

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2019-205

ROBERT SHARFE

APPELLANT

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

FINANCE AND ADMINISTRATION CABINET

APPELLEE

*** **

The Board, at its regular March 2021 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated February 8, 2021, 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 18th day of March, 2021.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Robert Long
Mr. Robert Sharfe
Ms. Stacy Perry

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VS.

**FINDINGS OF FACT, CONCLUSIONS OF LAW
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FINANCE AND ADMINISTRATION CABINET

APPELLEE

* * * * *

This matter came on for an evidentiary hearing on October 23, 2020, at 9:30 a.m., EST, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Mark A. Sipek, Hearing Officer. The proceedings were conducted by video teleconference using Amazon Chime. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Robert Sharfe, was present, and was not represented by legal counsel. The Appellee, Finance and Administration Cabinet, was present and represented by the Hon. Robert Long.

BACKGROUND

1. Robert Sharfe filed his appeal with the Personnel Board on September 18, 2019. He challenged the Agency's decision to promote Chad Purvis to the position of Construction Superintendent II over himself. Sharfe also claimed this decision was based on age discrimination.

2. Following the initial pre-hearing conference, Chad Purvis was given an opportunity to intervene in these proceedings; however, he did not. The parties agreed to conduct the hearing using Amazon Chime. The parties also entered into stipulations and submitted joint exhibits.

3. In addition to the joint exhibits, the Appellant proposed to introduce additional exhibits. One of his proposed exhibits was a letter from Ann Evans. Sharfe requested to enter this exhibit in lieu of Evans' testimony. Counsel for the Appellee objected, and the objection was sustained based on the fact that the letter without Evans' testimony would constitute hearsay.

4. The Appellant, Robert Sharfe, gave an opening statement. Sharfe stated he heard from Bud Legg that the decision to promote Purvis instead of him was made based on the interview worksheets. Sharfe noted that there was a lot of scratching out on Frieda Myers'

worksheet and all of the changes were in favor of Chad Purvis. He also noted that, on Question 5 concerning overtime, Sharfe received a "Very Good," while Purvis received an "Excellent." Sharfe stated he never turned down overtime. Sharfe stated that the promotion involved working special events. He stated he worked more special events than Chad Purvis. In summary, Sharfe thought he was more qualified, and Finance selected Purvis because they wanted a younger man.

5. Counsel for the Appellee deferred opening statement until the start of his case.

6. The Appellant called **Steve Redmon** as his first witness. Redmon is retired from the Finance and Administration Cabinet. He was employed as a Special Assistant in charge of special events. He testified that Sharfe worked more overtime than anyone with respect to special events. He acknowledged that Sharfe finished what was assigned to him. He had a reputation for doing a great job. Redmon received no complaints about Sharfe and people asked specifically for him to work on projects.

7. Redmon was Sharfe's supervisor for eleven to twelve years. He described Sharfe as a great employee. Redmon retired February 16, 2016.

8. Redmon stated that, over the years, he and Sharfe have played golf together occasionally, however, not much in the past four years. Redmon did not participate in any way in the interview process nor did he provide any information to the interview teams.

9. Redmon stated that, when he was Sharfe's supervisor, they probably had two or three special events per week.

10. The Appellant called **Carol Mitchell** as his second witness. She has been the Director of Historic Properties since December 2019. She sat out the previous three and one-half years from state government. Prior to that, she worked with Historic Properties and the Office of Special Events in the Governor's office. In her position, she was involved in multiple instances where short notice, after hours work was needed, and Sharfe was available. She stated that they had renovations that needed to be done and Sharfe always worked overtime. She agreed with Sharfe that he did an adequate job.

11. Mitchell stated that she knew Sharfe on a professional basis. They were not friends away from work. She was not his supervisor in any way. She stated she was not involved in the promotional process and did not provide any information.

12. The Appellant called **Bud Legg** as his next witness. Legg is the Director of the Division of Building Services within the Finance and Administration Cabinet. He has served in that position since May 2020. Previously, he was the Executive Director for the Office of Building and Mechanical Services. Sharfe asked Legg about the promotion interview's Question 5, which asked about employee's willingness to work overtime and their ability to meet deadlines. Legg responded that he gave both Purvis and Sharfe a "Very Good" rating on their response. Sharfe asked why his answer was not considered excellent; Legg responded that he

though Sharfe's response was very good. Legg testified that Sharfe always worked overtime when he was asked.

13. On questioning from counsel for the Appellee, Legg testified that he requested to fill the Construction Superintendent position. He stated that, at the time, he was the supervisor over that position. He also selected the interview panel, which consisted of Elizabeth Cunningham from Human Resources and Frieda Myers from Engineering in addition to himself. In setting up the interview panel, Legg's goal was to choose an impartial panel with diverse backgrounds. Legg also put the interview questions together with some assistance. He stated the goal of the questions was to test the applicants' depths of experience and knowledge and their attitude towards work. He stated he believes they interviewed everyone who applied. He does not recall anyone declining an interview. There were a total of seven or eight applicants. Legg testified that the applicants provided their last two evaluations and internal mobility forms.

14. After the interview process, Chad Purvis was the first choice of the interview panel and the Appellant, Robert Sharfe, was their second choice. Legg stated that the difference in scoring on the interview questions was the determining factor. He testified that Purvis and Sharfe scored the same on their answers to questions 1, 5, 8, 9, and 10.

15. Legg was asked a series of questions about the interview questions where he scored the responses from Purvis and Sharfe differently.

16. The second question concerned project drawings. Purvis' response indicated that he had read blueprints and construction plans for the Governor's office. He had also drawn plans for his own business. Legg graded this response as "Very Good."

17. The Appellant's response to the question was that he took drawing in school and that he can look at drawings and see what is needed. He stated he would get help from someone if he needs it. He also made reference to a particular project that he worked on. Legg graded Sharfe's response as "Good."

18. Question 3 asked the applicants about their experience with Procurement. Purvis indicated he had experience with FM Works. He had created requests, entered the information, and closed out the request. He had entered information regarding Procards. He had reconciled invoices and had worked with small purchases. Legg rated his response as "Very Good."

19. Legg rated Sharfe as "Good" on the same question. He indicated he had limited data entry knowledge with respect to FM Works and had only applied for a Procard.

20. With respect to Question 4 regarding management training, Legg gave Purvis an "Excellent" rating. Purvis mentioned he had taken state government management classes regarding and had additional training while he was in the military. In the military, he learned to follow the chain-of-command; he had also managed employees in his private business, where he stated that he hired and fired employees every day.

21. Legg rated Sharfe's response regarding management training and style as "Very Good." Sharfe explained that he coordinated jobs, managed products, and had a few management classes. Sharfe described his management style as "figuring out the best way to get something done and to work with his people." Legg believed that Purvis' experience with management was broader in scope.

22. Question 6 asked the applicants, as state employees, what is their obligation to the taxpayer? Legg rated Purvis' response as "Good." Purvis stated that we are all in it together and we are all taxpayers and that you have the ability to help yourself and others too. Legg stated he was looking for more of a response that acknowledged state employees having an obligation to do a good job for taxpayers.

23. He rated Sharfe's response as "Very Good." Sharfe stated that the obligation is to do the best job that he can do and that he owes this to the taxpayers. Legg stated that he thought that Sharfe gave a better answer to this question.

24. Question 7 asked the applicants why they were applying for this particular job. Purvis' response was rated "Excellent" by Legg. He stated he loves construction and working on historic constructions. He loves these historic buildings and believes it is something new every day. He likes to fix the structure and maintain the historic nature of these properties.

25. Legg rated Sharfe's response to Question 7 as "Very Good." Sharfe stated he had always done this kind of work. He likes working with trades and has experience working at the prison, doing the Justice building, and he likes to put in for jobs trying to move up. Legg felt that Purvis' answer warranted a higher score based on his attitude and enthusiasm for this particular work.

26. Legg stated that, in addition to the answers to the interview questions, members of the interview team also reviewed applications, noting the qualifications of the candidates. He stated they reviewed the performance records and conduct of the candidates. He noticed no distinction between Purvis and Sharfe, stating they were both excellent employees. He stated that seniority did not factor into the decision. He stated he reviewed performance evaluations; however, he did not remember anything significant from either performance evaluation.

27. Legg testified that Purvis was selected because the feeling was that he gave better answers during the interview and his answers had a little more depth. He stated the interview panel talked about it and reached that conclusion. Legg testified there was no discussion of the age of the various candidates. He felt that the scoring was good and fair, and his only regret was that they had only one position to fill.

28. Legg acknowledged that the candidates filled out Internal Mobility Forms and these were reviewed. The Internal Mobility Forms showed Purvis had forty-three months' seniority and Sharfe had one hundred seventy-seven months' seniority. Legg initially said they did not look at seniority. When asked to explain this, he stated that he did not believe that the person with the most seniority should automatically get the position. He stated that they

considered seniority and were aware of the seniority of the various candidates. He stated it was not a determining factor in the decision as to who was the best candidate for the job.

29. The Appellant next called **Frieda Myers**, who is the Statewide Projects Branch Manager. She works in Facilities and Support Services in the Division of Engineering for the Finance and Administration Cabinet. This is the same position she held at the time of the interviews.

30. Sharfe asked Myers to explain all of the changes she made on her interview score sheets. Myers stated that her mistake was that she brought a pen to the interviews instead of a pencil with an eraser. She stated that it was not unusual for her to change her mind regarding issues and she usually erased them.

31. Myers testified that she was simply a member of the selection panel. She did not choose who to interview or set up the questions.

32. When Myers was asked to explain why she changed Purvis' answer to Question 2 from a "Very Good" to "Excellent," she stated she noted he had drafting experience. She stated that she changed the score after hearing from all the applicants and discussing them with the other panel members.

33. Myers also reviewed Joint Exhibit 6, which was her score sheet for Sharfe. She changed her rating on his answer to Question 2 from "Good" to "Very Good;" on Question 3 from "Fair" to "Good;" on Question 7 from "Good" to "Very Good;" and his overall rating from "Good" to "Very Good." She stated that these were done for the same reasons she explained with respect to the change on Purvis' scoring. She stated that, following discussion, she thought these were the appropriate ratings.

34. Reviewing Joint Exhibit 5, Myers' scoresheet of Purvis, in addition to Question 2, she crossed out "Good" and "Very Good" and circled "Excellent" on Question 3; crossed out "Very Good" and circled "Excellent" on Question 4; crossed out "Very Good" and circled "Excellent" on Question 5; crossed out "Good" and "Very Good" and circled "Excellent" on Question 6; and crossed out "Very Good" and circled "Excellent" for the overall rating.

35. Myers testified there was no pressure placed on her to change any of her scores.

36. Myers explained why she rated Purvis higher than Sharfe when she scored various questions. The first question regarding experience, she rated Purvis higher because he emphasized his twelve to fifteen years' experience in construction. He also emphasized his military experience and stated he was involved with high pressure situations. He further emphasized his work on leak repair at the Capitol, which Myers was familiar with.

37. Myers rated Purvis higher on the second question based on his experience reading drawings, his ability to draft his own plans, and to work independently.

38. Myers rated Purvis higher on the third question based on his broader experience using eMars, FM Works, and Microsoft Office.

39. Myers felt that Purvis gave a better answer to the management question. She thought that Sharfe came across like he managed equipment, while Purvis came across as being experienced managing people. He also emphasized the fact he learned the chain-of-command while serving in the military.

40. Myers stated that Purvis gave a better answer to question five regarding working overtime and completing tasks on time because he gave specific examples of work he performed while on-call.

41. With respect to question six regarding the employee's obligations to the taxpayers, she felt that both Purvis and Sharfe gave good responses. She thought Purvis gave a better answer because he had more of a view of the bigger picture and thought about the future.

42. Myers rated the two candidates the same on questions seven and eight.

43. On question nine, Myers felt that Purvis gave more specific examples with respect to communications. Purvis specifically emphasized supervising inmates on projects and thought it was important to be able to talk to people on the job.

44. Myers rated Purvis higher on question ten. He stated he was eager to learn and was interested in accomplishing goals.

45. Overall, Myers thought that Purvis was the most qualified candidate. She felt that both his answers in the interview and his resume gave more detail of his experience. She was aware both were internal mobility candidates and reviewed both candidates' Internal Mobility Forms, including their seniority. She did not think seniority was an important factor in this job. She noted that Purvis had a great deal of experience outside of state government.

46. She stated that age was not a factor in determining who was the best candidate.

47. Myers stated she felt that Purvis was the best candidate for the job, while Sharfe was the second-best candidate for the job. She stated she increased the overall score for both candidates based on comparing and contrasting with the other individuals who interviewed for this position.

48. Myers could not remember exactly when she changed the rating on various answers to questions.

49. Next, the **Appellant, Robert Sharfe**, testified on his own behalf. Sharfe is a Construction Superintendent I. He applied for a promotion to be a Construction Superintendent II and was not selected. He stated that the promotion was on the Special Events crew. Sharfe had years of experience working Special Events. He described his work on some of these events,

including book drives, food drives, Christmas tree lighting, Minority Expo, Horses for Hope, and the event surrounding the Derby. He also mentioned that he worked on the Bluegrass Games and stated he was assigned to work on matters at the Capitol, the Annex, the Governor's Mansion, the Lt. Governor's Mansion, the Bush Building, Berry Hill Mansion, the 300 Building, and the State Office Building.

50. He stated he worked one year at a prison and has since worked for the Finance Cabinet. He was a paint supervisor for four years and, since then, has been a Superintendent I.

51. He stated that Purvis worked on the Special Events crew as a carpenter. At one time, Sharfe supervised Purvis.

52. Sharfe stated he has worked there longer and should have received the job. He believes that it was unfair that Freida Myers made changes on her scoresheet and believes that those changes demonstrate that the process was unfair.

53. Sharfe stated he is sixty-five years old. He estimated that Purvis was around forty-five years old.

54. He stated the last time there was an opening for this job, Lloyd Arnold received the position and was next in line. He stated this was filled by reclass and not by promotion. He believed he should have received the position, just like Lloyd Arnold did.

55. Sharfe stated he had nothing against, but stated that he (Sharfe) could do the job. He stated he has never been written up and he had more time in service. He stated he had more experience with respect to Special Events, which is what this job entails.

56. He stated he believed it was age discrimination because Purvis was so much younger and there was no reason not to give the promotion to Sharfe.

57. The parties stipulated that the scoresheet of the third interview panel member, Elizabeth Cunningham, spoke for itself, and the Appellant had no dispute with her scoring of the interviews.

FINDINGS OF FACT

1. The Appellant, Robert Sharfe, was employed as a Construction Superintendent I with the Finance and Administration Cabinet. He sought promotion to a position as a Construction Superintendent II; however, the Finance and Administration Cabinet selected Chad Purvis for this promotion. Sharfe alleged that he was more qualified and should have been selected for the promotion. He also alleged that the Finance and Administration Cabinet's decision was based on age discrimination. (Testimony of Appellant, Appeal Form.)

2. The interview panel consisted of Department for Facilities and Support Services Executive Director Bud Legg, Department for Facilities and Support Services Statewide Project

Branch Manager Freida Myers, and Office of Administrative Services Human Resources Administrator Elizabeth Cunningham. The panel interviewed Chad Purvis and Robert Sharfe as well as four other candidates. After considering the candidates' interviews, applications, and Internal Mobility Forms, the interview panel recommended Chad Purvis for promotion to Construction Superintendent II. Purvis was selected by the Appointing Authority. (Joint Stipulations, Testimony of Bud Legg and Freida Myers.)

3. The interview panel gave appropriate consideration to the candidates' seniority, record of performance, performance evaluations, qualifications, and conduct. The interview panel used behavioral interview questions designed specifically for the duties performed by the Construction Superintendent II. They also carefully reviewed the applications and Internal Mobility Forms submitted by the applicants. The interview panel considered Sharfe and Purvis to be the two strongest candidates for this position. The panel found Purvis to be the superior candidate based on his experience in the military, state government, and construction outside of state government. Purvis was found to have more experience with reading blueprints and construction plans, procurement, and more management experience than Sharfe. (Joint Exhibits, Testimony of Bud Legg and Frieda Myers.)

4. The Appellant alleged that the interview panel did not give appropriate consideration to his seniority. Sharfe had one hundred seventy-seven months of state service and Purvis had forty-three months of state service. The evidence established that the members of the interview panel were aware of the seniority of the candidates, but it was not a determining factor in their decision to recommend Purvis over Sharfe. The Hearing Officer finds that the interview panel gave appropriate consideration to seniority. The Hearing Officer finds that the interview panel believed that Purvis' superior qualifications were more important in selecting the best candidate for the Construction Supervisor II position than Sharfe's edge in seniority. (Joint Stipulations, Testimony of Bud Legg and Freida Myers.)

5. The Appellant alleged that the interview panel failed to take into account his ability to work overtime and complete Special Projects. Testimony demonstrated, however, that the interview panel was aware of Sharfe's excellent work record with respect to working overtime and working on Special Projects. Purvis had a similar record with respect to these issues and it was not a determining factor. (Joint Stipulations, Testimony of Bud Legg and Frieda Myers.)

6. The Appellant challenged Myers' crossing out ratings of answers to interview questions and rating Purvis higher upon reflection. The Hearing Officer accepts as credible Myers' testimony that she changed the ratings on these interview answers after hearing from her other panel members and hearing other applicant interviews. (Joint Stipulations, Testimony of Frieda Myers.)

7. The Appellant established that he is sixty-five years old and that Purvis is approximately forty-five years old. Sharfe established that he was qualified for the position and the position was awarded to a substantially younger employee. The Appellee articulated a legitimate, non-discriminatory reason for selecting Purvis over Sharfe in that, based on the entire

interview process, after giving appropriate consideration to the five factors, Purvis was the superior candidate. (Joint Stipulations, Testimony of Robert Sharfe, Bud Legg, and Frieda Myers.)

8. Age was not a factor in the Appellee's decision to promote Chad Purvis over the Appellant. (Joint Stipulations, Testimony of Bud Legg and Frieda Myers.)

CONCLUSIONS OF LAW

1. The Appellant, Robert Sharfe, has failed to meet his burden of proof to show that the Appellee failed to comply with the provisions of KRS 18A.0751(4)(f) and 101 KAR 1:400 in considering him for promotion to the position of Construction Supervisor II. Based on the Findings of Fact, the proof establishes that the Appellee gave appropriate consideration to seniority, record of performance, performance evaluations, conduct, and qualifications.

2. The Appellant, Robert Sharfe, has failed to meet his burden of proof to show that the Appellee's decision to promote Chad Purvis to the Construction Supervisor II position over him was based on age discrimination. While the Appellant may have presented a *prima facie* case of age discrimination, the Appellee articulated a legitimate, non-discriminatory reason for selecting Purvis, which reason the Appellant failed to prove was pretext for discrimination.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **ROBERT SHARFE V. FINANCE AND ADMINISTRATION CABINET (APPEAL NO. 2019-205)** 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 the Hearing Officer this 8th day of February, 2021.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Robert Long
Mr. Robert Sharfe