



COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2019-270

ROY BROWN

APPELLANT

FINDINGS OF LAW, CONCLUSION OF LAW  
AND RECOMMENDED ORDER

TRANSPORTATION CABINET

APPELLEE

and

JAIMESON MCCUTCHEN

INTERVENOR

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This matter came on for an evidentiary hearing on October 19, 2021, at 9:30 a.m., at 1025 Capital Center Drive, Frankfort, Kentucky, before the Hon. R. Hanson Williams, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant was present and represented by the Hon. Stephen Poindexter. The Appellee, Transportation Cabinet, was present and represented by the Hon. William Fogle. Appearing as Agency representative was William Lucas. The Intervenor, Jaimeson McCutchen, was present and was not represented by legal counsel.

The issue in the hearing was the Appellant's promotional challenge to the selection of Jaimeson McCutchen for a Highway Technician Superintendent I position in Clinton County. The Appellant was assigned the burden of proof by a preponderance of the evidence to show that the promotional process did not comply with all appropriate statutes and regulatory provisions.

BACKGROUND

1. The Appellant called **Jaimeson McCutchen**, the Intervenor, as his first witness. The witness testified that he currently holds the position of Highway Technician Superintendent I in Clinton County. This is equivalent to an Assistant Foreman, and he has held this position since December 1, 2019. He had previously held the positions of Highway Technician I and, for a brief time, Highway Technician II. He explained that, when the promotional opportunity was first posted, he held the position of Highway Technician I, but, when he was interviewed on November 6, 2019, he was a Highway Technician II.

2. The witness testified that he began state service in April 1998 as a Park Ranger and later gained the required experience as a Highway Equipment Operator (HEO) when he had

applied. He also stated that he did not operate a particular piece of heavy equipment but had operated such equipment as a backhoe, front-end loader, a mowing tractor, and a dump truck.

3. The witness stated that he did not have a dedicated snow and ice removal route but had also performed those duties. He testified that he spent a lot of time in the office working and logging information into the office computer system. He admitted that the Appellant had a dedicated snow and ice removal route.

4. The witness then examined and identified the Appellant's Exhibit 2-E, "Storm Logs" for the winter months of 2018 and 2019. These logs contained the names of drivers performing snow and ice removal during those times. The witness admitted that he was not listed on any of those snow and ice removal days.

5. The witness explained that, during these times, he and employee Rocky Tallent, rotated times in the Maintenance Barn when they did most of the paperwork. He added that the Appellant primarily worked outside on various projects during these times.

6. The witness also stated that he had no prior talks with Supervisor Ricky Duvall about the changes to be made after the promotional selection was completed. He added that he was interviewed for the promotional position by Mark Foster, William Lucas, and Bill Chaney, all of whom were employed in the District 8 Office.

7. The Appellee's counsel then questioned the witness on direct, taking him out of turn rather than having to recall him later. The witness confirmed that the Highway Technician Series consisted of Highway Technician I, II, and III. He stated that he had taken additional training before becoming a Highway Technician II, and this consisted of approximately eight (8) classes. He stated that both he and the Appellant had begun classes, but it was his impression that the Appellant had only completed one (1) class. The witness explained that he had taken all the classes necessary before interviewing for the promotion. He also added that he had overseen the By-Pass and Rowena Special Projects. He had helped his predecessor with ordering the necessary supplies and had used the ProCard for all purchases related to those projects. It was his opinion that the duties he had performed for those projects were Highway Technician Superintendent II duties.

8. On re-direct, the witness explained that the Appellant was an HEO IV, which is considered a crew leader position.

9. The Appellant's next witness was **Larry Booher**. He served twenty-five (25) years with the state in Clinton County before retiring as a Highway Technician Superintendent I. He stated that he had been second-in-command for his county but did not conduct any training for the Intervenor nor had he himself done any training on the ProCard.

10. He testified that he had worked with and supervised both the Appellant and the Intervenor at various times. In describing the Appellant's crew leader position, he explained that such a leader might do sporadic supervision at times when neither the foreman nor assistant

foreman was available. When asked to describe the primary duties of the Appellant and the Intervenor, he explained that the Intervenor did a lot of office work and occasionally went out on the road for duties. He also stated that the Intervenor had seldom used heavy equipment, but primarily drove the loader, the dump truck, and the tractor for mowing.

11. The witness confirmed that the duties assigned to the Intervenor required some outside work in the field and on the roads, but that he primarily stayed in the office. He stated that the Appellant might be a better choice for promotion because of his crew leadership and his amount of work in the field.

12. On cross-examination, the witness admitted that he had performed the evaluations for the Intervenor and had rated him Highly Effective for the three (3) years prior to the promotion. On direct-examination, the Intervenor had the witness confirm that the Intervenor had shared repair work, had plowed the shoulders with a backhoe, and had operated the OMS accounting system while supervised by witness Booher. The OMS accounting system is apparently a software program that the witness had no training in.

13. The Appellant's next witness was **Andy Flowers**. He is a Highway Technician I primarily involved in maintenance and has fourteen (14) years of service with the Transportation Cabinet. He stated that he has worked with both the Appellant and the Intervenor. He also added that, prior to 2019, the Appellant did primarily outside work, while the Intervenor mostly worked in the office (Maintenance Barn). However, he stated he has observed the Intervenor do clean-up and plowing at times. He also explained that, prior to 2019, the Appellant was his crew leader and answered some of his questions; however, the witness stated that the Appellant had to ask the Intervenor for help with computer questions, because he himself did not have any training on the necessary computer programs.

14. The witness testified that he had not heard from anyone that the Intervenor was in line to get the job of Highway Technician Superintendent I. Questioned by the Intervenor on cross-examination, the witness felt that either the Intervenor or the Appellant would be a good choice for the Highway Technician Superintendent I job.

15. The Appellant's next witness was **David Orton**. He has served with the Agency for seventeen (17) years in Clinton County and now holds the position of Highway Technician I.

16. The witness stated that, prior to the Fall of 2019, he had observed the Appellant primarily working outside on the roads with his crew, whereas he felt the Intervenor had primarily worked in the office but had spent some time outside on the roads. He has seen the Intervenor operate tractors, backhoes, and a dump truck, although not as much as the Appellant.

17. Asked about any prior knowledge on his part that the Intervenor was to be chosen for the promotion, he stated he had heard nothing but speculation. He also seemed somewhat worried about blowback on his current position because of the testimony he was to give in this evidentiary hearing.

18. Regarding the duties of the Intervenor, the witness felt that the Intervenor spent approximately fifty percent (50%) of his time in the office and fifty percent (50%) out in the field on the roads. He stated that he had never observed the Intervenor operating the grader but did see the Appellant do so. However, he stated that the grader was not really used all that much.

19. The Appellant's next witness was **Rocky Tallent**. He is currently a Highway Technician I and was previously an HEO III. He has seventeen (17) years state service in Clinton County and has worked with both the Appellant and the Intervenor. He explained that, prior to the Fall of 2019, the Appellant had performed many jobs, mostly outside, whereas the Intervenor had worked mostly in the office doing paperwork but did do some outside work as well.

20. The witness also added that he and the Intervenor rotated duties in the office, primarily consisting of various types of paperwork.

21. When questioned about his prior knowledge of the promotional selection, the witness replied that he did not know for sure that the Intervenor would get the promotion. He added that Superintendent Rick Duvall would probably work better with the Intervenor than with the Appellant.

22. On cross-examination, the witness admitted that everybody had an equal opportunity to take classes to prepare for the upcoming promotional position.

23. The Appellant's next witness was **Randy Guffey**. He was formally an HEO III and now holds the position of Highway Technician I. He has taken some classes to prepare for becoming a Highway Technician II. He has worked with the Agency for eight (8) years.

24. The witness stated he is aware that the Intervenor and Rocky Tallent rotated office work and road work since the beginning of the COVID-19 pandemic. He stated that he has observed the Intervenor operating a tractor, backhoe, and a loader during his time at the office. He added that he had no prior knowledge of whether the Intervenor would get the promotion.

25. The Appellant, **Roy Brown**, called himself as his last witness. He testified that he has been employed by the Commonwealth for eighteen (18) years, all at the Agency. He currently holds the position of Highway Operator IV. He added that he had begun attending the necessary classes to become a Highway Technician II and had completed approximately four (4) out of eight (8) classes in order to prepare for the promotion he sought. However, he said that Supervisor Mark Foster told him he did not need to reach the Highway Technician II level in order to be proficient at the job he was seeking.

26. The witness further explained that Superintendent Rick Duvall did not know much about computers, and, therefore, he called upon the Intervenor to do some of the computer work in the office.

27. Regarding his own qualifications, the witness stated that he had been in the military as a Promotable Assistant Sergeant, E4. In that job, he performed some supervisory duties over

the barracks in the military. In addition, after leaving the military, the witness added that he had worked for the Pepsi-Cola Company, servicing some thirty (30) store accounts.

28. The witness then compared himself to the Intervenor by stating that he has spent much more on-the-job time in maintenance, and most of this time has been in the field. He stressed that most of the experience gained by the Intervenor had been in the office and stated that he was always in the office on Wednesdays. Finally, the Appellant stressed that he had Veteran's preference, which should count in his favor in the consideration of the promotion.

29. On cross-examination, the witness admitted that the classes that he had taken had been more for the construction field rather than maintenance. He also admitted that he had no direct evidence of favoritism by anyone towards the Intervenor.

30. On cross-examination by the Intervenor, the witness admitted that the Intervenor had performed some mowing of right-a-way cycles.

31. The Appellant announced closed.

32. Counsel for the Appellee then moved for a directed verdict, which was denied by the Hearing Officer.

33. The Appellee then called its first and only witness, **William Lucas**. He is currently the Transportation Engineer Branch Manager, Branch I, for the Agency. He previously held the same position at Branch II in Clinton County.

34. The witness is one (1) of three (3) Interview Panel members who interviewed the applicants for this promotional position. The other members are Mark Foster and Bill Chaney.

35. The witness introduced Appellee's Exhibits 1 and 2, the Internal Mobility Forms for the Appellant and the Intervenor, respectively. These forms contained the information used to see whether consideration has been given by an Interview Panel to the five factors contained in 101 KAR 1:400 and KRS 18A.0751(4)(f).

36. 101 KAR 1:400. Section 1. Promotion.  
Agencies shall consider an applicant's qualifications, record of performance, conduct, seniority, and performance evaluations in the selection of an employee for a promotion.

37. 18A.0751(4)(f).  
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.

38. A comparison of the information viewed by the Interview Panel members from the Internal Mobility Applicants form is showed as follows:

Applicant  
Appellant Roy Brown

2. Seniority

202 months of State service

3. Qualifications

High School graduate

4. Performance Evaluations

Year	Rating	Score
18	HE	415
17	HE	400
16	HE	394

5. Record of Performance

HEO I TO HEO II 2005  
HEO II TO HEO III 2009  
HEO III TO HEO IV/Crew Leader 2014

6. Conduct

N/A

7. Training or Work Experience Unique to Position:

Have inspected tree contractors for removal of trees from right-a-ways, road master, road scholars, work zone traffic control technician, asphalt sampling, familiar with Microsoft and Outlook.

Over 19 years working with the public (2000 to present), managing a mobile home park and boat storages. Over 20 years working with heavy equipment, supervisor in the Army of a crew of 12, having inspected equipment and done inventory of gear and equipment. Have been an HEO IV since 2018 and have supervised jobs during this time.

Applicant  
Intervenor Jaimeson McCutchen

2. Seniority

258 months of State service

3. Qualifications

High School graduate  
23 Credit Hours of College

4. Performance Evaluations

Year	Rating	Score
18	HE	421
17	HE	415
16	HE	413

5. Record of Performance

KY State Park Ranger to HEO I to HEO II  
HEO II TO HEO III to Highway Technician I  
Reclassified from Highway Technician I to Highway Technician II  
Recognized as Park Ranger of the Year

6. Conduct

N/A

7. Training or Work Experience Unique to Position

See **Recommended Order Attachment 1.**

39. The witness was then asked to describe some of the former duties performed by the position of "Timekeeper." He responded that the Superintendent I and Superintendent II positions had basically taken over most of the duties of that old position that required a lot of paperwork and was possibly one reason McCutchen spent significant time in the office. He added that the Intervenor was able to do something that would be required of the Superintendent I position (timekeeping records) that the Appellant had not been trained to do. The witness was then asked to explain the OMS accounting system referenced earlier. He described this as an accounting



software program which helped supervisors stay current on tracking materials, job tasks, and expenses of a job. He deemed this an important program to be familiar with.

40. The witness also added that the Interview Panel had looked at the behavioral interviews of the Appellant and Intervenor. He described the behavioral interview as questions designed to see how the interviewees would handle various situations that might occur. After all consideration, the witness testified that it was a consensus decision of the Interview Panel to recommend Intervenor McCutchen for the promotion to Highway Technician Superintendent I. He concluded by stating that he was unaware of any outside influence on the Interview Panel's decision.

### **FINDINGS OF FACT**

1. Prior to his promotion, the Intervenor had assisted his predecessor, Larry Booher, with ordering supplies and using the ProCard, which Booher was not trained to use. These were Highway Technician Superintendent I duties.

2. There is no question that the Appellant's primary duties required outside field work and included sporadic supervisory duties as a crew leader. The Intervenor's duties included some outside duties in the field, but little use of heavy equipment.

3. The Intervenor had the training to operate the OMS accounting software system, which seems to be an integral part of a Highway Technician Superintendent I duties. Also, the Intervenor had taken and completed more training classes in preparation for the promotion he received.

4. None of the Appellant's witnesses had any specific knowledge of any prior favoritism towards the Intervenor in his selection for the promotion.

5. Although the Appellant maintained he had more outside experience in maintenance, he admitted most of the training classes he had taken had been more for the construction field than the maintenance field.

6. There is clear evidence that the provisions of KRS 18A.0751(4)(f) and 101 KAR 1:400, Section 1, were considered and followed. A close examination of each applicant's factors contained on pages 8, 9, 10, and 11 of this Recommended Order shows there was no abuse of discretion in the selection.

### **CONCLUSION OF LAW**

The Hearing Officer concludes as a matter of law that 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 the appeal of **ROY BROWN AND TRANSPORTATION CABINET and JAIMESON MCCUTCHEN (APPEAL NO. 2019-270)** 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 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 R. Hanson Williams**, this 9 day of November, 2021.

**KENTUCKY PERSONNEL BOARD**

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

A copy hereof this day mailed to:

Hon. Stephen Poindexter  
Hon. William Fogle  
James McCutchen  
J. R. Dobner  
Hon. Rosemary Holbrook (Personnel Cabinet)

## Internal Mobility Application Attachment

### Training or Work Experience Unique to Position:

#### Training:

Passed all required classes and training for HTA I, HTA II, HT I, and HT II

Passed the following training for HT Supt. I: Work Zone Traffic Control Tech 2

Passed the following training for HT Supt. II: Traffic Incident Management; Work Zone Traffic Control Supervisor

Passed Tree Risk Management Course

OSHA 10 Certified

Passed Road Scholar and Road Master Programs

First Aid and CPR Certified

Class A CDL with Tanker, Passenger and School Bus Endorsements

Proficient in the use of many common computer systems and applications

Proficient in the use of KYTC's OMS System

Working on 22 years of employment with the State of Kentucky with many different classes, in-service, and training pertaining to safety, job related duties, and customer service as well as interacting with both employees and the public

#### Work Experience:

Perform work on the computer and OMS System making equipment repair orders, doing inventory, and reconciling materials. Also perform material management tasks, requesting and transferring of material, parts and supplies. Also prepare employee time sheets and leave sheets. Prepare and submit snow and ice reports to District Office. Keep inventory of monthly mileage and hours and chart service records on pickups, dump trucks and equipment and inform Superintendent II of service needs and requirements. Monitor weather and take readings, maintain weather reports and logs. Assist employees with reports and paperwork including training requests, first reports of injury, etc. Take calls, reports and / or complaints from dispatch and the public. Assist the public with claims and give information or reports. Take employee information and prepare report for uniform orders. Assist in preparation of Diesel Tank Distribution Sheets and submit data in OMS.

Also work as an Inspector supervising State Contractors, Crews and State Jobs on State Rights Of-Way such as Roadway Construction and Repair Contracts, Roadway Sealing

**Contracts, Mowing, Trimming and Litter Contracts and Tree and Brush Removal Contracts.**

**Assist on Construction projects with Engineers, taking samples of concrete and performing tests on job site, also preparing test cylinders for the lab. Also work on special projects with other State Crews such as Agronomy, Sign Crew and the Bridge Crew.**