

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NOS. 2014-327 AND 2015-013

TERRI S. BRADSHAW

APPELLANT

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

EDUCATION AND WORKFORCE DEVELOPMENT CABINET

APPELLEE

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The Board at its regular January 2016 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated December 2, 2015; having noted Appellant's exceptions and request for oral argument (returned as untimely) 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 Appellant's appeal (2015-013) is therefore **SUSTAINED to the extent therein** and Appellant's appeal (2014-327) is therefore **DISMISSED**.

**IT IS FURTHER 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 appeals are therefore **SUSTAINED to the extent therein**.

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

**SO ORDERED** this 13<sup>th</sup> day of January, 2016.

KENTUCKY PERSONNEL BOARD

  
MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. James Maxson  
Terri S. Bradshaw

**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NOS. 2014-327 and 2015-013**

**TERRI S. BRADSHAW**

**APPELLANT**

**V. FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND RECOMMENDED ORDER**

**EDUCATION AND WORKFORCE DEVELOPMENT CABINET,  
THOMAS O. ZAWACKI, APPOINTING AUTHORITY**

**APPELLEE**

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These consolidated appeals came on for an evidentiary hearing on July 14 and 15, and on August 21 and 24, 2015, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Stephen McMurtry, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Terri S. Bradshaw, was present at the evidentiary hearing and was not represented by legal counsel. The Appellee, Education and Workforce Development Cabinet, was present and represented by the Hon. James Maxson.

**BACKGROUND OF APPEAL NO. 2014-327**

1. This is an appeal by Terri S. Bradshaw from a November 2014 decision by the Office of Employment and Training, Education and Workforce Development Cabinet, to promote Roger Phillips to the Assistant Director of Workforce and Employment Services. Bradshaw, an applicant for that position, who completed the promotion process, filed a December 22, 2014 appeal of that decision to the Personnel Board on these grounds: "I am filing an appeal challenging the process of filling the Assistant Director position with someone who is less qualified, considering seniority, record of performance, conduct, evaluation and experience. I was not given appropriate consideration of having performed these duties for a year. OET policy was not followed in the interview and hiring process."

2. Bradshaw occupied the position of Individual Customer Services Branch Manager, Office of Employment and Training, Division of Workforce and Employment Services. Part of her appeal included the complaint that the Cabinet had not given proper consideration to her claim she had been doing the work of the Assistant Director for a year prior to the selection of Phillips to the vacant position.

3. At the evidentiary hearing, the burden of proof was upon Bradshaw to prove her claims by a preponderance of the evidence. As the party with the burden of proof, Bradshaw proceeded first in the presentation of evidence. As her first witness, Bradshaw called **Shane Smith**, an Internal Policy Analyst III. Smith testified he worked closely with Bradshaw and Lori Collins, the Division Director, on a weekly basis throughout most of 2014. During that time, he said Bradshaw performed the usual and necessary duties of the Assistant Director. A more extensive description of Smith's testimony is found in the "Background" paragraph 6 of Bradshaw's Findings of Fact, Conclusions of Law and Recommended Order in Appeal No. 2015-013, which has been consolidated with this appeal.

4. **Buddy Hoskinson**, previously the Executive Director of the Office of Education and Training, and Lori Collins' supervisor, explained part of the procedure practiced by the Cabinet in hiring or promoting a person into a vacant position. A printed document identified as the "Interview Selection" explains the procedure, and "outlines the best practices for selecting candidates for state government employment within the merit system."

5. Hoskinson testified that the written policy provides that "the selection panel should contain at least three (3) panel members, including the immediate supervisor, the regional manager [or] the next-line supervisor...and a staff member at or above the grade level of the vacant position." He said that having three selection panel members is the best practice, but having only two (2) doesn't violate the statutes or regulations and invalidate the process.

6. **Tom Bowell**, a Branch Manager from 2005 to 2015 with the Office of Employment and Training testified that he had sat many times as a panel member selected to fill a vacant position. In his experience, the Interview Selection policy should be followed, but there was "leeway" in allowing the selection panel to consist of only two members if that "fits the moment."

7. Bradshaw called **Roger Phillips**, as if on cross-examination. Bradshaw questioned Phillips about what she considered to be inconsistencies in the months of service he reported on his "Internal Mobility Applicants" and in his application for the position. Phillips explained that he included ten years as Immunization Program Coordinator for the Green River District Health Department, but recognized that seniority earned in this position was not the same as seniority earned within the merit system of the Executive Branch.

8. Bradshaw questioned Phillips about whether his qualifications prepared him to fulfill and perform the job duties described and posted by the Personnel Cabinet for the position of Assistant Director. Phillips explained he had not done the specific duties described in the position description, but his experience in similar agencies, such as fundraising in twelve Kentucky counties as Division Director of the March of Dimes, gave him transferrable management skills, as did his position as Workforce Development Operations Administrator at the Office of Employment and Training in Hopkinsville, Kentucky, where he supervised 15 merit employees.

9. **Terri Bradshaw** testified about her seniority, qualifications, performance evaluations, record of performance and conduct, all of which are related in the resume' given to

the selection panel and will be further explicated in the Findings of Fact. She testified that Lori Collins completed Michelle Sutton's Interview Selection Worksheet during the selection process based on her comparison and analysis of Collins' handwriting.

10. On cross-examination, Bradshaw said she had not yet decided to re-apply for the Assistant Directorship if the Personnel Board voided the selection of Roger Phillips.

11. The Cabinet called **Lori Collins**, Division Director, Workforce and Employment Services of the Office of Employment and Training, who explained the hierarchy of the office, and the interminable acronyms used throughout the hearing. Within the Office of Employment and Training, Division of Workforce and Employment Services are an Executive Director, a Division Director and an Assistant Director and two Branch Managers, occupied respectively by Hoskinson, Collins, [vacant] and Bradshaw.

12. In late 2013, the Assistant Director's position became vacant. Not until October 2014, did the Office for Employment and Training start the process to fill the vacancy. Six or seven applicants qualified for the interview before the selection panel consisting of Lori Collins and Michelle Sutton, Acting Division Director for Grants Management and Support. Collins said she "reached out for a Regional Manager" for a third panel member, but no one was available. She justified having only two panel members by interpreting the "should," as used in the policy, to define "best practices," and not to be a mandatory obligation.

13. Collins was complimentary of Bradshaw's work with the Cabinet, her qualifications to be the Assistant Director, and the quality of her interview before the two-member panel. She said the selection panel considered the promotion criteria of 101 KAR 1:400 and KRS 18A.0751(4)(f) [qualifications, record of performance, conduct, seniority and performance evaluations], and was unanimous in choosing Roger Phillips. What convinced the panel that Phillips was the superior applicant was his experience in supervising the Hopkinsville One-Stop Career Center, one of the regional offices the Assistant Director must supervise to assure implementation of the multiple programs developed by the state and federal governments.

14. Bradshaw questioned Collins as to why she did not ask Buddy Hoskinson, at the time the next line supervisor of the Assistant Director, to serve on the selection panel. The Policy provides that the panel "should contain" the immediate supervisor [Lori Collins], the next line supervisor [Buddy Hoskinson], and a staff member above or at the level of the vacant position [Michelle Sutton]. Collins explained that Hoskinson managed a large bureaucracy of 575 employees, and the panel had five applicants to interview over a two-day period. If she, the Division Director and Hoskinson, the Executive Director, had to conduct these interviews to fill the vacant position, there would be no one left to manage the Office for Workforce and Employment Services. Collins said, because of this, she did not even consider asking Hoskinson to serve on the panel.

15. **Michelle Sutton**, Acting Division Director for Grants Management, whom Lori Collins appointed to the selection panel, testified there were no pre-interview discussions regarding the candidates. During the interviews, each candidate answered the same questions. The two panel members kept track of the answers on an Interview Questionnaire Worksheet,

then discussed together the quality of each applicant's responses and prepared a written consensus in an Interview Questionnaire Assessment Worksheet. Sutton stated that she and Collins considered the five criteria of KRS 18A.0751(4)(f) and 101 KAR 1:400. In answer to the question, "Why Phillips?", Sutton said he had more education and seniority, and most importantly, local experience in the Hopkinsville One-Stop Office.

### **BACKGROUND OF APPEAL NO. 2015-013**

1. The Appellant, Terri S. Bradshaw, a former Individual Customer Services Branch Manager in the Education and Workforce Development Cabinet, Office of Employment and Training (OET), filed this appeal on January 15, 2015, from a decision denying her a reclassification from her Branch Manager position to Assistant Director of Workforce and Employment Services. She had previously filed a grievance requesting that the process of reclassification be instituted, but Beth Steinle, Director, Division of Human Resources, after three levels of review, denied her request. Steinle wrote in her denial letter, "While it is agreed that you perform duties in addition to the primary duty of Individual Customer Services Branch Manager, those duties were either not permanent given that candidates have been selected for both the Employer Customer Services Branch Manager and Assistant Director positions, or, were not...a material change given that your primary duty has been continued to be the management of the Individual Customer Services Branch and its programs."

2. In her Personnel Board statement of appeal, Bradshaw asserted "I have been performing the duties of the Assistant Director for over a year. I was denied a reclass and back pay. Grievance process exhausted. Copy attached."

3. The Appellee, Education and Workforce Development Cabinet, filed a Motion to Dismiss the appeal on the grounds that Bradshaw, as a probationary employee, could not be reclassified into a vacant position. The Personnel Board, acting through its Executive Director, Mark A. Sipek, ruled that the "merit system does not allow for filling a vacant positions by reclassification, however, if the Appellant performed the duties of an Assistant Director without additional compensation, she may have stated a claim for a penalization."

4. There are two issues in this appeal: (1) Did Terri Bradshaw substantially perform the duties of the Assistant Director; and (2) did Bradshaw timely file the appeal? KRS 18A.095(29) states:

"...an employee that has been penalized, but has not received a written notice of his or her right to appeal as provided in this section, shall file his or her appeal with the Personnel Board within one (1) year from the date of the penalization or from the date that the employee reasonably should have known of the penalization."

5. An Assistant Director under the Director's supervision is responsible for fulfilling the responsibilities of the Division of Workforce and Employment Services. He serves as the

Division's principal liaison with the divisional branches and coordinates line-staff with the Director to ensure line-staff input into decisions made regarding management and program policies affecting service results. He also supervises and evaluates employees as assigned by the Director. He provides management consultation and technical assistance to the Kentucky Career Center Regional Managers. He participates in on-site reviews to assess problems resulting from program management, including those related to program policy and procedural interpretation, and institutes corrective actions when necessary. And he coordinates and communicates with local office managers to determine staff development needs and plans for needed training. He performs other duties assigned by the Director.

6. **Appellant, Terri Bradshaw**, testified that she performed all her duties as a Branch Manager for Individual Customer Services, as well as many of the duties of the Assistant Director. She introduced a flurry of email from late 2013 through 2014, which include: a September 30, 2014 email from Lori Collins, Director, Division of Workforce and Employment Services, requesting that Appellant do an interim evaluation. The email said, "Need a favor, will you do Frank's interim today? I'm extremely pressed for time."; an email chain dating from June 6, 2014, from Lori Collins regarding Bradshaw's interview of a person selected by the Governor to occupy a position on the Board for the Kentucky Association of Manufacturers and an inquiry of whether the appointment should be made; a November 9, 2014 email between her and Spade, Chief of Staff, Cabinet for Economic Development, on the continued funding of a particular program; a December 4, 2014 email between Bradshaw and Collins to schedule EKOS [Employ Kentucky Operating System] training; a December 9, 2014 email in which Collins asked Bradshaw to meet with her regarding, as explained by Bradshaw, whether she could move "trade staff" around to have more money, thus providing technical assistance to the Kentucky Career Center Regional Managers; an October 30, 2014 email from Bradshaw to Collins containing a draft she prepared of a proposed policy for the WIOA Local Board; a September 11, 2014 email from Bradshaw to Collins informing her of a contentious situation in Western Kentucky involving the WIA [Workforce Investment Act]; an email chain of August 18, 2014, about redoing a performance plan for an employee from Connie Schnell, Regional Program Manager, Kentucky Career Center, Department of Workforce Investment; an email of March 26, 2014, between Gina Triplett, Office of Employment and Training, and Bradshaw about getting a Colonelship for Tom; an email of June 27, 2014, in which Collins asked Bradshaw to perform a systems review to assure WIA, WOTC, Veterans, H2H/H2B programs comply with the changes in federal policy on same-sex marriage; an email of June 26, 2014, that shows Bradshaw gave Karen Dueker, a Regional Manager, Kentucky Career Center, technical assistance on a webinar; an email of March 24, 2014, in which Jason Slone, a Regional Manager, asked Bradshaw about information and data requests from the central office; an email of June 3, 2014, from Connie Schnell asking Bradshaw to help at a Shelbyville job fair; an email from Karen Dueker, Regional Program Manager, Owensboro, about removing a voicemail greeting of a person no longer working for the Cabinet; an email of August 24, 2014, from Collins to Bradshaw asking her to handle travel vouchers from a person under her (Collins') supervision; a December 10, 2014 email from Bradshaw to Collins containing requested information about combining trade programs to save money; an email chain of October 30, 2014, regarding ordering computers for staff; a December 4, 2014 email copied to Bradshaw asking staff to do a special monitoring visit to the Bluegrass Workforce Investment Board regarding adherence to state and federal regulations; a December 24, 2014 email from Collins to Bradshaw about answering a voicemail

issue in the Hopkinsville office; a November 19, 2014 email from Bradshaw to Collins regarding other divisions using 'our' division's supplies; an email between Collins and Bradshaw regarding improper use of conference room; a June 3, 2014 email from Bradshaw to Collins on policy for appointing WIB Board members; a December 4, 2014 email from Collins to Bradshaw to direct staff to review the impact of Congressional failure to appropriate funds under TAA [Trade Adjustment Assistance]; a September 10, 2014 email from Bradshaw about lack of computers for regional staff; a December 11, 2014 email between Bradshaw and Collins about budget changes and eliminating positions in the DVOP [Disabled Veterans Outreach Program] and LVER [Local Veterans Employment Representatives]; an email in October and November 2014 about a Memorandum of Understanding with Soldiers and Family Assistance Center at Fort Knox; an email chain dated September 30, 2014, to November 12, 2014, indicating Bradshaw was involved in satisfying an Open Records Request and how to respond to it; a September 6, 2014 email from Collins to Bradshaw on how to spend Wagner-Peyser money for the next three years; an email of November 4, 2014, about arranging EKOS training for residential care; a November 4, 2014 email among Collins, Schnell and Bradshaw regarding screening for eligibility for DVOP and LVER programs; a communication of April 29, 2014, from Collins requiring Bradshaw's attendance at a meeting to discuss revision of WIA's [Workforce Investment Act] drawdown process; an April 16, 2014 email from Collins to Bradshaw about changes to be made to the EKOS program and staff training; an email on September 5, 2014, from Collins to Bradshaw about EKOS issues instructing others to check with Bradshaw; an email of April 22, 2014, between Triplett and Bradshaw regarding how to deal with "an angry local staff office manager"; and an email of November 26, 2014, among Bradshaw, Kuhn (Education Cabinet), and Holly Neal (Department of Workforce Investment) on website survey to give feedback on experience at local offices.

7. Bradshaw also presented a series of 93 emails dating from early January 2014 to the end of December 2014, which, she asserted, proved she provided management consultation and technical assistance to Regional Managers of the Office of Employment and Training. They cover a wide variety of tasks, such as perceived problems with an Associated Press reporter talking with a laid-off coal miner, a myriad of communication on recommending or not persons seeking employment, appointments to Boards and Commissions, updating computer equipment, implementation of policy, reviewing medical leave requests and scheduling and arranging training.

8. **Buddy Hoskinson**, Executive Director of the Office of Employment and Training and Lori Collins' supervisor, testified that Bradshaw, from time-to-time, performed some of the job duties of the Assistant Director. He said the position was vacant for such a long period that "others also pitched in to help with those duties." Bradshaw showed Hoskinson a series of emails that he agreed indicated Bradshaw performed some of the duties of the Assistant Director. They included: obtaining a printer for an office and determining to which program it was to be expensed, Wagner-Peyser or JVSG; alerting Hoskinson's attention to the deadline for obtaining a Transitioning-to-Veterans Grant, then taking the initiative to "put our names in the hat"; taking the initiative to have certain agreements reviewed and signed by Hoskinson to send to the local schools; helping Hoskinson with details regarding 2015 goals; attending a meeting with "our good folks at OTS" for Hoskinson; editing and updating a 2014 Focus Outreach Plan for the Secretary's meeting with the Governor; covering a meeting for Collins and Hoskinson; meeting

with an OET group regarding “directional plans”; interpreting the Trade Act of 1974 for the West Kentucky Workforce Investment Board; discussing trade program questions with Beth Brinley of the Education Cabinet; attending a meeting of the Governor’s Reentry Task Force; organizing an interagency meeting regarding hiring Kentucky Heroes; organizing a KAM meeting at General Butler State Park; organizing a Veterans Interagency meeting; attending a Veterans Interagency Group Meeting; organizing a meeting regarding SHRM sponsorship; organizing a meeting with Ken Carroll; attending a Veterans Interagency Workgroup Session; organizing a KAM wage and benefit survey meeting; organizing a KAM luncheon at the Governor’s mansion; attending a KAM Wage Survey Discussion meeting; organizing a Veterans Interagency meeting; and attending the Governor’s Reentry Task Force Steering Committee meeting.

9. Hoskinson explained that Bradshaw worked outside of her usual job duties to help perform the duties of the vacant position, but that everyone pitched in. He said, “Collins did, Sutton did, Douglas may have and I did.”

10. **Deborah Eccles**, Program Coordinator for the Work Opportunity Tax Credit Program, testified that in her opinion Bradshaw spent 75 percent of her workday during the time the Assistant Director’s position was vacant working outside of her position as Branch Manager of Customer Services. Eccles said she knew what Bradshaw did, but not the “details.” She said they discussed what was going on during numerous phone calls, and she knew Bradshaw spent “an enormous amount of time on the budget,” a task outside of her position.

11. **Connie Schnell**, Regional Program Manager for the Office of Employment and Training, testified that Bradshaw was a good liaison for the central office for the programs within her Branch Manager’s position, but she also sought her help on other issues outside of her position because she was very accessible, even though there was no official directive for her to do so. She said she went to Gina Oney, the former Assistant Director, for direction until Oney left. Then she went to Bradshaw during the vacancy, and finally, to Roger Phillips, who filled the vacant position. Schnell testified about 18 instances documented by email during 2014 when she sought direction and technical assistance from Bradshaw. Schnell said she had contact with Bradshaw about three times per week on questions and issues outside of her Branch Manager’s position. She said, “I contacted Terri to funnel information to and from Lori (Collins) and Buddy (Hoskinson), although they didn’t ask me to contact her.” According to Schnell, “Terri produced, Terri wouldn’t need a follow-up and Terri makes sure it gets printed and makes it to Buddy’s and Lori’s offices.”

12. **Karen Dueker**, Regional Manager of the Green River Area, testified that she communicated with Bradshaw “about once a week or more whenever [she] needed information from the central office.” Before the vacancy, she would go to Gina Oney, and then when the position was finally filled, to Roger Phillips. Dueker identified 25 instances of email exchanges with Bradshaw to substantiate her testimony regarding personnel requests, obtaining “generic” contracts, REA staff working without pay, travel vouchers, requests to hire and timesheets.



13. Dueker said Gina Oney performed more supervision when she was the Assistant Director than did Terri Bradshaw during the vacancy, and she said neither Lori Collins nor Buddy Hoskinson told her to go to Terri for assistance and supervision.

14. **Shane Smith**, an Internal Policy Analyst III from 2008 to 2014, testified he performed budget analysis for the Office of Employment Training programs associated with the Wagner-Peyser Act, the Workforce Investment Act, the National Career Readiness Certificate and various Veterans' programs, among others. He said he worked daily with Terri, sometimes three to four hours per day, meeting hundreds of times. For example, he said the Wagner-Peyser Grant Program was running out of money because certain expenses were charged to it. He said he objected to the expenses, and went to Lori Collins about the issue, but received no response. He said he went to Terri Bradshaw about the problem, and they worked it out. He said Terri worked "to end improper charges made by the Commonwealth Office of Technology against the Wagner-Peyser fund."

15. On cross-examination, Smith admitted dating Bradshaw on and off for two years, but not at the time of his testimony.

16. **Jennifer Miller**, Regional Program Manager for the Northern Kentucky Office of Employment Training, testified she worked closely with Bradshaw when Gina Oney was still employed as the Assistant Director, and after she had left the position. She said Lori Collins announced at a staff meeting that Bradshaw would do personnel issues, including tracking for hiring and promotions, and edit a job fair handbook for the Northern Kentucky area that was to be replicated throughout the state. On cross-examination, Miller admitted being a good friend of Bradshaw's, but said that did not influence her testimony.

17. **Lori Collins**, Division Director, Office of Employment and Training of the Education and Workforce Development Cabinet, under whom Gina Oney worked as the Assistant Director until she retired on December 13, 2013, testified in direct opposition to Bradshaw. Collins first explained the hierarchy in the Office of Employment and Training. At the head was the Executive Director, the position held by Buddy Hoskinson. Below him was Lori Collins, whose classification was Division Director of OET. Under her were Gina Oney, Assistant Division Director until she retired in 2013, and Roger Phillips, who became Assistant Division Director on December 14, 2014. Under the Assistant Director was Terri Bradshaw, who from October 2013 until her resignation sometime in 2015, was the Manager of the Individual Customer Services Branch. Parallel to that Branch was the Employers Services Branch, an unoccupied position.

18. Collins said Bradshaw did work in the Employers Services Branch as needed, but that was not outside of her position description. She had done the work of that position when the two branches were joined. Collins said that Bradshaw essentially administered the Employment and Training programs at the regional offices. Collins testified that at no time did she ever assign to Bradshaw any of the duties of the Assistant Director, and no additional work was given to her outside of her normal duties as Regional Branch Manager. Bradshaw, Collins explained, expanded her responsibilities without any authority or direction on Collins' part. Collins said she only became aware of what Bradshaw was doing after she filed her grievance. In any event,

Collins testified, much of the work she claimed to have done was within her job description and not the Assistant Director's. If there was work normally done by the Assistant Director, she [Collins] did it.

19. **Beth Steinle**, Division Director of Human Resources for the Education and Workforce Development Cabinet, testified that an employee cannot be reclassified to a vacant position. She said it would be inappropriate. Steinle thought Bradshaw did a lot of work outside of her branch, or for that matter, outside both branches. She was a good, resourceful employee who took care of a lot of regional matters, but the majority of work she did was within her branch. To work as a liaison to the regional offices was consistent with her duties as a Branch Manager. If she performed duties outside of her position description, the solution would have been to temporarily detail her to a special duty. Furthermore, she could not have been reclassified to a higher position because of the longstanding practice that probationary employees cannot be reclassified to a vacant position. Steinle did not think that Bradshaw's work outside of her position description was substantial and material. Steinle admitted that if Bradshaw worked outside of her position description, a description that was admittedly out of date, the solution would have been to update the position description. Steinle admitted that updating Bradshaw's position description was a task that "slipped through the cracks." She said, "We should have caught it. It created a huge problem."

#### **FINDINGS OF FACT IN APPEAL NO. 2014-327**

1. The selection panel considered the five criteria of KRS 18A.0751(4)(f) and 101 KAR 1:400. A comparative analysis of the five criteria shows there were arguably two equally qualified candidates. Phillips said he had 174 months of state government seniority, most of which was outside of the merit system of the Executive Branch, with two state agencies, the Hopkins County Health Department and the Green River District Health Department. Bradshaw had 90 months seniority within the Executive Branch of state government. Both Phillips and Bradshaw used their educational backgrounds to establish their qualifications. Phillips earned a Bachelor of Science degree plus other classes, seminars and workshops. Bradshaw earned an Associates' Degree in Business, Marketing and Communications, plus other seminars, classes and workshops.

2. To establish "record of performance," each described his/her employment record. Phillips listed 12 years within local health departments, seven years with private corporations engaged in community services and philanthropy, and three years with the Office of Employment and Training. Bradshaw listed 7 to 8 years of state government service as Branch Manager with the Office of Employment and Training, and Director of Communications and Marketing with the Cabinet for Economic Development.

3. Phillips filed two "Highly Effective" performance evaluations for his time with the Cabinet. Bradshaw did not submit a performance evaluation for she was a probationary employee in her Branch Manager position, during which, apparently, performance evaluations are not kept. Conduct was not an issue.

4. The Cabinet did not violate the Interview Selection Policies in determining the size and composition of the selection panel, or in developing screening criteria to select qualified applicants to interview. Nor did it fail to follow the criteria of KRS 18A.0751(4)(f) and 101 KAR 1:400, as argued by Bradshaw.

5. The Policy provided that “the selection panel should contain at least three (3) panel members, including the immediate supervisor..., the next line supervisor for central office, and a staff member at or above the grade level of the vacant position.” Bradshaw argued that “should” in the context of this policy meant “must.” The Cabinet argued “should” in the context of the policy meant the appointment of three members constituted the “Best Practice,” but three members were not mandatory. The same argument applied to not appointing Hoskinson, the next line supervisor for Central Office, as the third panel member.

6. In the context of the Interview Selection Policy “should” means there was a probability or an expectation of having three panel members. [See *American Heritage Dictionary of the English Language*, Third Edition.] This interpretation of the word “should” conforms to the past practices of the Cabinet in selecting panel members. It also comports with the use of the word “must” in the policy directing the development of screening criteria. Thus, in interpreting the policy and reading it as a whole, it is assumed the drafters intended that “must” and “should” be given different meanings, one mandatory, and the other an expectation.

7. The applicants’ Screening Criteria Worksheet was “based on the knowledge, skills and abilities necessary to perform the duties of the position and [was] consistent with the position description (PD).” Bradshaw argued her past experience, particularly in assuming for a year the duties of the vacant Assistant Director’s position, as articulated in her application and résumé, compared to Phillips’ experience working in the private sector and with local and state agencies, made her a far superior candidate. She argued that her past duties coincided almost exactly with the duties and responsibilities of the Assistant Director position description; whereas Phillips’ experience did not.

8. Bradshaw misunderstands the objectives of the screening criteria. They were not to find an applicant who had experience in performing the day-to-day functions of the Assistant Director for Workforce and Employment Training, but an applicant with leadership abilities manifested in supervisory, management and decision-making experience, and with experience in grant writing, interpretation of statutes and regulations, project management and workforce programs. Bradshaw had all these skills, gained partly in doing for a year some of the work of an Assistant Director. Phillips had all these skills gained from working in the private sector, and in the Office of Employment and Training. The Selection Criteria Worksheet was designed to find applicants with professional abilities and experiences needed to perform the duties and responsibilities of the vacant position, whether acquired in the Office of Employment and Training, the private sector or both.

9. The selection process was not tainted or corrupted by Lori Collins completing Michelle Sutton’s Interview Selection Worksheet. Bradshaw argued that the handwriting on the worksheet was Collins’, not Sutton’s. Bradshaw did not establish her expertise as a handwriting analyst. Her opinion is given no credibility.

### **FINDINGS OF FACT IN APPEAL NO. 2015-013**

1. Gina Oney, the Assistant Director, Office of Employment and Training, resigned from her position in the Education and Workforce Development Cabinet on December 13, 2013. That position remained vacant until filled by Roger Phillips on December 14, 2014, after a competitive hiring process.

2. During the interim period from December 13, 2013, through December 14, 2014, Terri Bradshaw began to perform a substantial number of the duties and responsibilities of an Assistant Director, as well as her own duties in the position of Administrative Branch Manager for Individual Customer Services. During this period of time she was a probationary employee. This assumption of duties and responsibilities of the Assistant Director can be attributed to her extraordinary ability and willingness to assume responsibility. She filled a vacuum. The evidence does not establish a percentage of the Assistant Director's job Bradshaw performed, but it was substantial. Bradshaw introduced scores of email communications that Buddy Hoskinson, the Executive Director of OET, said described duties outside of her position and within the Assistant Director's. Connie Schnell, Regional Program Manager for OET, and Karen Dueker, Regional Manager for the Green River Area, also testified that Bradshaw performed duties of the Assistant Director. Shane Smith, Internal Policy Analyst, testified that he met with Bradshaw hundreds of times to perform work clearly within the realm of the Assistant Director's position. Deborah Eccles, Program Coordinator for the Work Opportunity Tax Credit Program, estimated that Bradshaw spent 75 percent of her time outside of her Branch Manager's duties. This testimony is found to be credible.

3. These claims by Bradshaw and her witnesses were not uncontested. Hoskinson, Collins and Steinle all agreed that Bradshaw worked outside of her position, but said the majority of her work was within it. Collins stressed that she never assigned Bradshaw work that an Assistant Director did, and she had to advise co-workers that they should not ask Bradshaw to do the work of an Assistant Director. When asked who filled in to perform the work, Hoskinson said, "we all pitched in" and Collins said, "I did." No dates were given, and they described no instances of who performed certain tasks to fill the vacant position. The parties presented two and one-half days of evidence, most of which described what Bradshaw did outside of her job as Branch Manager, and within the Assistant Director's job.

4. Terri Bradshaw timely filed her appeal on January 14, 2015, alleging she was penalized for not being paid for the work she did in performing the duties of Assistant Director during the past year and for a reclassification to the position of Assistant Director. On January 14, 2014, a year before, Bradshaw could not have reasonably known that for the next twelve months she would perform a substantial number of the Assistant Director's duties and responsibilities. The documentary evidence shows, beginning in December 2013, Bradshaw's gradual assumption of many of the Assistant Director's duties. At some point she would have known that she was being penalized. On December 13, 2013, Terri Bradshaw could not have reasonably known that she was being penalized and on notice that she had a year in which to file an appeal with the Personnel Board.

5. The Education and Workforce Development Cabinet, by the Office of Employment and Training, at no time intended to allow the vacant position of Assistant Director be filled except by a competitive hiring process. In fact, Beth Steinle was of the opinion that the vacant position could not be filled by an employee still in her probationary period. It was practical and indicative of good government to fill the vacant position by a competitive hiring process.

#### **CONCLUSIONS OF LAW IN APPEAL NO. 2014-327**

1. The Appellant, Terri Bradshaw, has failed to demonstrate, by a preponderance of the evidence, that she is entitled to promotion to the position of Assistant Director, Division of Workforce and Employment Services, Office of Employment and Training. The selection committee that made the decision not to promote her exercised reasonable, good-faith discretion in recommending to the Cabinet that Phillips fill the vacant position, and it considered the criteria of KRS 18A.0751(4)(f) and 101 KAR 1:400.

2. The decision of Lori Collins to have fewer than three panel members for the selection process and not to appoint Buddy Hoskinson, the next-line supervisor for Central Office, as a third panel member did not taint and corrupt the selection process. Strict adherence to the written policy was considered by Lori Collins to be “best practices” and not always required. That had been the prior practice and unwritten policy of the Office of Employment and Training. Officials who administer policies “containing ambiguous language” and who “by their course of action [have] adopted an interpretation [of the policies] and rights and have become adjusted to such interpretations will be upheld in their practice under the rule of contemporary construction.” *O’Connell v. Duff*, 125 S.W.2d 718 (Ky. 1939).

3. Furthermore, the selection process policy should exhibit a clear and consistent intent to make certain requirements mandatory or discretionary. The interview selection policy under which Lori Collins operated did not. For example, the policy says state agencies “are required” to give consideration to the criteria of KRS 18A.0751(4)(f). Then the policy says screening criteria “must” be based on knowledge, skills and abilities. Then, it states, the selection panel “should” contain at least three “panel members,” including “the next-line supervisor for Central Office.” Read in the context of the entire policy “should” appears discretionary. Statutory construction requires that “should” be interpreted as a discretionary act. See *Ocean Guarantee Corp. v. Milford Bank*, 33 S.W.2d 312 (Ky. 1930).

#### **CONCLUSIONS OF LAW IN APPEAL NO. 2015-013**

1. The appeal of Terri Bradshaw was timely filed, under the provision of KRS 18A.095(29) that permits an appeal from a penalization for which the employee has not received written notice, if the appeal is filed within one year from the date the employee reasonably should have known of the penalization.

2. A penalization can occur when a probationary employee substantially performs the duties of a vacant position with a higher classification for a significant period of time, in this appeal, approximately 12 months.

3. Bradshaw is not entitled to be reclassified to the Assistant Director's position vacated by Gina Oney. KRS 18A.0751(4)(f) provides that vacancies shall be filled by promotion whenever practicable.... KRS 18A.005(30) provides, "Reclassification shall mean the change in the classification of an employee when a material and permanent change in the duties or responsibilities of that employee has been assigned in writing by the appointing authority."

4. The Office of Training and Employment of the Education and Workforce Development Cabinet penalized Terri Bradshaw when it requested, allowed and suffered her to substantially perform the duties of Assistant Director during the period from December 13, 2013, through December 14, 2014, without commensurate pay. She should have been paid at an Assistant Director's salary.

### **RECOMMENDED ORDER**

The Hearing Officer recommends to the Personnel Board that the consolidated appeals of **TERRI S. BRADSHAW V. EDUCATION AND WORKFORCE DEVELOPMENT CABINET, (APPEAL NOs. 2014-327 and 2015-013)** insofar as they seek promotion and reclassification be **DISMISSED**. **Appeal No. 2015-013** should be **SUSTAINED to the extent** that Bradshaw receive compensation at the Assistant Director's level of pay from December 13, 2013, to December 14, 2014.

### **NOTICE OF EXCEPTION AND APPEAL RIGHTS**

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

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

The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

Each party has thirty (30) days after the date the Personnel Board issues a Final Order in which to appeal to the Franklin Circuit Court pursuant to KRS 13B.140 and KRS 18A.100.

**ISSUED** at the direction of **Hearing Officer Stephen McMurtry** this 2<sup>nd</sup> day of December, 2015.

**KENTUCKY PERSONNEL BOARD**

  
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**MARK A. SIPEK**  
**EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:

Hon. James Maxson  
Ms. Terri Bradshaw