

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2013-217

CHARLES STACY BENGE

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
J. MICHAEL BROWN, APPOINTING AUTHORITY**

APPELLEE

** ** *

The Board at its regular August 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated April 25, 2014, having considered Appellant's exceptions, Appellee's response and oral arguments and being duly advised,

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

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

SO ORDERED this 12th day of August, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Angela Cordery
Hon. Elmer George
Bobbie Underwood

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This matter came on for an evidentiary hearing on April 7, 2014, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before R. Hanson Williams, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellant, Charles Stacy Benge, was present at the hearing, and represented by the Hon. Elmer George and the Hon. Meredith Booth. Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and was represented by the Hon. Angela Cordery. Diana Eads was present as the Agency's representative.

This matter involves an appeal by the Appellant for having lost two promotional opportunities to the position of Probation and Parole Officer IV in Probation and Parole District 8. The two successful candidates for those positions were Tim Horn and Angie Howard. The successful candidates were provided the opportunity to intervene in this matter, but both chose not to do so.

The burden of proof was placed upon the Appellant by a preponderance of the evidence to show that the Appellee failed to comply with the requirements set forth at KRS 18A.0751(4)(f) and the requirements set forth at 101 KAR 1:400, when it selected Tim Horn and Angie Howard to the position of Probation and Parole Officer IV in Probation and Parole District 8 was appropriate under all surrounding circumstances and was neither excessive nor erroneous.

BACKGROUND

1. The Appellant's first witness was **Candy Bingham**. She is a Probation and Parole Officer (PPO) in the Division of Probation and Parole. She has been employed with the state for approximately fifteen years, beginning as a Social Worker and then transferring to the PPO position in 2006. She has worked with the Appellant for approximately five to six years. She testified that he is very knowledgeable and willing to help others in the office. She states that his conduct is very professional and he often works late, even though he drives daily from

London to Richmond. She also added that he treats his client parolees with respect and is willing to work with their schedule. In addition, he is very professional and helpful in court.

2. She continued by stating that Appellant has worked as a PPO for nineteen years and has exhibited leadership qualities by virtue of the way he works and mentors new PPOs. In her opinion, he has the ability to be an assistant supervisor or supervisor. She also stated that Mr. Davidson, the former Eastern Region Branch Manager, appeared to favor younger people.

3. On cross-examination, the witness stated that she also is punctual and willing to help others. She thinks that Mr. Davidson "had it in for everyone."

4. Appellant's second witness was **Melissa Estep**. She has been employed with the state in excess of twenty years and for the last three and a half years has been a Social Service Clinician in the Probation and Parole Office. She works out of the offices in Mt. Sterling, Richmond, and Irvine. Her duties include completing substance abuse assessments on parolees and making the appropriate referrals. She also follows up with those clients.

5. She has known the Appellant since September 2010. She testified that he has a good relationship with his coworkers and his work performance is good. She added that he is very compassionate with offenders. She is aware of no conflicts with his supervisors and stated that he often diffuses situations with the parolees.

6. She attests that he has good leadership qualities, as he is always looking for ways to make things better. She opined that he remains calm and makes good decisions; therefore, she feels he has the ability to act as an assistant supervisor or supervisor. She gave as one example of his looking to make things better an idea that he put forth to use televisions with videos in the waiting rooms so as to educate clients on addiction and how to combat those.

7. On cross-examination, the witness testified that she works with the Appellant approximately seven days per month, with those days being devoted to assessments and discussions with the Appellant regarding the process and recommendations for his parolees. She also does the same thing with other PPOs.

8. The Appellant's next witness was **Ashley Parker**. She is a PPO in Madison County. She began employment with the Cabinet in June 2008 as a Pre-Sentence Investigation (hereinafter PSI) writer. She has served as a PPO for approximately two years.

9. She has known the Appellant since 2008 and works with him in the same Richmond office. She classified his work performance as being very helpful, especially to her when she began. She states that he communicated with her and helped her with her on-the-job training. She also added that his advice usually proved to be correct.

10. She too confirms that he is innovative with the use of computers, has no conflict with his coworkers, stays calm and collected in all situations, and is personable with the clients.

11. She also added that he is professional in court with both his dress and his conduct. She feels he has the ability to communicate and lead others.

12. On cross-examination, she also classifies herself as a team player and one who acts and dresses professionally.

13. Appellant's next witness was **Jon Webb**. This witness was a PPO from November 2001 until his disability retirement in February 2014. Prior to that time, he was a Correctional Officer at the Blackburn Correctional Complex and then a PPO in Lexington from 2003 to 2006. He later became Assistant District Supervisor in Lexington until June 2011, at which time he transferred to the Richmond office in June 2013. He has known the Appellant since 2011 and was the supervisor over Appellant in the Richmond office beginning June 2013.

14. He terms the conduct and work performance of the Appellant as excellent and states that he got along well with others.

15. The witness testified that his evaluating supervisor in the Richmond office was Mark Davidson. He defined theirs as an odd relationship and stated that Davidson was stressful to work under as he was very demanding.

16. Mr. Webb was one of the three persons on the interview panel, along with Mark Davidson and Mike Bolcas. In his opinion, the Appellant did as well as the other candidates and, in fact, this witness, wanted to recommend the Appellant for one of the positions at either Mt. Sterling or Richmond.

17. The witness also testified that none of the Appellant's coworkers had a problem with him and in addition, he was the most tenured officer in the Richmond office, as well as the other district offices. At the end of the interview process, the witness testified that the Eastern Region Branch Manager, Davidson, did not seem to favor the Appellant and the other interview panel member, Bolcas, had no opinion. In this witness's view, Davidson made the final decision as to the choices.

18. On cross-examination, the witness confirmed that the promotional interviews occurred in July 2013. Following that time he suffered strokes in August and in September 2013, which have affected his memory since.

19. The witness then identified Appellee's Exhibit 1, a Probation and Parole Organizational Chart. This shows that Bolcas was the Assistant Director of Probation and Parole at the time of the interviews, Davidson was the Eastern Region Branch Manager, and this witness was a District Supervisor. He also confirmed that Tim Horn was chosen to fill the position in the Richmond office and Angie Howard was chosen to fill the position in the Mt. Sterling office.

20. The witness then identified Appellee's Exhibit 9, an Internal Mobility Applicant Interview Form and packet pertaining to Angela Howard. He confirmed this was available at the time of the interview for the panel members. This packet contained the educational background; the previous three years performance evaluation ratings; the record of performance for the candidate; seniority (Howard had 170 months of state service and 133 months of Cabinet service); and a series of interview questions asked of the candidate.

21. Notably, the record of performance for Howard shows that she had previously been on a Greenup County drug court team where she supervised the participants; had specialized as a sex offender officer; had supervised residents at the Morehead Inspiration Center; and had supervised offenders on a regular caseload in MRS and AIP. Howard had written PSIs during her time with the Cabinet and had received the 2010 District 8 Achievement Award. Her performance evaluation showed that she had received two "outstanding" and one "highly effective" ranking.

22. The witness then answered that of the time of these interviews in July 2013, he had been the District Supervisor for a little over one month, although he had been an Assistant Supervisor since 2006.

23. The witness then testified that the interviews were completed late in the day and the panel adjourned. He had discussions with Davidson and Bolcas (by phone) the following day to discuss each candidate. He testified that the five factors contained in 101 KAR 1:400 were discussed by the panel members. In this witness' opinion, he favored Benge primarily because of his years of service and due to the fact he always went beyond the call of duty. He also added that none of the five factors were considered more important than any other.

24. The witness then introduced Appellee's Exhibit 10, the Internal Mobility Interview Form and packet for Tim Horn. This shows that he had 139.5 months of state service and 113 months of Cabinet service. He had a college degree in Corrections and Juvenile Service and his previous three performance evaluations were all "highly effective." The witness noted that the record of performance showed that he had been firearms instructor in District 8, a Security Threat Group Coordinator in District 8; and adjunct instructor for Probation and Parole in-service training, had been the re-entry liaison in District 8, had been the lead officer in the District 8 CAP roundup, had completed 32 hours of Basic Training in the Moral Reconnection Therapy, had completed a Train the Trainer course and had been nominated to participate in the next Commissioner's Executive Leadership Program.

25. The witness also added that he felt that Horn's degree in Corrections and Juvenile Service was a plus and he felt that Horn had previous supervisory experience.

26. The witness next identified Appellee's Exhibit 11, the Internal Mobility Applicant Interview Form for Appellant. This showed the Appellant had 215 months of state service and 215 months service with the Cabinet. He has a college degree in Accounting and his previous yearly performance evaluations were all "highly effective." The Appellant's record of performance noted that he was on the Offender Handbook Committee, had attended the course given for Alcohol and Drug Dependency and had a Certificate of Excellence issued in March 2013. In addition, he had trained two interns and had coached two softball teams.

27. The witness added that there were really no major drawbacks for any of these three candidates. The witness then introduced Appellee's Exhibits 12 and 13, the July 11, 2013 memoranda recommending Angela Howard and Tim Horn to receive the two positions. The witness explained that he prepared these memos at the direction of Mark Davidson after Davidson had told him that Howard and Horn were to get the two positions. He testified that Davidson remarked to him "Horn needs a position." At that point, this witness suggested the Appellant for the other position. However, Davidson told him that Howard was to get the other position.

28. On cross-examination, the witness confirmed that another candidate named Elkins and the Appellant would have been his choices for the positions. He stated that Tim Horn had worked in his office; however, Howard had not. Therefore, he had the chance to observe Horn's work. The witness also concluded by stating that the Internal Mobility packet for Howard indicated that she had no previous supervisory experience.

29. The Appellant's next witness was **Jim Bundy**. He has been a PPO in London for the past nineteen years and has been a District Supervisor for the immediate past six years.

30. He has previously worked with the Appellant for approximately five years, where he was the Assistant Supervisor over the Appellant. He noted he has never seen any conflicts between the Appellant and supervisors. He added that the Appellant has a record of good work performance and had worked with a very high caseload, where he also did PSI reports.

31. Appellant's next witness was **Micah Scent**. He is a PPO in London, having begun in November 2001. He has a degree in Criminal Justice.

32. He stated that the Appellant was a PPO when he began employment and the Appellant helped him with his job when beginning, giving training and advice to him. He remarked that the Appellant always stayed calm, was a good worker, and got along well with his clients and coworkers.

33. Appellant, **Charles Bengé**, called himself as his next witness. Appellant stated that he lives in London, Kentucky, and makes the round trip daily to Richmond. He has been a PPO III since 2005 and has a total of in excess of eighteen years as a PPO. He received a degree in Business Administration, with an emphasis in accounting. In addition, he stated that he has taken classes in business management and personnel management.

34. The witness testified that he worked in the London office as a PPO until 2005, at which time he transferred to the Richmond office. His primary duties include supervising clients, negotiating their treatment, and writing PSI reports as necessary to help reduce the backlog.

35. The witness explained that he volunteered to help start the Drug Court Program in Laurel County. He also took voluntary training in a drug program furnished by Northern Kentucky University. He has received an award for "Excellence in Service" in the year 2013.

36. The Appellant introduced Appellant's Exhibit 1, his yearly evaluation in 2007 through 2012, all of which were rated "highly effective." He explained that his caseload is now approximately 70 cases, whereas a few years ago it was in excess of 100.

37. The witness added that he had good personal relationships with his coworkers in London and the Richmond office and has had no disciplinary actions in the past. He explained that he took Micah Scent under his wing when he began in 2001, and, in addition, trained two interns in Richmond, therefore, being a de facto training officer.

38. The witness noted that he submitted to the statewide suggestion box the idea that Probation and Parole offices might be more effective by working four days a week in his District and that this has occurred; however, he states that he does not know if his suggestion was primarily responsible for this. The witness also noted that he has trained others to work more efficiently by using computers and setting up spreadsheets for their caseload. He also states that he is always punctual at work. He noted that he has volunteered to be a part of the "Offender's Handbook" committee, which has prepared booklets which are useful for offenders. He noted that he has more seniority than the other two persons selected. He also stated that he felt that at the interviews, he did well and suggested some ideas.

39. Regarding his relationship with Mark Davidson, the Appellant stated that for the first year or so, they had a warmer relationship, but that it seemed to fall apart after the District office went to the four-day workweek. He also noted that after he had helped to restart the Parole Officer Association Group, in which Tim Horn was involved, he believes that management turned against both him and Horn.

40. On cross-examination, the Appellant confirmed his college degree is in Business Administration. He again noted that he had pioneered the use of the spreadsheet for other officers to help manage their caseloads.

41. On redirect, the witness explained that his degree had required him to take courses in all facets of business, including management. The Appellant announced closed.

42. The Appellee called as its first witness, **Michael Bolcas**. The witness testified that he was a PPO from 1991 through 2004, after which he advanced to Assistant District Supervisor and then to Branch Manager of the Eastern Region in 2006. He became the Acting Division Director of Probation and Parole in 2013. He is now retired.

43. He confirmed that he served on the interview panel with Jon Webb and Mark Davidson. He explained the process as convening the panel, performing interviews, reviewing the criteria under 101 KAR 1:400 as to the qualifications of each candidate and then having discussions about the candidates. He explained that he felt that those selected for the two positions had more unique and varied experiences than the Appellant.

44. He confirmed that the “five factors” listed in the regulations were considered. Specifically, as to Horn, he felt that his background was varied and unique and he thought that having such a background would allow the PPOs to approach these supervisors and receive training and guidance.

45. He stated that in the discussions among the panel members, that Webb had mentioned that the Appellant was near retirement and felt like the panel should help him if they could.

46. On cross-examination, the witness confirmed that he had never worked in either the Richmond or London offices and, therefore, had no chance to have observation of the Appellant’s work. He primarily knew the Appellant through the paperwork submitted. He also admitted that Webb, who had worked with the Appellant, probably knew him better. He also confirmed that he probably told Webb and Davidson that he would rely on their choices.

47. On redirect, the witness confirmed that he has been on in excess of ten interview panels during his career. He considers the past work history as a good predictor of success in a new job.

48. The Appellee’s next witness was **Mark Davidson**. He retired in August 2013 from the Justice and Public Safety Cabinet. Prior to that time he had been a PPO beginning in 1996 and was promoted in February 2005 to District Supervisor in District 8. In 2012, he became the Branch Manager over the five districts in the Eastern Region of Probation and Parole.

49. The witness testified that the Appellant had transferred to Richmond in 2005, and that the Appellant worked under him for approximately seven years. He stated that the Appellant was a good employee and that, as supervisor, he had received no complaints from the court or anyone else about the Appellant’s work performance.

50. He also confirmed that the “five factors” were considered and stated that the same questions were asked of each candidate. He also advised that a copy of the criteria in the “five factors” was before the panel members at the time of the interviews.

51. He stated that in the discussions during the following day between himself, Webb and Bolcas, they discussed who they liked for the Richmond and Mt. Sterling positions. Davidson stated that he saw no disgruntlement expressed as to the choices from either Webb or Bolcas.

52. The witness stated that he directed Webb to prepare the recommendation memos because these would be the first ones that Webb would write, since he was learning as a new supervisor, but he also said that it was Webb’s responsibility to prepare these.

53. As to Angela Howard, the witness stated that she had the first designated sex offender caseload and had proven herself meticulous in her work, in addition to doing additional duties. Regarding Tim Horn, the witness stated that he was impressed because Horn had taken on additional duties, had shown community involvement, and had taken additional trainings.

54. He also admitted that he was aware that the Appellant was one of the few PPOs to have trained interns from the Eastern Kentucky University Justice Program.

55. On cross-examination, the witness confirmed that there were discussion of each candidate, but he feels that a consensus was reached as to the choices. He also said Bolcas did participate in the process.

56. The witness denied that there was any concern from anyone in the Richmond office about the Appellant possibly getting the position there.

LAW AND REGULATION

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

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

58. 101 KAR 1:400 states in pertinent 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.

FINDINGS OF FACT

1. Jon Webb, Michael Bolcas, and Mark Davidson comprised the panel who interviewed candidates for the two vacant Probation and Parole Officer IV positions in District 8.
2. The two positions were to be located in Mt. Sterling and Richmond.
3. The interview panel members consistently and truthfully testified they were aware of, and considered, the five criteria under 101 KAR 1:400 in making their choice as to the best candidates. It appears that Bolcas may have delegated to some extent his decision making, but the Hearing Officer finds any such delegation was not material to the ultimate decision.
4. The testimony of all witnesses described the work history of the Appellant in complimentary terms, as well as those chosen to receive the promotions. The record shows the Appellant had the most state seniority, Howard had the best evaluations, with the Appellant and Horn having like evaluations; the educational background favoring Horn and Howard; and the record of performance favoring Howard and Horn because of their widely varied backgrounds. In addition, testimony showed that following the interview questions, the interviewees, including Appellant, were considered good candidates. All candidates had good conduct.
5. The Hearing Officer finds the interview process was correctly followed and appropriate consideration was given to the criteria outlined in 101 KAR 1:400. Although the Appellant seems to highlight his seniority, it is only one criterion, which taken along with others, helped form the basis for the panel's decision.
6. The Hearing Officer finds there was no credible proof of bias among the interview panel.

CONCLUSION OF LAW

The Hearing Officer concludes as a matter of law the Appellant failed to carry his burden of proof by a preponderance of the evidence.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **CHARLES STACY BENGE VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2013-217)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS


Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

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 R. Hanson Williams** this 25th day of April, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof mailed this date to:

Hon. Angela Cordery
Hon. Elmer George
Hon. Meredith Booth