

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NOS. 2013-261 AND 2013-283

CRAIG HICKS

APPELLANTS

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

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

APPELLEE

AND

KRISTY HICKS

INTERVENOR

** ** *

The Board at its regular May 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated March 21, 2014, 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 appeals are 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 14th day of May, 2014.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Stafford Easterling
Craig Hicks
Kristy Hicks
Stephanie Appel

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NOS. 2013-261 AND 2013-283**

CRAIG HICKS

APPELLANT

VS.

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

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

APPELLEE

AND

KRISTY HICKS

INTERVENOR

** ** ** ** **

These appeals came on for an evidentiary hearing on March 5, 2014, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before R. Hanson Williams, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellant, Craig Hicks, was present at the hearing and was not represented by legal counsel. Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and was represented by the Hon. Stafford Easterling. Appearing as the Agency representative was Martha Slemple. Intervenor, Kristy Hicks, was also present and was not represented by legal counsel.

The issues for these consolidated appeals were as follows:

A. In Appeal No. 2013-261, Appellant challenged the selection of Kristy Hicks for the position of Correctional Regional Education Administrator which occurred on or about September 13, 2013. In essence, the Appellant alleges the appropriate promotional statute and regulation factors were not properly considered.

B. In Appeal No. 2013-283, the issue is Appellant's claim of retaliation and/or discrimination as it relates to the denial of lodging for a required training which Appellant attended in Louisville, Kentucky

The burden of proof shall be upon the Appellant as to both issues and was to be by a preponderance of the evidence.

BACKGROUND

APPEAL NO. 2013-283:

1. Appellant called **Martha Slemp** as his first witness. She has been an Education Branch Manager with the Agency for in excess of nine years. She testified that mandatory training was held in Louisville, Kentucky, on October 15, 2013. The Appellant was one of those who attended. She confirmed that the Appellant was later reimbursed for his mileage for driving his personal vehicle, but was one of those who was not approved for overnight lodging.

2. The witness confirmed that attendees came from both the Northpoint Training Center (NTC) and the Blackburn Correctional Complex (BCC). Those coming from NTC were provided overnight lodging, while those from BCC were not. The Appellant was one of those coming from BCC.

3. The witness went on to explain that the Cabinet had not intended to provide overnight lodging for anyone from those two facilities, but due to a mistake by staff, lodging was provided for NTC. The witness rationalized her discretion in refusing overnight lodging by stating that the training began in Louisville at 9:30 a.m. on October 15. Those coming from NTC and BCC were coming from the Lexington area. Since the Appellant normally reported for work at 7:30 a.m., she reasoned that he would have sufficient time to travel from Lexington to Louisville and there would be no need for an overnight stay the previous night.

4. On cross-examination, the witness addressed overnight lodging given during previous trainings by saying that some of those trainings had contained some nighttime training activities, which justified the overnight lodging. She again stressed that having this October 2013 training in Louisville offered an opportunity for the Cabinet to save some money for overnight lodging, in that most of the people could drive in from their homes and easily make the 9:30 a.m. training.

5. The Appellant next called **Mike Massey**. He has been employed at BCC as an Academic Instructor since 1998. He testified that he attended the above-referenced training in Louisville in October 2013. He was not offered overnight lodging during this training.

6. The witness did not recall ever having to request lodging if the intended destination was more than forty miles from his workstation. He also stated that in those instances, the lodging had been arranged for the attendees. However, he did not dispute the discretion afforded the department in approving overnight lodging.

7. On cross-examination, the witness confirmed that he received reimbursement for mileage and was given comp time when driving back to Lexington after the day of training.

APPEAL NO. 2013-261:

8. The Appellant called **Dale Martin** as his next witness. Mr. Martin has been the Deputy Warden of Programs at BCC for in excess of four years. He discussed the promotional process by which Kristy Hicks received the herein referenced promotion.

9. The witness denied that he had ever discussed with Ms. Slemp a preference that the Intervenor be given the promotion to Correctional Regional Education Administrator in the fall of 2013. He stated that the interview panel members were himself, Ms. Slemp, and Rick Rowlette. He did confirm that following the interviews of all candidates, there was discussion among the panel members wherein they discussed all the candidates, including Intervenor Kristy Hicks. He also added that other people who had worked with the Intervenor had stated to him that she was a good candidate.

10. The witness then testified that he is now the Appellant's first-line supervisor and does his evaluations. At the time of interviews, he was not aware of any outside professional training which the Appellant had taken, but was informed of any such training by Ms. Slemp.

11. The witness also confirmed that prior to the selection of the successful candidate, he was aware that the Appellant and the Intervenor were going through a divorce. However, he saw no ethical problem with this and there was no concern expressed by anyone during the interviews of the Appellant and the Intervenor. He also added that the situation of an on-going divorce was not a part of the factors contained in 101 KAR 1:400. He added that there were approximately five people interviewed for the position in question.

12. As to comment on his knowledge of 101 KAR 1:400, the witness stated that he reviewed no materials prior to the day of interviews. However, on the day of interview, the witness testified that he reviewed the candidates' applications, the Internal Mobility Forms, which contained the record of performance, the seniority of candidates, and their record of conduct. The witness also added that there were non-state employees who were interviewed along with then current state employees.

13. On cross-examination, the witness answered that he had been on numerous interview panels in the past and was well aware of the required promotional factors. He added that the Appellant was a good employee and a good candidate for the position. He reaffirmed that the panel had considered and discussed the five factors in 101 KAR 1:400 and stated that the conclusion of the interview panel was that the Intervenor was the most qualified candidate.

14. The witness then added that following the interviews and while in the process of making their decision, the panel members were joined by the Human Resources person from NTC who came in and reviewed with them the promotional factors. After this was done, the panel's recommendation was forwarded to the Warden. The witness then confirmed that the decision of the panel based upon the factors under 101 KAR 1:400 was primarily subjective and did not necessarily lend itself to a point ranking system.

15. The Appellant's next witness was **Rick Rowlette**. He has been the Deputy Warden of Programs at NTC since May 2013. He indicated that while he was on the interview panel for this position, he did become aware that the Appellant's ex-wife was a candidate. This was of no concern to him and he saw no ethical problem with the process.

16. Rowlette testified that he came to his job in May 2013 from Virginia where he had been involved in Corrections for many years. As such, he was not personally aware or involved with any of the candidates because of his short tenure. He did add that he had worked with the Intervenor from May 2013 until the recommendation for filling the position was made in the fall of 2013.

17. He also stated that he had been involved in the hiring processes since 1989 and was familiar with the promotional factors. He stated the interview panel considered all those factors. He concluded by stating that all the candidates were "good"; however, he considered the Intervenor a "great" candidate.

18. Appellant's next witness was again **Martha Slemp**, recalled to testify on the issues in this appeal only.

19. She stated her familiarity with the Intervenor was only based upon one or two times wherein the Intervenor had come to her office on behalf of NTC while the school facility there was being reconstructed after a disturbance in the prison. The Intervenor was not stationed in her office and she had limited contact with her.

20. Asked to comment on the contention that the Intervenor may have been groomed for the position for which she received, the witness stated that Mr. Robert Epperson had been the school principal at NTC previously. The witness recalled that the Intervenor may have attended one administrative meeting on behalf of the school in Mr. Epperson's absence.

21. This witness also confirmed that prior to the interview of candidates for the position, to her knowledge there was no discussion between the Wardens at BCC or NTC concerning their preferred choice of a candidate. She again reiterated that the panel members considered the five factors under 101 KAR 1:400. She also added that after the interview process, the panel members discussed the candidates among themselves and unanimously agreed that the Intervenor was the appropriate candidate.

22. At this point, the Appellant announced the closing of his case.

23. Counsel for the Cabinet moved for a directed verdict in favor of the Cabinet, which was **GRANTED** by the Hearing Officer.

FINDINGS OF FACT

1. The Hearing Officer finds there was no discrimination or retaliation against the Appellant by virtue of the fact that he was not granted overnight lodging for training in Louisville, Kentucky, on October 15, 2013. Ms. Slemp candidly advised that there was no intention for any attendees from BCC or NTC to be given overnight lodging because of the time of the training and the sufficient time in which to drive from Lexington. She freely admitted it was a mistake made by her staff for anyone from NTC to have been given lodging. In addition, the Appellant was reimbursed for mileage expense for his personal vehicle.

2. The Hearing Officer finds it was within the discretion of the Agency to deny overnight lodging under the circumstances.

3. The Hearing Officer finds that the interview panel members appropriately considered the five factors under 101 KAR 1:400. The Appellant introduced no proof which would dispute the testimony of these three panel members. Also the Appellant introduced no documentary evidence of the qualifications of himself or the Intervenor which would allow the Hearing Officer to make a comparison as to whether the promotional factors were not properly considered. In addition, the Appellant did not call himself as a witness and, therefore, offered no testimony which could refute the testimony of the interview panel witnesses.

CONCLUSIONS OF LAW

1. 101 KAR 1:400 sets forth the five factors for promotion as follows:

Promotion. (1) Agencies shall consider an applicant's qualifications, record of performance, conduct, seniority and performance evaluations in the selection of an employee for a promotion.

2. The Hearing Officer concludes as a matter of law that the Appellant failed to carry his burden of proof by a preponderance of the evidence as to either of the two appeals herein.

3. KRS 13B.090(2) and (7) states:

(2) All testimony shall be made under oath or affirmation. Any part of the evidence may be received in written form if doing so will expedite the hearing without substantial prejudice to the interests of any party. The hearing officer may make a recommended order in an administrative hearing submitted in written form if the hearing officer determines there

are no genuine issues of material fact in dispute and judgment is appropriate as a matter of law.

...

(7) In all administrative hearings, unless otherwise provided by statute or federal law, the party proposing the agency take action or grant a benefit has the burden to show the propriety of the agency action or entitlement to the benefit sought. The agency has the burden to show the propriety of a penalty imposed or the removal of a benefit previously granted. The party asserting an affirmative defense has the burden to establish that defense. 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.

4. The Hearing Officer concludes as a matter of law that the Agency is entitled to a directed verdict on both appeals herein.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **CRAIG HICKS VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NOS. 2013-261 AND 2013-283)** 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).

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).

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

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 21st day of March, 2014.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof mailed this date to:

Hon. Stafford Easterling
Craig Hicks
Kristy Hicks