



**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2013-295**

**ROSA STEPHENS**

**APPELLANT**

**VS.**

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

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

**APPELLEE**

**AND**

**MARLENA GAIL GASTINEAU AND  
TONYA DOW JEFFRIES**

**INTERVENORS**

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This matter came on for an evidentiary hearing on July 1, 2014, at 9:30 a.m., at 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, Rosa Stephens, was present at the hearing, and was not represented by legal counsel. Appellee, Cabinet for Health and Family Services, was present and was represented by the Hon. Rebecca Wooldridge and the Hon. Kathleen Hines. Also present were the Intervenor, Marlena Gail Gastineau and Tonya Dow Jeffries.

This matter involves an appeal by the Appellant for having failed to receive a promotion to three positions located in Lincoln and Russell Counties. Intervenor Gastineau received the promotion to Social Service Worker I in Lincoln County, while Jeffries received a Social Service Worker I in Lincoln County. The third person to receive the sought after position as Social Service Worker I in Russell County was Tristen McGary, although she did not intervene in this matter.

The burden of proof was placed upon the Appellant by a preponderance of the evidence to demonstrate that the Appellee failed to comply with the requirements set forth at KRS 18A.0751(4)(f) and the requirements set forth at 101 KAR 1:400, when those individuals were selected for the positions noted.

### BACKGROUND

1. The Hearing Officer notes the Appellant, **Rosa Stephens**, filed a witness list containing no names other than herself, and, therefore, was her only witness.

2. The Appellant checked the box marked “discrimination” on her Appeal Form; however, no protected class of discrimination was outlined and no testimony was given as to any type of discrimination.

3. The Appellant testified that she has been employed at the Pulaski Office of Permanency and Protection as an Office Support Assistant II for the past twelve plus years. She stated that at times she would attempt to help the young people involved in that program by advising and talking with them. However, she stated that the primary function of her position was to perform secretarial functions.

4. The Appellant then addressed the first position in question, that being the Adult Protective Services position in Lincoln County, ultimately filled by the promotion of Intervenor Gastineau. The Appellant introduced Appellant’s Exhibit 1, a Selection Worksheet, used by the interview panel members in comparing applicants. This worksheet contains the five factors mandated in 101 KAR 1:400. The Appellant pointed out that on her Selection Worksheet under the category “experience” there was no mention of a practicum internship she had served nor any mention of her training record. There was no other comparison offered by the Appellant as to any of the other four factors regarding her and Intervenor Gastineau. The Appellant did point out that the Internal Mobility comments following the interview were significantly more detailed regarding Gastineau than the Appellant.

5. On cross-examination, the Appellant testified that her evaluations for the years 2009, 2010 and 2011 were all “Highly Effective.” She also admitted that the Selection Worksheet reflects her amount of state seniority, as it did for Gastineau.

6. The Appellant then addressed the second position in question, that being the Child Protective Services position in Lincoln County, where Intervenor Jeffries got the promotion.

7. The Appellant testified that the three interview panel members for that position were Kurt Fogle, Dalton Miller and Buford Edwards. The Appellant pointed out that on the Selection Worksheet for this position there was no relevant experience for the position listed on behalf of Intervenor Jeffries. The Appellant then added that none of the panel members asked her about her duties at the Office of Pulaski Permanency and Protection. No other testimony was given as to the comparison between the Appellant and the successful candidate regarding the factors on the Selection Worksheet.

8. On cross-examination by Intervenor Jeffries, the Appellant admitted that no experience relevant to the position was listed for any of the six candidates.

9. The Appellant then addressed the third position being protested, that being the Child Protective Services position in Russell County, ultimately filled by Tristen McGary. The Appellant protested that on the Selection Worksheet, experience relevant to the position regarding her was listed as "none." Appellant again pointed out that she felt that her additional training and experience should have qualified for relevant experience.

10. On cross-examination, Appellant stated that she submitted her training record to panel members Melissa Dudley and Melody Baker on the day of the interview. She added that her time with Permanency and Protection was not listed as experience, as she only functioned as a secretary in that office. Also on cross-examination, the Agency introduced Appellee's Exhibit 1, which was identified by the Appellant. This exhibit lists her duties as an Office Support Assistant II, both as prior to September 2013 and current as of January 2014.

11. A review of Appellee's Exhibit 1 by the Hearing Officer as to both time periods shows that all duties performed by the Appellant were secretarial in nature and reflect no relevant experience to the position sought.

12. At the conclusion of Appellant's testimony, the Appellee made a Motion for Directed Verdict. Pursuant to KRS 13B.090(7), the Hearing Officer **GRANTED** the Motion for Directed Verdict in favor of the Appellee.

### **LAW AND REGULATION**

13. KRS 18A.0751(4)(f) states:

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.

14. 101 KAR 1:400 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.

15. KRS 13B.090(7) states:

In all administrative hearings, unless otherwise provided by statute or federal law, the party proposing the agency take action or grant a benefit

has the burden to show the propriety of the agency action or entitlement to the benefit sought. The agency has the burden to show the propriety of a penalty imposed or the removal of a benefit previously granted. The party asserting an affirmative defense has the burden to establish that defense. The party with the burden of proof on any issue has the burden of going forward and the ultimate burden of persuasion as to that issue. The ultimate burden of persuasion in all administrative hearings is met by a preponderance of evidence in the record. Failure to meet the burden of proof is grounds for a recommended order from the hearing officer.

### **FINDINGS OF FACT**

1. The Appellant offered insufficient testimony as to how the interview panels failed to follow the five factors contained in 101 KAR 1:400 in selecting the successful candidates for the positions in question.
2. The Hearing Officer finds the Appellant's reliance on her experience as an Office Support Assistant/Secretary had little or no relevant bearing regarding her qualifications for the positions sought.

### **CONCLUSION OF LAW**

The Appellant failed to carry her burden of proof to show the Appellee failed to follow the requirements of 101 KAR 1:400.

### **RECOMMENDED ORDER**

The Hearing Officer recommends to the Personnel Board that the appeal of **ROSA STEPHENS VS. CABINET FOR HEALTH AND FAMILY SERVICES AND MARLENA GAIL GASTINEAU AND TONYA DOW JEFFRIES (APPEAL NO. 2013-295)** 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 25<sup>th</sup> day of July, 2014.

**KENTUCKY PERSONNEL BOARD**

  
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**MARK A. SIPEK**  
**EXECUTIVE DIRECTOR**

A copy hereof mailed this date to:

Hon. Rebecca Wooldridge  
Hon. Kathleen Hines  
Rosa Stephens  
Marlena Gail Gastineau  
Tonya Dow Jeffries