

**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2011-147**

**HERSHEL ADKINS**

**APPELLANT**

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

**JUSTICE AND PUBLIC SAFETY CABINET  
DEPARTMENT OF CORRECTIONS  
J. MICHAEL BROWN, APPOINTING AUTHORITY**

**APPELLEE**

**AND**

**CHARLES PENNINGTON**

**INTERVENOR**

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This matter came on for an evidentiary hearing on December 12, 14, and 15, 2011, and January 4, 2012, at 9:30 a.m. ET, at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Roland Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment pursuant to the authority found at KRS Chapter 18A.

Appellant Hershel Adkins was present and represented by the Hon. Robert L. Abell. Appellee Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Stafford Easterling. Also present was Ann Smith, paralegal, and Bobbie Underwood, agency representative. Intervenor Charles Pennington was present and represented by the Hon. Michael Kalinyak.

The issues in this case were:

- (1) Whether the Appellee complied with the statutory and regulatory provisions of KRS 18A.0751(4)(f) and 101 KAR 1:400 in its selection of Charles Pennington to the position of Correctional Complex Operations Manager;
- (2) Whether the Appellee engaged in political discrimination against the Appellant during the promotional process; and
- (3) Whether any elements of the promotional process violated Section 2 of the Kentucky Constitution.

Appellee objected to the presentation of the first issue, as Appellant had only declared the issue of political discrimination on his appeal form. The Hearing Officer **OVERRULED** the motion, noting that KRS Chapter 13B allows a Hearing Officer the ability to hold pre-hearing conferences to, among other things, better organize the issues in the case; that the presiding Hearing Officer at the time of pre-hearing conference, after having heard arguments of the parties, properly recognized the first two aforementioned issues.<sup>1</sup> Appellee's continuing objection was noted for the record. All parties then announced they were ready to proceed.

An administrative subpoena had been issued by the Kentucky Personnel Board (on November 15, 2011) at the request of the Appellant, directed to Rocky Adkins of Sandy Hook, Kentucky, requiring his testimony (hereafter referred to as Rep. Adkins). The Hon. John F. Vincent, of Martin & Vincent PSC, filed a Motion to Quash the Subpoena/Motion for Protective Order. At this part of the proceeding, and by agreement of the parties, Mr. Vincent participated by telephone (pursuant to KRS Chapter 13B) to present oral argument on his motion. After having heard the extensive oral arguments of counsel, having examined the motion and all cited authority contained therein, and having examined Appellant's response to same, the Hearing Officer ruled, as follows:

(a) A Kentucky State Legislator is not granted absolute immunity in such proceedings. Here, Rep. Adkins was not engaged in a legislative or law-making capacity. None of the statutes or regulations cited by Rep. Adkins apply or are persuasive for purposes of this administrative proceeding. The cited provision of Section 43 of the Kentucky Constitution does not give a legislator absolute immunity, but is specific as to when such immunity applies. Those cited situations are not applicable here. Furthermore, this is not a lawsuit against the Commonwealth and, therefore, Section 231 of the Kentucky Constitution likewise does not apply. The Motion to Quash with respect to the issue of immunity is, therefore, **OVERRULED**.

(b) Regarding the matter of the method of the service of process of the subpoena, the Personnel Board has long interpreted the statutes and regulations in a manner whereby service of its own administrative subpoena is not allowed by certified mail, but must be made by personal service. Administrative agencies are granted deference in the interpretation of their own policies and procedures; therefore, the subpoena issued and delivered to Rep. Adkins was required to have been served by personal service and not by certified mail. As service of the subpoena was not properly accomplished, the Motion to Quash the Subpoena is **SUSTAINED** based on method of service.

At this point of the proceedings, Mr. Vincent was excused from further participation. The rule separating witnesses was invoked and employed throughout the hearing.

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<sup>1</sup> The issue pertaining to Section 2 of the Kentucky Constitution arose during the course of the hearing and was discussed among the Hearing Officer and parties.

Appellee presented a Motion to Dismiss, stating the Personnel Board had no jurisdiction to hear this appeal; the grounds cited by Appellant pertained to allegations of a letter written by Rep. Adkins on behalf of another candidate. The Appellee contends that since there has been no penalization suffered by the Appellant, the Personnel Board may not hear this appeal. Having considered the respective arguments of counsel, the Hearing Officer **OVERRULED** the motion.

Opening statements were presented by the Appellant, Appellee, and the Intervenor.

### **BACKGROUND**

1. The first witness for the Appellant was **Barney Kinman**. Mr. Kinman is employed by the Justice and Public Safety Cabinet, Office of Investigations. Appellant had filed a grievance regarding the instant hiring process, and Kinman was requested to conduct an investigation. He reviewed several documents, interviewed about 15 individuals, and issued a report. Mr. Hille, Mr. Cannady, and Ms. Hale, all reported that they had seen a letter written by Rep. Adkins on behalf of Charles Pennington. Commissioner Thompson reported she had been aware of such letter. The actual letter was never produced. It had apparently been a generic letter of recommendation. Hille, Cannady, and Hale denied they were influenced in any manner by this letter. Commissioner Thompson told Kinman the letter had no effect on her decision.

2. He identified Appellant's Exhibit 16 as the response from Kentucky Employees Retirement Systems (KERS) to his open records request. He identified Appellant's Exhibit 17 as the open records request he made to KERS for copies of the sign-in sheets for the period of November 15, 2010 through January 13, 2011. Page 4 of the exhibit was the only indication of Billy Williams having signed in at the time he visited KERS to fill out retirement papers. Williams reported that the possible promotion of Charles Pennington spurred him to make inquiry about his retirement benefits.

3. **Gerald Profitt**, who for the past 15 years has been Operations Manager at the Eastern Kentucky Correctional Complex, Kentucky Correctional Industries (KCI) in West Liberty, Kentucky, was the next witness. He had been a Department of Corrections (DOC) employee for 23 years.

4. **Hershel Adkins** is employed as an Assistant Operations Manager in the KCI Woodshop under Profitt's supervision. KCI has three operations: coupon processing, custom wood refurbishing, and metal plant. Approximately 130 inmates work in the three shops. KCI staff conducts head counts, shakedowns, strip searches, and whatever might be needed to ensure security. Profitt and four KCI staff work in the shops.

5. Appellant reports to work at 7:00 a.m. He oversees the tools, as well as shakedowns, monitors his area, takes care of toxics and caustics, flammable materials, head counts (which are conducted twice daily), strip searches, and responds to incidents or altercations involving the inmates. He is a good employee who "puts in 110% effort." Adkins told Profitt he was going to apply for the Operations Manager position at Little Sandy. Adkins had worked in and around security for 7 – 10 years.

6. Profitt's supervisor, Neil Hille, told him a promotion to Operations Manager had been approved, but did not identify the successful candidate. Hille planned to visit the institution the next week to speak with Adkins. Profitt identified Appellant's Exhibit 19 as the memo he generated, which allowed Hille to come onto the institution grounds. They experienced bad weather that weekend, and Hille did not show up. Profitt later learned the job position had been recalled.

7. Profitt told Hille if Hershel Adkins got the job, he would probably retire. His intent in making that remark was not to disparage anyone. No one tried to influence him in the hiring process. He never saw a letter from Rep. Adkins.

8. The next witness was **David Green**, who for the past 1½ years has served as Deputy Warden at Little Sandy Correctional Complex (LSCC). He has over 22 years of service with DOC. He is currently responsible for security staff, security of the institution, KCI Prison Industries, food service, and maintenance.

9. Warden Joseph Meko asked Green to participate as a member of the first interview panel (hereinafter "FIP"). Green did not receive any instruction and did not pay any particular attention to the candidates' security background. The first interviews occurred in mid-November 2010.

10. As a panel member, Green wanted someone in the position who knew security and would keep the security of the institution in mind while they did their job. Other participants on the panel included Teresa Harris and Neil Hille, KCI Supervisor.

11. The panel interviewed seven candidates. Following the interviews, Green and Harris each gave Hille their respective recommendations. Hille had not made a decision at that time and said he would "go home and sleep on it." He did say he had two candidates in mind—Hershel Adkins and Billy Williams. Green did not have a clear idea who Hille's final choice would be. Green had recommended Hershel Adkins, whom Harris also recommended. While Charles Pennington had more supervisory experience than Adkins, he had no advantage over Adkins in the area of security.

12. The interview panel considered all "five factors" during the interviews of the candidates. They also considered the candidates' supervisory and security background, which played a factor in Green's decision. He concluded Adkins had a strong security background.

13. There was never a discussion among panel members whether Hille's vote would override the other two panel members. Green subsequently learned the panel recommendation forwarded through the chain of command was to hire Hershel Adkins.

14. **Billy Williams**, who had been employed for six years as a Production Coordinator at KCI (LSCC), was the next witness. He retired February 28, 2011. During his employment, he oversaw the woodshop and mattress factory, and served as interim Operations Manager after his supervisor (Jeffrey Havens) retired in September 2010. The institution had assigned a sergeant and an officer to KCI for security matters.

15. In late 2010, Williams applied for the position of Operations Manager at KCI (LSCC). At that time, Pennington was a Production Coordinator. Prior to the first interviews, Pennington told Williams he was going to apply, but that he was not yet ready for the position. He merely wanted others to know that when he did get ready, he would be able to do the interview and the process.

16. After the interviews were concluded, Williams told Hille he would not work for Pennington. He could not trust him after Pennington first told him he was not interested in the job. Williams also told of his own health considerations. Williams was then advised a second round of interviews was to be conducted.

17. Williams received an e-mail advising that all candidates who went through the first interview would go through a second interview. There was no indication why the second interview was being held or that there were any other qualifications to be examined. On the day of the second round of interviews, Williams told Tom Cannady he would retire if he was not selected. Hille told Williams that Pennington had been selected. Williams has no evidence of any outside political influence having been brought to bear on the hiring process.

18. He identified Appellant's Exhibit 17 as the sign-in sheet, which his wife had signed when they were at KERS on February 23, 2011. He identified Appellant's Exhibit 18 as the specifications published for the Operations Manager position.

19. **Joseph Meko**, Warden of LSCC since September 1, 2007, was the next witness. Prior to his service as Warden, he had been employed 28 years with the U. S. Department of Justice, Federal Bureau of Prisons.

20. The retirement of Jeff Havens resulted in a vacancy in the position of Operations Manager KCI (LSCC). Warden Meko served on the second interview panel (hereinafter "SIP") at the request of Operations Director Jim Erwin. Serena Waddell (Personnel Officer), and Tom Cannady (KCI Director), also served on that panel. Meko had no knowledge why a second round of interviews was conducted, nor did he receive any prior direction to examine any particular qualifications of the applicants. The panel considered the five factors in evaluating all the applicants, including Hershel Adkins, Charles Pennington, and Billy Williams.

21. Based on review of the five factors, the panel recommended two individuals—Hershel Adkins and Billy Williams—be considered to the position. That recommendation was made the same day the interviews were completed. Cannady passed the recommendation through the chain of command. He was a little surprised to subsequently learn that Charles Pennington had received the position, as normally the appointments are made from the recommendation of the interview panel. Meko had considered the security aspects of the position (and of the applicants) in making his recommendation.

22. At the time of the first round of interviews, Mr. Hille asked Meko for the identity of the state representative for Elliott County. Meko told him it was Rocky Adkins. Hille then asked if such representative got involved in these types of selections. Meko testified that Rep. Adkins had called him from time to time, but did not call him on this particular job opening. He was not aware that Rep. Adkins wrote a letter of recommendation for Pennington. He had no evidence Rep. Adkins got involved in this process or that there was any other outside political influence.

23. **Serena Waddell** was the next witness. Ms. Waddell is the institutional Human Resources Administrator at LSCC and served on the SIP. The second interviews were conducted in mid-January 2011. She had been advised this round of interviews was being conducted to narrow down the choices.

24. No one instructed her to examine any specific issues or candidate qualifications. They interviewed three candidates: Adkins, Williams, and Pennington. She then described in detail the interview process. The panel did not come up with recommendations, per se. The panel members' notes were collected after conclusion of the interviews, and the members did have a conversation.

25. Waddell had prepared a blank grid with the five factors in order to compare each candidate's information. She provided this grid to the panel members. She mentioned she wanted Mr. Adkins as her choice, and believed Warden Meko also wanted Adkins. She was not aware of Cannady's choice. This was the first panel on which she served that did not come to a decision after conducting interviews. Cannady collected all the paperwork.

26. She was not surprised when she learned Pennington had been appointed. She felt it was a "politically motivated" choice. "[I]t was obvious Mr. Adkins should have been chosen. If he wasn't chosen, then someone else made the choice to choose someone else." She has lived in Elliott County since 1986. Although she has no facts about political influence in this case, she "just had a feeling." State representatives have regularly made recommendations on their own letterhead. She did not see any such letter in this case. Elliott County is a small county with "tight-knit" people.

27. The panel members reviewed the five factors from the candidates' Internal Mobility forms. These factors included months of service, education, evaluations, record of performance, and conduct. She did not learn the panel had recommended Hershel Adkins to the position until she was interviewed by Barney Kinman. At the time of those interviews, she had expressed her choice of Adkins to the other panel members. She felt "very aggravated" because the panel did not do what it was supposed to, i.e. come to a consensus on a recommendation. She knew Adkins had "plenty of security background," and supervisory experience.

28. **Stephanie Appel**, employed in the office of the Secretary for Justice and Public Safety, who oversees personnel matters for DOC, was the next witness. She identified Appellant's Exhibit 18 as the initial job announcement for this position. Interested applicants submitted applications through the Personnel Cabinet. The Cabinet then certified applicants on a register, and the agency listed the names of those who met the minimum requirements for the position. The branch or division that had the vacancy then set up the candidate interviews through their personnel liaison, Stephanie Hale.

29. After the first interviews had been concluded, the name of the selected person, along with a DPS-1 form, was sent to Ms. Appel's office where the information was checked for accuracy. It was in December 2010 that she learned Hershel Adkins was to be appointed. The proper paperwork was sent to the Commissioner and Deputy Commissioner for their signatures. Once signed, the paperwork was returned to Appel's office. Notification was sent to the branch/division that the appointment had been approved and the affected applicant could be notified. The fully signed and approved DPS-1 for Hershel Adkins had been completed in December 2010.

30. Appel identified Appellant's Exhibit 11 as the DPS-1 form completed January 25, 2011, appointing Charles Pennington to the position. This form was similar in format to the one that had previously approved Adkins.

31. After the DPS-1 approving Adkins had been completed, Commissioner Thompson called Appel and inquired whether the Commissioner had signed that paperwork. The Commissioner was advised the signed DPS-1 form had been received and KCI had been notified of approval. Thompson told Appel to hold off processing the position until further direction. Thereafter, this particular DPS-1 (like any other document that is not processed) was shredded, as it contained personal information.

32. She identified Appellant's Exhibit 7 as a December 10, 2010 e-mail which had been copied to her at approximately 2:47 p.m. It appears the e-mail had been sent in response to some questions about what was contained in the employees' personnel files. Information, maintained in Appel's office, and obtained by Deputy Commissioner Erwin had been transmitted to Commissioner Thompson. Appel had no idea why the county of residence of Pennington and Adkins had been listed, as that was not relevant to the position. Individuals are appointed to positions from all across the state.

33. On another occasion, Appel had pulled the personnel files for Adkins and Pennington and gave Commissioner Thompson and Deputy Commissioner Erwin additional information from those files.

34. Appel identified Appellant's Exhibit 6 as a December 10, 2010 e-mail from Amanda Coulter. Coulter works for Appel.

35. Subsequent to conclusion of the second interviews, Appel received paperwork and another DPS-1 showing the recommendation of the appointment of Hershel Adkins. Upon receipt of this information, she called Deputy Commissioner Erwin to ask if they could process the paperwork. Erwin said it was not correct. Appel advised they needed the correct paperwork in order to process the matter. Appel later received a DPS-1 form naming Charles Pennington to the position. She signed the document and sent it to Commissioner Thompson and Deputy Commissioner Erwin for signatures.

36. Appel stated she has participated on many interview panels. She has seen numerous second—and even sometimes third and fourth—interviews conducted. It was not unusual that there was a second interview.

37. Commissioner Thompson has the final authority on the hire. Appel is not aware whether the appointing authority must, when changing a recommendation of an interview panel, consider the five factors to justify a change. The appointing authority can make a decision that differs from the panel recommendation and does not have to either justify or memorialize it. The appointing authority has absolute power to render that decision.

38. Appel identified Appellant's Exhibit 15 as print-outs generated from an old Personnel Cabinet system, which contained information about Adkins and Pennington. Appellant's Exhibit 5 (the e-mail sent by Coulter) had probably been sent after having received the fully-signed DPS-1 appointing Hershel Adkins.

39. She identified Intervenor's Exhibit 1 (also identified as Appellant's Exhibit 10) as the chart that shows the five factors.

40. The first witness on the second day of hearing was **Teresa Harris**. Ms. Harris is a Human Resources Branch Manager employed by DOC.

41. In November 2010, she served as a member of the FIP with Neil Hille and Deputy Warden Green. Prior to the interviews, the panel members examined each application. They interviewed eight or nine candidates. Each panel member then selected their top candidates. She and the other panel members all reviewed and considered the five statutory and regulatory factors during the process. Harris' top candidate was Hershel Adkins, followed by Billy Williams. She was impressed by Adkins' years of experience with Correctional Industries, as well as other experience he possessed. Green advised his top two candidates were also Adkins and Williams.

While Hille selected the same two candidates, he wanted to think about his decision overnight. The decision, thus, became Mr. Hille's final decision. Harris was later advised the panel would recommend Hershel Adkins.

42. She identified Appellant's Exhibit 4 as an e-mail she received from Hille on November 17, 2010. Appellant's Exhibit 3 is the attachment to that e-mail, which adequately sets forth the interview panel's conclusions.

43. It was never discussed with any of the panel members whether they were to look at any particular or singular aspect of the candidates' qualifications.

44. **Robert Neil Hille**, who since July 2009 has been Branch Manager of Operations for KCI DOC was the next witness. Hille is responsible for the operations portions of the business of the manufacturing operations in the prisons. He oversees such functions at eight different facilities.

45. Jeff Havens, the Plant Manager at KCI (Little Sandy), retired. The hiring process to fill this vacancy began in the latter part of 2010. (Exhibit 18 is the official posting of that vacancy). The Operations Manager at Little Sandy was the site manager. As such, he would help inmates learn skills and develop discipline that would help them succeed once they were released from prison. The business manufactured products for resale. The Operations Manager also supervised schedules for personnel and engaged in all interface with the institution, as well as disciplinary actions and security issues. Hille's responsibility in the hiring process was to take all steps necessary to fill that position. He participated on the FIP.

46. When the hiring process began, Warden Meko asked him whether Hille knew of (or had heard of) Rocky Adkins. Hille said no. Meko indicated Rep. Adkins might have some involvement in this selection process. This created a concern for Hille, as he did not need any outside political influence in selecting employees. Employees are here because of their qualifications and the ability to do their job, not who they knew.

47. Prior to the first round of interviews, Charles Pennington approached Hille to inquire whether he minded that Pennington applied for the job. Pennington indicated he did not think he was ready for the job, but would like to have the experience of having gone through the interview process. It indicated to Hille that Pennington was not a serious candidate who wanted the job.

48. Also prior to the first round of interviews, Hille saw a letter (on State letterhead) from Rep. Rocky Adkins generally recommending Pennington for the position. Tom Cannady had possession of the letter.

49. The FIP interviewed Hershel Adkins, Billy Williams, Charles Pennington, and three other applicants. The panel members had all the candidates' applications and any additional documents they submitted, including evaluations and attendance history.

50. At the conclusion of the interviews, the panelists all agreed on the top two candidates: Hershel Adkins and Billy Williams. Warden Meko's personal choice was Billy Williams. Hille had difficulty with this decision, as both candidates were very close and very deserving. The other panelists suggested he take the matter home with him and make the decision, which he did.

51. Hille identified Appellant's Exhibit 4 as the e-mail he sent to the other two panel members. The e-mail advised of his decision and that he had spoken to the Warden about the recommendation of Hershel Adkins. Appellant's Exhibit 2 was the attachment that accompanied Appellant's Exhibit 4. Stephanie Hale then prepared Appellant's Exhibit 3 from the information provided in Appellant's Exhibit 2.

52. Tom Cannady, Hille's supervisor, signed his approval. Hale then forwarded Exhibit 3 with a packet to DOC personnel. The approval of the Deputy Commissioner was now required to effect this hire.

53. Hille received a telephone call from Stephanie Hale advising Hershel Adkins' hire had been approved. Hille called Gerald Profitt, Operations Manager, and told him a decision had been made and he would like to come to the institution the following Monday to talk to the people involved. Profitt issued a visitor letter which stated Hille would be in attendance on December 13, 2010. That same afternoon, Stephanie Hale called Hille and told him to "hold off" on advising anyone at the institution. Cannady later told him there would be a second round of interviews.

54. Prior to the second interviews, Hille and Cannady discussed the process. Cannady told him a recommendation letter from Rocky Adkins had shown up at central office. An outside letter of recommendation, particularly a form letter, bore no weight for Hille in this process.

55. Sometime after the first interviews, Billy Williams told Hille he was very interested in the job. If Hershel Adkins got the job, he could work for him. However, if Charles Pennington got the job, Williams would retire. He felt that while they would be very sorry to see Williams retire, that is what would occur should Williams so decide. He did not view the communication as a threat. It was likely Hille relayed the communication to Cannady.

56. In selecting an Operations Manager, Hille was looking for someone with security and supervisory experience, as well as business experience and knowledge. The FIP was not particularly focused on security or any other specific qualification. It came to an agreement as a team to recommend Hershel Adkins.

57. **Amanda Coulter**, who since September 2005 has been employed with DOC, offered her testimony. She has been Executive Staff Advisor since May 2011 and serves as an HR generalist. The correctional facilities each have an HR Manager. Stephanie Hale is the HR liaison who types paperwork, sends out interview letters, and performs like duties.

58. Coulter returned to work the day after the register for this vacancy had been certified—October 27, 2010. Stephanie Hale was responsible for conducting a review of the minimum qualifications of the applicants. Thereafter, the hiring manager or director—in this case Neil Hille—identified the applicants he wanted to interview.

59. On December 8, 2010, Coulter received an e-mail that hiring approval had been received. She then sent an e-mail to Stephanie Hale (Appellant's Exhibit 5), and approval was sent to the HR liaison allowing promotion of Adkins to the position. That document was one similar to Appellant's Exhibit 7 and had been signed by the Commissioner.

60. The next morning she received a telephone call from her supervisor, Stephanie Appel. Appel told her not to send out notice of the approval. As approval had already been communicated, Coulter was instructed to tell the institution to put the matter on hold and wait for further instructions. Coulter telephoned Hale and told her to hold off on the announcement. She sent out a follow-up e-mail (Appellant's Exhibit 6).

61. In her opinion, it is not unusual for a promotion to be put on hold after a DPS form has been fully approved, although it does not happen often.

62. **Stephanie Hale** was the next witness. Ms. Hale is employed by DOC, KCI, as an Administrative Specialist III, with personnel duties. She is also Tom Cannady's secretary and the liaison between KCI and DOC personnel. She reports directly to Amanda Coulter.

63. At the request of individuals at Little Sandy, she completed the paperwork to send to DOC personnel, and requested a register for the process of filling the Operations Manager position. Appellant's Exhibit 18 is the job announcement for that position. Upon receipt of the register, she gave it to Neil Hille, who thereafter chose the applicants to be interviewed. Upon receipt of interviewee names, Hale submitted those to Coulter for a minimum qualifications review. Hale then received the approved names and submitted same to Hille. She was then requested to (and did) send e-mails to applicants chosen for interviews and requested they contact her to set up a date and time for their interview.

64. Prior to the first round of interviews, Hale saw a letter of recommendation from Rep. Adkins, which had been mailed to their office. Hale opened the mail, discovered the letter, and gave it to Hille. It was on Kentucky Legislature letterhead. She believed she showed the letter to Cannady and asked what to do with it. She then put it with the application that went on to Hille.

65. Thereafter, she prepared a packet for each interview panel member. That packet consisted of each applicant's application and the questions drafted for the panel. When the interviews concluded, Hille submitted a letter of justification. (Appellant's Exhibit 2). Hale took that information, drafted a letter (on letterhead) [Appellant's Exhibit 3], filled out a DPS form (with the nominee's name), and sent that group of documents for signature to Mr. Cannady and Mr. Hille. Once those signatures were obtained, she sent the packet to Ms. Coulter for the remaining signatures.

66. Hale received an e-mail from Coulter (Appellant's Exhibit 5) advising the promotion of Appellant had been approved. She advised Hille and Cannady they could proceed accordingly. Coulter thereafter contacted Hale and told her to put the matter on hold—that Stephanie Appel would later advise her how to proceed.

67. On December 14, 2010, Hale sent an e-mail to Appel requesting an update. (Appellant's Exhibit 6.) No updates were available at that time.

68. Hale's next involvement in the process was when Cannady asked her to set up the second round of interviews for January 13, 2011. She was advised the candidates would be Hershel Adkins, Charles Pennington, Billy Williams, and three other individuals. The three other individuals ultimately did not chose to participate in the interviews.

69. Hale sent an e-mail to all applicants advising them a second round of interviews would be conducted. (Appellant's Exhibit 20.)

70. Subsequent to the second round of interviews, she learned the panel recommended the promotion of Hershel Adkins. She received the justification letter and prepared Appellant's Exhibit 8 at Cannady's direction. She then forwarded Appellant's Exhibit 8 with a DPS. Subsequently, Cannady told her, "they" requested the letter be condensed to state who they want, rather than an explanation of why Hershel Adkins had been selected. The condensed letter became Appellant's Exhibit 9.

71. She later learned via e-mail from Coulter that Hershel Adkins' promotion had been approved. She then advised Hille and Cannady. Cannady walked with her to her office and handed her a letter (with a handwritten note at the bottom) stating that Charles Pennington had been appointed to the position (Appellant's Exhibit 10). Cannady asked her to prepare a DPS form for Pennington, which she did.

72. Tom Cannady who, for the past 3½ years has been the Director of KCI, was the next witness. He supervises Neil Hille and reports to Deputy Commissioner James Erwin. He is responsible for the overall operations of KCI and maintains and develops business. The mission of KCI is to employ inmates in service and production positions, teach them job skills, and maintain the organization as a self-funding entity.

73. Cannady was the individual who initiated the paperwork to start the process of filling the vacancy of Operations Manager. He set up the FIP consisting of Neil Hille, Teresa Harris, and Deputy Warden David Green.

74. On a visit to the institution—most likely before the first interviews were held—Cannady stopped by Warden Meko's office with Hille. They discussed the replacement of Mr. Havens. Meko made a general statement that Rep. Adkins has a lot of influence in the hiring process in that institution. Cannady had seen the letter from Rep. Adkins and viewed it as a "typical recommendation letter," which recommended Pennington for the position. The document had been presented to him by Stephanie Hale.

75. In November 2010, the FIP recommended Hershel Adkins for the position. Hille indicated it was a "very tough call" between Adkins and Billy Williams. Based on what Hille told Cannady about the attributes of both candidates and their recommendation justification, Cannady approved it. Hille advised that Adkins had years of experience, presented himself well during the interview, made an impression as a strong leader, communicated well, and presented several ideas that could be implemented. Cannady signed the necessary paperwork. Subsequently, Hale informed him the promotion of Hershel Adkins had been approved.

76. Cannady's next involvement in the process was when James Erwin contacted him to advise a second round of interviews was required with a "higher-tiered level of supervision." The SIP was to include Stephanie Appel, Warden Meko, and Cannady. Cannady denied telling anyone Adkins had been recommended for promotion was because other employees threatened to retire or resign.

77. The second round of interviews was conducted in mid-January 2011 by Cannady, Warden Meko, and Serena Waddell. No one had advised Cannady or the panel to examine any specific qualifications or experience of the candidates, or that security was of any heightened importance.

78. Cannady had a personal feeling, based on previous experience, that prior to the second interview, political influence was involved. "[I]t's not anything I can prove, but it happened in another hiring incident where someone else was selected after an interview panel had selected someone else." That other matter also involved Rep. Adkins.

79. Following conclusion of the second round of interviews, the panelists agreed Billy Williams and Hershel Adkins were the top candidates. Waddell and Cannady agreed Hershel Adkins was the top candidate, while Warden Meko was leaning towards Billy Williams. Meko said it was ultimately a KCI decision, and he would support whomever the other two panelists selected.

80. The panelists put together a sheet of qualifications, which form had been suggested by Waddell. They compared the three candidates. Even by that criteria, Cannady thought Adkins came out ahead. The panel reached a consensus Adkins was the best candidate for the position.

81. Cannady signed a DPS form, which was attached to the "comparison sheet," and the documents were sent to Stephanie Hale. He identified Appellant's Exhibit 8 as the panel recommendation to promote Hershel Adkins. Appellant's Exhibit 9, drafted after Appellant's Exhibit 8, dated January 14, 2011, was signed by Cannady.

82. Thereafter, Deputy Commissioner Erwin telephoned Cannady and requested he rewrite the recommendation to include language that all three candidates met the minimum requirements for the position—to just include that sentence and attach the "5 factors" sheet. Later, Erwin told Cannady he had not done it correctly, as Cannady had included a statement that the panel had "unanimously selected" Hershel Adkins. Erwin did not want the panel's opinion on the memo.

83. As determined by the Personnel Cabinet, a pre-condition to an applicant securing an interview was that the applicant met the minimum requirements for the position.

84. Cannady received an e-mail from Stephanie Appel thanking him for forwarding the recommendation of Charles Pennington. Cannady replied in a "snarky" response, "[D]on't thank me." The next morning he received a visit from the Deputy Commissioner who chastised him for his comment and told him he needed to support the Commissioner's decision.

85. Upon his review of Appellant's Exhibit 10/Intervenor's Exhibit 1, Cannady stated he probably saw that document for the first time on January 19, 2011. The "team" had not determined that all three candidates met the minimum requirements. That had previously been determined by the Personnel Cabinet prior to any interviews. Furthermore, the team had not concluded all three candidates were capable of fulfilling the duties of the position.

86. Subsequent to the second round of interviews, Cannady had a conversation with Billy Williams, who was Operations Manager at Little Sandy. Williams stated he would support whatever decision was made in the hire, and that he could work well with Hershel Adkins. However, he could not work well with Pennington. Cannady did not think Williams made any statement to him about retirement or advised he would quit if Pennington got the position. In any event, Williams' statement to him had no influence on his decision.

87. The hearing was called into recess by the Hearing Officer. Upon return, the Hearing Officer advised Cannady of his rights under KRS 61.101, 102, and 103, which is known as the Kentucky Whistleblower's Statute. The Hearing Officer declared and took judicial notice of the fact that Tom Cannady—and any testimony he offers in this matter—is protected under the provisions of this statute.

88. Cannady testified that the applicants' county of residence had no relevance whatsoever to the qualifications for the position. The SIP considered the five factors in the interviews of all candidates. He was aware State Representative John Stacey had sent a recommendation letter on behalf of another candidate, Gerald Adkins.

89. At no time, up until the spring of 2011, had Deputy Commissioner Erwin held discussions with Cannady regarding KCI security issues. He did have a conversation with Erwin indicating Billy Williams might quit or retire if Pennington was selected. Cannady was aware there were rumors throughout KCI that a number of employees might leave if Pennington was hired.

90. He acknowledged the Commissioner and Deputy Commissioner were better suited than him to determine security issues. However, if the Commissioner or Deputy Commissioner had serious concerns about what the FIP did, he questioned why those concerns had not been communicated to him before or during the second interview process.

91. On the third day of hearing, **Amanda Coulter** was recalled. She identified Appellant's Exhibit 25 as an e-mail she had sent making inquiry of the identity of the register from which Hershel Adkins was to be promoted. She later discovered she had made a mistake, having rushed through her work and pulled the old DPS 1 form that had been placed on hold.

92. By agreement of the parties, **Stephanie Hale** was recalled to offer her testimony by telephone. She stated she had reviewed a number of her e-mails the day before. She did not recall the e-mail she sent in response to Coulter. After the second round of interviews, Hale did not receive approval of the hire of Hershel Adkins. She did eventually receive approval for hiring Pennington.

93. **Charles Pennington, Intervenor**, next gave his testimony. Pennington is currently the Operations Manager at LSCC for KCI, effective February 1, 2011. He never told anyone he was not interested in this position, nor had he told Hille that he was not ready to hold the position. He told Hille several times he was interested in the job. As soon as Mr. Havens announced his retirement, Pennington had a conversation with Billy Williams. He told Williams he did not think he would apply for the position, but he had not yet made up his mind. He later decided to apply for the job because his family needed the money.

94. Prior to the first interview, Pennington spoke to Rep. Rocky Adkins. At that time, his application had already been submitted. He asked Rep. Adkins for a character reference. Following the second round of interviews, he spoke to Rep. Adkins again and mentioned the second interviews had been concluded.

95. Pennington's father had been county judge/executive for Elliott County from 1998 through 2006. Pennington worked for the Highway Department during that time as a manager. He resides in Elliott County and knew that Rocky Adkins grew up in that same county.

96. When he was a Sergeant, Pennington had several people report to him and for whom he was responsible. He supervised their jobs, completed their evaluations, and was responsible for oversight of security. He developed skills to multitask, communicate with people, and supervise employees.

97. The security duties of an Operations Manager include controlling entry of any contraband into the recycling center. Five to six truckloads of materials per day come into the center. He also makes certain the staff can handle fires, riots, and conduct regular drills. There is no way the regular security staff can adequately handle all the security matters at KCI. Pennington also has extensive training and became "CERT" – (Correctional Emergency Response Team) qualified.

98. Pennington and Billy Williams had at one time been good friends, but had a falling out over Pennington applying for this position. He overheard Williams tell others he was not going to work for Pennington. Pennington had told Williams he did not think he was going to apply. Pennington made his application and Williams told him their friendship was over because he lied.

99. The next witness was Deputy Commissioner of Adult Institutions for DOC, **James Erwin**. Mr. Erwin has held this position since November 2010. From September through November 2010, he was acting Deputy Commissioner. He is responsible for the hiring process in the adult institutions.

100. Applicants for a vacant position are placed on a register and "vetted" through personnel to determine their minimum qualifications. Those who make it through are placed on a final register and become eligible for interviews. An interview panel is assembled, conducts interviews, and thereafter issues a recommendation. Such recommendation usually is done in writing or by e-mail and sent to Erwin. It was Erwin and Tom Cannady who determined the interview panel members. Once Erwin had approved the initial request to fill this vacancy, he signed off on authority to proceed. The vacancy was then posted as shown in Appellant's Exhibit 18.

101. The FIP consisted of Deputy Warden Green, Neil Hille, and Teresa Harris. Erwin received the DPS1 form from Hille and learned the interview panel recommended hiring Hershel Adkins. Erwin signed the DPS1 and forwarded it to Commissioner Thompson. The Commissioner also signed it.

102. Later in the day, he spoke to Cannady by telephone about the hire. Cannady informed him the reason Adkins had been selected was to "keep peace in the institution;" at least one employee stated he would resign if someone other than Adkins was selected. Erwin told Cannady the hire needed to be placed on hold until he spoke with the Commissioner. He told Cannady this reason for a personnel selection was not appropriate, and he had concerns about it. Erwin thereafter advised the Commissioner of the telephone conversation with Cannady. The Commissioner directed the DPS1 be rescinded and a second round of interviews be conducted. DOC personnel was then contacted to place a hold on the hire. Erwin informed Cannady that the process was to start over.

103. Erwin selected Cannady, Stephanie Appel, himself, and Warden Meko to serve on the SIP. That panel eventually consisted of Meko, Cannady, and Serena Waddell. When he spoke to Warden Meko, he did not tell him to do anything other than select the best candidate for the job. He told Cannady there was a need for a candidate who had more security and supervisory experience. The purpose of the second round of interviews was to look at the candidates again without consideration of a threat of resignation or retirement by another employee. He told Cannady this absolutely could not be a factor.

104. Prior to the second round of interviews, Erwin asked Appel's office for information on the experience of all candidates. He received that information verbally and forwarded it by e-mail to the Commissioner (Appellant's Exhibit 7). The e-mail contained information on Hershel Adkins and Charles Pennington. He testified DOC always looks at the county of residence of an applicant to determine whether they have to commute or whether they have gone from institution to institution. At the time of the e-mail, he had not yet received information on Billy Williams.

105. The SIP, by way of written memorandum of Cannady, again recommended the hire of Appellant.

106. On or about January 14, 2011, he received a memorandum from Cannady accompanied by a grid comparing the "five factors" for the candidates. (Appellant's Exhibit 8). At this time, Cannady again "absolutely" told Erwin that employee resignation was the basis for the recommendation of the SIP. Erwin directed Cannady to rewrite the memo, as it was missing the key component that Cannady verbally told him Adkins was selected in order to avoid the resignation of Billy Williams. He directed the new memo state who the three candidates were and whether they met the qualifications for the job. He did not tell Cannady to include a statement the panel had unanimously selected Adkins. Erwin had no reason to disagree with the fact the panel had unanimously selected Adkins. At no time during the process had he heard of a letter by Rep. Adkins, nor had he discussed it with anyone.

107. Erwin acknowledged that a candidate meeting the minimum requirements was a pre-condition to interview for the position. He also agreed the "team" did not make the determination of those minimum requirements. He verbally reported the recommendation of this panel to Commissioner Thompson. After testifying that he did not communicate this in writing to the Commissioner, he then identified Appellant's Exhibit 10 as a memorandum he authored, signed, and delivered to her. He had not given the Commissioner the first page of Appellant's Exhibit 8 or Appellant's Exhibit 9. He did provide her the grid, which is the attachment to Appellant's Exhibit 8, which was a "stand alone" document. He told her the panel unanimously recommended Hershel Adkins, then recounted Cannady's statement that the selection was made to avoid the resignation of Billy Williams. He left out information on Exhibit 10 about the unanimous selection because "...we were going to solely make the recommendation based on the grid that was prepared." The recommendation of the SIP would be overridden based on (1) the threat of Billy Williams to quit; and (2) the information provided on the grid including the candidates' respective background and experience. It was Erwin who recommended to the Commissioner that Charles Pennington be hired. The Commissioner agreed with that recommendation and made the appointment.

108. On January 19, 2011, after receiving verbal approval from the Commissioner, Erwin told Cannady that Charles Pennington had been appointed to the position based on the "grid," after having paid particular attention to the fact Pennington served both as an Officer and a supervisor.

109. Security issues were being brought to light all throughout the interview process. Current employees within KCI had very little security experience. The security component was missing in current KCI line staff and in the central office staff. Therefore, this impacted the decision process in this hire.

110. From the date Tom Cannady was hired, Erwin had spoken to him at least once a week about security and KCI matters. Prior to the second round of interviews, he specifically communicated to Cannady his security concerns as a hiring requirement. Cannady had direct knowledge of all the security concerns Erwin had about KCI and expected it to be a major factor in the selection process.

111. Erwin disagreed with the SIP's recommendation based on the information contained on the "grid," and that Charles Pennington had security supervisory experience. He and the Commissioner reviewed the grid and considered Pennington a better candidate. Pennington had served as a Sergeant, a security supervisor, had experience with the K-9 unit, and possessed CERT training.

112. The recommendation letter from Rocky Adkins did not affect Erwin's actions in making selections of individuals for the SIP or in his recommendation to hire Pennington. He had not been aware of any letter at the time, and there was no political influence.

113. Erwin had drafted Appellant's Exhibit 10 and noted that as of January 19, 2011, the Commissioner had approved Pennington's hire. He subsequently wrote another memorandum (on January 26, 2011 – Appellant's Exhibit 13) which was a second version of his earlier memo. He drafted this second memo for the Commissioner's signature and to further explain the grid. Erwin was adamant the reason for the second round of interviews had been Cannady's statement concerning the potential employment separation by Billy Williams; that the reason was not the "comparable level of the candidates."

114. LaDonna Thompson, who for the past four years has been the Commissioner of DOC, was the next witness.

115. She received information about the vacancy and approved commencement of the hiring process. She heard the FIP recommended the hire of the Appellant. She signed the paperwork and sent it to Personnel. Prior to the first interviews, she had heard that Rep. Adkins had written a letter of recommendation for Charles Pennington; however, she had not seen the letter. She also heard that Rep. Stacey wrote a letter for Appellant.<sup>2</sup> Rep. Adkins had also called the Commissioner, gave her a good recommendation for the hire of Pennington, and requested he be interviewed.

116. Subsequently, Deputy Commissioner Erwin told her the reason Appellant had been recommended by the panel was there had been some "pressure from the local folks at the facility indicating if the candidate they thought should get the job, did not get the job, they would leave employment of the agency." Thompson was advised the employee threatening to leave was Billy Williams. This was the sole reason she directed the process be redone. She contacted Personnel to stop the notification and asked for a second round of interviews. She directed Erwin to sit on the interview panel and schedule those interviews. She also asked Stephanie Appel for basic information on the three KCI candidates for her own review. She was only interested in the KCI candidates because they had "Industries' background." She was also looking for strong background in security and supervision. There were KCI security concerns about this time, which affected her decision.

117. Thompson received the information she requested and thereafter requested the chart that compared the candidates' qualifications. She received an e-mail from Erwin (Appellant's Exhibit 7), which provided information on Adkins and Pennington. The candidates' county of residence had nothing to do with their qualifications.

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<sup>2</sup> No testimony during the course of the four days of hearing indicated Hershel Adkins received a letter of recommendation from any State Representative. The letter from Rep. Stacey recommended another applicant for the position with the last name of Adkins. See Background paragraph 88.

118. Subsequent to the second round of interviews, Erwin advised Thompson that Hershel Adkins had again been recommended for the position. Thompson acknowledged she had seen Appellant's Exhibits 8 and 9, but did not recall the order in which they were presented to her. She saw them before she decided to hire Pennington. Thompson had also seen Appellant's Exhibit 10. She acknowledged the contents of Appellant's Exhibits 8 and 9 differ substantially, but she did not know why. Usually, she received memoranda similar to Appellant's Exhibit 8, as it provided detailed information, which is helpful to her in her decision making process.

119. When Thompson received the second recommendation to hire Appellant, she believed it did not appear the panel gave consideration to the supervisory background of Pennington. Thompson acknowledged Warden Meko, who served on the second panel, would have knowledge of the background and experience of the candidates employed at his institution, i.e. Williams, Pennington, and Adkins.

120. In her examination of Appellant's Exhibit 10, Thompson acknowledged the first line of that document was inaccurate. The second interviews were conducted due to the statement that Billy Williams would quit or retire. Furthermore, the SIP had not been required to make any determination about the candidate's minimum requirements.

121. On January 19, 2011, Thompson advised Erwin that she approved the hire of Charles Pennington. She had reviewed the chart comparing the candidates' qualifications and the five factors. She signed the DPS1 form appointing Pennington on January 25, 2011 (Appellant's Exhibit 11). Rocky Adkins did not influence her decision in any manner, either in writing or by telephone.

122. Thompson identified Appellant's Exhibit 21 as the April 15, 2011 letter she sent to Hershel Adkins, and Appellant's Exhibit 22 as the June 28, 2011 letter she sent to Adkins.

123. When Thompson directed that a second interview panel be assembled, she expected a different result or, at the very least, if Adkins was recommended again, a statement of the rationale why he was the better choice.<sup>3</sup>

124. She identified Appellant's Exhibit 13 as the memorandum she received from James Erwin. She believes this was written as a follow-up to the verbal communications she and Erwin had. On January 19, 2011, she had given verbal approval for the hire of Pennington. She also acknowledged the handwriting on this document (showing "approved") dated 1/3/11 was her own. She believes she made a mistake with the date; the date should have been 1/31 or 2/3.

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<sup>3</sup> Tom Cannady did generate a January 14, 2011 memorandum, stating in explicit detail the SIP's rationale for the recommendation of Adkins (Appellant's Exhibit 8 – pg. 1), but this document, according to the testimony of James Erwin, was never given to Thompson.

125. The next witness was **Appellant Hershel Adkins**. For the past eight years, Adkins has been employed by DOC/KCI Eastern Kentucky Correctional Complex, as Production Coordinator. For the previous 10½ years, he served as a Correctional Officer, where he maintained security, safety, and sanitation of the institution. As a CO, he has worked at more than 50 different posts. He had attended basic academy, which was a 4-week training session, and qualified for the position after passing a test. As a Production Coordinator, he maintains security and manages the plant. He supervises six separate operations. Adkins then gave a detailed description of all his current duties. Adkins is a high school graduate and has a 2-year degree in vocational auto body. He was named KCI employee of the year. He is currently the safety coordinator at Eastern Kentucky CC. He has received several commendations, as well as recognition from the Kentucky House of Representatives. He has 13 years' experience operating his own business and supervising five employees of that business. For the past three years, he has also served as Operations Manager designee, acting in that capacity in the absence of the Operations Manager.

126. After the first round of interviews, Gerald Profitt told him a hire had been approved, and Neil Hille was coming to the institution to speak with him. Thereafter, Profitt told him the job had been recalled. Stephanie Hale sent an e-mail advising that a second round of interviews was to be conducted. After completion of the second round of interviews, it was announced Charles Pennington had been hired. The position of Operations Manager is a Grade 15.

127. The next witness, who was recalled to the stand, was **James Erwin**. Mr. Erwin did not give Commissioner Thompson the memoranda identified as Appellant's Exhibits 8 and 9 prior to January 19, 2011, but had given her a verbal account of matters contained within those memos.

128. In compliance with the Hearing Officer's last Discovery Order, Erwin had requested Neil Hille and Tom Cannady assemble any documentation they had in their possession regarding security issues. He identified the following Appellant's Exhibits as the documents so produced, with corresponding reported incident dates, all of which were admitted into evidence:

- Appellant's Exhibit 26, re: 01-20-11;
- Appellant's Exhibit 27, re: 09-02-10;
- Appellant's Exhibit 28, re: 07-29-10;
- Appellant's Exhibit 29, re: 01-19-11;
- Appellant's Exhibit 30, re: 09-02-10;
- Appellant's Exhibit 31, re: 08-09-10;
- Appellant's Exhibit 32, re: 07-15-10;
- Appellant's Exhibit 33, re: 07-30-10;
- Appellant's Exhibit 34, re: 07-29-10; and
- Appellant's Exhibit 35, re: 07-20-10.

129. DOC began to look at and place more emphasis on matters of security, rather than production, at KCI facilities. Erwin had direct conversations with Cannady about security issues. The produced e-mails (Appellant's 26-35) had been discussed with Cannady. Erwin had security conversations with Cannady once or twice a week since the day Cannady had been hired. Cannady realized that when he was hired, he had no security background and would have a sharp learning curve on this issue. Erwin, former Deputy Commissioner Al Parke, and Commissioner Thompson have all had security conversations with Cannady. From July 15, 2010, to the date of the first interviews, Erwin discussed these issues with Cannady "at least 50 times." Security issues arose prior to July 10, 2010, and continued through the interview process.

130. Tom Cannady was advised to look at the security backgrounds of all applicants during the interview process. He was well aware of the security concerns when his panel made its recommendation. However, Cannady told Erwin the reason Adkins had been recommended was "due to the threats that someone would retire if they didn't get their way, as far as who was selected."

131. Warden Meko would have known about security concerns regarding his institution, but probably not about the situation at Peewee Valley KCI. No panel members had knowledge of the theft of money that occurred at KCI central office.

132. Deputy Warden Green, who was on the FIP, had been specifically assigned to security issues at LSCC. Warden Meko, who was on the SIP, is ultimately responsible for security issues at his institution. However, neither had full knowledge of all KCI security concerns.

133. **Barney Kinman** was recalled to the stand by Appellant. During the course of his investigation, Kinman learned a letter of recommendation had been written by House Majority Leader Rocky Adkins on behalf of Charles Pennington and one other letter of recommendation had been written by another legislator on behalf of Gerald Adkins. Commissioner Thompson told Kinman in her interview the letter from Rocky Adkins was one of the factors in her decision of hiring Pennington. In that interview she stated, "[W]e always consider recommendations... It is a factor you look at, but it's not the driving factor; that recommendations are considered as part of the package." She denied that any phone calls had been made or received on behalf of any candidate. Had Commissioner Thompson told him that she indeed received a telephone call from Rep. Adkins in support of Charles Pennington, he would have expanded his investigation and definitely included an interview of Rep. Adkins. As Commissioner Thompson denied receiving any such phone call, his investigation followed the course reflected in his report.

134. Kinman had shown Thompson Appellant's Exhibits 8 and 9. The Commissioner stated she had not seen what was Appellant's Exhibit 8, and she probably had not seen Appellant's Exhibit 9. Thompson also stated that following the second interview, she was aware KCI "strongly wanted him [Hershel Adkins] for his industries background."

135. In the context as explained by Thompson, she considered the letter from Rep. Adkins as she would consider any other reference letter. The other applicant who received a legislator's letter of reference was Gerald Adkins—not Hershel Adkins. Thompson had seen the "grid" when she made her decision to hire Pennington.

136. Kinman's investigation gathered and reported facts. He made no findings or conclusions. He did not discover any facts that indicated political discrimination or political influence occurred. He identified Intervenor's Exhibit 2 as the entirety of his investigative report, with attachments, containing all documents in his investigative file.

137. If a legislator had made a telephone call to Commissioner Thompson "urging" her to hire a candidate, Kinman would consider that as constituting political influence. During his investigation, he discovered no facts showing the SIP had been advised to put heightened emphasis or focus on the security background or experience of the applicants.

138. Appellant rested his case. Appellee presented a Motion for Directed Verdict on the issue of political discrimination and/or political influence. Intervenor presented a Motion for Directed Verdict on political discrimination and Appellee's consideration of the "five factors" in the promotional process. After having heard arguments of counsel, all motions were **OVERRULED**.

139. Appellee announced it had no witnesses to present and rested its case. Intervenor announced he had no witnesses to present and rested his case.

140. A briefing schedule was set and disseminated per separate Interim Order.

### **FINDINGS OF FACT**

1. Hershel Adkins, the Appellant, is a classified employee with status. For the past eight years, he has been employed as a Production Coordinator by the Department of Corrections ("DOC"), Kentucky Correctional Industries ("KCI"), at Eastern Kentucky Correctional Complex. His prior 10½ years of state service was as a Correctional Officer where he maintained security, safety, and sanitation of the institution. He possesses 13 years experience operating his own business, supervising five employees. During the past three years, he has also served as Operations Manager Designee, acting in the absence of the Operations Manager.

2. Jeff Havens, Operations Manager for KCI at Little Sandy Correctional Complex (LSCC) retired. The resulting position vacancy was posted (Appellant's Exhibit 18). The Personnel Cabinet employed its normal procedure in receiving applications for the position, determining those applicants who met the minimum requirements for the position, and approving commencement of the interview process.

3. The First Interview Panel (FIP) was assembled. The FIP consisted of Neil Hille, Branch Manager of Operations for KCI/DOC; David Green, Deputy Warden of LSCC; and Teresa Harris, Human Resources Branch Manager for DOC. Prior to the interviews, the FIP received and reviewed each candidate's application, evaluations, attendance history, and any other documents submitted by the candidate. Six candidates were interviewed on November 15, 2010, including Hershel Adkins, Charles Pennington, and Billy Williams. The FIP received no specific instructions, nor were they advised to pay particular attention to the security background and experience of the candidates. The FIP gave adequate consideration to the "five factors" consisting of applicants' qualifications, record of performance, conduct, seniority, and performance evaluations. They also considered each candidate's supervisory and security background experience. Green and Harris recommended Hershel Adkins as their respective first choice to the position, and Billy Williams as their second choice. Hille considered the matter overnight following the interviews.

4. On November 17, 2010, Hille sent an e-mail to the other two panel members (Appellant's Exhibit 4). The panel recommendation to hire Adkins (Appellant's Exhibit 2) was attached to that e-mail. Stephanie Hale, based on information provided to her, including Tom Cannady's approval of the panel's recommendation, prepared the November 17, 2010 memo from Hille to acting Deputy Commissioner James Erwin (Appellant's Exhibit 3). The FIP did not base its recommendation on the threat of any employee, nor had Tom Cannady communicated to anyone that such "threat" was a factor in the FIP recommendation.

5. Commissioner LaDonna Thompson and acting Deputy Commissioner James Erwin both approved the hire of Adkins by signing the appropriate DPS-1 form. This form was then received by Stephanie Appel. James Erwin subsequently communicated to Commissioner Thompson that he had been told by Tom Cannady the basis for the recommendation of the FIP was to "keep the peace," as an employee stated he would retire if Pennington was hired.

6. Stephanie Hale telephoned Neil Hille and told him Hershel Adkins' promotion to the position had been approved. Hille telephoned Gerald Proffitt and made arrangements to go to LSCC on Monday, December 13, 2010, to speak to the successful candidate.

7. Based on Erwin's interpretation of his conversation with Cannady, Commissioner Thompson directed the process be redone.<sup>4</sup>

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<sup>4</sup> Commissioner Thompson testified it was at this time James Erwin had identified Billy Williams as the employee who would retire.

8. Thompson telephoned Appel and asked whether she (the Commissioner) had signed the DPS-1 for Adkins. Upon learning she had signed the document, Thompson instructed Appel to hold off processing the position until further notice. Appel telephoned Amanda Coulter who, in turn, telephoned Stephanie Hale, to direct the matter be placed on hold. Hale then advised Hille.

9. Commissioner Thompson directed the hiring process begin again by holding a second round of interviews. All candidates were invited to the second round.<sup>5</sup>

10. The second interview panel (SIP) consisted of Joseph Meko, Warden of LSCC; Serena Waddell, Human Resources Administrator LSCC; and Tom Cannady, KCI Director. The SIP received and reviewed the applicants' applications and all documentation. This panel received no specific instructions, nor were they told why a second round of interviews was being held. They were not instructed to pay attention to the security background and experience of the candidates.

11. The SIP gave adequate consideration to the "five factors" during the interview and recommendation process. Meko had also given consideration to the security aspects of the position, as well as each candidate's security background. Waddell believed Adkins had "plenty of security background" and supervisory experience.

12. Following conclusion of these interviews, Waddell informed her fellow panelists that her recommendation was Hershel Adkins. Warden Meko's choices were Adkins (first) and Williams (second). Cannady subsequently also recommended Adkins as the best candidate.

13. Cannady signed the DPS-1 form to begin the approval process for Adkins' hire. The form was attached to the "comparison sheet" the SIP had reviewed. At his direction, a January 14, 2011 memorandum was drafted stating the justification for the SIP recommendation (Appellant's Exhibit 8).<sup>6</sup>

14. Following the second round of interviews, Stephanie Appel received notice of the SIP recommendation of Hershel Adkins. On January 14, 2011, she contacted Deputy Commissioner Erwin to inquire whether the process could proceed. Erwin advised this was not correct and that Charles Pennington had been selected. (Kinman report of interview with Stephanie Appel; Intervenor's Exhibit 2).

15. Erwin thereafter telephoned Cannady and directed him to rewrite the SIP memorandum (Appellant's Exhibit 8); that the new memorandum should have one sentence that stated all three candidates met the minimum requirements for the position. Cannady was also to attach the "five factors" comparison sheet. Cannady followed orders and rewrote the January 14 memorandum (Appellant's Exhibit 9).

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<sup>5</sup> From the testimony, it appears only Adkins, Pennington, and Williams participated.

<sup>6</sup> Upon review of this document, Commissioner Thompson testified this memo contained the type of justifications she normally received from interview panels.

16. Erwin later told Cannady he had not correctly rewritten the memo, as it included information that the SIP had “unanimously selected” Hershel Adkins.

17. Erwin generated his own memorandum, dated January 19, 2011. (Appellant’s Exhibit 10; Intervenor’s Exhibit 1). Neither the FIP nor the SIP concluded the candidates were on a “comparable level.” It had been the Personnel Cabinet—not the SIP—that initially determined, as part of the eligibility for interview, that these three candidates met the minimum requirements for the position.<sup>7</sup>

18. The SIP never concluded all three candidates “were capable of fulfilling the duties of the position.”

19. Erwin verbally reported to Commissioner Thompson that the SIP had recommended Hershel Adkins. He told her this panel’s recommendation had also been made to avoid the resignation of Billy Williams. He received verbal approval to hire Pennington. He later delivered his own January 19 memorandum (Appellant’s Exhibit 10) to the Commissioner, along with the “grid” (attachment to Appellant’s Exhibit 8). He did not provide the Commissioner with either of Cannady’s January 14 memoranda (Appellant’s Exhibits 8 and 9).

20. Erwin received verbal approval from the Commissioner on January 19, 2011, for the selection of Charles Pennington. The DPS-1 form approving the hire of Pennington was processed for signatures on January 24 and 25, 2011. (Appellant’s Exhibit 11). Charles Pennington was then hired as Operations Manager.

21. On January 26, 2011, Erwin wrote an additional memorandum to Commissioner Thompson (Appellant’s Exhibit 13). He utilized the first three paragraphs of his January 19 memo (Appellant’s Exhibit 10; Intervenor’s Exhibit 1) and added a fourth paragraph. At no time had he communicated in writing to the Commissioner the SIP recommended Adkins to the position. The notation which appears on this January 26 memo of “Approved 1-3-11” was made by Commissioner Thompson.<sup>8</sup>

22. Hershel Adkins filed a grievance. Commissioner Thompson instituted a review of the process and notified Adkins on April 15, 2011. (Appellant’s Exhibit 21). An investigation was conducted by Barney Kinman of the Office of Investigations. He reviewed documents, interviewed 15 people, and issued his report on June 7, 2011. (Intervenor’s Exhibit 2).

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<sup>7</sup> This, in fact, was a prerequisite for all the candidates at the first round of interviews.

<sup>8</sup> Commissioner Thompson testified she had placed this notation on the memo but noted the wrong date.

23. Charles Pennington had spoken to Rep. Rocky Adkins prior to the first interviews and requested he provide a character reference on his behalf. Rep. Adkins wrote a letter of recommendation and prior to the first round of interviews, telephoned Commissioner Thompson and requested Pennington be given an interview.<sup>9</sup> After completion of the second round of interviews, Pennington again spoke with Rep. Adkins, who inquired how the interview process went.

24. Rep. Adkins' letter was on Kentucky House of Representatives' stationery and had been received by personnel sometime before the first interviews were conducted. The physical letter had been seen during the hiring process by Neil Hille, Tom Cannady, and Stephanie Hale. Subsequently, the letter could not be found or produced either during Kinman's investigation or in the discovery process for the Personnel Board hearing.

25. Another letter of recommendation had been written by Kentucky State Representative John Stacey on behalf of candidate Gerald Adkins.

26. If Commissioner Thompson had requested the SIP place emphasis on security, particularly supervisory experience in security (Kinman interview report – Intervenor's Exhibit 2), that request was never communicated to the SIP.

27. Commissioner Thompson never saw a written recommendation for the hire of Hershel Adkins from the SIP or the January 14, 2011 memorandum written by Cannady, prior to her approving the hire of Pennington. She received paperwork from Erwin recommending Pennington (Kinman interview report – Intervenor's Exhibit 2), and agreed with his recommendation.

### CONCLUSIONS OF LAW

1. In late 2010, following the retirement of Jeff Havens, the Department of Corrections (DOC) began the process of selecting Havens' successor to fill the position of Correctional Industries Operations Manager at the Little Sandy Correctional Complex in Elliott County. The vacancy was posted on the Personnel Cabinet's website. (Appellant's Exhibit 18). A number of individuals tendered their applications for consideration. The Personnel Cabinet reviewed the minimum qualifications of the applicants, created a register, and forwarded that information to Neil Hille, Branch Manager for KCI. Hille then selected the applicants to be interviewed. Among those selected were the Appellant Hershel Adkins, the Intervenor Charles Pennington, and a third KCI employee, Billy Williams.

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<sup>9</sup> Although three witnesses testified they saw the actual letter, such letter could not be found or produced for purposes of this appeal.

2. The First Interview Panel (FIP) consisted of Neil Hille, first line supervisor for the vacant position; Deputy Warden David Green, Little Sandy CC; and Teresa Harris, a Human Resources Branch Manager for DOC.

3. Prior to the time the first interviews were conducted, Charles Pennington solicited from State Rep. Rocky Adkins, a letter of recommendation. Rep. Adkins submitted this letter on official Kentucky Legislative stationery and telephoned Commissioner LaDonna Thompson, encouraging her to offer Pennington an interview for the position.

4. The Personnel Board is required to promulgate comprehensive administrative regulations for the classified service governing promotions. KRS 18A.0751(1)(f). These regulations must "...give appropriate consideration to the applicants' qualifications, record of performance, conduct, and seniority." KRS 18A.0751(4)(f). The regulation promulgated in compliance with the statutory direction is 101 KAR 1:400, which states, "[A]gencies shall consider an applicant's qualifications, record of performance, conduct, seniority, and performance evaluations in the selection of an employee for a promotion."

5. "Qualifications" are 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 Board, et al., 846 S.W. 2d. 711, 715 (Ky. App. 1992). "Seniority" means the total number of months of state service. KRS 18A.005(33).

6. The DOC was required by statute and regulations to consider the applicants' qualifications, record of performance, conduct, seniority, and performance evaluations (hereinafter referred to as the "Five Factors"). Such factors must be given "appropriate consideration" in the process. Bowling v. Natural Resources and Environmental Protection Cabinet, 891 S.W. 2d. 406, 410 (Ky. App. 1994).

7. The issues under consideration in this appeal are:

- (A) Whether the DOC gave appropriate consideration to the applicants' qualifications, record of performance, conduct, seniority, and performance evaluations, as required by 101 KAR 1:400(1) and KRS 18A.0751(4)(f); and
- (B) Whether Charles Pennington was favored for promotion due to political affiliation in violation of KRS 18A.140(1); and

8. During the course of the first day of hearing, the Hearing Officer also advised the parties—and made them aware—that the promotional process must also comport with Section 2 of the Kentucky Constitution, i.e. "[A]bsolute and arbitrary power over the lives, liberty, and property of free men exists nowhere in a republic, not even in the largest majority."

9. The parties have stipulated, and the Hearing Officer concludes, that the FIP gave appropriate consideration to the five factors. The FIP thereafter recommended the promotion of Hershel Adkins to the position.

10. During the hearing, the Hearing Officer observed Tom Cannady's discomfort and hesitancy while testifying, particularly when it came to matters pertaining to his superiors. The Hearing Officer openly gave Cannady (in the presence of the parties) notice of his rights and protections under KRS 61.101-103 (Kentucky Whistleblower Act). Cannady thereafter testified freely. The Hearing Officer places great credibility on his testimony. This is particularly so when Cannady testified that, as an aside, he anecdotally told Deputy Commissioner Erwin that during the process, an employee of the facility stated he would most likely retire if Charles Pennington was promoted to the position. Furthermore, Cannady denies he ever told Erwin the FIP based its decision on the threat of one or more employees to quit or retire.

**Testimony of Commissioner LaDonna Thompson**  
**And**  
**Deputy Commissioner James Erwin**

11. There exists glaring contradictions between the testimony of Commissioner LaDonna Thompson and Deputy Commissioner James Erwin with reference to significant points in this case. At times, their testimony was also contradicted by the testimony of Investigator Barney Kinman, the Report (Intervenor's Exhibit 2) of Kinman's investigation, and the recording of Kinman's interviews. Such contradictions, some of which are identified below, were taken into consideration by the Hearing Officer in weighing the credibility of these witnesses:

**Rocky Adkins' Telephone Call:**

- (A) Commissioner Thompson testified she received a telephone call from Rep. Adkins prior to the first interviews, whereby Adkins gave Charles Pennington a good recommendation and requested he be given an interview.
- (B) In Barney Kinman's recorded interview of Commissioner Thompson (and as related through the testimony of Kinman), the Commissioner denied ever having received any telephone calls on behalf of the candidates.

**Rocky Adkins' Letter of Recommendation:**

- (A) Thompson testified the recommendation letter from Rep. Adkins had no weight in her decision to hire Pennington. Kinman, in his Report, recorded Commissioner Thompson told him these letters had "no impact on her decision."

- (B) In the recorded interview of Commissioner Thompson she stated recommendation letters are always a factor, but not the driving factor; they are considered as “part of the package.”

**Billy Williams and His Retirement:**

- (A) After Commissioner Thompson signed the DPS-1 form approving the hire of Adkins, James Erwin told her the FIP recommendation had been based on a threat by Billy Williams to leave his position if Pennington was hired.
- (B) James Erwin testified that after the first interviews, Tom Cannady told him an employee had threatened to quit, and the FIP based its decision on that factor; however, he had not learned the identify of Billy Williams until around January 14, 2011.
- (C) In his testimony, Tom Cannady stated that after the second round of interviews, he had a discussion with Billy Williams. Williams told him he could work well with Adkins but did not think he could work well with Pennington. “I don’t recall that he said he would retire.” Cannady did not think he heard from any source, prior to this discussion with Williams, that Williams had been considering retirement.
- (D) In Kinman’s report, Cannady said he believed his conversation with Erwin, concerning the Williams’ statement, took place around the time Erwin informed Cannady that he (Erwin) was recommending Pennington to the position. Cannady was not aware the selection could cause personnel issues until January 13<sup>th</sup> following the conclusion of the second interview process (Summary of Investigation).

**Reasons for the Second Interview:**

- (A) Thompson testified that the sole reason for holding a second round of interviews, was Erwin told her the FIP based its decision to recommend Adkins on the possible resignation of Billy Williams.
- (B) Thompson told Investigator Kinman the decision to hold the second panel was based solely on the security needs and the inadequate justification for recommendation of Mr. Adkins.
- (C) Thompson later testified she was interested in examining the security and supervisory background of the KCI candidates.

- (D) Erwin testified the purpose of redoing the process was to look at the candidates without consideration of the resignation issue. This is also what he told Investigator Kinman, as per Kinman's report.
- (E) Erwin also testified that he told Cannady to look into the security and supervisory experience of the candidates, without consideration of the threat of an employee resignation.
- (F) Erwin also testified he told Warden Meko to select the best candidate for the job.
- (G) Cannady reported to Kinman he did not have knowledge of possible personnel issues at the time of the first interview process and therefore could not have used that justification with Mr. Erwin (Summary of Investigation).

**The Candidate's County of Residence:**

- (A) Thompson testified the candidates' county of residence had no relevance to the decision.
- (B) Erwin testified the Cabinet always examines the county of residence of applicants for several reasons.

**Rationale for Rejection of the Second Recommendation of Herschel Adkins:**

- (A) In his testimony, Tom Cannady stated that after the second round of interviews, he had a discussion with Billy Williams. Williams told him he could work well with Adkins but did not think he could work well with Pennington. "I don't recall that he said he would retire." Cannady did not think he heard from any source, prior to this discussion with Williams, that Williams had been considering retirement. As reported to Investigator Kinman, Cannady believes he relayed this information to Erwin around the time Erwin told him he (Erwin) was recommending Pennington for the position. When Cannady was informed of possible personnel issues, this was after the second interview process and the SIP had already made their recommendation in favor of Adkins (Summary of Investigation).
- (B) Erwin testified that when he received the Cannady memo dated January 14, 2011 (Appellant's Exhibit 9) Cannady told him "absolutely" this panel recommended Adkins because Billy Williams had threatened to resign if Pennington were hired. Erwin told Investigator Kinman the SIP justification had been the same as the FIP: people would resign if Mr. Pennington was chosen.

- (C) Erwin testified it was because the SIP had made its recommendation based on the threat to quit by an employee, that the Commissioner overrode that recommendation. In Kinman's report, Erwin told Cannady that he (Erwin) and the Commissioner would make the selection.
- (D) Commissioner Thompson related to Investigator Kinman (Kinman's Report) that after completion of the second round of interviews, she received paperwork from Mr. Erwin recommending Mr. Pennington; and been told by Erwin the SIP had recommended Adkins; she was not aware of the January 14 memos written by Mr. Cannady recommending Adkins.

12. The preponderance of the evidence shows the promotional process worked well until Deputy Commissioner Erwin communicated to Thompson either an egregiously erroneous interpretation of the Cannady conversation, or made a false report to the Commissioner. In either event, he fatally tainted a process which, to that point, had been lawfully conducted. Although the Commissioner acted reasonably and within the scope of her authority when she ordered the process be redone, that decision was unfortunately tainted by the Erwin communication.

The FIP appropriately considered the applicants' qualifications, record of performance, conduct, seniority, and performance evaluations, pursuant to 101 KAR 1:400. This was a fact to which the parties have previously stipulated. When the FIP made its recommendation to promote Hershel Adkins, it did not base its decision on or consider the threat to quit by any employee. The process would not have been redone, but for the erroneous communication by Erwin. That faulty communication is squarely on Deputy Commissioner Erwin. His was an arbitrary act of power over the lives of the applicants and, thus, was in violation of Section 2 of the Kentucky Constitution.

13. It is interesting to note that after Tom Cannady, KCI Director, approved the FIP recommendation, both Deputy Commissioner Erwin and Commissioner Thompson approved the promotion of Hershel Adkins. It was Erwin's subsequent erroneous communication to the Commissioner that led her to direct the process begin again. Absent this communication, and as the FIP acted properly under statute and regulation, the Appellant would have been promoted.

14. The Hearing Officer questions the motivation of DOC in offering testimony that supervisory experience and security issues were not sufficiently considered to satisfy the Commissioner. This is a particularly curious position, for security and supervisory experience would undoubtedly have been a part of such consideration to the position all during this process. Although Appellee tried to make security concerns an important issue for consideration, neither the Commissioner nor Deputy Commissioner raised this as an objection to the promotion of Adkins when they both signed off on the first DPS-1 form. This was not even a consideration for them. Deputy Commissioner Erwin testified the only reason the recommendation of the FIP was

questioned was solely on the alleged representation that the recommendation was made in reaction to the threat of an employee to retire or quit.

15. 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.

16. 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.

17. As stated by the Intervenor (pg. 15 of his brief), the Hearing Officer agrees that the record in this case reflects the Five Factors were exhaustively considered at every phase of the promotion process. The SIP adequately considered the applicants' qualifications, record of performance, conduct, seniority, and performance evaluations pursuant to 101 KAR 1:400. The SIP forwarded a recommendation that Hershel Adkins be promoted to the position. From the testimony of Warden Meko, it is clear he gave consideration to the security aspects of the position and each candidate's security background. Ms. Waddell believed Adkins had "plenty of security background" and supervisory experience.

18. 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 testified that Erwin told her the recommendation of Adkins was not correct; that Charles Pennington had been selected (Intervenor's Exhibit 2).

19. Despite the SIP having adequately considered all the elements required of them in this promotional process, pursuant to 101 KAR 1:400, Erwin ignored the SIP recommendation and was already of a mind that Pennington would receive the promotion. Erwin then improperly inserted himself into what was once the independent process employed by the SIP. Instead of forwarding to Commissioner Thompson the January 14, 2011 memorandum from Cannady recommending Hershel Adkins (Appellant's Exhibit 8), Erwin directed Cannady, a member of the SIP, to rewrite the memo.<sup>10</sup> Erwin telephoned Cannady and specifically directed him to include in the new memorandum a phrase similar to "all three candidates met the minimum requirements for the position as determined by the Personnel Cabinet," and that it be the sole sentence for the memorandum. He was also directed the "five factors" chart be attached.

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<sup>10</sup> When presented with a copy of the January 14, 2011 memorandum, Commissioner Thompson stated she had never seen that memorandum, but its form and substance was what she normally expected to receive from promotional interview panels.

20. 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.

21. 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.

22. 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, "[D]ue 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."

23. Deputy Commissioner Erwin also states in his memo that the second interview team, "...determined that all three candidates met the minimum requirements for the position, and were capable of fulfilling the duties of the position." The evidence shows this was a totally false representation. It was not the SIP that determined all three candidates met the minimum requirements for the position. This had been determined by the Personnel Cabinet prior to selection of candidates for interviews. The SIP never concluded the three candidates (Adkins, Williams, and Pennington) were all capable of fulfilling the duties of the position.

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

25. The acts of Deputy Commissioner Erwin, interfering with the independent process of the SIP and delivering false information to Commissioner Thompson by his oral and written communications of his memorandum of January 19, 2011, constituted acts in violation of Section 2 of the Kentucky Constitution.

26. Based on a preponderance of the evidence and the credibility of the witnesses, as weighed by the Hearing Officer, the Hearing Officer concludes that Charles Pennington was not favored for promotion due to political affiliation in violation of KRS 18A.140(1); however, the arbitrary acts committed by Deputy Commissioner Erwin and his interference in the independent processes of the FIP and SIP constitute acts in violation of Section 2 of the Kentucky Constitution, as the exercise of absolute and arbitrary power over the lives and property interests of all applicants including the Appellant. While the FIP and SIP each gave appropriate consideration to the applicants' qualifications, record of performance, conduct, seniority, and performance

evaluations, as required by 101 KAR 1:400(1) and KRS 18A.0751(4)(f), and performed in a reasonable and lawful manner, as directed by statute and regulation, the acts of Deputy Commissioner Erwin arbitrarily interfered with and diverted the process that otherwise would have resulted in the promotion of Hershel Adkins.

### **RECOMMENDED ORDER**

The Hearing Officer recommends to the Personnel Board that the appeal of **Hershel Adkins v. Justice and Public Safety Cabinet, Department of Corrections** (Appeal No. 2011-147) be **SUSTAINED**; that the promotion of Charles Pennington to the position of Correctional Complex Operations Manager be **VACATED** and held for naught; and that **Appellant Hershel Adkins** be appointed to the position of Correctional Complex Operations Manager effective December 16, 2010 (the initial effective date of appointment pursuant to e-mail of Amanda Coulter, Appellant's Exhibit 5), and that Appellant otherwise be made whole.

### **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 Merkel this 3<sup>rd</sup> day of July, 2012.

**KENTUCKY PERSONNEL BOARD**



**Mark A. Sipek**  
**Executive Director**

A copy hereof this day mailed to:

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