

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NOs. 2020-169 and 2021-134**

MARSHALL PEEK

APPELLANT

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

**JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF CORRECTIONS**

APPELLEE

and

ROBIN MCCALISTER

INTERVENOR

*** **

The Board, at its regular February 2024 meeting, having considered the record, including the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer dated January 19, 2024, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer are approved, adopted, and incorporated herein by reference as a part of this Order, and the Appellant's appeals are therefore **DISMISSED**.

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this 14th day of February, 2024.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

Copies hereof this day emailed and mailed to:
Hon. D. Wes Sullenger
Hon. Jesse Robbins
Robin McCalister
Hon. Rosemary Holbrook (Personnel Cabinet)
Rodney Moore

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This matter came on for an evidentiary hearing on September 25 and 26, 2023, at 9:30 a.m. ET, at 1025 Capital Center Drive, Suite 105, Frankfort, KY, before the Hon. Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by KRS Chapter 18A.

The Appellant Marshall Peek was present and was represented by the Hon. D. Wes Sullenger. The Appellee Justice and Public Safety Cabinet, Department of Corrections was present and was represented by the Hon. Jesse L. Robbins. Intervenor Robin McCalister, by agreement, was not present on September 25 or 26, 2023. She was due to attend on September 27, 2023, but the parties concluded the evidence prior to that date. The Hearing Officer and the parties conducted a phone call with Ms. McCalister, who consented to ending the evidence without her presence.

At the conclusion of the evidentiary hearing, the Hearing Officer directed the Appellant to file proposed Findings of Fact, Conclusions of Law, and Recommended Order and a written closing brief on or before October 27, 2023. The Hearing Officer provided the Appellee and the Intervenor until December 8, 2023, to file any written responses. The Hearing Officer then provided the Appellant until January 5, 2024, to file any reply to those responses.

BACKGROUND

1. The Appellant filed Appeal No. 2020-169 challenging the decision by the Justice and Public Safety Cabinet, Department of Corrections, to select William Simpson (Simpson) for

promotion to Corrections Unit Administrator I over the Appellant. The Appellant also alleged disability and age discrimination in being denied this promotion.

2. The Appellant filed Appeal No. 2021-134 challenging the decision by the Appellee to select Robert Harris (Harris) for promotion to Corrections Unit Administrator I over the Appellant. The Appellant also alleged disability and age discrimination in being denied this promotion.

3. Simpson eventually left his position as Corrections Unit Administrator I. This position is now held by Robin McAllister (McAllister). McAllister intervened in this proceeding and was named a party.

4. These appeals were consolidated on March 16, 2023, for evidentiary hearing purposes.

5. The issues for the evidentiary hearing were as follows:

- a) Whether the Appellee appropriately considered the applicants' qualifications, record of performance, performance evaluations, seniority, and conduct in selecting Simpson for Corrections Unit Administrator I over the Appellant in 2020, and in selecting Harris for Corrections Unit Administrator I over the Appellant in 2021.
- b) Whether the Appellee discriminated against the Appellant based on his age in not selecting him for promotion to Corrections Unit Administrator I in 2020 and 2021.
- c) Whether the Appellee discriminated against the Appellant based on his disability in not selecting him for promotion to Corrections Unit Administrator I in 2020 or 2021.
- d) The burden of proof on all issues was placed on the Appellant and the Appellant went first in the presentation of evidence.

6. At a pre-hearing conference on March 10, 2023, the Appellant disclosed that he was promoted to Corrections Unit Administrator I on January 16, 2023. As a result, the Hearing Officer informed the parties that the appeal appeared to be only about backpay. The Hearing Officer also informed the parties that it was extremely rare for the Personnel Board to award a position to an Appellant and that the usual relief, should the Appellant prevail, would be for the promotion to be set aside and for the Agency be ordered to redo the promotion process in compliance with the law. The parties were also provided a copy of Donald Bell v Cabinet for Families and Children, Appeal No. 1999-581, 2000 WL 35675133, as an example of the level of proof necessary for the Appellant to prevail.

7. Witnesses called by the Appellant:

- a) **The Appellant, Marshall Peek**
- b) **Jill Robinson**- Interview Panelist 2020 promotion
- c) **Roger Mitchell**- Coworker
- d) **Stacie Gibson**- Interview Panelist 2020 promotion
- e) **Skyla Grief**- Interview Panelist 2020 promotion
- f) **Alex Hearell**- Coworker and applicant for 2020 and 2021 promotions
- g) **Jacob Bruce**- Interview Panelist 2021 promotion
- h) **Laura Plappert**- Interview Panelist 2021 promotion
- i) **The Appellant** (recalled)

The Appellee did not call any witnesses.

8. Exhibits

a) **Joint Exhibits- 1-20**

- 1) February 22, 2012 Memorandum, Re: Promotion of Appellant from Maintenance Supervisor to Classification and Treatment Officer effective February 16, 2012, and Personnel Action Notification (pp. 130-131)
- 2) Appellant's Training Transcript 2017-2021 (pp. 588-592, 585-587)
- 3) Job Class Specification, Corrections Unit Administrator I (pp. 489-490)
- 4) Request for Personnel Action Re: Promotion of Appellant from Classification and Treatment Officer to Corrections Unit Administrator I, effective January 16, 2023 (p.134)

- 5) Appellant's Resumé (492-493)
- 6) Appellant's Application, dated February 26, 2020 (pp. 494-505)
- 7) Appellant's Employee Performance Evaluations 2018 (Outstanding) and 2019 (Highly Effective) (pp. 379-404)
- 8) Memorandum, dated April 9, 2020, from Deputy Warden Skyla Grief recommending Lauren Massey and William Simpson for promotion to Corrections Unit Administrator I (p. 909)
- 9) Interview Questionnaire Worksheets for Appellant from Interview Panelists Deputy Warden Skyla Grief, Stacey Gibson, and Jill Robertson (pp. 506-520)
- 10) Appellant's Appeal Form (Appeal No. 2020- 169) including a three (3) -page narrative statement, Grievance Form and responses, Internal Mobility Applicant Forms, and Certificates for Moral Recognition Therapy and Western Regional LEAD program (pp. 10-44)
- 11) Lauren Massey's Application (pp. 526-538)
- 12) William Simpson's Application (pp. 557-566)
- 13) Interview Questionnaire Worksheets for Lauren Massey from Interview Panelists Deputy Warden Skyla Grief, Stacey Gibson, and Jill Robertson (pp. 540-556)
- 14) Interview Questionnaire Worksheets for William Simpson from Interview Panelists Deputy Warren Skyla Grief, Stacey Gibson, and Jill Robertson (pp. 568-584)
- 15) Appellant's Application, dated September 23, 2021 (pp. 632-648)

- 16) Deputy Warden Laura Plappert's Memorandum, dated October 20, 2021, recommending Robert Harris for promotion to Corrections Unit Administrator I (p. 585 and p. 48)
- 17) Appellant's Appeal Form (Appeal No. 2021-134) (pp. 45-46)
- 18) Interview Questionnaire Worksheets for Appellant from Interview Panelists Stephanie Chowning, Jacob Bruce, and Laura Plappert (pp. 649-664)
- 19) Robert Harris' Application (pp. 597-619)
- 20) Interview Questionnaire Worksheets for Robert Harris from Interview Panelists Stephanie Chowning, Jacob Bruce, and Laura Plappert (pp. 620-631)
- b) **Appellant's Exhibits – 21-26** (Admitted over Appellee's objection regarding Sasha Primozich's promotion)
 - 21) Interview Questionnaire Worksheets for Appellant from Interview Panelists Jacob Bruce, Jill Robertson, and Laura Plappert; Prison Rape Elimination Act Disclosure; Authorization to Conduct Criminal Records Check, Driving History Records Check, and Credit Reports Check; Internal Mobility Applicant Form, Appellant's Resumé and Application (pp. 682-712)
 - 22) Appellant's Application dated June 21, 2022; Internal Mobility Applicant Form; Authorization to Conduct Criminal Records Check, Driving History Records Check, and Credit Report Check; Prison Rape Elimination Act Disclosure and 2020 Performance Evaluation (pp. 726-775)
 - 23) Sasha Primozich's Application; Authorization to Conduct Criminal Records Check, Driving History Records Check, and Credit Report Check; Prison Rape Elimination Act Disclosure; Internal Mobility Applicant Form (pp. 864-890)

- 24) Sasha Primozich's Request for Personnel Action for promotion from Administrative Specialist III to Corrections Unit Administrator I, effective August 1, 2022 (p. 863)
- 25) Interview Questionnaire Worksheets for Appellant from Interview Panelists Jill Robertson, Stephanie Chowning, and Laura Plappert (pp. 714-721, 776-779)
- 26) Interview Questionnaire Worksheet for Sasha Primozich from Interview Panelists Stephanie Chowning, Jill Robertson, and Laura Plappert (pp. 891-902)
- c) **Appellee's Exhibit**
 - 27) William Simpson's Internal Mobility Application Form (p. 567)
- d) **Appellant's Exhibit**
 - 28) Kentucky Corrections Policy and Procedure 18.1, "Classification of the Inmate"

FINDINGS OF FACT

1. The Appellant failed to prove that the Appellee did not appropriately consider the candidates' qualifications, seniority, record of performance, performance evaluations, and conduct in selecting William Simpson for promotion to Corrections Unit Administrator I over the Appellant in 2020.

- a) The Appellant interviewed for a position as a Corrections Unit Administrator I on April 3, 2020. The Interview Panel consisted of Deputy Warden Skyla Grief, Jill Robertson (Robertson), and Stacy Gibson (Gibson).
- b) Lauren Massey and William Simpson (Simpson) were selected and promoted to Corrections Unit Administrator I. The Appellant did not challenge the promotion of Lauren Massey. The Appellant alleged he should have been selected over Simpson.
- c) The Interview Panelists testified they considered the applicants qualifications record of performance, performance evaluations,

seniority, and conduct in assessing the candidates. Applicants submitted applications, resumés, internal mobility form, and their last two (2) performance evaluations. The candidates were also asked a series of questions during their interviews.

- d) The Interview Panelists chose Simpson over the Appellant because they felt he was a stronger candidate for promotion. Simpson was described as an excellent employee. He was described as showing more initiative and that his work was more consistent than that of the Appellant. The Appellant was described as having problems with accuracy in his work.
- e) Simpson's responses were rated better than the Appellant's by all Interview Panelists to job related questions asked of all the candidates. It is also clear that the interview was used as a tool to consider the "qualifications" of the candidates. The Interview Panelists referred to it as a measure of "knowledge, skills, and abilities."
- f) During the interview, even when prompted by Interview Panelists, the Appellant's responses were lacking on question four (4). He even stated that medium custody inmates could work outside the fence. This response was so inaccurate that one of the Interview Panelists wrote in quotes "Yikes!" in their notes. As a Classification Treatment Officer (CTO), the Appellant should have known the answer to this basic classification question. As a Corrections Unit Administrator I, he would be expected to supervise the work of the CTOs. Such a mistake could lead to disastrous results at the Kentucky State Penitentiary.
- g) The Appellate failed to list a 2016 written reprimand under "conduct" on his Internal Mobility Form. Although he declared this a mere "clerical error," the Hearing Officer finds this "error" demonstrated a lack of attention to detail. Attention to detail is clearly a necessary qualification for a Corrections Unit Administrator I.
- h) The Appellant argued that appropriate consideration of the five (5) factors should be reduced to a math problem (he claimed he won two (2) categories and three (3) were even, therefore, he should be promoted). The Hearing Officer finds this approach completely oversimplifies the promotional process and distorts the evidence. In this case, while the Appellee did not have the burden of proof, it is more likely than not that Simpson was more qualified to be a

Corrections Unit Administrator I and had superior conduct. More importantly, it is more likely than not that the Appellee appropriately considered the five (5) promotional factors in selecting Simpson for promotion to Corrections Unit Administrator I.

- i) The Hearing Officer acknowledges that Gibson, one of the Interview Panelists, testified that the five (5) factors were viewed as more of a tie breaker in the interview process. Nonetheless, the overall review of Gibson's testimony and the documentation shows that appropriate consideration was given to the five (5) factors. The Hearing Officer finds the testimony of the three (3) Interview Panelists credible and they appropriately considered the promotional factors.

2. The Appellant failed to prove that the Appellee did not appropriately consider the candidates' qualifications, seniority, record of performance, performance evaluations, and conduct in selecting Harris for promotion to Corrections Unit Administrator I over the Appellant in 2021.

- a) The Appellant interviewed for a promotion to Corrections Unit Administrator I on October 19, 2021. The Interview Panel consisted of Deputy Warden Laura Plappert (Plappert), Unit Administrator II Jacob Bruce (Bruce), and Unit Administrator I Stephanie Chowning (Chowning).
- b) Harris was selected and promoted to Corrections Unit Administrator I. The Appellant alleged he should have been selected over Harris.
- c) Plappert and Bruce testified they considered the applicants qualifications, record of performance, performance evaluations, seniority and conduct in assessing the candidates. Applicants submitted applications, resumés, internal mobility forms, and their last two (2) evaluations.
- d) Harris was selected for promotion to this Corrections Unit Administrator I position in the Segregation Unit because of his extensive experience as a security supervisor. This Unit Administrator I would be supervising security staff in the Segregation Unit. The Hearing Officer finds the testimony of Bruce and Plappert credible that they appropriately considered the five (5) promotional factors in recommending Harris for promotion to Corrections Unit Administrator I.

- e) The Appellant argued Harris did not meet the minimum qualifications for Corrections Unit Administrator I because he did not have experience in the rehabilitation of offenders. The Personnel Cabinet determines if candidates for merit positions meet the minimum qualifications. The Personnel Cabinet adopts minimum qualifications for classifications in the merit system. The Personnel Cabinet also interprets the minimum qualifications. If the Appellant wanted to challenge the determination that Harris met the minimum qualifications for Corrections Unit Administrator I, he should have named the Personnel Cabinet as a party to this appeal.
- f) The Hearing Officer finds that Harris met the minimum qualifications for Corrections Unit Administrator I. Plappert was promoted to Unit Administrator I from Correctional Captain and Bruce was promoted to Corrections Unit Administrator I from Correctional Lieutenant.

3. The Appellant was not discriminated against because of his age when he was not promoted to Unit Administrator I in 2020 and 2021.

- a. The Appellant did not establish the ages of Simpson or Harris other than to say they were younger than him.
- b. No direct evidence of age discrimination was presented.
- c. The Appellee articulated nondiscriminatory reasons for promoting Simpson and Harris that were not proven to be pretexts for discrimination.
- d. The Appellant was promoted to Corrections Unit Administrator I in 2023 when he was older than he was in 2020 and 2021.
- e. The Hearing Officer finds the Appellant was not denied promotion because of his age. The Hearing Officer finds the testimony of Grief, Robertson, Gibson, Plappert, and Bruce credible that they did not consider the age of the candidates in making a recommendation for promotion.

4. The Appellant was not discriminated against because of a disability when he was not promoted to Corrections Unit Administrator I in 2020 and 2021.

- a. The Appellant is a disabled veteran. He described back injuries and alleged he suffered from Post Traumatic Stress Disorder (PTSD).

The Hearing Officer finds his testimony about his disability credible.

- b. The Appellant only asked for one (1) accommodation during his employment, a more suitable chair for his back problems, and he was given the chair. The Appellant never asked for any other accommodation.
- c. The Hearing Officer finds the Appellant was not denied promotion because of his disability. The Hearing Officer finds the testimony of Grief, Robertson, Gibson, Plappert, and Bruce credible, that they did not consider the Appellant's disability in making a recommendation for promotion. They also credibly testified they were aware of no reason the Appellant could not perform the job of Corrections Unit Administrator I.
- d. The Appellant testified he did not ask for an accommodation because he was "nervous" and "didn't interview well." The Appellee was under no obligation to offer any special consideration. Nonetheless, the Interview Panelists testified they gave the Appellant "prompts" when he was missing key points in his answers. There was no testimony to suggest this was only offered to the Appellant and was instead a regular interview practice.
- e. No evidence was introduced that the Appellant was denied promotion because he missed work due to medical appointments.

5. The Appellant failed to prove that he should be awarded either of the Corrections Unit Administrator I positions or the concomitant backpay.

- a. Because the Appellant was promoted to Corrections Unit Administrator I in 2023, the only meaningful relief for the Appellant was backpay from the time of the 2020 or 2021 promotions. The Appellant did not present any evidence that special circumstances were present in either promotional processes suggesting the Appellant should have been promoted.
- b. No evidence was introduced about any candidates for promotion other than the Appellant, Simpson, Massey and Harris. Alex Hearrell testified the Appellant was more qualified than him and he applied for both the 2020 and 2021 promotions. No evidence was introduced that the Interview Panelists agreed with Hearrell's assessment.

- c. Even if the Appellant had proven the Appellee failed to appropriately consider the promotional factors, he could not be awarded backpay to the date of the promotions. He presented no evidence about the other candidates, how they were assessed by the Interview Panelists or their qualifications, record of performance, performance evaluations, seniority and conduct.

CONCLUSIONS OF LAW

1. KRS 18A.0751(4)(f) reads as follows:

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.

2. 101 KAR 1:400 reads as follows:

Section 1. Promotion.

- (1) Each agency 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.

Section 2. Promotion Documentation.

- (1) Prior to a promotion in the classified service, an employee with status shall request a promotion on the Voluntary Transfer/Demotion/Promotion Employee Agreement Form incorporated by reference by the Personnel Cabinet in 101 KAR 2:034.
- (2) The form shall include:
 - (a) The effective date of the promotion;
 - (b) The position number and job classification from which the employee is promoting;
 - (c) The position number and job classification to which the employee is promoting;

- (d) The pay grade, salary, and work week for the position to which the employee will be promoted; and
 - (e) A statement that the employee waives the right to appeal the promotion.
- (3) The agency shall forward a copy of the form to the Personnel Cabinet Secretary.

3. "Qualifications" are defined as "[A]ny quality, knowledge, ability, experience, or acquirement that fits a person for a position, office, profession, etc." *Cabinet for Human Resources vs. Kentucky State Personnel Board, et al.*, 846 S.W.2d 711, 715 (Ky. App. 1992). "Qualifications" are not limited to "minimum qualifications."

4. "Seniority" means the total number of months of state service." KRS 18A.005(36).

5. Interviews are a tool that agencies use in the promotion process. In this case, the evidence demonstrates that interviews were used in an effort to give appropriate consideration to the five (5) factors. *Adams v Commonwealth Health and Family Services*, 2014 WL 505910 (KY. APP 2014).

6. The Appellee appropriately considered the candidates' qualifications, record of performance, performance evaluations, seniority and conduct in selecting William Simpson for promotion to Corrections Unit Administrator I in 2020. KRS 18A.0751(4)(f) and 101 KAR 1:400.

7. The Appellee appropriately considered the candidates' qualification, record of performance, performance evaluations, seniority and conduct in selecting Robert Harris for promotion to Corrections Unit Administrator I in 2021. KRS 18A.0751(4)(f) and 101 KAR 1:400.

8. The Appellant failed to carry his burden of proof that he was discriminated against based on his age in not being selected for promotion to Corrections Unit Administrator I in 2020 and 2021. KRS 13B.090(7)

9. The Appellant failed to carry his burden of proof that he was discriminated against based on his disability in not being selected for promotion to Corrections Unit Administrator I in 2020 and 2021. KRS 13B.090(7)

10. The Appellant failed to carry his burden of proof that he should have been promoted to Corrections Unit Administrator I in 2020 or 2021 had the Appellee appropriately considered the candidates' qualifications, record of performance, performance evaluations, seniority and conduct. *Nikki Townsend v Cabinet for Health and Family Services*, 2008 WL 3996611 (KY PB) and *Donald Bell v Cabinet for Families and Children*, 2000 WL 35675133 (KY PB).

11. When examining applicants for positions, the General Assembly clearly expressed its intent that the Personnel Cabinet "be free to use any investigation of education and experience and any test of capacity, knowledge, manual skill, character, personal traits, or physical fitness, which in [its] judgment, serves the need to discover the relative fitness of applicants." KRS 18A.110(7)(c). Based upon this authority, the Personnel Cabinet has implemented a method to review an individual's application in concert with a Job Class Specification to determine if the applicant meets the minimum qualifications of a position assigned to a certain job classification.

12. The Personnel Board has previously held that "(t)he legislature has given the Personnel Cabinet the authority to set class specifications and to review the qualifications of applicants and eligibles. Absent some clear abuse of discretion or arbitrary action, the discretion of the Personnel Cabinet over this area should not be disturbed." *Mercer v. Justice Cabinet, et al.*, 2001 WL 36147190 (KY PB 2000-387). See also *Klatt v. Justice & Public Safety Cabinet, et al.*, 2019 WL 6050251 (KY PB 2017-210 and 2017-240).

13. Because he was placed in the Corrections Unit Administrator I position after review of his qualifications by the Personnel Cabinet, there is no reason to contest Harris met the minimum qualifications. Without naming the Personnel Cabinet as a party, the Appellant could not contest this issue because the Appellee did not make this determination.

14. Because all the events underlying this Appeal occurred before the effective date of Senate Bill 153, all references to KRS Chapter 18A are to the sections in effect at the time of the events associated with this Appeal.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **MARSHALL PEAK V JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS AND ROBIN MCALLISTER (APPEAL NOs. 2020-169 and 2021-134)** 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 fifteen (15) 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).

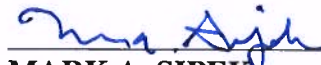
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The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

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.

SO ORDERED at the direction of the Hearing Officer this 19 day of January, 2024.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day emailed and mailed to:

Hon. Wes Sullenger
Hon. Jesse Robbins
Robin McCalister
Hon. Rosemary Holbrook (Personnel Cabinet)