

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2012-035

CHERYL GABBARD

APPELLANT

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

DEPARTMENT OF VETERANS AFFAIRS  
KEN LUCAS, APPOINTING AUTHORITY

APPELLEE

AND

RITA GILBERT

INTERVENOR

\*\* \*\* \*

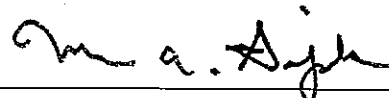
The Board at its regular November 2013 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated September 24, 2013, and being duly advised,

**IT IS HEREBY ORDERED** that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be, and they hereby are approved, adopted and incorporated herein by reference as a part of this Order, and the Appellant's appeal is therefore **DISMISSED**.

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

**SO ORDERED** this 13<sup>th</sup> day of November, 2013.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Dennis Shepherd  
Cheryl Gabbard  
Rita Gilbert

**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
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**CHERYL L. GABBARD**

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**V. FINDINGS OF FACT, CONCLUSIONS OF LAW  
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This matter came on for an evidentiary hearing on August 15, 2013, at 9:30 a.m., at 28 Fountain Place, 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, Cheryl Gabbard, was present at the evidentiary hearing and was not represented by legal counsel. The Appellee, Department of Veterans' Affairs, was present and represented by the Hon. Dennis Shepherd. Also appearing as the agency representative was Gilda Hill. The Intervenor, Rita Gilbert, was also present and not represented by legal counsel.

This matter involves the Appellant's appeal from failure to receive a promotion to Nurse Manager. As such, the burden of proof was upon the Appellant by a preponderance of the evidence, to show whether or not the Appellee complied with provisions of KRS 18A.0751(4)(f) and 101 KAR 1:400 in the selection of Rita Gilbert for Nurse Shift Program Supervisor at East Kentucky Veterans' Center (EKVC). Additional issues to be examined were the Appellant's claims of age discrimination, conflict of interest, and retaliation.

**BACKGROUND**

1. The Appellant, **Cheryl Gabbard**, called herself as her first and only witness. She testified she is now 55 years old, but was 54 years old when the promotional process herein occurred. She has been employed at the EKVC in Hazard, Kentucky, as a Charge Nurse for over 11 years. She has been employed with the State for a total of 17 years. Appellant has been a nurse since 1977, and received her R.N. license from Hazard Community College in 1996.

2. The Appellant submitted as Appellant's Exhibit 1 a list of her duties and her background and also attached to the Exhibit were her yearly performance evaluation for 2009 through 2011. The attachment also included her seniority and additional classes she had attended, as well as a record of her conduct, which included no reprimands or suspensions.

3. The Appellant listed some of her duties and responsibilities as supervising the entire staffing after 14:30 hours during the weekdays, and supervising the entire building on the weekends she works. She maintains she oversees the care and safety of up to 120 residents and at least 30 to 35 staff. Additionally, she makes rounds on all units in the facility, and covers call-ins to make sure each unit is properly staffed to provide appropriate resident care.

4. Appellant's 2009 evaluation has her rated as "Outstanding," the 2010 evaluation has her rated as "Highly Effective" and the 2011 evaluation shows her rated as "Outstanding."

5. The Appellant's testimony was that she and the Intervenor, Rita Gilbert, underwent an interview for the position of Nurse Manager on January 4, 2012. Following those interviews, Rita Gilbert was given the position of Nurse Manager. Thereafter, the Appellant filed a grievance, claiming the recommended Internal Mobility forms (IM) had not been given to the applicants to fill out and submit. As a result of this grievance, the administration decided to re-do the interview process and use the IM forms. The facility also acceded to Appellant's request to bring an interviewer on the panel from outside the Hazard facility. The agency did this by putting Becky Burton from the Thompson-Hood Veterans' Center on the second interview panel. That three person panel was then filled-out by Shawn Thacker, the Nurse Manager at the Facility, and Wade Lindon, the Assistant Administrator at EKVC.

6. Following a second interview conducted on or about February 27, 2012, the Intervenor Gilbert was again was given the promotion. As some of her reasons in believing she should have been selected, the Appellant stated that Gilbert had only held a nursing license for approximately 10 years, had only been employed by the Commonwealth for approximately six years, and had only held one position at the agency, that being MDS Coordinator (Minimum Data Set).

7. Regarding her claim of age discrimination, the Appellant stated that within the nursing administration staff, the staff is in their 40s. Regarding the retaliation claim, the Appellant stated she was not chosen for the position because she had filed a grievance over the first interview process. She also states that her score on the second interview process was 107, whereas the score on her first interview was 136.

8. As to her claim of conflict, the Appellant stated that the vacant position being interviewed for has previously been held by Greg Gilbert. The Intervenor, Rita Gilbert, is his wife. Appellant stated she was afraid that Greg Gilbert would then become his wife's supervisor, as he had been promoted to Assistant Director of Nursing (ADON). However, Appellant also admitted that this chain of command was changed after the Intervenor received the position, as Director of Nursing (DON) Roxanna Combs became the supervisor for all Nurse

Managers and Greg Gilbert became the supervisor for all Charge Nurses. However, Appellant argued that when Combs is out of the office for any reason, her duties fall to the ADON, who at that point becomes his wife's supervisor.

9. Appellant cited KRS 11A.020(1)(a)(c) and (d). This statute generally provides that public servants are prohibited from supervising a family member.

10. On cross-examination, the Appellant was asked about the MDS (Minimum Data Set). She admitted that all VA facilities are now in a transition period, and the MDS is an integral part of the Medicare/Medicaid program. She stated that the MDS duties were added to the Nurse Manager position only two days before the second interview, and she never had a chance to learn this skill.

11. Appellee also admitted that no questions were asked by the interview panel regarding her age. She confirmed that the three-member panel asked the same questions of each applicant, took notes, and believes they did look at the conduct, seniority, evaluations, record of performance and performance evaluations in the process.

12. Appellant also admitted that during the interview process, approximately 10 to 12 questions were asked, with only one concerning the MDS skill. She also testified she is aware the interview panel has access to the entire personnel file of each applicant. Although she stated she had no reprimands or plan of correction, she admitted there were some memos documenting mistakes she had made regarding practicing nursing prior to receiving her license. Appellant argued this was a mistake in submitting the wrong social security number during her application request.

13. She also stated she did not know panel member Becky Burton before the second interview, and stated she appeared to be fair in the interview process.

14. Appellant admitted that regarding medical conditions and such issues, it is appropriate for there to be discussions between Rita Gilbert, herself, and Greg Gilbert.

15. Lastly, the Appellant stated that Roxanna Combs (DON) is in charge of all the Nurse Managers, which would include Rita Gilbert. The Nurse Manager is responsible for the entire unit with 45 to 50 clients, whereas the Charge Nurse, a position held by the Appellant, is a shift supervisor and reports to the ADON. She concluded by stating she felt that the second interview went better than the first.

16. The Appellee called as its first witness **Honor Barker**. She was previously employed by the Appellee, and had been for 12 years, at the time of this promotional process. She was the Human Resources Branch Manager, and had been involved with promotional processes in the past.

17. Barker testified that because of the grievance filed by the Appellant, citing the fact of the IM forms not used, she felt a second interview was appropriate. She then convened a

new panel of persons the same grade or above as the vacant position. She confirmed that Becky Burton was brought in from outside the agency.

18. Barker personally observed each interview of the Appellant and the Intervenor. She opined that she thought the process went well and all five mandated criteria were considered. She added there was no consideration of age, medical condition, or retaliation in the interview process, and it was clearly conducted along appropriate lines.

19. The next witness to be called by Appellee was **Wade Lindon**. He has worked at EKVC for 12 years, and has been the Assistant Administrator at the facility for the past three years. His duties include overseeing support services at the facility. He was the team leader of the interview panel, along with Shawn Thacker and Becky Burton.

20. Lindon confirmed previous testimony that only standard questions were asked, and notes were taken and scored as the process proceeded.

21. Lindon stated that Intervenor Gilbert had better answers to the questions posed and scored better on the results. He also confirmed that no questions were asked regarding Appellant's age or medical condition. He then added that after the interview concluded, the panel reviewed the personnel files of both the Appellant and the Intervenor. He testified that Gilbert had higher evaluations and no disciplinary record. He added that there was a problem with the Appellant in that she had practiced nursing for a period of time without a valid license.

22. He then introduced Appellee's Exhibit 3, a list of facility employees with their birthdates. It appears there are approximately some 27 employees at the facility who are older than the Appellant. He also stated he was aware of the duties of a Nurse Manager position prior to the interview.

23. Appellee's next witness was **Roxanna Combs**. Combs testified she has been the Director of Nursing (DON) at the EKVC since September 2011. She has worked with the Appellant since the facility opened, and has been Rita Gilbert's direct supervisor in the past and continues in that position.

24. She stated the responsibilities of the Charge Nurse position and the Nurse Manager position are different, in that the Nurse Manager position requires more professionalism, good organizational skills, maintaining appropriate discipline, and having good knowledge of resident care. She felt that Gilbert prevails in all these areas.

25. Regarding the Appellant, she stated she will do anything asked, but has a different level of professionalism than Gilbert. She added that the Appellant also has good job skills.

26. Combs denied that the age level of the nurses was a factor, and denied any retaliation toward Appellant.

27. Regarding the conflict of interest claim, Combs stated that if she is out of the office for any time, the Intervenor Gilbert must go to the Administrator of the facility, and states that if absent, the evaluations of Gilbert are also done by the Administrator.

28. Regarding the choice of the Intervenor for the position, Combs stated that the Appellant does the job well on her shift, but that the interviews and the review of the personnel files brought out other things which differentiated between the two candidates.

29. The Appellee's next witness was **Shawn Thacker**. She has been employed at the EKVC as Nurse Manager for approximately nine years. She began employment at the same time as the Appellant.

30. Thacker testified that her working relationship with the Appellant is sometimes strained, but they manage to put their differences aside and put the patients' interests first. She also added there was no mention of age or medical issues in the second interview. She stated she scored the Intervenor higher because she felt she had more knowledge and more professionalism.

31. On cross-examination, she denied there was any favoritism shown from Greg Gilbert toward the two units, one of which was headed by the Appellant.

32. Appellee's next witness was **Becky Burton**. She has been the ADON at Thompson-Hood's Veteran Center for the past six years, and has sat in on previous interview panels. She stated she had no prior knowledge of the Appellant, and confirmed that Honor Barker did observe the interviews.

33. Burton testified she was aware of the mandated criteria to be considered, and added there was no mention of age or medical issues during the interview process. Neither was there any mention of the Appellant having filed a previous grievance. This witness scored the Intervenor higher, after the interview and after looking at the personnel files of both.

34. The Appellant was then permitted to call the Intervenor, **Rita Gilbert**. Gilbert stated that she is now employed as the Nurse Manager at EKVC, beginning on February 12, 2012. She confirmed she is married to Greg Gilbert.

35. Gilbert testified she has been employed as the MDS Coordinator from 2005 through 2012 at the facility, and admitted she had not worked as a floor nurse, although she has been an RN for 10 years. She has also previously worked at the Hyden, Kentucky, and Manchester, Kentucky health facilities in a nursing position.

36. 101 KAR 1:400, Section 1(1) states:

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. KRS 18A.0751(4)(f) states:

(4) These administrative regulations shall provide:

(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;

### **FINDINGS OF FACT**

1. The testimony of Honor Barker and the three panel members convinces the Hearing Officer the agency properly considered and used the promotional criteria contained in 101 KAR 1:400.

2. The Minimum Data Set (MDS) is an integral part of the Medicaid/Medicare program, and knowledge of such is a qualification possessed by Intervenor Rita Gilbert, but not by the Appellant.

3. The Appellant has more seniority, but the Intervenor has a slight edge in record of performance, conduct and performance.

4. There is no credible evidence to support the Appellant's claims of age discrimination, conflict of interest or retaliation. Although Gilbert's age was not given for the record, it is obvious to the Hearing Officer that she is several years younger than the Appellant.

### **CONCLUSION OF LAW**

The Hearing Officer concludes as a matter of law that the Appellant failed to carry her burden of proof by a preponderance of the evidence.

### **RECOMMENDED ORDER**

The Hearing Officer recommends to the Personnel Board that the appeal of **CHERYL L. GABBARD V. DEPARTMENT OF VETERANS' AFFAIRS AND RITA GILBERT, (APPEAL NO. 2012-035)** 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 R. Hanson Williams** this 24<sup>th</sup> day of September, 2013.

**KENTUCKY PERSONNEL BOARD**

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

A copy hereof this day mailed to:

Hon. Dennis Shepherd  
Ms. Cheryl Gabbard  
Ms. Rita Gilbert