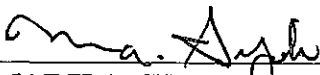


**IT IS FURTHER ORDERED** that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer as altered be, and they hereby are approved, adopted and incorporated herein by reference as a part of this Order, and the Appellant's appeal is therefore **DISMISSED**.

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 16<sup>th</sup> day of October, 2013.

**KENTUCKY PERSONNEL BOARD**

  
\_\_\_\_\_  
**MARK A. SIPEK, SECRETARY**

A copy mailed this day to:

Hon. Angela Cordery  
Warren McLemore  
Stephanie Appel

**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2011-059**

**WARREN McLEMORE**

**APPELLANT**

**V. FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND RECOMMENDED ORDER**

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

**APPELLEE**

\*\* \*\* \*

This matter came on for an evidentiary hearing on February 19, 2013, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Boyce A. Crocker, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellant, Warren McLemore, was present at the evidentiary hearing and was not represented by legal counsel. Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Angela Cordery. Also present on behalf of the Department of Corrections as agency representative was Dr. James Van Nort.

Issues for this evidentiary hearing were stated in the Interim Order entered December 20, 2012, and were identified as Appellant's challenge to the selection of Jennifer Bogard for the position of Corrections Program Administrator at the Luther Lockett Correctional Complex. Appellant was assigned the burden of proof, which was by a preponderance of the evidence, to demonstrate the Department of Corrections did not follow the statutory requirements set forth at KRS 18A.0751(4)(f) and the regulatory requirements set forth at 101 KAR 1:400 when it selected Jennifer Bogard for that position. As the party having the burden of proof, Appellant was assigned to proceed first in the presentation of evidence.

No opening statements were made at the evidentiary hearing. Pre-hearing motions were also discussed, at least part of which led to certain matters being admitted under seal due to their containing possibly confidential information regarding inmates under the care and custody of the Department of Corrections.

Subsequent to preliminary matters, the Appellant began the presentation of evidence.

**BACKGROUND**

1. Appellant called as first witness **Dr. James Van Nort**. Dr. Van Nort testified he is employed at the Sex Offender Treatment Program (SOTP) by the Department of Corrections. Upon being properly sworn, he offered the following summarized testimony.

2. Dr. Van Nort is the Licensed Psychological Program Administrator over the Sex Offender Treatment Program (SOTP). Dr. Van Nort agreed that Deborah Coleman was the Acting Director of Mental Health for the Department of Corrections.

3. Dr. Van Nort testified there were an "Institutional Component" and a "Community Component" in the SOTP.

4. Appellant questioned Dr. Van Nort from what was admitted as Appellant's Exhibit 1, an organizational chart prepared by Appellant. Dr. Van Nort agreed that Jennifer Bogard held a credential which Appellant did not, specifically that Bogard is a Certified Psychological Associate.

5. Dr. Van Nort testified that Bogard had the ability, due to her Certified Psychological Associate status, to test individuals for mental retardation. Making reference to Appellant's Exhibit 1, Dr. Van Nort agreed that Kathy Colebank, the Corrections Program Administrator (CPA) over at the Kentucky State Reformatory (KSR), the Northpoint Training Center (NTC), and the Kentucky Correctional Institution for Women (KCIW), is also a Certified Psychological Associate. However, Dr. Van Nort also agreed that neither Mr. Campbell, the CPA for the Community Component, including Louisville, Newport and Owensboro, nor Keth Zimmerman-Hicks, the CPA for the Community Component over Lexington, Hazard and other areas, could test for mental retardation.

6. Dr. Van Nort testified that Campbell and Zimmerman-Hicks asked for mental retardation testing for the population they serve in the Community Component of the SOTP three to five times per year. Appellant then asked the witness regarding some individuals who had previously been a CPA in the SOTP. Dr. Van Nort did not know whether Mr. Barnes had been a CPA. Dr. Van Nort testified that previous CPAs at LLCC, Lickteig and Snider, were also able to test for mental retardation. Dr. Van Nort testified that Mr. Dunn was a CPA in place when he took over the SOTP. He testified he did not believe Mr. Dunn was able to test for mental retardation, that is, Mr. Dunn did not possess the credentials which would allow him to do so.

7. Serving as an interim (as Dr. Van Nort termed it) CPA at LLCC was Sara Sutphin, whom Dr. Van Nort stated was also approved to do mental retardation testing. He agreed with the Appellant that she was no longer at LLCC, but was at KSR.

8. Dr. Van Nort agreed that one did not need to be a Certified Psychological Associate to be a CPA.

9. Appellant then questioned Dr. Van Nort about Appellant's Exhibit 4 (under seal), Appellant's grievance filed in early 2011 regarding the selection of Jennifer Bogard to the CPA

position at LLCC. In that grievance, Dr. Van Nort defended the decision to select Bogard instead of Appellant. Dr. Van Nort then accurately testified as to the requirements of 101 KAR 1:400 and the areas to be considered when considering classified employees for promotion. Dr. Van Nort agreed with the Appellant that Dr. Van Nort did not reference record of performance, conduct or performance evaluations in the grievance response.

10. Appellant and Dr. Van Nort sparred concerning the areas mandated to be considered by 101 KAR 1:400. Dr. Van Nort then offered testimony as to why he believed Jennifer Bogard being a Certified Psychological Associate was important, commenting that it showed a level of dedication to achieving a standard and maintaining that standard, and being governed by an independent board and being accountable for one's behavior and continuing education. In sum, Dr. Van Nort testified that licensure is significant.

11. Dr. Van Nort stated it was significant to the SOTP that Bogard could perform testing and could evaluate testing as well. Dr. Van Nort testified it was also significant that for purposes of the work that is done in the SOTP to have someone who can do the psychological testing versus having someone over the program who would not be able to do such testing. Dr. Van Nort testified he preferred someone with certification over someone who did not have certification for this CPA position. He also testified he didn't know if the Appellant could have overcome Bogard's having professional certification.

12. Dr. Van Nort testified that he believed eight people were interviewed for the CPA position, and he did not recall how many of those held professional certifications in psychology.

13. Dr. Van Nort did not agree with Appellant's question that he was "dead in the water," not having that professional certification in psychology. Dr. Van Nort disagreed he was biased in favor of someone with a certification, whether it be in psychology or counseling, but certainly viewed such certification positively.

14. Dr. Van Nort testified he had many years of experience in the Corrections field.

15. On further cross-examination, Dr. Van Nort disagreed with Appellant that for this Corrections Program Administrator position that administration was the main focus; rather, he appeared much more interested in the clinical functions of a CPA in the SOTP.

16. During cross-examination, Dr. Van Nort did not disagree with Appellant when Appellant claimed that only four mental retardation assessments had been performed at LLCC in the past three years. When Appellant surmised that would only take about one week out of the year (assuming 30 hours for each assessment), Dr. Van Nort stated during the other time the CPA would be performing the clinical functions of the position. Appellant pointed out that even though Dr. Van Nort testified on cross-examination that other functions would take up the rest of the time when not performing mental health assessments, such as IQ tests, such reasons were not given in his response to Appellant's grievance regarding the selection of Jennifer Bogard to the CPA position.

17. On cross-examination from the Appellant, Dr. Van Nort disputed that scoring the interviews, or using a set structure would give any better result than relying on his "15 years clinical experience." Appellant had asked the witness if he scored interviews or if a more structured selection process would eliminate bias. Dr. Van Nort did not agree to that.

18. Dr. Van Nort agreed that he and Warden Clark Taylor made the decision together (to offer the position at LLCC to Jennifer Bogard) and agreed. Warden Taylor had been warden of LLCC at the time the selection was made.

19. Dr. Van Nort disagreed that the only reason cited in the response to Appellant's grievance regarding the selection of Jennifer Bogard was she was more qualified than Appellant. Dr. Van Nort cited the regulation, which has all the factors listed, and also a record of performance. He testified he believed that Jennifer Bogard had five to six years with the Department of Corrections at the time she was selected for promotion to the CPA position, and he also believed she had several years of graduate school training. Dr. Van Nort testified he believed she had come to the Department of Corrections from graduate school.

20. Appellant asked the witness as to whether he (the Appellant) had more experience than Bogard. Dr. Van Nort acknowledged the Appellant had more years experience, but was not necessarily more experienced or had better experiences. Through Dr. Van Nort, Appellant established he had begun his career with the Department of Corrections in 2000, and spent two years with the Correctional Psychiatric Program, thus having four years in the SOTP before Bogard began with the Department of Corrections in 2006.

21. Dr. Van Nort stated he was also aware of Appellant's educational achievements. When queried, Dr. Van Nort stated he could not quantify how much of the CPA position would deal with administrative functions.

22. Questioning Dr. Van Nort while referring to Appellant's Exhibit 6, a chart prepared by the Appellee in response to a discovery request, Appellant pointed to the perceived paucity of psychological testing requiring a person holding a certification (such as a Certified Psychological Associate) being done over the years, as demonstrated in the exhibit. Appellant surmised from this document, and questioned Dr. Van Nort accordingly, that if the psychological assessments were being done infrequently, as does appear on Appellant's Exhibit 6, then what would the CPA be doing the remainder of the time, if not administration? Dr. Van Nort replied that the remainder of the time would not all be administrative functions, but would be doing psychological functions, such as clinical groups, and he stated Bogard had assisted him with research projects and performed other duties, which he did not view as administrative.

23. Through the next document, Appellant's Exhibit 7, an e-mail from Dr. Van Nort to his staff in 2009, Appellant questioned the witness regarding various psychological testing and what changes had been made. Dr. Van Nort stated for a variety of good reasons (as he termed it), he wished to move away from some of the more psychological assessments to more dynamic tools. For one of these tools, the IORN, an individual would need training to interpret, but not to score or administer them. There was then some testimony from the witness following questions from the Appellant as to how a mental retardation test is requested, and who makes the decision

to actually conduct such a test on an inmate. The point of that questioning was Appellant was attempting to establish that aside from not actually being able to conduct the testing, he could call Dr. Van Nort if such a request came in. This goes back to the question which established not that many actual mental retardation tests are completed.

24. Dr. Van Nort agreed that the Appellant conducts group therapy and has more experience doing so than Jennifer Bogard.

25. Upon completing Appellant's examination of Dr. Van Nort, the Appellee began its examination.

26. Dr. Van Nort outlined his educational history, and when he began with the Department of Corrections. He then described some of his professional accomplishments as well.

27. Appellee's Exhibit 2, the job description for the SOTP CPA, and Appellee's Exhibit 3, the class specification, both were introduced through Dr. Van Nort. He described many of the SOTP CPA duties, as previously done, as being clinical.

28. The next witness called by the Appellant was **Warden Clark Taylor**. Upon being properly sworn, Warden Taylor offered the following summarized testimony.

29. At the time of this evidentiary hearing, Warden Taylor was Warden at the Kentucky State Reformatory.

30. Warden Taylor testified he had previously been a Correctional Program Administrator (CPA) at the Central Office level from 1998 through 2001, when he was promoted. He testified that he did not then, nor does he now, hold a professional certification in psychology. He stated he stayed busy with his administrative duties while a CPA.

31. On examination by counsel for the Appellee, Warden Taylor reviewed his work history with the Department of Corrections, dating back to 1988. Warden Taylor stated when he became a CPA in 1998, his duties were split between reviewing transfers, classification appeals and other duties. As a CPA, he also provided oversight to private prisons then operating in the Commonwealth. With regards to the selection process for the position in question, Warden Taylor stated it was a department head position in his prison, and he wanted input into the selection of the person. As to what he was looking for in a successful candidate, Warden Taylor stated that high on his list was someone who had experience in the specialized field of sex offender treatment, someone who could be an administrator, administering the program at the facility and supervise five employees; in essence, he needed someone who was well-rounded and who could be a team player.

32. Warden Taylor testified that SOTP, by the nature of the program, tended to be somewhat isolated from the rest of the facility. He was looking for someone who could be more of an integral part of the prison and have more interaction with the staff.

33. Looking back on the selection of Jennifer Bogard, which Warden Taylor supported, not only as the Warden but also as one of the interviewers in the selection process, he stated that Bogard had the SOTP experience, which only she and Appellant had amongst the applicants. He stated she also gave a good interview; that she was eager, very upbeat and very interested in being a part of the facility. Warden Taylor denied there was any discussion in the selection process about the age of the candidates.

34. On re-direct examination by Appellant, Warden Taylor stated he was sure he was aware at the time that Appellant had significant criminal justice background. Warden Taylor stated that he was aware that Appellant had more seniority as a SOTP clinician than Bogard; however, he believed she had adequate experience to handle the responsibilities. Warden Taylor noted that neither Appellant nor Bogard had served as administrators in the Department of Corrections, and that having degrees in Criminal Justice Administration would not necessarily equate to success as an administrator.

35. Upon conclusion of Warden Taylor's examination by Appellant, he was excused.

36. Appellant stated he had no further witnesses.

37. During the course of the evidentiary hearing, the Hearing Officer had discussed with Appellant the difference between testimony under oath as evidence and argument. Having heard this, Appellant stated he would rest his case.

38. Appellee indicated it had no case in rebuttal, having been able to question the witnesses counsel for the Appellee had wished to call.

39. At the request of counsel for the Appellee, the parties agreed to a briefing schedule. Counsel for the Appellee timely filed a brief. Appellant faced issues in filing a timely brief, which were set forth in an Interim Order entered in May 2013, which led to his being given more time in which to file a brief. Appellant then filed a timely brief in accordance with the revised schedule. Though given time in which to file a reply, Appellee did not do so.

40. KRS 18A.0751(4)(f) states, as follows:

(4) These administrative regulations shall provide:

...

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

...

41. 101 KAR 1:400 states, as follows:

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.

(2) Promotions may be interagency or intra-agency.

(3) (a) An employee in the classified service, other than a career employee, may be promoted to a position in the unclassified service.

(b) He shall not have reversion rights to a position in the classified service.

(c) An employee who was promoted or changed as a result of other action, with no break in service, from a position in the classified service to a position in the unclassified service prior to July 15, 1986, shall retain the reversion rights he held at the time of promotion or other action.

### **FINDINGS OF FACT**

1. The Hearing Officer finds that Appellant, Warren McLemore, at the time of the filing of this appeal, and during the relevant times of the selection process for the Corrections Program Administrator (CPA) position at the Luther Luckett Correctional Complex (LLCC) in early 2011 was a Social Services Clinician position in the classified service in which Appellant had status.

2. The Hearing Officer finds that Appellant and Jennifer Bogard, a fellow Clinician in the SOTP, both applied for the vacant SOTP CPA position at LLCC in or about January 2011. Both Appellant and Bogard interviewed for the CPA position.

3. The Hearing Officer finds that Jennifer Bogard was the successful candidate, accepting the position on or about February 2011.

4. The Hearing Officer finds Appellant filed a timely appeal regarding the selection of Jennifer Bogard into the LLCC SOTP CPA position in March 2011.

5. The Hearing Officer finds the basis for the appeal was the challenge to the selection for promotion of Jennifer Bogard into the above-mentioned position, challenging it via 101 KAR 1:400 and KRS 18A.0751(4)(f), the regulatory and statutory provisions which allow for classified employees to challenge the selection of others for promotion.

6. The Hearing Officer finds that Appellant failed to meet the burden of proof required to prevail in a case challenging the promotion of another with the requirements set forth in the statutes and regulations noted above.

7. The Hearing Officer finds that the main point of contention between Appellant and the chief witness for the Appellee, Dr. James Van Nort, the Corrections employee with

overall charge of the SOTP department, was that Jennifer Bogard was a Certified Psychological Associate, and Appellant was not.

8. The Hearing Officer finds this qualification which Bogard possessed, and which Appellant did not, was a prime and motivating factor in the decision made by Dr. Van Nort and Warden Taylor, and especially Dr. Van Nort as the employee with direct overall supervision of the SOTP, to recommend Bogard for the position.

9. The Hearing Officer finds persuasive Dr. Van Nort's reasons given during the course of the evidentiary hearing as to why he believed this qualification, possessed by Bogard and not possessed by the Appellant, gave Bogard the edge for purposes of the hiring recommendation.

10. The Hearing Officer finds that the candidates were not equal in the area of qualifications. The Hearing Officer finds that as to the other areas required to be considered by statute and regulation in the selection of a classified employee for promotion, that Appellant had greater seniority than Bogard; that in the area of conduct they were equal; that both Bogard and Appellant were roughly equivalent in the area of record performance; and that in the area of performance evaluations they were also roughly equivalent. It is the area of qualifications which the Hearing Officer finds tilted the selection in Bogard's favor.

11. The Hearing Officer finds that the statutes and regulations require appropriate consideration be given to the factors mandated by statute and regulation, and that such was done by the Appellee, being aware of the factors and being aware of Appellant's and Bogard's standing as to these factors when the decision was made.

12. The Hearing Officer is well aware of Appellant's contention that there was over-reliance on Bogard having certification in psychological administration, which had the practical affect that Bogard could administer certain psychological tests, and interpret and score them, which Appellant could not. It was undisputed, and the Hearing Officer so finds, that at LLCC in years 2004 through 2012, that only about 25 psychological tests were administered wherein this certification would be meaningful, that is, the clinician or the CPA could administer or interpret the tests, especially the tests to rule out mental retardation. The Hearing Officer heard testimony that this testing could be important, because if an inmate is determined to be mentally retarded, he may well be exempted from having to participate in the SOTP as a condition of release.

16. Even having found that relatively few of these tests were conducted over the years, the Hearing Officer is convinced by Dr. Van Nort's testimony that especially in the person they were choosing to fill the CPA position at LLCC, having such a qualification could be meaningful. The Hearing Officer finds that it was not in violation of statute or regulation for the Appellee to consider Jennifer Bogard having this qualification, and Appellant not having it, to be important in the selection process.

17. The Hearing Officer finds that Appellant did have significant education in the field of Criminal Justice Administration, and this may be important in other positions within the

Department of Corrections. The Hearing Officer finds it to be of less importance for this specific CPA position which dealt with the Sex Offender Treatment Program.

18. The Hearing Officer having found that Appellant has not met his burden of proof, does not find the selection process violated 101 KAR 1:400 or KRS 18A.0751(4)(f).

### **CONCLUSIONS OF LAW**

1. The Hearing Officer concludes as a matter of law that as the Appellant, as found above, did not meet his burden of proof regarding his claim that the selection process which resulted in Jennifer Bogard being promoted into the Corrections Program Administrator position in the Sex Offender Treatment Program at Luther Lockett Correctional Complex did not violate the statutory and regulatory provisions, that Appellant's appeal must fail.

2. The Hearing Officer concludes this essentially came down to a judgment call on the part of Appellee that the clinician with the certification in psychological administration would be of more value in the CPA position over the SOTP than one who did not have it. Such does not violate the law.

3. As the Hearing Officer has found and concluded that the Appellee acted appropriately and within its discretion, the Hearing Officer concludes the appeal should be dismissed.

### **RECOMMENDED ORDER**

The Hearing Officer recommends to the Personnel Board that the appeal of **WARREN McLEMORE V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS, (APPEAL NO. 2011-059)** 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 Boyce A. Crocker** this 13<sup>th</sup> day of September, 2013.

**KENTUCKY PERSONNEL BOARD**

  
\_\_\_\_\_  
**MARK A. SIPEK**  
**EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:

Hon. Angela Cordery  
Mr. Warren McLemore