

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-008

KELLY JONES

APPELLANT

VS.

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

CABINET FOR HEALTH AND FAMILY SERVICES
J. P. HAMM, APPOINTING AUTHORITY

APPELLEE

AND

MARY BURTON

INTERVENOR

** ** ** ** **

This matter came on for evidentiary hearing on July 29, 2014, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before Geoffrey B. Greenawalt, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Kelly Jones, was present at the evidentiary hearing and was represented by the Hon. Whitney Lawson. The Appellee, Cabinet for Health and Family Services, was present and was represented by the Hon. Tim Salansky. The Intervenor, Mary Burton, was present and was not represented by legal counsel.

The issue at the evidentiary hearing was whether the selection of Mary Burton to the position of Family Support Specialist III complied with the requirements set forth at KRS 18A.0751(4)(f) and 101 KAR 1:400. The burden of proof was upon the Appellant and was to be by a preponderance of the evidence.

BACKGROUND

1. The Appellant, Kelly Jones, timely filed her appeal with the Personnel Board on January 13, 2014, appealing from the promotion of the Intervenor, Mary Burton, to the position of Family Support Specialist III (FSS III) in the DCBS/Family Support Rockcastle office.

2. The first to testify was **Roger Caldwell**. Mr. Caldwell worked with the Appellant at the Mt. Vernon office and between November 2009 and March 2014, after being promoted to Field Services Supervisor, was the Appellant's immediate supervisor. During this time the Appellant was a Family Support Specialist II (FSS II). Mr. Caldwell was the Appellant's immediate supervisor at the time of the subject interview.

3. Mr. Caldwell testified that a FSS III had the same job duties as a FSS II but also had the added responsibility of reviewing coworker's cases and helping with training. He noted that the FSS III also acts as the office manager whenever the supervisor is absent. Appellant's Exhibit 1 was introduced through the witness and is a copy of the Job Specifications for the FSS III. Appellant's Exhibit 2 was introduced through the witness and is a copy of the Selection Worksheet which summarized the candidate's (for the subject position) qualifications, which included their Education, Experience, Additional Training and the results from their personal Interview. The Selection Worksheet also contained information regarding each candidate's Record of Performance, Conduct, Seniority and Performance Evaluations and was signed by Roger Caldwell and Kristen Miller on October 18, 2013, indicating they chose Mary Burton as the successful candidate for the subject position of FSS III. Mr. Caldwell testified that he and Kristen Miller comprised the interview panel. He also noted that ordinarily an interview panel would be comprised of three people, but due to the reorganization of the Cabinet and the excess hiring activity resulting therefrom, a waiver was in place which allowed just two people to make up an interview panel.

4. Appellant's Exhibit 3 was introduced through the witness and is a copy of Mr. Caldwell's Interview Questionnaire Worksheet for the Appellant. This document sets forth Mr. Caldwell's contemporary impressions of the Appellant's answers to the various questions asked during her interview.

5. Appellant's Exhibit 4 was introduced through the witness and is a copy of e-mail communication from the Appellant to Mr. Caldwell regarding the need for help and expressing Appellant's frustration regarding her increased caseload.

6. Appellant's Exhibit 5 was introduced through the witness and is a copy of Mr. Caldwell's Interview Questionnaire Worksheet for the Intervenor, Mary Burton. Again, this document sets forth Mr. Caldwell's contemporary impressions of Ms. Burton's answers to the various interview questions asked of her. Mr. Caldwell testified that his overall assessment of how each candidate answered the interview questions was based on how the candidate answered the questions and not based upon their actual job related experience. He did note, however, that the actual experience of each candidate was taken into consideration when the successful candidate was eventually determined.

7. Mr. Caldwell testified that he performed the Appellant's job performance evaluations for the years 2010, 2011, and 2012. Appellant's Exhibit 6 was introduced through the witness and are copies of said evaluations. Mr. Caldwell testified that the Appellant's first interim review in 2013 demonstrated that she had good adaptability and was dependable. He testified that nothing occurred between the date of the first evaluation and the interview date to change his perception of the Appellant's work capability. Mr. Caldwell testified that on the

whole the Appellant is a very good worker for the office.

8. Mr. Caldwell testified that seven people applied for the subject position and three were chosen to interview, including the Appellant, the Intervenor and Ada Camur.

9. Appellant's Exhibit 7 was introduced through the witness and is a copy of the justification letter prepared by Mr. Caldwell setting forth the interview panel's reasoning for choosing Mary Burton as the successful candidate for the subject position. Mr. Caldwell testified that this is the first and only justification letter he has ever written. He stated that he wrote the same without any help and that most of the information was taken directly from the Interview Selection Worksheet.

10. Appellant's Exhibit 8 was introduced through the witness and is a copy of e-mail communication between Mr. Caldwell and the Appellant. These communications were entered into the record for purposes of demonstrating the extra work the Appellant was required to perform.

11. Appellant's Exhibit 9 was introduced through the witness and is a copy of additional e-mail communication between the Appellant and Mr. Caldwell. These communications demonstrated the Appellant requested a reduction in her workload. Mr. Caldwell testified he did not think he was setting up the Appellant for failure.

12. The next to testify at the hearing was **Kristen Miller**. Ms. Miller is a Field Services Supervisor and has been the Appellant's supervisor since March 2014. Ms. Miller has to commute between Jackson and Rockcastle County two to three times a week or communicate with the workers in Rockcastle County via e-mail. Ms. Miller stated that the Appellant has a heavy caseload which is typical of all the workers. She also stated that the Appellant is a good employee and performs her work in a timely and dependable manner.

13. Ms. Miller was on the subject interview panel along with Mr. Caldwell and was the office supervisor for Jackson County at the time the interviews took place. Appellant's Exhibit 10 was introduced through the witness and is a copy of Ms. Miller's Interview Questionnaire Worksheet for the Appellant. Ms. Miller stated that the handwriting contained on this document is hers and that the same sets forth her contemporary impressions of the Appellant's responses to the interview questions asked.

14. Appellant's Exhibit 11 was introduced into the record through the witness and is a copy of Ms. Miller's Interview Questionnaire Worksheet for the Intervenor, Mary Burton. Again, her contemporary impressions of Ms. Burton's interview responses are contained on this document. Ms. Miller testified she rated both the Appellant and the Intervenor as "good" for their experience, even though the Appellant had considerably more seniority than Ms. Burton,

because the Intervenor had completed all the training necessary to become a FSS III.

15. The next to testify was the Appellant, **Kelly Jones**. Ms. Jones testified that she has completed 58 hours of college work at the Somerset Community College. In December 2001 she began working for the Appellee and was a FSS I in Pulaski County. By the time she came to Rockcastle County in January 2003 she had been promoted to a FSS II, which is her current position. Ms. Jones explained that in 2011 she volunteered to perform the Adult Medical Assessments in Rockcastle County and by the end of the year, she began getting swamped at work. Ms. Jones also testified she had over 600 hours of training by the time of the subject interview and had never had any disciplinary action taken against her.

16. The end of the Appellant's testimony marked the end of her case in chief. The Appellee's motion for directed verdict was taken under consideration and was held in abeyance pending its rebuttal testimony.

17. The first to testify on behalf of the Appellee was **Roger Caldwell**. Cabinet's Exhibit 1 was introduced through the witness and is a copy of the job specification for FSS III. The same document had already been entered into the record as Appellant's Exhibit 1. Mr. Caldwell noted that not all the duties of a FSS III are noted on Cabinet's Exhibit 1. For instance, he stated that the FSS III had to act on behalf of the supervisor whenever the supervisor was out of the office or would occasionally be asked to attend meetings on the supervisor's behalf.

18. Cabinet's Exhibit 2 was introduced through the witness and is a copy of the Selection Process Checklist. Mr. Caldwell completed this list and testified it is the first item to be prepared whenever an open position needs to be filled.

19. Cabinet's Exhibit 3 was introduced through the witness and is a copy of a Conflict of Interest Statement for the job selection process.

20. Cabinet's Exhibit 4 was introduced through the witness and is a copy of the Register for the subject position. The register is prepared by the Personnel Cabinet and simply sets forth the applicants for the position which meet the minimum requirements of the job. The candidates to be interviewed are selected from this list.

21. Cabinet's Exhibit 5 was introduced through the witness and is a copy of the Screening Criteria Worksheet. This document was created for purposes of identifying which qualified applicants contained on the Certified Register would actually be interviewed for the subject position.

22. Cabinet's Exhibits 6, 7 and 8 were introduced through the witness. Mr. Caldwell explained that these documents were prepared by the actual interviewees and the information contained thereon, as well as the information (performance evaluations and employment applications) attached thereto, was considered by the interview panel in selecting the successful candidate for the subject position. Mr. Caldwell testified he also checked the references for each candidate and found them all to be good and complimentary. He also noted that having supervised all three of the candidates, he was aware of their abilities and knew firsthand that the Intervenor was an outstanding/excellent employee.

23. Cabinet's Exhibit 9 was introduced through the witness and contained Mr. Caldwell's and Kristen Miller's Interview Questionnaire Worksheet for the Intervenor. These documents were previously entered and marked as Appellant's Exhibits 5 and 11 respectively.

24. Cabinet's Exhibit 10 was introduced through the witness and contained Mr. Caldwell's and Miller's Interview Questionnaire Worksheet for candidate Ada Camur.

25. Cabinet's Exhibit 11 was introduced through the witness and are copies of the Interview Questionnaire Worksheets for the Appellant which were marked previously as Appellant's Exhibits 3 and 10 respectively.

26. Mr. Caldwell testified that the interview was part of determining the candidates' qualifications. Mr. Caldwell referred to Cabinet's Exhibit 12, the Selection Worksheet, which had previously been entered as Appellant's Exhibit 2.

27. Mr. Caldwell testified that the first interview question had to do with the candidates' time management and people skills. Mr. Caldwell noted that based on his own personal experience and observation the Intervenor was easy to approach and talk to and that her coworkers were comfortable coming to her. According to Mr. Caldwell, he had heard over the years from several of the Appellant's coworkers that the Appellant could be hateful and difficult to converse with. According to Mr. Caldwell, there was a vast difference in people skills between the Intervenor and the Appellant.

28. According to Mr. Caldwell, in addition to their responses to the question, the difference in his assessments between the Intervenor and the Appellant with regard to the second interview question was also based upon his interaction with each of them on the job site. It was Mr. Caldwell's opinion that the Intervenor picked things up fast and mastered them; while the Appellant would ask the same questions over and over again on certain occasions. In Mr. Caldwell's opinion, the Intervenor had a greater understanding of the policy and that although the Appellant also had a good understanding of the policy, he gave the edge to the Intervenor.

29. As for the fourth interview question, Mr. Caldwell testified that both the Intervenor and the Appellant did a good job with that. Regarding the fifth question, he noted that the Intervenor was always respectful of her coworkers while that was not always the case with the Appellant. Question number six involved how each candidate dealt with different personalities, etc. and as before, Mr. Caldwell stated the Intervenor can get along with pretty much everyone while the Appellant generally got along with everyone but would occasionally have a flare-up. Mr. Caldwell testified that both the Intervenor and the Appellant did fine with the seventh question. As for the eighth question, he pointed out that the Intervenor is a very good writer and gets her point across without irritating anybody. He stated that the Appellant also does a good job with that. As for the ninth question, Mr. Caldwell pointed out that the Intervenor had no past due cases, while the Appellant had quite a few. He did however note that the Appellant met expectations with regard to timeliness.

30. Finally, the tenth question had to do with the candidates' experience. Mr. Caldwell was well aware of the large discrepancy with time on the job between the Intervenor and the Appellant. However, Mr. Caldwell noted that he and Ms. Miller looked at all the statutory criteria and not just solely on the candidates' experience. He further noted that if all an interview panel had to do was consider a candidate's experience, there would be no point in conducting interviews.

31. Cabinet's Exhibit 12 was introduced into the record and had previously been entered as Appellant's Exhibit 2. Mr. Caldwell testified that in determining the successful candidate for the subject position, he considered each candidate's education, experience relative to the position, additional training, etc., as well as their responses to the interview questions. He noted that comparisons between the record of performance between the candidates was basically a non-issue as none of the candidates had any commendations, awards or performance related discipline to be considered. He also considered each candidate's conduct which again was a non-issue because none of the candidate's had had any disciplinary actions taken against them. Mr. Caldwell testified that he also considered each candidate's seniority and performance evaluations. He noted that since the Intervenor did not have a full Annual Evaluation until 2013, he relied on her two previous interim evaluations.

32. Cabinet's Exhibit 13 was introduced through the witness, which had been previously introduced and marked as Appellant's Exhibit 7. This was the justification letter prepared by Mr. Caldwell setting forth the reasoning for selecting the Intervenor over Ada Camur and the Appellant for the subject position of FSS III. Mr. Caldwell testified that he prepared this document because he was told he needed to explain why the interview panel was recommending a candidate with so much less experience than the other candidates.

33. Mr. Caldwell admitted he was concerned that the recommendation of the interview panel would be criticized due to the experience discrepancy. He noted he and Kristen Miller discussed each candidate's qualifications following the interviews and were both of the opinion that while the Appellant had considerably more experience and training than the Intervenor, the Intervenor had the intangibles and at the end of the day, was the best candidate for the position.

34. On cross-examination, Mr. Caldwell admitted he never spoke directly to the Appellant regarding the complaints he received from her coworkers about her but indicated he might have said something to her in passing such as "try to be nice" instead. He also acknowledged that much of the Appellant's caseload timeliness issues had to do with her unfamiliarity working the Adult Medical assessments and that most of the questions she would repeatedly ask had mainly to do with the Adult Medical program which was new to her. On redirect, Mr. Caldwell admitted the Appellant's inability to better grasp the Adult Medical assessment policy played a part in his decision even though he understood it usually took two to three years to become proficient in this program. According to Mr. Caldwell, the Intervenor had some Adult Medical program experience prior to the interview and in his opinion, had a very good understanding of the policy.

35. The next to testify was **Kristen Miller**, who testified that prior to interviewing the Appellant she was aware of her work proficiency.

36. She noted that Mr. Caldwell never expressed any preference for a candidate prior to the interviews and that after the interviews she and Mr. Caldwell agreed that the Intervenor was the best candidate for the subject position. Ms. Miller stated that although she knew the Appellant had far more experience, training and seniority than the Intervenor, she was of the opinion the Intervenor was the best candidate because she had a Bachelor's degree and two excellent interim evaluations. The Intervenor also provided detailed answers and presented well during the interviews. To Ms. Miller this indicated the Intervenor was a good role model and a leader. Although Ms. Miller was aware she had less experience than the Appellant, she noted that when she watched her work, it was clear the Intervenor picked things up fast and really hit the ground running. Ms. Miller now supervises both the Intervenor and the Appellant and has been very satisfied with her selection. Whenever she has to leave the Intervenor in charge of the office, she never worries. Also, as expected, the Intervenor works well with staff and clients.

37. On cross-examination, Ms. Miller explained that SRAA Jeff North instructed her to send her only Adult Medical staff member to Rockcastle County to help the Appellant because their Adult Medical program was being poorly managed. On redirect, Ms. Miller stated the ability to handle large caseloads was very important for a FSS III and that in order to carry a regular workload along with handling the role of a supervisor, you needed to be very dependable.

38. The next to testify was the Intervenor, **Mary Burton**. Ms. Burton has been the FSS III in the Rockcastle County office since November 2013. Ms. Burton testified she is a quick learner and is meticulous. She testified she was able to perform two cases and a spend-downs before even being trained on how to do so. She was able to do so without the training because she took it upon herself to read the policy which lays it all out for you in black and white. If she had any questions, she just went to Mr. Caldwell.

39. This matter is governed by KRS 18A.0751(4)(f) which states:

For promotions which shall give appropriate consideration to the applicant's qualifications, record of performance, conduct, and seniority. Except as provided by this chapter, vacancies shall be filled by promotion whenever practicable and in the best interest of the service.

40. This matter is also governed by 101 KAR 1:400, Section 1(1) which states:

Section 1. 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.

...

41. The Hearing Officer has considered the entire administrative record, including the testimony and statements therein.

FINDINGS OF FACT

1. After requesting and receiving a Certified Register and determining which applicants to interview, Roger Caldwell and Kristen Miller, who are each Field Service Supervisors, on October 10, 2013, interviewed three qualified applicants (including the Appellant and the Intervenor) for the position of Family Support Specialist III (FSS III) in the DCBS/Family Support Rockcastle County office. [See Cabinet's Exhibits 2, 3, 4, and 5.] Mr. Caldwell and Ms. Miller interviewed each of the candidates and prepared written impressions and assessments resulting therefrom. [See Cabinet's Exhibits 9, 10, and 11.] The interview panel also reviewed the documentation provided to them by each candidate, including their Internal Mobility Applicants Information Sheet, their applications and their Performance Evaluations. [See Cabinet's Exhibits 6, 7, and 8.]

2. From this information, Mr. Caldwell prepared the Selection Worksheet, marked as Cabinet's Exhibit 12. This worksheet was signed off on by both Mr. Caldwell and Ms. Kristen Miller on October 18, 2013, indicating they each recommended the Intervenor, Mary Burton, for the subject FSS III position.

3. From the testimony of Mr. Caldwell and Ms. Miller, it is abundantly clear that each of them were aware of the large discrepancy in seniority and experience that existed between the Intervenor and the other two candidates (including the Appellant). Mr. Caldwell testified that he was concerned he would be criticized for choosing the Intervenor who had considerably less experience than the Appellant. Mr. Caldwell went onto prepare the justification for the recommendation letter dated November 13, 2013, and marked as Cabinet's Exhibit 13. There is further nothing in the record to indicate the interview panel failed to consider each candidate's qualifications, record of performance, conduct, and performance evaluations.

4. After conferring with each other, Mr. Caldwell and Ms. Miller each agreed that the Intervenor had the best interview and was the best candidate for the subject position due mainly to her ability to interact with staff and clients, and quickly pick up on policy issues.

CONCLUSIONS OF LAW

1. The Appellant timely filed her appeal with the Personnel Board appealing from the promotion of the Intervenor to the position of Family Support Specialist III in the DCBS/Family Support Rockcastle County office on or about November 18, 2013.

2. The interview panel members who recommended the Intervenor for the subject position were well aware that they were recommending a candidate with considerably less seniority than that of the other candidates and properly considered each candidate's qualifications, record of performance, conduct, seniority, and performance evaluations when it recommended the Intervenor for the subject position.

3. The Appellant has failed to demonstrate by a preponderance of the evidence that the Appellee failed to comply with the requirements set forth at KRS 18A.0751(4)(f) and 101 KAR 1:400.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **KELLY JONES VS. CABINET FOR HEALTH AND FAMILY SERVICES AND MARY BURTON (APPEAL NO. 2014-008)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

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

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

The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

Each party has thirty (30) days after the date the Personnel Board issues a Final Order in which to appeal to the Franklin Circuit Court pursuant to KRS 13B.140 and KRS 18A.100.

ISSUED at the direction of **Hearing Officer Geoffrey B. Greenawalt** this 8th day of January, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Mona Womack
Hon. Whitney Lawson
Mary Burton