

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2011-263**

JOHN VEITCH

APPELLANT

VS.

**FINAL ORDER ALTERING HEARING OFFICER'S
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
RECOMMENDED ORDER**

**PUBLIC PROTECTION CABINET
KENTUCKY HORSE RACING COMMISSION
ROBERT VANCE, APPOINTING AUTHORITY**

APPELLEE

** ** * * *

The Board, at its regular July 2013 meeting, having considered the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer, dated April 24, 2013; having noted Appellant's exceptions, Appellee's exceptions, Appellant's response to exceptions, Appellee's response to exceptions, oral arguments, and being duly advised,

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

A. **Delete** Findings of Fact paragraph 2 and substitute the following:

2. Veitch subsequently met the requirements and was appointed Chief State Steward pursuant to KRS 12.050. He was hired to this non-merit position effective July 16, 2005, after a letter, in compliance with KRS 12.050, was signed by the Appointing Authority and approved by then Governor Fletcher (Appellee's Exhibits 5 and 6). Procedures for the hire of an employee to a merit or classified position were not employed in this instance. A "12:050" letter is not used to fill a vacant merit position.

B. **Delete** Findings of Fact paragraph 5 and substitute the following:

5. The position of Chief State Steward, as it existed in 1999, was a merit position with a class code of "3845" (Appellant's Exhibit 3). On June 9, 1999, the Kentucky Racing Commission (now the Kentucky Horse Racing Commission) passed a motion to make a request to the Personnel Cabinet pursuant to 101 KAR 2:095, Section 3, that Bernie Hettel serve in the ". . . dual non-merit positions as executive director of the Commission . . . and as Chief State Steward." (Hearing Officer Exhibit 1). Richard "Smitty" Taylor, Chairman

of the KHRC, sent his June 23, 1999 letter to Personnel Cabinet Secretary Carol Palmore, with that request.

C. **Delete** Findings of Fact paragraph 8 and substitute the following:

8. The KHRC is attached to the Public Protection Cabinet for administrative purposes. KRS 230.225(1).

D. **Add** Findings of Fact paragraphs 23, 24, and 25 as follows:

23. The Chairman of KHRC, Robert M. Beck, Jr., and the then Acting Executive Director of the KHRC, Marc Guilfoil, both concurred with Secretary Vance in the decision to terminate Veitch from his non-merit employment.

24. The Board finds that Robert Vance as Secretary of the Public Protection Cabinet is the Agency head for that Cabinet and for the agencies attached to it, including the KHRC.

25. The Board finds that Secretary Robert Vance acted in terminating the employment of John Veitch under the expressed and implicit authority set forth in KRS 18A.005(1), and the expressed and implicit authority set forth at KRS 12.270(3) and (4). The Board finds that the enumeration of duties associated with that Executive Director of the KHRC set forth in KRS 230, *et seq*, did not and does not confer sole and exclusive authority over personnel and programs in the KHRC to that Executive Director. The Board finds that a plain reading of the statutes listed *infra* clearly granted the authority to Secretary Robert Vance to terminate the employment of John Veitch as Chief State Steward.

E. **Delete** Conclusions of Law paragraph numbers 2 through 15.

F. **Renumber** Conclusions of Law paragraphs 16, 17, and 18 to 2, 3, and 4, respectively.

G. **Add** Conclusions of Law paragraph 5, 6, 7 and 8 as follows:

5. The Board concludes as a matter of law that the Secretary of the Public Protection Cabinet, Robert Vance, had the authority conferred by KRS 18A.005(1) and KRS 12.270(3) and (4) to make the decision to instruct Holly McCoy-Johnson to draft a letter terminating employment of John Veitch as Chief State Steward.

6. The Board concludes as a matter of law that the authority possessed by the Secretary of the Public Protection Cabinet, as outlined in Conclusion of Law paragraph 5 above, does not conflict with the authority granted the Executive Director of the KHRC at KRS 230.230.

7. The Board rejects the Hearing Officer's conclusions that rely on interpretations of Executive Branch Ethics Commission opinions and statutes and regulations of other states in determining the boundaries and parameters of the Secretary's authority. The Board concludes that Kentucky statutory law provides ample authority for the Public Protection Cabinet Secretary, as the Agency head, to exercise that authority conferred explicitly and implicitly in KRS Chapter 12 and KRS Chapter 18A to terminate a non-merit employee in an agency under his purview.

8. As a non-merit employee, the Appellant was legally dismissed without cause by Holly McCoy-Johnson at the direction of Secretary Robert Vance.

H. **Delete** the Recommended Order.

IT IS HEREBY ORDERED that the appeal of **JOHN VEITCH VS. PUBLIC PROTECTION CABINET, KENTUCKY HORSE RACING COMMISSION, (Appeal No. 2011-263)** be **DISMISSED**.

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 16th day of July, 2013.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day mailed to:

Hon. LaTasha Buckner
Hon. Gordon R. Slone
Hon. Thomas M. Miller
Rhonda Hardesty

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2011-263

JOHN VEITCH

APPELLANT

VS.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER

PUBLIC PROTECTION CABINET
ROBERT VANCE, APPOINTING AUTHORITY

APPELLEE

** ** * * * * *

This matter came on for evidentiary hearing on October 3 and 4, 2012, at 9:00 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Roland P. Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment and authorized by virtue of KRS Chapter 18A.

Appellant, John Veitch, was present and represented by the Hon. Thomas Miller. Appellee, Public Protection Cabinet, was present and represented by the Hon. Gordon Slone and the Hon. LaTasha Buckner. Also present as Agency representative was Marc Guilfoil.

The Appellant had been terminated from his position of Chief State Steward with the Kentucky Horse Racing Commission ("KHRC"). The issues were: (1) Did the termination of the Appellant constitute discrimination based on age over forty? (2) Was the termination performed by the improper person and, therefore, illegal? (3) Was the termination the result of Appellant's insistence on exercising his constitutional right of due process? and (4) Since the termination was instituted "without cause," was it in violation of laws pertaining to the termination procedures pertinent to classified employees, as Appellant claims he was a classified employee? The burden was on the Appellant to prove his case by a preponderance of the evidence.

Prior to the hearing Appellant filed a motion to elicit by telephone the testimony of two of his witnesses. The Cabinet advised it had not agreed to telephonic testimony. Appellant stated he was prepared to have these two individuals offer their testimony in person.

The rule separating witnesses was invoked and employed throughout the course of the hearing. Appellant waived presentation of an opening statement. An opening statement was presented by the Appellee.

BACKGROUND

1. The first witness for the Appellant was **Marc Guilfoil**. Mr. Guilfoil has been Deputy Executive Director of KHRC for approximately six years. He was Acting Director from December 2011 to April 2012. Pursuant to a Subpoena *Duces Tecum*, he brought to the hearing copies of the KHRC meeting minutes from November 1, 2011 to the current date, with the exception of the two months when there had been no committee meeting. Guilfoil has no access to the personnel file of Barbara Borden; knows not of the existence of any list of the employees of the KHRC which would include their year of birth, date hired and current position; and stated there exists no official description of the requirements to obtain the position of, or a list of the duties pertaining to the Chief State Steward, or the Assistant State Steward.
2. In 2011, about the 15th of November, he had spoken with Secretary Robert Vance about whether the KHRC would be better off with or without John Veitch. The telephone call had been made by Secretary Vance who asked that very pointed question. Mr. Guilfoil answered in the affirmative, but stated he did not want his response to be the "end all, be all" to the matter. Guilfoil then related a few reasons for his opinion including that the Commission was a "dysfunctional family at the time." Employees were not getting along with other employees.
3. In September of 2011 there had been an incident at Kentucky Downs. An error occurred in the "official" posting of the fourth place finish of a race. Appellant had made a comment that the photo finish equipment was substandard. This comment resulted in Ford Cook, of American Teletimer, contacting the witness. Mr. Cook was not happy about the statement made to the press and explained there was nothing substandard about the equipment. The President of Kentucky Downs also issued a statement. The Commission received bad press over this incident.
4. Neither the press reports nor the fact that Veitch had appealed and defended certain charges made by the KHRC, were ever discussed with Vance. The decision to discharge Veitch was not his (Guilfoil's). The KHRC did not vote to terminate the Appellant.
5. He identified Appellant's Exhibit 1 as the November 28, 2011 letter addressed to John Veitch which notified Appellant he was terminated as Chief State Steward. He identified Appellant's Exhibit 2 as a memorandum he had prepared on February 28, 2011, which had been attached to a notice of furlough.
6. In his review of Appellant's Exhibit 3, Class Specification for Chief State Steward, Guilfoil testified this document accurately described the duties and responsibilities Appellant had as Chief State Steward. There are also Kentucky Administrative Regulations that delineate other duties.

7. As Deputy Director, Guilfoil had been Appellant's supervisor. Veitch's employment was a full-time appointment from the Governor. Appellant did not serve on an interim basis or as a Division Director. He was not anyone's Principal Assistant. Veitch was the state's representative at the thoroughbred tracks who enforced the rules of racing. It was either Guilfoil or the Commission's Executive Director who occasionally gave performance directions to Appellant.

8. He identified Appellant's Exhibit 4 as the March 16, 2011 Notice of Violation and Administrative Hearing issued by KHRC to John Veitch. Guilfoil did have a conversation with Appellant regarding a possible resolution of this matter.

9. He identified Appellant's Exhibit 6 as the November 14, 2011 Showing of Good Cause for 30-Day Extension requested by the Hearing Officer. He identified Appellant's Exhibit 7 as the November 15, 2011 Agency Order he had signed approving the Hearing Officer's request for an extension. At the time he signed the Agency Order, Guilfoil was not aware Appellant would be terminated. He had no discussions with anyone by that date about termination.

10. Mr. Veitch was first hired by the Commission to the position of Deputy Executive Director. Veitch did not qualify for the position of State Steward at that time. It was intended Veitch would become Chief State Steward once he met the qualifications of a Steward. Veitch then trained to be a Steward. When Appellant became Chief State Steward there had been no advertisement for the position nor had a register been requested or produced.

11. Guilfoil cited another problematic incident: a Breeder's Cup race where a jockey had filed an objection. When camera footage of the Stewards was shown, the bottom right corner of the screen showed broadcast of a football game. This was picked up by some of the press and resulted in embarrassment for the Stewards and the Commission.

12. The "Life at Ten" incident¹ played no part in Guilfoil's opinion that the KHRC was better off without the Appellant. Appellant's age played no part in his opinion. Appellant was not the oldest employee at the KHRC.

13. The KHRC is attached to the Public Protection Cabinet for administrative purposes only. The PPC handles the hiring and firing of non-merit employees, helps the Commission with employee concerns and handles the budget.

14. At no time did Guilfoil perform a Performance Improvement Plan or evaluation for the Appellant, as Veitch was a non-merit employee.

¹ The subject of the March 16, 2011 Notice of Violation and Administrative Hearing.

15. **Holly McCoy-Johnson**, who works for General Administration Program Support (GAPS) was the next witness. GAPS is an entity that provides administrative services to the PPC, Labor Cabinet, and Energy and Environment Cabinet. Pursuant to a Subpoena *Duces Tecum*, she brought to the hearing those documents that were in her custody. It was noted the Appellant had previously been provided the requested Commission Committee Meeting Minutes. Appellee objected to production of the other documents. The witness was excused from the hearing room.

16. After hearing the arguments of counsel, the Hearing Officer **DENIED** Appellant's request for the personnel file of Barbara Borden. However, he determined Appellant was entitled to a list of KHRC employees, and the year of their birth. All counsel in the matter were directed to keep this information confidential. At the end of the appeal time in this matter, Appellant's counsel is to either return to Appellee's counsel the document so produced, or in the alternative certify to Appellee's counsel that such documents had been shredded and destroyed.

17. Ms. McCoy-Johnson then returned to the hearing room to offer her testimony.

18. She identified Appellant's Exhibit 1 as the termination letter she had signed after having been directed by Secretary Vance to draft it. She had pulled Mr. Veitch's file, looked at the paperwork and determined he was a non-merit employee. "Everything shows that he is a non-merit." He was appointed under KRS 12.050, the Governor signed off on the appointment and all was done in accordance with a non-merit appointment. Mr. Veitch was a non-merit employee in a non-graded position.

19. Barbara Borden was appointed to a pay grade "00," that is a non-merit employee. She also had a KRS 12.050 letter of appointment, signed by the Appointing Authority and approved by the Governor, which made her a State Steward effective April 1, 2012. This position differed from a Chief State Steward and an Assistant State Steward.

20. She identified Appellant's Exhibit 8² and Appellant's Exhibit 10, the Job/Class Specifications, as documents that were retrieved from the Personnel Cabinet's website. The ungraded "00" merit employees are not on this list. A position is "graded" when it has a defined range of compensation at the point an employee is hired. An "ungraded" position is one that is not posted on the Personnel Cabinet website. For such a position, there is no defined minimum compensation at the time of hiring. The Agency may pay what they choose, so long as such compensation is not greater than that paid to the Governor.

² This document is sealed in the record due to the confidential personal identifier information it contains.

21. The parties stipulated to the admission of Appellee's Exhibit 1, the Personnel Cabinet Authorization Signature Form. By this form, Secretary Robert Vance, effective February 1, 2009, designated Holly McCoy-Johnson an Appointing Authority for the PPC authorizing her to sign certain types of documents.

22. The hiring of merit or classified employees requires adherence to specific statutes and regulations. An agency sends up a request to fill a position. A register is posted for ten days by the Personnel Cabinet. A list of candidates is then sent to the agency. The agency reviews the list, considers veteran's preference, and submits to the Personnel Cabinet the names of those it wishes to consider. The Personnel Cabinet makes a determination which candidates meet the position's minimum qualifications. The agency may then interview and select a successful candidate. If it is an agency that uses GAPS, Ms. McCoy-Johnson then signs approval as Appointing Authority. The Personnel Cabinet does a background check, then approves the appointment.

23. There are several ways a non-merit or unclassified employee may be hired. If the position is already on the books, Ms. McCoy-Johnson might get a telephone call from the agency after its Secretary has approved it with a justification letter. Ms. McCoy-Johnson then drafts a "12.050" letter if it is a policy making position, or a "12.040" letter if it is a Commissioner's position. This letter goes to the Governor for review and approval. Upon approval, the person is appointed. There is no competition for such appointment.

24. She identified Appellee's Exhibit 2 as the October 18, 2004 "12.050" letter requesting approval for the appointment of John M. Veitch to the position of Deputy Executive Director. This appointment was approved by Governor Ernie Fletcher.

25. She identified Appellee's Exhibit 3 and Appellee's Exhibit 4 as the back and front, respectively, of the Personnel Cabinet form evidencing appointment of the Appellant to the Deputy Executive Director position effective November 16, 2004. Appellee's Exhibit 3 is a copy of the explanation of codes used on the front of the form. The KHRC is under the Public Protection Cabinet; Class Code 9943 means it is an unclassified position; he was paid a salary of \$6,377.80 a month; he was a non-merit employee serving a six month period; Veitch had no prior state service; he was a non-merit employee in a non-merit position.

26. She identified Appellee's Exhibit 5 as the July 8, 2005 "12:050" letter requesting approval of the appointment of John M. Veitch to the position of Chief State Steward. This appointment was approved by Governor Ernie Fletcher. She identified Appellee's Exhibit 6 as the Personnel Cabinet form showing the appointment of John Veitch as Chief State Steward effective July 16, 2005. The "0191" code showed that he was in a non-graded, non-merit position. The salary pay grade of "00" also showed he was in a non-graded position and was earning \$7,070.04 per month.

27. Appellee's Exhibit 7 is the Personnel Cabinet form showing the new monthly salary for the Appellant as Chief State Steward of \$7,423.56 per month. The form shows him as a non-merit employee in a non-merit position.

28. She identified Appellee's Exhibit 8 as the April 9, 2004 "12:050" letter requesting approval of the appointment of Michael K. Sample to the position of Chief State Steward. This appointment was approved by Governor Ernie Fletcher. Appellee's Exhibit 9 is the Personnel Cabinet form showing the appointment of Sample to Chief State Steward effective April 16, 2004. The "0191" class code shows him to be a non-graded, non-merit employee who would serve a six month period. Appellee's Exhibit 10 is the Personnel Cabinet form showing that Sample had resigned as Chief State Steward July 15, 2005.

29. It was the Cabinet Secretary who was the Appointing Authority for both Mr. Sample and Mr. Veitch in their positions of Chief State Steward.

30. R. Williams was "detailed" to Chief State Steward after Mr. Veitch had been terminated. One may be "detailed" to a position up to one year and compensated accordingly. A merit employee may be detailed into either a merit or non-merit position. Mr. Williams' detail has ended. There is currently a vacancy in the Chief State Steward position. R. Williams, who is now an Associate State Steward, is 49 years of age.

31. Upon her review of Appellant's Exhibit 3, the Class Specification for Chief State Steward, Ms. McCoy-Johnson testified the position identified on this form is no longer active. This class was established in 1993. It has a title code of "3845." When "3845" was active it would have been a merit position. The Chief State Steward position to which Mr. Veitch was appointed (Appellee's Exhibit 7) showing a class code of "0191" is a different position from the one coded "3845." When there is a "0" in the title, this is a non-graded, non-merit position. Appellant had been appointed into the non-merit Chief State Steward position at the time there still existed a separate merit Chief State Steward position on the books.

32. There is no mechanism in state government which would allow a merit employee to be hired at a salary greater than the mid-point. Appellant was hired in at a salary substantially higher than the highest mid-point for the merit position of Chief State Steward.

33. In her review of the personnel file of Barbara Borden, Ms. McCoy-Johnson testified Borden had been appointed to the position of State Steward. There was nothing in the file to indicate that she had been detailed or appointed to Acting Chief State Steward.

34. The next witness was **John Ward**, who since April 2012 has been the Executive Director of the KHRC. Prior to that position he was a member of the Commission. He is 67 years old.

35. Meeting minutes of the Commission are prepared in-house and reviewed by staff for accuracy. The parties stipulated that Appellant's Exhibit 11 represented Commission meeting minutes for the period stated therein.

36. Upon review of these documents, Mr. Ward agreed that the minutes for August 15, 2012, reflected that Barbara Borden was the Acting Chief State Steward. She had been appointed the first part of April 2012 by Chairman Beck. He also agreed upon review of minutes from December 14, 2011, that Rick Williams was identified as Acting Chief State Steward, although Ward had no knowledge Mr. Williams ever held this position. He voiced the same acknowledgement of the minutes generated for the meetings for February 15 and March 14, 2012.

37. Subsequent to the filing of administrative charges by the KHRC, Ward approached Veitch four to five times about the possibility of settling the matter. He told Appellant the matter "could all just go away with just a little notation in his file and let's move on with racing in the state of Kentucky." Veitch thanked him each time, but did not respond. Ward had been the sole Commission member who voted in Appellant's favor when the Commission decided to refer the matter to a hearing officer, and at the time the hearing officer made his recommendation.

38. Mr. Ward had not been consulted about the termination of the Appellant, nor had he ever discussed this with Secretary Vance. When he approached the Board chairman to advise he wished to speak to Veitch about settling the administrative charges, he was not dissuaded from making the approach nor had anyone mentioned terminating Appellant or anything about Appellant's age. Currently the Chief State Steward position remains vacant.

39. The KHRC is attached to the Public Protection Cabinet for administrative purposes of personnel and budget matters. The Commission's Executive Director, as well as the Commission itself, follows the policies of the Public Protection Cabinet in the Executive Branch. The Commission is able to fill employment positions but "we also have control from above." The firing of employees was never something in which the Commission was involved. The designation of an employee as "Acting" Chief State Steward was done by the Commission.

40. The next witness was **Barbara Borden**. Ms. Borden had been hired as a State Steward. She last worked as a Steward on September 30, 2012, at Turfway Park. She agreed that in that track's program she had been identified as Chief State Steward. No one told her she was the Acting Chief State Steward. Ms. Borden is 52 years of age.

41. In March of 2012, Ms. Borden submitted an application for the position of State Steward. Prior to that she had been an Association Steward employed by Ellis Park. She was contacted by John Ward and spoke with Marc Guilfoil. Guilfoil told her she had the State Steward position. She had completed the University of Louisville's Steward Accreditation Program and kept up her continuing education.

42. There is currently an open Chief State Steward position. Ms. Borden fills in until the position is filled by another. As Acting Chief State Steward, she has received no change in her State Steward salary.

43. Rick Williams was the first person to fill-in as Chief State Steward after Appellant had been terminated. She believes Mr. Williams is approximately 55 years of age.

44. Robert M. Beck, Jr., who is 62 years of age and has, since the spring of 2008, served as Chairman of the KHRC, was the next witness.

45. It was mid to late summer of 2011 when he had three to four conversations with Secretary Vance regarding the Appellant. They discussed some of Appellant's activities as Chief State Steward and whether the Commission would be better off with or without Appellant. He did not recall that the "Life at Ten" matter had been a part of the discussion nor was the license revocation matter discussed. These conversations probably took place after that administrative hearing, most likely in July or August.

46. He and Secretary Vance reached a mutual decision sometime around the beginning of October 2011 that Veitch should be terminated. They discussed the Fall Kentucky Racing calendar including the Breeder's Cup at Churchill Downs and the Churchill Downs Meet. It was decided that rather than hire a steward during that period, termination would wait until after the conclusion of the Churchill Downs Meet. Logistics of the termination were handled by the PPC. Beck was not involved in those logistics.

47. Appellant's right to defend himself in the "Life at Ten" administrative hearing had no bearing on his conclusion that Veitch ought to be terminated. His opinion was generated prior to issuance of the ruling in that matter. Beck was aware the ruling recommended Mr. Veitch be found negligent and that his license be suspended for one year. Beck signed the Final Order in the matter suspending Appellant's license. With such license suspended, Veitch cannot perform duties as Chief State Steward.

48. He testified about a number of occurrences that gave him some concern about the Appellant. He continued to monitor Appellant's performance. There was an incident prior to the summer of 2011 regarding a positive finding pertaining to a trainer and a veterinarian. He discussed the matter with Appellant and indicated there appeared to be a failure to apply the trainer responsibility rule.

49. The Executive Director as a matter of policy instituted a rule that anyone employed by the Racing Commission should not function in a non-racing Commission job on race day. One such employee had been named as an Assistant Starter at the Kentucky Derby. Mr. Veitch licensed that employee to work the gate that day.

50. During late summer of 2012 a number of Commissioners came to him to complain about Veitch's performance. They suggested Veitch be removed. There were events at Race Commission meetings where Veitch's rulings came under direct questioning. His persona under questioning by the Commission was defensive and arrogant and he was not willing to engage in discourse with Commission members. Veitch was not a positive force for the Commission.

51. He was also familiar with the incident at Kentucky Downs. Two individuals told Beck that Veitch smelled of alcohol that day and appeared to have been impaired.

52. The integrity of the horse racing industry in Kentucky is very important. He did not believe they could continue to operate on this basis. Appellant's age never entered into the consideration of termination.

53. **Robert Vance**, who is 72 years of age and Secretary of the Public Protection Cabinet, next offered his testimony. The PPC consists of ten agencies, five of which directly report to the Cabinet, the other five being attached for administrative purposes. The KHRC is one of those agencies attached for administrative purposes.

54. Secretary Vance had telephoned Marc Guilfoil and asked his opinion whether in the best long-term interests of horse racing, Mr. Veitch should or should not continue to be employed by the KHRC. Guilfoil said Veitch should not be employed.

55. Appellant's Exhibit 1 was the termination letter prepared under Vance's direction. The decision to terminate was his. He shared his decision with Chairman Beck. Vance would not have terminated Veitch had Beck objected. He most likely made this decision at the beginning of October 2011. In his discussions with Beck, the matter of "Life at Ten" was never discussed.

56. Upon his review of Appellant's Exhibit 3, Secretary Vance assumed there is a vacant Chief State Steward position. Currently a State Steward is serving in that position. Due to the litigation, the position has not been filled.

57. Secretary Vance had read about the administrative proceedings pertaining to "Life at Ten" in the Lexington Herald-Leader and the Louisville Courier-Journal. He never discussed hearing testimony with Chairman Beck. The matter had "zero influence" on his decision to terminate, particularly from an administrative standpoint. The KHRC was the proper entity to handle the "Life at Ten" matter. That was totally unrelated to Vance's decision to terminate the Appellant.

58. When Vance became Secretary of the PPC, the state was in a recession. Horse racing was struggling. Fees were raised on a number of racing licenses. The Commission was very stretched for money. Under these conditions, he noticed certain behaviors of Veitch that were not right. During meets at Kentucky Downs, while other employees stayed in local Kentucky motels, Veitch stayed in Nashville every night and his bills were much higher. This showed a lack of "team effort." When a veterinarian advisor to the Commission recommended that a particular drug be removed from a list due to "new science," Veitch said he was against it. Vance told KHRC members they needed to speak with one voice on the issue before they came forward. He was advised the Commission thought Veitch had been "on-board." That incident bothered the Secretary. At Kentucky Downs a race finish had been misread. Veitch reported it as an equipment problem. Other reports said that the same equipment had been used at other tracks in the state. At a Commission meeting, Ned Bonnie questioned Mr. Veitch on a particular issue. In response, Veitch came down hard on Bonnie. He was arrogant and talked down to people.

59. His decision to terminate Veitch was the result of an accumulation of matters. They were also going to hire a new Executive Director and he believed that person did not need the "baggage" of John Veitch. Veitch's age played no role in his decision.

60. He identified Appellee's Exhibit 11 as the document executed by Governor Beshear which authorized Secretary Vance to handle all documents pertaining to the PPC.

61. John Veitch, the Appellant, was the next witness. Jim Gallagher, who had been Executive Director at the time, told Veitch that he would be the Chief State Steward after he obtained his certification. It was July 1, 2005, when he was appointed Chief State Steward.

62. Veitch would generally receive documents once a year from the Personnel Cabinet whenever there was some change pertaining to his employment. He never noticed or looked for any notations thereon about the status of his employment, or whether he was merit or non-merit. Prior to today's hearing, he never received any criticism of his job performance other than the charges pertaining to the "Life at Ten" matter.

63. Although he had not seen Appellant's Exhibit 3 prior to today's hearing, he acknowledged the document accurately describes the duties and responsibilities of his position of Chief State Steward. He had no duties with administrative staff around the office nor did he act on anyone's behalf at the racetrack or with staff.

64. He understood at the time of his appointment that his position was permanent. Anything that happened at a racetrack was the responsibility of the Stewards. At a racetrack there are two association Stewards that serve with Veitch as State Steward. The three made collective decisions.

65. He acknowledged having received the letter of termination (Appellant's Exhibit 1) on the morning of November 28, 2011. At that time he was given the option of resigning or being fired. He did not resign.

66. After issuance of charges by the KHRC, John Ward offered him an opportunity in negotiation to accept a lesser penalty by accepting part of the responsibility. Had he agreed to same there would have been no evidentiary hearing.

67. After the June 2011 hearing, he had a "very strained relationship" with Executive Director Lisa Underwood. However, he had a tenuous relationship with her prior to the hearing, as did everyone else.

68. Mr. Veitch described in detail his version of the incident at Kentucky Downs. A mistake had been made by the placing judges. However, there was nothing the Stewards could do by regulation to correct the matter once it occurred. He denied having criticized the equipment. He did criticize the facilities which separated the Stewards from where they could have had proper communication with the placement judges. He also denied drinking at Kentucky Downs. Depending on the racetrack, security staff usually gave him and other staff breathalyzer tests. He never drank alcohol at a racetrack.

69. When they traveled to Kentucky Downs, there were a number of "cheap motels in the vicinity." Veitch is responsible for the equipment brought to the site. There is no place at the track to store the equipment and so he locked it up in his car. A year before, some cars at one of the local motels had been broken into.

70. About September of 2010, he asked Mr. Guilfoil whether he could stay in Nashville and put his car in the parking garage to safe keep several thousand dollars worth of equipment. He received approval. Afterward, when he submitted his expenses, same was denied and he ended up paying the bill by himself.

71. He did not perceive his discussion with Ned Bonnie as a heated argument. He had explained to Mr. Bonnie what Stewards are allowed to do under regulation for a first offense.

72. He had never received any complaints about his behavior from state veterinarians. He attended a medication committee meeting and told Mary Scollay, KHRC Equine Medical Director, that as long as a regulation is on the books about a regulated drug, he had no power to change the rules.

73. The showing of a football game on a TV screen at the Breeder's Cup would have occurred after the decision to terminate him had been made.

74. After his appointment as Chief State Steward, he never had any contact with Mr. Beck or Mr. Vance except at Commission meetings or during infrequent visits to the Stewards' stand on special race days. He never received any advice or corrective action from Vance or Beck, prior to the June 2011 hearing, nor any comments about any of the events that allegedly led to his termination.

75. No one ever told him his age was a problem. He has no direct evidence that the "Life At Ten" matter was a reason for his termination or that his age played a part. Mr. Veitch was 66 years old when he was terminated.

76. The KHRC through its administrative hearing suspended Veitch's ability to hold a license. This license is required for him to serve as Chief State Steward.

77. At the start of the second day of testimony the parties stipulated to the fact that the Kentucky Administrative Regulations require the Chief State Steward to possess a racing official's license and, furthermore, the Appellant, John Veitch, is not so currently licensed.

78. The next witness was **Richard Leigh**. Mr. Leigh has been a licensed racing official in Kentucky for the past twenty to thirty years. He has qualified and serves as a Steward at Kentucky racetracks and had worked with the Appellant since 2005.

79. During the past two years in his interactions with Appellant, he has never observed Mr. Veitch to have drunk alcohol while on duty or to have been intoxicated. He observed no change over that time in Appellant's performance nor had he received any complaints from anyone about Appellant. He opined Mr. Veitch was always "an able Steward."

80. He was familiar with the September 2011 incident at Kentucky Downs. The Stewards at that facility are in a completely different room from that of the placing judges. The facilities at Kentucky Downs are not as good as at other tracks. As he was racing secretary for that event, he placed no fault on Mr. Veitch for the incident.

81. The next witness was **Brooks Becraft**. Mr. Becraft has been a licensed racing official in Kentucky for the past thirty years. He serves as a Steward at thoroughbred race tracks in Kentucky and had worked with the Appellant on occasion.

82. From and since the Breeders' Cup of 2010, he has never seen the Appellant drink alcohol while on duty or to have been in a state where alcohol affected his job performance. He has not observed any change in Appellant's performance. Appellant did a good job.

83. Appellant's case in chief was closed. Appellee presented a motion for a directed recommendation on the allegations pertaining to age discrimination and retaliation. After hearing the arguments of counsel, the motion was **OVERRULED**.

84. Appellee began its case with the testimony of **Mary Elizabeth Harrod**. Ms. Harrod has been employed in the Personnel Cabinet for thirteen years. For seven years she served as Director of Employee Management and is currently the Commissioner for the Department of Human Resource Administration.

85. She identified Appellee's Exhibit 1 as a Personnel Cabinet Authorization Signature Form which gave Holly McCoy-Johnson Appointing Authority as the designee of Secretary Robert Vance. When an agency, such as the KHRC, is attached to the Public Protection Cabinet, it is the Public Protection Cabinet's Secretary who is the agency's Appointing Authority.

86. She described the requirements for filling employment positions under the merit system. A register is requested for the agency. The agency then determines which candidates to interview. Those candidates must then meet minimum requirements of the vacant position.

87. When Veitch was hired in 2005, there had been no agency requests for a register for the Chief State Steward position. Upon her examination of Appellant's Exhibits 2 and 4, she opined that Veitch's appointment to Deputy Executive Director was as a non-merit employee.

88. Class Specifications are prepared for all the classes within the merit system. She identified Appellee's Exhibit 12 as a Class History Summary which shows the history of the classification of Chief State Steward in the merit system. Title Code 3845 means it is in the merit system. The class was established April 16, 1993 and abolished March 16, 2006. At that time, a review of all classes had been performed. Classes that had a vacancy, or where no register requests had been made in the previous twelve months, were abolished. On March 16, 2006, the classified Chief State Steward position had no incumbent nor had a register for that position been requested the previous twelve months. The KHRC could have requested a register for Chief State Steward any time up to the abolishment of the class.

89. She identified Appellee's Exhibit 6 as the Request for Personnel Action (P-1) for John Veitch appointing him to the Chief State Steward position. Items 30 and 31 indicate that it is a non-merit position. The salary listed thereon is substantially higher than the mid-point for the Chief State Steward classified position in the merit system. All classes with a "0" title code are non-merit.

90. She identified Appellee's Exhibit 4 as the Request for Personnel Action (P-1) which appointed John Veitch to the Deputy Executive Director position. Positions with grades above 19 are non-merit positions. This document showed a grade of 20, therefore, it was non-merit.

91. Currently there is no merit classification for a Chief State Steward. It is possible to have two positions with the same title: One as a merit position and one as a non-merit position. Ms. Harrod then gave some examples. At the time Veitch had been appointed Chief State Steward, there existed one position that was non-merit and one position that was merit.

92. She was not aware when the non-merit position of Chief State Steward was created. Ms. Harrod was directed to search records in her possession or access that document and return with it later today.

93. If a person held the position of a merit Chief State Steward and the classification of merit Chief State Steward were abolished, that employee could continue to hold the position. It would mean the agency could no longer fill that position, once vacant.

94. Even if there were no existing unclassified position of Chief State Steward at the time Appellant was hired, and if there was only a classified Chief State Steward position at that time, he could not have been hired to the classified position.

95. In her examination of p. 2 of Appellant's Exhibit 10, she stated the "3800" level represents classified positions. The "9900" level is an unclassified, graded classification.

96. She also reviewed Appellee's Exhibit 9, the Request for Personnel Action (P-1) for Michael K. Sample. Item 16 shows a class code of "0191" for Chief State Steward. Mr. Sample was appointed to the unclassified Chief State Steward position April 16, 2004. This document shows the same class code and title as the Chief State Steward position to which Mr. Veitch had been appointed (see Appellee's Exhibit 6).

97. Upon her review of Appellee's Exhibit 5, she identified this document as a "12:050" letter. Such letters are used for non-merit appointments. These letters are not used for appointing merit employees.

98. **Dinah Bevington**, Executive Director of the Office of Legal Services, Personnel Cabinet, was the next witness. The KHRC is not exempt from the Personnel Cabinet's system. Secretary Vance, Secretary of the Public Protection Cabinet is the Appointing Authority for the KHRC. Although the KHRC Executive Director may make decisions about hiring employees, such must be processed through the Personnel Cabinet from the Public Protection Cabinet. Merit employee compensation is bound by what is set by the Personnel Cabinet. Ms. Bevington had no experience or knowledge that an Executive Director of the KHRC had ever been designated as an Appointing Authority, or given the ability to fix merit compensation. That Executive Director may certainly make a recommendation of salary that is within the range set by the Personnel Cabinet for any merit position.

99. A letter issued pursuant to KRS 12:050 is used to secure the governor's approval for an appointment. It is not used for the appointment of any individual to a merit position. It would be improper for a governor to become involved in a merit hiring.

100. After research, Ms. Bevington found that the merit Chief State Steward position with a code of "3845" had been created April 16, 1993. The non-merit Chief State Steward position with the code "0191" was created June 16, 1999.

101. A Blue Ribbon Commission set out to abolish vacant and unused classifications. As the coded "3845" Chief State Steward merit position had not been occupied at the time, and as no certificates had been requested the previous twelve months, that classification was abolished March 16, 2006. Upon her review of Appellee's Exhibit 12, she testified this document was consistent with the abolishment of the "3845" class.

102. It is possible that there may simultaneously exist a merit and non-merit classification with the same name.

103. The paperwork in Veitch's personnel file along with documents show his appointment to a position with a "0191" title code indicate he held a non-merit position.

104. **Christopher Clark**, Director of Enforcement for the KHRC, was the next witness. He had been present at Kentucky Downs during the meet of September 2011. Accompanied by Danny Hyland, he spoke to the Appellant at the racetrack's parking lot. Clark detected the smell of alcohol from Veitch. It was close to 100 degrees that day and Clark was not certain whether the odor came from Veitch's mouth or whether it was his perspiration.

105. Clark's prior employment from 2000 to 2010 had been with the Kentucky State Police. "I know what alcohol smells like." He had come into contact with people under the influence or who have imbibed alcohol. He knew that the odor had not come from Mr. Hyland as Clark had driven to the facility with Hyland in the same vehicle.

106. Clark was subsequently questioned about this incident by Lisa Underwood, then Executive Director of the KHRC. He was later asked about it by Chairman Beck.

107. He had not conducted breath tests of the Stewards that day. He had not been ordered by his superiors to conduct such breath tests until after this incident.

108. **Holly McCoy-Johnson** was recalled to the stand. Upon her review of Appellant's Exhibit 8, she testified that Barbara Borden's position is that of State Steward. The document also shows that the position of Chief State Steward is vacant.

109. As previously directed, McCoy-Johnson brought with her certain documents to which she had access. These documents are from the Kentucky Human Resources Information System (KHRIS) for the period of the "go-live date" of March 16, 2011, to the present. The document shows the hires of KHRC employees. It was marked and admitted into evidence as Appellee's Exhibit 13. The document shows there is no position of Interim Chief State Steward.

110. An "acting" position is something the agency may do, to fill the needs of the agency. It is not an appointment or matter that requires action or attention of the Personnel Cabinet.

111. **Marc Guilfoil** was recalled to the stand. He clarified the identity of individual known as Richard or Rick Williams. Richard Williams is the Presiding Judge on the standard bred side; a position that is equivalent to the Chief State Steward on the thoroughbred side. Rick Williams, currently retired, was a fill-in Steward and Assistant Director of Breeders Incentive. When Veitch needed time off from work, Rick Williams filled in as Steward; he was later detailed to Chief State Steward when Veitch was terminated. Once Rick Williams retired, Ms. Borden was named Acting Chief State Steward. At that time, Rick Williams was in his upper 50s in age.

112. The Chief State Steward reports to the Executive Director of the KHRC. The KHRC holds the Chief State Steward responsible for what had occurred during the Kentucky Downs' incident.

113. Mr. Guilfoil denied having given Veitch prior approval to stay at the hotel in Nashville. Approval would have had to have come from the Cabinet, as Guilfoil could not grant same. He also testified that Lisa Williams, the Executive Director, had ordered Guilfoil several times to have Veitch return the original records in his possession to the office.

114. **Mary Elizabeth Harrod** was recalled to the stand. Upon direction, she returned with possession of three documents which were marked for identification and admitted into evidence as follows:

Hearing Officer Exhibit 1: A June 23, 1999 letter from Richard "Smitty" Taylor, Chairman, KHRC, to Personnel Cabinet Secretary Carol Palmore. This letter was a request to Secretary Palmore to allow Bernie Hettel to serve in the dual non-merit positions as Executive Director of the Commission and as Chief State Steward. Hettel was Executive Director at that time. Regulations allow dual employment. This was a request to create the non-merit Chief State Steward position.

Hearing Officer Exhibit 2: Memorandum of August 18, 1999, from H. Redmon Lair, Deputy Secretary, to Personnel Cabinet Secretary Carol Palmore. This memorandum was a clarification of Mr. Hettel's salary to be paid while serving in the dual employment role. Ms. Harrod testified that the non-merit Chief State Steward ungraded position was established June 16, 1999, and the cited salary had been approved.

Hearing Officer Exhibit 3: A computer screen printout from the records kept by Ms. Harrod's office. It contains information that would be placed in a P-1. This information pertains to the classified title "3845" of Chief State Steward. The position was abolished November 1, 1998. Hettel held the position on an "Interim" basis.

115. Upon her review of p. 2 of Appellant's Exhibit 3, she testified the merit class for Chief State Steward had been established April 16, 1993, and this document represented a modification of February 24, 2006. So long as this classification remained open, the KHRC could have established and filled a position in this class.

116. When a new class is created, whether classified or non-classified, written approval is generated. To date, Harrod has not found documents approving the establishment of the ungraded class of Chief State Steward. An ungraded class means that it is unclassified.

117. When a classified position is abolished, action is taken in the system with a P-1. An agency may abolish a position on its own. However, abolishment of a classification would require a class history form like that shown in Appellant's Exhibit 12. Approval for the abolishment would be required. Once a classification is abolished, all agencies are notified of that event.

118. Up until 2006 when the Chief State Steward classification was abolished, the KHRC could have requested that a classified position of Chief State Steward be established. The KHRC never made such a request. From the documents she reviewed, Harrod opined that Veitch did not hold a position of Chief State Steward in the merit system.

119. The Cabinet rested its case.

120. Appellant, **John Veitch**, was recalled to the stand. With regard to the Kentucky Downs' incident, Mr. Veitch denied that he consumed any alcoholic beverages that day. He probably had a drink the night before. That day was over 100 degrees and Appellant had been perspiring. At no time had he ever had alcohol during that day at Kentucky Downs.

121. He offered additional testimony pertaining to his hotel stay in Nashville. During Derby week that year, he had stayed at a hotel in Louisville where they had stayed in prior years. The hotel, like many in the area, required a minimum stay package. This package cost \$3,000. As staff had stayed at that location in the past, Veitch did not seek prior approval. When he turned in his expenses for same, Larry Bond denied it. Appellant paid the \$3,000 out of his pocket.

122. He would not have gone to Nashville and stayed there without prior approval as he knew the regulations and had previously been required to pay out-of-pocket for the Louisville expenses. He approached Kendra Thompson, Administrative Coordinator, and requested she secure approval from Marc Guilfoil. He received word his request had been approved.

123. He wanted to stay in Nashville to be able to secure the original files, a computer, and the two-way radios for Commission employees. A past incident at local hotels involved staff cars having been broken into. Appellant would not have stayed in Nashville if he did not have pre-approval.

124. When he submitted the expenses for his Nashville stay, Larry Bond refused to pay it. Again, Veitch paid these expenses out of his pocket.

125. No further testimonial evidence was presented by the parties. A briefing schedule was set by separate order.

FINDINGS OF FACTS

1. John Veitch, the Appellant, was hired by the Kentucky Horse Racing Commission (KHRC) to the position of Deputy Executive Director effective November 16, 2004. (Appellee's Exhibits 2, 3, and 4). It was intended he hold this position until he met the requirements of Chief State Steward.

2. Veitch subsequently met the requirements and was appointed Chief State Steward pursuant to KRS 12.050. He was hired to this non-merit position effective July 16, 2005, after a letter, in compliance with KRS 12.050, was signed by the Appointing Authority and approved by then Governor Fletcher (Appellee's Exhibits 5 and 6). Procedures for the hire of an employee to a merit or classified position were not employed in this instance. A "12:050" letter is not used to fill a vacant merit position. The Governor is prohibited from participating in any process that hires employees to merit positions.

3. All records showed Veitch's position to have been coded "0191," non-graded and non-merit, with a salary grade of "00" which code is assigned to a non-graded position. The P-1 indicated Veitch had been appointed to a non-merit, unclassified position (Appellee's Exhibit 6). This was the position he held when he was terminated.

4. Michael K. Sample had been Veitch's predecessor as Chief State Steward. Sample had been appointed April 16, 2004, and resigned effective July 15, 2005 (Appellee's Exhibit 8, 9 and 10).

5. The position of Chief State Steward, as it existed in 1999 was a merit position with a class code of "3845" (Appellant's Exhibit 3). On June 9, 1999, the Kentucky Racing Commission (now the Kentucky Horse Racing Commission) passed a motion to make a request to the Personnel Cabinet pursuant to 101 KAR 2:095, Section 3, that Bernie Hettel serve in the ". . . dual merit positions as Executive Director of the Commission . . . and as Chief State Steward." (Hearing Officer Exhibit 1). Richard "Smitty" Taylor, Chairman of the KHRC, sent his June 23, 1999 letter to Personnel Cabinet Secretary Carol Palmore, with that request.

6. Subsequently, a new ungraded classification of Chief State Steward was established. Effective June 16, 1999, Mr. Hettel was resigned from the graded classification and appointed to the new, ungraded Chief State Steward position (Hearing Officer Exhibit 2).

7. The merit position of Chief State Steward had been established on April 16, 1993. It was assigned a title code of "3845." Subsequently, a class review was conducted. Classes that had a vacancy, or where no register requests had been made the previous twelve months, were abolished. On March 16, 2006, the "code 3845" Chief State Steward position was vacant and no register had been requested for that position the prior twelve months. This merit position was abolished March 16, 2006 (Appellee's Exhibit 12, Hearing Officer Exhibit 3). From and after the abolishment date, there existed no merit classification or position of Chief State Steward.
8. The KHRC is attached to the Public Protection Cabinet for administrative purposes only. KRS 12.020.
9. The non-merit position of Chief State Steward was established June 16, 1999. It had a position code of "0191."
10. The Chief State Steward reports directly to the Executive Director of the KHRC.
11. Robert Vance, as Secretary of the Public Protection Cabinet, was also the Appointing Authority of that Cabinet. (Appellee's Exhibit 11). The authorization signature form giving Vance this authority had been dated and signed June 16, 2008.
12. Secretary Vance signed an authorization signature form on February 4, 2009, designating Holly McCoy-Johnson as an Appointing Authority for the Public Protection Cabinet (Appellee's Exhibit 1).
13. On March 16, 2011, the Public Protection Cabinet, KHRC, issued a notice of violation and administrative hearing against John Veitch in Case KHRC-TB-11-003 (Appellant's Exhibit 4). Veitch had been charged with violating certain administrative regulations on November 5, 2010 (hereafter referred to as the "Life at Ten" matter).
14. Subsequent to the filing of these administrative charges, John Ward, who since April 2012 has been the Executive Director of the KHRC, approached Veitch four to five times about the possibility of settlement. Veitch thanked him each time but did not respond.
15. The hearing officer in that administrative proceeding recommended Mr. Veitch be found negligent and that his license be suspended for one year. Chairman Beck signed the final order suspending Appellant's license. With such license suspended, Veitch cannot perform duties as a Chief State Steward. The parties have stipulated to the fact that the Kentucky Administrative Regulations require the Chief State Steward to possess a Racing Official's License, and that at the time of this evidentiary hearing John Veitch was not so currently licensed.

16. In 2011, Secretary Vance had discussions with KHRC Deputy Executive Director Marc Guilfoil and KHRC Chairman Robert M. Beck, Jr., about whether John Veitch should continue as Chief State Steward. In October 2011 Secretary Vance decided to terminate Veitch. He directed Holly McCoy Johnson, of the General Administration Programs Support, to draft the termination letter.

17. After having examined Appellant's personnel records and having determined Veitch was a non-merit employee, McCoy-Johnson drafted and signed the November 28, 2011 letter advising Appellant he had been terminated as Chief State Steward with the KHRC, without cause (Appellant's Exhibit 1). The KHRC did not vote to terminate Veitch (Testimony of Marc Guilfoil).

18. For a time after Veitch's termination, R. Williams was "detailed" as Chief State Steward.

19. Pursuant to execution of a KRS 12.050 letter, Barbara Borden was appointed a State Steward effective April 1, 2012. This was a non-merit position. In April 2012, Chairman Beck named Ms. Borden "Acting Chief State Steward." Although designated Acting Chief State Steward, Ms. Borden received no change in her salary as a State Steward and is Acting Chief State Steward until such time someone is appointed to that position.

20. At the time of his termination, John Veitch was 66 years of age. John Ward, Executive Director of the KHRC, and former member of that Commission, is 67 years old. Robert M. Beck, Jr., Chairman of the KHRC, is 62 years old. Robert Vance, Secretary of the Public Protection Cabinet, is 72 years old.

21. As of the date of the evidentiary hearing, the merit, classified position of Chief State Steward did not exist; the non-merit, unclassified position of Chief State Steward existed, and was vacant.

22. It was Robert Vance who made the sole decision and took action to terminate Veitch. While Secretary Vance had been aware of the "Life at Ten" matter at the time, his testimony that such matter had "zero influence" on his decision to terminate and that the KHRC was the entity that was to handle the administrative proceeding pertaining to "Life at Ten" is given much credibility by this Hearing Officer. Secretary Vance had knowledge of a number of other incidents involving Veitch which gave him reason to consider Appellant's termination.

CONCLUSIONS OF LAW

1. If there is anything to which the parties agree, it is that there is no conflict between the statutes and regulations previously cited by the Hearing Officer. Appellant takes the position that the statutes do not conflict because neither KRS 12.015, 12.020 nor 12.270 confer upon the Secretary of the Public Protection Cabinet (PPC) the authority to hire or fire Kentucky Horse Racing Commission (KHRC) employees. The Appellee has taken the position that when the statutes and regulations are read together, it is the Secretary of the PPC who had authority to terminate Veitch from his position.

2. There is a complete absence of helpful case law in Kentucky to address specifically what the Kentucky Legislature meant by attaching an administrative body such as the KHRC to a program Cabinet, such as the PPC "for administrative purposes." The Hearing Officer is convinced that the interpretation and meaning of that phrase is critical in the determination of the authority to hire and terminate employees of the Commission.

3. Dinah Bevington, Executive Director of the Office of Legal Services for the Personnel Cabinet, testified the KHRC Executive Director may make decisions about hiring employees, but once such decision is made, it must be processed through the Personnel Cabinet from the Public Protection Cabinet. Holly McCoy-Johnson, who is employed in GAPS, testified the Executive Director of the KHRC may take certain personnel actions without processing it through the Personnel Cabinet. She made this statement with reference to the Commission having appointed Barbara Borden as "Acting" Chief State Steward and simultaneously holding the position of Steward.

4. In Kentucky, each administrative body established by statute or statutorily authorized executive action is to be included for administrative purposes in an existing department or program cabinet. KRS 12.015. The KHRC has been attached for administrative purposes only, to the PPC. KRS 12.020. Specifically set out in that statute is the following exception:

... except in the case of the Personnel Board and where the attached department or administrative body is headed by a constitutionally elected officer, the attachment shall be solely for the purpose of dissemination of information and coordination of activities and shall not include any authority over the functions, personnel, funds, equipment, facilities, or records of the department or administrative body.
[Emphasis Added.]

The KHRC was created as an independent agency of state government with the purpose of regulation of the conduct of horse racing and pari-mutuel wagering on horse racing and related activities within the Commonwealth of Kentucky. KRS 230.225(1). That same statutory provision reiterates the Commission's attachment to the PPC "for administrative purposes."

The Governor of the Commonwealth appoints the Executive Director of the Commission, who serves at the pleasure of the Governor. KRS 230.230(1). Included among the duties of the Executive Director is the appointment of all staff. KRS 230.230(1)(c). The KHRC does not fall under the exception enumerated in KRS 12.020.

5. The Executive Director of the Commission may employ, dismiss, or take other personnel action pertaining to Commission personnel. The compensation of such employees, except for that of the Executive Director is to be paid from Racing Commission funds. KRS 230.230(2). It is the Commission then that must fit within its budget the amount of the compensation paid to employees, including the Chief State Steward.

6. Much testimony has been offered to explain the difference between the Chief State Steward, Racing Stewards, and Stewards who are employed by racing associations for specific race meets. Mr. Veitch, as Chief State Steward, was employed on a full-time basis by the Commonwealth, and was not an employee of any racing association.

7. The Executive Director of the Commission has the authority to employ, dismiss, or take other personnel action and determine a reasonable compensation of stewards. KRS 230.240(1). Furthermore, the Commission, ". . . for the purpose of maintaining integrity and honesty in racing, shall prescribe by administrative regulation the powers and duties of the persons employed under this section and qualifications necessary to competently perform their duties." KRS 230.240(1).

The Commission has promulgated such regulations. In particular, 810 KAR 1:005, Section 1. Definition. "Racing Official" includes those persons serving as Steward. 810 KAR 1:004, Section 1. Qualifications for Steward, clearly sets out the qualifications to qualify for employment or approval by the Commission as a Steward. Such qualification requirements were applied to the Appellant.

Section 2 of that same regulation states that of the three Stewards for each race meeting, two of the Stewards, including the Chief Steward, shall be employed and compensated by the Commission. 810 KAR 1:004, Section 2, Employment of Stewards (1)(a). Furthermore, Stewards shall be responsible only to the Commission and may be replaced by the Commission at any time for failure to perform their duties to the satisfaction of the Commission. 810 KAR 1:004, Section 2, Employment of Stewards (3).

8. The minutes of the KHRC (Appellant's Exhibit 11) reflect that the Commission did in fact take action pertaining to its employees. The minutes for April 16, 2012, for example, memorialize that the Acting Executive Director approved changes in Keeneland Associations Roster of Racing Officials for the Spring 2012 Meet, pursuant to his authority under KRS 230.230. That statute specifically addresses the authority of the Executive Director with reference to "personnel" of the KHRC.

9. The minutes of May 16, 2012, show the Commission went into Executive Session to discuss the appointment of an individual employee. A motion to renew the employment contract of Dr. Scollay was approved. These were all personnel actions taken by the KHRC.

10. Some insight has been provided by the Kentucky Executive Branch Ethics Commission in advisory opinions relating to administrative attachment. Advisory Opinion 95-3 (February 9, 1995), advised that the Kentucky River Authority could not accept donations for a river cleanup project from Kentucky American Water Company. The Commission stated in part:

...

The Secretary of the Natural Resources and Environmental Protection Cabinet is an appointed member of the Authority. However, the Authority is not an organizational unit of the Cabinet, but is a separate agency created by statute.

KRS 151.710(10) provides:

The authority shall be attached for administrative purposes to the natural resources and environmental protection cabinet, and the cabinet shall provide the necessary personnel to provide administrative services for the authority.

The Commission agrees that an organizational unit created by statute, such as a board or commission which is attached to an agency only for administrative purposes, is not necessarily a part of the agency to which it is attached, but may be a separate agency. In this case, we believe the Kentucky River Authority is a separate agency. However, because the Kentucky-American Water Company is required to pay water withdrawal fees to the Kentucky River Authority, the Commission believes a conflict may exist if donations are accepted by the Authority.

...

11. The Ethics Commission in its Advisory Opinion 97-11, (March 20, 1997) gave an opinion advising whether the "state agency" for which an employee works is the state agency by which his appointing authority is employed. The response was: "Yes, unless agency is attached for administrative purposes only or agency's characteristics are distinct from the appointing authority." In rendering this opinion the Commission stated:

KRS 11A.010(10) provides:

(10) "State agency" means every state office, department, division, board, commission, institution, public corporation, and authority within the executive branch.

KRS 18A.005 defines "appointing authority" as follows:

(1) "Appointing authority" means the agency head or any person whom he has authorized by law to designate to act on behalf of the agency with respect to employee appointments, positions establishments, payroll documents, register requests, waiver requests, requests for certification, or other personnel actions.

Thus, the Commission believes that a public servant is employed by the agency by which his appointing authority is employed unless his agency is attached to the appointing authority's agency for administrative purposes only, or unless the agency's characteristics are of a separate independent nature distinct from the appointing authority, and it is considered an agency on its own, such as an independent department or commission.

In that instance the Ethics Commission opined that because the Department was an independent entity which had characteristics distinct from the Cabinet, it was a separate agency for purposes of applying the ethics code.

12. The Ethics Commission issued Advisory Opinion 09-5 (January 23, 2009). In that instance it investigated whether the Deputy Secretary of the Tourism, Arts, and Heritage Cabinet could accept employment with the World Games 2010 Foundation, Inc. The Commission's answer was affirmative.

The Horse Park is attached for administrative purposes to the Tourism, Arts, and Heritage Cabinet. It is run by the Kentucky Horse Park Commission ("KHP Commission") which is established under KRS 148.260 and whose mission it is to provide management expertise and direction in the operation of the Horse Park. Although the Horse Park is attached to the Tourism, Arts, and Heritage Cabinet,

you have limited involvement with the Horse Park due to the fact that it is operated by an independent, statutorily-created commission.

...

Pursuant to KRS 11A.010(10) and KRS 148.260 et seq., the Horse Park is deemed to be a separate agency and any relationship that exists between the Cabinet and the Foundation, exists solely because the Horse Park is attached to the Cabinet for administrative purposes. Since the Horse Park is deemed a separate agency and you have had no involvement in any matters related to the 2010 Games on behalf of the Cabinet or the Horse Park, you are not prohibited under KRS Chapter 11A.040(7) from immediately accepting employment with the Foundation.

13. A number of states other than Kentucky have by statute administratively attached commissions and bodies to departments or cabinets. Under Montana Code Annotated, 2-15-121(2), "The department to which an agency is allocated for administrative purposes only in this title shall: . . . (d) provide staff for the agency. Unless otherwise indicated in this chapter, the agency may not hire its own personnel." It is clear that the Montana Legislature did not intend such attached agencies to make personnel hiring decisions independent from the department to which it was attached. This is in stark contrast to the Kentucky statutes which give the KHRC Executive Director the authority to hire and fire.

Under the Texas Human Resources Code, Section 112.043:

(a) The Office for the Prevention of Developmental Disabilities is administratively attached to the Texas Department of Mental Health and Mental Retardation.

...

(c) The Executive Director and staff of the office are employees of the Office and not employees of the Texas Department of Mental Health and Mental Retardation.

In this instance the Texas Department of Mental Health and Mental Retardation has absolutely no say in the hiring and firing of personnel for the Office for the Prevention of Developmental Disabilities; the OPDD itself has that sole and exclusive authority.

Finally, New Hampshire Revised Statutes Annotated, 170-H:13, Administrative Attachment, states in part:

I. The Juvenile Parole Board shall be administratively attached to the Department of Health and Human Services.

...

IV. Unless otherwise provided by law, the Juvenile Parole Board shall hire personnel in accordance with state personnel laws.

This statutory provision does not make clear whether the Juvenile Parole Board, hiring personnel in accordance with state personnel laws, has exclusive authority or co-authority with the Department of Health and Human Services, or any personnel board in New Hampshire.

14. Reading the Kentucky Statutes and Kentucky Administrative Regulations together, and considering the above-cited Kentucky Executive Branch Ethics Commission Advisory Opinions, the examples from other states pertaining to the issue of attachment of Executive Branch bodies or committees to departments or cabinets, and considering the testimony of the witnesses, it is concluded that the Executive Director of the KHRC, has the sole and exclusive authority to hire and to terminate employees of the KHRC, but must process such personnel actions to the Personnel Cabinet through the Public Protection Cabinet. The statutes and regulations make it clear that such personnel actions must originate from within the KHRC. This termination action did not originate from the KHRC. It originated from the Public Protection Cabinet. In fact, no action pertaining to termination was considered, voted on, or taken by the KHRC. Therefore, Appellant has met his burden of proof by a preponderance of the evidence to show his termination from the position of Chief State Steward was improperly done.

15. While argument has been made that if Appellant's termination had been done by the improper authority, his initial hiring would be void *ab initio*, that issue is not properly before this Hearing Officer and is not considered. This is not an appeal of the hiring of John Veitch.

16. Appellant has failed to show by a preponderance of the evidence that his termination constituted discrimination based on age of 40 years or over.

17. Appellant has failed to show by a preponderance of the evidence that his termination was the result of exercising his constitutional right of due process during the "Life at Ten" matter.

18. The position to which Appellant had been appointed as Chief State Steward was a non-merit, unclassified position. Appellant has failed to prove by a preponderance of the evidence that termination procedures pertinent to classified employees were applicable to his termination.

RECOMMENDED ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Kentucky Personnel Board that the appeal of **JOHN VEITCH VS. PUBLIC PROTECTION CABINET (APPEAL NO. 2011-263)** be **SUSTAINED** to the following extent:

1. The termination of the Appellant from the non-merit, unclassified position of Chief State Steward be **VACATED** and **REVERSED**. He should be reinstated to such position effective close of business November 28, 2011, and awarded all back pay and benefits from such date.

And that such appeal be **DENIED** to the following extent:

2. The termination of Appellant did not constitute discrimination based on age over 40;

3. The termination of the Appellant was not the result of his exercising his constitutional right of due process in the "Life at Ten" matter;

4. The regulation and laws pertaining to termination procedures pertinent to classified employees did not apply to the Appellant, as he occupied a non-merit, unclassified position.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

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

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 24th day of April, 2013.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Gordon Slone
Hon. LaTasha Buckner
Hon. Thomas Miller