

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2011-256**

KATY E. RENFROE

APPELLANT

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

**TRANSPORTATION CABINET
MIKE HANCOCK, APPOINTING AUTHORITY**

APPELLEE

AND

RANDI VINT

INTERVENOR

**** ** * * ***

The Board at its regular January 2013 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated December 4, 2012, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer 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 _____ day of January, 2013.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Donald Duff
Hon. William Fogle
Randi Vint
Kathy Marshall

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This matter came on for an evidentiary hearing on November 1, 2012, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Roland P. Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment pursuant to the authority found at KRS Chapter 18A.

Appellant, Katy E. Renfro, was present and represented by the Hon. Donald Duff. Appellee, Transportation Cabinet, was present and represented by the Hon. William Fogle. Mr. Kelly Baker was present as Agency representative. The Intervenor, Randi Vint, was present and not represented by legal counsel.

The issue in this appeal is whether Appellee followed the statutory requirements set forth at KRS 18A.0751(4)(f) and the regulatory requirements set forth at 101 KAR 1:400 when it chose an applicant other than the Appellant for the position of Transportation Engineer II in District 7 of the Kentucky Transportation Cabinet on or about November 15, 2011. The burden of proof was on the Appellant to demonstrate by a preponderance of the evidence that the statutory and regulatory provisions were not followed.

The parties waived presentation of opening statements. The rule separating witnesses was invoked and employed throughout the course of the hearing

BACKGROUND

1. The first witness was the Appellant, **Katy E. Renfroe**. At this time all parties stipulated to the admission into evidence of Appellant's Exhibits 1 through 9.

2. Ms. Renfroe is employed by the Kentucky Transportation Cabinet (KYTC) as Transportation Engineering Supervisor, District 5, in Franklin County, Kentucky. She has held this position since May 16, 2012.

3. At the time she submitted her application for consideration to promotion to the Transportation Engineer II (TE II) position, Appellant had been employed in Fayette County, Kentucky, as a Transportation Engineer I (TE I) in District 7.

4. She recited her educational background and her employment history since graduation from college. All post college employment has been with the KYTC. Ms. Renfroe is a registered professional engineer.

5. The Personnel Cabinet posted on its website notice of the vacancy of the TE II position available in Lexington. Appellant confirmed that Appellant's Exhibit I contained an accurate description of that position. She had been on the Internal Mobility Register and able to fulfill the duties of the position.

6. She completed and turned in her application (Appellant's Exhibit 2). She participated in an interview that was conducted by Kelly Baker, Steve Farmer, Matt Simpson, and Jason Siwula, on September 29, 2011. Three other candidates had also been interviewed.

7. She presented her Internal Mobility Applicants form (p. 1 to Appellant's Exhibit 7) along with her last three Annual Employee Performance Evaluations (Appellant's Exhibit 8). In her Internal Mobility form she listed she had 92 total months of seniority, gave a recitation of her education, work experience, training or work experience unique to the position, her last three performance evaluation ratings, her record of performance, and that she had no disciplinary actions. On her Annual Performance Evaluations she received ratings of 355 (Highly Effective) in 2008; 402 (Highly Effective) in 2009; and 452 (Outstanding) in 2010. She had also received a certificate for going above and beyond duty for work she performed in the 2009 ice storm.

8. Upon her examination of Randi Vint's Internal Mobility form (p. 2 to Appellant's Exhibit 7), Ms. Renfroe recited that Vint listed 67 months of seniority; had three performance evaluations with scores of 412, 407, and 397, all in the Highly Effective category, and had also received a certificate for her work in the 2009 ice storm.

9. She reviewed the Selection Summary sheet that accompanied the memorandum recommending Ms. Vint to the position (pp. 6 – 7 to Appellant’s Exhibit 9). She agreed that the listing of her and Ms. Vint’s respective total months of state service were correct and that they both held a Bachelor’s of Science degree in Civil Engineering from the University of Kentucky. She testified the listing of her having 4 years, 5 months, experience with KYTC Construction and Maintenance was not correct, when compared with the information she provided on her application (Appellant’s Exhibit 2). Work experience on her application under numbers (10), (11) and (12) when added to the work experience listed under number (9), showed she had experience in Construction and Maintenance of approximately 7 years. The panel had this information available to them at the time of her interview. She further noted that under “Record of Performance,” the Selection Summary failed to list that she too received a certificate of recognition for 2009 ice storm job performance. The panel had listed Ms. Vint’s training at the 2009 APWA Kentucky Snow and Ice Conference.

10. Her application showed she had worked with snow and ice removal operations, as well as multiple construction and highway improvement projects; that she was recognized in 2009 for her work efforts during the 2009 ice storm. Ms. Renfroe believes the panel properly recognized her seniority, but did not properly recognize her work experience or record of performance.

11. The September 30, 2011 memorandum (Appellant’s Exhibit 9) erroneously stated that Ms. Vint was the only candidate to have received the APWA Snow and Ice Conference Training. Appellant had attended that conference on November 8, 2006. This is confirmed by the training records she received from the Transportation Cabinet Human Resources Branch (Appellant’s Exhibit 10). However, she never provided such information to anyone on the interview panel.

12. She identified Appellant’s Exhibit 11 as the KYTC’s Certificate of Distinction she received in 2009 for her work during that year’s snow and ice storm.

13. She delineated the difference between construction and maintenance. In construction, one administers contracts for construction projects, paving, the building of bridges and roads, etc. In maintenance, one oversees the maintenance crews and their daily “pot-holing” operations, snow and ice removal, and removal of debris.

14. The next witness was **Edward Steven Farmer**. For the past four years, Mr. Farmer has been the Transportation Engineering Branch Manager in Branch 1, District 7, for the KYTC. His prior position was that of Branch Manager for Operations in District 7. He has 20 years, 10 months, employment with the Cabinet.

15. The Transportation Engineering Branch performs construction and maintenance functions.

16. Mr. Farmer, Kelly Baker, Matt Simpson, and Jason Siwula comprised the interview panel. Interviews were conducted at the District office. Prior to the interviews, he had been furnished information that the promotional factors of qualifications, record of performance, conduct, seniority, and performance evaluations (hereafter the “five factors”), were to be considered. He had been provided a questionnaire form listing all the interview questions, which he was to fill out during each of the interviews. The packet he received had each applicant’s application, their internal mobility sheet, copies of their last three years evaluations, and the list of interview questions.

17. Four applicants were interviewed. After all interviews were completed over the course of two days, the panel discussed the interviews and the five factors. They then selected a candidate. They ranked the applicants based on the strength of their interviews: from “excellent” to “very good,” “good,” or “fair.” The hiring manager then wrote a memorandum of recommendation which the panel members thereafter reviewed.

18. The hiring manager put together the Selection Summary sheet which was reviewed and signed by each interview panel member. That document became part of the packet attached to the memorandum which recommended Ms. Vint to the position (Appellant’s Exhibit 9).

19. Mr. Farmer opined that following these interviews, Appellant had the most seniority; Appellant and Ms. Vint were equal in educational background; with reference to work experience it was Mr. Baker who had filled out the Selection Summary form. The other panel members did not discuss whether the matters inserted in the form were correct. Farmer did not give any consideration to it. “I really didn’t look at it that close.”

20. Mr. Farmer upon request reviewed Appellant’s work experience as shown on her application. He testified that the start time of Appellant’s construction experience should be considered from when she became an Engineer In Training I (EIT I). Her application indicates this would have begun with work experience number (8), from May 1, 2004, and thus be in excess of seven years. At that time he had not considered Appellant’s work experiences listed under (6) and (7) as applicable because she had been on rotation. Appellant was in a maintenance function at the time she was a bridge engineer. However, during the promotion process, Farmer did not consider her time as a bridge engineer.

21. In his consideration of the applicants' respective performance evaluations, he considered the point totals and noted that Vint's was just slightly higher than Renfroe's. Seeing that, he believed the evaluations were close enough and that "it was a tie." He had looked strictly at the numbers. The panelists did not discuss whether to consider the evaluation score or the categories.

22. He had no knowledge why the information shown on Appellant's Internal Mobility form pertaining to her citation for the 2009 ice storm, did not make its way onto the Selection Summary. Hundreds of people across the state had received this certificate and Farmer testified it was not a factor for him in his evaluation of each candidate's qualifications.

23. He believed "both candidates were pretty equal. But I thought Ms. Vint did a lot better job in the interview process . . . She referenced snow and ice . . . and also mentioned the Highway Safety Improvement Program (HSIP) projects in one of her answers." Part of the duties of the TE II position involved coordinating snow and ice response, as well as serving as HSIP coordinator. Vint's training and experience in these areas made her more qualified than Renfroe.

24. He himself had rated Ms. Vint's overall interview as "excellent" (Appellee's Exhibit 1); and Ms. Renfroe's overall interview as "very good -" (Appellant's Exhibit 3).

25. **Mr. Kelly Baker**, who since 2008 has been the Engineering Support Branch Manager in District 7 for the KYTC, next offered his testimony. The TE II position was under Mr. Baker's supervision. He made the request to his supervisor, the District Engineer, that such vacancy be filled. Personnel then put together the request packet. That request was approved.

26. Mr. Baker then prepared the interview questions and a packet containing the Position Description. He set up the interviews. He coordinated the establishment of the interview panel. The panelists were provided each candidate's Internal Mobility form, their past three years Annual Performance Evaluations, their applications, and a list of interview questions. The Position Description had been presented to each candidate.

27. The panel interviewed each of the candidates. Thereafter, the panel discussed each candidate's strengths and weaknesses and came up with a recommendation. Subsequently, Mr. Baker put together the Selection Summary and the September 30, 2011 memorandum.

28. In the panel's discussion of the candidates' Annual Performance Evaluations, they considered the documents provided by Ms. Renfroe and Ms. Vint to be a "wash" because they were so close. Seniority was validated from the applications and Internal Mobility documents submitted by the applicants. Renfroe had the advantage in seniority. The panel believed they both had equal education.

29. In comparing the candidates' work experience, Baker calculated their years of experience by looking at the duties on the Position Description, examining the candidates' listed work experience, and thereafter selecting the work experience areas he felt were "most unique to the position."

30. He did not feel that the Appellant, during the time she was a bridge engineer, had snow and ice duties directly related to her job. Thirty percent of the total job of the current position was snow and ice removal according to the Position Description. However, he agreed that under that 30 percent listing the duties included work with disasters, such as floods and storm damage, and were not exclusive to snow and ice removal. He considered the candidates' years of experience specifically applicable to the position. He wanted to hire a candidate that would excel the most in the position.

31. During the evaluation, Mr. Baker was unaware Appellant had received recognition for her participation in the 2009 snow and ice storm. "It was a mistake. I missed it." However, that knowledge would not have made a difference in the selection. Every employee who worked in maintenance during the ice storm received this certificate. It did not weigh in the selection of Ms. Vint.

32. He was looking for work experience that was unique to the position. In a broad sense, if one were to look at work experience in construction and maintenance, one could have brought each candidate's seniority down to that "box." Baker made the distinction about which work experience was specific to the position and believed that as the majority of Vint's experience had been in construction and maintenance, she had the advantage.

33. The panelists took a considerable amount of time considering each applicant's performance evaluations, both the total raw scores, as well as the applicable categories.

34. He identified Hearing Officer Exhibit 1 as the Class Specification for TE II. Mr. Baker had this document but did not recall whether the other panelists had it at the time of their decision. While he made a determination which work experience for the candidates was applicable to the Class Specification, he referred to the Position Description rather than the Class Specification. The Class Specification is much broader in its description of the duties than those set out in the Position Description. He had been focused on the duties in the Position Description.

35. He acknowledged that the Selection Summary form had been provided to him by the Transportation Cabinet Human Resources and that he was required to fill out the information for each of the grids. He acknowledged that under “qualifications,” the work experience subcategories should have been examined with reference to (1) total months of experience as applicable to Class Specifications; and (2) training/work experience unique to the position. If the panel had looked at the applicants’ work experience as it pertained to the Class Specification, they probably could have listed each applicant’s seniority in that box. The more specific work experience, which the panel listed in the box pertaining to class specification, was information that should have been contained in the work experience unique to the position. He believed Ms. Vint had 5 years, 6 months experience unique to the position, while Ms. Renfroe had 4 years, 5 months of such experience.

36. The difference between the candidates that led to the promotion of Ms. Vint was the amount of work experience specific to the job, and the performance of the applicants during their interviews.

37. The Appellant rested its case. The Appellee and the Intervenor each rested their cases without calling witnesses. The Appellant and the Appellee presented their respective closing arguments, while the Intervenor waived presentation of a closing argument.

FINDINGS OF FACT

1. Katy E. Renfroe, the Appellant, has since May 16, 2012, been employed by the Kentucky Transportation Cabinet as Transportation Engineering Supervisor, District 5, in Franklin County, Kentucky. She had been a Transportation Cabinet summer scholarship student employed during the summer months of 1999, 2000, 2001, 2002 and 2003. She began full-time employment with the Cabinet on January 16, 2004 (Appellant’s Exhibit 2). She is a classified employee with status and a registered professional engineer.

2. During the latter half of 2011, the Personnel Cabinet posted on its website, Notice of a Vacancy for the position of Transportation Engineer II (TE II) in Lexington, Kentucky. Appellant applied for this position (Appellant’s Exhibit 2).

3. Ms. Renfroe interviewed for the position on September 29, 2011. The interview panel consisted of Kelly Baker, Steve Farmer, Matt Simpson and Jason Siwula. Three other candidates, including the Intervenor, Randi Vint, also interviewed for the position.

4. Prior to the interviews, the interview panel members had been provided information that the factors of qualifications, record of performance, conduct, seniority, and performance evaluations (the “five factors”) were to be considered. They were also provided each applicant’s application, Internal Mobility sheet, and last three years performance evaluations, as well as the list of interview questions and a Position Description. Information on a candidate’s Internal Mobility sheet had been provided individually by each candidate.

5. Following completion of the four interviews, the panel members discussed their observations of the interviews and consideration of the five factors. The panelists then recommended Randi Vint be offered the position. Kelly Baker subsequently drafted the Selection Summary and the September 30, 2011 memorandum to the Office of Human Resource Management (Appellant’s Exhibit 9). That memorandum set out specifically the panelist’s consideration of the five factors, and their opinion as to which candidates they ranked at the top of each category. The memorandum also specifically stated:

At the conclusion of the above process the panelists recommended that Randi Vint be offered the position as a result of being the best qualified according to the required promotional criteria.

6. Appellant timely filed her appeal on November 17, 2011.

CONCLUSIONS OF LAW

1. The 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)]. Agencies are required to consider an applicant’s qualifications, record of performance, conduct, seniority, and performance evaluations in the selection of an employee for a 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 a position, office, profession, etc.” *Cabinet for Human Resources v. Kentucky State Personnel Board, et al.*, 846 S.W.2d 711, 715 (Ky. App. 1992).

3. “Seniority” means the total number of months of state service [KRS 18A.005(33)].

4. The Appellee, Transportation Cabinet, was required by statute and regulation to consider each applicant's qualifications, record of performance, conduct, seniority, and performance evaluations (hereinafter referred to "the five factors"). Such factors must be given "appropriate consideration" during the process. *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406, 410 (Ky. App. 1994).

5. In all administrative hearings 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 of persuasion in all administrative hearings is met by a preponderance of 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, Katy Renfroe, had the burden of proof to show by a preponderance of the evidence that the statutory and regulatory preferences were not appropriately considered by the Appellee during this promotion process.

6. It is quite clear from the evidence that all four interview panel members were cognizant before, during, and after this particular promotion process, that they were required to give appropriate consideration to, and examine how the five factors for each of the applicants compared.

7. The question to be considered in this appeal is not whether the Appellant should have been offered the vacant position, nor is it appropriate for the Personnel Board to second guess the judgment of the interview panel and the Cabinet in having made this hiring decision. Rather, the question is: Did the Cabinet give "appropriate consideration" to the five factors when it determined to recommend Randi Vint be promoted? It is not within the province of the Personnel Board to determine whether Ms. Vint was or was not more qualified than Ms. Renfroe. That judgment lies within the sole authority and discretion of the Appellee. The evidence strongly supports the position of the Cabinet that they gave appropriate consideration to the five factors as required by statute and regulation. The statutory and regulatory requirements set forth at KRS 18A.0751(4)(f) and 101 KAR 1:400 were given appropriate consideration during this promotion process.

8. The Appellant has failed to meet her burden of proof by a preponderance of the evidence.

RECOMMENDED ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Personnel Board that the appeal of **KATY E. RENFROE VS. TRANSPORTATION CABINET AND RANDI VINT (APPEAL NO. 2011-256)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

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

Any document filed with the Personnel Board shall also 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 Roland P. Merkel** this _____ day of December, 2012.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Donald Duff
Hon. William Fogle
Randi Vint
Kathy Marshall