

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD**

**JASON CALLEBS (APPEAL NO. 2013-239), AND
HARVEY L. KUHL, II (APPEAL NO. 2013-231)**

APPELLANTS

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

**TRANSPORTATION CABINET
MIKE HANCOCK, APPOINTING AUTHORITY**

APPELLEE

AND

DAVID HOFFMAN

INTERVENOR

** ** *

The Board at its regular July 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated June 19, 2014, having noted Intervenor's exceptions, Appellant Callebs' response, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be altered as follows:

A. **Delete** Finding of Fact paragraph 3 and substitute the following:

3. Two successful candidates were promoted to the vacancies, including Lonnie Morgan. While Mr. Morgan accepted the promotion, the other candidate rejected the promotion and that position remained vacant until it was posted again in 2013.

B. **Delete** Conclusion of Law paragraph 6 and substitute the following:

6. A position vacancy for Transportation Engineer Technologist Supervisor in District 11 was posted in 2013. Appellants, Jason Callebs and Harvey L. Kuhl, II, as well as Intervenor David Hoffman, applied for the position.

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer as altered be, and they hereby are approved, adopted and incorporated herein by reference as a part of this Order, and the Appellants' 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 16th day of July, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. William Fogle
Jason Callebs
Harvey L. Kuhl
David Hoffman
Kathy Marshall

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD

JASON CALLEBS (APPEAL NO. 2013-239)

AND

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TRANSPORTATION CABINET
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** ** ** ** **

These consolidated matters came on for evidentiary hearings on April 24, 2014, and May 15, 2014, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Roland P. Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment and authorized by virtue of KRS Chapter 18A.

Appellant Jason Callebs and Appellant Harvey L. Kuhl were both present. Neither was represented by legal counsel. Appellee, Transportation Cabinet, was present and represented by the Hon. William Fogle. Also present as Agency representative was Sherri Chappell. The Intervenor, David Hoffman, was present and not represented by legal counsel.

The issue in this case is the Appellants' contention that the Appellee did not follow the requirements of KRS 18A.0751(4)(f) and 101 KAR 1:400 in applying the "five factors" in selecting David Hoffman for the Transportation Engineering Technologist Supervisor position in District 11. The burden was on the Appellants to prove their case by a preponderance of the evidence.

Each of the parties made opening statements. Appellee then presented a motion to dismiss the appeal of Jason Callebs due to the Appellant's failure to submit his witness and exhibit list in compliance with a previous Interim Order. Mr. Callebs stated he was relying on the same witnesses and exhibits listed by the co-appellant, Harvey L. Kuhl, II. As there was no surprise or prejudice to the Cabinet, the Cabinet's motion was **DENIED**.

The rule separating witnesses was invoked and employed throughout the course of the hearing.

BACKGROUND

1. The first witness for the Appellants was **Eddie Hollen**. Mr. Hollen is employed by the Transportation Cabinet as an Engineer Technologist III for District 11. He never heard anyone say that the Transportation Engineering Technologist Supervisor position (hereafter the "Position") was for any specific person. He did know that before he himself got a promotion, the Department advertised the position for him. He stated, "That's the way it's always been. That's the way I got my job."

2. **Ian Napier**, who for the past three years has been employed by the Transportation Cabinet as an Engineer Technologist II, was the next witness. In early 2013 prior to the Position having been posted as vacant, Mr. Napier heard Section Supervisor, Quentin Smith, make statements such as, "When David gets that job," and "David was the most qualified."¹ The vacancy was not posted until later that Spring.

3. When the witness' 2012 Annual Employee Evaluation was performed in February 2013, those in the room with Mr. Napier were Quentin Smith, Lonnie Morgan, and David Hoffman. It was Mr. Smith who eventually signed the evaluation. Napier was told Mr. Hoffman was present for the planning portion of the evaluation for the coming year; that Hoffman would have some supervisory role in the next year. Napier remembered reading an e-mail from the Branch Manager advising that David Hoffman would be acting as a "staff supervisor." Napier did not know what that position was.

4. After the Position had been posted, Napier heard Smith make comments such as "once David gets that job." While he acknowledged it was common for employees in the office to talk about who might get a job that has been posted, he had "Never heard it from a supervisor like that."

5. **Greg Nolan**, who for the past three years has been employed by the Transportation Cabinet as Engineer Technologist III, was the next witness. In the spring of 2013 prior to the Position having been posted, Mr. Nolan heard Quentin Smith state, with reference to a certain project known as the "30 job," that David Hoffman will be the supervisor. When Rob Hatcher, a Technologist III, asked Smith his opinion about the upcoming job posting, Smith said Hoffman would be the best qualified.

¹ David Hoffman

6. When one's Annual Employee Performance Evaluation is done, it is usually performed by one person. When Nolan's evaluation was completed in early 2013, he met with Quentin Smith, Lonnie Morgan and David Hoffman. Mr. Smith said Hoffman was sitting in and probably going to be a supervisor in the future. Nolan had never in the past had more than one person sit in on his evaluation during his thirteen years of employment.

7. On the day the interviews for the Position were conducted, prior to the interviews, Lonnie Morgan stated Quentin Smith called and told him to take care of everyone's reference check form and that he (Smith) would take care of Hoffman's.

8. Crew members had earlier received an e-mail telling them that Hoffman was coming on to the crew as a "staff supervisor." Nolan had never heard of that position during the course of his employment.

9. **Robbie Hatcher** next offered his testimony. Mr. Hatcher, who has been employed with the Transportation Cabinet for more than nine years, is in the Laurel County Section Office as a Transportation Engineer Technologist III and has held that position in District 11 for about two years. About April of 2013, Hatcher had been asked by Quentin Smith to go to a site where the new Section Office was to be built. He was to find the corners of the building and relocate them. Jason Callebs and Tyler Kirby also went to the site.

10. While on the site, Mr. Smith described the office layout: "I'll be in this office, David Hoffman will be in this office . . ." Hatcher questioned why Hoffman was going to get an office as he was only an EIT-II. Smith then corrected himself and stated, "Well, or whoever is going to be the supervisor."

11. At the time of Hatcher's Annual Employee Performance Evaluation in January of 2013, Quentin Smith asked him if he objected to David Hoffman being present. Mr. Hatcher answered that Hoffman was a pay grade below him and he did not think he was supposed to be sitting in on these evaluations. Smith retorted, "I've called the District Office. I've talked to them. They said it was okay." Hatcher responded stating he did not think it was right as Hoffman was only on temporary assignment to the crew at the time. Lonnie Morgan, Hatcher's direct supervisor who signed the evaluation, had also been present. Smith explained he wanted Hoffman and Morgan to see how he did evaluations so they would know how to do them from here on out.

12. The subject Position had been vacant for more than three years. Sometime in April 2013 the vacancy was posted. Among the applicants interviewed were two employees with professional engineering degrees: Jason Callebs and David Hoffman. Mr. Hatcher was also an applicant but believed the best he could do was come in third. He went through the process for the first time to experience the procedures.

13. The interview panel consisted of Chief District Engineer Sherri Chappell, Quentin Smith, and Ruth Estep.

14. Prior to the interviews, he had filled out and submitted an Internal Mobility Form, copies of his past three employee evaluations, and an updated application. When he turned those papers in he believes he was told by Quentin Smith that the forms filled out by the supervisor had to be redone because Smith was on the interview panel and could not fill out such forms; the forms had to be filled out by someone else. Quentin Smith called Lonnie Morgan to redo Hatcher's Reference Check Form.

15. After the vacancy was posted, but prior to the interviews, Hatcher was involved in a discussion with Quentin Smith and a few other employees. Smith said, "They" said David was the "leading candidate" going into the interviews and "was the most qualified." He asked Smith, how could "they" say that prior to seeing the register, knowing who would interview for the job, and having no knowledge of the applicants' qualifications? Smith later identified "they" as Mark Hoskins.

16. **Lonnie Morgan**, who has been employed by the Transportation Cabinet since 1999, was the next witness. For the past four to five years he has served in District 11 as a Transportation Engineer Technologist Supervisor.

17. He and Quentin Smith spoke several times about the Position prior to the interviews. Several people on their crew had applied. Smith at one time opined that David Hoffman was the most qualified person for the position. He had made that statement before seeing anyone else's qualifications.

18. On the day of the interviews, Smith contacted Morgan and instructed him to redo the Reference Check Forms for the employees in their office. Morgan did so with everyone's form except for the form of David Hoffman. He was not told to do Mr. Hoffman's form. He filled the forms out and e-mailed them to the district office so they could be used during the interviews. He was a supervisor to most everyone on that crew.

19. Reference checks are completed by a supervisor in an applicant's office. If you are on the interview panel, you normally do not fill out such a form for someone in your office. Quentin Smith is Lonnie Morgan's supervisor and Mr. Morgan was the supervisor over the crew members. He identified Appellant's Exhibit 1 as a form typical of the Reference Check forms used in the process. He identified the signature at the bottom of the exhibit as that of Quentin Smith. This form was not filled out by Mr. Morgan.

20. David Hoffman had at first been loaned out to the crew as a temporary transfer. He had previously worked at the Clay County office.

21. Quentin Smith had been moved to the Laurel County office as the Transportation Engineer Supervisor of the crew long enough to perform the 2012 Annual Employee Evaluations, although technically Morgan's name was still listed and Morgan was considered the crew's first-line supervisor. When the evaluations were handed out to crew members, Morgan, Quentin Smith, and David Hoffman were in the room. It was Morgan who did all the scoring for the evaluations.

22. The subject Position had remained vacant four to five years. Its availability was posted shortly after David Hoffman was permanently assigned to Laurel County.

23. He had received an e-mail from Daniel Hoffman after David Hoffman had been permanently assigned to the Laurel County office. The crew was told David Hoffman was the "staff supervisor." Morgan does not know whether there is a position with that title. An EIT II does have supervisory capabilities. At that point Morgan was one grade higher than David Hoffman. David Hoffman took over supervision of the "thirty project" in Jackson County and supervised Mr. Kuhl, Mr. Hatcher, and Mr. Holland. While Morgan took care of everything in Laurel County, it was David Hoffman who took care of everything in Jackson County.

24. The next witness was **Mona Nichols**. Ms. Nichols is employed by the Transportation Cabinet in District 11 as a Transportation Engineer Technologist I. In the spring of 2013, she heard Quentin Smith make the statement that "they" felt David Hoffman was most qualified for the open Position.

25. On or about December 27, 2013, she was present during a conversation with Jason Callebs and Quentin Smith. The conversation involved job postings and interviews. Mr. Smith was asked whether he ever felt bad about any time he was in an interview or felt like such process was not done correctly. Smith answered, "Yes," and said it was the supervisory position to which David Hoffman had been appointed. When Smith left the room, Mr. Callebs told Ms. Nichols, "Don't forget what he just said."

26. Prior to the interviews, there had been a lot of speculation that the Position had been posted for David Hoffman. She told various interested crew members that if they felt that way, they should notify the OIG or someone in Frankfort, see what the outcome was, and they could have it further investigated.

27. Prior to the interviews, Ms. Nichols was present with Jason Callebs, Robbie Hatcher, and Quentin Smith when Smith made a statement that "they" felt David Hoffman was most qualified for the position. Another person asked who "they" were? Nichols never heard Quentin's answer to that question.

28. **Quentin Smith**, who for the past one and a half years, has been employed by the Transportation Cabinet as Transportation Engineering Supervisor in the London section, District 11, was the next witness. He has been Engineering Supervisor for more than five years.

29. David Hoffman began working in Laurel County about one month after Smith arrived. Smith was supervisor over Jackson and Laurel counties, while Lonnie Morgan and David Hoffman each had one of those counties.

30. Smith wanted any available vacant positions to be filled as soon as possible. He was never told the subject Position would be filled by David Hoffman. Smith was Hoffman's first-line supervisor.

31. Mr. Smith served on the interview panel. Prior to the interviews, he had been asked several questions by many people on the crew who were applicants about how the process worked. He explained to them how it went. When he was asked who had and who did not have advantages, he explained that also. Any time he was asked a question he would say, "Well in this case, education, Jason and David would probably be the leading candidates." If experience was considered, he opined to them that probably Larry Kuhl, who has been employed the longest, would have the advantage. Several applicants asked him questions about the scoring process. He spoke openly with the applicants he knew. He told them what each needed to emphasize when they got to the interview and to stress why they were better than the other applicants. He had the opportunity to speak in this manner to at least four of the applicants in his office, including David Hoffman, Harvey Kuhl and Jason Callebs.

32. On one occasion, Smith was out on the site of the new office building, marking out the offices. Rob Hatcher came to him and stated, "Yeah, David's going to get this, David's going to get that." Hatcher had pushed just enough buttons for Smith, when Smith finally said, "Yeah, David's got this office, Jason will be in this office." "That's what you wanted to hear, isn't it?" Smith was trying to make a point that Hatcher stop assuming things. Smith stated that he himself reacted out of anger.

33. He believes the interview process was conducted fairly. In December 2013, he had been asked a question about whether EIT IIIs should apply for Tech Supervisor jobs. At the time he stated he did not agree with that and did not think an EIT III should apply for a Tech Supervisor's position.

34. He believes Mr. Callebs had made a mistake on the job in one instance and for Callebs, that mistake came at the worst possible time. "It did set a bad light on you throughout the whole process."² He had been told that Sherrie Chappell had come out to a job site. Mr. Callebs had been sitting back in his truck with his feet up in the window when she walked up; that such behavior was a disrespectful to a supervisor. He had been told that Chappell had asked a question and Callebs responded, "Well, you just have to ask Quentin that." Mr. Smith testified, "That's the story I was told." He was also told other things that allegedly happened before Smith became supervisor. He had seen a few incidents on his own. All of this resulted in Callebs having been issued a Performance Improvement Plan (PIP).

35. Smith did not feel that he should write Callebs up for the things that he himself had not seen. But others had told him about other incidents. "I was told pretty well to write him up for those situations by Daniel Hoffman." At that time, when Hoffman approached Smith, the Position had already been posted.

36. It was decided a PIP would be appropriate. Smith had discussed the situation with someone in Personnel at Central Office and decided on that approach.

37. Smith testified that neither Daniel Hoffman having asked him to write up Callebs, nor the eventual issuance of a PIP had any effect on Smith's decision in this promotional process. He was told that a PIP does not form any prior disciplinary history and he believed neither Callebs' nor Hoffman's Internal Mobility Forms showed any previous discipline.

38. David Hoffman had management experience. Although Hoffman did not have the construction experience of other applicants, a manager needed management experience. It is beneficial, however, for a supervisor in this position to have construction experience.

39. He identified Appellants' Exhibit 1 as the Reference Check Form he filled out for David Hoffman. He believes he filled out a similar form for every applicant. When one applies for a promotion it is the supervisor who completes the form. Smith identified his signature at the bottom of the form having been affixed on May 17, 2013. When he is on an interview panel, he tries to look at these forms to determine the additional information about each candidate. The Reference Check Form was one of the documents he and the other interview panelists considered

² Witness testimony with comment having been directed to Jason Callebs.

for each of the applicants. He could not recall having to redo any of these forms prior to the interviews.

40. He identified Appellant's Exhibit 2 as an Interview Panelist Conflict of Interest Statement he had signed on May 22, 2013. He read into evidence the sixth bullet point which states: "I understand that I cannot provide a reference for any of the applicants I will be interviewing." He also read into evidence the following bullet point: "I understand that the selection process and subsequent discussions regarding such hiring are confidential, and I will not discuss any aspect of the selection process with any individual outside the interview panel, except to present any questions or concerns I have to my human resource generalist or another agent of OHRM."

41. He recalls that in prior situations he had made inquiry whether signing the Reference Check Form for applicants he would be interviewing, was a problem. He was told it was not and that he could sign such forms.

42. There were other applicants who could have filled the Position, including those who had more construction experience.

43. Everyone on the crew assumed David Hoffman was going to get the job. Smith never said or encouraged that. Everything the crew members asked or did leaned toward that assumption.

44. No one influenced or tried to influence Smith's decision in the matter. He did not begin the process thinking one candidate was better than any other. He received no outside pressure from anyone. He did feel that Callebs and David Hoffman had an advantage as each was an engineer.

45. At the beginning of the second day of hearing, the Appellants opened their case with the testimony of **Appellant Harvey L. Kuhl, II**. He testified that in 2010, two separate supervisor positions had been posted. At that time, Daniel Hoffman, David Hoffman's brother, who was Section Supervisor, made the comment to those in attendance that that would be a good job for his brother. David Hoffman was not employed by the Commonwealth at that time.

46. For these two positions, Mr. Kuhl and others applied and engaged in interviews. Lonnie Morgan was promoted to one of the positions and Chuck Curlin was offered the second position, but turned it down. That position was left vacant for three years thereafter. The office had run during that time with one Section Supervisor and one Tech Supervisor. There was never an issue of being short a supervisor.

47. David Hoffman began to work out of the same District office as the Appellant. A few months after Hoffman began, the vacant Position was posted. Quentin Smith spoke to several of the crew members and made comments that David Hoffman would be the most qualified for that position.

48. David Hoffman has an Engineering degree. However, he had no office construction experience when he hired in with the Commonwealth. Kuhl believed an applicant should have some experience and knowledge of the job if he is to be a supervisor. Kuhl contends that the Selection Summary, while showing Hoffman had no construction experience when he came to work for the state, erroneously showed that he had "two hundred" months of experience. Mr. Kuhl did not dispute any other matter shown on the Selection Summary for Mr. Hoffman.

49. Kuhl began employment as an Assistant I, then became an Assistant II. Thereafter he became a Tech I, II and then a III. He considered these promotions although on the Selection Summary he had listed "none." He acknowledged that he rose up through the ranks by reclassification.

50. After David Hoffman received the promotion, Mr. Kuhl filed a grievance. He identified Appellant's Exhibit 3 as the response of Sherri Chappell to that grievance, dated July 24, 2013. He read the entirety of the document into the record, including the following:

David Hoffman did not have the most construction experience of the five interviewed, but he did have more supervisory experience than all of the other candidates. Additionally, David was the only candidate to answer all of the behavior interview questions completely.

51. Mr. Kuhl also operates an outside business where he has supervised employees for more than 18 years.

52. **Quentin Smith** was recalled to the stand. After qualified applicants were selected, interviews were arranged for those candidates. Five candidates were interviewed. The panel then made a recommendation and sent it to Frankfort for approval.

53. Mr. Smith had been asked to serve on the interview panel. He served on that panel with Sherri Chappell and Ruth Estep. Before the interviews began, the panel members met that same day to review how to proceed. They were given packets which included each applicant's application and any other information they turned in. The packet included the list of questions to be asked. Smith did see and had filled out Reference Check forms for some of the candidates, prior to the interview. Those candidates were individuals who worked for him.

54. The five applicants were all interviewed on the same day. It was assumed that Ms. Chappell, as Chief District Engineer (CDE), would head the panel. After each applicant was interviewed, the panelists held a brief discussion. A more detailed and in-depth discussion was held after all the interviews were completed. At that point the panel made their decision and they all signed a sheet which was eventually sent to Frankfort. What stood out most to the panelists was the management experience of David Hoffman. As the vacant Position was a management position, such experience made Hoffman a better candidate.

55. The panelists looked at all applications, their own interview notes and considered the engineering experience possessed by the two EIT applicants. Construction experience was discussed, as well as work experience with the state. The panel reached a consensus and all three felt David Hoffman was best qualified for the job.

56. He identified Appellant's Exhibit 4 as the Selection Summary sheet or the "score sheet" he previously referenced. During each interview the panelists penciled in their thoughts on such a sheet. Their consensus was then later typed up on this Summary Sheet. Appellant's Exhibit 4 is a true and accurate reflection of the information recorded by the interview panel.

57. Smith stated Mr. Hoffman had no evaluations performed as of the date of the interview. Based on the Selection Summary, performance evaluations were not considered as Hoffman had no scores to compare with the other applicants. According to Smith, in his past interview experiences, when an applicant has no evaluation scores, and if there is nothing negative about any of the candidates, then everyone is treated "equal" in that category. With a rating of "Good and above" you treat them equal. If past practices were followed here, the evaluations would have been "a wash."

58. He identified Appellant's Exhibit 5 as the Internal Mobility Form for Harvey Kuhl, II. The information on this form appears to have been correctly transferred to the Selection Summary. Smith said the IM forms were available to the panel as part of the packets. The panelists took a few minutes to compare the IM form with the applicant's application to determine consistency.

59. Mr. Kuhl had the most seniority among the applicants. The panelists looked at and considered everything among the five factors. Mr. Kuhl also had the most work experience.

60. He recognized the Request for Requisition form submitted to him at the hearing (Appellant's Exhibit 6), but did not recognize this particular document.

61. Mr. Smith felt that going into the interview Mr. Callebs and Mr. Hoffman had the advantage because they had Engineering degrees. However, he kept an open mind throughout the process and did not make his mind up prior to the interviews.

62. He identified Appellant's Exhibit 7 as the Internal Mobility Applicants form submitted by Jason Callebs. Although Callebs identified his transition from Tech I to EIT I in Section 5: Record of Performance, Mr. Smith testified this was not shown on the Selection Summary sheet.³

63. Counsel for Appellee produced p. 1 of the Selection Summary sheet which constituted that document's signature page. The parties stipulated that this p. 1 of 6 is the first page of the Selection Summary and should be attached as such to Appellant's previously admitted Exhibit 4. The Hearing Officer then attached p. 1 to Appellant's Exhibit 4.

64. **Lonnie Morgan** was recalled to the stand. On May 22, 2013, the day of the interviews, Mr. Morgan was contacted by Quentin Smith and directed to redo several Reference Checks. Smith related he was on the interview panel and could not fill out Reference Checks. Mr. Morgan filled out the Reference Checks for Mr. Hatcher, Mr. Callebs, and Mr. Kuhl, and e-mailed them to Ruth Estep.

65. Prior to the day of the interviews, Quentin Smith had made the comment to Mr. Morgan that David Hoffman was the most likely candidate to receive the Position.

66. The next witness was **Appellant Jason Callebs**. The day the vacancy was posted, Mr. Callebs received an e-mail notifying him of same. He telephoned Quentin Smith. Mr. Smith told Callebs that he knew they were going to post this job for David Hoffman, but did not know they would post it so soon.

67. A couple of days later Mr. Callebs asked Mr. Smith the question again. Again, Smith told Callebs the job was posted for David Hoffman.

68. Prior to the interviews, Callebs filled out an on-line application and an Internal Mobility Form. He also had a Reference Check filled out by Quentin Smith. He was asked five questions during the interview.

69. The Appellant's case in chief was closed. The Appellee and the Intervenor joined in a Motion to Dismiss and requested a Directed Verdict. After hearing arguments of the parties, the Hearing Officer **DENIED** the motion.

³ Later testimony was offered by another witness who stated such transition did not constitute a promotion.

70. The first witness for the Appellee was **Sherri Chappell**. Ms. Chappell is the Chief District Engineer for District 11, of the Transportation Cabinet. She described her duties and educational background. As part of her duties she participates in hiring decisions.

71. The duties of a Transportation Engineer Technologist in PD & P, includes inspections of projects, along with other duties, which depend on whether the individual is a Tech I, II, or III.

72. The vacant Position, Transportation Engineer Technologist Supervisor, included duties of managing personnel and assigning inspectors to projects; managing time for employees and their assignments.

73. Ms. Chappell had been appointed Acting CDE in September 2012. At that date, the TET Supervisor position was vacant. In discussions with Quentin Smith, he related how in his previous position with the Commonwealth, he had two TET Supervisors in his section and was comfortable with that type of arrangement. Through their discussions they decided to open another position for supervisor. There was a need for that position in Laurel County, as well as to help Mr. Smith. The Position was not opened in order to allow Mr. Hoffman to obtain the job. Ms. Chappell had no one in mind for the position.

74. Daniel Hoffman, brother to David Hoffman, supervises construction in four counties: Laurel, Jackson, Clay and Leslie. He had no role or influence in this hiring decision.

75. When this vacancy was posted, David Hoffman was an EIT II. Ms. Chappell described the duties of an EIT II, including supervision of employees. An EIT II is also able to provide supervision of TETs.

76. She examined Appellant's Exhibit 6, a Request for Requisition for the Transportation Engineer Technician Supervisor vacancy. She identified this as the form she sent in by e-mail to central office, which had electronic signatures thereon, and which requested approval to open the position of TET Supervisor. This request was approved.

77. Thereafter applicants submitted their applications. Once a register was returned, all these names were sent to Personnel to check their qualifications. They then received the names of the qualified applicants and set up an interview schedule.

78. The five applicants were interviewed on the same day. As each applicant arrived they handed the panel their respective Reference Check and Internal Mobility form. Mr. Hoskins had provided each panelist an interview booklet, as well as the application of each employee, and the list of questions which were posed to all five applicants.

79. Before the interviews commenced that day, Quentin Smith stated he had completed the Reference Checks for some of the applicants. Ruth Estep said someone else needed to do that. A telephone call was made to Lonnie Morgan and he was asked to do the reference checks for the applicants who were under his supervision. The panelists also asked Phillip Howard, the previous supervisor of David Hoffman, to complete his Reference Check. Mr. Smith never indicated before the interviews that he favored any particular candidate.

80. Upon her review of Appellant's Exhibits 5 and 7, Ms. Chappell testified that the panelists received information from each applicant on their Internal Mobility form. With reference to Mr. Kuhl's listing of his record of performance, he had never formally been designated to special duty; he volunteered to perform those extra duties he listed.

81. She identified Appellee's Exhibit 1 as the Internal Mobility form completed and submitted by David Hoffman. This document along with its attachments had been reviewed by the interview panelists.

82. They interviewed David Hoffman, Jason Callebs, Harvey Kuhl, Jeff Crowder and Robbie Hatcher. She believed that David Hoffman performed the best on the interview. He was the only applicant to answer all five questions completely, and from his past experience. His answers were far and above what the other applicants had displayed during the interviews.

83. After completion of the interviews, the Selection Summary was signed by all three panelists and sent on to Frankfort. Mr. Kuhl had far more seniority than the other applicants, and this was certainly considered. Also considered was that David Hoffman and Jason Callebs had the same level of education, and that Mr. Hoffman had 200 months work experience, which included his experience in engineering and as a supervisor.

84. She identified Appellee's Exhibit 2 as the application submitted by David Hoffman. His supervisory experience was very important to the panelists. This was because the District was limited in the number of techs they could hire on any crew. Laurel County is their largest county in population and number of roads. There were a lot of ongoing, as well as upcoming, projects. Someone was needed who not only could manage projects, but also could manage people and their time to ensure all projects were covered with available resources. Mr. Hoffman had the most managerial experience of all the candidates. Although he did not have the same level of highway construction experience, he had experience in reading plans and overseeing projects, and had done excellent project oversight during his prior employment with the Transportation Cabinet.

85. The interview panel did discuss the applicant evaluations and the fact that Mr. Hoffman had none. The evaluations were seen as "mediocre" as there were no outstanding ratings as shown on p. 1. Had there been "highly effectives" and "outstandings" on an evaluation, this would have been weighed as a significant difference. As the other applicants' evaluations were neither extraordinary nor poor, the panelists considered the evaluations as "an even wash" with no one candidate being stronger than any other in this category.

86. She did subsequently acknowledge that Mr. Crowder's evaluation was not mediocre as he had two "highly effective" ratings and one "outstanding." Had all other items been equal among the applicants, this category of evaluations would have been weighted more heavily in Crowder's favor, but he did not have an Engineering degree and only possessed twelve months of experience.

87. At the end of the interviews, the panelists reviewed all of the five factors for the applicants. They wrote matters out in paper and pencil. Ruth Estep then typed up the Selection Summary. All three panelists agreed that David Hoffman should be recommended to the Position. They had discussed each candidate individually, the interview ratings, supervisory experience, and each of the five factors.

88. She identified Appellee's Exhibit 3 as a copy of the May 23, 2013 Recommendation and Justification, which summarized the matters shown on the Selection Summary and recommended David Hoffman to the Position. The recommendation was approved and Mr. Hoffman was promoted to the Position.

89. Ms. Chappell was concerned that Quentin Smith had discussed the matter with others before the interviews. "I feel that Mr. Smith may need to go through the selection and hiring process training again." She stated, however, that the panel properly considered the five factors in making its determination.

90. The next witness was **Jennifer Wright**. Ms. Wright has been an employee of the Transportation Cabinet for almost twelve years and since September 2012 has served as Human Resources Branch Manager. She described her duties which include approval of all personnel actions.

91. She reviewed the data in connection with the promotion of David Hoffman. Such materials included the request to post a position, the approval, selection summary, and all accompanying materials. It appeared to her that the five factors were considered in this instance and that the selection of David Hoffman was proper.

92. She testified that the information on Mr. Kuhl's Internal Mobility form, that he had been detailed to special duty in various instances, had not, in fact, been details and were not to be properly included in the record of performance.

93. Likewise, Mr. Callebs' transition from Tech I to EIT was not a promotion. He met the criteria for EIT I and, therefore, was appointed to the position. She acknowledged that in doing so, Mr. Callebs went from a grade 12 to grade 14 and received an increase in salary.

94. If a Reference Check is signed for an applicant by an individual who is a member of the interview panel, this constitutes a direct conflict and is improper. At the point when Ms. Wright received the recommendation from the interview panel, she did not consider the reference checks that had been submitted with the selection packet. They had been voided.

95. She had no knowledge whether the reference checks were redone by anyone else. Reference Checks are only required for the selected candidate and Wright did receive one for Mr. Hoffman. That form had been signed by a panel member. She advised the panelists that the Reference Check would not be considered.

96. Also improper was the fact that the Reference Check had been completed prior to the interviews. A Reference Check is conducted after a recommendation has been made by the panel, and then only for the individual or individuals recommended by the panel.

97. Upon her review of Appellant's Exhibit 1, she identified that document as the Reference Check for David Hoffman that had been voided. A Reference Check is normally conducted by an applicant's prior employer. As Mr. Hoffman is a current employee of the Cabinet and as his current supervisor was on the interview panel, she did not ask for a Reference Check and it was not required.

98. The Appellee rested its case in chief. The Intervenor advised he had no evidence or testimony to present. The Appellants advised they had no rebuttal testimony. Each of the parties made closing arguments. The matter was then submitted to the Hearing Officer for his recommendation.

FINDINGS OF FACT

1. Jason Callebs and Harvey L. Kuhl, II (Appellants) and David Hoffman (Intervenor) were three of the five applicants for promotion to the position of Transportation Engineer Technologist Supervisor in District 11 of the Kentucky Transportation Cabinet. At the conclusion of the process, David Hoffman was promoted to the position. Mr. Callebs and Mr. Kuhl timely filed this appeal to the Kentucky Personnel Board.

2. In 2010, two separate TET Supervisor position vacancies were posted. Daniel Hoffman, Section Supervisor, commented to those present that one position would be a good job for his brother, David Hoffman. At that time David Hoffman was not employed by the Commonwealth.

3. Two successful candidates were promoted to the vacancies, including Lonnie Morgan. While Mr. Morgan accepted the promotion, the other candidate rejected the promotion and that position remained vacant until it was posted again on May 22, 2013.

4. In early 2013, David Hoffman sat in with Lonnie Morgan, TET Supervisor, to observe Quentin Smith perform Annual Employee Performance Evaluations for Robbie Hatcher and Greg Nolan. Smith explained to Hatcher that he wanted Hoffman and Morgan to see how he did evaluations so they would know how to do them in the future. Hoffman was later promoted to the vacant TET Supervisor position.

5. Sherri Chappell, Chief District Engineer for District 11, after discussions with Quentin Smith, Transportation Engineer Supervisor in the London section, agreed the vacant supervisor Position should be posted to be filled. She completed and submitted a Request for Requisition which was subsequently approved by Jennifer Wright on March 19, 2013. (Appellant's Exhibit 6.) The vacant Position was then posted.

6. Applicants submitted their applications. Among the applicants were the Appellants, Jason Callebs and Harvey Kuhl, II, and the Intervenor, David Hoffman. A register of qualified applicants was generated. Interviews for the qualified applicants were then arranged. Interviews of the applicants took place in the course of one day.

7. Prior to having been assigned to the Laurel County office, David Hoffman worked from the Clay County office. He was transferred to Laurel County as a "Staff Supervisor." Once he had transferred and been permanently assigned to Laurel County, the subject vacant Position was posted.

8. Sherri Chappell, Quentin Smith, and Ruth Estep served on the interview panel.

9. Prior to the interviews, Quentin Smith made many statements to his crew to the effect that David Hoffman would be best qualified; or that Mr. Hoffman would get that job; or that "they" said David Hoffman was the leading candidate and most qualified. At that point, Jason Callebs and David Hoffman were the only two applicants who possessed Engineering degrees.

10. Smith was open in answering questions posed to him by applicants who were under his supervision. He told them what each needed to emphasize in the interview and coached them on what they should stress during the interviews.

11. After this vacancy had been posted, Daniel Hoffman approached Quentin Smith and directed him to "write up" Jason Callebs for one or more alleged infractions. Smith had been provided hearsay about an alleged incident of insubordination towards Sherri Chappell, as well as other allegations.

12. Although Smith did not feel comfortable writing up Callebs, all of this resulted in issuance of a Performance Improvement Plan. This had an impact on Smith's judgment during the promotion process, as he testified that this matter came at the worst possible time and, "It did set a bad light on you throughout the whole process."

13. On May 22, 2013, Quentin Smith reviewed and signed an Interview Panelist Conflict of Interest Statement (Appellant's Exhibit 2). Among the representations made by Mr. Smith were:

- I understand that I cannot provide a reference for any of the applicants I will be interviewing.
- I understand that the selection process and subsequent discussions regarding such hiring are confidential, and I will not discuss any aspect of the selection process with any individual outside the interview panel, except to present any questions or concerns I have to my human resource generalist or another agent of OHRM.

14. Quentin Smith filled out, signed and tendered a Reference Check for the applicant, David Hoffman, on May 17, 2013 (Appellant's Exhibit 1).

15. From the totality of the testimony, it is apparent that Mr. Smith had also completed, signed and tendered Reference Checks for applicants who were under his supervision. On the day of the interviews, Mr. Smith instructed Lonnie Morgan, Transportation Engineer Technologist Supervisor, to redo the Reference Check forms for the applicants who were under Smith's supervision.

16. As the testimony of Jennifer Wright, Human Resources Branch Manager, showed, it is improper and a direct conflict of interest for an interview panel member to sign a Reference Check for an applicant. Furthermore, a Reference Check is only required once an applicant recommendation has been made by the interview panel, and then, only for the successful candidate. The testimony of Quentin Smith was less than credible when he testified he did not remember having to redo the Reference Check forms.

17. The five applicants were interviewed by the interview panel on May 22, 2013. The interview panel had before them each applicant's application, Internal Mobility form, and a list of questions to be asked. Each of the five applicants was asked all of the questions.

18. Following completion of the interviews, the panelists met and agreed unanimously to recommend David Hoffman to the Position. A Recommendation and Justification letter of 5-23-13 was signed by Sherri Chappell and sent to Frankfort (See Appellee's Exhibit 3). The recommendation was approved and David Hoffman was promoted to the Position.

19. During the interview process, the panelists were aware that David Hoffman did not have any performance evaluations. The testimony of Quentin Smith, on this topic, was, at best, confusing. He first testified the panelists did not consider the performance evaluations as David Hoffman had no scores to compare with the other applicants. He later testified that as other applicants had no negative ratings, everyone was treated "equal" and the evaluations were seen by the panel as a "wash."

20. Sherri Chappell's testimony was also self-contradictory. At first, she testified that none of the candidates had an "outstanding" rating; had there been ratings of "highly effective" or "outstanding" on an evaluation, such would have been weighted as a significant difference. As other applicants were neither extraordinary nor poor, the panelists considered the evaluations as "an even wash" with no candidate being stronger than any other.

21. However, upon subsequent questioning by the Hearing Officer, Ms. Chappell acknowledged that Mr. Crowder's evaluations were not mediocre as he had two "highly effective" ratings and one "outstanding" rating. However, Mr. Crowder's evaluations made no difference to the panel as he did not have an Engineering degree and only possessed twelve months experience.

22. In view of the testimony of Sherri Chappell and Quentin Smith, the panelists failed to appropriately consider the performance evaluations.

23. Sherri Chappell was also concerned that Quentin Smith had discussed the matter with applicants prior to the interviews. She testified, "I feel that Mr. Smith may need to go through the selection and hiring process training again."

24. Prior to the interviews, Jason Callebs completed and submitted his Internal Mobility form (Appellant's Exhibit 7). On such form, in Section 5: Record of Performance, he listed Tech I to EIT I as a promotion.

25. The Selection Summary by the interview panel shows that for Jason Callebs, under "(Recognition related to job performance; service awards; promotions; accomplishments; details to special duty, etc.)" there was "None." (Appellant's Exhibit 4.) Jennifer Wright, Human Resources Branch Manager, testified that Mr. Callebs was appointed to the position of EIT I because it was learned that he met the criteria. She testified this was not considered a promotion even though he went from grade 12 to grade 14 with a corresponding increase in pay.

26. According to KRS 18A.005(26), "promotion" means a change of rank of an employee from a position in one (1) class to a position in another class having a higher minimum salary or carrying a greater scope of discretionary responsibility.

27. The interview panel failed to appropriately consider the Record of Performance of Jason Callebs.

CONCLUSIONS OF LAW

1. The Personnel Board shall promulgate comprehensive administration regulations for the classified service governing promotion. KRS 18A.0751(1)(f). Such administrative regulations dealing with promotions shall give ***appropriate consideration*** to the applicant's qualifications, record of performance, conduct, and seniority. KRS 18A.0751(4)(f) [Emphasis added.] Agencies are required to consider an applicant's qualifications, record of performance, conduct, seniority and performance evaluations in the selection of an employee for promotion. 101 KAR 1:400, Section 1(1).

2. "Qualifications" is defined as "[A]ny quality, knowledge, ability, experience, or acquirement that fits a person for a position, office, profession, etc." *Cabinet for Human Resources v. Kentucky State Personnel Board, et al.*, 846 S.W.2d 711, 715 (Ky. App. 1992).

3. "Seniority" means the total number of months of state service. KRS 18A.005(36).

4. "Record of Performance" to have been considered by the interview panelists in this case included "recognition related to job performance; service awards; promotions; accomplishments; details to special duty, etc." (Appellant's Exhibit 4.)

5. "Performance Evaluations" to have been considered by this interview panel, included the "last three completed year-end ratings." (Appellant's Exhibit 4.)

6. A position vacancy for Transportation Engineer Technologist Supervisor in District 11 was posted on May 22, 2013. Appellants, Jason Callebs and Harvey L. Kuhl, II, as well as Intervenor David Hoffman, applied for the position.

7. The Appellee, Transportation Cabinet, was required by statute and regulation to give appropriate consideration to each applicant's qualifications, record of performance, conduct, seniority and performance evaluations (hereinafter referred to as "the five factors.") *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406, 410 (Ky. App. 1994).

8. In all administrative hearings, the party proposing the agency take action or grant a benefit has the burden to show entitlement to the benefits sought. The party with the burden of proof on any issue has the burden of going forward and the ultimate burden of persuasion as to that issue. The ultimate burden of persuasion in all administrative hearings is met by a preponderance of evidence in the record. Failure to meet the burden of proof is grounds for a recommended order from the hearing officer. KRS 13B.090(7). The Appellants, Jason Callebs and Harvey L. Kuhl, II, had the burden of proof to show by a preponderance of the evidence that the statutory and regulatory requirements were not appropriately considered by the Appellee during this promotion process.

9. It is quite clear from the evidence that all three interview panel members, Sherri Chappell, Quentin Smith, and Ruth Estep, were cognizant before, during, and after this particular promotion process, that they were required to give appropriate consideration to, and examine how the five factors for each of the applicants compared.

10. The question to be considered in this appeal is not whether either of the Appellants should have been offered the vacant Position, nor is it appropriate for the Personnel Board to second guess the judgment of the interview panel and the Cabinet in having made this hiring decision. Rather, the question is: Did the Cabinet give "appropriate consideration" to the five factors when it determined to recommend David Hoffman to promotion?

11. The evidence shows the interview panel gave either no or inappropriate consideration to the record of performance of Jason Callebs when it did not consider his raise by two pay grades to EIT I as part of his record of performance. Furthermore, the testimony of witnesses Quentin Smith and Sherri Chappell on the issue of the panel's consideration of the candidates' performance evaluations, was inconsistent and troubling. Mr. Smith first testified that as David Hoffman had no performance evaluations, the panelists did not consider the evaluations of the other candidates. He later testified that the evaluations of the other candidates were considered and as there was nothing "negative" about those documents, the panelist considered that category to have been a "wash" for all the candidates, including David Hoffman.

12. Sherri Chappell testified that the applicants who did present performance evaluations had evaluations that were considered by the panel to be "mediocre" as there were no "outstanding" ratings. However, she later acknowledged, through questioning by the Hearing Officer, that one of the candidates did indeed have performance evaluations with two ratings of "highly effective" and one rating of "outstanding." The evidence shows the interview panel did not give appropriate consideration to the candidates' performance evaluations.

13. The evidence has also raised a question of what outside influence or influences may have had an adverse affect on "appropriate" consideration of the five factors. Several events affecting such consideration were presented:

- In early 2013, prior to the vacant position having been posted, David Hoffman sat in with Lonnie Morgan, TET Supervisor, and Quentin Smith, to observe the Annual Employee Performance Evaluations for Robbie Hatcher and Greg Nolan. Smith explained to Hatcher he wanted both Hoffman and Morgan to observe how he performed evaluations so they would know how to do so in the future. One must ask why was David Hoffman involved at that time, unless he was going to fill the vacant Position that was on the same level as Lonnie Morgan?
- There was testimony from a number of witnesses that prior to the interviews, Quentin Smith made many statements to crew members to the effect that David Hoffman was the best qualified for the position; or that Hoffman would get the job; or that "they" said David Hoffman was the leading candidate and most qualified.
- Although knowing he would serve on the interview panel, Quentin Smith openly answered questions about the process posed to him by applicants who were under his supervision. He coached them in various ways about what they should stress during the interview.

- On May 22, 2013, Smith had signed an Interview Panelist Conflict of Interest Statement (Appellant's Exhibit 2) representing that he understood that a selection process and subsequent discussions regarding such hiring were confidential and that he would not discuss any aspect of the selection process with any individual outside the interview panel. He failed to report his breach of this representation, when he served on the interview panel.
- Quentin Smith completed Reference Check forms for applicants who were on his crew, in violation of the May 22, 2013 Interview Panelist Conflict of Interest Statement. He had also completed such a Reference Check for David Hoffman (Appellant's Exhibit 1). He failed to report his breach of conflict of interest, when he served on the interview panel.
- After the vacancy had been posted, Daniel Hoffman, brother to David Hoffman, directed Quentin Smith to "write-up" Jason Callebs for one or more infractions. Smith did issue a Performance Improvement Plan. As part of Smith's testimony, this incident apparently had an impact on his judgment during the promotion process as he testified that the matter had come at the "worst possible time" and "it did set a bad light on you throughout the whole process."
- Sherri Chappell, Chief District Engineer, testified, "I feel that Mr. Smith may need to go through the selection and hiring process training again."

14. The evidence strongly supports the position of the Appellants that the statutory and regulatory requirements set forth at KRS 18A.0751(4)(f) and 101 KAR 1:400 were not given appropriate consideration by the Appellee during the promotion process. The Appellants have met their burden of proof by a preponderance of the evidence.

RECOMMENDED ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Kentucky Personnel Board that the appeals of **JASON CALLEBS (APPEAL NO. 2013-239) AND HARVEY L. KUHL, II. (APPEAL NO. 2013-231) VS. TRANSPORTATION CABINET** be **SUSTAINED to the extent** that the promotion of David Hoffman should be vacated and held for naught and the promotion process begun anew with Appellee giving appropriate consideration to the statutory and regulatory requirements set forth at KRS 18A.0751(4)(f) and 101 KAR 1:400, in a manner that will avoid the familial and other conflicts of interest that were apparent during this process. **FURTHER**, the Appellee shall reimburse the Appellants for any leave time they used attending the hearing and any pre-hearing conferences at the Board. [KRS 18A.095(25).]

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13.B.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 also 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 Roland P. Merkel** this 19th day of June, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Will Fogle
Jason Callebs
Harvey L. Kuhl
Kathy Marshall
David Hoffman