



which is not “state service” as used in the definition of seniority pursuant to KRS 18A.005(36).

28. The Board finds that not knowing, or having incorrect information as to seniority, each candidate had, means the appointing authority could not, and, in this case, did not give appropriate consideration to the factors set forth in statute and regulation.

29. The Board finds the Appellee failed to give appropriate consideration of the candidates “qualifications” and “record of performance.” The comparison spreadsheet (attached as Appellee’s Exhibits 8, 9, and 10) utilized by Cannady, Erwin and Thompson, did not even list qualifications of the three candidates. The spreadsheet contained a summary of the candidates’ education but not the rest of their qualifications. The spreadsheet also contains information not related to record of performance for the Intervenor, such as “Board Member of Elliott County Farm Bureau, Site Based Council and member of Elliott Shrine Club.” The testimony demonstrated that Erwin and Thompson relied on this document which did not give an accurate depiction of three of the five factors to consider for promotion.

30. The Board finds Commissioner Thompson told Investigator Kinman that a second interview panel was convened to consider security, but testified at the hearing that the second interview panel was convened due to the “threat” of Billy Williams’ retirement having improperly influenced the two interview panels. The Board finds these inconsistent statements lead to the conclusion the appointing authority could not, and, in this case, did not give appropriate consideration to the statutory and regulatory factors applicable to promotional decisions.

31. The Board finds there was no political discrimination in this case. Commissioner Thompson did speak with Representative Rocky Adkins; however, the Board finds persuasive Commissioner Thompson’s testimony that Adkins’ communication did not influence her decision.

32. The Board further rejects any findings or conclusions made by the Hearing Officer that Deputy Commissioner James Erwin acted in violation of Section 2 of the Kentucky Constitution. The Board agrees with Appellee’s position that Erwin, as Deputy Commissioner, is not the Appointing Authority, and lacked the authority to make a decision in this case that would be violative of Section 2 of the Kentucky Constitution. In any event, Erwin’s conduct did not rise to the level of a constitutional violation.

C. **Delete** Conclusion of Law paragraph 9 and renumber paragraphs 10 and 11 to 9 and 10.

D. **Delete** the Conclusions of Law paragraphs 12 through 26, and substitute the following.

11. It is clear from the evidence that none of the members of the FIP, prior to conducting the interviews, were advised by anyone to specifically examine each applicant's background and experience pertaining to security issues and supervisory abilities.

12. The Second Interview Panel (SIP) consisted of Tom Cannady, LSCC Warden Joseph Meko, and Serena Waddell, Human Resources Administrator at LSCC. Those interviewed included Hershel Adkins, Charles Pennington, and Billy Williams.

13. Sometime after January 14, 2011, when Cannady signed the new DPS-1 form designating Hershel Adkins, and drafted a Memorandum of Justification for the recommendation (Appellant's Exhibit 8), Stephanie Appel made inquiry with Mr. Erwin about this most-recent recommendation. Appel clearly stated that Erwin told her the recommendation of Adkins was not correct; that Charles Pennington had been selected (Intervenor's Exhibit 2).

14. Cannady generated another memorandum, dated January 14, 2011, in which he included Erwin's phrase (Appellant's Exhibit 9). Cannady also included, on his own initiative, the identity of the second interview team, the fact they had interviewed three candidates, and had "unanimously" selected Hershel Adkins.

15. Subsequently, Erwin communicated to Cannady that Cannady had not correctly rewritten the memo. Cannady had included a sentence indicating a unanimous selection. Erwin did not want the panel's opinion to appear in this memorandum.

16. Instead of submitting the SIP memorandum to Commissioner Thompson, Erwin took it upon himself to draft his own memorandum, which was generated January 19, 2011. (Appellant's Exhibit 10; Intervenor's Exhibit 1). Prior to delivering this memorandum to Thompson, Erwin communicated (by telephone) the contents of the memo to the Commissioner. While Erwin and Commissioner Thompson both testified the SIP had been set up because of an alleged improper threat of one or more employees to quit or retire, the opening sentence of Erwin's memo states, "Due to the comparable level of candidates for the KCI Operations Production Manager at LSCC, an additional team was selected to conduct a second set of interviews."

17. As of January 19, 2011, the Commissioner and Deputy Commissioner had approved the promotion of Charles Pennington.

18. Having found earlier that the promotional process did not give appropriate consideration to the factors set forth at KRS 18A.0751(4)(f) and 101 KAR 1:400, the Board concludes as a matter of law that the process which resulted in the promotion of Charles Pennington to Operations Manager at Little Sandy Correctional Complex for Kentucky Correctional Industries must be vacated, found void *ab initio*, and the selection process must be redone in compliance with the statutory and regulatory requirements.

19. The Board concludes that there was no political discrimination by the Appellee during this process and further concludes that Section 2 of the Kentucky Constitution was not violated by any of the actors herein.

E. **Delete** the Recommended Order.

**IT IS HEREBY ORDERED** that the appeal of **HERSHEL ADKINS VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS, AND CHARLES PENNINGTON (Appeal No. 2011-147)** be **SUSTAINED to the extent** that the promotion of Charles Pennington to the position of Correctional Complex Operations Manager at the Little Sandy Correctional Complex be voided, that the position be re-advertised and a new position be filled using the normal promotional process with the Appellee, Department of Corrections, **ORDERED** to ensure that proper attention and appropriate consideration is given to the statutory factors set forth at KRS 18A.0751(4)(f) and the factors set at the regulation 101 KAR 1:400. The Board having determined that Appellant has prevailed pursuant to KRS 18A.095(26), Appellant shall be awarded leave time used in conjunction with any pre-hearing conferences, evidentiary hearings and other appearances before the Personnel Board in accordance with KRS 18A.095(26).

**IT IS FURTHER ORDERED** that the Findings of Fact, Conclusions of Law, and recommended Order of the Hearing Officer, as altered, 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** herein..

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 14<sup>th</sup> day of September, 2012.

**KENTUCKY PERSONNEL BOARD**



**MARK A. SIPEK, SECRETARY**

A copy hereof this day mailed to:

Hon. Stafford Easterling  
Hon. Robert Abell  
Hon. Michael Kalinyak  
Stephanie Appel