COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-264

JOYCE A. FRY **APPELLANT**

VS.

FINAL ORDER
SUSTAINING HEARING OFFICER'S
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER

ENERGY AND ENVIRONMENT CABINET **APPELLEE**

AND

STEPHANIE HAYES **INTERVENOR**

*** *** *** *** ***

The Board, at its regular June 2016 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated May 4, 2016, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be, and they hereby are approved, adopted and incorporated herein by reference as a part of this Order, and the and the Appellant's appeal is therefore **DISMISSED**.

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this 17th day of June, 2016.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Leesa B. Moorman
Ms. Joyce Fry
Ms. Sherry Butler
Ms. Lynn Gillis
Ms. Stephanie Hayes

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This matter was brought for an evidentiary hearing and presided over by E. Patrick Moores, Hearing Officer. The proceedings were recorded by audio-video equipment pursuant to the authority found at KRS Chapter 18A.

The Appellant, Joyce A. Fry, was present and was not represented legal counsel. The Appellee, Energy and Environment Cabinet, was present and represented by the Hon. Leesa B. Moorman. The Intervenor, Stephanie Hayes, was present and was not represented by legal counsel.

The appeal arises out of a rejection of the Appellant's application for an Environmental Biologist Supervisor position in the Water Quality Certification Section of the Division of Water in the Energy and Environment Cabinet. The position was awarded to a candidate alleged by the Appellant to have no experience in the field of water quality certification.

The Appellant alleges that the Cabinet did not comply with the statutory requirements of KRS 18A.0751(4)(f) nor with the administrative regulatory requirements set forth at 101 KAR 1:400, when it selected another person, Stephanie Hayes, for the position.

I. STATEMENT OF THE CASE

This appeal was filed on October 14, 2015, to a determination made by the Division on September 24, 2015, rejecting her grievance concerning the rejection of her application for the supervisory position. The Appellant sought to have the selection voided and the appointment process redone.

A preliminary hearing was conducted before a Hearing Officer of the Personnel Board on December 10, 2015, and an Interim Order was issued by the Board's Executive Director on December 22, 2015, scheduling the matter for an evidentiary hearing on February 2, 2016, and putting Stephanie Hayes on notice that her promotion to the supervisory position was being challenged, and of her right to intervene in the appeal to defend her position. By letter dated December 30, 2015, Stephanie Hayes requested to be allowed to intervene in the appeal, which was approved by order of the Personnel Board entered on January 13, 2016.

The hearing was conducted on February 2, 2016. The issue was whether the Division of Water failed to comply with the statutory and administrative regulatory requirements in making the promotion. The Appellant had the burden of proof by a preponderance of the evidence. At the close of all the proof, the parties declined to give closing statements, and the matter was submitted for determination.

II. SUMMARY OF THE EVIDENCE

1. The first witness for the Appellant was **Chloe Brantley**, an Environmental Biologist Consultant with the Water Quality Certification section, where she has worked for the last six years. She testified that Stephanie Hayes is her fourth supervisor, but that most of the time her section had no supervisor, and most of the time she and Joyce Fry did the work themselves with no supervision. Ms. Brantley testified that they worked with numerous other state and federal agencies and coworkers from other agencies. She further testified that the water certification projects involved such technical information that it took her two years to learn the basics and six years to learn all the regulations and project requirements.

2. Ms. Brantley described spending half her work time training others on the water quality process. She testified that she is regularly consulted by people in other agencies and persons developing construction projects on how to permit, processing programs, and managing projects. She described her daily work averaging more time training people with other agencies and responding to inquiries from public concerns than she does on any actual projects. She said the section has lost a lot of experienced people, who have been replaced by inexperienced staff.

3. Ms. Brantley testified that the section staff normally assigned the work among themselves according to who had the skills to do the work needed. In the past year the role of Environment Biologist Supervisor had been vacant. The section's manager did all the performance evaluations and signed the timesheets. She said that their staff was short-handed with herself and Fry and two entry-level employees, a staff member who had been with them two years, and Ms. Hayes.

4. Ms. Brantley testified that her section oversees and issues certifications for construction and development projects that cross or impact a stream of water or a wetland within the guidelines of the Clean Water Act. She described the process of their section as being contacted by a developer and that they determine what's on the property and advise as to the requirements to be performed to assure compliance with the law pertaining to water quality in order to have the project certified. She acknowledged that her section has the power to impact virtually every construction project in the state, and that they currently had some 700 projects requiring their involvement. She explained that due to the workload, many projects do not get certified and many that do receive the certification are politically driven.

5. Ms. Brantley testified that Stephanie Hayes came to the section virtually from her having completed graduate school, and that she considered Ms. Hayes to be nothing more than an entry-level employee, and that it didn't help that she was put in a supervisory position not knowing the process for performing the work or the regulations required to be followed. She said she believed that Ms. Hayes did not have the skills or experience. She said they filed a grievance against the hiring of Ms. Hayes, which was denied.

6. **Stephanie Hayes** testified that she learned of the opening for the Environmental Biologist Supervisor position within the Water Certification Section from a friend that she went to college with that was now working with the Division of Water. She testified that she believed she was qualified for the position as she had supervisory experience in water projects and different areas dealing with ecology while she was in graduate school and conducting ecological research involving the Clean Water Act. She testified that she had wetland experience through field work associated with her research, although in non-regulatory positions. Her college degree is a Bachelor of Science in Biology with an emphasis on ecology from Northern Kentucky University and her graduate degree is a Master of Science in Forestry with an emphasis in ecology, from the Southern Illinois University. After completing her work on her master's degree, she went to work on an ecological project in Colorado, followed with work in North Carolina. Her work experience during and after her school work demonstrated 12 years as an environmental biologist with nine years' experience as a Water Quality Project Manager.

7. Ms. Hayes was living in North Carolina at the time she applied for the position as Environmental Biologist Supervisor. She also applied for other positions with the state. She said that she did not know what the hiring committee reviewed concerning her application. She said she was contacted by Kathy Clarkson, the Administrative Assistant of the Water Quality Branch, to schedule an interview. She was eventually hired to supervise the issuance of the Water Quality Certification permits. She testified that her education and experience supervising students in college research projects and working with other government agencies were the key factors resulting in her being hired for the Water Certification Supervisor position. She stated that she is able to determine the requirements through the regulatory process, but that the site visits present a much more rigorous process. She described the permit application going first to the Flood Plains Branch management to review. When that agency review is completed, it is determined if more work on the application is needed. If so, it then comes to the Water Certification section. She said the staff does the technical review of the application and the site

visits with the applicant. She said she comes in on the very end of the process to sign off on the certification. She described the process can take up to a year to get the certification out, as they have work with consultants and that site visits to larger pieces of property can take more time to complete.

8. Ms. Hayes testified that her start date was November 1, 2015, and that there was a large backlog of applications, and that her project managers are much overloaded with work. She testified that most of her work has been spent developing standard operating procedures, working on processes to increase communications, and studying other state programs in an effort to make their program more efficient. She described spending a large amount of time training the staff on procedures documenting the TEMPO database, and reducing the backlog. She also described that she has been spending time going out in the field. She acknowledged that she had little background in determining wetlands, but that her staff has experience and she uses them.

9. **Andrea Keatley** is the Manager of the Water Quality Branch in the Division of Water. Ms. Keatley testified that she had a degree in Biology with emphasis on Natural Resources Management, and a Master's degree in Public Health. She spent 15 years with the state working in air quality and the past 13 months prior to the hearing as Branch Manager of the Water Certification Section. She remarked that she had no experience in water regulations prior to coming to the Division of Water. She said she brought to her position in management a skill set in processing.

10. Ms. Keatley was on the interview committee for the supervisory position, stating that she had previously served on over ten interview panels, and that she was very familiar with the "Five Factors" required in the selection process. She testified that two candidates rose as her top choices for the position, and she only contacted the references on the résumés of those two candidates. Fry was not in that category. Ms. Keatley acknowledged that Ms. Fry had ten years' experience in Water Certification, but she selected the top two candidates based on matters other than solely on experience. Ms. Keatley said the scoring process from the questions asked during the interviews had specific needs addressed. She said that she was looking for characteristics other than just experience and she scored the candidates higher for leadership skills based on their answers to the interview questions. Ms. Keatley said that experience was not as key to her as education and the characteristics of leadership that she was looking for to fill the position.

11. Ms. Keatley was cross-examined extensively by Ms. Fry about the importance of experience and seniority in selecting a supervisor, and she repeatedly testified that while experience was important, she was more interested in the demonstrated leadership qualities. She testified that she had limited knowledge when she started, but that she knew where to go ask questions and how to find answers. She explained that Ms. Fry gave very short and limited answers during her interview and did not elaborate on her skills that would disclose qualities of a good supervisor. Ms. Keatley added that she could not get a good feel for Ms. Fry's ability to be a supervisor.

12. Ms. Keatley said that the person selected as the supervisor would not necessarily be teaching the program as much as she would be leading the program. The section already had experienced staff, and she was looking for someone to lead the program through skill sets of educational knowledge, organization ability, leading others who already know the program and have the ability to develop protocols such as standard operating procedures, and understanding the regulations. Ms. Keatley said she expected that through on-the-job experience, the person selected would learn the processes as she worked.

13. Ms. Keatley said that she saw that the section works with other agencies and that she was looking for someone capable of developing protocols with those agencies. She said she wanted someone who could organize and strengthen the procedures of working with the other agencies, and that Ms. Hayes has already been able to bridge relationships with other agencies. She testified that Ms. Hayes was already at work developing the procedures and working through the processes and regulations. She said that there are resources available inside and outside the section to assist a supervisor in finding answers, and that Ms. Hayes demonstrated skills sets that would allow her to ask questions and learn answers.

14. Ms. Keatley testified that although she was aware of Ms. Fry's years of seniority and experience, she was also aware of criticisms of Ms. Fry from the field staff, stating that she had received complaints from the field, where they had requested information which they did not receive. She testified that Ms. Fry's work with other agencies did not show leadership skills, and also stated that she and Ms. Fry have had arguments in her office.

15. Ms. Keatley testified that she asked the same questions to all the interviewees, and that she looked for specific examples of how each candidate reached their responses. She said she reviewed the résumés, application and cover letters of each candidate before their interview. She testified that Ms. Hayes really stood out in her interview. She also did reference checks only on Stephanie Hayes and Chloe Brantley, as they were her top two candidates after the interviews. Based on the leadership skills demonstrated in the interviews and her education including graduate work in biological sciences, which was acceptable as a substitute for experience, Ms. Keatley recommended that the position be offered to Stephanie Hayes.

16. **Sarah Gaddis** is the Environmental Controls Manager with the Cabinet. She served on the hiring interview committee with Ms. Keatley. She did not know Ms. Hayes prior to the interview. She said that the supervisor's position was not all technical in nature. Ms. Gaddis said that she is in a position where she had limited experience, and that she has been involved in many technical programs, and that the regulations can be learned and understood, and that a person lacking experience, but with appropriate leadership skills would be able to supervise and mentor staff. She testified that she rated Ms. Brantley higher even though she only had six years' experience, due to her project management experience. However she was impressed by Ms. Hayes' education and regulatory experience.

17. Ms. Gaddis said that she believed that the interview gave a true impression of who the person was, and that Ms. Fry's responses did not relate well to the questions during her interview. She said she felt Ms. Fry's answers during the interview were very abrupt and confrontational. Ms. Gaddis testified that Ms. Hayes' overall responses to the interview questions were very impressive in her extent of knowledge. Ms. Gaddis said that she and Ms. Keatley met after the interviews and discussed the candidates, and they both agreed that Ms. Hayes and Ms. Brantley were the top candidates. Ms. Gaddis said it was her opinion that Ms. Hayes demonstrated an excellent leadership ability to analyze difficult issues and that she had experience in a "quasi-government" environment background that indicated she would perform well in the state government.

18. **Nina Hockensmith** is the Assistant Director of the Division of Environment Program Support where she has served a little over a year providing human resources support, and has human resources experience with the Commonwealth of Kentucky for more than 15 years. She testified that she received a request for an Environmental Biologist Supervisor in the Water Certification Section and was on the requisition team to review the selection of the candidate for the position. She introduced the Job Specification for the position which stated that consideration is given for graduate work in the biological, environmental or natural sciences as a substitute for the required experience on a year-by-year basis. Ms. Hockensmith reviewed the Position Action Request for the vacancy to be filled and the appointment of Ms. Hayes to the position.

19. Ms. Hockensmith said that she researched the process of the appointment of Ms. Hayes to the supervisory position and that she was qualified for the position. Ms. Hockensmith also testified that she was satisfied that the factors for consideration mandated by statute and the Kentucky Administrative Regulations were met in the selection of Ms. Hayes. She reviewed the documents relating to the position and the selection process, and that the appointment of Ms. Hayes complied with the legal requirements and criteria for the selection of the candidate for the position.

20. The Appellant, **Joyce Fry**, declined to testify on her own behalf. Additionally, the Intervenor, Stephanie Hayes, declined to offer further testimony.

III. FINDINGS OF FACT

1. KRS 18A.0751(4)(f) provides administrative regulations shall be formulated "For promotions which shall give appropriate consideration to the applicant's qualifications, record of performance, conduct, and seniority. Except as provided by this chapter, vacancies shall be filled by promotion whenever practicable and in the best interest of the service."

2. 101 KAR 1:400(1) states that "Agencies shall consider an applicant's qualifications, record of performance, conduct, seniority and performance evaluations in the selection of an employee for a promotion." These considerations to be given are commonly referred to as the "Five Factors."

3. The Water Quality Certification Section of the Division of Water issues permits approving development and construction projects as being in compliance with the Clean Water Act and the EPA guidelines concerning any impact on waterways and wetlands.

4. The Water Certification Section had operated for more than a year without a supervisor, and the staff of the section assigned the work amongst themselves, according to their skills to meet the required project under consideration for a permit. Chloe Brantley, an Environmental Biologist Consultant with the Water Quality Certification section, testified that while they are required to review the application for a permit within thirty days, the actual certification process can take up to a year, resulting in huge added costs to the developer or the contractor.

5. It was determined that the section supervisor would be opened for applications for the position. Andrea Keatley, Branch Manager, and Sarah Gaddis, the Environmental Controls Manager with the Cabinet, would serve together on the hiring committee. Eight candidates were narrowed down to two by Keatley and Gaddis. One finalist was Brantley, who had served within the section for six years. The other candidate was Stephanie Hayes, who had obtained both her Bachelor's and Master's degree in Biological Sciences and worked with several biological research organizations in Colorado and North Carolina. Hayes was determined to be the best candidate and received the job offer.

6. Stephanie Hayes' background was that she had wetland experience through field work associated with her college research, although in non-regulatory positions. Her college degree is a Bachelor of Science in Biology with an emphasis on Ecology from Northern Kentucky University and her graduate degree is a Master's of Science in Forestry with an emphasis in Ecology, from Southern Illinois University. After completing her work on her Master's degree, she went to work on an ecological project in Colorado, followed with work in North Carolina. Her work experience during and after her school work demonstrated 12 years as an Environmental Biologist with nine years' experience as a Water Quality Project Manager.

7. Both Brantley and the Appellant, Joyce Fry, objected to their not receiving the offer. Fry brought this appeal, alleging that the hiring process did not give proper consideration to her 10 years of experience in the section. Both Fry and Brantley viewed Hayes as obtaining the position straight out of graduate school without the necessary experience to perform the duties required in the position.

8. Fry was argumentative in her cross-examination of Keatley and Gaddis, who served on the hiring committee, arguing throughout her questioning of them that her 10 years' experience within the section was the most important factor for the position. Keatley and Gaddis testified that they were more interested in the applicant's qualifications of skill sets demonstrating leadership qualities, and educational qualifications were counted as the equivalent of experience on a year-by-year basis. Additionally, Keatley noted that Fry failed to show the skill sets of leadership they were seeking during her interview, and Gaddis testified that Fry was

abrupt and confrontational during the interview, which was the same characteristic she exhibited during her cross-examination of Keatley and Gaddis during the hearing.

9. The scoring done of the candidates, as reflected in the testimony of Keatley and Gaddis, and in the copies of their scoring the candidates, discloses that they gave due consideration to the factors required by the statutory and regulatory mandates, and the persuasive impact was the educational qualifications and the experience associated with the educational achievements, properly allowed as a substitute for experience. Based on said evidence, the Hearing Officer finds that appropriate consideration was allowed all the candidates and that the decision to select Stephanie Hayes is supported by the evidence.

IV. CONCLUSIONS OF LAW

1. Pursuant to KRS 18A.0751(4)(f) and 100 KAR 1:400, the Cabinet must consider the following factors in choosing to promote a candidate: (1) qualifications, (2) performance record, (3) conduct, (4) seniority, and (5) performance evaluations; these are the five mandatory criteria. The term "qualifications," as used in 101 KRS 1:400, includes "any quality, knowledge, ability, experience, or acquirement that fits a person for a position, office, profession, etc." *Cabinet for Human Res. v. Kentucky State Personnel Bd.*, 846 S.W.2d 711, 715 (Ky. App. 1992).

2. The evidence establishes that the hiring and reviewing committees gave appropriate consideration to the statutory and regulatory factors in selecting Stephanie Hayes for the position of Environmental Biologist Supervisor because of her leadership skills demonstrated in the interview and her educational qualifications, which the Cabinet considered as the equivalent to experience on a year-by-year basis.

3. The hiring committee's decision is within the consideration allowed by law in the Commonwealth of Kentucky. In the matter of *Cabinet for Human Resources v. Kentucky State Personnel Bd., supra,* the court reviewed education and experience as part of the qualifications to be considered, and ruled:

> Therefore, we conclude that qualifications mean education and experience and we take the view that these should be the guideposts for every step in our merit system including but not limited to entry classification, promotion, salary grade establishment, etc., for to do otherwise would be to attain nothing more than some degree of mediocrity. To argue that state government should not consider education and experience in personnel policies of any nature whatsoever is to say that we do not seek the best possible people to serve the Commonwealth.
> 846 S.W.2d at 715.

V. RECOMMENDED ORDER

Having considered and weighed all the evidence and the laws of the Commonwealth of Kentucky, and based upon the foregoing findings of fact and conclusions of law, the Hearing Officer recommends to the Personnel Board that the Appeal of **JOYCE A. FRY VS. ENERGY AND ENVIRONMENT CABINET (APPEAL NO. 2015-264) be DISMISSED.**

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

Each party has thirty (30) days after the date the Personnel Board issues a Final Order in which to appeal to the Franklin Circuit Court pursuant to KRS 13B.140 and KRS 18A.100.

ISSUED at the direction of **Hearing Officer E. Patrick Moores** this 4th day of May, 2016.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Leesa B. Moorman
Joyce A. Fry
Stephanie Hayes