

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2018-118

AMBER RHODES

APPELLANT

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

TRANSPORTATION CABINET

APPELLEE

AND

DAVID SMITH

INTERVENOR

*** **

The Board, at its regular May 2019 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated April 10, 2019, 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 7th day of May, 2019.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. William Fogle
Ms. Amber Rhodes
Mr. David Smith
Mr. J. R. Dobner

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** ** * * *

This matter came on for an evidentiary hearing on February 26, 2019, at 9:30 a.m., at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Stephen McMurtry, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Amber Rhodes, was present *pro se*. The Appellee, Transportation Cabinet, was present and represented by the Hon. William Fogle. The Intervenor, David Smith, was present *pro se*.

BACKGROUND

1. Amber Rhodes is a Program Coordinator, pay grade 13, in the Division of Driver Education. She presents several complaints to the Personnel Board for which she seeks redress in an appeal filed June 19, 2018. She complains that she is entitled to increased pay from October 27, 2017, through April 2018 for serving as the acting Administrative Section Supervisor in the Division of Driver Licensing; that she was not selected for the position in violation of 101 KAR 1:400 and KRS 18A.0751(4)(f) and gender discrimination when that position became open; and she was retaliated against for stating that she would no longer perform the duties of the Administrative Section Supervisor by being transferred to another office location. Rhodes had the burden to prove these allegations.

2. **Traci Stigers** worked at the help desk at the Division of Driver Licensing in the Transportation Cabinet. She testified that Mike Neal, Branch Manager, did not adequately perform his job responsibilities because of health problems; specifically, that perfumes and lotions triggered his disabling migraine headaches. She said the Transportation Cabinet moved the Appellant, Amber Rhodes, to a different office location during a Human Resources' investigation because it was believed she was the source of the migraine-inducing scents. Stigers

reported to her supervisor, Matthew Cole, that she, not Amber Rhodes, had spilled scented lotion in the office. Regardless, the Cabinet moved Rhodes to a different location.

3. **Shelia Collins** testified that she worked at the Division of Driver Licensing as Administrative Section Supervisor until she retired in 2017. She said that Mike Neal was often absent from his work duties because of health problems. She praised the work abilities of Amber Rhodes and trained Rhodes to perform her job in preparation for her retirement. She said for months, prior to her retirement, Rhodes performed her duties in addition to the responsibilities of her own position. She said that David Smith, the Intervenor who was selected over Rhodes for the Administrative Section Supervisor, did not have much knowledge about her job.

4. **Brandy McDonald**, acting Hearing Officer, Division of Driver Licensing, testified that Rhodes was doing Shelia Collins' job duties, as well as her own, prior to Shelia's retirement. She stated that Rhodes was given another office space during a Human Resources investigation. Human Resources had interviewed her, questioning whether Rhodes wore scents. McDonald testified she told Human Resources that Rhodes wore scents, but not after being told they caused Mike Neal's migraine headaches.

5. **Tara Brewer** testified that she worked in the Division of Driver Licensing. She said she created a training manual for learning to drive and passing the driver's test. Her testimony was a criticism of Mike Neal, who, she said, "was never hands-on" and was "helpful only when needed." She said Neal "never really had my back or the team's back." According to her, Mike Neal was always asking how to do the job. She recalled one time when he asked her where he could find a "Cash Receipt Transmittal Form."

6. **Ashlee Whisman**, Program Coordinator for the Division of Driver Licensing, testified that she was present when Rhodes was moved to another office location. She recalled being questioned during a Human Resources' investigation about who might be trying to hurt Mike Neal by wearing scents to work. Whisman said she felt she was being singled-out. She told the Human Resource's investigators that she could not smell odors, but never noticed Rhodes wearing scents.

7. **Rachael Footland**, Administrative Specialist II, testified that Mike Neal, Branch Manager, helped her perform her job. She stated that Neal filed a grievance about fellow workers wearing scents that caused him migraine headaches. Footland said she felt singled-out when Human Resources questioned her regarding the grievance. She sat one desk away from Rhodes, but never noticed the odor of scents. She thought the Human Resources investigators believed the scents were worn maliciously to hurt Mike Neal.

8. **Matt Cole**, Director of Driver Licensing, introduced the job questionnaire which was part of the application of David Smith for Administrative Section Supervisor. He testified that Rhodes was upset for not getting the position given to Smith. He agreed that Rhodes had helped out by performing the duties left by Shelia Collins when she retired. He said that Traci Stigers took responsibility for bringing scented hand sanitizer lotion to the workplace.

9. Appellant, Amber Rhodes, chose not to testify on her own behalf. She offered into evidence Appellant's Exhibits 4, 6, and 8.

FINDING OF FACT

The evidence presented by the testimony of the witnesses related in the Background and the documents entered into evidence are found to be truthful. The Hearing Officer adopts this evidence as his Findings of Fact.

CONCLUSIONS OF LAW

1. Pursuant to KRS 13B.090(2), the Hearing Officer determines there are no genuine issues of material fact in dispute and judgment in favor of the Transportation Cabinet is appropriate as a matter of law on all of the Appellant's complaints.

2. There is no evidence offered by the Appellant that the Transportation Cabinet did not give appropriate consideration to her qualifications, record of performance, conduct, and seniority in violation of KRS 18A.0751(4)(f) and 101 KAR 1:400. There is a complete lack of evidence of what occurred during the promotion process, for example: who were the panel members, what documents were considered, and what were the evaluations of the candidates' interviews?

3. There is no evidence in the record that the promotion panel's decision to promote David Smith was influenced by gender discrimination.

4. There was no evidence presented that the Appellant was penalized as defined by KRS 18A.005(24). She has not been demoted, dismissed, suspended, fined, involuntarily transferred, had her salary adjusted, or suffered an increase or decrease in her level, rank, discretion, or responsibility, nor denied or had abridged other rights granted to state employees. Her desk and workstation were temporarily moved to another location during the Human Resources' investigation of Mike Neal's grievance concerning "scents."

5. Appellant's claim that she should be entitled to a pay differential from a grade 13 to 15 from October 17, 2017, through April 2018 should be dismissed because the Appointing Authority had not designated in writing, signed by the Agency head or his designee, that Rhodes shall temporarily serve in the position of Administrative Section Supervisor after the retirement of Shelia Collins, as required by KRS 18A.005(1).

RECOMMENDED ORDER

Based on the foregoing Finding of Facts and Conclusions of Law, the Hearing Officer recommends to the Personnel Board that the appeal of **AMBER RHODES V.**

**TRANSPORTATION CABINET AND DAVID SMITH (APPEAL NO. 2018-118) 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 Stephen McMurtry** this 10th day of April, 2019.

KENTUCKY PERSONNEL BOARD



MARK A. SIPER
EXECUTIVE DIRECTOR

A copy hereof this day faxed & mailed to:

Hon. William Fogle
Ms. Amber Rhodes
Mr. David Smith
Mr. J. R. Dobner