

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2022-059

SHAWN BERRY

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

PERSONNEL CABINET

APPELLEES

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

The Board, at its regular April 2024 meeting, having considered the record, including the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer dated March 19, 2024, 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 **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 17th day of April, 2024.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day emailed and mailed to:
Shawn Berry
Hon. Kristin Wehking
Hon. Catherine Stevens
Hon. Rosemary Holbrook (Personnel Cabinet)
Rodney Moore

COMMONWEALTH OF KENTUCKY
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This matter came on for an evidentiary hearing on August 29, 2023, at 9:30 a.m., ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Stafford Easterling, Hearing Officer. The hearing was conducted in-person. The proceedings were recorded using audio/video equipment and were authorized by KRS Chapter 18A.

The Appellant Shawn Berry was present and was not represented by legal counsel. The Appellee Justice and Public Safety Cabinet, Department of Corrections (DOC) was present and was represented by the Hon. Kristin Wehking and appearing as Agency representative Rodney Moore. The Appellee Personnel Cabinet was present and was represented by the Hon. Zach Mowen. Also present for the Personnel Cabinet was Agency representative Teresa Harris.

Following the evidentiary hearing, the parties submitted proposed Findings of Fact, Conclusions of Law, and Recommended Order. This appeal has been reassigned to Hearing Officer Mark A. Sipek for Findings of Fact, Conclusion of Law, and Recommended Order.

BACKGROUND AND FINDINGS OF FACT

1. The Appellant, Shawn Berry, filed his appeal with the Personnel Board on May 17, 2022, appealing an applicant rejection for the Chaplain position at Northpoint Training Center (NTC). The issue for the evidentiary hearing was whether the Appellant met the minimum qualifications for the job classification of Chaplain. The burden of proof was on the Appellees. Additional issues to be addressed by the Appellees at the evidentiary hearing included:

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- a) Whether the Appellant's approval by the Personnel Cabinet as meeting the minimum qualifications for Chaplain in 2019 was a mistake;
- b) Whether the Personnel Cabinet has a longstanding historical interpretation that degrees must be from an accredited school or university to satisfy minimum requirements; and
- c) Whether that requirement has been applied to degrees from religious institutions.

2. The Appellant had the burden to prove whether KRS 164.947(2) and 13 KAR 1:020, Section 2(7) had any applicability to the minimum qualifications review process and, if so, in what manner.

3. By agreement of the parties, the Appellant's exhibits were admitted collectively as **Appellant's Exhibit 1** and Appellees' exhibits were admitted collectively as **Appellees' Exhibit 1**.

4. The Appellee Personnel Cabinet presented the following witnesses:

- a) **Teresa Harris**, Personnel Program Director, Personnel Cabinet, Department of Human Resources Administration; Division of Career Opportunities, Human Resources Certification Branch; and
- b) **Tameka Crittenden**, Personnel Program Consultant, Personnel Cabinet, Department of Human Resources Administration; Division of Career Opportunities, Human Resources Certification Branch.

5. The Appellee DOC called no witnesses.

6. The Appellant, **Shawn Berry**, called himself as his only witness.

7. The material facts in this matter are largely not in dispute:

- a) The Appellant is a graduate of Landmark Baptist Theological Seminary (Landmark) located in Fort Worth, Texas, and holds both a master's degree and doctorate in theology.
- b) Landmark is not an accredited post-secondary institution or program according to the U.S. Department of Education.
- c) The job class specification in effect at the relevant time specified the minimum primary educational requirement for the job class of

“Chaplain” as follows: “Graduate of a theological or divinity school with a master’s or doctorate degree in divinity, theology or a related field.”

- d) The Appellant’s minimum educational requirements for the position of Chaplain were approved by the Personnel Cabinet in 2019 but rejected in 2022. The Personnel Cabinet claims that the 2019 approval was in error.
- e) The Personnel Cabinet rejected the Appellant as an applicant for the Chaplain position in 2022 for the stated reason that Landmark was not an accredited institution.
- f) The Appellant asserts that Landmark is not required to be accredited for him to meet the minimum qualifications of the Chaplain job classification.

8. On April 27, 2022, the Appellant was an applicant for the vacant Chaplain position at NTC. The Personnel Cabinet Division of Career Opportunities, Human Resources Certification Branch (HR Cert.), performed a Minimum Qualifications Review of the Appellant’s application. On or about May 12, 2022, the Personnel Cabinet determined that the Appellant did not meet the minimum qualifications for the Chaplain classification because Landmark was not an “accredited” post-secondary institution. The Appellant filed this appeal on May 17, 2023.

9. The Personnel Cabinet’s first witness was **Teresa Harris** (Harris). Harris had held the position of Personnel Program Manager for three (3) years and was the supervisor of the Personnel Program Consultants in HR Cert. HR Cert. is responsible for assessing the minimum qualifications of applicants before they are appointed, reinstated, reclassified, etc., to a classified position in an agency. During the time relevant to this appeal, she supervised HR Cert. employees Tameka Crittenden and Chris Cross.

10. Harris explained that a Minimum Qualifications Review is typically performed by HR Cert. after an agency has conducted interviews for a vacant position. The agency submits their top three (3) candidates for Minimum Qualifications Review. HR Cert. takes those names and applications and compares them to the job class specification to determine if the applicants meet the minimum requirements of the job. As part of the evaluation of the education minimum requirements, HR Cert. uses the U.S. Department of Education (DOE) database that lists all accredited schools and programs in the United States. This includes religious institutions like theological seminaries, along with every other type of post-secondary school, such as law schools, medical schools, etc. If a school is not on the DOE website as being accredited, a minimum qualifications rejection is issued.

11. Harris testified that all degrees required for jobs within the merit system must be from accredited institutions or programs. The accreditation status of the institution is checked with

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every verification of education. She has personal knowledge of historical data of this policy of the Personnel Cabinet dating back at least to the early 1990s. Prior to the internet, the Personnel Cabinet would subscribe to books from the American Education Council that would list every accredited institution.

12. The accreditation status of Landmark was checked in 2022 by Personnel Program Consultant Chris Cross (Cross). Cross found that Landmark was not an accredited institution and determined that the Appellant did not meet the minimum educational requirement for the Chaplain job classification.

13. The Appellant had originally been promoted to the position of Chaplain at NTC in March 2019. He resigned in early 2020 in order to pastor a church on a full-time basis. Harris testified that his minimum qualifications for the position of Chaplain should not have been approved in 2019 because Landmark was not accredited. It was Harris' understanding that Personnel Program Consultant Tameka Crittenden had approved the Appellant's minimum educational requirement in 2019 in error.

14. Harris testified that the Personnel Cabinet was not bound by the previous erroneous approval in 2019. The minimum qualifications check was required to be repeated even though the Appellant had previously held the position of Chaplain at NTC.

15. **Tameka Crittenden** (Crittenden) testified that she performed the Minimum Qualifications Review of the Appellant's education in 2019 before he was promoted to Chaplain at NTC. Crittenden testified that she approved his minimum qualifications in error, because she believes she neglected to check that his degree was from an accredited institution.

16. Crittenden testified that, to the best of her knowledge, the Personnel Cabinet is not bound by prior mistakes. A Minimum Qualifications Review must still be performed before the Appellant would be allowed to return to the Chaplain position at NTC.

17. **Appellant Shawn Berry**, testified on his own behalf. The Appellant pointed out that he had the doctorate degree in theology required by the job class specification for Chaplain. The job class specification did not say that the school has to be accredited by an agency recognized by the U.S. Department of Education.

18. The Appellant argued that 101 KAR 2:020, Section 1(5) states:

Job class specifications shall establish the minimum requirements, which are comprehensive statements of the minimum background as to education, experience, and other qualifications required for the job classification.

As the job class specification for Chaplain does not state that the theological or divinity school must be accredited by an accrediting agency recognized by the U.S. Department of Education, the Appellant argues that he does meet minimum qualifications.

19. The Appellant noted that he previously held the position of Chaplain at NTC from 2019-2020 and the job class specification for Chaplain has not changed from 2019 to 2022 regarding the minimum educational requirement.

20. Finally, the Appellant argued that Landmark is not required to be licensed or accredited under Kentucky or Texas law, citing KRS 164.947(2), 13 KAR 1:020, Section 2(7), and Texas Administrative Code Title 19, Part 1, Chapter 7, Rule 7.9.

21. The Hearing Officer accepts as uncontested Harris's testimony that, for decades, the Personnel Cabinet verified post-secondary institutions were accredited prior to determining that an applicant met minimum educational requirements of the job classification. This practice predated the widespread use of the internet. The testimony of Harris and Crittenden established that the requirement of accreditation applied to all institutions, including religious and theological institutions.

22. The Hearing Officer accepts as uncontested that Crittenden approved the Appellant's educational minimum requirements in error in 2019. She believes she failed to check the DOE database to verify whether Landmark was an accredited institution.

CONCLUSIONS OF LAW

1. The General Assembly delegates the authority to prepare, maintain, evaluate, and revise the system of job classification to the Personnel Cabinet. KRS 18A.025(3)(b)1 and c; KRS 18A.110(1)(c) and (7)(a); 101 KAR 2:020. When examining applicants for positions, the General Assembly clearly expressed its intent that the Personnel Cabinet "be free to use any investigation of education and experience and any test of capacity, knowledge, manual skill, character, personal traits, or physical fitness, which *in [its] judgment*, serves the need to discover the relative fitness of applicants." KRS 18A.110(7)(c) (Emphasis supplied). Based upon this authority, the Personnel Cabinet has implemented a method to review an individual's application in concert with a job class specification to determine if the applicant meets the minimum qualifications of a position assigned to a certain job classification. Absent some clear abuse of discretion or arbitrary action, the discretion of the Personnel Cabinet over this area should not be disturbed." *Mercer v. Justice Cabinet, et al.*, Appeal No. 2000-378, 2001 WL 36147190 (KY PB, 6/18/2001); *See also Klatt v. Justice & Public Safety Cabinet, et al.*, Appeal Nos. 2017-210 and 2017-240, 2019 WL 6050251 (KY PB, 10/16/2019).

2. The Personnel Cabinet has broad discretion on the interpretation of its own job class specifications:

The classification process, as we have seen before, is a legislative function which has been delegated to the Commissioner of Personnel¹ and involves the exercise of discretion. There may be broad disagreement, for instance,

¹ Now known as the Secretary of the Personnel Cabinet.

regarding the amount of education required to accomplish a given employment function; nevertheless, the Legislature has said that the Commissioner shall have the final say on the matter. This is the essence of discretion.²

3. The Personnel Cabinet's interpretation that an applicant's degree must be from an accredited college or university is reasonable and permissible. The Personnel Cabinet proved that it was their longstanding policy to verify that an institution was accredited before approving that a job candidate had met minimum educational requirements.

4. The previous mistake in 2019 does not stop the Personnel Cabinet from correctly implementing its longstanding policy regarding accredited institutions in 2022. The Supreme Court of Kentucky has held that an "erroneous interpretation of the law will not be perpetuated," and the failure of a public officer to correctly administer the law does not prevent a more efficient public administrator from doing so. *Delta Air Lines, Inc. v. Commonwealth, Rev. Cabinet*, 689 S.W.2d 14, 20 (Ky. 1985) (citations omitted).

5. The Personnel Cabinet carried its burden that it had just cause for the determination that the Appellant did not meet the minimum qualifications for the job classification of Chaplain. The Personnel Cabinet demonstrated, through the uncontested testimony of Teresa Harris and Tameka Crittenden, that it has consistently over many years verified that all post-secondary institutions were accredited.

6. The Hearing Officer finds KRS 164.947(2) and 13 KAR 1:020, Section 2(7) are not applicable to the Personnel Cabinet's minimum qualifications review process. For minimum qualifications review purposes, it is within the discretion granted to the Personnel Cabinet by the General Assembly to require that educational requirements be conferred by postsecondary institutions that are accredited. This conclusion in no way infringes on the rights of religious institutions or students.

7. Because all the events underlying 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

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Kentucky Personnel Board that the appeal of **SHAWN BERRY VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS AND PERSONNEL CABINET (APPEAL NO. 2022-059)** be **DISMISSED**.

² *Deborah Goin Appeal No. 83-024, et al., Appellants v. Dep. of Personnel, Appellee*, 1983 WL 820921, at *22 (KY PB, 10/21/1983), as adopted by Final Order, 1983 WL 820938 (KY PB, 11/18/1983) (emphasis added).

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).

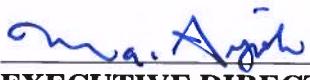
The parties are strongly encouraged to send any exceptions and/or requests for oral argument by email to: PersonnelBoard@ky.gov

Any document filed with the Personnel Board shall be served on the opposing party.

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 Mark A. Sipek, this the 19 day of March, 2024.

KENTUCKY PERSONNEL BOARD


EXECUTIVE DIRECTOR

A copy hereof this day emailed and mailed to:

Shawn Berry
Hon. Kristin Wehking
Hon. Catherine Stevens
Hon. Rosemary Holbrook (Personnel Cabinet)