

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2010-213

RANDALL SMITH

APPELLANT

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

CABINET FOR HEALTH AND FAMILY SERVICES
J.P. HAMM, APPOINTING AUTHORITY

APPELLEE

** **

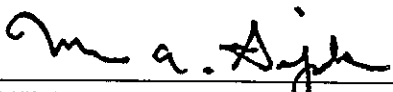
The Board at its regular September 2013 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated July 23, 2013, and being duly advised,

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 17th day of September, 2013.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Catherine York
Hon. Scott Foster
J.P. Hamm

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This matter came on for an evidentiary hearing on June 24, 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, Randall Smith, was present at the evidentiary hearing, and was represented by the Hon. Scott Foster. Appellee, Cabinet for Health and Family Services, was present and was represented by the Hon. Catherine York. Also appearing as Agency representative was Michael Handy.

BACKGROUND

1. This matter involves the failure of the Appellant to receive a promotion for the position of Family Services Office Supervisor. The burden of proof, to be by a preponderance of the evidence, was assigned to the Appellant to demonstrate that the process that resulted in the promotion of Joyce Cummins to that position was not done in accordance with either statutory or regulatory authority expressed at KRS 18A.0751(4)(f) and 101 KAR 1:400. The position involved was in the Somerset, Kentucky, office of the Cabinet.

2. 101 KAR 1:400, Section 1(1), Promotion. reads 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.

3. The Selection Worksheet used in the process herein [Exhibit 6] includes under "Qualifications" components of education, experience, and additional training, experience, or education and interview. The components used under "Record of Performance" include discipline, related to performance and commendations.

4. The Appellant called as his first witness, **Shirley Eldridge**. She is now retired from the Cabinet, but was employed there in the Department of Aging and Independent Living for approximately twenty years. She was a member of the three-person promotion panel which interviewed the applicants and recommended the selection of Ms. Cummins. She testified that she had previously been on several promotion panels and, in this instance, received no specific training other than being told to give appropriate consideration to the promotional criteria.

5. Regarding the questions used in the behavioral interviews [Exhibit 5], the witness stated that she had no involvement in the formulation of these and believed they were done by the Director of the Division. The assessment scale for the answers given to these questions were poor, fair, good, very good and excellent. No numerical value was given to each of these ratings. The witness went on to say that the more detailed the answers given in the interviews, the better the rating they achieved. At the end of the interviews, the number of each of the ratings in the assessment scale was compiled to determine the applicant with the best assessment.

6. The witness testified that she believed the interviews themselves had some importance, but does not know whether the interview in and of itself was more or less important than the promotional criteria. Again she stressed that the panel members did consider the criteria under 101 KAR 1:400. The Interview Questionnaire Worksheet compiled by Eldridge [Exhibit 5] reveals that Cummins received assessments of 6-very good; 1-excellent and 1-good. The interview worksheet for the Appellant compiled by this witness shows she gave him assessments of 2-good; 3-fair; 2-very good and 1-excellent. She also acknowledged that she had changed one rating from good to fair, but was unable to recall why. In addition, she scored Cummins higher on the interview itself than the Appellant. In the witness' opinion, she expressed that she probably thought the best interviewee should get the recommendation. She also added that she did not know any of the candidates.

7. On cross-examination, the witness stated that she thought the more thorough the answer given during the interview, the better the score received. She added that she felt Cummins gave more detailed responses to the questions than the Appellant. The Interview Questionnaire Worksheets of the three-panel members regarding the Appellant were addressed as Exhibit 4. The Interview Questionnaire Worksheets for Joyce Cummins of the three panel members were introduced as Exhibit 5. A comparison of the ratings by the three panel members showed that Cummins received 18-very good; 3-excellent; and 3-good. The Appellant received 6-very good; 3-excellent; 6-good; and 9-fair.

8. When asked if the interviews were considered to be part of the qualifications, the witness expressed that she did not know. The witness also stated that as well as considering the five mandated criteria, her recommendation also was partially based on the interviews of the applicants.

9. The witness recalled that the Appellant had more experience with the state and recalls that Cummins had some experience with the Cabinet, although she does not remember whether it was in the Guardianship Division. She also was not aware that the Appellant had five commendations while at Oakwood, nor was she aware that he was the acting supervisor over the Guardianship Division when the supervisor was out of the office.

10. In summary, Eldridge stated that the interviews played a significant part in the recommendation of Cummins, but no more than the promotional criteria.

11. Appellant, **Randall Smith**, called himself. He stated that he began work as a Social Services Clinician II in the Somerset office where he worked in Guardianship for approximately ten years. His initial supervisor was Joyce Cummins and for the past seven years prior to his retirement, Rodney Thayer was his supervisor.

12. Appellant stated that upon Thayer's retirement, the Director of the Guardianship Division, Virgie Clayton, encouraged him to apply. She was also one of those on the interview panel. The Appellant relates that Clayton advised him that the office needed someone with guardianship experience and leadership ability. He added that while working at Oakwood, he progressed from a Social Worker to a Social Worker II to a Unit Director, where he supervised over 200 employees. He left Oakwood in 2003 to go to the Guardianship Division.

13. Appellant went on to state that he has been involved in a promotional process before as a panel member. He recalled that previous interview worksheets consisted of the panel members writing the questions, then writing the desired answers and then giving a numerical value to each of the answers. He added that this process was approved by the Cabinet's personnel department.

14. Appellant further testified that after the interview, he had submitted five commendations he had received during his employment and pointed out that these do not appear on the Selection Worksheet. He also added that his previous promotions do not appear on the Selection Worksheet [Exhibit 6]. The Appellant's understanding is that the interview process is a tool chosen to highlight the five criteria and not a component of the "qualifications" criteria.

15. In summary, the Appellant's position is that the interview itself played a disproportionate role in the selection of the successful candidate.

16. On cross-examination, the Appellant admitted that he was not sure if Virgie Clayton had any bias toward him. He pointed out that the other candidates appear to have their commendations listed on the worksheet, whereas his was not. He stated that he had submitted the commendations post-interview to Clayton. Appellant emphasized that he feels the assessment scale used should have had a numerical value and that the type of questions asked in these interviews were very broad and lent themselves to subjective judgments.

17. The Appellant's last witness was **Rodney Thayer**. He retired in 2010, but prior to that was employed in excess of 21 years with the Cabinet and prior to retirement was the guardianship supervisor in the Somerset region.

18. He stated that he previously knew the Appellant at Oakwood and supervised him for the immediate seven years prior to his retirement in Somerset. He added that Smith primarily acted as the acting supervisor when this witness was out of the office. He stated that he was a good employee and maintained good relations with his coworkers.

19. The witness went on to add that he had participated in promotional processes previously and, in his opinion, the interviews were part of the promotional process, to be used to elicit more information. He does not think the interviews were more important than the promotional criteria.

20. He also stated that he had some conversations with Director Clayton about filling his position and he assumed that the Appellant would get the job, since he knew the applicants and he knew of the Appellant's experience in guardianship. However, he also added that if an interviewee "blew" an interview, this would hurt their chances.

FINDINGS OF FACT

1. Joyce Cummins was promoted to Family Services Office Supervisor in the Cabinet's Somerset office subsequent to a review process, including interviews, conducted by a three-person panel.

2. During the promotional process, 101 KAR 1:400 mandates that five factors be considered. These are qualifications, record of performance, conduct, seniority and performance evaluations.

3. The Selection Worksheet (Exhibit 6) used by the panel outlines the interview as a component of the Qualification factor.

4. It is apparent from the cumulative ratings of the three-person panel that the assessments given Cummins exceeded those of the Appellant.

5. Although an improved rating method may have been achieved by assigning numerical values, as agreed by the Appellant, that also involves some element of subjectivity. Regardless, the Hearing Officer does not find the process used to be flawed. Also, it is unlikely that failure to list Appellant's commendations on the worksheets would have resulted in a different selection.

6. The Hearing Officer finds witness Eldridge to be credible in her testimony that the panel members did consider the criteria under 101 KAR 1:400, and so finds.

7. There is no persuasive evidence that the interviews in and of themselves played a disproportionate role in the selection of Cummins.

CONCLUSIONS OF LAW

The Appellant failed to carry his burden of proof to show the promotional process did not follow the mandates of 101 KAR 1:400.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **RANDALL SMITH VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2010-213)** 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 23rd day of July, 2013.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof mailed this date to:

Hon. Catherine York
Hon. Scott Foster