

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2020-062**

DOUGLAS ALTON

APPELLANT

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

VS.

TRANSPORTATION CABINET

APPELLEE

** ** ** ** **

The Board, at its regular December 2020 meeting, having considered the record, including the Findings of Fact, Conclusion of Law and Recommended Order of the Hearing Officer dated October 22, 2020, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusion of Law and Recommended Order of the Hearing Officer be altered as follows:

A. **Add Findings of Fact paragraph 6:**

6. Even given the Board's agreement that a three-day suspension is neither excessive nor erroneous and that the Agency acted properly within its discretion in imposing such action, the Board is mindful of the fact that the Appellant was placed in a very difficult position. Property damage can be reasonably expected when using heavy equipment, no matter how skilled the equipment operator. Given that risk of property damage, heavy equipment operators in the public and private sector often work with another employee to assist the operator and help "spot" potential problems. Here, the Agency appears to have

regularly asked the Appellant to operate heavy equipment in precarious circumstances without the benefit of a spotter. While the Board accepts a suspension is appropriate in this incident because of the Appellant's multiple previous incidents involving property damage, the Board would strongly recommend that the Agency encourage the use of a spotter when using heavy equipment and specifically notes that the absence of appropriate assistance may be considered in similar situations in the future. A three-day suspension is appropriate in this case; however, the Board is concerned about the possibility of an Agency failing to provide an employee with appropriate equipment/support/manpower and then penalizing that employee for the foreseeable consequences of that failure.

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer, as Altered, are approved, adopted and incorporated herein by reference as a part of this Order, and Appellant's appeal is **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 16th day of December, 2020.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
SECRETARY

A copy hereof this day mailed to:

Hon. Will Fogle
Douglas Alton
J.R. Dobner

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2020-062**

DOUGLAS ALTON

APPELLANT

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

TRANSPORTATION CABINET

APPELLEE

** ** * * *

This matter came on for a telephonic evidentiary hearing on July 31, 2020, at approximately 9:30 a.m., EDT, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Stafford Easterling, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A. The parties agreed to appear telephonically in accordance with KRS 13B.080(7).

The Appellant, Douglas Alton, was present by telephone and was not represented by legal counsel. The Agency/Appellee, Transportation Cabinet, was present and represented by the Hon. Will Fogle, who appeared by telephone. Also present as Agency representative was Priscilla McCowan, who also appeared by telephone.

At issue was the Agency's issuance of a three (3) day suspension to the Appellant. The Agency was assigned the burden of proof on the suspension. Therefore, the Agency had to establish by a preponderance of the evidence that there was just cause for the Appellant's suspension and that such suspension was neither excessive nor erroneous.

BACKGROUND

1. Following the waiver of opening statements by both parties, the Agency called the Agency Representative, **Priscilla McCowan**, as its first witness. McCowan is currently employed as a Human Resources Administrator for the Transportation Cabinet, Employee Compliance Branch, a position she has held since 2012.

2. The witness' primary duties include investigation and drafting of employee disciplinary matters. She receives complaints of possible violations of policy by Transportation Cabinet employees, investigates those complaints, drafts a disciplinary letter including a recommendation as to the appropriate level of discipline, and then submits that draft letter to the Appointing Authority for consideration and final approval.

3. In this case, the witness received a Request for Corrective or Major Disciplinary Action from District 6, the Appellant's home district, on January 12, 2020. In that request, the leadership of District 6 alleged that the Appellant, a Highway Technician I with District 6 of the Department of Highways, was negligent in the performance of his job duties. Specifically, as incorporated into the February 10, 2020 letter imposing a three (3) day suspension on the Appellant, the Agency alleged:

Poor Work Performance. On November 22, 2019, you were working with the Carroll County maintenance crew, performing roadside tree cutting and using a bucket truck. As you were lowering the bucket on the truck to cut lower level limbs, the clevis hook hit the top of the side compartment of the truck. Repairs to the bucket truck were approximately \$500.00.

4. The core controversy to be resolved in this evidentiary hearing is whether the Appellant's use of his assigned equipment, the bucket truck, on November 22, 2019, violated Agency policy and, if it did, the appropriate level of discipline for the Appellant's violation of policy.

5. The witness testified about the February 10, 2020 suspension letter and the thirteen (13) pages of documents attached to the letter, hereby entered into the record as **Appellee's Exhibit 1**. Included in the documentation attached to the suspension letter is an accident report form, pictures from the accident, minutes from a Loss Control Committee Meeting where they discuss the November 22 incident, pictures of the bucket truck used by the Appellant, an estimate that repairing the damage cost approximately \$500, and a written statement from the Appellant where he responds to the allegations against him. The witness said that she considered the Appellant's statement when recommending discipline against him, including his statement that:

I had a small accident that occurred during my use with my crews aerial lift truck on November 22, 2019 in carroll (sic) county. I'm sure you have a copy of the accident report. I just wanted to have a little input on what I feel like needs some attention. I've had a few incidents during my four plus years working for the transportation cabinet (sic) which is unfortunate, but I've always filled out the incident reports and have had meetings about them which ive (sic) always been informative and honest at. Several times accidents could have been "swept under the rug" so to speak, or I could've even not said anything and "blame it on the next guy." I think that should count for something.

* * * *

The few small incidents ive (sic) had all couldve (sic) been avoided yes, but they couldve (sic) always been worse. We have to work in

dangerous environments many times and have to know what to do & when. Take the bucket truck for example, your suspended several feet in the air and running a chainsaw all while traffic is driving past. You have to keep your focus on where the limbs/logs your cutting are falling, where your bucket boom pole is, keep an eye on everybody down below, and pay attention to what vehicles might be driving past. One bad move or cut from a tree & you or your coworkers could be toast.

6. The witness testified about the policy the Agency alleges the Appellant violated. She identified and discussed the applicable provisions of Transportation Cabinet General Administration & Personnel, Employee Conduct, General Conduct, codified in GAP-801, which is hereby entered into the record as **Appellee's Exhibit 2**. She determined that the Appellant failed to engage in acceptable conduct by having an accident, specifically the requirement that he ensure that the work of the Cabinet is efficiently and effectively accomplished by: carrying out assignments as directed by their supervisors or requesting meetings with their supervisors to seek further direction or discuss problems with the assignments.

7. McCowan addressed the Appellant's prior disciplinary history, which served, in part, as a basis for her recommendation to impose a three-day suspension. She identified and discussed a one-day suspension issued to the Appellant on July 30, 2019, an April 19, 2018 Written Reprimand, and a December 8, 2016 Written Reprimand, which are hereby entered into the record as **Appellee's Exhibits 3, 4, and 5**, respectively, along with the documentation attached thereto. Importantly, the three previous disciplinary actions all involve incidents of the Appellant causing property damage with his state-issued equipment.

8. Lastly, the witness discussed the variables that went into her decision to recommend a three-day suspension for the Appellant. She began by noting that, generally speaking, the Appellant is considered a "very good employee." She testified that she relied on principles of progressive discipline in reaching her decision, stating that discipline is used "to get that employee's attention." She noted that this was the fourth incident in the Appellant's history with the Agency that resulted in property damage, including an incident in each of the last three years, due to behavior she described as "careless." She said that they are trying to teach the Appellant the importance of assessing the entire situation before taking action.

9. In cross-examination, the Appellant verified that the Appellant's property damage incidents had been when he was alone, so he had not placed any of his coworkers at risk. Upon questioning from the Hearing Officer, the witness clarified that the Agency is alleging that the Appellant used the bucket truck in an unauthorized manner by lowering the lift bucket to a point that is lower than the truck, which is a policy violation. Additionally, the Agency alleged that the Appellant committed another violation by damaging his state vehicle while operating the bucket truck in an unauthorized manner. After McCowan's testimony, the Agency concluded its case in chief.

10. The only witness in the Appellant's case in chief was Appellant himself, **Douglas Alton**, and the Appellant testified in the narrative form. He began by discussing his disciplinary history and the factual circumstances underlying the instant three-day suspension. He clarified that a small clevis hook, that he was unaware that was hanging from his boom pole, clipped and dented the top of the metal toolboxes attached to the bucket truck. He said that he did not even notice he hit the truck until he finished his assignment and climbed down from the bucket. He instantly took a picture of the damage and reported the incident to his supervisor. He acknowledged hitting the truck, stated that it was an accident, and noted that he promptly followed the policy for reporting a property damage incident.

11. The Appellant disputed the Agency's assertion that he violated policy by lowering the bucket lower than the truck. He noted that he used the bucket in a manner consistent with how he was trained and pointed out that the boom pole did not hit the truck, but, instead, a clevis hook that he was unaware of. He acknowledged the factual accuracy of the suspension letter otherwise and argues that the three-day suspension was excessive. He believes that a one-day suspension would be more appropriate under the circumstances. Thereafter, the Appellant closed his case-in-chief.

FINDINGS OF FACT

1. On February 10, 2020, the Appellant was issued a three-day suspension from his position as a Highway Technician I in the Kentucky Transportation Cabinet, Department of Highways, District 6, for poor work performance. Specifically, on November 22, 2019, the Appellant is alleged to have hit the top of the toolbox/side compartment of his work truck with a clevis hook while performing roadside tree cutting using a bucket truck in Carroll County, causing approximately \$500 in damage. The Hearing Officer notes that many of the facts set out in the suspension letter have been agreed to by the parties; the Appellant disputes the assertion that he used the bucket truck in a manner that violated policy, but acknowledges that he damaged the truck while performing his duties.

2. The Appellant filed the instant appeal on February 24, 2020, asserting that the disciplinary action was not issued upon just cause and was excessive or erroneous. The Appellant argues that the damage was done accidentally and that a three-day suspension is excessive.

3. The Agency argues that a three-day suspension is appropriate because this is the Appellant's fourth incident involving damage to state property in the last four years, including incidents in 2016, 2018, 2019, and 2020. They further argue that the progressive discipline supports escalating the severity of disciplinary actions to encourage the Appellant to more fully assess the entire situation before taking action. The Appellant argues that: 1) he is a very good employee, 2) he uses heavy machinery more often than other employees, and he is more likely to have an incident, and 3) he is already working towards improving his performance.

4. As set out above, the core controversy to be resolved in this appeal is whether the Appellant's use of his assigned equipment, the bucket truck, on November 22, 2019, violated Agency policy and, if it did, what is the appropriate level of discipline for the Appellant's violation of policy. Given the evidence of record, including the Appellant's acknowledgements, the Hearing Officer finds that the Appellant violated Transportation Cabinet GAP-801 on November 22, 2019, in failing to effectively carry out an assignment as directed by his supervisor due to damaging his assigned equipment. Accordingly, the Agency had just cause to discipline the Appellant for a policy violation; still at issue is whether the discipline imposed, a three-day disciplinary fine, was excessive or erroneous.

5. Given the Appellant's prior disciplinary record, including three previous incidents involving property damage since 2016, the Hearing Officer finds that a three-day suspension is neither excessive nor erroneous and that the Agency acted properly within its discretion in imposing such action.

CONCLUSIONS OF LAW

1. The Agency's complaint with Appellant has to do with (his) asserted "lack of good behavior." 101 KAR 1:345 does not present examples of what should be considered as "lack of good behavior" nor does the regulation (or the underlying statute) provide the level of penalization to accompany the determination of poor performance, as it cannot. This is left to management's discretion, with the factors deemed relevant thereto summarized in the statutorily-mandated written notice assessing the penalty. Stated differently, the grounds for disciplining a merit employee must be set out in the letter and due process principles mandate that justification for any penalization be predicated upon those grounds. The basis for any penalization, and likewise any challenge thereof, must be statutory, regulatory, fact-based, or a combination of these. KRS 18A.095 (1), (8).

2. In the immediate appeal, many of the facts are largely uncontested. The parties agree that the Appellant damaged a piece of state equipment during the performance of his duties. Thus, just cause for a penalization was established and the primary question before the Hearing Officer is whether the Appellant's three-day suspension was excessive.

3. The evidence establishes that the Appellant was a skilled employee with an aptitude for operating heavy machinery and takes on difficult assignments by himself. The evidence also establishes that the Appellant could improve his performance by being more fully aware of the instant situation when he is operating state equipment. Given the totality of the circumstances, including the Appellant's history of property damage incidents, the Hearing Officer concludes that a three-day suspension is neither excessive nor erroneous.

4. Accordingly, the Agency has carried its burden to establish that there was just cause to correct the behavior of the Appellant and has carried its burden of proof to establish, by a preponderance of the evidence, that a three-day suspension was appropriate under the circumstances.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **DOUGLAS ALTON V. TRANSPORTATION CABINET (APPEAL NO. 2020-062)** 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).

Any document filed with the Personnel Board shall be served on the opposing party.

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

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

ISSUED at the direction of **Hearing Officer Stafford Easterling** this 22ND day of October, 2020.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Will Fogle
Douglas Alton
J.R. Dobner