

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-108

MICHAEL SHANE TOLSON

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

JEFF GABBARD

INTERVENOR

** ** *

The Board at its regular January 2015 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated December 3, 2014, having considered Appellant's exceptions, Appellee's exceptions (returned as untimely), Appellee's response, oral arguments, 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 **SUSTAINED to the extent** therein.

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 13th day of January, 2015.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. William Fogle
Hon. Paul Fauri
Jeff Gabbard
Kathy Marshall

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-108**

MICHAEL SHANE TOLSON

APPELLANT

VS.

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

**TRANSPORTATION CABINET
MIKE HANCOCK, APPOINTING AUTHORITY**

APPELLEE

AND

JEFF GABBARD

INTERVENOR

** ** ** ** **

This matter came on for evidentiary hearing on October 13, 2014, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before Roland P. Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Michael Shane Tolson, was present and represented by the Hon. Paul Fauri. The Appellee, Transportation Cabinet, was present and represented by the Hon. William Fogle. Also present as Agency representative was Ms. Elizabeth Miller. The Intervenor, Jeff Gabbard, was present and not represented by legal counsel.

Mr. Tolson's claim in this appeal is that the statutory requirements set forth at KRS 18A.0751(4)(f) and the regulatory requirements set forth at 101 KAR 1:400 were not followed when Appellant was not selected for the position of Highway Superintendent II in Lee County. He also raised a claim that the promotion of Jeff Gabbard was arbitrary in violation of Section 2 of the Kentucky Constitution. The burden of proof was on the Appellant to show by a preponderance of the evidence that the requirements set forth by statute at KRS 18A.0751(4)(f) and set forth in regulation at 101 KAR 1:400 were not followed when Jeff Gabbard was selected for the position of Highway Superintendent II in Lee County. Appellant has the burden to show by a preponderance of the evidence that the hiring procedure was exercised in an arbitrary manner in violation of Section 2 of the Kentucky Constitution.

The rule separating witnesses was invoked and employed throughout the course of the proceedings. Opening statements were presented by the Appellant and the Appellee. Mr. Gabbard waived presentation of an opening statement.

BACKGROUND

1. The first witness for the Appellant was the Intervenor, **Jeff Gabbard**. For the past eleven years Mr. Gabbard has been employed by the Kentucky Transportation Cabinet. Since May 15, 2014, he has been employed in the position of Highway Superintendent II.

2. He identified Appellant's Exhibit 1 as his 2003 Personnel Cabinet Application for Employment, which he had tendered the time he first obtained state employment. He also identified Appellant's Exhibit 2 as his 2008 Personnel Cabinet Application for Employment. Appellant's Exhibit 3 is his 2014 Personnel Cabinet Application for Employment, which he completed as part of the current promotional process.

3. With reference to Appellant's Exhibit 1, Gabbard confirmed that he has 54 hours of general college classes. He did not have a major nor had he obtained a college degree. Through testimony he confirmed this application showed the following history of employment:

December 2000 to June 2002: Everett Marshall Auto Parts;
June 2000 to December 2000: Advance Auto Parts;
April 1997 to June 2000: Marshall Auto Parts;
July 1994 to June 1996: Mudcat Construction;
May 1990 to June 1994: Millcreek Excavation;
May 1988 to April 1990: Boogie Jones Ford

When Gabbard was first employed by the Commonwealth, he was hired as a Highway Equipment Operator I.

4. Appellant's Exhibit 2 is the application he completed and tendered for consideration to the position of Highway Equipment Operator II. Through his testimony he confirmed the following work history:

April 2001 to July 2003: Everett Auto Parts.
April 1999 to April 2001: Advance Auto Parts;
April 1995 to April 1999: Everett Auto Parts;
November 1993 to August 1995: Mudcat Construction
September 1988 to November 1993: Millcreek Excavation;
September 1986 to October 1988: George Jones Dealership;

His work history also indicated he began employment with the Department of Transportation on September 1, 2003, as a Highway Equipment Operator I until September 9, 2005.

In November 2005, he began duties as a Highway Equipment Operator II until November 1, 2007. In September 2008 he was classified as an Administrative Specialist I and held that position through April 8, 2009.

5. When asked to compare the discrepancies in the employment history dates, between Appellant's Exhibit 1 and Appellant's Exhibit 2, Gabbard stated he "messed up" with some dates. He testified that while he was a Highway Equipment Operator II, he had performed the duties of that position as well as administrative duties in the office.

6. He identified Appellant's Exhibit 3 as the application he completed and tendered for consideration to the Highway Superintendent II position. He confirmed the application showed the following work history:

July 2010 to February 2014: KYTC Heavy Equipment Operator III.
April 2006 to July 2010: KYTC Administrative Specialist II;
September 2005 to April 2006: KYTC Heavy Equipment Operator II;
September 2003 to September 2005: KYTC Heavy Equipment Operator I;
February 2002 to June 2003: Advance Auto Parts;
March 1997 to February 2002: Millcreek Excavation;

Gabbard testified he apparently had "messed up" listing some of the dates.

7. He identified Appellant's Exhibit 4 as his 2008 Annual Employee Performance Evaluation. He had been evaluated in the performance of duties of Administrative Specialist I and Highway Operator II. Halfway into the year, he had begun duties as an Administrative Specialist. He admitted the evaluation does not list any duties of a Highway Equipment Operator. He obtained a score of 485 which was in the "Outstanding" category.

8. He identified Appellant's Exhibit 5 as his 2010 Annual Employee Performance Evaluation. He had been evaluated in the performance of duties of Highway Equipment Operator III. During that year he had performed some Administrative Specialist duties, although such duties were not listed on this evaluation. He assisted the superintendent, Kevin McIntosh, with his duties. McIntosh noted on the third performance review that Gabbard did help him keep up with inventory and matters around the office. Gabbard obtained a score of 451 which was in the "Outstanding" category.

9. He identified Appellant's Exhibit 6 as his 2011 Annual Employee Performance Evaluation. He was evaluated in the performance of duties of a Highway Equipment Operator III. He had also performed some duties of an Administrative Specialist. He obtained a rating of 465 which was in the "Outstanding" category.

10. He identified Appellant's Exhibit 7 as his 2012 Annual Employee Performance Evaluation. He was evaluated in the performance of duties of a Highway Equipment Operator III. He had still been doing some Administrative Specialist duties that year. He obtained a score of 429 which was in the "Highly Effective" category.

11. He identified Appellant's Exhibit 8 as his 2013 Annual Employee Performance Evaluation. He was evaluated in the performance of duties of a Highway Equipment Operator III. During that year he performed some duties as an Administrative Specialist. He obtained a score of 452 which was in the "Outstanding" category.

12. He identified Appellant's Exhibit 9 as the Request for Personnel - Position Action, P-1 form, showing his appointment as Highway Equipment Operator I on September 1, 2003.

13. He identified Appellant's Exhibit 10 as his P-1 form showing his reclassification on February 1, 2007, to a Highway Equipment Operator II.

14. He identified Appellant's Exhibit 11 as his P-1 form showing a reclassification on November 1, 2007, to Administrative Specialist I.

15. He identified Appellant's Exhibit 12 as his P-1 form showing an August 16, 2008 change of title to a Highway Equipment Operator II, due to reorganization. During that time he still performed office work and assisted his supervisor. He did not perform many duties outside the office.

16. He identified Appellant's Exhibit 13 as his P-1 form showing a reclassification to a Highway Equipment Operator III on May 16, 2009. His primary duties at that time were office duties; however, he still performed occasional outside roadwork.

17. Gabbard identified Appellant's Exhibit 14 as the Internal Mobility Applicants form he completed and submitted for consideration to the Highway Superintendent II position. He had 127 months of seniority, attended high school and college, and had specific work experience, as well as training. He also reported his Performance Evaluation scores for 2011, 2012 and 2013. Under Record of Performance he listed he had been awarded a Kentucky Colonel Recommendation. He had no disciplinary conduct record.

18. As an Administrative Specialist he kept time and attendance records, monthly inventory on all parts and materials, kept service and repair records on all the equipment, and an inventory of supplies as reported by employees. He also served as liaison for the maintenance crew when they imparted information to him about sick leave, applications, and insurance. Evaluations were performed by the superintendent and thereafter typed up by Gabbard. He also kept track of PH runoff levels, ordered materials, and was on-call 24/7 for emergency call-outs. He has and is able to operate a front-end loader, grader, bulldozer, single and double axle tandems, and backhoe.

19. In his current position as Superintendent, he performs some of the same duties he did when he was a Highway Equipment Operator III. He also has delegated some of those duties to a subordinate.

20. Appellant's next witness was **Elizabeth Miller**. Ms. Miller has been employed as Administrative Coordinator with the Kentucky Transportation Cabinet since March 2008.

21. This promotional process started early in the spring of 2014 when the position had been vacated by Mr. McIntosh. The vacancy was posted and a register provided. She identified Appellee's Exhibit 15 as the Certified Register Report received for this vacancy. There are four persons listed on the register. McIntosh is the individual who vacated the position. She had handwritten certain notes. "I" means that person had been interviewed. Three candidates were interviewed: Gabbard, Pence, and Tolson. During the interview, Pence declined to be considered. Miller then put the notation "Decline" next to his name. Following the interview panel's decision, Gabbard was recommended to the position and she placed the notation "Appoint" on the document.

22. She identified Appellant's Exhibit 16 as the April 1, 2014 letter signed by Adrian Hall, TE Super Jackson Section. That letter recommended the promotion of Jeffrey Gabbard to the position. The interview panel consisted of Elizabeth Miller, Steven Gunnell and Adrian Hall. The panel believed Gabbard had more related work experience than Tolson.

23. She identified Appellant's Exhibit 17 as the Selection Summary sheets completed and signed by the interview panel on April 1, 2014. The information pertaining to Seniority was obtained from the applicants' own records. Gabbard had 127 months of state service, while Tolson had 170 months. Education is listed as a subcategory under Qualifications. Gabbard had some college experience while Tolson was a high school graduate. Work experience was also a subcategory of Qualifications. The panel looked at the candidates' applications to add up a total of work experience outside state service. They looked at Gabbard's most recent application (Appellant's Exhibit 3) and gave him additional credit for employment at Millcreek Excavation (58.5 months) and Advance Auto Parts (16). They added 74.5 months outside service to Gabbard's 127 months of state service to reach a total of 201.5. The Auto Parts experience was

credited due to his having listed supervisory experience.

24. Although Gabbard had never been an Administrative Specialist II, the panelists knew he had been an Administrative Specialist from all the office work he had done.

25. The interview panelists relied on each applicant's application and any other information they provided to the panel, including evaluations and internal mobility forms. The panelists did not check records for conduct or awards and did not verify months of state service. The majority of employees who turn in applications have inaccurate information. She did not know for sure nor did the panelists confirm Gabbard's time and nature of work outside state employment. During the interviews they did not ask the applicants anything other than the specific behavioral interview questions and whether they were still interested in the job.

26. Both Gabbard and Tolson rated "very good" on their interviews. The information about evaluation scores was taken directly from each evaluation. Their Record of Performance information was taken from their respective Internal Mobility forms. Neither Miller nor the interview panel examined any applicant's personnel files. All three panelists were sure that neither applicant had any conduct issues dating back to at least 2008.

27. When the interviews had been concluded, the panel met to discuss the qualifications of Gabbard and Tolson. Pence had indicated near the end of his interview he was no longer interested in the position. The information was placed on the Selection Summary which the panelists reviewed and signed.

28. In her review of Appellant's Exhibit 18, she stated this was the application submitted by Tolson. She made the notation on p. 3 of "+10." Again the panelists reviewed prior work experience and in doing so decided to give Tolson credit for his first work experience at Anthony Banks Logging Company. The panelists, although having reviewed the complete application, did not give Tolson credit for work experience at Campton Auto Parts, although he indicated he did perform supervisory duties over three employees. She testified she apparently had "missed it" and should have added 79 months to Tolson's experience, to bring his total work experience to 259 months.

29. The panel also did not give him credit for work experience (6) at Ranger Construction as the panel believed these duties had overlapping dates with previously listed experience. When pointed out to her on examination that these hours had been listed as performed during nights and weekends, and then asked if Tolson should have been given some credit, she answered, "Yes."

30. Even if the total work experience were to have been corrected, Miller still believed Gabbard had more work experience relevant to the position. Gabbard had actually worked with that garage and had knowledge of the road crew. He worked with and had knowledge of the community, and had performed that garage's paperwork. He knew the men's strengths and weaknesses. He had skills to have done this job in the past.

31. She acknowledged that Tolson had worked with this maintenance crew on occasion. Also there is a training program for the successful applicant by which he would complete certain requirements of the job within the first six months.

32. She identified Appellant's Exhibit 19 as Tolson's Internal Mobility Applicants form. Tolson's information about Seniority and Work Experience was transferred to the Selection Summary. The panel had reviewed Tolson's application and knew about his auto parts store experience.

33. The panel had considered all five factors on the Selection Summary, which constituted the basis for submission of the recommendation of Gabbard.

34. She identified Appellant's Exhibit 20 as Tolson's 2011 Annual Employee Performance Evaluation. He had been evaluated for performance of duties as a Highway Equipment Operator III and had obtained a rating of 452 which was in the "Outstanding" category.

35. She identified Appellant's Exhibit 21 as Tolson's 2012 Annual Employee Performance Evaluation. He was evaluated for performance of duties as a Highway Equipment Operator IV, by which he received a rating of 460 which was in the "Outstanding" category.

36. She identified Appellant's Exhibit 22 as Tolson's 2013 Annual Employee Performance Evaluation. He was evaluated for performance of duties as a Highway Equipment Operator IV. He received a rating of 450 which was in the "Outstanding" category.

37. She identified Appellant's Exhibit 23 as the Job Specification for Highway Superintendent II. In this position an individual oversees the maintenance crew and assigns them their tasks; reviews roads throughout the county to determine what jobs need to be done. He also coordinates assignment of work for snow and ice events, by determining what roads need to be treated, how to be treated, and who to assign. The individual must also maintain the facility, and inventory, and manage human resources. One has to be able to perform work duties on the road, if necessary, as well as inspect the performance of jobs by employees.

38. The interviews took place on the morning of April 1, 2014. The panelists then discussed the matters on the Selection Summary and Miller took notes. They reviewed each applicant's application and determined a total of months for work experience. Miller went through each work experience listing, and tallied up a total sum of months. The panelists looked at it and accepted that number. The panelists also accepted what the candidates had put on their applications. Gabbard was credited with 201.5 months and Tolson was credited for 180 months. When the panelists discussed Tolson's work experience (6), they concluded that time period seemed to overlap other experience.

39. As Gabbard was in the barn on a regular basis and knew the maintenance crew activities on a day-by-day basis, it was determined he was the better candidate.

40. The next witness for the Appellant was **Steven Gunnell**. Gunnell has been employed by the Transportation Cabinet for sixteen years. He has been the TE Branch Manager in District 10 for the past two years, and served on the current interview panel.

41. Upon his review of Appellant's Exhibits 6, 7, and 8, Gunnell testified that Gabbard was a Highway Equipment Operator III and at times operated a dump truck. Gabbard worked some in the office and some in the field. Nothing in the evaluations, however, reflected office duties. There was an indication of office work on the next to the last page of one such evaluation (Appellant's Exhibit 6). Gunnell was aware Gabbard had been working in the office. Appellant's Exhibits 7 and 8 do not fully reflect all duties performed by Gabbard.

42. The information filled in on the Selection Summary (Appellant's Exhibit 17) was based on each applicant's application and their Internal Mobility forms. The panelists reviewed the information on the Selection Summary and then signed it. The interviews had been conducted in Miller's office. The panelists took turns reading the interview questions. Applicants were then handed the class specification and position description and asked whether they could perform those duties.

43. Gunnell took notes during the interviews. At the end of the interview each applicant was asked if they were still interested in the job. Pence indicated he was no longer interested. From that point forward, Pence was no longer considered.

44. At the conclusion of the interviews, the panelists went to lunch. When they returned they reviewed all the information, considered the five criteria, and made their selection of Gabbard.

45. With reference to the calculation of the applicants' work experience (Appellant's Exhibit 3, p. 3) it was Miller who came up with the number of months and explained it to the panelists. If the experience was applicable to the job specification, the applicant got credit. The

panelists considered Gabbard's listed first and second employments for which he got credit: work at Mill Creek and Advance Auto Parts.

46. The panelists agreed Tolson would receive an additional ten months credit. The calculation was treated the same as Gabbard's. When Tolson's listed work experience #2 at Campton Auto Parts was pointed out, Gunnell testified it was not included because he guessed it was an "oversight"; that it would change Tolson's total months of experience by adding 79 months.

47. He did not know how the "OSHA 10" experience was included on Gabbard's part of the Selection Summary.

48. Both applicants received the same rating for Interview Performance; the panelists reviewed the applicants' evaluation scores.

49. A Highway Superintendent II has six months after appointment to learn computer based duties through training. This is not a prerequisite for appointment to the position.

50. The panelists judged Gabbard had more work-related experience as he has done call-outs after hours. "We know that he had" such experience. He acknowledged, however, that Tolson had done that as well and both were qualified candidates. They felt Gabbard was the right man for the job.

51. When asked by the Hearing Officer what it was about the five criteria that made Gabbard the man for the job, Gunnell responded there was a difference in the applicants' education. Gabbard had more education; however, that was not a required qualification for the position. "Everything else was pretty much even." The performance evaluations were subjective "based on who did the evaluations. Both gave good interviews. It was kind of nip and tuck." Being in a maintenance crew is a little different than being specialized in running a crane. One is within the crew setting in the same county every day. Tolson took his crane from county to county and district to district as assigned. Gabbard knew the current crew, and was the better one for this job. Tolson knows the crew and has worked with them and had experience operating other equipment.

52. The next witness was the Appellant, **Michael Shane Tolson**. Tolson has been employed by the Kentucky Transportation Cabinet as a Highway Equipment Operator IV.

53. He had taken to his interview his Internal Mobility form and two letters of recommendation. At no time during the interview was he asked about or discussed anything on his application.

54. Upon review of his prior work experience, Tolson testified that his having been given a "+10" for his logging company experience was correct. He had, however, been a supervisor at Campton Auto Parts.

55. From 2004 to 2010 he ran and carried equipment fifteen hours, evenings and weekends, for an average of 45 weeks a year. No one asked him about that prior work experience.

56. He was on the Cabinet's bridge crew from 2004 to 2006, then assigned to the guardrail crew where he ran special equipment. He started as the crane operator in 2006. His office is in Lee County where the equipment garage and the maintenance garage are located. He worked with and had contact with the maintenance garage three to four times a year. He ran all types of equipment before he was assigned to the crane. Everyone who works for the Cabinet performs snow and ice duties every winter.

57. As a crane operator, he is required to fill out paperwork every time the crane is operated, as well as run safety checks, keep track of fuel receipts, and account for his own timesheets.

58. Appellant's case was closed. Appellee indicated it had questioned all its own witnesses during examination of the witnesses called by the Appellant. Mr. Gabbard indicated he did not desire to call any witnesses or offer any additional testimony.

FINDINGS OF FACT

1. The position of Highway Superintendent II in Lee County became vacant in the spring of 2014. A Certified Register Report was generated (Appellant's Exhibit 15) and three Transportation Cabinet employees, Jeffrey Gabbard, Carl Pence, and Michael Tolson, applied for the position. At the conclusion of the process, Jeffrey Gabbard was recommended and promoted to the position. Michael Tolson timely filed this appeal with the Kentucky Personnel Board.

2. Once the position became vacant, an interview panel was assembled. The interview panel members were Elizabeth Miller (Administrative Coordinator with the Kentucky Transportation Cabinet), Steven Gunnell (TE Branch Manager in District 10), and Adrian Hall (TE Super-Jackson Section).

3. On April 1, 2014, applicants' Gabbard, Pence and Tolson were separately interviewed by the panel. They had each provided an application for employment (Gabbard: Appellant's Exhibit 3; Tolson: Appellant's Exhibit 18), and an Internal Mobility Applicants Form TC12-230 (Gabbard: Appellant's Exhibit 14; Tolson: Appellant's Exhibit 19). Each had been asked a series of behavioral questions and whether they were still interested in the position.

When Pence indicated he was no longer interested in the position, he was dropped from further consideration.

4. Following completion of the interviews, the panelists met to review how Gabbard and Tolson compared with reference to Seniority, Qualifications, Performance Evaluations, Record of Performance, and Conduct.

Information about Seniority was taken directly from each applicant's own records. Gabbard had 127 months of state service and Tolson had 170 months. This information was entered by the panelists on the Selection Summary (Appellant's Exhibit 17).

There were four subheadings on the Selection Summary under the category of "Qualifications": Education, Work Experience, Training/Work Experience Unique to Position, and Interview Rating. Mr. Gabbard had some college course hours, while Mr. Tolson was a high school graduate. Gabbard was credited 201.5 months work experience, while Tolson was credited 180 months. It was noted under Training/Work Experience that Gabbard had 67 months as an Equipment Operator and 60 months as an Administrative Specialist; Tolson operated a crane for seven years and supervised its operation for 5.5 years. Both applicants received a "Very Good" interview rating.

The last three performance evaluations for Gabbard showed he obtained scores of 465 (Outstanding), 429 (Highly Effective), and 452 (Outstanding) (Appellant's Exhibits 6, 7, and 8). The last three performance evaluations for Tolson show he obtained scores of 452 (Outstanding), 460 (Outstanding) and 450 (Outstanding) (Appellant's Exhibits 20, 21 and 22).

The applicants' respective Record of Performance and Conduct were also reviewed. Neither applicant had received any disciplinary action.

5. It was Ms. Miller who had reviewed the applicants' Work Experience outside state service and calculated months of credit for each. She explained her reasoning and calculation to the other panelists, who accepted her calculations.

In consideration of Work Experience, the panelists failed to credit Tolson the proper total amount. Although they had given credit to Gabbard for his supervisory experience at Advance Auto Parts, they mistakenly failed to give Tolson such credit or consideration of similar employment and experience at Campton Auto Parts. (Testimony of Elizabeth Miller and Steven Gunnell). Both Miller and Gunnell agreed Tolson should have received credit for an additional 79 months, which would have raised his total to 259 months.

The panelists also failed to give Tolson credit for his evening and weekend work experience at Ranger Construction (Appellant's Exhibit 18). The panelists mistakenly believed

such hours “overlapped” with other listed work history. According to Ms. Miller’s testimony, Tolson should have been given some additional credit for this work experience.

The panelists, therefore, failed to appropriately consider Mr. Tolson’s Work Experience, which was a part of consideration of Qualifications.

6. Gabbard’s familiarity with that specific garage and his knowledge of the road crew, as well as having performed some administrative functions there, bore weight on the decision of two of the panelists: Elizabeth Miller and Steven Gunnell.

7. The panelists met, completed and signed the Selection Summary and unanimously agreed to recommend Jeffrey Gabbard for promotion to Highway Superintendent II. On April 1, 2014, Adrian Hall signed the promotional recommendation and justification letter, which was then sent to the office of Human Resource Management (Appellant’s Exhibit 16). Mr. Gabbard was promoted to the position of Highway Superintendent II.

CONCLUSIONS OF LAW

1. The Kentucky Personnel Board shall promulgate comprehensive administrative regulations for the classified service governing promotion. KRS 18A.0751(1)(f). Such administrative regulations dealing with promotions shall give ***appropriate consideration*** to the applicant’s Qualifications, Record of Performance, Conduct, and Seniority. KRS 18A.0751(4)(f) [Emphasis added]. Agencies are required to consider an applicant’s Qualifications, Record of Performance, Conduct, Seniority and Performance Evaluations in the selection of an employee for promotion. 101 KAR 1:400, Section 1(1).

2. “Qualifications” is defined as “[A]ny quality, knowledge, ability, experience, or acquirement that fits a person for a position, office, profession, etc.” *Cabinet for Human Resources v. Kentucky State Personnel Bd. et. al.*, 846 S.W.2d 711, 715 (Ky. App. 1992). In this interview process “Qualifications” included the sub-categories of Education; Work Experience (total months of experience as applicable to class specification); Training/Work Experience Unique to Position; and Interview Rating (with summary of knowledge/skills/experience demonstrated in interview that supports rating). (Appellant’s Exhibit 17.)

3. “Seniority” means the total number of months of state service. KRS 18A.005(36).

4. “Record of Performance” considered by the interview panelists in this case included “recognition related to job performance; service awards; promotions; accomplishments; details to special duty, etc.” (Appellant’s Exhibit 17.)

5. “Performance Evaluations” to have been considered by this interview panel

included the last three completed year-end ratings (Appellant's Exhibit 17).

6. The Appellee, Transportation Cabinet, was required by statute and regulations to give appropriate consideration to each applicant's Qualifications, Record of Performance, Conduct, Seniority, and Performance Evaluations (hereinafter referred to collectively as "The Five Factors"). *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406, 410 (Ky. App. 1994).

7. In all administrative hearings, the party proposing the agency take action or grant a benefit has the burden to show entitlement to the benefits sought. 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. KRS 13B.090(7). The Appellant, Michael Shane Tolson, was required to show by a preponderance of the evidence that either the statutory and regulatory requirements were not appropriately considered by the Appellee during this promotion process, or in the alternative that the hiring procedure was exercised in an arbitrary manner in violation of Section 2 of the Kentucky Constitution.

8. It is quite clear from the evidence that all three interview panel members, Adrian Hall, Steve Gunnell, and Elizabeth Miller, were cognizant before, during and after this particular promotion process that they were required to give appropriate consideration to, and examine how the five factors for each of the applicants compared.

9. The question to be considered in this appeal is **not** whether Appellant should have been offered the vacant position, nor is it appropriate for the Personnel Board to second guess the judgment of the interview panel and the Cabinet in having made this hiring decision. Rather, the question is: Did the Cabinet give "appropriate consideration" to the five factors when it determined to recommend Jeffrey Gabbard to the position?

10. Through the testimony of both Elizabeth Miller and Steve Gunnell, it was apparent that the interview panel did not give appropriate consideration to all the Qualifications of Mr. Tolson when Ms. Miller calculated credit for his work experience, applicable to this specific class specification that Appellant had outside state service. Both Ms. Miller and Mr. Gunnell testified Tolson should have been credited at least an additional 79 months for his work experience at Campton Auto Parts. Ms. Miller stated this was something she had "missed." Mr. Gunnell testified this was an "oversight." Adding 79 months credit to the 180 total months given to Mr. Tolson would have raised his total months of work experience to 259 months.

11. Furthermore, Ms. Miller testified that Tolson should have been given some additional credit for his part-time work at Ranger Construction. While a specific number of months for that experience was not identified during the hearing, there is no doubt it would raise Mr. Tolson's work experience to something in excess of 259 months. There was no disagreement that Gabbard was credited with 201.5 total months work experience.

12. The panelists failed to properly evaluate the totality of Tolson's relevant prior work experience and supervisory experience. Regardless whether two of the three panelists believed, after the fact, that had Tolson been credited the proper amount of work and supervisory experience Gabbard would still have been the panel's recommendation, the fact remains that when they did make the decision, they failed to give appropriate consideration to Tolson's Qualifications. Appellant has, therefore, met his burden of proof on this issue by a preponderance of the evidence.

13. The evidence also raised a question whether matters outside the "five factors" had an adverse effect on the interview panel being able to give "appropriate consideration" to the five factors. Two of the three interview panelists offered their testimony on this. Elizabeth Miller testified that even if the total work experience for Tolson would have been corrected, she believed Gabbard had more work experience relevant to the position, having worked with that specific garage and having knowledge of the road crew and the surrounding community. As Gabbard had been in the Barn on a regular basis and knew the Maintenance Crew activities on a day-to-day basis, the panelists determined that Gabbard was the better candidate. Steve Gunnell, when asked by the Hearing Officer what it was about the five criteria that made Gabbard the right man for the job, responded there was a difference in the applicants' education. Gabbard had more education. However, Gunnell also answered that a college education was not a required qualification for the position. He viewed the qualifications of Gabbard and Tolson as "pretty much even." He viewed Gabbard's experience in the Maintenance Crew as being important.

14. In giving appropriate consideration to "Qualifications," the panelists could definitely consider "any quality, knowledge, ability, experience or acquirement that fits a person for a position, office, profession, etc." *Cabinet for Human Resources v. Kentucky State Personnel Board, et al.*, 846 S.W.2d 711, 715 (Ky. App. 1992). It is clear from the evidence that at least two of the three interview panelists took into account the knowledge, ability, and experience of Mr. Gabbard with having performed certain duties pertinent to the promotional position, with the same crew to be supervised by the promoted Highway Superintendent II. Both Tolson and Gabbard were highly qualified applicants for the position, as the testimony of both Miller and Gunnell showed. The consideration of Gabbard's experience with the crew, community, and some of the duties, all fall within the Training/Work Experience Unique to Position subcategory of qualifications.

15. Appellant has also alleged that the promotional process employed by the Cabinet was in violation of Section 2 of the Kentucky Constitution. That provision provides:

Absolute and arbitrary power denied.

Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.

16. The Supreme Court of Kentucky in *Kentucky Milk Marketing and Anti Monopoly Commission v. the Kroger Co.*, 691 S.W.2d 893 (Ky. 1985) provided a clear explanation of that provision:

Section 2 is a curb on the legislature as well as on any other public body or public officer in the assertion or attempted exercise of political power. *Sanitation Dist. No. 1 v. City of Louisville*, 213 S.W.2d 995 (1948). Whatever is contrary to democratic ideals, customs and maxims is arbitrary. Likewise, whatever is essentially unjust and unequal or exceeds the reasonable and legitimate interests of the people is arbitrary, *Id.* No board or officer vested with governmental authority may exercise it arbitrarily. If the action taken rests upon reasons so unsubstantial or the consequences are so unjust as to work a hardship, judicial power may be interposed to protect the rights of persons adversely affected. *Wells v. Board of Education of Mercer County*, Ky., 289 S.W.2d 492, 494 (1956). Our function is to decide a test of regularity and legality of a board's action by statutory law and by the constitutional protection against the exercise of arbitrary official power. *Id.*

Section 2 is broad enough to embrace the traditional concepts of both due process of law and equal protection of the law. *Pritchett v. Marshall*, Ky., 375 S.W.2d 253, 258 (1963). Unequal enforcement of the law, if it rises to the level of conscious violation of the principle of uniformity, is prohibited by this Section. *City of Ashland v. Heck's, Inc.*, Ky., 407 S.W.2d 421 (1966); *Standard Oil v. Boone County Bd. of Sup'rs*, Ky., 562 S.W.2d 83 (1978). The question of reasonableness is one of degree and must be based on the facts of a particular case. *Boyle Cty. Stockyards Co. v. Commonwealth, etc.*, Ky.App., 570 S.W.2d 650 (1978).

[The majority of the Kentucky Supreme Court in the originally cited case held that the Kentucky Milk Marketing Law, on its face, and in its enforcement by the Commission violated Section 2 of the Kentucky Constitution.]

17. Appellant has failed to show by a preponderance of the evidence that the process utilized by the Appellee in promoting Mr. Gabbard was essentially unjust, unequal, or exceeded the reasonable and legitimate interests of the people. Appellee did not violate Section 2 of the Kentucky Constitution.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **MICHAEL TOLSON VS. TRANSPORTATION CABINET AND JEFF GABBARD (APPEAL NO. 2014-108)** be **SUSTAINED to the extent** that the promotion of Jeff Gabbard should be vacated and held for naught and the promotion process begun anew with Appellee giving appropriate consideration to the statutory and regulatory requirements set forth at KRS 18A.0751(4)(f) and 101 KAR 1:400. **FURTHER**, the Appellee shall reimburse the Appellant for any leave time used attending the hearing and any pre-hearing conferences at the Board. [KRS 18A.095(25).]

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 **Hearing Officer Roland P. Merkel** this 3rd day of December, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. William Fogle
Hon. Paul Fauri
Jeff Gabbard
Kathy Marshall