclusion of Adkins' testimony, it was discussed that the Annual Employee Performance Evaluations for the applicants, other than Baker, were not included in the packet provided to the Hearing Officer. All supplemental documents provided by the applicants were provided prior to the third day of testimony and admitted into the record as the **Appellee's Exhibit 2A**. Notably, these records do not include any Annual Employee Performance Evaluations provided by the Appellant to the hiring panel. Following submission of these records, the Appellee rested with regard to the Assistant Director position.

Branch Manager

22. The Appellant, Rosemary Bebe, also did not testify on her own behalf about her challenge to the Branch Manager position. The Appellant's Appeal Form in this matter states that her challenge to the hiring of Tucker for the Branch Manager position was based on her belief that Tucker was an external candidate to the agency whereas the Appellant had KPPA experience.

23. The Appellant called **Anne Baker** as a witness. Baker is the Assistant Director in the Division of Procurement and Office Services and was the hiring manager for the Branch Manager position. Following the posting and closing of the Branch Manager position listing, Baker was able to review the applications and complete the screening criteria worksheet to determine who to interview. Baker testified that she would review the applicant's application as well as any resumes or additional documents that they uploaded. Baker noted that there is only room for six (6) applicants on the screening criteria form, so she had to fill the form out multiple times for all of the applicants. There were eight (8) applicants who were offered interviews, and

six (6) were ultimately interviewed. Serving on the panel with Baker were Rebecca Adkins and Alicia Odom from HR. (**Appellee's Exhibit 4**, generally).

24. Baker testified that then-HR Director, Marlane Robinson, would ask the applicants to provide their two (2) most recent Annual Employee Performance Evaluations and the internal mobility form. She would forward those to Baker, who would provide copies to the rest of the hiring panel. In conducting the interviews, Baker stated that the HR representative would do the beginning and closing portions of the interview script. The Appellant did not provide her internal mobility form prior to the interview but did provide it afterwards before the panel began their deliberations.

25. Baker stated that the questions asked at the interview applied to the job and were considered with the documents provided. The questions the applicants were asked were drafted to help the applicants explain their experiences. One question asked was what they considered was their greatest career achievement. Their answers indicated the accomplishments and growth of the applicants as a result of their experiences. For example, Tucker discussed improvements to processes she had worked on as an answer to one question. Those type of questions help explain the applicant's qualifications and performance. (**Appellee's Exhibit 4**, generally).

26. Panel members would take notes on the applicant's responses, rank each response, and then discuss the applicants together after the interviews. Baker stated they would discuss each applicant after their interview but, if the interviews were back-to-back or if someone had a scheduling conflict, that might not have been possible. She specifically testified that, in every interview she has ever been in, the panel discusses the individual candidate first and then discusses and compares all the candidates together.

27. Baker testified that, with regard to the five (5) factors listed in 101 KAR 1:400, there would be a discussion among the panel members. Everyone would have had a copy of the internal mobility forms and other documents provided by the applicants and they would have discussed and compared the applicants. Baker affirmed that panelists looked at the five (5) factors of each applicant and compared them with each other. At the end of the six (6) interviews completed for this position, the hiring panel met and selected the three (3) applicants they thought were the best fit for the position. The panelists considered the criteria and all the documentation and information presented. Baker confirmed that the panel met after Tucker's interview and discussed all the applicants before Baker sent the email requesting a Minimum Qualifications Review (MQR) to Robinson.

28. Baker indicated that the three (3) individuals submitted for MQR were not ranked because the panelists did not know if one of the applicants would have an issue with their background check. One of the individuals did not pass the MQR, and it was Baker's understanding that the Personnel Cabinet had asked for original educational documents from that individual, but the applicant was unable to provide them due to their loss during Hurricane Katrina. Whether or not an applicant passes MQR is a determination solely made by the Personnel Cabinet and agencies are not party to those discussions. After the MQR, she conducted reference checks for the top

applicant, Tucker. She does not recall doing a reference check for the second-choice applicant. She then prepared the hiring memo, which summarized the selection process and noted that applicants were properly assessed in accordance with 101 KAR 1:400. (**Appellee's Exhibit 4(1)(3)**).

29. On Tucker and the Appellant's applications, Baker made notes at the top of the applications regarding their qualifications and experience when reviewing their applications for the screening criteria. Baker noted that the Appellant's application did not list any tasks she had done recently; Baker had been informed that the application, as submitted, was what should be considered for the screening criteria process to determine who to interview. At the interview stage everything was considered and the Appellant's recent experience as well as the evaluations submitted was discussed as a part of the interview. The Appellant's Annual Employee Performance Evaluations were considered by the panel as part of the process.

30. Baker had prepared a training plan for the Branch Manager position and had shared that with Adkins regarding the steps to go through and the schedule she planned to follow. They both felt the training plan was appropriate. There was training provided by Baker as well as training and shadowing with other staff that would allow the Branch Manager to get to know their staff better. The Appellant did not want to assist Tucker in learning specific tasks regarding microfiche and that delayed her training. Baker testified that she feels that Tucker grasped the concepts and information quickly and gave suggestions on how to improve processes. Baker affirmatively stated that an individual coming into KPPA would not be required to have known agency-specific procedures before arriving and there is a training and probation period for a reason. Tucker supervised groups of people prior to coming to KPPA and would not have been required to have supervised the specific people at KPPA to be eligible for the position. Otherwise, there would have been no possibility that anyone outside KPPA could ever be hired.

31. Baker additionally testified that, prior to the interviews held for this position, the Appellant had missed mandatory meetings for which she had received a verbal reprimand. This conduct had not progressed to formal discipline at the time of the interviews, however, since it was conduct that Baker was aware of prior to the interview, it was discussed with the hiring panel. Baker believed that, if an employee was missing meetings and refusing to communicate with her, it was relevant to the position because communication is important in a team. Baker further noted that the Appellant answered an interview question stating the importance of meetings and communication, but her actions had demonstrated otherwise.

32. Baker testified that she had followed all the procedures required by the Personnel Cabinet and had worked closely with the HR department to ensure those requirements were met.

33. The Hearing Officer inquired why Baker recommended Tucker for the position. She referenced Tucker's seniority, her qualifications and applications, professionalism, and background with management. Tucker's management experience was much broader than the Appellant's because Tucker had six (6) people reporting to her and several state programs for which she was responsible. Tucker was also receiving awards for her work, had demonstrated

taking initiative, and her interview reflected that. When completing the internal mobility forms, Tucker was very thorough; she listed trainings and awards while the Appellant's did not. On the Annual Employee Performance Evaluations, Tucker's reviews were exceptional, very detailed, and showed lots of notes regarding her experience improving procedures. The Appellant's reviews were also good but were vague, and Tucker's evaluations were scored higher. Everything Baker looked at regarding Tucker's past experience showed experience with teams, management, communication, and initiative that Baker felt were direct correlations to the Branch Manager position. Baker believed that Tucker could learn the specific job tasks but already had the needed management skills.

By contrast, the Appellant had one (1) employee or none at some points, and Baker did not believe that management skills were being demonstrated if the Appellant did not supervise employees. Baker stated that this was not the Appellant's fault, since there is high turnover in that area due to those positions being entry level. Tucker had demonstrated more management skills and the ability to "juggle more balls." Baker believed this made Tucker more qualified for the position. (**Appellee's Exhibit 4(2)(16) and (3)(17)**).

34. On August 18, 2022, the parties reconvened for the third day of the evidentiary hearing. Following a verbal motion by the Appellant to sustain the appeal and denial of same by the Hearing Officer, the Appellant rested her case. The parties stipulated to the admission of the hiring materials for the Branch Manager position, which were entered into the administrative record as the **Appellee's Exhibit 4**. After the admission of these relevant documents, the Appellee also rested its case.

RELEVANT LAW

18A.0751(f) provides that regulations shall be promulgated:
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[.]

101 KAR 1:400(1) provides in relevant part:
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.

KRS 13B.090(7) further provides:
In all administrative hearings, unless otherwise provided by statute or federal law, the party proposing the agency take action or grant a benefit has the burden to show the propriety of the agency action or entitlement to the benefit sought. The agency has the burden to show the propriety of a penalty imposed or the removal of a benefit previously granted. The party asserting an affirmative defense has the burden to establish that defense. 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, except when a higher standard of proof is required by law. Failure to meet the burden of proof is grounds for a recommended order from the hearing officer.

FINDINGS OF FACT

1. Rebecca Adkins, as Executive Director of Operations for the Kentucky Retirement Systems in 2020, had a vacancy in the Division for Procurement and Office Services that was in her line of supervision. Adkins determined that she wanted to fill this vacancy with an Assistant Director position and notified the three supervisors who had reported to the newly retired Director Gilbert. The three (3) supervisors were the Appellant, Wells, and Anne Baker. (Testimony of Adkins and **Appellant's Exhibit 1**).

2. Adkins had determined that she would pick one of the three current Branch Managers to be detailed to special duty as the Assistant Director of the Division; Adkins had previously determined she would not hire a non-merit Director of Procurement and Office Services but rather an Assistant Director who would be able to remain in the classified service. Adkins did not have a concern about the supervision of the sections by the Assistant Director, but she wanted to make sure the person could work with the newly hired Manager of Facility Operations (or "Facilities Manager"), who would be in charge of facility operations, which was part of the duties of the previous Director of Procurement and Office Services. Adkins prepared the Position Description for the Assistant Director position. (Testimony of Adkins).

3. Adkins had a telephonic meeting with the three Branch Managers on July 29, 2020, where she advised them that she would be interviewing them to make a selection for the Detail to Special Duty to the newly created Assistant Director position. The purpose of the individual meetings were to discuss if they were interested in the position, what challenges they would have moving forward, and any changes they might like to make to the Division going forward. Baker notified Adkins that she would not be available after July 29, 2020, and, therefore, was interviewed on that date. The Appellant and Wells were interviewed on July 30, 2020. Adkins chose Baker to be detailed to special duty as set forth in the August 7, 2020 memorandum. (Testimony of Adkins and the **Appellant's Exhibit 3**).

4. The recommendation and justification memorandum for Baker's promotion noted that she was a Section Supervisor in the Division since March 2018 and had shown outstanding initiative when given any assignment. The memorandum concludes:

Anne will be challenged in this position; however, with support and with her knowledge, skills, and experience, I believe she can address these challenges successfully. Because of her qualifications, I am requesting that Anne Baker be detailed to special duty for this vacancy, with a request start date of August 1, 2020.

[emphasis added]

Baker became the Appellant's supervisor, who then became responsible for the section that Baker left, Document Imaging, as well as her own section, Records Retention. As of December 3, 2020, the agency's official organizational chart indicated the interim Assistant Director for Procurement and Office Services was Anne Baker. (emphasis added) (Testimony of Adkins and **Appellant's Exhibits 2 and 4**).

5. As of August 1, 2020, Deputy Executive Director Adkins became the direct supervisor of Baker and was responsible for evaluating her for the 2020 year. Adkins' 2020 Annual Employee Performance Evaluation of Baker is set forth in Appellee's Exhibit 2, commencing at page A005 through A25. The evaluation for August through December 31, 2020, commences on page A17 of Exhibit 2. On page A19, Adkins addresses Baker's work with her former co-supervisors, the Appellant and Wells, and ways to improve the process. On page A20, Adkins sets forth as follows:

When Anne started her special duty assignment as Assistant Director, she met with me, her new supervisor (Exec. Dir.), to be sure she understood what I wanted. She then met with the supervisors and set expectations. When issues presented themselves, Anne stayed calm and unoffended. She worked to get consensus. If that was not possible, she set expectations and monitored results. It has not been an altogether smooth transition, but it has been successful in that customer service did not suffer. Work remained at high levels even in the face of the pandemic.

Baker has used multiple issues as coaching opportunities for supervisors while attempting to get everyone on the same page. On page A21, Adkins commented on Baker's working with the maintenance portion of her duties as follows:

The procedures and tasks associated with Facility Maintenance has been a tremendous learning curve that Anne tackled with expertise. Her attention to detail and her ability to adhere to deadlines has been impressive. She provided leadership in multiple facility projects including the move of storage from one location to multiple ones including the clean out process, window re-sealing and lighting replacement with LEDs. She monitored progress on each step of these projects: budget, Board presentations, quotes, contracts, implementation, updates, staff notifications, completion. Her leadership was critical to the success of these complex projects. Anne is always willing to take on another task she has never had to do before. She genuinely enjoys the challenge.

The overall rating of Baker's 2020 Annual Employee Performance Evaluation was the highest – exceptional performance. Adkins, during her testimony, did not recall Baker's

evaluation for 2020, but thought it was pretty good. The evaluation was signed by Adkins on January 22, 2021. (Testimony of Adkins and **Appellee's Exhibit 2**).

6. By letter of December 9, 2020, Baker was notified that the Detail to Special Duty would terminate as of January 31, 2021. Adkins could not recall specifically if she was involved in the decision to terminate the Detail to Special Duty, but it was the intent to go ahead and fill the Assistant Director position permanently. (Testimony of Adkins and **Appellant's Exhibit 5**).

7. The position was then advertised, and interviews took place with Adkins to fill the position permanently. As the hiring manager, Adkins testified that she did not have a copy of the Appellant's Exhibit 8A, the Executive Branch Classified Hiring and Selection Procedure, but had been trained on same. Adkins prepared the screening criteria worksheet. The screening criteria were used to determine which candidates to interview. Baker and the Appellant were among the seven (7) candidates who were chosen for interviews. (**Appellant's Exhibit 6 at page A9-A14**).

8. Adkins, on page A13 of Appellant's Exhibit 6 under "job task", Assistant Division Director on completion of complex projects at multiple locations, set forth for Baker functioning in a detail to special duty role and cited basically the same information as is set forth on the evaluation in Finding of Fact 18 above. Additionally, Adkins referenced under "other", at page A13 of that same exhibit, that Baker is currently working as detail to special duty to the position being hired. The screening criteria form was signed by Adkins on March 14, 2021. (**Appellant's Exhibit 6, page A9**).

9. The three (3) members of the interview panel for the Assistant Director position were Adkins, Laurie Casey, and Connie Davis. All three (3) signed the selection panelist conflict of interest statement. This statement included the following:

- I understand it is my responsibility to consider the criteria established by statute and regulation during my participation in the selection of a candidate to fill the vacancy.
- I have no knowledge of pre-selection of an applicant for this position, and no person has pressured me to recommend a particular applicant.

(testimony of Adkins, Casey, and **Appellee's Exhibit 2, pages 15 through 17**).

10. KPPA followed appropriate procedures in conducting the hiring for the Assistant Director position. Adkins attended training on hiring and noted that KPPA's HR is very involved during the hiring processes. HR likes to have a representative on each hiring panel. Lori Casey served on this panel. Seven (7) individuals were selected for interviews and six (6) were interviewed after one (1) applicant declined. The Appellant was one of the applicants interviewed. Following the interviews, the panel discussed each applicant and all documentation submitted by the applicants, including the applications, evaluations, and internal mobility forms. The panelists scored their own interview sheets individually and then discussed the applicants together. Adkins

testified that they preferred to discuss each applicant after their interview if time allows. At the end of all interviews, she indicated that the panel discussed all of the applicants together. The panel discussed the applicants' seniority, conduct, education, experience, and qualifications, as set forth in the submitted materials including the internal mobility form. The panel looked at seniority, however, it was not a deciding factor. Conduct was listed on the internal mobility forms and the panel talked about it. Education, experience, and qualifications were all included on the applications and discussed. Evaluations were considered and she noted that the range was very similar with the interviewees, with the exception of one applicant who did not have evaluations to submit. The panel talked about all of the criteria and had notes in their individual interview questionnaires. The interview questions elicited additional information regarding the applicant's previous performance and background. The first question asked about their experience. At the end of the interview, the applicants were offered the opportunity to add anything else. There was no Selection Summary Form completed to compare the different applicants interviewed. The Selection Summary Form is no longer used. (Testimony of Adkins, Casey, and **Appellee's Exhibit 2**, generally).

11. Baker was chosen for the Assistant Director position by the hiring panel based primarily on her qualifications as demonstrated by the documentation, her interview, and her work experience. All members of the interview panel agreed that Baker was their first choice. Baker was promoted to Assistant Director on May 16, 2021. (Testimony of Adkins, Casey, and **Appellant's Exhibits 6 and 9**).

12. Adkins' memorandum recommending Baker for Assistant Director mistakenly stated Dominique McKinley was on the interview panel instead of Davis. The hiring panel asked each candidate the same twelve (12) questions and all questions were related to the Assistant Director position. (Testimony of Adkins, Casey, and **Appellant's Exhibit 6 and Appellee's Exhibit 2**).

13. The Appellant failed to carry her burden of proof that the Appellee failed to give appropriate consideration to the five (5) factors (qualifications, record of performance, seniority, performance evaluations, and conduct) in filling the Assistant Director position. The Appellant demonstrated that the contemporaneous paperwork created by the Appellee did not show exactly how the hiring panel considered the five (5) factors in selecting Baker for the Assistant Director position. Nonetheless, through testimony and explanation of the documentation, the Hearing Officer finds that it is more likely than not that the Appellee gave appropriate consideration to the five (5) factors. Adkins' memorandum regarding Baker's selection for the Assistant Director position did not provide any explanation as to why Baker was selected for this position. This certainly made the Appellant's case difficult to prove. The burden of proof, however, remained with the Appellant and she was not able to present evidence showing the Appellee failed to give appropriate consideration to these five (5) factors.

14. The Appellant also failed to carry her burden of proof that Baker was pre-selected for the Assistant Director position. While Adkins selected Baker for the Detail to Special Duty to the Assistant Director position and then later selected her for promotion to this same position, there

was no evidence that Adkins pre-selected Baker or that she did not properly consider the other candidates, including the Appellant.

15. As to the Branch Manager hiring process, a vacancy was announced for the Branch Manager position on May 25, 2021. Applications were accepted and interviews were conducted commencing on June 21, 2021, through June 23, 2021. The recently appointed Assistant Director of Procurement and Office Services (Baker), Alicia Odom, and Rebecca Adkins were members of the hiring panel for that position with Baker serving as the hiring manager. (Testimony of Baker and **Appellant's Exhibit 10**).

16. After the hiring panel conducted interviews, Kimberly Canterbury, Anya Carnes, and Tara Tucker were submitted for MQR by memorandum of June 23, 2021. (**Appellant's Exhibit 15**).

17. The July 1, 2021 memorandum, recommending that Tara Tucker be appointed to the Branch Manager position in the Division of Procurement and Office Services was sent by Baker to the Executive Director of KPPA, David Eager. The memorandum set forth that the applicants were assessed by their knowledge, skills, and experience as demonstrated within their submitted documentation as well as their responses to a combination of technical and behavioral interview questions. The memorandum asserted that the internal applicants were properly reviewed in accordance with 101 KAR 1:400. The memorandum also asserted that, after the panel's thorough review, Tucker best demonstrated the knowledge, skills, and experience necessary to perform the essential functions of the position and, as a result, she was recommended to fill the vacancy. (Testimony of Baker and **Appellant's Exhibit 16**).

18. Baker considered a verbal reprimand that the Appellant received for failing to attend meetings. Baker thought this was appropriate since, during the interview for the Branch Manager position, the Appellant had answered a particular interview question specifically about attending meetings. The hiring panel did not ask the Appellant about this verbal reprimand but discussed it after her interview while considering the Appellant's conduct. The Appellant's internal mobility form had nothing listed under conduct. Baker was aware of the Executive Branch Classified Hiring and Selection Procedure. (Testimony of Baker and **Appellant's Exhibit 8**).

19. Tucker was selected for the Branch Manager position with a start date of August 1, 2021. (Testimony of Baker and **Appellant's Exhibit 16**).

20. The Appellant failed to carry her burden of proof that the Appellee failed to give appropriate consideration to the five (5) factors in filling the Branch Manager position. The Appellant again demonstrated that the Appellee's contemporaneous documentation did not show exactly how the hiring panel gave consideration to the five (5) factors as Baker's memorandum recommending Tucker for the position failed to give any explanation of how the panel considered the five (5) factors. Nonetheless, through testimony and explanation of the documentation, the evidence showed that it was more likely than not that the Appellee gave appropriate consideration to the five (5) factors. Importantly, the burden of proof in this case remained with the Appellant

on all issues and she was unable to produce evidence that affirmatively established beyond a preponderance of the evidence that the Appellee failed to give appropriate consideration to the five (5) factors. (**Appellant's Exhibit 16**).

21. The Appellant argued that it was inappropriate for Baker to consider a verbal reprimand when considering her conduct during the Branch Manager hiring process. The Appellant relied on the internal mobility form, which lists disciplinary actions and includes written reprimands, but not verbal reprimands. The fact that verbal reprimands are not specifically included as a form of discipline on the internal mobility form does not mean that it is inappropriate to consider a verbal reprimand when considering an employees' conduct when they are applying for a promotion.

Here, Baker was also unsure of the exact date of the verbal reprimand. It was clear from her testimony that the verbal reprimand was issued prior to the Appellant's interview for the Branch Manager position. Baker's testimony that she issued a verbal reprimand to the Appellant was uncontradicted. The Hearing Officer finds the Appellee appropriately considered the Appellant's verbal reprimand in assessing her conduct.

CONCLUSIONS OF LAW

1. KRS 18A.0751(1)(f) provides that the Board shall promulgate comprehensive administrative regulations for the classified service. Pursuant to subsection (4)(f) of the statute, the administration regulation shall provide:

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.

[emphasis added]

101 KAR 1:400, Section 1, provides as follows:

Each agency shall consider an applicant's qualifications, record of performance, conduct, seniority, and performance evaluations in the selection of an employee for a promotion.

2. The Appellee gave appropriate consideration to the applicants' qualifications, record of performance, seniority, performance evaluations, and conduct in selecting Anne Baker for the Assistant Director position. (KRS 18A.0751(4)(f) and 101 KAR 1:400).

3. The Appellee gave appropriate consideration to the applicants' qualifications, record of performance, seniority, performance evaluations, and conduct in selecting Tara Tucker for the Branch Manager position. (KRS 18A.0751(4)(f) and 101 KAR 1:400).

4. While the Appellee's contemporaneous documentation did not clearly demonstrate that the hiring panels gave appropriate consideration to the five (5) factors, the testimony offered at the hearing, along with the explanation of the documentation, demonstrated compliance with both the statute and the regulation. In filling a promotion, the Appellee was required to give appropriate consideration to the five (5) factors. There is no legal requirement that the Appellee generate documentation showing how it gave appropriate consideration to these factors. While documentation that provides a clearer description of the process might be a better practice, it is not legally required by the statute or the regulation.

5. The fact that the Appellee utilized the Executive Branch Classified Hiring and Selection Procedures, in this case, does not change the legal issue or the burden of proof. The Appellant failed to carry her burden of proof regarding both promotions. (KRS 13B.090)(7)).

6. The Appellant failed to carry her burden of proof that Baker was pre-selected for the Assistant Director position. Baker was eligible for promotion to Assistant Director even though she had been special detailed into this position previously. (KRS 13B.090)(7)).

7. Interviews are a tool that agencies may use in the promotion process. In this case, the evidence demonstrates that interviews were used in an effort to give appropriate consideration to the five (5) factors. *Adams v Commonwealth Health and Family Services*, 2014 WL 505910 (Ky. App. 2014).

8. Because all of the events with this appeal occurred before the effective date of Senate Bill 153, all references to KRS Chapter 18A are to the sections in effect at the time of the events associated with this appeal.

RECOMMENDED ORDER

The Hearing Officer recommends to the Kentucky Personnel Board that the appeal of **ROSEMARY BEBE V. KENTUCKY PUBLIC PENSIONS AUTHORITY (APPEAL NO. 2021-094)** 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 fifteen (15) 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).

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.

SO ORDERED at the direction of the Hearing Officer this 7 day of July, 2023.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day emailed and mailed to:

Hon. Paul Fauri
Hon. Leigh Ann Jordan Davis
Hon. Rosemary Holbrook (Personnel Cabinet)