



**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2015-047**

**CRAIG FEESE**

**APPELLANT**

**VS.**

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

**TRANSPORTATION CABINET  
MIKE HANCOCK, APPOINTING AUTHORITY**

**APPELLEE**

**AND**

**BRUCE CUNDIFF**

**INTERVENOR**

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This matter came on for evidentiary hearing on August 13, 2015, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before Roland P. Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellant, Craig Feese, was present, but was not represented by legal counsel. Appellee, Transportation Cabinet, was present and represented by the Hon. William Fogle. Also present as Agency representative was Ms. Michelle Barnes. The Intervenor, Bruce Cundiff, was also present and not represented by legal counsel.

There are two issues in the case. The first issue is Appellant's contention that the statutory and regulatory requirements were not met when the Appellee, Transportation Cabinet, selected Bruce Cundiff for the position of Highway Superintendent II in Adair County. The burden of proof is on the Appellant to demonstrate by a preponderance of the evidence that the statutory requirements set out at KRS 18A.0751(4)(f) and the regulatory requirements set out at 101 KAR 1:400 were not followed, and the "five factors" were not given the appropriate consideration in the process that resulted in the selection of Bruce Cundiff to the position of Highway Superintendent II.

The second issue is the Appellant's contention that he had suffered retaliation for having filed a grievance regarding this promotion process. The burden of proof on this issue is also on the Appellant by a preponderance of the evidence.

The rule separating witnesses was invoked and employed throughout the course of the proceeding. Appellee made an opening statement. The Appellant and Intervenor both waived presentation of an opening statement.

### **BACKGROUND**

1. The first witness for the Appellant was Appellant, **Craig Feese**. Mr. Feese has been employed by the Transportation Cabinet for about sixteen years. Since 2011 he has been employed as a Highway Equipment Operator IV. The district office for his district is located in Somerset, Kentucky. During 2014 the Superintendent I for the district was out with an injury. The Superintendent II, Junior Brown, announced and did in fact retire. Appellant and Mr. Cundiff worked from the same office and performed duties of the Superintendent II in preparation for Mr. Brown's retirement. They helped take care of the day-to-day operations.

2. Thereafter, Mr. Feese became aware of the vacancy in the Superintendent II position. Once the register came out, he made application on-line for the position. There were four applicants to the position, three of whom came from the same "barn" where Feese worked. Each of those three individuals had been assigned to work a period of two consecutive weeks performing the duties of the Superintendent II.

3. Interviews were conducted on December 11, 2014. The e-mail recommending Mr. Cundiff to the position went to Frankfort the following day. On December 23, 2014, all four applicants were called into a meeting room where it was announced Mr. Cundiff had been the successful applicant. Appellant received a follow-up e-mail confirming same on December 29, 2014.

4. On January 6, 2015, Appellant filed a grievance about the promotional process. To that grievance he attached his previous performance reviews showing reconsiderations had been performed on the same day. He testified both signatures of supervisors were already on the form before he signed his request that it be sent to the next level. Each supervisor found the selection process to have been properly carried out.

5. Mr. Feese appealed that decision. It was Mr. Neely, Supervisor, who conducted the final reconsideration. Neely completed the entire review process in less than two hours on January 16, 2015.

6. The matter, at Appellant's request, was then sent to Carol Beth Martin, the Appointing Authority. Ms. Martin approved the prior reviews. Appellant then filed an appeal with the Kentucky Personnel Board.

7. It was Mr. Robertson who had come in during the transition period to perform the Employees' Annual Evaluations. He had never supervised the Appellant or any of the employees. Most everyone's scores, including the Appellant's, dropped some 30-40 points. Appellant's evaluation score went from 410 the previous year to 370 in 2014. Appellant disagreed with that evaluation score and indicated same with his signature. The promotional interviews were coming up and neither he nor two or three other employees felt comfortable that their scores had dropped; it did not look good with upcoming interviews.

8. The evaluators stopped the evaluation process and collected all the paperwork. They returned the next day. On that second day they gave all employees new performance evaluations with scores that were identical to those each had received the previous year. This was done by Mr. Robertson, Mr. Neely, and Mr. Tracy Taylor. Appellant had identical performance evaluation scores of 410, in the "Highly Effective" range, three years in a row. On February 2, 2015, he added additional pertinent comments and information in an attempt to have his score reconsidered.

9. No changes were made and he disagreed with that decision. He was advised he would have to meet with Mr. Neely and Mr. Robertson to discuss the matter. Instead, Mr. Neely signed-off the next day that there would be no changes in his evaluation. The matter was then sent on to Frankfort. Appellant was not notified until Mr. Cundiff obtained copies of all employees' evaluations which were distributed to the respective employees.

10. When Appellant filed his appeal with the Personnel Board on March 10, 2015, someone from Frankfort called down to get a copy of the letter that explained to Appellant why his evaluation had not been changed. It was not until March 24, 2015, that he physically received that letter.

11. Appellant contends that when his score was dropped by someone who had never seen the work he performed, that it was in response to his having recently filed a grievance. When he asked for a copy of that document to prove the decline in points, it was not available. He was told that document had been disposed of by Mr. Robertson and new documents were generated.

12. He identified Appellant's Exhibit 1 as the application for employment he tendered for consideration to the position of Highway Superintendent II. He identified Appellant's Exhibit 2 with attachments, as the Grievance Form he had filed on January 6, 2015. He identified Appellant's Exhibit 3 as the Annual Employee Performance Evaluations he had received for the past four years, the last being for 2014. The document that is the 2014 evaluation is the second version of that year's evaluation. This was generated after he had disagreed with the first evaluation, which his supervisors shredded. The first evaluations had been conducted on January 30, 2015. He pointed out that on the second version, he was directed to date the document January 30, 2015, when he signed it that day in February.

13. He identified Appellant's Exhibit 4 as an e-mail chain between Bruce Neely and Katherine Jones which showed Mr. Neely's explanation of the reason the 2014 evaluation had been conducted by the third-line supervisor for the Unit, Mark Robertson, and that Mr. Neely agreed no change on the evaluation should be made.

14. He identified Appellant's Exhibit 5 as the Internal Mobility Applicants forms submitted by him and Mr. Cundiff.

15. He identified Appellant's Exhibit 6 as the Selection Summary filled out and completed by the interview panel.

16. He identified Appellant's Exhibit 8 as the Application for Employment submitted by Bruce Cundiff for consideration to the position of Highway Superintendent II.<sup>1</sup>

17. Mr. Feese believed that as he had performed extra services in 2014 as evidenced by the added comments he had provided, he was entitled to a score higher than 410.

18. With reference to Appellant's Exhibit 6, Appellant agreed that the seniority of 183 months reflected the same amount that he had entered on his Internal Mobility Application (Appellant's Exhibit 5) and he had no dispute with that. He did dispute the work experience credited to him when compared to Mr. Cundiff's, and their respective applications. For example, on Cundiff's application at p. 4 he was given 104 extra months of comparable service time as opposed to the four extra months given to Mr. Feese. Mr. Feese agreed that for such time, Cundiff had been given 40 percent of the total time he had claimed on his application.

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<sup>1</sup> Appellant's Exhibit 7, tendered by the Appellant, was not admitted into evidence.

19. Mr. Feese did not dispute the recording of the evaluation scores for himself or Mr. Cundiff, nor did he dispute the record of performance, and agreed that the conduct for each was "a wash."

20. Appellant called no further witnesses. Appellee presented a Motion for Directed Verdict on the recommendation for dismissal of the appeal on both issues. The Intervenor made no comment. Appellant responded to the motion. The Hearing Officer **OVERRULED** Appellee's motion.

21. The first witness for the Appellee was **Michelle Barnes**. Ms. Barnes has been employed in the Human Resources field for about fifteen years. Since February 1, 2014, she has been employed by the Kentucky Transportation Cabinet as Assistant Director for the Division of Personnel Administration. She described her duties which included personnel and payroll matters. With regard to promotional matters, she reviews the promotional packets and offers assistance to Branch Managers when they have questions.

22. She identified Appellee's Exhibit 1 as the Selection Summary that had been filled out by the interview panel with reference to the promotional process of the Highway Superintendent II. The first page identifies the position number and the title, and includes a certification by the panelists that they complied with statutes and regulations during the process. The signature of Ms. Barnes signifies she reviewed the entire packet and considered the five factors, and that she agreed and approved the recommendation of the interview panel. She also double-checked all calculations made by the panel.

23. She reviewed the five factors as they applied to Mr. Feese and Mr. Cundiff. With reference to the comparable work experience listed by Mr. Cundiff, she confirmed that the interview panel had given him credit for 40 percent of the 248 months he listed. She opined that she would have given Mr. Cundiff the full 248 months.

24. She testified all five factors were properly accounted for by the committee. Her conclusion after reviewing all the documents was that Mr. Cundiff was the more qualified applicant for the position. Everything in the documentation showed that the interview panel properly considered the five factors.

25. She identified Appellee's Exhibit 2 as the December 12, 2014 memorandum from Bruce Neely recommending Bruce Cundiff to the position of Highway Superintendent II. This recommendation was then acted on by the Appointing Authority and Mr. Cundiff was promoted to the position.

26. The Appellee's case was closed. No testimony or evidence was presented by the Intervenor. The Appellant called **Mr. Mark Robertson** to offer rebuttal testimony.

27. Since November 2012 Mr. Robertson has been employed by the Kentucky Transportation Cabinet as a Transportation Engineering Branch Manager for Branch II. He, as well as Joe Gossage, Design Branch Manager, and Bill Chaney, TEBM for Branch I, served on the interview panel. The panel reviewed the five criteria and overall score that each had recorded. The interview was a part of the criteria considered by the panelists. All the applicants were close in qualifications and this was not an easy decision. There was no clear-cut favorite from the five criteria.

28. He identified Appellant's Exhibit 6 as the Selection Summary filled out by the panel. The four interviews were conducted on the same day. After conclusion of the interviews, the panelists went over the scores and discussed the matter. They felt that both Mr. Cundiff and Mr. Feese would do a great job in the position. Mr. Cundiff had a little more seniority. Robertson had scored Feese a bit higher in the interview. All other areas were close. Cundiff had an ACE Award. The evaluations were all in the "Highly Effective" range. The panelists decided that Cundiff was the easier applicant to justify receiving the promotion, based on the five factors.

29. No further witnesses offered testimony. Appellee presented its closing argument. The Intervenor and the Appellant did not present closing arguments. The matter stood submitted to the Hearing Officer for his recommendation.

### **FINDINGS OF FACT**

1. Craig Feese, the Appellant, is a classified employee with status. For the past sixteen years he has been employed by the Kentucky Transportation Cabinet. He has held the position of Highway Equipment Operator IV since 2011.

2. Junior Brown, Superintendent II for District 8/Somerset, announced his intended retirement. When he retired, a vacancy posting was created and the register obtained. Mr. Feese submitted an on-line application for consideration to the position (Appellant's Exhibit 1). Bruce Cundiff (the Intervenor) also submitted an application (Appellant's Exhibit 8). All applicants completed and submitted an Internal Mobility Applicant's Form, TC12-230. (Appellant's form is shown as Appellant's Exhibit 5.)

3. Four employees, including Appellant and the Intervenor, applied for consideration to the position. Feese, Bruce and another applicant each had been assigned to work a period of two consecutive weeks performing the duties of the Superintendent II.

4. Applicant interviews were conducted on December 11, 2014. The interview panel consisted of: Mark Robertson, Transportation Engineering Branch Manager for Branch II; Joseph Gossage, Design Branch Manager; and Bill Chaney, Transportation Engineering Branch Manager for Branch I. All four applicants were interviewed that day.

5. The panelists reviewed each applicant's application, Internal Mobility Form, and Annual Performance Evaluations for 2011, 2012, and 2013. They discussed information gathered from these forms, as well as information obtained through the interviews, and recorded information for each applicant on a Selection Summary Form, TC12-202 (Appellant's Exhibit 6).

6. According to the testimony of Mark Robertson, all candidates' qualifications were close. It was not an easy decision and there was no clear-cut favorite after review of the five criteria (seniority, qualifications, performance evaluations, record of performance, and conduct).

7. The handwritten information from the Selection Summary (Appellant's Exhibit 6) was transferred and typed into a new Selection Summary Form (Appellee's Exhibit 1). The panelists decided they could more easily justify Bruce Cundiff receiving the promotion, based on the five criteria. They advised Bruce Neely, CDE, of their recommendation to promote Bruce Cundiff. Mr. Neely wrote the December 12, 2014 letter to the Office of Human Resource Management advising of his recommendation that Bruce Cundiff be promoted to the Highway Superintendent II position (Appellee's Exhibit 2).

8. Michelle Barnes, Assistant Director for the Division of Personnel Administration in the Kentucky Transportation Cabinet, reviewed the entirety of the packet sent to her from District 8. After reviewing that information and herself considering the five criteria, she agreed with and approved Mr. Neely's recommendation. She signed the first page of the Selection Summary on December 17, 2014 (Appellee's Exhibit 1).



9. On January 6, 2015, Appellant filed a grievance pertaining to the promotional process (Appellant's Exhibit 2). Part of Appellant's grievance included an allegation that his most recent Annual Performance Evaluation, and the process employed, had been unfair; that it resulted in a score of 30-40 points lower than what he had received in previous years and had, therefore, been prejudicial to him particularly with upcoming promotional interviews. He alleged that the reduction in score was also in retaliation for having recently filed a grievance. He alleged Mark Robertson, who had never supervised Appellant or other employees at the "Barn," performed the evaluations during the transition period following the retirement of Junior Brown; that most everyone's scores, including Appellant's, had dropped 30-40 points.

10. After this grievance was filed, the evaluation process was halted. All paperwork was collected and the next day all employees were given new Annual Performance Evaluations containing scores that were identical to scores each employee had received the previous year.

11. On February 2, 2015, as part of the reconsideration process, Appellant added additional pertinent comments and requested reconsideration. No changes were made to his evaluation. He then indicated on the document that he disagreed with the decision. In the next step of the process, Mr. Neely signed off the next day indicating there would be no changes to the evaluation.

12. Appellant timely filed his appeal with the Kentucky Personnel Board.

### CONCLUSIONS OF LAW

1. The Personnel Board shall promulgate comprehensive administrative 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 SW2d 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 6.)

5. "Performance Evaluations" to have been considered by this interview panel, included the "last 3 completed year-end ratings." (Appellant's Exhibit 6.)

6. A position vacancy for Superintendent II position in District 8 was posted when Junior Brown, the office holder, retired. Appellant Craig Feese, Intervenor Bruce Cundiff, and two other employees 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 that 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 Appellant, Craig Feese, had the burden of proof to show by a preponderance of 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, Mark Robertson, Joseph Gossage, and Bill Chaney, 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. Equally clear from Mr. Robertson's testimony was that the panelists, after concluding the interviews, reviewed the five factors and had same recorded on the Selection Summary Sheet. They discussed each candidate's qualifications and gave a thorough review to the five factors. Mr. Robertson even stated the applicants were close in qualifications, there was no clear-cut favorite from the five criteria, and this was not an easy decision. While the panelists believed both Mr. Cundiff and Mr. Feese would do a "great job" in that position, they decided Cundiff, based on the five factors and qualifications, was the "easier applicant to justify receiving the promotion."

10. The evidence also showed that the five factors were considered at the next level of the process. After the interview panel completed its duties, the entire packet of information was sent to Michelle Barnes. Ms. Barnes also reviewed the five factors as they applied to Mr. Feese and Mr. Cundiff. She testified that all five factors, in her opinion, had properly been considered by the interview panelists. After reviewing the documentation she concurred that Mr. Cundiff was the more qualified applicant for the position; everything in the documentation showed that the interview panel properly considered the five factors.

11. The evidence strongly supports that the statutory and regulatory requirements set forth in KRS 18A.0751(4)(f) and 101 KAR 1:400 had been given appropriate consideration by the Appellee during the promotion process. Appellant has failed to meet his burden of proof on this issue by a preponderance of the evidence.

12. We turn to examination of Appellant's allegation that he had suffered retaliation for having filed a grievance regarding the promotion process. Mr. Feese filed that grievance on January 6, 2015. The basis for the grievance was that the 2014 Annual Employee Performance Evaluation had initially been conducted improperly, with evaluation having been conducted by an individual who had never supervised the Appellant or the employees receiving such evaluations; that most everyone's scores, including the Appellant's, had dropped 30 to 40 points from the previous year. Appellant rightly believed that a decline in his performance evaluation score from prior years would be a detriment in the upcoming interviews conducted during the promotional process.

13. The evidence showed the evaluation process stopped, all the paperwork was collected, and that replacement evaluations were issued the following day. According to Appellant's testimony, he, as well as others, was issued Annual Performance Evaluation scores identical to those that each employee had received the previous year.

14. On February 2, 2015, Mr. Feese added additional pertinent comments and information and submitted same for reconsideration of the evaluation.<sup>2</sup> No changes were made after Appellant's request. He indicated that he disagreed with the decision. He was thereafter advised that no changes would be made to the corrected evaluation.

15. Appellant testified he believed the retaliation also occurred by his scores having been dropped; that the evidence was thereafter destroyed by Appellee.

16. It appears from the evidence that after Mr. Feese filed a grievance about the scores having been lowered by an individual who had no personal knowledge of his or other employees' previous job performance, the Cabinet corrected the matter by scoring all employees exactly at the level of the prior year. As the testimony and evidence is undisputed

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<sup>2</sup> The Appellant has not filed an appeal challenging the performance evaluation itself. His claim is that by having followed up with the filing of a grievance, he suffered a retaliatory act by not having been selected in the promotional process.

that other employees, as well as Mr. Feese received a corrected evaluation, after Appellant and other employees had an initial evaluation with lower scores, such does not support an allegation that the lower scores initially received by Mr. Feese were retaliation against him. Furthermore, there was no testimony from Mr. Robertson that the interview panelists had before them for consideration any information pertaining to the prior grievances filed by Mr. Feese. The evidence does not support a conclusion that the interview panelists in any manner acted in a retaliatory fashion against the Appellant. Therefore, the Appellant has failed to meet his burden of proof on this issue by a preponderance of the evidence.

### **RECOMMENDED ORDER**

The Hearing Officer recommends to the Personnel Board that the appeal of **CRAIG FEESE VS. TRANSPORTATION CABINET AND BRUCE CUNDIFF (APPEAL NO. 2015-047)** be **DISMISSED**.

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

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

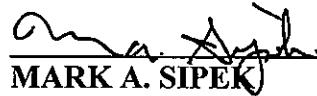
**Any document filed with the Personnel Board shall be served on the opposing party.**

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 Roland P. Merkel** this 21<sup>st</sup> day of October, 2015.

**KENTUCKY PERSONNEL BOARD**



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

A copy hereof this day mailed to:

Hon. William Fogle  
Craig Feese  
Bruce Cundiff  
J. R. Dobner