

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD**

**APPEAL NOS. 2012-262, 2014-054 and 2014-055
AND
APPEAL NOS. 2013-271, 2014-080 and 2014-081**

CATHY D. GOPAUL

AND

CURTIS EDWARD SEARS

APPELLANTS

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

**JUSTICE AND PUBLIC SAFETY CABINET
DEPARTMENT OF JUVENILE JUSTICE
J. MICHAEL BROWN, APPOINTING AUTHORITY**

APPELLEE

**** ** ***

The Board at its regular April 2015 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated March 18, 2015, 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:

Delete the first paragraph of the preamble and substitute the following:

This matter came on for an evidentiary hearing on January 13 and 14, 2015, at the offices of the Kentucky Personnel Board, Frankfort, Kentucky, before E. Patrick Moores, Hearing Officer. The proceedings were recorded by audio-video equipment pursuant to the authority found at KRS Chapter 18A.

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 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 21st day of April, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Adam Adkins
Hon. William Codell
Curtis Sears
Cathy Gopaul
Joslyn Olinger Glover

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APPELLEE

This matter came on for an evidentiary hearing on January 13, 2015, at the offices of the Kentucky Personnel Board, Frankfort, Kentucky. The proceedings were recorded by audio-video equipment pursuant to the authority found at KRS Chapter 18A.

The Appellants, Cathy D. Gopaul and Curtis Edward Sears, were present and unrepresented by legal counsel. The Appellee, the Department of Juvenile Justice, was represented by the Hon. William F. Codell, and Hon. Adam T. Adkins of the Justice & Public Safety Cabinet's Office of Legal Services.

I. STATEMENT OF THE CASE

1. Cathy D. Gopaul is a classified employee who filed an appeal on November 30, 2012 (2012-262), concerning a lateral work assignment recommended by her immediate supervisor, Antoine Bland, to the position of "Intensive Aftercare," which was rejected by Bland's supervisor, Vicki Kohus, who directed that the position be given to another staff member, Amanda Leo. Gopaul alleged that Ms. Kohus made a personal attack of her character in denying Bland's recommendation and directing the assignment to Ms. Leo, stating that Gopaul was difficult to work with and that she wanted someone "fresh" in the position, which Gopaul believed was racially motivated.

2. Gopaul filed a second appeal on March 21, 2104 (2014-054), after being denied a promotion to the position of Juvenile Services District Supervisor (JSDS), which was awarded to

Amy Lombard. Gopaul alleged that she was denied the position for which she was the most qualified because of unfair and unethical hiring practices that discriminated against her due to her race and age.

3. Gopaul also filed an appeal on March 21, 2014 (2014-055), alleging that the denial of the promotion to the JSDS position was because of retaliation against her by Kohus, who was on the interview committee that recommended the position be given to Ms. Lombard, a less qualified person. Gopaul alleges that the retaliation was in response to the racial and age discrimination charges she had made against Kohus.

4. By Order issued on April 15, 2014, by the Executive Director of the Kentucky Personnel Board, with the agreement of the parties, all three appeals brought by Gopaul were consolidated.

5. Curtis Sears is a classified employee who filed an appeal on November 22, 2013 (2013-271), alleging discrimination based on race, age and disability, from his receiving a Performance Improvement Plan (PIP) from Kohus for minor infractions that he alleged were unjust, unethical and disproportionate, and he further alleged that as a result of his grievance of unfair practices Kohus ordered the supervisors to start issuing PIPs to others.

6. Sears filed a second appeal on April 18, 2014 (2014-080), in which he alleged that Kohus' participation on an interview and hiring committee resulted in retaliation against him and caused him to be denied a promotion to the position of JSDS with the hiring of a less qualified person.

7. That was followed with another appeal filed by Sears on April 22, 2014 (2014-081), in which he alleged that as a result of Kohus' being on the interview and hiring committee, there was no way, under the circumstances, that he could have received a fair and objective interview.

8. By Order issued on May 21, 2014, by the Executive Director of the Kentucky Personnel Board, with the agreement of the parties, the appeals filed by Sears were consolidated.

9. Pre-hearing conferences were held in both cases before the Kentucky Personnel Board and eventually the appeals of Gopaul and Sears were consolidated by Order entered July 9, 2014. Evidentiary hearings were set to take place on August 18-19, 2014, and then continued to December 2, 2014. The matter was ultimately rescheduled for an evidentiary hearing to be held before the Board on January 13, 2015, and was recorded by audio-video equipment pursuant to the authority of KRS Chapter 18A.

10. The issue presented was whether the statutory requirements set forth at KRS 18A.0751(4)(f) and the regulatory requirements set forth at 101 KAR 1:400 were not met by the Department of Juvenile Justice in its selection of Amy Lombard for the JSDS position, and that the "five factors" were not given appropriate consideration in the interview and hiring process, which was conducted in an unfair and unjust manner. Also at issue were whether the claims of Gopaul and Sears that the determinations made denying the position to either of them were

influenced by racial and age discrimination and retaliation. The Appellants Gopaul and Sears had the burden of proof, which is by a preponderance of the evidence.

11. Also at issue for Gopaul is her claim that she was denied the Intensive Aftercare assignment based upon race and age discrimination. The burden of proof was upon the Appellant by a preponderance of the evidence.

12. An additional issue for Sears was his claim of discrimination and retaliation regarding his 2013 performance evaluation and his PIP.

13. The Evidentiary Hearing was conducted on January 13 and 14, 2015, before the Hon. E. Patrick Moores, Hearing Officer. Opening Statements were made by both Appellants and by counsel for the Department of Juvenile Justice.

FINDINGS OF FACTUAL EVIDENCE

1. The first witness was **Antoine Bland**, who is the Juvenile Service district supervisor, in Louisville, Kentucky, for the Department of Juvenile Justice. He has worked for the Department for 22 years, and has served as Gopaul's supervisor for approximately ten years. He testified that the position of "Intensive Aftercare" came open in October 2012, and that he asked several employees if they wanted the position, most of whom declined, but Gopaul said she would do the job. It was a lateral move of job assignments, involving additional requirements in her job duties. Bland said he also felt that Gopaul was the most qualified to be assigned the position. He testified that he just makes recommendations for assigning positions, that he did not consider race or age in offering the position, and that he discussed his decision to offer the position to Gopaul with his supervisor, Victoria Kohus. He testified that Kohus told him that she did not want Gopaul to be given the position because she had problems with her attitude, and that she preferred that another employee, Amanda Leo, be given the position, as she was someone "fresh."

2. Bland testified that he sent an email on October 31, 2012, to Kohus explaining his reason for selecting Gopaul for the assignment, as she had done the same work previously and that he had many years of observing the quality of her work and the caring and dedication she showed the families she worked with every day. Bland wrote that he believed the selection being made by Kohus was based on friendship. Bland complained that he did not know Ms. Leo or the quality of her work, and that since the work performed was under his direct supervision he felt great trust with Gopaul. Kohus responded that same day by email that she didn't think that Gopaul was appropriate for the position, as she was viewing the assignment based on her extensive experience working with the Intensive Aftercare program and seeing the big picture of what the program needed. Kohus denied that friendship had any bearing on her decision and her perception of the program and not the worker. Bland testified that he believed that Kohus' decision was based on personal reasons she had against Gopaul, and not on her qualifications, although he acknowledged that he did not hear her say any racist remarks about Gopaul.

3. Bland testified that a meeting was then held between him, Gopaul and Kohus. He said that Gopaul presented the reasons she should have the position. Kohus responded that she

wanted a person with a "fresh perspective," and repeatedly said she felt that Leo was "fresh." He testified that as they discussed the matter Kohus became upset, and let them know she did not want to discuss the matter any further, putting her hands up in a position indicating she was done with the discussion. Bland testified that it appeared that there were issues between Kohus and Gopaul, stating it appeared to him that there was something between them.

4. Bland testified that the Intensive Aftercare position involved more work than performed by the average caseworker and that he felt that Gopaul was the most qualified, although he acknowledged that she was not his first choice for the position. He had asked several other people to accept the position, all of whom declined, but that Gopaul accepted without hesitation. He testified that the decision to deny the position to Gopaul was within Kohus' discretion and that when she gave her reasons for offering the job position to Leo, he felt her desire for wanting Leo in the job was due to personal friendship. Bland testified that he did not have any personal knowledge of Leo or her qualifications, nor did he have any information concerning her work. Bland also testified that he had not previously been made aware of, or received any complaints, about the attitude of Gopaul. He also said he did not know Ms. Leo or what qualifications she presented.

5. Bland is an African American and Kohus is a Caucasian. He testified that he did not hear Kohus state anything about Gopaul that indicated a racially discriminatory attitude. He did say that he thought there was some bias on Kohus' part against Gopaul, but that he could not say it was based on her race or her age, and that he had no knowledge of any racial bias from Kohus towards Gopaul. He said that the issues of race, sex and age were never considered in his decision to recommend Gopaul, and he was not aware of any such consideration by Kohus.

6. **Cathy Deneen Gopaul** is employed with the Department of Juvenile Services in Louisville as a Social Services Clinician 1, specializing in performing juvenile services as a court support worker with youthful offenders. She testified she was initially hesitant to accept the position of Intensive Aftercare because it was a lateral move that involved more work but provided no more money. Gopaul testified that she was never told why she didn't get the position, other than she heard Kohus say she had a bad attitude. She wrote an email to Kohus, but Kohus refused to talk with her. She said that there appeared to be something going on, and that she felt she was denied the position because Kohus wanted a Caucasian female in the position.

7. Gopaul said she had no issues with Ms. Leo, who Kohus instructed be given the Intensive Aftercare position, but that she was concerned by the meaning of Kohus' statement that she wanted someone "fresh" and "new" for the position. She testified that she did not hear Kohus say anything that was a racist statement, adding that Kohus refused to talk to her. She testified that racist conduct is not necessarily blatant, but could be hidden. She testified that she felt the statement of Kohus that she wanted someone "fresh" in the position, while not racist in itself, was a racist statement. She said that Kohus would never explain to her what she meant by wanting someone "fresh."

8. Gopaul testified that she never received an explanation from Kohus as to why she was denied the position of Intensive Aftercare, as Kohus refused to discuss the matter with her. Gopaul alleged that there was never an explanation about her qualifications for that or any position she sought, but that it was a continuous and ongoing thing of Kohus denying her the

right to have other positions. Gopaul testified that her concern in bringing the appeals was not to seek relief for being awarded the jobs she was denied, but concerned the reasoning behind Kohus denying her opportunities for other positions, which she believes were racially based.

9. Gopaul subsequently made a formal application for promotion to the position of Juvenile Services District Supervisor (JSDS), and was placed on the register. She complained about the interview process being unfairly conducted, as she objected to Ms. Kohus being on the panel. Gopaul testified that she objected to Sherre Smith-Jones and Miranda Denney about Kohus being on the interview panel, believing that her participation was unfair and improper, given the attitude she had against Gopaul.

10. The position was awarded to Amy Lombard. Gopaul said the interview was rigged for her, as she alleged Lombard told several people she had been promised the job by Sherre Smith-Jones. Gopaul stated that Lombard was so confident she would be selected that she didn't bother to wear appropriate clothing to the interview.

11. Gopaul testified that when she tried to talk with Kohus, she would flail her arms, indicating she was done talking.

12. **Curtis Edward Sears** had initially filed a grievance against Kohus on October 25, 2013, who had instructed his supervisor to give him a Personal Improvement Plan (PIP) for not timely finalizing his work records. Sears said he had no prior incidents, and stated that this was a minor violation, but that Kohus said anyone who violated the Department policy was to get a PIP. He said that previously Kohus had given other staff workers time to finalize their work records, however, he was not afforded the same consideration. He testified that allowing others to go without PIPs showed that he was treated differently from his co-workers, who were all white. He testified that it was not until after his grievance was filed, that Kohus instructed the supervisors on December 28, 2013, that PIPs be given to those other staff that had let their paperwork duties slide.

13. Sears testified that Kohus instructed his supervisor that she was going to change the dates on his performance evaluation that his supervisor had completed. Sears testified that when he later inspected the performance evaluation, he discovered that Kohus had made other changes to the evaluation (including on the form that he had been given a PIP) and accused her of changing the evaluation without his knowledge. He said it wasn't receiving the PIP that he disputed, but the inappropriate change she made to his performance evaluation.

14. Sears testified that he applied for the position of JSDS, and subsequently learned that Kohus was on the interview-hiring committee. Sears stated that he felt it was unfair to him that she serve on the selection committee while he had a grievance pending against her, and that he believed it led to him being denied the promotion. He testified that he was treated differently than his co-workers who were all white. Sears testified that the issue for him on his appeals was the inconsistency of her actions and the unfair practices of the hiring interview process. He felt that due to the way he had previously been treated by Ms. Kohus, and the fact he had filed a grievance against her, that her involvement of the interview/hiring committee gave him no chance for a promotion.

15. Sears testified that he applied for the same position as Gopaul. He testified that he learned that the position was promised to Amy Lombard by Sherre Smith-Jones. Sears testified that from a fairness standpoint he did not think it was appropriate for Kohus to serve on the interview hiring committee, and that he believed the committee was greatly influenced by her. He testified that Kohus had given a letter of recommendation to an employee for doing a good job, which showed a tendency to favor one employee over another, as both he and Gopaul had done good jobs but did not receive letters of recommendation and that it was inappropriate for Ms. Kohus to single out an individual. Her involvement in amending his performance evaluation and serving on the committee that determined his eligibility for promotion caused him to feel he had been subjected to unfair treatment. Sears testified that he was treated differently than his co-workers, who were all white, and who had violations of policy by being behind on work requirements or putting data into the system, but did not receive PIPs, or the PIPs they received were given much later after he filed a grievance.

16. **Miranda Denney** is the Department of Juvenile Justice Deputy Commissioner. She received a Master's degree in Criminal Justice from Eastern Kentucky University, started working for the Commonwealth of Kentucky in 1991 and transferred to the DJJ in 1996. She held various offices in DJJ and in July 2014 she was appointed Deputy Commissioner. She testified about the goals and purposes of the community services and mental health and treatment services of the agency. She testified that she became aware of Gopaul when she was working with the equine program, helping the troubled youths connect with the race tracks and farms when they left the Department's custody to obtain employment and vocational training.

17. Denney testified that the Intensive Aftercare program has three basic components for identifying highest risk youth for being a re-offender, and to provide intervention services to lower that risk. This involves (1) selection of the youths at risk, (2) based on their geographical location in Jefferson County, Fayette County and Northern Kentucky, and (3) between the ages of 14 and 17. She said that it did not take a specific grade employee to conduct this role, as it could be done at any social services level. She became aware of Gopaul's concerns about Kohus rejecting her being assigned to the position when she received an email from Gopaul outlining the issues she had with the decision. She subsequently arranged a phone conference with Gopaul, Bland and Kohus. During the phone conference Gopaul informed her of other instances of issues with Kohus, including the comments Kohus made to Bland that held Gopaul in a negative light. She said that the key issue appeared to be a lack of communication.

18. Denney testified that she had a working relationship with Kohus since 1999, and had been her supervisor since July 2008, and found her to always be honest, forthright and professional. She had never been made aware of any disciplinary problems or any discriminatory conduct. She testified that she also never heard anything negative about the work of Gopaul.

19. Denney testified that she was aware of the grievances filed by Sears on his claim concerning actions by Kohus on a PIP against him, and also about his appeal on a hiring interview that involved retaliation by Kohus. She testified that PIPs are corrective action plans where employees are not compliant with policy or work requirements, are used to improve performance and are never considered a disciplinary action. Denney testified that she became aware that the case work documentation on a particular youth offender under Sears' supervision had not been completed for five months, and she felt the record had to be corrected and updated immediately. She also instructed Kohus to issue the PIP to Sears, and to further issue PIPs as she

learned that other cases were not being properly updated and documented. Denney said that the level of violation in failing to meet department policy documenting work on the case and case audits concerned and irritated her and that she directed the PIPs be given.

20. Denney said that DJJ interview and hiring process always utilizes a three person panel, involving people with management experience. On the interview panel the DJJ policy is that the person who would serve as the supervisor of the person awarded the position needs to serve on that committee. While acknowledging that the word "fresh" may have alternate meanings, she had no personal knowledge of how it was allegedly used by Kohus.

21. **Kevin Garvin** is the community regional Manager for the west region, having six residential facilities under his responsibility, and he was involved in the hiring process for group homes. He described his experience serving on interview panels, including in regions not under his supervision. He said he was contacted to serve on the interview panel and Ms. Kohus sent him copies of the applications and a list of areas which they were to make inquiries about. He said that as he reviewed the applications, he looked at their education, experience, years served in their present positions, and clues of how they would be able to handle and work with management. Garvin said that he did not receive any other information from Kohus concerning any of the applicants, including Sears, nor did she attempt to influence him concerning any applicant. He testified that the interview score sheets accurately reflected his opinions and judgments of the applicants. He further testified that he never worked under Kohus and knew nothing of her management style. He further testified that his statements made later about the interview process and included in the Investigator's summary were accurately reported.

22. Garvin testified that he vaguely remembered Sears, and recalled that from his responses during the interview he did not appear to be qualified as a supervisor. He said he scored Sears solely based on his reaction to Sears responses, and his recent review of the interview score sheets indicated that Sears scored lowest of the applicants. Garvin is an African American, and said that all the decisions the panel made were based solely on the applicants' responses to the questions, and not on the basis of race or age.

23. Garvin also was involved in the interview of Gopaul, and he testified that he was surprised at how poorly she responded to questions in the interview. He said that given her experience she should have shown she was more knowledgeable about the position's requirements, and that he expected more from her. He further testified that Kohus had no influence on his decision. He testified that Gopaul was not evaluated on her experience as a worker but as to his opinion of her ability to perform in the supervisory position. He said he was unaware of any prior issues Gopaul had with Kohus or about any pending grievances by any applicant.

24. Garvin testified that he was not aware of any promises made to other applicants, particularly to a Ms. Lombard, and that he would be surprised to learn any promises had been made to anyone. He said he expected every applicant to give their best performance during the interview, and do their best to feature their skills. He said that anybody interviewing for a job would presumably be responsible to present themselves as the best person for that job. He added that the fact that an employee is a good worker does not mean that person would be a good supervisor.

25. Garvin testified that when he is interviewing or considering someone for a position, he is not concerned about their feelings, as he is looking for the best individual for that position. He acknowledged that in supervising people, their feelings may be important as it would impact performance. He did acknowledge that racism still exists and can be overt, but that he saw no evidence whatsoever of any bias or racial animus or hostility or unfair consideration on any of the candidates by the members of the panel, nor that any members of the panel had issues concerning the candidates. He said that he believed that Ms. Lombard was the best candidate for the position, based on her responses during the interview and her experience. He said that he believed his decision was correct even given what he learned later of the charges being levied against Kohus.

26. **Monica Edmonds**, also an African American, has served as the Division Director for Placement Services since January 2012. She discussed the process of posting jobs that are available, collecting and reviewing resumes, looking for the best candidates for the position and selecting an interview panel. She said it was a requirement that the branch manager be on that panel, as that person will have the responsibility of supervising the individual being hired. She testified that the branch manager will want to select someone who will not be a burden, and that she did not think that the fact an applicant had filed a grievance against that manager is disqualifying.

27. Edmonds testified that she received an email from Kohus requesting her to serve on the interview panel for the JSDS position, and she responded that she would. She said she did not know the other panel members or the applicants until she arrived to conduct the interviews. She said the interviews of the candidates were set up and conducted in thirty minute increments. She said that she looked at the candidates for what was needed and required for the position, and that the panel's opinions of the candidates' responses were reflected in the scores given, which reflected the consensus of the group. She said there was no discussion regarding any candidate concerning their race or age nor was any discussion had that anyone was aware of any pending issues with or grievances against Ms. Kohus.

28. Edmonds testified that she was aware that Gopaul had been an interim JSDS, which should have given her a leg up coming into the interview. However, Edmonds said that Gopaul did not "sell herself" well, and that there was something about the supervisory role on which she did not adequately respond. She stated that the low score given to Sears reflected her ranking of him among the candidates. She said the panel made the best decision about selecting the person for the position, who they believed would also be the best person to manage the position. She said that the interview scores reflected a calculation of all the numbers each candidate was given, and that the person who does a bad interview will not be selected. She said that even though an applicant named Thompson attained the highest interview scores, he was not the appropriate person to be chosen as he did not have any community work experience. She testified that she believed the panel chose the best candidate, which was Ms. Lombard.

29. **James Franklin Gabbard** is an investigator for the DJJ. He obtained a degree in law enforcement from Eastern Kentucky University, and worked for 26 years with the police department in Lexington, Kentucky. He was directed to investigate the grievances filed by Gopaul that she had been denied a fair hearing in her application for the JSDS position, and that Sears had charged Kohus with improperly inserting information about his receiving a PIP in his

performance evaluation after it had been prepared and signed by him, and that he was denied the promotion to JSDS because of his grievance and Ms. Kohus being on the selection panel.

30. Gabbard reviewed the documents pertaining to the allegations, interviewed 15 people whose interviews were recorded, and prepared a written report on both Gopaul and Sears. He said that neither Gopaul nor Sears provided any direct evidence of discriminatory or unfair conduct by Kohus. Based on his interviews, he concluded that Kohus did not influence the interviews or the scoring of the candidates, and that no racial bias was demonstrated against any candidate. He further determined that the grievances of Gopaul and Sears had no role in the interviews and that the scoring during the interviews was based solely on how the candidates answered the questions.

31. **Amy Lombard**, who was selected for the JSDS position, testified that she began working with the Commonwealth of Kentucky in 1990, and transferred to DJJ in 1994. She testified that she has been certified for work with high risk juveniles, relapse prevention and sex offender treatment. She said that she represented herself to the best of her ability in the interview for the JSDS position, and that no one had ever promised her the job, nor that she ever told anyone she had been promised the job.

32. **Victoria Kohus** is the regional manager for the Central Division of DJJ, a position she has held for eight years. She first started working with the Commonwealth of Kentucky's Cabinet for Health and Family Services in 1981, working with juveniles and neglected children. She came to the DJJ when it was created in 1996. Kohus testified that Gopaul was supervised by Mr. Bland and had worked in different programs within the DJJ and its Audubon facility. She was not aware, however, that Gopaul had previously worked as an Intensive Aftercare specialist.

33. Kohus said when Bland mentioned to her that he had selected Gopaul for the Intensive Aftercare position, she told him that she had already asked someone else to perform the job and that the matter was already decided. She did not recall saying to Bland that Ms. Gopaul was not fit for the job. She said that she had a conversation with Gopaul as to how she came across to others, as she asked questions in an argumentative style.

34. Kohus acknowledged to Sears that she was aware of a long history of many problems in the Breckinridge Office, stating that since she became regional manager she felt that she would not be accepted in that office. She said the issue of the PIPs began when Ms. Denney became aware that the supervisors were not doing their job in auditing the case workers and their documented files. She said that when this came to the attention of Ms. Denney, she told Kohus "enough is enough" and instructed her to go through every worker's running records and start directing the supervisors to start pushing the workers to see the reports got done. She testified that she was instructed by Denney to go through every supervisor to make sure they were aware of what their employees' status was with their cases and their records, and that Denney directed her to issue PIPs on everyone not up to date with their running records.

35. Kohus denied that she had any racial animus and that she does not use race in her decisions to provide opportunities for work to anyone. She testified that all she considers are their qualifications. She said that during the interview for the JSDS position, Amy Lombard stood out more than any of the other applicants. She denied saying anything to the other panel

members concerning any issues of Gopaul or Sears and that the decision to select Ms. Lombard was made by the panel.

III. CONCLUSIONS OF LAW

1. This matter of consolidated appeals involves two years of litigation and allegations of discrimination in the DJJ's hiring process, and the ongoing desire of the Appellants to argue with the DJJ concerning its hiring policies and management decisions. Cathy Gopaul and Curtis Edward Sears appeal the Department's denial of promotion to the position of JSDS. The Appellants allege that they were discriminated against because of their race and age, and that they were also retaliated against for their previous grievances against Ms. Kohus. They allege that the Department engaged in racial discrimination and unfair hiring practices by utilizing an interview process that was biased in its investigation and interview procedures. The Department responded that the hiring practices of the Department were in accordance with Kentucky's statutory and regulatory guidelines.

2. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 makes it an unlawful employment practice for an employer to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

3. The Commonwealth of Kentucky, as employer, is prohibited from discriminating against state employees on account of their race, age, or religion. KRS 344.040. For state employees, KRS 18A.0751(4)(f) provides that any candidate for promotion shall be given appropriate consideration of the applicant's qualifications, record of performance, conduct and seniority, and that the selection be in the best interests of the state service.

4. The regulatory requirements set forth at 101 KAR 1:400 provide that in making promotions all agencies shall consider an applicant's qualifications, record of performance, conduct, seniority and performance evaluations in the selection of an employee for a promotion. These requirements are commonly referred to as the "five factors."

5. Under the familiar *McDonnell Douglas* framework, "a plaintiff bears the burden of establishing a *prima facie* case of discrimination, 'which includes demonstrating that he suffered an adverse employment action ... under circumstances giving rise to an inference of discriminatory intent.' " *Maraschiello v. City of Buffalo Police Dep't*, 709 F.3d 87, 92 (2d Cir. 2013) [quoting *Mathirampuzha v. Potter*, 548 F.3d 70, 78 (2d Cir. 2008)]. "Once the *prima facie* case has been shown, the burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the adverse employment action.' " *Id.* [quoting *United States v. Brennan*, 650 F.3d 65, 93 (2d Cir. 2011)]. To establish a *prima facie* case in the instant litigation, Plaintiff must show that (i) he is a member of a protected class; (ii) he was qualified for the position he held; (iii) he suffered an adverse employment action; and (iv) the adverse action took place under circumstances giving rise to an inference of discrimination. See, e.g., *Reynolds v. Barrett*, 685 F.3d 193, 202 (2d Cir. 2012); *Ruiz v. Cnty. of Rockland*, 609 F.3d 486, 491-92 (2d Cir. 2010).

6. To establish that one was retaliated against or discriminated against, the record must show, among other things, that their management's actions were motivated by discriminatory animus. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 518 (1993). Further, if the alleged discriminators provide a non-discriminatory explanation for their actions, the inquiry moves to whether the record demonstrates that management's explanations were merely a pretext for discriminatory animus. *St. Mary's*, *supra*, at 518-525; see also: *U.S. Postal Service Board of Governors v. Aikens*, 46 U.S. 711, 714-717 (1983).

7. As the Supreme Court has explained, Title VII is not "a general civility code for the American workplace." *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 80, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998). Thus, we must view the alleged conduct with common sense, and an appropriate sensitivity to social context to determine whether it constitutes conduct which a reasonable person in the Appellants' position would find severely hostile or abusive. *Id.* at 82, 118 S.Ct. 998. This inquiry is necessarily fact-specific. See: *Alaniz v. Zamora-Quezada*, 591 F.3d 761, 771 (5th Cir. 2009).

8. While the Appellants cannot prevail unless the conduct actually offended him or her, the application of a reasonable person standard prevents us from awarding relief to overly-sensitive plaintiffs for hurt feelings. To be actionable, the challenged conduct must be both objectively offensive, meaning that a reasonable person would find it hostile and abusive, and subjectively offensive, meaning that the victim perceived it to be so. *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1009 (7th Cir. 1999).

9. There is no *prima facie* evidence of discrimination in the hiring process with respect to the Appellants, nor is there evidence that they were actual or potential victims of discrimination or unfair or unjust actions. Despite the allegations made by the Appellants, the record does not contain any evidence to demonstrate the existence of discriminatory animus, retaliation or unjust or unfair conduct directed to either Appellant. The testimony of Bland, Garvin and Edmonds, all three being African Americans, clearly demonstrates that there were no racial bias or unfair influences utilized in the considerations given toward Gopaul or Sears, and that each candidate was duly considered under the Kentucky statutory and regulatory requirements.

10. Additionally the testimony of Miranda Denney made it clear that the PIP was issued against Sears at her direction and not by Kohus, because DJJ policy was not being followed with regards to documenting the case record on a particular youthful offender. Further, the testimony of Denney explained the reasons why the persons were picked to serve on the interview panel that interviewed both Gopaul and Sears for the JSDDS position, which was clearly within their discretionary authority to conduct, and showed no discriminatory animus or unfair or unjust proceedings. Even if the record did demonstrate discriminatory animus, and it were assumed that the Appellants had made a *prima facie* case of discrimination and retaliation, the record does not indicate that Kohus' reasons for her actions were pretextual. Aside from the Appellants' own unsubstantiated assertions, there were no other comments in the testimony of racial or age discrimination, or that either Appellant was treated unfairly or unjustly or that DJJ policy was unjust, unfair or unreasonable. The lack of any specific evidence other than innuendo based on their own perceptions that they were being abused detracts from the value of Gopaul's

and Sears' statements in their appeals. Even taken together, these statements of the Appellants, without more, do not convince that Kohus' actions or reasons were a pretext for racial or age discrimination. As for the allegations of retaliation, there is no evidence in the record to suggest such was the rationale for Kohus' decisions to sustain a finding of retaliation against the Appellants.

11. The record does demonstrate a tension between the Appellants and their manager, Victoria Kohus. The expressed concern of Gopaul regarding Kohus' statement that she had a bad attitude, and that Kohus expressed the belief that someone "fresh" would be best for the position of Intensive Aftercare, and Sears' belief that the PIP given him and the changes Kohus made on his performance evaluation to indicate the disciplinary action against him, although not necessarily inappropriate actions, did clearly exacerbate in their minds the tensions between the Appellants from Kohus. However, the record does not contain any evidence to demonstrate that this tension was based on race, age or retaliation. As noted above, the United States Supreme Court has held that the Civil Rights Act is not a general civility code for the American workplace. *Oncale, supra*. Regardless of the feelings or personality conflicts Gopaul and Sears have with Kohus, there is no evidence that the actions of Kohus were hostile, abusive or racially motivated.

12. The Hearing Officer concludes that the record fails to demonstrate discrimination based on race, or age or retaliation in the form of discrete acts by Kohus against either Gopaul on choosing another employee for the Intensive Aftercare position or that she improperly issued a PIP against Sears and subsequently revised his performance evaluation form to reflect the PIP had been issued. Further, the record fails to demonstrate any evidence of discrimination, unfairness, or bias in the interview and hiring process.

13. There is no *prima facie* evidence to support the appeals of Gopaul and Sears and it is the conclusion of this Hearing Officer that the Appellants failed to meet their burden of proof and that their respective consolidated appeals should be dismissed.

IV. RECOMMENDED ORDER

Having considered and weighed all the evidence and the laws of the Commonwealth of Kentucky, and based upon the foregoing findings of fact and conclusions of law, the Hearing Officer recommends that the consolidated appeals of **CATHY D. GOPAUL (Appeal Nos. 2012-262, 2014-054 and 2014-055)** and **CURTIS EDWARD SEARS (Appeal Nos. 2013-271, 2014-080 and 2014-081)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen 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 exception 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 the 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 E. Patrick Moores** this 18th day of March, 2015.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK
EXECUTIVE DIRECTOR

Copies this date mailed to:

Hon. Adam Adkins
Hon. William Codell
Mr. Curtis Sears
Ms. Cathy Gopaul