

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2021-112

BRIAN SCOTT PHELPS

APPELLANT

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

TRANSPORTATION CABINET

APPELLEE

AND

MATTHEW WEST

INTERVENOR

*** *** *** *** ***

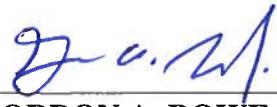
The Board, at its regular March 2025 meeting, having considered the record, including the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer dated February 6, 2025, and being duly advised,

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 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 24th day of March, 2025.

KENTUCKY PERSONNEL BOARD



GORDON A. ROWE, JR., SECRETARY

Copies hereof this day emailed and mailed to:

Brian Scott Phelps

Hon. Edwin Logan

Matthew West

Hon. Rosemary Holbrook (Personnel Cabinet)

J. R. Dobner

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2021-112

BRIAN SCOTT PHELPS

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v.

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

TRANSPORTATION CABINET

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This matter came on for an evidentiary hearing on November 12, 2024 at 9:30 a.m. EDT at 1025 Capital Center Drive, Suite 105, Frankfort, KY, before the Hon. Roland P. Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Brian Scott Phelps, was present without legal representation (pro se). The Appellee, Transportation Cabinet (KYTC), was present by its agency representative, Deneatra Henderson, and represented by the Hon. Edwin Logan. The Intervenor, Matthew West, was present without legal representation (pro se).

This appeal was filed September 28, 2021. The issue is whether the Appellee, Transportation Cabinet, complied with the provisions of KRS 18A.0751 and 101 KAR 1:400 in selecting Matthew West as a Transportation Engineering Branch Manager over the Appellant, Brian Scott Phelps. The burden of proof was on the Appellant to prove his case by a preponderance of evidence.¹

At the evidentiary hearing, the Rule separating witnesses was invoked and employed throughout the course of the proceedings. The parties announced they were ready to proceed and they waived presentation of opening statements.

¹ As set out in the 08-20-2024 *Interim Order*.

BACKGROUND

1. **Kyle Poat** ("Poat") was the first witness called by the Appellant. Since September 2018, Poat has been employed by the Commonwealth of Kentucky, Transportation Cabinet, as Transportation Engineering Branch Manager/Chief District Engineer in District 1. He participated "virtually" in applicant interviews as an interview panel member on July 22 and 23, 2021 [9.28.37.020] (T: 1:35); [9.31.40.861] (T: 0:53). The first interview on day 1 was scheduled for 12:00 p.m. (noon) and he had spent an "adequate amount of time" reviewing the applications prior to that time. He had received the July 22, 2021 email from Deneatra Henderson (Appellant's Exhibit 1) with attached applicants' resumes and applications. He was advised "questions coming soon" (T: 1:55). He had been aware of the "Five Factors" that had to be considered in promotion matters (T: 2:25).

2. He identified Appellant's Exhibit 3A, pages 7-10, as the Interview Questionnaire Worksheet he had completed for the interview with the Appellant. His overall rating of the Appellant at the interview was "very good" [9.37.48.421] (T: 1:45). The panel conducted a discussion of the interview after the Appellant left (T: 2:25). All ratings circled on his Questionnaire had been his (Poat's) individual analysis (T: 2:46).²

3. Once all the interviews had been completed, the panel members met to review and discuss all documents they had at the interview, including the Questionnaire,

² There was a question raised by the Appellant why Mr. Poat had circled "very good" at the bottom of page 10 under the heading *Interview Panel Overall Rating*. The Appellant took the position that rating was meant to be the consensus of the interview panel. The Hearing Officer, having heard the testimony of the interview panel witnesses, and having examined the instructions set out in the *Evaluation* box directly above the *Interview Panel Overall Rating*, believes the panel members had each correctly circled their own individual interview rating for each applicant, and the "panel as a whole" later discussed the individual ratings and reached a consensus on a final, overall rating of each applicant's interview.

and assessed by consensus who the best candidate was for the position (T: 2:25); [9.40.52.109] (T: 0:01).

4. He identified Appellant's Exhibit 5 as the Internal Mobility Applicant Forms tendered by Matthew West ("West") (first page) and the Appellant (second page) [9.43.55.990} (T: 1:25). He believed he received the Forms prior to the panel's meeting to form a consensus (T: 10). He agreed West had 129 total months of state service and the Appellant had 258 total months of state service (T: 2:35, 2:40); that the Appellant possessed more total state service (T: 3:00).

5. He identified Appellant's Exhibit 4A as West's application and that West had received his professional engineer's license August 4, 2014 [9.45.59.638] (T: 1:10). He identified Appellant's Exhibit 4B as the Appellant's application and that the Appellant obtained his professional engineer's license in 2004, giving him about 10 years greater professional engineering experience than Mr. West (T: 2:35, 2:55).

6. The "Five Factors" were discussed "several times during the interview process." [9.50.03.363] (T: 0:40). He identified Appellant's Exhibit 7 as the Appellant's performance evaluations and stated this document was supplied by Ms. Henderson at the interview as part of a packet of documents (T:1:24). He reviewed every document in an adequate amount of time to be informed before the interview (T: 1:42).

7. Based on the criteria of the Five Factors and a review of all documents provided to him, Mr. Poat would not change his opinion that West was the best candidate for the position. (T: 2:00). Both the Appellant and West had met the qualifications for the job position, otherwise they would not have been offered an interview (T:1:25). Poat had examined each candidate's seniority and qualifications; both West and the Appellant had a Master's degree in engineering [9.56.10.854] (T:

0:18, 0:23). In the 2019 and 2020 performance evaluations, West had received an “exceptional” and an “outstanding” rating; the Appellant received an “outstanding” and a “distinguished” (T: 0:50). West had 129 months in the Transportation Cabinet; the Appellant had 135 months with the Transportation Cabinet (T:1:40). He believed the records reflected that West had the superior record of performance (T: 2:13). West had no conduct problems; the Appellant had one noted conduct problem (T: 2:20. 2:25).

8. The “conduct” category required an applicant to list all discipline from the level of written reprimand to more severe levels. The conduct the Appellant had listed had been a verbal reprimand which, Poat agreed, was not “written” [9.59.14.550] (T: 0:50, 1:00). The Appellant had listed that incident on his document (T: 1:00). Poat did consider the verbal reprimand when he made his decision (T: 1:20). He believed as a supervisor, any reprimand of an employee was a cause for concern; he agreed a verbal reprimand was not as bad as a suspension or written reprimand (T: 2:11).

9. The next witness for Appellant was **Deneatra Henderson**. Since April 2018, Henderson has been employed by KYTC as Chief District Engineer/Executive Director of District 2 in Madisonville, KY. [10.02.18.242] (T: 2:38, 2:50). She oversees four (4) branches in her District, four (4) section offices, and various other sections [10.42.06.360] (T: 0:01). As Chief District Engineer, she was second (2nd) in the line of supervision to both the Appellant and West and was able to view their work the entire time she has held this position (T: 0:45).

10. She served on the interview panel that recommended Matthew West to the vacant position. She identified Appellant’s Exhibit 1 as the July 22, 2021 email she sent that morning to Kyle Poat and Paul Sanders (“Sanders”), the other two (2) interview panel members, along with the applicants’ resumes and applications.

[10.05.22.017] (T: 1:35). None of the panel members objected to the timeframe in which they received information about the candidates (T: 2:00). The interviews of three (3) candidates were held July 22 and 23, 2021, with the first interview scheduled for July 22 at 12:00 p.m. (noon) (T:2:12).

11. In the hour before the first interview, she took the interview questions she had selected and placed them in the Interview Questionnaire Worksheets [10.08.25.601] (T: 0:12).

12. Poat is an Executive Director of a District that adjoins District 2 and, at the time of the interviews, Mr. Sanders was Executive Director of District 4 (T: 1:37).³

13. During her time as Executive Director, she had participated in selection of four (4) branch managers in her District. [10.11.29.301] (T: 0:52). In selecting interview panel members, she preferred to pick other Chief District Engineers who manage other branch managers and who had experience in the position that was being filled. (T: 1:22).

14. She identified Exhibit 3A, pages 1 through 5, as the Interview Questionnaire Worksheet she filled out during the interview of West. Although she filled in her notes, she acknowledged this exhibit shows she had not circled any ratings [10.14.33.036] (T: 3:02). She stated there is a version of that document that shows she did in fact circle the ratings, but could not explain what document had been provided to the Appellant through discovery [10.17.36.739] (T: 0:05). Regarding this same exhibit, she explained the remainder of the pages were the Questionnaires that were completed by Poat (pages 7 to 10) and Sanders (pages 11 to 14), but it appears Sanders did not

³ At this time in the hearing, the Appellant presented Appellant's Exhibit 2. Counsel for the Appellee's objection to same was sustained and the exhibit was not admitted into evidence.

fill in his name on his document (T:1:38). She denied not circling the ratings on her form in order to be able to give West a higher rating (T: 2:37).

15. She and the other panel members discussed the overall ratings and reached a consensus on the successful candidate [10.20.40.558] (T: 0:20). She signed the hiring memo (T: 0:28) and gave "Valerie" the panel's selection information and the identity of the successful candidate on July 23 following conclusion of the last interview. [10.05.22.017] (T: 0:10).

16. When each candidate appeared for their interview, they handed in their respective Internal Mobility Forms (IMF). She identified Appellant's Exhibit 5 as the IMFs of West and of the Appellant. The candidates also brought their performance evaluations for the prior two years. As the other two (2) panelists participated "remotely" in the interviews they could not have immediate access to the forms. Henderson went through the information with them so they could have the information during their later meeting [10.20.40.558] (T: 1:04, 2:07).

17. The other panelists posed questions to the candidates about their performance evaluations. The panelists also discussed among themselves, after conclusion of each interview, the candidates' IMFs and performance evaluations [10.26.47.994} (T: 0:25, 0:58). Two (2) interviews were conducted on July 22 and one (1) interview was conducted on July 23 (T: 1:15).

18. Henderson examined Appellant's Exhibit 6 and identified it as the Screening Criteria Worksheet used in this process.⁴ This document was used to determine who among the applicants would be offered an interview. It shows all three (3) candidates met the two (2) selection criteria and so, were all offered interviews.

⁴ She testified the name of the 3rd candidate had been redacted on the first line under "Applicant Name".

She testified the "Int. Status" box where the letter "A" was inserted next to each of the three (3) candidates, was in error, as "A" meant "Appointed"; that she did not complete this form; they did not "Appoint" three (3) persons to the position; an "I" for "Interviewed" should have been next to the first candidate and the Appellant's names, and the letter "A" next to West's name. (T: 2:27, 2:30, 2:45), [10.29.51.719] (T: 0:18, 1:37), [10.32.55.400] (T: 0:01). In reaching a decision, Henderson considered the candidates' seniority, qualifications, performance evaluations, record of performance, and conduct [10.42.06.360] (T: 1:50).

19. She identified Appellee's Exhibit 1 as a copy of the register that had been generated for this vacant position [10.45.10.025] (T: 0:01). She received this document after the vacancy posting closed. She was provided with all applicants' names and email addresses. The register is also used to complete the Screening Criteria Worksheet to decide which candidates qualify for an interview. Under "Status" her assistant had entered "A" for Matt West indicating he would be appointed, and "I" for Brian Scott Phelps and a third applicant, indicating they too had been interviewed [10.48.13.718] (T: 0:05).

20. She described the general process employed to promote someone to a vacancy: She requested the personnel administrator request a posting of the position; such posting goes on for signature approval by Henderson, the hiring manager, and the Executive Director (who is also Henderson). (T: 2:25). The vacancy is posted a certain number of days. She then receives a register spreadsheet (T: 2:48). The screening criteria is reviewed and a decision made to offer interviews to the qualified candidates. In this instance all three (3) applicants were offered and participated in interviews [10.51.17.501] (T: 0:12). The interviews were scheduled and thereafter conducted,

using the "TEAMS" program (T: 0:19). The interview panel examines all documents, engages in a separate discussion and reaches a decision of who is to be appointed. All paperwork, along with the appointing memo signed by Henderson, is sent to the personnel administrator (T: 0:30). The matter is then sent to personnel where all required steps are employed for the final appointment (T: 0:53). She identified Appellee's Exhibit 2 as the interview panel's recommendation memo for this appointment (T: 1:10).

21. All candidates were asked the same questions during their interviews (T: 2:03). Each panel member made their own decision on each interview and rated the candidates accordingly (T: 2:20). After all interviews were completed, the panelists discussed their individual findings (T: 2:45). The consensus of the panel was that West was overwhelmingly the preferred candidate; "It was unanimous" [10.54.21.242] (T: 0:07, 0:20).

22. Prior to his appointment, West had served ten (10) months as special detail to the same Branch Manager position (T: 1:30). He had performed the duties of the job prior to the posting of the vacancy (T: 1:56). The Appellant had no prior experience as a Branch Manager (T: 2:14).

23. At this point in the hearing, counsel offered Appellee's Exhibit 3 for admission: another version of the Interview Questionnaire Worksheet completed by Henderson for Matt West. The Appellant objected to admission as such document had not been provided to him through discovery. After discussion, the Hearing Officer sustained the objection.

24. Henderson recalled her individual overall rating of The Appellant's interview was "very good" and her rating of West's interview was "excellent" [11.00.28.660] (T: 2:18).

25. The Appellant offered Appellant's Exhibit 6 for admission: Screening Criteria Worksheet and attachments. The Appellee had no objection and the exhibit was admitted ([11.15.47.292] (T: 0:27).

26. The next witness for the Appellant was **Paul Sanders**. Sanders has been employed by the Kentucky Transportation Cabinet as Supervisor for the Utilities Section in District 4 for more than a year [11.29.12.778] (T: 0:45). He took this position after his December 2021 retirement as Executive Director of District 4 (T: 1:00). In July of 2021, he participated as a panel member during the interview and hiring process involving the Appellant and West (T: 1:10).

27. In his review of Appellant's Exhibit 3A, he identified pages 11 through 14 as the Interview Questionnaire Worksheet he filled out during the interview of West. He had rated West's interview as "excellent" [11.32.16.299] (T: 0:58).

28. In his review of Appellant's Exhibit 3B, he identified pages 9 through 12 as the Interview Questionnaire Worksheet he filled out during the interview of the Appellant. He had rated the Appellant's interview as "good" (T: 1:40).

29. He had received a packet of forms from Henderson at the start of the interviews (T: 2:30). He did not remember how the interview process proceeded or if the panel members discussed the "Five Factors" for promotion [11.35.20.043] (T: 0:46, 1:38). He did not recall discussion of the overall interview ratings for the candidates or any actions that took place in the process [11.38.23.851] (T: 2:10).

30. The Appellant closed his case-in-chief. Intervenor Matthew West declined to present any evidence. The Appellee began presentation of its case and called **Matthew West** as its sole witness.

31. Since September 2021, West has been employed by the Kentucky Transportation Cabinet as District 2 Transportation Engineering Branch Manager of Project Delivery and Preservation [11.44.31.158] (T: 0:12). During his previous six (6) years, he held the position of Transportation Engineering Supervisor in District 2 (T: 0:30). He is a licensed professional engineer (T: 0:50).

32. He identified Appellee's Exhibit 4 as his application to the posted position with his attached resume of past positions (T:1:20). He identified Appellee's Exhibit 5 as the application he completed online for the position (T: 2:25).

33. West had been interviewed by a three (3)-person panel [11.47.34.866] (T: 0:28). He had supplied his performance evaluations for 2019 and 2020, which had overall ratings of "outstanding" and "exceptional", respectively (T: 1:12). He had no conduct incidents (T: 1:20). He acknowledged the performance records he supplied were complete and accurate (T:1:38). Prior to his appointment to the position, he had, for a period of 10-11 months, been on special duty assignment to this same position (T: 2:20).

34. The Appellee closed its case-in-chief. The Appellant declined to present rebuttal evidence. Closing arguments were presented by the Appellant and by counsel for the Appellee. The Intervenor declined to make a closing argument. The matter stood submitted to the Hearing Officer for a decision.

FINDINGS OF FACT

1. Since June 2014, the Appellant, Brian Scott Phelps, has been employed as a Transportation Engineer Supervisor/Transportation Engineer II by the Kentucky Transportation Cabinet (Appellee) in District 2 (Appellant's Exhibit 4B). He is a classified employee with status.

2. A vacancy occurred in the position of Transportation Engineering Branch Manager (TEBM) in District 2 in mid-2021. The vacancy was posted and a register was generated (Appellee's Exhibit 1). Deneatra Henderson, Chief District Engineer and Executive Director of District 2 in Madisonville, KY, assembled an interview panel to facilitate hiring an individual to the position. She, along with Kyle Poat and Paul Sanders (who, at the time of the interviews, were Transportation Engineering Branch Manager/Chief District Engineer in District 1 and Chief District Engineer/Executive Director in District 4, respectively) were the interview panel members (panelists).

3. Three (3) individuals applied for the vacancy: the Appellant, Brian Scott Phelps, the Intervenor, Matthew West, and a third applicant⁵ (Appellee's Exhibit 1). All were employees of the Appellee at that time. Prior to his appointment to the vacancy, West had been on special detail for ten (10) months to the position that was posted vacant (T: DH: [10.54.21.242] (1:30)). There were two (2) Selection Criteria for the position, which each applicant met, and which entitled each to participate in an interview (Appellant's Exhibit 6, p 1).⁶

4. Kyle Poat and Deneatra Henderson remembered and testified as to most of the details pertaining to the vacancy as well as the interview and hiring process.

⁵ The third applicant did not participate in this appeal nor was he called to testify as a witness.

⁶ The name of the third applicant had been redacted prior to the hearing as he was not a party or witness to this hearing.

Their testimony is deemed credible on these matters. Sanders, having retired from KYTC employment in December 2021 and returned to KYTC employment in the past year, remembered only that he had received a packet of forms from Henderson at the start of the interview (T: PS: [11.32.16.299] (2:30)), but did not remember the interview process itself or if the panel members discussed the “Five Factors” for promotion (T: PS: [11.35.20.043](0:46, 1:38), the overall ratings for the candidates, or other portions of the process (T: PS: [11.38.23.851] (2:10)). Therefore Sanders’ testimony is deemed less credible than his other two (2) co-panelists.

5. Henderson, having received the register identifying the three (3) applicants, set up an interview schedule. She sent an email on July 22, 2021 at about 10:56 a.m. to the panelists with attachments of each applicant’s resume and application. In that email she stated “...questions coming soon,” referencing the Interview Questionnaire Worksheet. (Appellant’s Exhibit 1). Poat confirmed receipt of the email and attachments (T: KP: [9.31.40.861] (T:1:55)) and was aware of the “Five Factors” that had to be considered in promotion matters (T: 225).

6. Henderson sent a follow-up email on July 22, 2021, at about 12:10 p.m. to the panelists with a copy of the Interview Questionnaire Worksheet, requesting her panelists “...to print 3 copies and write that [your name and the candidate’s name] in yourself.” (Appellant’s Exhibit 1; bracketed information supplied).

7. The interviews were conducted over a 2-day period, July 22 and 23, 2021. Henderson participated in-person with each candidate; Messrs. Poat and Sanders participated virtually. The interviews were scheduled to begin at 12:00 p.m. (noon) on July 22, 2021 (T: DH: [10.05.22.017] (T: 2:12)). The Appellant and West were interviewed on that first day (Appellant’s Exhibits 3A and 3B-Interview Questionnaire

Worksheets). Each applicant had been asked the identical interview questions, shown on the respective Interview Questionnaire Worksheets. Appellant's Exhibit 3A contains the Questionnaires completed by Deneatra Henderson, Kyle Poat, and Paul Sanders⁷ during the interview of Matt West. Appellant's Exhibit 3B contains the Questionnaires completed by the same three Interview Panel Members during the interview of the Appellant.

8. The Appellant and West each brought to their respective interviews their Internal Mobility Applicant Form (Appellant's Exhibit 5), a written application with additional information and resumes (Appellant's Exhibits 4A and 4B), and copies of their performance evaluations for the last two (2) years.

9. West had 129 months of total state service, all of which were served in the Transportation Cabinet. The Appellant had 258 months of total state service, 135 of which were served in Transportation Cabinet. (Appellant's Exhibit 5).

10. West achieved a graduate degree, having obtained a Bachelor of Science in Engineering and a Master of Science in Engineering from the University of Louisville. He has been a licensed professional engineer since 2014. The Appellant achieved a graduate degree, having obtained a Bachelor of Science in Civil Engineering and a Master of Science in Civil Engineering from the University of Kentucky. (Appellant's Exhibit 5). He has been a licensed professional engineer since 2004 (Appellant's Exhibit 4B, p 3).

⁷ Although Sanders did not fill in his name as the "Interview Panel Member," he testified he remembered having filled out this document during the interview of West and had rated his interview as "excellent" (T: PS: [11.32.16.299] (T: 058).

11. The applicant's performance evaluations showed: West-2019: Outstanding; 2020: Exceptional; Phelps-2019: Outstanding; 2020: Distinguished (Appellant's Exhibit 5; Appellant's Exhibit 7).

12. West's Record of Performance (Occupational experiences, accomplishments, positions, awards, etc.) showed: He had been detailed to Special Duty as Acting TEBM in 2016/2017; Promotions included - EIT II, TE Supervisor of Owensboro Section in 2015; Project Engineer: Natether to I-165, Spottsville Bridge over Green River, US 60 BY-Pass Rehab, KY 81/56 Roundabout. The Appellant's Record of Performance showed: ACE Award 2006. (Appellee's Exhibit 5). Prior to his appointment, West had served 10 months as special detail to the same Branch Manager position and had performed the duties of that job prior to the vacancy posting. The Appellant had no prior experience as a Branch Manager (T: DH: [10.54.21.242] (T: 1:30, 1:56, 2:14).

13. West had received no reportable Conduct corrections (written reprimands, disciplinary fines, suspension, or other disciplinary actions received at any time). The Appellant likewise received no reportable Conduct corrections.⁸

14. The panelists gave the following overall interview ratings: (i) Henderson: Phelps-“very good”; West-“excellent” (Appellant's Exhibit 3B; (T: DH: 11.00.28.660] (T: 2:18)); (ii) Poat: Phelps-“very good”; West-“very good” (Appellant's Exhibits 3A and 3B); (iii) Sanders: Phelps-“good”; West-“excellent” (Appellant's Exhibits 3A and 3B).

15. Following conclusion of the interviews, the panelists discussed among themselves the overall ratings and reached a consensus on the successful candidate.

⁸ Although the Appellant voluntarily reported having received a verbal reprimand July 2019 for a vehicle accident, Kyle Poat testified such conduct correction did not reach the level of a “written” reprimand and Poat did not consider that incident when he made his recommendation for promotion (T: KP: [9.59.14.550] (T: 0:50, 1:00, 1:20).

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(T: DH: [10.20.40.558] (T: 0:20); (T: KP: [9.37.48.421] (T: 2:25), [9.40.52.109] (T: 0:01)).

Poat and Henderson each independently recalled the "Five Factors" having been discussed several times during the entire process and considered prior to identifying the "successful" candidate (T: KP: [9.50.03.363] (T: 0:40); T: DH: [10.42.06.360] (T: 1:50)).⁹

16. The three (3) Interview Panel Members, who, according to a preponderance of the evidence, gave appropriate consideration to each applicant's qualifications, record of performance, conduct, seniority and performance evaluations, reached a unanimous conclusion that Matthew West was the preferred and successful candidate (T: DH: [10.54.21.242] (T: 0:07, 0:20).

17. On August 5, 2021, Deneatra Henderson, Executive Director sent a memorandum titled "Recommendation and Justification [Transportation Engineering Branch Manager] Position Number [30010038], Requisition Number [21-03831]" to the Appointing Authority, Office of Human Resource Management, which identified the Interview Panel Members, the dates of the interviews, and that:

"Based upon the selection panel's thorough review, Matt West best demonstrates the knowledge, skills, and abilities necessary to perform the essential functions of the position. As a result of their qualifications, the interview panel respectfully recommends approval of Matt West to fill the vacancy, with a requested start date of Sept 1, 2021."

"Additionally, the District is requesting a salary of \$6,744.21 per month for Mr. West. This request is to prevent salary disparity within the District." (Appellee's Exhibit 2).

18. The Appellant, Brian Scott Phelps, timely filed his appeal with the Kentucky Personnel Board, received September 28, 2021.

⁹ Although Sanders could not recall how the interview process proceeded or if the panel members discussed the "Five Factors", there was a lack of a preponderance of evidence to show he was any less of an informed, active participant during this hiring process.

CONCLUSIONS OF LAW

1. The Kentucky Personnel Board shall promulgate comprehensive administrative regulations for the classified service governing promotion. KRS 18A.0751(1)(f). Such administrative regulations dealing with promotions shall give **appropriate consideration** to the applicant's qualifications, record of performance, conduct and seniority. KRS 18A.0751(4)(f). (emphasis added). Agencies are required to consider an applicant's qualifications, record of performance, conduct, seniority and performance evaluations in the selection of an employee for promotion. 101 KAR 1:400 Section 1(1).

2. "Qualifications" is defined as "[a]ny quality, knowledge, ability, experience or acquirement that fits a person for the position, office, profession, etc." *Cabinet for Human Resources v. Kentucky State Personnel Board, et al.*, 847 S.W. 2d 711, 715 (Ky. App. 1992).

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

4. "Record of Performance" considered in this case included "Occupational experiences, accomplishments, positions, awards, etc." which information was provided by each Applicant in their respective Internal Mobility Applicant Form (Appellant's Exhibit 5).

5. "Performance Evaluations" considered by this interview panel included evaluations for the two (2) years prior to application: 2019 and 2020 (Exhibit 5).

6. A position vacancy was posted in mid-2021 by the Transportation Cabinet for the position of Transportation Engineering Branch Manager ["TEBM"] in District 2.

The Appellant, Brian Scott Phelps, and the Intervenor, Matthew West, were two (2) of the three(3) applicants.¹⁰

7. The Appellee, Transportation Cabinet, was required by statute and regulation to give appropriate consideration to each applicant's qualifications, record of performance, conduct, seniority and performance evaluations (hereafter referred to as the "Five Factors"). *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W. 2d 406, 410 (Ky. App. 1994).

8. In all administrative hearings conducted under KRS Chapter 13B, the party proposing the agency take action or grant a benefit has the burden to show entitlement to the benefits sought. The party with the burden of proof on any issue has the burden of going forward, and the ultimate burden of persuasion as to that issue. The ultimate burden or persuasion in all administrative hearings is met by a preponderance of the evidence in the record. Failure to meet the burden of proof is grounds for a recommended order from the Hearing Officer. KRS 13B.090(7). The Appellant, Brian Scott Phelps, had the burden to show, by a preponderance of the evidence, that the Appellee failed to comply with the statutory and regulatory requirements in selecting Matthew West as a Transportation Engineering Branch Manager over the Appellant.

9. Kyle Poat was aware that, during the selection process, there were "Five Factors" that the panelists had to consider (T: KP: [9.31.40.861] (T: 2:25)). Prior to the interviews of July 22 and 23, 2021, he had examined each applicant's applications and resumes. Those documents showed the applicant's training, state service, employment

¹⁰ Phelps, West and a third applicant were deemed to have met all two (2) Selection Criteria and were each invited to and did participate in an interview (Appellant's Exhibit 6).

position history, education, volunteer service, certification(s) and license(s) (Appellant's Exhibits 4A and 4B). The applicants brought to the interview their respective Internal Mobility Applicant Form (Appellant's Exhibit 5) that showed the applicant's seniority, qualifications, performance evaluation ratings, record of performance, and conduct. Poat had participated in the three (3) interviews and completed his own Interview Questionnaire Worksheet for each candidate (Appellant's Exhibit 3A, pp 7 to 10 for West; Appellant's Exhibit 3B, pp 5 to 8 for the Appellant). These Worksheets showed that Poat recorded detailed notes about the candidates' responses to each question, his rating for the answers to each question posed to the candidate, and his overall rating of the entirety of a candidate's interview. His overall rating for the Appellant was "very good" (T: KP: [9.37.48.421] (T:1:45)). His overall rating for West was "very good" (Appellant's Exhibit 3A, p 10).

10. Poat had been aware at the time of his evaluation of the candidates that the Appellant possessed more seniority than West; that both had a Master's Degree in engineering and had received their professional engineer's license; West had received "exceptional" and "outstanding" ratings in his 2019 and 2020 performance evaluations; the Appellant had received "outstanding" and "distinguished" in his respective evaluations; West had no conduct incidents while the Appellant had one noted conduct incident, which incident Poat had not considered when he deemed West to be the person to recommend to the vacancy (T: KP: [9.59.14.550] (T: 1:20)).¹¹

11. Poat had given appropriate consideration to the "Five Factors".

¹¹ Mr. Poat agreed in his testimony that Phelps, who had listed a single verbal reprimand, had not been required to report in his application this lower level of corrective direction he had received.

12. Deneatra Henderson was extremely knowledgeable about the promotion process and the requirement of giving appropriate consideration to the "Five Factors". During her time as Chief District Engineer/Executive Director of District 2 she had participated in the selection of four (4) branch managers in her District (T: DH: [10.11.29.301] (T:1:22)). She too served as an Interview Panelist in the instant promotion process and was present in person at the interviews. She had examined all documents identified in paragraphs 9 and 10 above. She was the individual who selected the interview questions and placed them in the Interview Questionnaire Worksheets (T: DH: [10.08.25.601] (T: 0:12)). Henderson had completed her own Interview Questionnaire Worksheet for each candidate (Appellant's Exhibit 3A, pp 1 to 50 for Mr. West; Appellant's Exhibit 3B, pp 1 to 4 for the Appellant). These Worksheets showed she also recorded detailed notes about the candidates' responses to each question. The version of these documents provided at hearing do not show her individual or overall rating for West; they do show her individual and overall rating of the Appellant. Her overall rating for the Appellant was "very good" (Appellant's Exhibit 3B, p 4). She testified there was another version of her completed Worksheet for West and recalled her overall rating had been "excellent" (T: DH: [11.00.28.660] (T: 2:18)).

13. Henderson, having organized and participated in a number of promotional processes in the past, having organized and participated in the instant promotional process, and having had access to and examined the documents identified in paragraphs 9 and 10 above, exhibited an understanding that appropriate consideration be given to the "Five Factors". Henderson had given appropriate consideration to the "Five Factors".

14. Paul Sanders did not recollect much about his participation in this promotional process. Henderson included Sanders in the email of July 22, 2021 when she sent him and Poat the candidates' resumes and applications (Appellant's Exhibit 1). He did remember having received a packet of forms from Henderson at the start of the interviews (T: PS: [11.32.16.299] (T: 2:30)). He also remembered having completed the Interview Questionnaire Worksheet for the Appellant and for West. He identified Appellant's Exhibit 3A, pp 11 through 14 as his Worksheet for West and Appellant's Exhibit 3B, pp 9 through 12 as his Worksheet for the Appellant; that he had given an overall interview rating of "excellent" to West and "good" to the Appellant. (T: PS: [11.32.16.299] (T: 0:58, 1:40)).

15. The testimony of both Henderson and Poat evidenced the interview panelists met after all interviews were completed to discuss the documents and interviews and then reached a consensus of who they believed was the best candidate for the position. They were well aware the "Five Factors" were to be given appropriate consideration. The documents show an itemization of the "Five Factors", particularly in the Internal Mobility Applicant Forms completed and submitted by the candidates (Appellant's Exhibit 5).

16. The Appellant, Brian Scott Phelps, failed to prove by a preponderance of the evidence that the Appellee Transportation Cabinet failed to comply with the statutory and regulatory requirements (KRS 18A.0751 and 101 KAR 1:400) in selecting Matthew West as a Transportation Engineering Branch Manager over the Appellant.

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 **BRIAN SCOTT PHELPS V. TRANSPORTATION CABINET and MATTHEW WEST (APPEAL No. 2021-112)** 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 Kentucky 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).

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

The Kentucky 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 Kentucky Personnel Board. 101 KAR 1:365, Section 8(2).

The parties are strongly encouraged to send any exceptions and/or requests for oral argument by email to: PersonnelBoard@ky.gov.

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

**Brian Scott Phelps
Recommended Order
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ISSUED at the direction of the **Hearing Officer Roland Merkel** this 6th day of February, 2025.

KENTUCKY PERSONNEL BOARD


GORDON ROWE
EXECUTIVE DIRECTOR

A copy hereof this 6th day of February, 2025 was emailed and mailed to:

Brian Scott Phelps, Appellant (pro se)
Hon. Edwin Logan, Attorney for Appellee
Matthew West, Intervenor
Hon. Rosemary Holbrook (Personnel Cabinet)