

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-062**

KENDRAH SANDERS

APPELLANT

VS.

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

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

APPELLEE

** ** ** ** **

This matter came on for an evidentiary hearing on September 14, 2016, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. R. Hanson Williams, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellant, Kendrah Sanders, was present and was not represented by legal counsel. Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Edward Baylous. Also appearing as Agency Representative was Kevin Pangburn.

At issue in this case were the Appellant's contentions that a person less qualified than she received the position in question with the Department of Corrections and that the statutory requirements set forth at KRS 18A.0751(4)(f) and the regulatory requirements set forth at 101 KAR 1:400 were not met when the Department of Corrections selected another applicant for the position of Social Service Clinician I in Jefferson County.

Also at issue were the Appellant's claims of discrimination in this process based upon race and gender. The burden of proof was placed upon the Appellant by a preponderance of the evidence as to all issues.

It should be noted that a portion of Appellant's claims border on a charge of constructive discharge regarding herself and others. However, at an earlier pre-hearing conference, the Appellant was advised of this and has subsequently filed a separate appeal based solely on constructive discharge. To the extent that some testimony herein may go to that claim, it will not be the basis of any decision in the present appeal.

BACKGROUND

1) The Appellant called as her first witness **Rachel Marks**, a white female. She explained that she had been employed at the Roederer Correctional Complex (herein after Roederer) as a Social Service Clinician for approximately 4 and one-half years, prior to having resigned on Friday, September 9, 2016. She stated it was not an easy decision to leave her job, as she enjoyed it.

2) She testified that she left primarily for personal reasons, including spending more time with her family. She also testified about two coworkers, Martina Shirley (Social Service Clinician) and Sheila Garnett (Marks' direct supervisor), who had recently left their positions at Roederer. To this witness's knowledge, she felt it was a result of the pressure from their job duties.

3) The witness also testified that she and other team members, including the Appellant, had received written reprimands for having delinquent client files. She explained this by saying that their team members had missed their deadlines for completing these files because of the inability of another clinician, Raymond Eastridge, to keep his files current. After Eastridge left his job, the other team members were forced to pick up the slack on his files, leaving very little or no time to complete their own.

4) Appellant's second witness was **Jean Waldrige**. She testified she has served as Program Administrator over the Substance Abuse Division at Roederer for the past eight years. She oversees the Social Service Clinicians at Roederer as the second-line supervisor.

5) She testified that she was a part of a two-person panel who picked the successful applicant, Shannon Peterson, for the position the Applicant sought. She recalled there were approximately six applicants for the position of Social Service Clinician I, and she further stated that looking at the applicants, she considered their experience, their evaluations, their length of service and their job interview performances. She freely admitted that Peterson was selected, even though she only had six months state service at the time of her selection. However, the witness felt that Peterson had much desired experience working with providers in the community in the substance abuse program. The witness further confirmed that she had consulted with Mylea McFelea regarding the selection. McFelea was the second-line supervisor of the successful applicant, Peterson. McFelea was very familiar with the work of the Clinicians involving the Jefferson Alcohol and Drug Assistance Center (JADAC). The witness stated that the available Clinician position is primarily a data-driven job with very little direct contact with clients. She added that she had asked for McFelea's advice, since she was very familiar with Peterson's job performance. The witness was unable to state whether Peterson was a Certified Alcohol and Drug Counselor (CADC) at the time of her selection.

6) Appellant stated that of the promotion factors involved, she was aware that Sanders had more length of state service time than Peterson. However, she stated that she did not feel that the Appellant would like the new job, because there was little client contact, whereas the Appellant seemed to have enjoyed that in her previous job.

7) Regarding the selection, the witness confirmed that after she and the other panel member, Kathy Taylor, had reached a decision, she informed Division Director Kevin Pangburn that she would be submitting the selection of Peterson as the successful candidate. The witness also readily admitted that at the time of selection Peterson had no evaluations to review, as she was just coming off of initial probation. However, she stated she knew that Peterson had previously worked at Luther Luckett, although she had no knowledge of her work there.

8) On cross-examination, the witness stated that she had previously served on approximately ten interview panels. She again confirmed that she talked with McFelea about the selections because she was Peterson's second-line supervisor and also this witness' counterpart. She also confirmed that McFelea was the wife of Director Pangburn.

9) The witness then identified Appellee's Exhibit 1, a copy of 101 KAR 1:400. This regulation states in pertinent part;

Section 1. Promotion. (1) Agencies shall consider an applicant's qualifications, record of performance, conduct, seniority and performance evaluations in the selection of an employee for a promotion.

10) The witness then added that the selection herein was not actually a promotion, but rather a lateral transfer for Peterson and for the Appellant.

11) The next witness was **Kathy Taylor**. She has been employed with the Agency in Frankfort as a Program Administrator for the Substance Abuse Division for 19 years. She confirmed she was one of the two interview panel members for the position in question. She did not readily recall how many applicants were interviewed.

12) She explained that she primarily looked for experience and clinical experience in the selection process. She did not recall how many of the applicants had more pertinent experience than Peterson. Neither did she recall specifically why the Appellant was not chosen. She did confirm the selection happened in early 2015. She denied that she had talked with Director Pangburn prior to the selection process, and confirmed that after the interviews were completed, Waldridge finished the paperwork process to fill the position. She added that in choosing Peterson, she "thought they chose the best person for the position."

13) On cross-examination, the witness confirmed that she and Waldrige each had a form to use containing information on each applicant, which included all their background information regarding the five regulatory factors.

14) Appellant's next witness was **Kevin Pangburn**. He has served as the Division Director of the Substance Abuse Program in Frankfort for the past 12 years. He testified that candidate Peterson was not in his chain of command and he was not personally aware about her job performance. He was aware that she had previously served as a Clinician at the Luther Luckett facility. He also added that he relied on his interview panel to find the right applicant.

15) The witness also stated that a CADC was encouraged, but not required to be attained for holding the Clinician position. He described the position as a new one which was one of several created to be established in community mental health centers, rather than prison facilities.

16) He closed by saying that he did not specifically question the panel members as to whether they had used the required regulatory factors.

17) On cross-examination, Pangburn stated that he has also served on interview panels. He stated that he never sat down with any appointing authority to discuss the preferred choices in any detail; rather, he has simply made recommendations.

18) Appellant's next witness was **Shannon Peterson**. She testified that she met with the interview panel on March 2, 2015, and was selected effective April 1, 2015. She now serves as a Social Service Clinician I with the West Jefferson Community Relations Center. There she deals with the Substance Abuse Programs (SAP).

19) She had previously worked at the Kentucky State Reformatory for one month with the Phoenix Program which dealt with the dual-diagnosis of drug and alcohol abuse. Immediately prior to that position, she worked as a Social Service Clinician I at the Luther Luckett facility for five months dealing with the Substance Abuse Programs.

20) She testified that she has a BS in criminal justice from Michigan State University and had completed several hours toward the CADC certification when she applied for this position.

21) She stated that since she was coming off initial probation, she had not yet received a year-end evaluation. She confirmed that at her previous position at Luther Luckett, the job was primarily a data-driven collection task. She also added that she did conduct weekly client updates, but had few connections with the service providers in the community. She also described her four and one-half months at Luther Luckett as primarily a liaison with the

Homeless Outreach Center. In describing her new position, she stated it is primarily data collection with minimal contact, usually involving only one face-to-face or one conversation by phone.

22) In this position, she routinely talks with Probation and Parole Officers regarding her offender caseload and does monthly reports based on her conversations.

23) On cross-examination, the witness described her job as primarily involving seeing that offenders receive help with whatever substance abuse problem they may have. She again confirmed that her state service began in late 2014. The witness then identified herself as an African American female, but clarified that by stating that she identifies herself simply as an American, and not an African American. She also confirmed that she had worked with the outside provider JADAC while at the Homeless Outreach Center.

24) Appellant's next witness was **Mylea McFelea**. The witness confirmed that prior to the interviews, she had been questioned by Jean Waldrige concerning Shannon Peterson's work. She was not surprised, since she was her second-line supervisor. After the interviews, Waldrige told her that Peterson had been selected.

25) The Appellant then recalled **Keven Pangburn**. He testified to the racial makeup as to the Program Administrators for the Division of Substance Abuse. He testified these were white females, although the number was uncertain. He also testified as to the penal institutions, there was one black female and three white male administrators. He closed by saying that he thought there was diversity in the Social Service Clinician positions down through the line staff.

26) On cross-examination, the witness stated that an example of diversity was that Kim Potter-Blair, a black female, was the Deputy Director of the Department of Corrections. He also added that Cookie Crews, a black female, was the Medical Director for the Department of Corrections and a former prison Warden.

27) The Appellant, **Kendrah Sanders**, then called herself as the next witness. She described herself as having 14 years of relevant state service at the time she sought the position herein. She testified that she had been a Pre-Trial Services Officer for Jefferson County and had over three years' service with the Administrative Office of the Courts. She then returned to the pre-trial services office in Jefferson County until 2007, at which time she began work for Child Protective Services from 2007 through 2010.

28) She testified that in 2011 she became employed as a Social Service Clinician I with the Department of Corrections. In seeking the position herein, she sought to have a position dealing with Community Services in Jefferson County.

29) The witness then detailed her educational and work background. She has a BS in Criminal Justice from Kentucky State University and a Master's degree in Social Work from the University of Louisville.

30) In addition, she testified that she had experience of 300 hours of supervision with clients prior to beginning her work with Corrections. She also stated that she served a two-year practicum with the University of Louisville involving work with the Volunteers of America Halfway Back program.

31) The Appellant then contrasted her experience versus that of the chosen applicant as saying she had a broader background dealing with offenders. She stated that her evaluations had been good, although she was not specific and did not produce any.

32) She also added the only disciplinary action suffered was a written reprimand for an earlier discussed non-compliance with keeping client files current. This was again blamed on worker Eastridge, now departed.

33) On cross-examination, the Appellant confirmed that she had not previously applied for any Program Administrator jobs within the Substance Abuse Division, but mentioned that none had been vacant. She is also not aware of whether any qualified African Americans had previously applied for those positions.

34) She again testified that she had done much work with the JADAC program and with Child Protective Services over her previous ten years employment. Regarding Child Protective Services, she stated that most cases involved people needing treatment as part of a case plan. The Appellant then confirmed that she had filed an Equal Employment Opportunity complaint in 2015 for failure to receive the previously-sought position. When shown a letter from the EEOC dismissing her complaint, but giving her a "right to sue," the witness stated that she did not recall having seen this. Neither did she recall the sequence of time in which she received a recommendation, was denied this job, and filed an EEOC complaint.

35) The witness concluded by stating that her frustration was her perception that there are general claims of denial of opportunities for minorities within her division. Appellant then rested.

36) Counsel for the Appellee then moved for Motion for Directed Verdict as to the claims of race and gender discrimination. The Hearing Officer **GRANTED** the Motion, as the successful applicant in this matter was also an African American female.

37) The Appellee then recalled **Kathy Taylor** as its witness. She identified Appellee's Exhibit 2, a copy of the Social Service Clinician interview questions used by the

interview panel for the eight job applicants. Ms. Taylor mentioned that one of the applicants had substantial clinical experience while another, Amy Hazle, had a Certification for Alcohol and Drug Counseling. The witness testified that she and panel member Waldridge considered the five regulatory factors mandated and chose Shannon Peterson, even though she had much less state service than the Appellant.

38) The Appellee then recalled **Jean Waldridge**. She confirmed her interview notes as part of Appellee's Exhibit 2. She also introduced Appellee's Exhibit 3, a March 2, 2015 email from her to Marka Burns confirming all the interview times of the various candidates.

39) She recalled a portion of the interview with Shannon Peterson, and remembered that she had much contact and much experience with JADAC. She felt that this was a big factor because it involved performing street outreach with the homeless population. She does not recall the Appellant talking about her own experiences with the JADAC program. In fact, the witness mentioned that Katie Lyle had a decade of experience as a Certified Drug and Alcohol Counselor, even more than either Peterson or the Appellant.

40) Lastly, the witness stated that she and Taylor had considered the promotional regulatory factors, even though this was not technically a promotion for either Peterson or the Appellant, but rather a lateral transfer.

APPLICABLE LAW AND REGULATION

- 1) **101 KAR 1:345, Section 1(1) states:**
Section 1. Promotion.

(1) Agencies shall consider an applicant's qualifications, record of performance, conduct, seniority and performance evaluations in the selection of an employee for a promotion.

- 2) **KRS 18A.0751 (4)(f) Personnel Board – Regulatory Authority**

(4) These administrative regulations shall provide:

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

FINDINGS OF FACT

The Hearing Officer makes the following findings by preponderance of the evidence:

1. The Appellant, along with approximately seven other candidates, applied for an open position for Social Service Clinician I with the Agency in early March 2015.
2. All were interviewed and Shannon Peterson was recommended to receive the position by a consensus of the two-person interview panel. Peterson's appointment became effective April 1, 2015.
3. Panel member Kathy Taylor testified she and Waldrige each had a form to use for each applicant which included their background information regarding the five regulatory questions.
4. The Appellant makes much of the difference in length of service with the state between herself and Peterson. However, that factor by itself is not determinative. Instead, the interview panel focused more on clinical experience and working with providers in the community dealing with substance abuse programs.
5. Although each of the five regulatory factors could have been explained and compared between the candidates in greater detail, the burden of proof to accomplish this was placed upon the Appellant.

CONCLUSIONS OF LAW

1. The Appellee, as a matter of law, was entitled to a **DIRECTED VERDICT** as to the Appellant's claims of racial and gender discrimination.
2. The Hearing Officer concludes as a matter of law the Appellant failed to carry her burden of proof by a preponderance of the evidence to show the promotional regulatory factors were not adequately considered.

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 **KENDRAH SANDERS VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2015-062)** 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).

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 Hanson Williams** this 2nd day of November, 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Edward Baylous
Ms. Kendrah Sanders

*Reissued
w/new date*

RECOMMENDED ORDER

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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 Hanson Williams** this 10th day of November, 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Edward Baylous
Ms. Kendrah Sanders