

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2012-044

KIM SHOEMAKER

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

AMBER HALE

INTERVENOR

** ** *

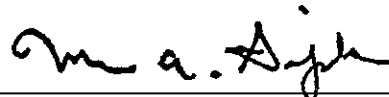
The Board at its regular December 2013 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated October 30, 2013, and being duly advised,

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 18th day of December, 2013.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Edwin Logan
Hon. Paul Fauri
Kim Shoemaker
Kathy Marshall

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2012-044

KIM SHOEMAKER

APPELLANT

VS.

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

TRANSPORTATION CABINET
MIKE HANCOCK, APPOINTING AUTHORITY

APPELLEE

AND

AMBER HALE

INTERVENOR

** ** ** ** **

This matter came on for an evidentiary hearing on October 15, 2013, at 9:30 a.m., 28 Fountain Place, Frankfort, Kentucky, before R. Hanson Williams, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellant, Kim Shoemaker, was present at the evidentiary hearing, and was not represented by legal counsel. Appellee, Transportation Cabinet, was present and was represented by the Hon. Edwin A. Logan. Also appearing as Agency representative was Kathy Marshall. Intervenor, Amber Hale, was not present, but was represented by the Hon. Paul Fauri.

Hearing Officer Boyce A. Crocker issued an Interim Order Containing Findings of Fact and Conclusions of Law which is attached hereto as **Recommended Order Attachment A**.

BACKGROUND

1. This appeal involves the Appellant's claim that she failed to receive a demotion from Administrative Specialist III, grade 12, to Public Information Officer (PIO), grade 11. As stated in the pre-hearing Order, this matter did not involve a promotion nor the factors contained in 101 KAR 1:400.

2. Appellant alleged that she failed to receive the requested demotion because of age and political discrimination. As such, the burden of proof was placed upon the Appellant by a preponderance of the evidence to prove her claims.

3. The Appellant, **Kim Shoemaker**, called herself as her first and only witness. She stated that she is currently an Administrative Specialist III, grade 12, in the District 8 office in Somerset, Kentucky. She added that she first became an Administrative Specialist III sometime in 2004. She also received an ACE award subsequent to that and her salary is approximately \$46,000 annually. She was 52 years old at the time of the demotion which she sought.

4. Regarding her claim of political discrimination, she was only able to state that she heard rumors that the Intervenor, Amber Hale, attended a fundraiser for a man named Kenny Isaacs who was seeking a state legislative position. Supposedly, this fundraiser was given by Hale's family. Appellant was not able to add any information as to date, time, place, people involved, or any other information which would bring out her claim of political discrimination.

5. At the conclusion of Appellant's testimony regarding political discrimination, the Agency moved for directed verdict, which was **GRANTED** by the Hearing Officer.

6. The Cabinet then continued with cross-examination. In answering why she had requested such a demotion, the Appellant stated that she had hoped to be demoted to a grade 11, PIO position, which in turn would then allow her to subsequently receive promotions to a PIO III position and to receive a future raise.

7. Appellant admitted that she was not aware of what the Intervenor's salary was and was not sure of her exact age, although she thought the Intervenor was approximately 29 years of age.

8. The Appellant also admitted that the Cabinet could pick the best employee for their needs after going through the merit system process. She also confirmed that her talents in the Administrative Specialist III position could perhaps best be used in that position, rather than in the position of PIO.

9. She also stated that she was aware that the selection of the person to the demoted position was done by the use of the merit system.

10. Finally, Appellant admitted that the Cabinet would be within its rights in selecting one to fill a demoted position who had a lower salary than she did.

Applicable Law and Regulations:

11. KRS 13B.090(2) in pertinent part:

. . . The hearing officer may make a recommended order in an administrative hearing submitted in written form if the hearing officer determines there are no genuine issues of material fact in dispute and judgment is appropriate as a matter of law.

FINDINGS OF FACT

1. The Hearing Officer finds that the testimony of the Appellant that she was 52 years old at the time of the action in question is not sufficient in and of itself to state a genuine issue of fact. The Appellant was unable to say with certainty the age of the Intervenor and, even if the Intervenor was years younger, there are no other facts in dispute which relate to the age of the Intervenor as being a reason why she was selected for the PIO position.

2. Regarding the claim of political discrimination, there is no genuine issue of material fact in dispute as to that claim. The Appellant was unable to state the time, place, date, people involved, or any pertinent relation thereto to her failure to receive the sought after demotion.

CONCLUSIONS OF LAW

1. The Hearing Officer concludes there are no genuine issues of material fact in dispute and the judgment is appropriate as a matter of law.

2. The Appellant failed to carry her burden of proof to show that age and politics were a factor, and certainly not the factor, in her failure to receive the sought after demotion.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **KIM SHOEMAKER VS. TRANSPORTATION CABINET AND AMBER HALE (APPEAL NO. 2012-044)** 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).

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 R. Hanson Williams** this 30th day of October, 2013.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof mailed this date to:

Hon. Edwin A. Logan
Kim Shoemaker
Hon. Paul Fauri

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2012-044**

KIM SHOEMAKER

APPELLANT

V.

**INTERIM ORDER
CONTAINING FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

TRANSPORTATION CABINET

APPELLEE

AND

AMBER HALE

INTERVENOR

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

This matter came on for a pre-hearing conference on April 25, 2012, at 9:30 a.m. ET, at 28 Fountain Place, Frankfort, KY, before Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellant, Kim Shoemaker, was present and not represented by legal counsel. Appellee, Transportation Cabinet, was present and represented by the Hon. Edwin A. Logan.

At the pre-hearing conference held April 25, 2012, Appellant summarized her claim against the Transportation Cabinet regarding a voluntary demotion she had sought from Administrative Specialist III, grade 12, to Information Officer I, grade 11. Appellant claimed that the person who received the Information Officer I position in District 8, Amber Hale, also took a demotion to be in that position. Appellant stated that she was more qualified, more experienced than the applicant selected, Ms. Hale, that the Transportation Cabinet did not follow its own hiring procedures and also did not consider the statutory criteria set forth at KRS 18A.0751(4)(f) and the regulation at 101 KAR 1:400. Appellant also claimed that she was discriminated against based on her age and also experienced political discrimination arising from a conflict of interest with a member of the hiring panel.

Subsequent to the pre-hearing conference, Amber Hale, the person who did receive the position, requested to intervene. Ms. Hale was allowed to intervene as a party and, subsequently, counsel for Intervenor Amber Hale, entered an appearance.

Appellee, Transportation Cabinet, filed a Motion to Dismiss, and the Intervenor filed a "Motion Pursuant to Interim Order as to Validity of This Appeal" and a Motion to Dismiss.

A briefing schedule was established whereby Appellant was given time in which to respond to these motions. Appellant did not file a response to either motion, but the Appellee, Transportation Cabinet, did file a Memorandum in Response to Order stating that this position (Information Officer I) in District 8 would have been a promotion for one of the applicants on the register.

These motions stand submitted to Hearing Officer Boyce A. Crocker for a ruling.

BACKGROUND

1. As to the Appellee's Motion to Dismiss, it argued simply that the Personnel Board lacks jurisdiction to consider this matter, as the Information Officer I position would have been a demotion for the Appellant. The Appellee argues that there is no provision within KRS 18A that allows an employee to appeal the filling of a vacancy by demotion of another employee. The Appellee argues that the criteria stated at 101 KAR 1:400 would only apply in a position filled by promotion and not demotion.

2. The Appellee did not address Appellant's claim of discrimination.

3. The Intervenor in its "Motion Pursuant to Interim Order as to Validity of This Appeal" essentially makes the same argument as the Appellee; arguing that "Because Ms. Hale was demoted into the position, the promotional factors do not apply." Counsel for the Intervenor argues that the Intervenor executed the Voluntary Demotion Form and that such complied with 101 KAR 1:335, Section 3.

4. Counsel goes on to argue that it is irrelevant to cite the factors which must be considered in a promotional process, because neither the Appellant nor the Intervenor would have been promoted into this position, it would have been a demotion for both.

5. The Intervenor, through counsel, does address the claim of discrimination based on conflict of interest of a panel member. Counsel argues Appellant cannot challenge the underlying demotion since the claim of political discrimination would also have to fail.

6. As noted, though given ample time to do so, Appellant filed no response to either of these motions.

7. 101 KAR 1:400, Section 1 (1) states as follows:

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

8. KRS 18A.0751(4)(f) states as follows:

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.

9. 101 KAR 1:335, Section 3 (2) states as follows:

(2) Voluntary demotion.

(a) A voluntary demotion shall be made if an employee with status requests a voluntary demotion on the Voluntary Transfer/ Demotion/ Salary Retention Agreement Form prescribed by the Personnel Cabinet.

(b) The form shall include:

1. A statement of the reason for the request;
2. The effective date of the demotion;
3. The position from which the employee requests demotion;
4. The position to which the employee will be demoted; and
5. A statement that the employee waives the right to appeal the demotion.

(c) The agency shall forward a copy of the request to the Secretary of Personnel.

FINDINGS OF FACT

1. The Hearing Officer finds that at the time of the filling of the Information Officer I position, that Appellant, Kim Shoemaker, was in an Administrative Specialist III position, grade 12.

2. The Hearing Officer finds that at the time of the filling of the Information Officer I position, that the Intervenor, Amber Hale, was also in an Administrative Specialist III position, grade 12.

3. The Hearing Officer finds that the Information Officer I position in District 8 was a grade 11.

4. The Hearing Officer finds that as this position was filled by a voluntary demotion, that the provisions of 101 KAR 1:400 and KRS 18A.0751(4)(f) do not apply and that Appellant has no right to challenge whether the factors set forth in the regulations and statute were applied in the selection of Intervenor, Amber Hale, for this voluntary demotion.

5. The Hearing Officer finds that merely because the position in question would have been a promotion for one of the people on the register, does not give Appellant, for whom the position would have been a demotion, the right to challenge whether those promotional factors were utilized correctly, or at all. The Hearing Officer finds that, much like a transfer, if an agency determines it can fill a position by demotion that such is allowable; and that a person in the position of Appellant, for whom filling that position would have been by demotion, cannot challenge the action by relying on 101 KAR 1:400 or KRS 18A.0751(4)(f).

6. The Hearing Officer, however, is not convinced that the Intervenor's argument as to Appellant's claim of political favoritism must fail due to the Hearing Officer agreeing with Intervenor and Appellee that Appellant cannot challenge the use or non-use of the promotional factors in the filling of this position.

7. The Hearing Officer finds that Appellant's claims of discrimination based on age and political favoritism should be allowed to proceed to evidentiary hearing.

8. The Intervenor's Motion to Dismiss is **DENIED**.

CONCLUSIONS OF LAW


1. The Hearing Officer concludes as a matter of law that Appellant does not have the right to challenge the demotion of Intervenor to the Information Officer I position by referencing the promotional factors set forth at 101 KAR 1:400 or KRS 18A.0751(4)(f); as this also would have been a demotion for the Appellant. That statute and regulation clearly refer to promotions. As this would not have been a promotion for the Appellant, she cannot utilize those factors to challenge the selection of the Intervenor.

2. However, the Hearing Officer does conclude that Appellant's claims of discrimination based on age and political favoritism (interpreted to be a claim of discrimination based on political opinion or affiliation) should be allowed to proceed to an evidentiary hearing.

3. This matter will be returned to the scheduling clerk for either another pre-hearing conference and/or to set an evidentiary hearing date.

SO ORDERED at the direction of **Hearing Officer Boyce A. Crocker** this 13th day of November, 2012.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Edwin Logan
Kim Shoemaker
Hon. Paul Fauri
Kathy Marshall