

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-021**

RICHARD SPEARS

APPELLANT

VS.

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

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

APPELLEE

AND

JAMES BRAY, JR.

INTERVENOR

** ** ** ** **

This matter came on for evidentiary hearing on July 1, 2015, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before Stephen T. McMurtry, Hearing Officer. The proceedings were recorded by audio/video equipment as authorized by KRS Chapter 18A.

The Appellant, Richard Spears, was present and was not represented by legal counsel. The Appellee, Cabinet for Health and Family Services, was also present and represented by the Hon. Matthew Perdue. Also present was the Intervenor, James Bray, Jr.

BACKGROUND

1. Richard Spears is employed as a Maintenance Operation Tech II for the Cabinet for Health and Family Services at the Hazelwood Center in Louisville. In September of 2014, he applied for the position of Mechanical Maintenance Operations Manager at the Glasgow State Nursing Facility, a position for which he had earlier applied in 2013 in competition with James Bray, the Intervenor herein, who was chosen for the position then and in 2014.

2. After Spears completed the promotion process structured by KRS 18A.0751(4)(f), Donnie Wyatt, Superintendent Associate at the Glasgow State Nursing Facility, notified Spears by letter dated December 1, 2014, that he had not been chosen for the position. Spears appealed the decision on January 31, 2015, to the Personnel Board expressing this statement of facts:

After reviewing & comparing – selection process checklist, conflict of interest statements, reference checks, selection worksheets, screening criteria worksheets, applications of both myself and Mr. James Bray I found what I would consider many errors in the procedures and methods used in awarding the #35250BR, Mechanic Maintenance & Operations Manager position to Mr. James Bray.

3. Spears testified that the selection process was “tainted” because his qualifications for the position were obviously better than James Bray’s. Although Spears did not present a comparative analysis of his and Bray’s qualifications, he introduced their applications for the position and the Selection Worksheets on which are found their qualifications and records of performance, conduct, seniority and performance evaluations, the criteria of KRS 18A.0751(4)(f) and 101 KAR 1:400. He also introduced the selection committee’s evaluations of the interviews of Bray and Spears.

4. Spears testified that the process was manifestly “tainted” because (1) During the 2013 selection process for the same position in competition with Bray, his references were reviewed, but not during this selection process in 2014, (2) Bray left the position a few months after he was hired in 2013, (3) Bray failed to complete the Screening Criteria Worksheet and (4) his, Spears, computer skills and life safety code knowledge were superior to Bray’s. As will be explained below, the process calls for a selection committee to interview and evaluate the candidates for the vacant position considering the candidates’ applications for the position and the information learned during interviews with each. Additionally, Spears, because he had been employed by the Cabinet since August 16, 2011, provided an Internal Mobility Worksheet, that gave quick reference to the promotion factors of KRS 18A.0751(4)(f) and 101 KAR 1:400, and his performance evaluations.

5. A comparison of these documents finds that Spears had a high school diploma with post high school computer and welding training. He also completed one year at Western Kentucky University. Bray had a high school diploma with training in electricity, HVAC, and welding. Spears had 34 years and 10 months work experience; Bray had 30 years and 10 months. Each had experience and training relevant to the work position sought. Spears had a written reprimand, 29 months of seniority and a 2013 performance evaluation of being “Highly Effective.” Bray had left state employment in 2013 after several weeks for a job in the private sector. He had no state record regarding performance, seniority or disciplinary actions.

6. The selection committee, as expressed in the Selection Worksheet, found Bray’s interview to be “Very Good” in giving verbal examples of dependability, attendance, flexibility, confidentiality, continuous quality and process improvement and job knowledge.

7. The committee found Spears’ interview to be “Fair” in dependability, attendance, flexibility, job knowledge, continuous quality and process improvement and continuous development; “Good” in confidentiality, and “Poor” in dependability, attendance and job and organizational knowledge. In response, Spears said, “They could not have read my performance evaluations.” Spears argued that these inexplicabilities led to the conclusion that the selection process was “tainted,” for some reason “corrupted.”

8. **Robin Furlong**, Human Resources Administrator for the Cabinet, described the process for hire of a candidate from outside state government and of promoting from within. If a position becomes open, she requests a Position Description and a register and organizes the process. The Cabinet posts notification of the job opening with requisite qualifications. The department head in this case, Donnie Wyatt, sends out notices to the qualified applicants of times and places for their interviews.

9. Furlong explained she did not "play a role" in the selection process of panel members, who evaluate, interview and recommend an applicant for hire or promotion. Furlong explained that after the selection panel had reviewed the applications, conducted interviews of the candidates and made a recommendation, all documents generated in the selection process were sent to the Cabinet in Frankfort for final review. She explained that performance evaluations are not sent for review as they are already considered by the selection panel.

10. **Donnie Wyatt**, Facility Assistant Director and manager of maintenance, became the lead panel member working with Amanda Allen (Burkhart), Facility Director, and Scott Baker, Director of Facilities Management. Wyatt testified that she developed the questions on the screening criteria worksheet. She said a certain number of the questions had to be met affirmatively before an applicant passed to the interview stage. Both Bray and Spears qualified for the interview along with three other applicants. Spears satisfied more screening questions than Bray, but Wyatt explained that did not give him an advantage in the selection process because the Screening Criteria Worksheets are not given to the selection panel for consideration.

11. Wyatt said the next step was for the panel to choose behavioral interview questions posted on the state website that are asked uniformly to all applicants. Each panel member asks some of the questions, but all members evaluate the answers on a scale of excellent to poor. After each interview, the panel members discuss the applicant's answers, summarize the discussion, and record the panel members' evaluations. The panel members then prepare a Selection Worksheet, completed by the lead panel member, in this case Donnie Wyatt. It serves as a checklist and summary of the qualifications of the candidate whom they recommend. The Selection Worksheet includes the candidates' qualifications, record of performance, and, if available, conduct, seniority and performance evaluations. Each panel member signs the worksheet. The final step then is to check the references for the recommended candidate and send all of the documentation except performance evaluations to the Cabinet in Frankfort for review.

12. The panel's decision was unanimous for James Bray.

13. In response to Spears' testimony that the selection process was obviously corrupt and tainted as evidenced by the fact that his references were reviewed by the Cabinet during the 2013 selection process, but not in 2014, Wyatt said that occasionally the Cabinet requests references of other candidates for whatever reason. She also explained that Spears' concern that the panel did not properly consider the information contained on his Screening Criteria

Worksheet was unfounded because the panel as a matter of policy is never given this worksheet for consideration.

14. **Scott Baker**, Director of Facilities Management and panel member, testified that he thought Bray was a good communicator with “solid knowledge of this state of the art” Glasgow Nursing Facility. Bray had the “ability to react quickly in a crisis situation.” Spears, in comparison, did poorly in the behavioral interview which he, Baker, regarded as “very important.” Baker concluded that he would not want to work with Spears. In response to Spears’ claim to have superior computer skills, Baker said the Glasgow facility did not need HVAC computer skills for the system was “as simple to operate as a cell phone.”

15. The Cabinet’s final witness was **Amanda Allen**, formerly Burkhart, Director of the Glasgow Nursing Facility. The following is a summary of her testimony. She was a panel member and permitted Donnie Wyatt to take the lead in the selection process because Wyatt oversaw the Maintenance Department. Bray had more knowledge of the Life Safety Code as evidenced by his ability to use the Code’s technical language and speak in detail of its provisions. Knowledge of the Code was especially important in a long-term care facility. Spears’ experience had been at the Hazelwood facility where a lower level of care was expected. Spears’ answers to the Life Safety Code questions were not responsive. She chose Bray, although the two were almost equal, because Bray had the best interview.

FINDINGS OF FACT

1. Richard Spears and James Bray were two of the five eligible applicants competing for the vacant position of Mechanical Maintenance and Operations Manager at the Glasgow Long-Term Care Facility. The Cabinet opened a Register that allowed internal mobility promotions, as was Spears’ situation, and hiring of non-state applicants who met the required qualifications, as did Bray. (See 101 KAR 2:056.)

2. The testimony of the Cabinet’s witnesses (Furlong, Wyatt, Baker and Allen) describing the selection process was essentially unchallenged by Spears except for his assertion that these facts evinced corruption. He did challenge Allen’s testimony that the Glasgow Facility required a higher level of patient care than Hazelwood. That controversy is tangential to the appeal and need not be decided. Otherwise, the testimony of the Cabinet’s witnesses is accepted as true.

3. Spears failed to prove by a preponderance of the evidence that the selection process was “corrupted” and “tainted.” That Spears’ references were reviewed in the 2013 selection process, but not in 2014 was satisfactorily explained. Wyatt said occasionally the Cabinet in reviewing an entire proceeding asked to see the references of more than one candidate. Although Bray abruptly left the Maintenance Manager’s position in 2013, one can reasonably conclude that Bray quit the position because his skills were in demand, not because he was so untrustworthy or disloyal the Cabinet should not rehire him. Wyatt also explained that

Bray did not fail to complete his Screening Criteria Worksheet as Spears alleged; he just did not have as much information to include, a fact that was of no advantage to Spears. Allen, Baker and Wyatt chose Bray for his ability to communicate much better than Spears.

4. Spears failed to prove that the selection process was corrupt.

CONCLUSIONS OF LAW

1. The selection panel fairly considered Bray's and Spears' qualifications and records of performance and Spears' conduct, seniority, and performance evaluations as required by KRS 18A.0751(4)(f) and 101 KAR 1:400.

2. The Cabinet did not penalize Spears as that concept is defined by KRS Chapter 18A. There was complete lack of evidence that the process was corrupt or that it violated the above cited statute and regulation. The Cabinet did not penalize Spears by a demotion, decrease in salary or removal of job duties. The Cabinet may legally choose between two qualified candidates for a vacant position without having its discretion challenged, unless the process is corrupt or a candidate, who is a merit employee, penalized.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **RICHARD SPEARS VS. CABINET FOR HEALTH AND FAMILY SERVICES AND JAMES BRAY, JR. (APPEAL NO. 2015-021)** 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).

Any document filed with the Personnel Board shall be served on the opposing party.

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 T. McMurtry** this 28th day of August, 2015.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Matthew Perdue
Richard Spears
James Bray, Jr.