

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2011 – 147

HERSHEL ADKINS

APPELLANT

vs.

POST-HEARING BRIEF FOR APPELLANT

JUSTICE AND PUBLIC SAFETY CABINET
DEPARTMENT OF CORRECTIONS

APPELLEE

AND

CHARLES PENNINGTON

INTERVENOR

* * * * *

Hershel Adkins was recommended by two separate interview panels for promotion to the job of operations manager for Kentucky Correctional Industries (KCI) at Little Sandy Correctional Complex. The record indicates that unlawful political discrimination was a substantial factor in his non-selection. Accordingly, Adkins is entitled to relief including reinstatement to the position, pay and grade of operations manager for KCI as of December 16, 2010, backpay and all other relief necessary to make him whole.

Statement of the Case

The Hiring Process

The hiring process pertinent to this case began in the latter part of 2010 when Jeff Havens, the operations manager for KCI at Little Sandy gave notice of his retirement, and Department of Corrections (DOC) Commissioner, LaDonna Thompson, approved filling of the vacancy. Pursuant to that approval on or about October 15, 2010, a vacancy posting

setting forth the principal and minimal qualifications for the job of operations manager for KCI at Little Sandy was posted on the DOC website.

(Appellant's Ex. 18).

Following posting of the job vacancy interested persons submitted their applications to the Personnel Department, which screened them to determine if they met the position's minimal qualifications. (D1-Stephanie Appel @ 3:20:00 - 22:44). Those applicants meeting the position's minimal qualifications were certified to a registry. (*Id.*). The registry was then forwarded to Neil Hille, the branch manager for KCI, who selected persons to be interviewed. (*Id.*). The list was then double-checked by the Personnel Department, essentially re-certified and sent back to Hille. (D2 – Stephanie Hale @ 2:03:05-04:25). Stephanie Hale, the KCI personnel liaison and administrative specialist, then notified those qualified candidates selected for an interview. (*Id.*). There were six applicants interviewed. (D2 – Neil Hille @ 10:24:35-25:15).¹ These included appellant Hershel Adkins, Billy Williams, Charles Pennington, a Gerald Adkins and two other unnamed-at-the-hearing applicants. Hille explained that Little Sandy Warden Joseph Meko had asked him previously to interview all persons on the register that were employed at

¹ A Gerald or Gerry Adkins was one of the other candidates interviewed. Testimony at the hearing indicated that a legislator, Rep. John Will Stacy, wrote a letter of recommendation or reference on behalf of Gerry Adkins, not appellant Hershel Adkins. (D4 – Barney Kinman @ 10:24:20-25:32, 10:38:05-18). Nevertheless, Commissioner LaDonna Thompson erroneously asserted at the hearing that Stacy's letter had been on behalf of appellant. (D3 – LaDonna Thompson @ 2:21:20-45).

Little Sandy, a practice Hille followed in this instance. (D2 – Neil Hille @ 10:20:55-23:38).

Charles Pennington and his Benefactor, House Majority Leader Rep. Rocky Adkins

A Charles Pennington, a KCI employee at Little Sandy, applied and was selected to be interviewed, although he had acknowledged twice previously that he was not ready for the job. Before the first round of interviews Pennington informed Hille in a discussion at Little Sandy that, while he was not ready for the job, he wished to participate in the application and interview process, because he thought he would gain valuable experience from doing so. (D2 – Neil Hille @ 10:13:58-15:28). Later, after a letter from House Majority Leader Rep. Rocky Adkins was received urging Pennington's selection for the position and after hearing that Pennington was boasting that Majority Leader Adkins would get him the job, Hille spoke with Pennington again. (*Id.* at 10:15:40-17:16, 10:18:00-19:25). This time Pennington conceded no inadequacies or unpreparedness; foreshadowing the influence that Majority Leader Adkins has and does wield in employment matters at Little Sandy, Pennington informed Hille that he would do what he had to do to get the job. (*Id.* at 10:18:00-19:25, 10:56:20-57:01). Pennington, at the hearing, denied making any such admissions to Hille, who is his immediate supervisor.²

² The citizens of this Commonwealth can marvel in dismay at the dysfunction imposed on their state government by the egregious and inexcusable violations of the merit system illustrated by this case. Pennington has categorically denied and therefore labeled as

Pennington also acknowledged to Billy Williams, a co-worker and interim operations manager of KCI at Little Sandy following Havens' retirement, that he was not ready yet for the job. (D1 - Billy Williams @ 1:22:38-23:55). As with Hille, Pennington informed Williams that he believed it would be useful for him to go through the process. (*Id.*). Also as with Hille, Pennington denied at the hearing that any such conversation took place with Williams.

House Majority Leader Rocky Adkins, whose home base is in Sandy Hook in Elliott County where Little Sandy Correctional Complex is located,³ has a history of meddling in, influencing and/or attempting to influence personnel decisions at Little Sandy. Very early on in the process at issue herein, shortly after Jeff Havens announced his retirement, Hille and Tom Cannady were discussing the job with Little Sandy Warden Joseph Meko in Meko's office. (D2 – Neil Hille @ 10:11:25-13:56; D2 – Tom Cannady @ 3:18:45-20:00, 20:00-22:02; D1 – Joseph Meko @ 1:59:15-2:00:15). Meko asked if they knew representative Rocky Adkins and advised that he might have some involvement in the hiring process. (*Id.*).

Majority Leader Adkins exercised his influence and power on Pennington's behalf by first writing a letter recommending him for the

untrue sworn, material testimony of his immediate supervisor, Neil Hille. One wonders how the Department of Corrections can reasonably expect Hille to exercise effective supervision over Pennington in this situation. Incongruities like this are the product of a decision-making process driven by who knows who rather than who can do the best job, which is the whole point of KRS Chapter 18A and this Board.

³ www.rockyadkins.com (last checked January 25, 2012).

position. (D3 – LaDonna Thompson @ 2:20:10-21:20; D2 – Neil Hille @ 10:15:40-17:16; D2 – Tom Cannady @ 3:22:10-22:55). According to those that saw it, the letter, which has been lost inexplicably, said nothing of Pennington's merits, experience or qualifications but simply urged his favorable consideration. (D2 – Neil Hille @ 10:15:40-17:16; D2 – Tom Cannady @ 3:22:10-22:55). Lest anyone wished to erroneously characterize the letter as *pro forma* or perfunctory, Majority Leader Adkins himself placed such emphasis and importance on the letter that he characterized it as an official legislative act. *Motion to Quash Subpoena of Representative Rocky Adkins/Motion for Protective Order* at p. 3 (asserting that "[l]egislators are prohibited from being summoned into court or administrative tribunal to answer questions concerning of their legislative conduct in representing their constituents.").⁴

Majority Leader Adkins also took the additional step of personally telephoning DOC Commissioner LaDonna Thompson in her office to advocate the selection of Charles Pennington. (D3 - LaDonna Thompson @ 2:21:49-22:38, 22:50-23:05). Commissioner Thompson had explicitly denied any such telephone contact from House Majority Leader Adkins in an interview by Barney Kinman, who conducted an investigation prior to the hearing and recorded that conversation. (D4 – Barney Kinman @ 10:37:05-37:16).

⁴ As the Supreme Court has recognized, the writing and sending of the letter by Majority Leader Adkins for Charles Pennington was an exercise of political influence. *Brewster v. United States*, 408 U.S. 501, 512 (1972). Neither the Department of Corrections nor intervenor Pennington took any issue with this contention by the House Majority Leader.

Commissioner Thompson is clearly heard on the recording of her interview with Kinman denying any telephone contact by Majority Leader Adkins or anyone else. (*Id.*)⁵ Furthermore, Commissioner Thompson is heard clearly stating to Kinman that Majority Leader Adkins's letter on Charles Pennington's behalf was a "factor" considered favorably toward him by her. (D4 @ 10:35:46-36:55 recording of LaDonna Thompson interview by Barney Kinman playing during Barney Kinman's hearing testimony).⁶

After the second round of interviews and apparently to make sure that Charles Pennington appreciated what had been done for him, House Majority Leader Adkins phoned Pennington, after the second round of interviews, and asked him how the hiring process was going. (Intervenor's Ex. 2, Barney Kinman's Summary of Interview with Charles Pennington). Pennington, at the hearing, claimed that he could not remember this admission to Kinman.

Charles Pennington's ultimate placement in the position marks the third time that the recommendation of an interview panel has been disregarded in Pennington's favor. Pennington was hired into KCI after the recommendation of that hiring panel was ignored and Pennington installed in the position in question. (Intervenor's Ex. 2 – Interview Report by Barney

⁵ Thompson's denial to Kinman of this telephone call from Majority Leader Adkins materially influenced Kinman's investigation, as he explained at the hearing. (D4 – Barney Kinman @11:02:22-03:13).

⁶ Thompson's acknowledgement to Kinman that House Majority Leader Adkins's letter on Charles Pennington's behalf was a "factor" considered in his favor is directly contrary to her hearing testimony. (D3 – LaDonna Thompson @ 2:24:55-27:07).

Kinman of Interview of Gerald Profitt).⁷ And in this case two interview panels unanimously recommended Hershel Adkins, both were disregarded and Pennington placed in a position that he had twice previously acknowledged he was not ready for.

The First Interview Panel and Process

According to Deputy Commissioner James Erwin, he and KCI Director Tom Cannady selected the members of the first interview panel. (D3 – James Erwin @ 10:54:04-20). The panel consisted of Neil Hille, the KCI Branch Manager and the first-line supervisor of the position, Deputy Warden David Green, a 22 1/2 years DOC employee and deputy warden for security at Little Sandy for the last 1 1/2 years,⁸ and Teresa Harris, a human resources branch manager for the Department of Corrections. (D2 – Teresa Harris @ 9:31:20-54).⁹ The panel was provided with various materials and documents regarding the applicants including their education, experience, work history and performance. (D2 – Teresa Harris @ 9:33:12-42).

The interview panelists were emphatic that they discussed and considered the five factors mandated by 101 KAR 1:400: the applicant's qualifications, record of performance, conduct, seniority and performance

⁷ Barney Kinman's report including all of its interview summaries was moved in evidence in its entirety by the intervenor Pennington with the full acquiescence and support of appellee Department of Corrections. Neither now can be heard to quarrel or quibble with the evidence they introduced.

⁸ (D1 - David Green @ 11:40:20 -- 11:40:54). Green also related that he was asked by Joseph Meko, the Warden at Little Sandy, to serve on the interview panel. (D1 – David Green @ 11:42:10-22).

⁹ Harris testified that Hille asked her to serve on the first interview panel. (D2 – Teresa Harris @ 9:31:58-32:17).

evaluations. (D1 - David Green @ 12:01:50-12:02:04; D2 - Teresa Harris @9:46:10-58; D2 - Neil Hille @ 10:49:50-51:20, 11:30:20-54).

Deputy Warden Green explained that, given his particular responsibilities for security at Little Sandy including its KCI operations, he applied special emphasis and scrutiny to the applicants' security backgrounds, experience and orientations. (D1 - David Green @ 11:41:00-11:41:55, 11:44:10-11:44:30, 12:05:10- 12:06:21, 12:06:41-57, 12:07:40-57).¹⁰ Green acknowledged that Pennington was due extra credit for supervisory experience. (D1 - David Green @ 12:05:10-21). However, Green, whom DOC has employed for some time as a deputy warden for security of an entire correctional facility and a person well-situated to know of what he speaks, discounted the notion that Pennington would have greater security knowledge than Hershel Adkins merely because of Pennington's one-year service as a sergeant. (D1 - David Green @ 11:53:30 - 11:54:05).¹¹ Harris confirmed that the interview panel considered and discussed the applicants'

¹⁰ In response to the Hearing Officer's question, Green stated that no one has asked him since the interview panel completed its work whether it considered the applicants' security backgrounds and qualifications. (D1 - David Green @ 12:06:21-37).

¹¹ Commissioner Thompson would later in the hearing acknowledge the obvious point that not all sergeants perform the same, some perform well and some perform not so well. (D3 - LaDonna Thompson @ 3:39:03-30). In this case, the two interview panelists best situated to know Charles Pennington's capabilities and performance record, Little Sandy Warden Joseph Meko and Little Sandy Deputy Warden for Security David Green, both came down clearly and emphatically that Hershel Adkins should be selected for the position of Operations Manager for KCI at Little Sandy. (D1 - Joseph Meko @ 1:54:00-29, 56:26-48; D1 - David Green @ 11:48:10 - 33). Commissioner Thompson likewise acknowledged that Warden Meko would be more knowledgeable than her of Charles Pennington's ability, since Pennington worked at Little Sandy where Meko has been Warden for many years. (D3 - LaDonna Thompson @ 3:39:03-30).

security and supervisory experience. (D2 – Teresa Harris @ 9:35:10-51, 9:54:20-24).

Charles Pennington was not even the second choice of any of the interview panelists. (D2 – Teresa Harris @ 9:36:18-36). That he had expressed previously to Hille that he was not ready for the job was certainly factored against him, doubtlessly since an applicant's qualifications are a factor and an admission of their absence can reasonably be credited. (D2 – Neil Hille @ 10:31:10-36, 11:54:00-46). Hille further advised that Pennington's evaluations from his former supervisor impacted adversely his candidacy. (*Id.* @ 11:55:05-10, 12:18:45-20:03, 20:03-21:30).¹²

Appellant Hershel Adkins was the interview panel's selection for the position of operations manager for KCI at Little Sandy. Harris explained that Hershel Adkins was her first choice and Billy Williams her second. (D2 – Teresa Harris @ 9:33:46-34:12). Harris understood from their discussions that Green's choices were the same. (*Id.* @ 9:34:36-56). Green affirmed that Hershel Adkins was his choice, although he did not recall discussion of a second choice. (D1 – David Green @ 11:48:10-33, 11:50:00-26). Both Green and Harris expressed surprise at Charles Pennington's subsequent selection for the position. (D1 – David Green @ 11:51:50-52:22; D2 – Teresa Harris @ 9:36:18-36).

¹² It is at least some form of irony but more like distressing commentary that Pennington was hired into KCI despite not being the pick of that position's interview panel, performed not particularly well in the job once he got it (one reasonably infers from the adverse reviews of his supervisor) and then gets a promotion with a large raise, despite two panels selecting unanimously another candidate, Hershel Adkins.

Harris and Green both confirmed that Hille was going back and forth between Hershel Adkins and Billy Williams. (D2 – Teresa Harris @ 9:35:53-36:22; D1 – David Green @ 11:59:20-35). Hille subsequently emailed Green and Harris that his choice too was Hershel Adkins. (Appellant’s Ex. 4; D2 – Neil Hille @ 10:32:20-34:25). Hille explained that he was mindful that Billy Williams was Warden Meko’s preferred candidate and that he called Meko to inform him of Hershel Adkins’s selection, which Meko accepted and supported. (*Id.*).¹³

After notifying Meko, Green and Harris, Hille then prepared a rough draft of a memorandum reflecting that Hershel Adkins was the interview panel’s choice. (D2 – Neil Hille @ 10:35:30-37:45; Appellant’s Ex. 2). Stephanie Hale then formatted Hille’s rough draft memo into proper format and on proper stationary. (*Id.*). Harris confirmed that Appellant’s Ex. 3, the memo Hille put together, accurately reflected the interview panel’s deliberations and rationale for selecting Hershel Adkins. (D2 – Teresa Harris @ 9:42:26-36).

Hershel Adkins’ selection for the position of operations manager for KCI at Little Sandy was then forwarded through DOC for the necessary administrative steps and signatures. Hale forwarded Hille’s memo and a personnel form known as a DPS 1 onto Amanda Coulter in the state

¹³ Hille’s email (Appellant’s Ex. 4) contains language that could be misconstrued as indicating that Warden Meko opposed or resisted Hershel Adkins’s selection. Hille explained that the remarks were in humor and that Warden Meko was fully supportive of Adkins’ selection. (D2 – Neil Hille @ 10:32:20-34:25).

Personnel Department. The Personnel Department double checks entries on the DPS 1 such as salary level, registry number and the like and, when that work is done, it is signed by Stephanie Appel, the personnel director for DOC. (D1 – Stephanie Appel @ 3:17:36-45, 3:23:42-26:08). All the reviews were completed and all the necessary signatures obtained; a completed DPS 1 reflecting Adkins's promotion to operations manager was signed by KCI Director Tom Cannady, Appel, Deputy Commissioner Erwin and Commissioner LaDonna Thompson. (*Id.* @ 3:25:25-3:28:06).¹⁴ After Erwin and Thompson signed off on Hershel Adkins's promotion, the DPS 1 was sent back down the channels; eventually, it got back to Stephanie Hale, who informed Hille that the administrative process had been completed and Hershel Adkins could be informed of his promotion. (D2 – Stephanie Hale @ 2:07:50-:08:20; D2 – Neil Hille @ 10:40:20-42).

Hershel Adkins' Selection Is Recalled At the Last Minute

After receiving notice from Hale, Hille then contacted Gerald Profitt, Hershel Adkins's immediate supervisor and the general manager of KCI at EKCC, advised him that a selection had been made and informed him that he was coming to EKCC the following Monday, December 13, 2010, to notify the selected candidate. (D2 – Neil Hille @ 10:40:20-41:29). Profitt, in preparation for Hille's visit, sent proper notice to security personnel at EKCC.

¹⁴ The fully executed and signed DPS 1 reflecting Hershel Adkins promotion to the job of Operations Manager for KCI at Little Sandy was later destroyed and thus was unavailable at the hearing. (D1 – Stephanie Appel @ 3:31:35-32:05). The exhibits that do exist indicate that Hershel Adkins's promotion was to be effective December 16, 2010. (Appellant's Ex. 6).

(Appellant's Ex. 19). Although Hille did not so state specifically, Profitt understood from his conversation with Hille that Hershel Adkins had been officially selected for the position of operations manager of KCI at Little Sandy. (D1 – Gerald Profitt @11:18:35-19:56).

Hille never traveled to EKCC on December 13, 2010, and Hershel Adkins's hiring for the position was reversed and put on hold.

The Testimony About Why Hershel Adkins's Promotion Was Reversed

The testimony regarding why Hershel Adkins's promotion to the operations manager position was put on hold in December 2010 is conflicting and raises very serious credibility issues for Erwin and Thompson.

Hille was simply informed by Hale that Adkins's selection had been put on hold. (D2 – Neil Hille @ 10:41:30-42:38). No explanation was or has ever been given to Hille, there was and remains an "absence of information," he was never told the first interview process was flawed, he was never given a reason for the second round of interviews. (*Id.* @ 10:42:42-44:20). Hale, in turn, was informed simply by Amanda Coulter, who works in Appel's office, to put Adkins's promotion on hold. (D2 - Stephanie Hale @ 2:08:20-50). Word to put Adkins's promotion on hold filtered down from Thompson to Appel to Coulter to Hale and then, of course, to Hille. No one received an explanation for this very unusual action. (D2 - Amanda Coulter @ 1:44:04-48; D1 - Stephanie Appel @ 3:29:20-30:35).

The explanations from Erwin and Thompson regarding why Adkins's promotion was put on hold cannot be reconciled, and, as a result, raise

serious and disturbing credibility issues for both. Erwin testified that, after the DPS 1 for Hershel Adkins's promotion had been signed off on by both him and Thompson, he asked Cannady why Adkins had been selected. (D3 – James Erwin @11:01:02-01:57). According to Erwin, Cannady did not identify anyone by name but indicated – without identifying anyone by name -- that the basis for Hershel Adkins's selection by the interview panel was to keep the peace because "an employee" had threatened to retire if anyone but Hershel Adkins were put in the position. (*Id.* @ 11:03:00-03:30). Tom Cannady denied saying any such thing. (D2 – Tom Cannady @ 3:35:20-44). So there is a direct conflict in Cannady's and Erwin's testimony: Erwin says Cannady explained that an unnamed employee would retire if Hershel Adkins was not selected, Cannady testified that he said no such thing.

Erwin undercuts his own credibility as to this first point by testifying subsequently that he first and only learned the name of the employee who supposedly made this threat (to retire) in January 2011 *after* the second round of interviews. Erwin lead into this admission by first explaining that a "major factor" why the second interview panel's recommendation of Hershel Adkins for the position was that Cannady again reported that the basis for Adkins's selection was to quell a retirement threat. (D3 - James Erwin @ 12:20:55-22:00).¹⁵ However, Erwin testified that Cannady this time identified the employee that made the retirement threat, explaining "*at that point he gave me the name*" and said that Billy Williams would resign if anyone but

¹⁵ No one gave any testimony corroborating Erwin in any way on this point.

Hershel Adkins was selected. (D3 – James Erwin @ 11:20:04-15).¹⁶ So, according to Erwin’s testimony, it was first and only after the second interview that the employee, Billy Williams, that was threatening to retire if Hershel Adkins was not selected was identified to him.

Erwin himself exposed the untruthfulness of his explanation for the reversal of Adkins’s promotion following the first round of interviews in December 2010 by his answers to questions asked him by the Hearing Officer. After Erwin discoursed pointedly on the dangers, concerns and issues raised when a staff member (here Billy Williams according to Erwin) attempts to extort (by threatening to retire) a particular result from his supervisors (the selection of Hershel Adkins for operations manager), the Hearing Officer asked why, in view of those concerns, Billy Williams was permitted to participate in the second round of interviews. (D3 – James Erwin @ 12:25:50-27:00). Erwin explained that he allowed Williams to participate in the second round of interviews “out of a sense of fairness” and because he was concerned that he would wind up before this Board pursuant to a complaint by Williams. (*Id.*).

Erwin’s testimony and explanation cannot be true. First, according to Erwin’s own testimony, Billy Williams was identified to him by Cannady as the employee threatening to retire *only after the second round of interviews in*

¹⁶ Billy Williams did in fact inform Cannady that he would likely retire if neither he nor Hershel Adkins were selected for the operations manager job. (D1 – Billy Williams @ 1:30:10-49; D2 - Tom Cannady @ 4:07:45-08:58). Cannady acknowledged that he informed Erwin of Williams’ statement but only after the second interview. (D2 – Tom Cannady @ 5:11:16-50).

January 2011. (D3-James Erwin @ 11:20:04-15). Accordingly, it was impossible for Erwin in December 2010 after the first round of interviews but before the second to cultivate a “sense of fairness” toward Williams or a concern for a Personnel Board proceeding by Williams if he was excluded from the second round of interviews, because Erwin did not know that Williams was the employee that had supposedly made the threat to retire if Hershel Adkins were not selected for the operations manager position.

Second, as mentioned above, Erwin testified regarding the evils inherent in an employee attempting to extort a particular decision from a supervisor and the greater evil of the supervisor succumbing to the employee’s wrongful efforts. (D3 – James Erwin @ 12:25:50-27:00). The extortion present here, according to Erwin, was Williams’ threat to retire if Hershel Adkins was not selected for the operations manager’s job. (*Id.*). And yet according to Erwin’s testimony, the even greater evil of Williams’s supervisors succumbing was doubly present since, according to Erwin, both Warden Meko and Deputy Warden David Green had selected, in response to Williams’s threat, Hershel Adkins for the operations manager job. This type situation, Erwin took pains to explain, was untenable and something he would have to take action on and cure. (*Id.*).

And yet Erwin confronted with what, according to him, is repeating evil by a Warden and Deputy Warden *did nothing*. Neither Erwin nor anyone else on his behalf ever contacted either Warden Meko or Deputy Warden

Green regarding the deliberations and decisions of the interview panels on which they served. (D1 – Joseph Meko @ 1:56:26-48; D1 – David Green @ 12:06:21-37). If Erwin truly received the information he claimed to have received and/or had the concerns that he so fervently expressed, logic, reason and common sense require that there would have been some follow-up of some kind however minimal by Erwin or someone on his behalf. After all, according to Erwin he has both a Warden and a Deputy Warden caving in to Billy Williams' extortionate threats. That there was no follow-up of any kind, coupled with the impossibility of Erwin cultivating any sense of fairness toward Williams (since he did not know Williams had made the threat) removes even the patina of credibility from Erwin's explanation.

Thompson's explanation as to why Hershel Adkins promotion was recalled in December 2010 casts further doubt on her and Erwin's credibility. Thompson claims that very shortly after she signed a DPS 1 form approving Hershel Adkins's promotion to operations manager of KCI at Little Sandy, Erwin informed her that the reason for Hershel Adkins' selection was that Billy Williams had threatened to leave his employment unless Hershel Adkins were selected for the position. (D3 - LaDonna Thompson @ 2:23:10-24:10, 2:24:38-2:25:13, 2:25:40-26:09, 3:10:00-33, 3:14:00-15:12). This testimony by Thompson raises at least three problems for her and Erwin's credibility. First, according to Erwin, he did not learn Billy Williams's identity as the employee threatening to retire if Hershel Adkins was not

selected until after the second interviews,¹⁷ an account that squares with Cannady's. (D2 - Tom Cannady @ 5:11:16-50). Accordingly, since Erwin did not know that the employee was Billy Williams, he could not have told that to Thompson and Thomson could not of known it either.

Second, if Thompson is truthful and she knew of Williams's threat before the second interviews because Erwin told her, Erwin's testimony about the evils of an employee attempting to extort a result from a superior by threatening to retire seen nothing other than a gratuitous fabrication. The evil that Erwin claimed this type of scenario presented cannot be squared with his paradoxical claims of "a sense of fairness" directed at Williams. It defies logic, reason and common sense.

Third, if caving into an extortionate threat as a basis for employment decision is bad (which it unquestionably is bad) and Erwin and Thompson had reliable information this had occurred (and both claim they had reliable information), Thompson could reasonably be expected to communicate directly or indirectly her dissatisfaction, as would Erwin as mentioned above. That Thompson did not either and admitted that she never discussed or attempted to discuss the first interview panel's deliberations with Hille, Green or Harris further undermines her and Erwin's credibility.

Finally, there is even more to cast doubt on Thompson's and Erwin's credibility. Thompson testified that the reason for the second round of interviews was not concerns about Hershel Adkins' security background and

¹⁷ (D3 - James Erwin @ 11:20:04-15).

qualifications but solely and only the extortionate (to use Erwin's characterization) threats made by Billy Williams. (D3 – LaDonna Thompson @ 2:25:40-2:26:09). Thompson claimed that subsequently information came to her attention indicating that security qualifications warranted greater attention in the second interview process. (*Id.* @ 3:02:30-04:28). However, every last one of the instances on which any documentation was introduced was either well before Hershel Adkins' selection was put on hold on December 10, 2010, or after Charles Pennington's selection was a "done deal" on January 19, 2011. (Appellant's Exs. 26-35). These pre-occurring and post-hoc incidents, therefore, could not have created, as Erwin and Thompson claim, a heightened focus on security background after December 10. If the security matters were truly a motivating concern and since the documentation shows that they unquestionably existed prior to December 10, 2010, reason and logic strongly suggest that they would have been cited by Erwin and/or Thompson as grounds to reject Hershel Adkins selection. That they were not makes the invocation of security concerns appear to be a *post-hoc* pretext.

Cannady denies that he had any discussion with Erwin mentioning Billy Williams's retirement until after the second round of interviews. (D2 – Tom Cannady @ 3:35:45-36:05, 5:11:16-50). Moreover, Cannady testified that Hille had informed him that Hershel Adkins was the first interview panel's selection because of his qualifications, years of experience, strong leadership

capabilities, communication and follow-up skills. (*Id.* @ 3:31:04-45). He further denies that Erwin said anything to him about security being a heightened concern for the second interview panelists and/or in the promotion process overall. (*Id.* @ 3:38:20-40:05, 3:40:05-25, 4:38:55-39:53).

Actions between Putting Adkins' Selection on Hold and Second Round of Interviews

In the time period between Adkins's initial selection (and it being put on hold) and the second round of interviews, Erwin undertook to gather information regarding the experience of all six of the candidates that had interviewed. (D3-James Erwin @ 11:08:54-10:42). Erwin sought this information from Stephanie Appel's office and claimed he received responsive information back both verbally and by e-mail. (*Id.*; *see also* Appellant's Ex. 7).

Thompson also asked Appel's office for information; unlike Erwin, however, she limited her request to Hershel Adkins, Billy Williams and Charles Pennington, because she was narrowing down the candidates. (D3-LaDonna Thompson @ 2:27:09-28:42). She identified Appellant's Ex. 7 as the information she received in response to her inquiries. (*Id.* @ 2:28:42-30:50). She further explained that Billy Williams was omitted from Appellant's Ex. 7, because he had worked lesser time with corrections and had lesser education. (*Id.*).¹⁸ Thompson confirmed that Hershel Adkins and Charles Pennington were the only candidates about which she received information

¹⁸ Given the supposedly heightened interest in emphasis on security and/or supervisory experience, one would reasonably expect one or both criteria to have been cited as grounds by Thompson for her disinterest in Williams.

between the time that Adkins's promotion was put on hold and the second round of interviews. (*Id.* @ 3:37:28-38:38). Appel confirmed that she and/or her office provided information regarding the candidates to Erwin and/or Thompson. (D1-Stephanie Appel @ 3:33:50-36:10).

Erwin took pains to report the county of residence of both Hershel Adkins and Charles Pennington on Appellant's Ex. 7, the e-mail he sent to Thompson. Erwin claimed that their county of residence was material to Thompson's decision-making process. (D3-James Erwin @ 11:11:00-13:04, 12:28:26-29:00). Appellant's ex. 7 reports that Charles Pennington's county of residence is Elliott County, the home base of House Majority Leader Rep. Rocky Adkins. Thompson contradicts Erwin, explaining that she did not know why this information was included in that it was irrelevant to her decision-making process. (D3-LaDonna Thompson @ 3:12:20-13:12). Appel had no idea why Adkins's and Pennington's counties of residence were included. (D1-Stephanie Appel @ 3:39:44-40:02, 4:18:10-18).

Second Round of Interviews: Selection of and Communication with Panelists, Their Deliberations and Selection

A second round of interviews was ordered by Erwin or by Thompson, both claim credit for doing so. (D3 - LaDonna Thompson @ 2:26:09-44, 2:23:26-24:30; D3 - James Erwin @ 11:05:00-06:20). Erwin testified that he was directly involved in selection of the second interview panel as well. (D3 - James Erwin @ 11:06:50-07:14). In fact, Erwin did contact directly Joseph Meko, the Warden at Little Sandy, and requested him to serve on the

interview panel, although Erwin said nothing to Meko about paying particular attention to the applicants' security backgrounds, etc. (D1 - Joseph Meko @ 1:51:25 - 52:02, 1:52:35-46, 1:52:50-53:00). Serena Waddell, the human resources administrator at Little Sandy, was contacted by Cannady to serve on the interview panel. (D1 - Serena Waddell @ 2:11:55-13:51). A second interview panel was unusual, Waddell observed, and Cannady informed her that it was being conducted to narrow the choice. (*Id.* @ 2:12:20-52, 2:14:40-51). Waddell, as with Meko, received no instruction from Cannady, Erwin or anybody else to pay particular attention to the candidates' security backgrounds or anything else for that matter. (*Id.* @ 2:15:15-25). Erwin confirmed that he did not communicate to Meko or Waddell that special attention should be paid the applicants security and/or supervisory backgrounds or any other issue. (D3 - James Erwin @ 11:34:35-35:35). Packets of information regarding each interviewed candidate were provided to the panelists. (*Id.* @ 2:17:20-18:00; D1 - Joseph Meko @ 2:09:20-48). Although he directly asked Warden Meko to serve on the second interview panel and said nothing to him about paying special attention to security, supervisory experience or any other area, Erwin claimed it was Cannady's responsibility to pass this point of emphasis along to Meko and Waddell. (D3 - James Erwin @ 11:16:50-17:15). Cannady denies receiving any such instruction from Erwin. (D2 - Tom Cannady @ 3:38:20-40:25). The second round of interviews was held January 13, 2011.

Hershel Adkins was the unanimous selection of the second interview panel. Waddell determined, as did Warden Meko to her understanding, that Hershel Adkins was the clear choice upon considering the applicable five factors. (D1-Serena Waddell @ 2:20:42-48, 2:22:40-23:36, 2:23:38-24:44). Meko confirmed that Hershel Adkins and Billy Williams were his top choices, a conclusion likewise reached upon consideration of the applicable five factors including their demonstrated capacity to handle properly security issues. (D1-Joseph Meko @ 1:53:06-32, 54:00-29, 58:42-58). Cannady confirmed that Hershel Adkins was his selection. (D2 - Tom Cannady @3:42:40-43:38). The second interview panel used a slate of questions developed by Cannady, reviewed and approved by Stephanie Appel. (*Id.* @ 3:44:35-45:09).

Meko and Waddell expressed mixed opinions regarding Charles Pennington's ultimate selection for the job. Waddell stated that she was not very surprised, because she had observed previously that House Majority Leader Rocky Adkins had influence on employment decisions at Little Sandy, although she also had concluded that Hershel Adkins was the "obvious" and best choice. (D1 - Serena Waddell@ 2:24:48-27:22, 2:48:15-49:00). Meko expressed surprise at Pennington's selection, since the interview panel's recommendation is usually followed and since Pennington had displayed to the interview team that he was "egocentric, narcissistic and not a team player." (D1-Joseph Meko @ 1:55:42-55, 56:26-48).¹⁹ Meko did acknowledge

¹⁹ Both Thompson and Erwin affirmed that the KCI operations manager was required to work closely with the Warden and it was essential that the operations manager

the prior involvement of House Majority Leader in hiring matters at Little Sandy. (*Id.* @ 1:59:15-2:00:15).

Hershel Adkins's Selection by the Second Interview Panel Is Reported

Cannady reported up the chain of command that Hershel Adkins was the second interview in the usual way. He had Stephanie Hale prepare a DPS 1 form reflecting Hershel Adkins's selection as well as a memo of explanation and a comparative chart, which Hale forwarded through the channels to Stephanie Appel. (D2 - Tom Cannady @ 3:45:20-48:00; D2 - Stephanie Hale @ 2:15:40-17:23). Appel, upon receiving these documents from Hale, observed that Hershel Adkins was the selection again and immediately called Erwin, who check and see if Hershel Adkins was the correct selection for the second time. (D2 - Stephanie Appel @ 3:46:30-49: 20). Erwin acknowledged that he may have learned first that Hershel Adkins was the selection of the second interview panel from Appel. (D3 - James Erwin @ 12:49:40-52). Erwin informed Appel, in this phone call made by Appel upon her receipt of the paperwork reflecting Hershel Adkins's selection by the second interview panel, that Hershel Adkins was not the correct choice, that the position was to go to Charles Pennington. (Intervenor's Ex. 2; Report by Barney Kinman of his interview of Stephanie Appel).

The testimony by Appel regarding her discussion with Erwin makes it impossible to credit Erwin's and Thompson's explanation regarding how,

be regarded as a team player. (D3-LaDonna Thompson @ 2:44:30-46:09; D3-James Erwin @ 12:23:28-56).

when and why Charles Pennington was selected for the position. According to Appel, Erwin before he ever saw the memos dated January 14, 2011, from Cannady to him (Appellant's Exhibits 8 & 9) and before he ever saw the grid or chart that is attached as the second page of Appellant's Ex. 8, advised Appel that Charles Pennington not Hershel Adkins was the selection for the position. That this is so makes the testimony by Erwin and Thompson that they considered the applicable five factors, as set forth on the second page of Appellant's Ex. 8, utterly undeserving of any credit whatsoever.

Furthermore, this testimony compounds the credibility problems raised for Thompson and Erwin by their earlier explanations regarding why Hershel Adkins's promotion was put on hold and a second round of interviews ordered.

In any event, Cannady did prepare a memorandum regarding the selection of Hershel Adkins by the second interview panel, which was admitted in evidence as Appellant's Ex. 8. This memorandum, which is dated January 14, 2011, does accurately reflect the deliberations of the second interview panel, most specifically, that Hershel Adkins was its unanimous selection for the position, a point even Erwin concedes. (D2 – Tom Cannady @ 3:46:25-40; D1 – Serena Waddell @ 2:38:00-14, 2:52:29-50; D3 – James Erwin @ 11:20:10-57).²⁰ This memorandum was accompanied by a chart or grid

²⁰ It is an established policy and/or custom of the Department of Corrections that a memorandum reporting the deliberations and actions of an interview panel be truthful and accurate. (D3 – James Erwin @ 11:20:10-57). Commissioner Thompson allowed that she certainly expected any such memorandum to be truthful and accurate. (D3 - LaDonna

showing some of the qualifications and relevant criteria for Hershel Adkins, Billy Williams and Charles Pennington.²¹ Thompson testified that the memorandum included precisely the type of substantive content that she expected from this interview panel for this promotion process. (D3 – LaDonna Thompson @ 2:42:06-43:01).

Erwin Orders Cannady to Create a Memo Falsifying the Actions of the Second Interview Panel and Then Creates His Own

Although Cannady's memo accurately and truthfully reports the deliberations and actions of the second interview panel and although it included precisely the sort of substantive content that Thompson expected, Erwin ordered Cannady not just to rewrite it but to include false information in the rewritten memo. (D3-James Erwin @ 11:19:30-20:10, 11:21:32-22:10). Specifically, Erwin ordered Cannady to include in the rewritten memo information that the second interview panel had simply found all three candidates to meet the position's minimal qualifications. (*Id.* @ 11:21:32-22:10). Erwin did not want Cannady to include in the rewritten memo that Hershel Adkins was the unanimous selection of the second interview panel, although Erwin acknowledged both that this was a true statement and that

Thompson @ 2:13:47-14:21). KRS 18A.145 prohibits the making of a false statement or report with regard to any appointment in the classified service.

²¹ This chart or grid was admitted in evidence as the second page of Appellant's Ex. 8. Cannady explained that he and Stephanie Hale created the chart. (D2 - Tom Cannady @ 3:47:20-40). Cannady also noted that it omitted some important information including prior supervisory and managerial experience of Hershel Adkins, which the interview panel was aware of and considered. (*Id.* @ 5:23:00-25:10). Erwin was mistaken regarding the provenance of the chart, which he believed originated in Stephanie Appel's office. (D3 – James Erwin @ 11:25:32-26:22).

Kennedy was required to report truthfully the panel's actions and decisions. (D3-James Erwin @ 11:20:10-57, 11:20:59-21:31, 11:21:32-22:10, 11:22:10-26).

Erwin admitted that he ordered Cannady to violate DOC policy and report untruthfully that the second interview panel had determined merely that all three candidates met the minimal qualifications. Erwin admitted that meeting the position's minimum requirements was a predicate to a candidate being selected for an interview, that whether an applicant met the minimal qualifications was determined by the Personnel Department not the interview panel and that it was untruthful to report that the interview panel had done so. (D3-James Erwin @ 11:24:26-25:32, 11:30:11-31:30, 11:31:30-32:02, 12:59:22-1:00:33). Thompson confirmed that the Personnel Department determines whether applicants met the minimal qualifications not the interview panel. (D3-LaDonna Thompson @ 2:49:10-28).

Erwin was so dissatisfied with Cannady's rewrite of Appellant's Ex. 8 (the rewrite is Appellant's Ex. 9) that he created his own memo, which was admitted in evidence as Appellant's Ex. 10. Erwin fabricates further information in Appellant's Ex. 10 and repeats some that he ordered Cannady to include in Appellant's Ex. 9.²² First, Erwin begins his memo (which is dated January 19, 2011) by falsely stating that the rationale for the second round of interviews was the "comparable level of candidates." (Appellant's Ex. 10). Erwin acknowledged this assertion was untrue as did Thompson. (D3-

²² Because it contains admittedly false information Erwin's memo (Appellant's Ex. 10) constitutes a violation of KRS 18A.145(1).

James Erwin @ 12:55:40-58:30; D3-LaDonna Thompson @ 2:47:27-49:06).

Second, both Thompson and Erwin also acknowledged that it was inaccurate and false to report that the second interview panel had merely determined that the candidates all met the minimal qualifications. (D3-LaDonna Thompson @ 2:49:10-28; D3-James Erwin @ 11:30:11-31:30, 31:30-32:02).

Third, Erwin did not believe that he was required to include the truthful information that Hershel Adkins was the unanimous selection of the second interview panel. (D3-James Erwin @ 11:32:02-26). Erwin explained that he included untrue information in his memo (Appellant's Ex. 10) and omitted truthful information from it, because he did not want to make Cannady and/or the promotion process look bad. (D3-James Erwin @ 12:35:50-36:50, 12:55:40-58:30, 1:00:40-01:38).

Thompson expressed no concern at the hearing regarding the untruths that Erwin compelled Cannady to include in Appellant's Ex. 9 and those he himself included in his own memo, Appellant's Ex. 10.²³ It is unclear whether Thompson saw Appellant's exs. 8 and/or 9 before January 19, 2011, said she told Barney Kinman that she had not and then contradicted herself in her hearing testimony. (*Compare* D3-LaDonna Thompson @ 2:51:10-45; D4-Barney Kinman @ 10:27:06-28:17, 10:33:10-35:05; Intervenor's Ex. 2, interview report by Barney Kinman of interview with LaDonna Thompson).

²³ Thompson did allow that she did not know why two memos were created by Cannady regarding the second interview panel's deliberations and did not know why the substantive content of Cannady's two memos (Appellant's exs. 8 & 9) varied so substantially. (D3-LaDonna Thompson @ 2:40:10-41:59).

Erwin testified that he withheld both of Cannady's memos (Appellant's exs. 8 and 9) from Thompson. (D3-James Erwin @ 11:27:30-28:10). In any event, Erwin and Thompson agreed that Charles Pennington's selection was a "done deal" by January 19, 2011, the same date of Erwin's memo that is Appellant's Ex. 10. (D3-LaDonna Thompson @ 2:49:50-50:32; D3-James Erwin @ 11:33:15-34:00).²⁴

There is another version of Erwin's memo and it is dated January 26, 2011. (Appellant's Ex. 13). It explains further the rationale for Charles Pennington's promotion and was created to pad the file against possible litigation. (D3-LaDonna Thompson @ 3:31:38-33:00).²⁵ In this memo for the first time does it appear in any documentation that security and/or supervisory background was due special emphasis in this promotion process. This memo dated January 26, 2011, bears the notation that it was approved by Commissioner Thompson on January 3, 2011, which is supposed to be a mistake, according to Thompson. (Appellant's Ex. 13; D3-LaDonna Thompson @ 3:33:00-34:00).

Thompson's Ignorance regarding Security Practices for KCI at EKCC and regarding Adkins's Qualifications

²⁴ However and as noted above, Erwin had informed Stephanie Appel that Charles Pennington was the selection some several days earlier. (D1-Stephanie Appel @ 3:46:30-49:20; D3-James Erwin @ 12:49:40-52; Intervenor's Ex. 2, Interview Report by Barney Kinman of Interview with Stephanie Appel).

²⁵ This memo repeats the false statements in Erwin's earlier memo (Appellant's Ex. 10), and likewise violates KRS 18A.145(1). Furthermore, Kentucky courts recognize that *post hoc* padding of the file is indicative of pretext. *Dollar General Stores v. Upchurch*, 214 S.W.3d 910, 917 (Ky. App. 2006)(affirming finding of pretext where documentation appeared only after substantive decision made).

Thompson could not have fully and fairly considered Adkins's security background and qualifications, because she was and is ignorant about how security is handled for KCI at EKCC, where Adkins has worked for many years. Thompson and Erwin both believed erroneously that KCI at EKCC, as at Little Sandy, has specially-assigned security personnel present in its workspace. (D3-LaDonna Thompson @ 2:15:03-17:19; D3-James Erwin @ 10:55:45-56:55). Thompson also erroneously believes that for KCI at EKCC these specially-assigned security personnel perform Pat downs, shakedown, observed inmates and work with KCI staff, all while physically present in the KCI workspace. (*Id.*). This is incorrect completely.

As Gerald Profitt, the KCI operations manager at EKCC, explained, there are no security personnel present and the KCI staff itself including Hershel Adkins are directly responsible for all security measures including Pat downs, shakedown, inmate supervision, strip searches, tool and contraband control and responding to inmate disturbances and fights. (D1-Gerald Profitt @ 11:12:45-13:06, 11:13:07-52, 11:13:32-14:55, 11:14:58-15:40, 11:15:40-16:01, 11:16:08-17:27). Furthermore, Hershel Adkins has served in Mr. Profitt's stead for the last several years. (*Id.* @ 11:17:27-42).

The security procedures for KCI at Little Sandy are in marked contrast. At Little Sandy, there is specially-assigned security staff present always in the KCI workspace and they not the KCI staff take lead responsibility for security issues, a point explained by Warden Joseph Meko,

Deputy Warden David Green and Billy Williams. (D1-Joseph Meko @ 1:57:54-58:08; D1-David Green @ 11:56:50-57:30; D1-Billy Williams @ 1:21:05-34).

The reality is that Hershel Adkins has had direct, every day and primary security responsibility for KCI at EKCC for many years, a fact unknown to an unconsidered by Erwin and Thompson.²⁶

Thompson also betrayed and to otherwise how misguided and limited her deliberations were. First, she asserted erroneously that Warden Meko had been responsible for selecting Pennington to be interviewed. (D3-LaDonna Thompson @ 3:39:44-41:00, 3:41:05-42:02). Thompson implied that Pennington's selection by Meko to be interviewed indicated Meko's support for Pennington's promotion, a conclusion at odds with the recommendation of the second interview panel on which Meko served, Meko's testimony and the reality that Hille selected the persons to be interviewed. Second, Thompson claimed that the absence of protest from Warden Meko regarding Pennington's promotion signaled his support for that promotion, although she did not (and could not) square this assertion with the reality that Meko sat on an interview panel that unanimously recommended Hershel Adkins not Pennington. (*Id.*). Third, Thompson alone offered that the memo from the second interview panel was supposed to explain not just why Hershel Adkins

²⁶ Although appellee and its counsel claim stridently that developments late in 2010 in early 2011 heightened security concerns at KCI operations everywhere, these claims are undercut by the failure to assign even a single security officer to KCI's operations at EKCC, an omission for which no explanation was offered. The truth is that neither Thompson nor Erwin knew or know how security is handled for KCI at EKCC and their invocation of "security concerns" is pretext.

was selected but also why Charles Pennington and Billy Williams were not. (D3-LaDonna Thompson @ 3:20:15-21:28). This is at best a very curious assertion given that Thompson cannot even say whether she saw Cannady's memos (Appellant's Exs. 8 and 9) before selecting Pennington and had no problems with Erwin's January 19, 2011, memo (Appellant's ex. 10), which she acknowledged contained multiple untrue statements and itself is a violation of KRS 18A.145(1).

The process that played out in this case is apparently unprecedented. Thompson did not identify a single prior instance in which she had ignored the recommendations of two separate interview panels and instead promoted someone not recommended by either. Neither was any prior instance identified where there had been multiple violations of KRS 18A.145(1) tainting the process.

Hershel Adkins's Grievance and Barney Kinman's Investigation

After he was unfairly and unlawfully passed over for promotion to operations manager of KCI at Little Sandy, Adkins filed a grievance that was of course rejected by Thompson. (Appellant's exs. 21 and 22). Barney Kinman was assigned to conduct an investigation. Thompson waylaid that investigation by falsely denying any direct contact with her by House Majority Leader Rep. Rocky Adkins, a misrepresentation that calls Kinman not to interview Majority Leader Adkins and to reach an incorrect conclusion. (D4-Barney Kinman @ 11:02:22-03:13). Kinman was not asked at the hearing to comment upon whether Thompson lying about her telephone conversation

with House Majority Leader Rocky Adkins affected his assessment of her credibility or how the irreconcilable conflicts in Erwin's and Thompson's testimony could have or would have influenced his conclusion had they been known to him at the time.

Adkins' Complaint to This Board

Adkins charges to this Board that political influence wrongfully and unlawfully caused him not to be selected for promotion to the job of operations manager for KCI at Little Sandy. He requests relief to make himself whole, which entails reinstatement to the position, pay and grade of operations manager retroactive to December 16, 2010, along with all back pay and all other relief necessary to make him whole.

Argument

1. The Purpose of KRS 18A.140 Is To Establish Civil Service Based Solely on Merit and Fitness In Which Political Influence Is Eliminated to the Greatest Extent Possible

“The general purpose of [KRS] Chapter 18 was to establish for the state system of personnel and administration based on merit principles.”

Martin v. Corrections Cabinet, 822 S.W.2d 858, 861 (Ky. 1961). “The entire purpose of the merit law was to establish civil service based solely on merit and fitness in which political influence was eliminated to the greatest possible extent.” *Id.* “[T]he problem which the statute was intended to remedy was political interference in the classified civil service.” *Id.*

Accordingly and toward this end, KRS Chapter 18A grants the Personnel Board powers of enforcement.

KRS 18A.140 is the key statute at issue and it provides, in pertinent part, as follows:

(1) No person shall be ... in any way favored or discriminated against with respect to employment in the classified services because of his political ... affiliations[.]

A person injured by violation of this statute may be made whole including, in this instance, reinstatement to the position and/or grade and pay level of operations manager and paid his back pay. KRS 18A.095(22).

2. Elements and Proof Standards

While Kentucky courts have not yet offered direct instruction regarding the elements and proofs applicable to an appeal claiming political discrimination in violation of KRS 18A.140, the Board should conclude that Adkins must show (1) he sought a promotion in the classified service; (2) he did not receive the promotion; and, (3) political influence was a substantial factor in his non-selection. This conclusion is reached following consideration of a variety of authorities including statutes with similar language and purpose, caselaw construing the causation standard applicable to similar statutes and caselaw that addresses claims of political discrimination arising under the First Amendment to the federal constitution, which, of course, protects political affiliation and non-affiliation rights.

KRS 161.164 is similar in language and purpose to KRS 18A.145 and a “substantial factor” causation standard is applicable to claims under it. KRS 161.164(4) prohibits political discrimination in employment decisions involving school employees and provides, in pertinent part, as follows:

No teacher or employee ... shall be appointed or promoted to, or demoted or dismissed from, any position or *in any way favored or discriminated against with respect to employment because of his political ... affiliations*[(emphasis supplied because of similarity to KRS 18A.145(1))

The Kentucky Supreme Court has applied what is the material equivalent of a “substantial factor” causation test to claims under this statute and its predecessor. In *Calhoun v. Cassady*, 534 S.W.2d 806, 808 (Ky. 1976), the Court held that the plaintiff-teachers proved sufficiently political discrimination where they showed reprisal was the primary motivation, although there were other lawful explanations for the challenged action. Subsequently, in *Harlan Bd. of Educ. v. Stagnolia*, 555 S.W.2d 828, 830 (Ky. App. 1977), the Court remarked that the proof standard to show a violation was “no more than an inference of arbitrariness.” Accordingly, a claim of political discrimination under KRS 161.164(4), a statute materially indistinguishable from KRS 18A.145(1), is sustained where political discrimination is a substantial factor for the challenged employment action and/or there is an inference of arbitrariness arising from the employer’s explanation.

The Kentucky Supreme Court applied a “substantial factor” causation proof standard in *Meyers v. Chapman Printing*, 840 S.W.2d 814 (Ky. 1992), a case that involved a claim under KRS 344.040 which makes unlawful various employment practices “because of” the individual’s race, gender and/or various other factors. The Court explained that the plaintiff, whose claim was

of gender discrimination, was not required to show that gender discrimination was the employer's "exclusive motive" but only that it was an "essential ingredient" and therefore a "substantial factor." 840 S.W.2d at 823-24.

We turn now to political discrimination cases under the First Amendment and begin with *Rutan v. Republican Party*, 497 U.S. 62 (1990). In *Rutan*, the Supreme Court held that political support or activity cannot be used as a basis for employment decisions by state government including transfers, promotions and rehires.²⁷ The plaintiffs claimed they were politically discriminated against in their employment because they did not have the support of Illinois Republican Party officials. The Court held such discrimination would violate the plaintiffs' First Amendment rights and explained its holding as follows:

Respondents next argue that the employment decisions at issue here do not violate the First Amendment because the decisions are not punitive, do not in any way adversely affect the terms of employment, and therefore do not chill the exercise of protected belief and association by public employees. This is not credible. Employees who find themselves in dead-end positions due to their political backgrounds *are* adversely affected. They will feel a significant obligation to support political positions held by their superiors, and to refrain from acting on the political views they actually hold, in order to progress up the career ladder. Employees denied transfers to workplaces reasonably close to their homes until they join and work for the Republican Party will feel a daily pressure from their long commutes to do so. And

²⁷ *Rutan* had immediate application in Kentucky as it required the summary reversal by the Supreme Court of a Sixth Circuit decision holding in *Messer v. Curci*, 881 F.2d 219 (6th Cir. 1989)(*en banc*), that the plaintiffs could not assert claims of political discrimination where they alleged that they were not rehired because they had not affirmatively carried favor with political party officials. See 497 U.S. 1001 (1990); 908 F.2d 103 (6th Cir. 1990).

employees who have been laid off may well feel compelled to engage in whatever political activity is necessary to regain regular paychecks and positions corresponding to their skill and experience.

497 U.S. at 73.

Rutan instructs that the First Amendment like KRS Chapter 18A aims to eliminate political influence as a determinative factor in public merit employment systems to the greatest extent possible. "The right not to politically associate is as protected as the right not to associate." *Christy v. Pennsylvania Turnpike Comm'n*, 904 F.Supp.2d 427, 430 (E.D. Pa. 1995). It likewise recognizes that this purpose is contravened where the political support of some employees is permitted to trump the merits of others.

Following *Rutan* courts have ruled that to establish a claim of political discrimination based on political affiliation, or lack of political affiliation, the plaintiff must show: (1) he was a public employee; (2) he was engaged in constitutionally protected conduct; and (3) his protected conduct was a substantial factor or motivating factor in the employment decision. *Robertson v. Fiore*, 62 F.3d 596, 599 (3d Cir. 1995); *Christy v. Pennsylvania Turnpike Comm'n*, 904 F. Supp. 427, 429 (E.D. Pa. 1995). If the plaintiff presents a factual basis to establish these elements, "the burden shifts to the employer to show that it would have made the same employment decision" regardless of the plaintiff's political affiliation. *Christy*, 904 F.Supp. at 430.

Furthermore, courts hold that a plaintiff in a political discrimination case may but is not required to show that the grounds offered by the

employer are pretextual. In a political discrimination case, the plaintiff may discredit the proffered nondiscriminatory reason, either circumstantially or directly, by adducing evidence that discrimination was more likely than not a motivating factor. *See Rodriguez-Rios v. Cordero*, 138 F.3d 22, 26 (1st Cir. 1998); *Acevedo-Diaz v. Aponte*, 1 F.3d 62, 69 (1st Cir. 1993); *see also Stephens v. Kerrigan*, 122 F.3d 171, 181 (3^d Cir. 1997). In this way, the burden-shifting mechanism is significantly different from the device used in other employment discrimination contexts, such as Title VII cases, where a plaintiff is required to come forward with affirmative evidence that the defendant's nondiscriminatory reason is pretextual. *See Acevedo-Diaz*, 1 F.3d at 67; *see also Stephens*, 122 F.3d at 176 (explaining the distinction between political discrimination and Title VII employment discrimination). Whether Adkins must show pretext need not be decided by this Board; there is ample and disturbing evidence of pretext in any event.

Adkins may prove the causal connection – that political influence was a substantial factor in his nonselection – by direct or circumstantial evidence. *Ky. Dep't of Corr. v. McCullough*, 123 S.W.3d 130, 135 (Ky. 2003). "Direct evidence is evidence, which if believed by the trier of fact, will prove the particular fact in question without reliance on inference or presumption." *Id.*, quoting *Walker v. Glickman*, 241 F.3d 884, 888 (7th Cir. 2001). Circumstantial evidence of a causal connection is evidence sufficient to raise

the inference that political discrimination or influence was the likely reason why Adkins was not promoted. *McCullough, supra*.

As for pretext, the Kentucky Supreme Court offered the following instruction in *McCullough*:

To meet her burden of persuasion, the plaintiff "must be afforded the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for [retaliation]." Proof that the defendant's non-retaliatory reasons are "unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." Consequently, "a plaintiff's prima facie case, combined with sufficient evidence to find that the defendant's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully [retaliated against the plaintiff]."

123 S.W.3d at 134 (citations omitted).

Finally, in the event that appellee offers the meritless argument that no witnesses were aware of evidence of political discrimination, the knowledge of lay witnesses (even assuming they possessed the expertise to recognize probative evidence) is not determinative here. The fact-finding is on what the record shows as the D.C. Circuit once explained: "The factfinder will have much more than the complainant's answer to a question posed in a deposition from which to infer that the challenged employment action reflected intentional discrimination." *Aka v. Washington Hosp. Center*, 116 F.3d 876, 889, fn 9, (D.C. Cir. 1997), *aff'd. en banc*, 156 F.3d 1284 (1998). Accordingly, we turn to what the facts show.

3. Political Influence Was A Substantial Factor In Adkins's Nonselection

Hershel Adkins, as two interview panels concluded unanimously, was and remains the best candidate for the position of operations manager for KCI at Little Sandy. The political influence and power of House Majority Leader Rocky Adkins corrupted the hiring process and disadvantaged Adkins in precisely the manner prohibited by KRS 18A.140. This is the only reasonable conclusion presented by the evidence.

The first two elements of proof are easily met. First, Adkins applied for promotion to operations manager for KCI at Little Sandy, a merit system position. Second, Adkins did not receive the promotion, despite the recommendations of two interview panels. This case really turns on whether the proof shows that a substantial factor for his nonselection was political influence, an analysis that must include consideration of the direct and circumstantial evidence including that of the arbitrary and pretextual nature of the decision-making process.

(a) Direct Evidence of Political Influence

First, this case presents direct evidence of political discrimination. Notwithstanding protestations to the contrary that Rep. Adkins's letter had no impact or was not considered in the decision-making process, Commissioner Thompson is clearly heard on the recording of her interview by Barney Kinman admitting candidly that Rep. Adkins's letter on Charles Pennington's behalf was "a factor" considered in his favor. (D4 @ 10:35:46-36:55 recording of LaDonna Thompson interview by Barney Kinman played

during Barney Kinman's hearing testimony). Since as the Supreme Court recognized in *Brewer v. United States*, 408 U.S. 501, 512 (1972), House Majority Leader Rep. Rocky Adkins's letter on behalf of Charles Pennington, who got the promotion, was a political act and an exercise of political influence.²⁸ No inference or presumption is necessary to determine that improper political influence was a factor in the promotion decision.

The inference that political influence was a substantial factor is strengthened by Thompson's misrepresentation to Kinman that Rep. Adkins had not called her. (D4-Barney Kinman @ 10:37:05-37:16 playing the recording of Kinman's interview of Thompson). She admitted at the hearing that Rep. Adkins had called her at her office to advocate for Charles Pennington's selection. (D3-LaDonna Thompson @ 2:21:49-22:38, 22:50-23:05).

(b) Hershel Adkins Was Better-Qualified

Hershel Adkins was better-qualified for the position than was or is Charles Pennington. When challenging a promotion decision, the showing of better qualifications goes toward proving an improper purpose. *McCullough*, 123 S.W.3d at 136-137. Two separate interview panels reached this

²⁸ House Majority Leader Rep. Rocky Adkins viewed the letter on behalf of Pennington as an official act of his legislative office, which is a direct admission and acknowledgement of the political influence brought to bear by the letter. *See Motion to Quash Subpoena of Representative Rocky Adkins/Motion for Protective Order* at p. 3 (asserting that "[l]egislators are prohibited from being summoned into court or administrative tribunal to answer questions concerning of their legislative conduct in representing their constituents.").

conclusion; their members explained the basis for their conclusions and their consideration of the five factors identified in 101 KAR 1:400.

The disagreement offered by Thompson and Erwin with the conclusions of the two interview panels cannot be reliably credited. First, neither Thompson nor Erwin understood what Hershel Adkins's security responsibilities have been for the last many years while he has worked for KCI at EKCC. Both Thompson and Erwin labored under the misconception that at EKCC, as at Little Sandy, there are present inside the KCI facilities a security staff contingent that directly and principally handles security issues. (D3-LaDonna Thompson @ 2:15:03-17:19; D3-James Erwin @ 10:55:45-56:55). This is incorrect; at EKCC the KCI staff directly handles the security procedures and there are no security staffers present in the workplace, as Gerald Profitt explained. (D1-Gerald Profitt @ 11:12:45-13:06, 11:13:07-52, 11:13:32-14:55, 11:14:58-15:40, 11:15:40-16:01, 11:16:08-17:27).

Second, Thompson conceded that the senior administration at a facility (such as Warden Joseph Meko and Deputy Warden David Green) would be better situated than her to judge Pennington's capabilities²⁹ and both came down clearly and emphatically in Hershel Adkins's favor. (D1 - Joseph Meko @ 1:54:00-29, 56:26-48; D1 - David Green @ 11:48:10 - 33). Third, both Thompson and Erwin stressed that an important qualification for the operations manager was to work closely with and be regarded as a team

²⁹ (D3 - LaDonna Thompson @ 3:39:03-30).

player by the Warden (D3-LaDonna Thompson @ 2:44:30-46:09; D3-James Erwin @ 12:23:28-56), yet they gave no credence to Warden Meko's explanation that Charles Pennington had proved "egocentric, narcissistic, and not a team player." (D1-Joseph Meko @ 1:55:42-55, 56:26-48).

Fourth, the interview panels had much more information available to them than the mere chart that Thompson relied on. Hille testified to the importance of Pennington's apparently negative evaluations from his supervisor, (D2-Neil Hille @ 11:55:05-10, 12:18:45-20:03, 20:03-21:30), and Cannady himself noted that the chart, which he prepared, did not report Hershel Adkins's supervisory experience in running his own business. (D2-Tom Cannady @ 5:23:00-25:10). It was impossible for Thompson to fully and fairly consider the applicable factors, because she operated on a fundamental misconception and misunderstanding about how security is handled at KCI at EKCC, and what Hershel Adkins's security responsibilities have been and what his experience therefore is. Furthermore, Thompson had available only limited information. A decision is arbitrary and capricious where it rests on incorrect information,³⁰ limited information and is contrary to the supposed aims.

(c) Deviations from Standard Procedures and Violations of KRS 18A.145(1)

³⁰ Thompson offered further incorrect information that she considered. She asserted incorrectly that Hershel Adkins had been beneficiary of a legislator's recommendation letter. (D3-LaDonna Thompson @ 2:21:20-45). She also claimed incorrectly that Warden Meko had selected Charles Pennington to be interviewed, an action that she offered as proof of Meko's support for her selection of Pennington. (*Id.* at 3:39:44-41:00, 3:41:05-42:02).

Courts have repeatedly recognized that deviations from standard procedures are indicative of an improper purpose. *E.g.*, *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 267 (1977) (“departures from the normal procedural sequence also may afford evidence that improper purposes are playing a role.”); *Norville v. Staten Island Univ. Hosp.*, 196 F.3d 89, 97 (2d Cir 1999)(evidence that the employer “departed from its usual employment practices and procedures” in dealing with the plaintiff supports an inference of discrimination); *Stewart v. Rutgers the State University*, 120 F.3d 426, 434 (3d Cir. 1997)(holding that a jury could properly find discriminatory motive based on university’s departures from its supposed standard procedures); *Ware v. Howard University*, 816 F.Supp. 737, 748-49, fn. 13 (D.D.C. 1993) (failure to follow policies relating to interviews for promotions found to be evidence of discriminatory motive). Perhaps the biggest deviation from standard procedures is the apparently unprecedented overruling of two separate interview panels, which is what happened here.

Another major and disturbing deviation from standard procedures are the two memos, one dated January 19, 2011 (Appellant’s Ex. 10) and the other January 26, 2011 (Appellant’s ex. 13) created by Erwin that contain false statements and thus establish violations of KRS 18A.145(1). Remarkably, Thompson acknowledged the false statements in these memos even while defending them. On top of these two memos is Erwin’s coercive

and wrongful command to Cannady to include an untrue statement in one of his memos (Appellant's ex. 9) that the second interview panel had merely found all three candidates to meet the minimum qualifications.

The presence of these major perhaps unprecedented deviations from standard procedures and repeated statutory violations coupled with Hershel Adkins's better qualifications as recognized by two separate interview panels, the incorrect assumptions and misconceptions relied on by Thompson and the admission that political influence was considered (as well as Thompson's attempt to hide the fact of Rep. Adkins's phone call to her) supports an inference of arbitrariness and a finding that political influence was a substantial factor in Hershel Adkins's nonselection.

(d) Credibility and Pretext Issues

There are the credibility issues and these go powerfully to the issue of pretext. A plaintiff can show pretext by reviewing such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence. *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997). Deviations from standard procedures and practices, in addition to proving discriminatory motive, likewise prove pretext. *E.g., Rudin v. Lincoln Land Community College*, 420 F.3d 712 (7th Cir 2005); *Bass v. Board of County Commissioners, Orange County*, 246 F.3d 1095, 1108 (11th Cir. 2001); *Brennan v. GTE Gov't Sys. Corp.*, 150 F.3d 21, 29 (1st Cir. 1998).

There are a number of direct and material conflicts in the testimony and in each instance they cut against appellee's explanation for its actions disadvantaging Hershel Adkins and ultimately resulting in his non-selection. The first regards the rationale for quashing Adkins's promotion after the first round of interviews at the very last minute. Erwin and Thompson say it was done because Cannady disclosed to Erwin that the basis for Hershel Adkins's selection was a threat by an unnamed employee to retire if Hershel Adkins did not receive the position. (D3-James Erwin @ 11:03:00-03:30; D3-LaDonna Thompson @ 2:25:40-2:26:09). Cannady denies saying any such thing. (D2-Tom Cannady @ 3:35:20-44).

The basis to credit Cannady's account and not Erwin's and Thompson's comes from several factors. First, the first interview panel did not base their decision to recommend Hershel Adkins on any threat of any kind by anybody; they all testified concerning their deliberations and that their decision was based on consideration of the relevant five factors. (D1 - David Green @ 12:01:50-12:02:04; D2 - Teresa Harris @9:46:10-58; D2 - Neil Hille @ 10:49:50-51:20, 11:30:20-54). It would be untrue and frankly silly for Cannady to discredit the interview panelists by informing Erwin that the panel based its decision on some threat. Accordingly, it is implausible to credit the account of Erwin and Thompson on this point.

Second, Erwin claimed that Cannady, after the second round of interviews, again reported that the basis for Hershel Adkins's selection was a

threat by an employee to retire and this time identified Billy Williams.³¹ Again, the second interview panel did not base their decision to recommend Hershel Adkins on any threat of any kind by anybody; as with the first interview panel, the second interview panelists all testified concerning their deliberations and that their decision was based on consideration of the relevant factors. (D1-Serena Waddell @ 2:20:42-48, 2:22:40-23:36, 2:23:38-24:44; D1 - Joseph Meko @ 1:53:06-32, 54:00-29, 58:42-58; D2 - Tom Cannady @3:42:40-43:38). And once again, it would be untrue and personally discrediting for Cannady to report that the second interview panel based its decision on some threat from Billy Williams or anybody else.

Third, Erwin's testimony that he only learned the name of the employee (Billy Williams) supposedly making the threats and coercing the recommendations of Hershel Adkins after the second interviews cannot be reconciled with his explanation that, despite the threats, he allowed Billy Williams to participate in the second round of interviews out of "a sense of fairness" and out of concern that Williams would initiate a Personnel Board proceeding if blocked from the second round of interviews. (D3-James Erwin @ 12:25:50-27:00).

It would be impossible for Erwin to cultivate any sense of fairness toward Williams or have any deliberations as to whether he should be able to participate in the second round of interviews since, according to Erwin, he did

³¹ Erwin emphasized that he got the name of the employee that was making the threats after the second round of interviews. (D3-James Erwin @ 11:20:04-15).

not know it was Williams that had supposedly made the threat until after the second round of interviews. This is the type of contradiction that suggests an imperfectly crafted pretextual explanation.

Erwin further undermined his own credibility with his assertions that attempts and/or threats by employees (such as Billy Williams' supposed threats to retire) to coerce their superiors (made to his superiors Warden Joseph Meko and Deputy Warden David Green) to make particular decisions (the selection of Hershel Adkins) is highly improper and would require a strong response from him. (*Id.*). Frankly, this makes sense. But faced with what he claims to be reliable information not just that an employee is engaging in this type misconduct but also that a Warden and a Deputy Warden have succumbed to it, what did Erwin do: nothing. Neither Green nor Meko was ever contacted by anybody regarding the actions and deliberations of the interview panels on which they served. (D1-Joseph Meko @ 1:56:26-48; D1-David Green @ 12:06:21-37). This too is the type of contradiction that indicates an imperfectly crafted pretextual explanation.

The invocation of security concerns as a driving force for the decision also is pretextual. There can be no doubt that security capabilities are relevant to the position. There can also be no doubt that the security concerns and backgrounds of the candidates were thoroughly examined and considered by the two interview panels. (D1-David Green @ 11:41:00-11:41:55, 11:44:10-11:44:30, 12:05:10- 12:06:21, 12:06:41-57, 12:07:40-57; D2-Teresa Harris @

9:35:10-51, 9:54:20-24; D1-Joseph Meko @ 1:53:06-32, 54:00-29, 58:42-58).).

There can be no doubt that the two panelists, Warden Meko and Deputy Warden Green, best situated to assess Charles Pennington both strongly recommended another candidate, Hershel Adkins. There can be no doubt that Thompson does not understand or know how security issues are handled at KCI at EKCC and that Hershel Adkins and the other staff there have total direct and daily responsibility for security issues, unlike at Little Sandy.

(*Compare* D3-LaDonna Thompson @ 2:15:03-17:19; D1-Gerald Profitt @ 11:12:45-13:06, 11:13:07-52, 11:13:32-14:55, 11:14:58-15:40, 11:15:40-16:01, 11:16:08-17:27).

All of that aside, there are further implausibilities. All of the documentation that supposedly fueled the heightened security concerns regarded incidents that occurred either well before Hershel Adkins's promotion was put on hold on December 10, 2010, or after Charles Pennington's promotion was "a done deal" on January 19, 2011. (*See* Appellant's exs. 26-35). If security were becoming such an overriding concern because of these incidents well before December 10, 2010, it would be plausible for them to be cited as grounds for another round of interviews or for rejected Hershel Adkins's recommendation by the first interview panel. But they were not; instead, the explanation was given that the threat by Billy

Williams to retire was the sole reason the second round of interviews were ordered. (D3-LaDonna Thompson @ 2:47:27-43).³²

After the second round of interviews was ordered, further implausibilities arise. Neither Cannady nor Hille got any explanation. (D2-Neil Hille @ 10:42:42-44:20; D2-Tom Cannady @ 3:34:05-35:16, 3:36:25-36:20). Security was supposed to be a paramount concern for the second interview panel, although this was not communicated by Erwin when he enlisted Warden Meko to serve on the panel. (D1-Joseph Meko @ 1:51:25-52:02, 1:52:35-46, 1:52:50-53:00). Cannady did not get any instruction from Erwin that security and/or supervision was a paramount concern. (D2-Tom Cannady @ 3:38:20-40:25). The information that was researched in the interim (after Adkins's promotion was put on hold and the second round of interviews) did not regard security or supervisory backgrounds or education but Erwin did report to Thompson that Charles Pennington was a resident of Elliott County and Hershel Adkins a resident of Morgan. (Appellant's ex. 7).³³ Any documented reference to security and/or supervisory background turns up only in Erwin's memo dated January 26, 2011, which is at least a week after Pennington's selection was "a done deal," was created to pad the file and

³² Thompson received her information regarding the alleged threat from Erwin. (D3-LaDonna Thompson @ 2:13:10-24:28). Since Erwin did not know the name of the employee that had supposedly made the threats, he could not have informed Thompson that it was Billy Williams that made the threat. Erwin emphasized that he did not get "the name" until after the second round of interviews. (D3-James Erwin @ 11:20:04-15).

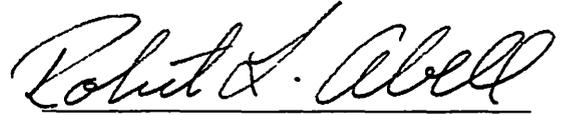
³³ Erwin and Thompson contradict on the relevance of this information. Erwin says a candidate's county of residence is relevant and material to the personnel process. (De-James Erwin @ 11:11:00-13:04, 12:28:26-29:00). Thompson says it is not and does not know why the information was included in Erwin's email. (D3-LaDonna Thompson @ 3:12:20-13:12).

contains false statements in violation of KRS 18A.145(1). The *post-hoc* appearance of this memo and its initial documented mention of security and/or supervisory background is properly regarded as pretextual. *Dollar General Stores v. Upchurch*, 214 S.W.3d 910, 917 (Ky. App. 2006)(affirming finding of pretext where documentation appeared only after substantive decision made). Furthermore, where the implausibilities continually arise in the explanations offered by Erwin and Thompson, the inference surely and reasonably follows that those explanations are pretextual.

Conclusion

The evidence shows that political influence was a substantial factor in Hershel Adkins's nonselection for the job of operations manager for KCI at Little Sandy. The promotion process shows substantial deviations from standard practice and procedure, as well as statutory violations in the form of untrue reports and statements created by Deputy Commissioner James Erwin that violate KRS 18A.145(1) that irrevocably taint the process. The inference of arbitrariness arises, particularly since a lack of information precluded full and fair consideration of the applicable factors. Finally, the multiple implausibilities, inconsistencies and irreconcilable testimony warrant the conclusion that pretextual explanations have been offered by appellee. Accordingly, Hershel Adkins should be granted full relief including reinstated to the position, pay and grade of operations manager for KCI as of December 16, 2010, backpay and all other relief necessary to make him whole.

Respectfully submitted,



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Certificate of Service

It is hereby certified that the original or a true copy of the foregoing was mailed, postage prepaid or hand-delivered this 2 day of February 2012 to the following:

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