COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2011 – 147

HERSHEL ADKINS APPELLANT

vs. **POST-HEARING REPLY BRIEF FOR APPELLANT**

JUSTICE AND PUBLIC SAFETY CABINET
DEPARTMENT OF CORRECTIONS APPELLEE

AND

CHARLES PENNINGTON INTERVENOR

* * * * *

Reply Statement of Facts

Appellee and the intervenor offer relatively limited recitations of fact but appellee does make some key concessions which buttress appellant's contention that Pennington's selection was made prior to Thompson or Erwin reviewing the "five factors" based on the chart or grid that was part of Appellant's ex. 8.

1. The Evidence of House Majority Leader Adkins's Meddling In Employment Matters at Little Sandy Correctional Complex

Both appellee and intervenor ignore the evidence and testimony presented at the hearing regarding House Majority Leader Rocky Adkins' meddling in, influencing and/or attempting to influence personnel decisions at Big Sandy. Some of this is cited in appellant's brief including the following:

(1) "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.*)." *Appellant's Brief at p. 4.*

(2) "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). Meko did acknowledge the prior involvement of House Majority Leader in hiring matters at Little Sandy. (*Id.* @ 1:59:15-2:00:15). *Appellant's Brief at pp. 22-23.*

Put simply there was substantial evidence presented from multiple witnesses at the hearing regarding House Majority Leader Adkins's meddling and/or involvement in personnel and employment issues at LSCC. The contrary contentions by appellee and intervenor are unfounded.

Appellee's footnote 4 in this regard is particularly and especially out of bounds. Citations to supporting testimony were provided in appellant's brief; the absolutely and completely erroneous assertions of appellee's counsel of a "glaring lack of citation" and others do not pass the Rule 11 test and are not well-taken to put it in the most benign light possible.

2. Appellee's Concession That Pennington's Selection Was All But Done By January 14

Appellee asserts at pp. 4-5 of its brief that the scenario that unfolded following the second round of interviews was as follows:

> Upon receipt of Cannady's memo on January 14, Appel called Erwin to verify that Hershel Adkins was the candidate selected for promotion. (D2 – Stephanie Appel @3:46:30-49:20). Erwin then informed Appel that Intervenor Pennington was the candidate selected for promotion, not the Appellant.

This concession by appellee confirms and buttresses appellant's argument that Pennington's selection was made on January 14, 2011, ***before*** Erwin or Thompson ever received Cannady's memo, which is Appellant's ex. 8, and before it was possible for either Erwin or Thompson to consider, based on the chart that was part of Appellant's Ex. 8, the "five factors" as they claimed to have done. Appellee's concession on this point forecloses any further debate or dispute as to whether Pennington's selection was "a done deal" before it was possible for either Erwin or Thompson to use the chart that it part of Appellant's ex. 8 to consider the "five factors."

Appellant set that argument forth on pages 22-23 of his brief, to wit:

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

> explanation regarding how, 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.

Accordingly and in light of appellee's concession, it cannot be found that the "five factors" were considered as part of the decision to select Pennington.

3. Appellee's Footnote 3

Appellee raises a very unusual point in footnote 3 of its brief regarding the evidence that the intervenor Pennington introduced (Intervenor's Ex. 2, the Barney Kinman report) without objection of any kind from appellee. It is true that objections from appellee and intervenor were sustained when Gerald Profitt was asked about a prior hiring process that resulted in intervenor Pennington being initially hired into KCI.

However, it is also true that appellee and intervenor subsequently undercut completely those objections by introducing Intervenor's Ex. 2 *in toto* without any objection or request for redaction. It is a curious strategy: a party introducing evidence (or acquiescing to introduction of evidence) that previously it had objected to, but that is what intervenor and appellee did with regard to Intervenor's Ex. 2. Having sponsored the introduction of this

evidence, neither appellee nor intervenor can complain about the record they labored to create. *Thomas v. Greenview Hosp., Inc.,* 127 S.W.3d 663, 671 (Ky. App. 2004), *overruled in part on other grounds, Lanham v. Commonwealth,* 171 S.W.3d 14, 20 (Ky. 2005)(remarking that a party cannot complain about admission of evidence whose admission it initiated).

4. Appellee's Concession that Erwin Did Not Know the Name of the KCI Employee That Had Threatened to Resign

The unraveling of the scenario testified to by Erwin and Thompson also centers substantially on irreconcilable inconsistencies regarding why Hershel Adkins's initial selection was overturned at the last second and why a second round of interviews was ordered in which Billy Williams was permitted to participate. Appellant discussed the adverse inferences that must be drawn from these disturbing incongruities on pages 11-19, 45-48 of his brief.

Appellee on page 2 of its brief confirms and buttresses those arguments with the following concession:

> Meanwhile, as the administrative hiring process proceeded between the November 17 recommendation date, when Hille recommended Adkins, and December 8, when the administrative hiring process was completed, Tom Cannady, Director of KCI, informed Deputy Commissioner James Erwin that an unnamed employee at KCI at LSCC threatened to quit if either he or the Appellant was not selected for the Operations Manager promotion. (Day 3 – James Erwin @ 11:01:02-01:57). Cannady further informed Erwin that the as-of-then unidentified employee's threat influenced the interview panel's considerations of the candidates. (*Id.* @ 11:03:00-03:30; 12:20:55-22:00).

As discussed in appellant's brief, the fact, as appellee acknowledges, that Erwin did not know the name of the employee that had supposedly made

this threat does great and disturbing damage to his credibility. These are discussed at pages 11-19, 45-48 of appellant's brief and need not be repeated here. Appellee does not address or contest appellant's arguments concerning the grave credibility problems raised for Erwin by his contradictory testimony.

Furthermore, Cannady directly and emphatically denies and disputes that he said anything of this sort to Erwin in December 2010. (D2 – Tom Cannady @ 3:35:45-36:05, 5:11:16-50). Erwin's account would also require rejection of the first interview panelists, Neil Hille, Deputy Warden David Green and Theresa Harris, all of whom indicated that their decision was based on 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).

The intervenor, of course, urges that Erwin's claim that Cannady told him that the first panel's decision was improperly influenced by a retirement threat should be credited. The intervenor, however, does not and cannot explain how that conclusion can be reached given (1) that it contradicts with the testimony of the first interview panelists; and, (2) the grave credibility problems raised for Erwin.

Intervenor also asserts incredibly that Cannady did not engage in any whistleblowing in his testimony, an assertion that ignores at least the multiple violations of KRS 18A.145(1) by Erwin in falsifying 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. Erwin

acknowledged these false statements, as did Thompson, neither expressing any concern whatsoever. (D3-James Erwin @ 12:55:40-58:30; D3-LaDonna Thompson @ 2:47:27-49:06); (D3-LaDonna Thompson @ 2:49:10-28; D3-James Erwin @ 11:30:11-31:30, 31:30-32:02).

Appellant otherwise relies upon the facts as stated in his principal brief.

Argument

1. Elimination of Political Influence from the Merit System Requires Elimination of Advantages Gained by Political Affiliation

Appellee's argument that KRS 18A.140 addresses only partisan political influence -- Democrat v. Republican - is a radical and limiting rewrite of the statute. First, 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.* Thus, the statutory purpose is not merely to address partisan political influence but all political influence; merit employees shall rise or fall on what they know and can do, not who they know or what powerful and influential legislator they can get to go to bat for them.

Second, it is an axiom of Kentucky law that statutes "shall be liberally construed with a view to promote their objects and carry out the intent of the

legislature[.]" *Workforce Dev. Cabinet v. Gaines,* 276 S.W.3d 789, 792-93 (Ky. 2008), *quoting* KRS 446.080(1). KRS Chapter 18 is remedial and "statutes which are remedial in nature should be liberally construed in favor of their remedial purpose." *Gaines, supra, citing Kentucky Ins. Guar. Ass'n v. Jeffers ex rel. Jeffers,* 13 S.W.3d 606, 611 (Ky. 2000). Appellee's argument is contrary to this principle, one which appellee does not acknowledge.

Third, the right of political affiliation includes, as has been noted, "[t]he right not to politically associate[.]" *Christy v. Pennsylvania Turnpike Comm'n,* 904 F.Supp.2d 427, 430 (E.D. Pa. 1995). In the context of KRS Chapter 18A, this means that classified employees like Hershel Adkins shall not be compelled to seek the support of legislators in order to advance their careers or even simply to preclude being disadvantaged, as occurred here. And this evil – this insidious undermining of a fundamental freedom – is what the Supreme Court described in *Rutan v. Republican Party,* 497 U.S. 62, 73 (1990):

> 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 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.

Appellee's proposal disregards the purpose of KRS Chapter 18A, disregards Kentucky law and seeks to have this Board compel merit employees to seek sponsorship of legislators or other politically-connected persons -- exactly what is supposed to be precluded. Accordingly, appellee's contention is without merit.

2. KRS Chapter 6 Does Not Authorize That Hershel Adkins Be Disadvantaged In the Classified Service On Account of Political Affiliation

The issue in this case is not whether or not House Majority Leader Adkins's conduct is or is not authorized by KRS 6.7444. The issue is whether the Department of Corrections itself violated KRS 18A.140 by allowing the House Majority Leader's exercise of political influence to taint the promotion process at issue in this case.

The Majority Leader's actions indisputably are an exercise of political influence. *Brewster v. United States,* 408 U.S. 501, 512 (1972). Majority Leader Adkins himself considered his efforts on Pennington so compelling that he was moved to incorrectly and unwisely characterize them as official legislative acts. *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."). While that characterization is incorrect as a matter of law, it does weigh

heavily and pointedly against the notion that the Majority Leader's actions can be discounted as *pro forma* and generic. Furthermore and to the point, even if Majority Leader Adkins acted lawfully, the evidence here shows that the Department of Corrections acted unlawfully and disadvantaged Hershel Adkins in violation of KRS 18A.140. Neither appellee nor intervenor cite any authority whatsoever that KRS Chapter 6 in any way excuses a violation of KRS Chapter 18A.

3. Appellee Agrees that "Substantial Factor" Is the Proof Element

Appellee engages in a rather extended discussion of the proof elements but ends up in the same place as appellant: KRS 18A.140(1) was violated if political influence was a "substantial factor" in Hershel Adkins's nonselection. *Compare Appellant's Brief at 33-34; Appellee's Brief at 15.*

Appellee's discussion, *Appellee's Brief at 12-16* of this Board's decision in *Patricia Martin v. Justice Cabinet, Department of Corrections,* 1992 WL 12598113 (KY PB), raises disturbing questions about the actual availability of any relief for Hershel Adkins or any other merit employee before this Board. The facts in *Martin* are, as appellee urges, "egregious" and betray "blatantly political" discrimination. Appellee's argument can be read to assert that the Board will not offer relief to Adkins, no matter what the evidence indicates, or that the Board has grafted improperly and without authority proof elements on top of KRS 18A.140. Neither, of course, is acceptable. Accordingly, appellee's argument is without merit.

3. The Multiple Deviations from Procedure, Violations of Law and Evidence of Pretext

Appellee betrays ignorance of the disturbing violations of procedure and law that were included in the hiring process at issue in this case.

First, appellee does not dispute that Erwin violated KRS 18A.145(1) by the false information he included in two memos, one dated January 19, 2011 (Appellant's Ex. 10) and the other January 26, 2011 (Appellant's ex. 13). Remarkably, Thompson acknowledged the false statements in these memos even while defending them. Compliance with the governing law would be considered the standard procedure here; the multiple violations of it are obvious deviations, a point that neither appellee nor intervenor can or does dispute.

Second, there 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. One asks is it standard operating procedure in DOC hiring processes for this type of wrongful conduct to occur by the Deputy Commissioner?

Third, appellee's assertion that interview panels are only overruled 5-10% of the time itself acknowledges that, in even the most routine cases, the practice is a substantial deviation from the norm. What smaller subset of 5% is a second unanimous interview panel disregarded is a further and more substantial deviation from standard procedure. What number of that also

includes multiple violations of KRS 18A.145(1) by the Deputy Commissioner? Surely this case is an outlier, both generally and particularly a wide departure from the procedures mandated by statute and regulation.

The disturbing departures what are supposed to be standard practice and procedure offer powerful proof of both discriminatory purpose and pretext. *Brief for Appellant at 42-50.* The Supreme Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000), offered this apt description of this evidence's power:

> Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. See *id.* at 517 ("Proving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination"). In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." *Wright* v. *West,* 505 U.S. 277, 296, 120 L. Ed. 2d 225, 112 S. Ct. 2482 (1992); see also *Wilson* v. *United States,* 162 U.S. 613, 620-621, 40 L. Ed. 1090, 16 S. Ct. 895 (1896); 2 J. Wigmore, Evidence § 278(2), p. 133 (J. Chadbourn rev. ed. 1979).

Indeed, to "be realistic ... [t]he most reasonable inference for jurors to draw, once they disbelieve the defendants' proffered explanations" is that the employer indeed acted wrongfully. *Kocacevich v. Kent St. Univ.*, 224 F.3d 806, 839 (6th Cir. 2000)(Gilman, J., concurring in part and concurring in the judgment).

The implausibilities, incongruities and inconsistencies offered to explain the decision-making process coalesce powerfully in proof of the charged violation of KRS 18A.140. Furthermore, it was impossible for the "five factors" to have been reviewed by the time Erwin informed Appel that Pennington was the choice on January 14, 2011, before Erwin received Cannady's memo and the chart that was part of it, Appellant's ex. 8. The most reasonable and coherent conclusion is that an imperfectly crafted explanation for a decision-making process has been offered in an attempt to obscure the political influence that drove Pennington's selection.

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 instated 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

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