



September 2011 through February 2012. He also witnessed Mr. Hylton working on his personal vehicle in the state garage for more than an hour, as well as towing another employee's vehicle with a state vehicle and trailer from campus. He alleged he witnessed Mr. Hylton transporting non-employees in a state vehicle.

**IT IS FURTHER ORDERED** that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer, as altered be, and they hereby are, approved, adopted and incorporated herein by reference as a part of this Order, 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 16<sup>th</sup> day of July, 2013.

**KENTUCKY PERSONNEL BOARD**

  
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**MARK A. SIPER, SECRETARY**

A copy hereof this day sent to:

Hon. Lisa K. Lang  
Harlan T. Barnett

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2012-138

HARLAN T. BARNETT

APPELLANT

VS.

**FINDINGS OF FACT, CONCLUSION OF LAW  
AND RECOMMENDED ORDER**

EDUCATION AND WORKFORCE DEVELOPMENT CABINET  
DEPARTMENT OF EDUCATION  
JOE MEYER, APPOINTING AUTHORITY

APPELLEE

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This matter came on for evidentiary hearing on February 18, 2013, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Harlan T. Barnett, was present at the evidentiary hearing and was not represented by legal counsel. The Appellee, Education and Workforce Development Cabinet, Department of Education, was present and was represented by the Hon. Lisa K. Lang. Also present was the Appointing Authority Lynn McGowan-McNear and the Hon. David Wickersham was observing.

**BACKGROUND**

1. The Appellant filed his appeal with the Personnel Board on June 18, 2012, from a one-day suspension he received. [See suspension letter dated April 26, 2012, attached hereto as **Recommended Order Attachment A.**] Appellant disputed the action taken and the punishment imposed as relief and he sought to have the matter expunged from his record and receive any back pay to which he was due.

2. Following a couple of continuances agreed to by the parties, this matter was scheduled for an evidentiary hearing for February 18, 2013.

3. At the evidentiary hearing the burden of proof was assigned to the Agency. During its opening statement, counsel for the Agency stated that the Appellant was suspended one day for his failure as a supervisor of another employee. Mr. Barnett was accused of not preventing an employee from improperly using state resources for personal gain and not taking appropriate action after the fact. After a brief opening statement, the Appellant stated that he is responsible for supervising a staff of four who have duties all over the campus of the Kentucky

School for the Deaf (KSD). He stated he tries to do his best given the resources that they have. He also questioned why there was no progressive discipline in this case.

4. The Agency called **Rebecca Ogden** as its first witness. Ms. Ogden is the Assistant Director of Resource Management, a position she has held since December 1, 2012. Last year she was a Human Resources Branch Manager and she has worked for the Department for approximately ten years. Ms. Ogden has attended training regarding personnel, payroll and investigations. She serves as the ADA Evaluation and Disciplinary Coordinator for the Department of Education.

5. Ms. Ogden established that the Appellant, Harlan "Tommy" Barnett, was appointed as a Mechanical Maintenance and Operations Technician I (MMOT I) in July of 2007 (Appellee's Exhibit 1). On March 1, 2009, he was promoted to Maintenance Section Supervisor (MSS) (Appellee's Exhibit 3). His main duties in that position were to manage the maintenance section including supervising the employees who worked in that section (Appellee's Exhibit 4). The Appellant completed his promotional probation on February 1, 2010 (Appellee's Exhibit 5).

6. Ms. Ogden stated that she was also familiar with Bryan Hylton who was originally hired as a Janitor at KSD. While serving as a Janitor, Ms. Ogden became involved in an investigation into Mr. Hylton's improper use of his state computer. As a result of that investigation, Mr. Hylton was issued a one-day suspension. Ms. Ogden was aware of no other disciplinary issues involving Mr. Hylton until February of 2012.

7. In February of 2012, Ms. Ogden received an e-mail from Martha Robertson, the HR representative at KSD. In the e-mail, Ms. Robertson stated she had received a complaint from another employee about Bryan Hylton (Appellee's Exhibit 6). The employee making the complaint turned out to be Mark Carey who sent an e-mail to Martha Robertson and then copied Ms. Ogden regarding his complaints of Mr. Hylton (Appellee's Exhibit 7). Mr. Carey complained that Mr. Hylton was working on his personal vehicle within the state facility for over an hour on February 27, 2012. In addition, he stated that he has observed Bryan Hylton sleeping in the laundry area for extended periods of time, sometimes in excess of two hours. The most recent time was on February 8, 2012. Another time was on January 26, 2012, which Mr. Carey alleged was also observed by Tommy Barnett. Carey also alleged that Hylton had taken gasoline from the KSD supply and put it in his personal truck. He stated this happened on December 7, 2011. He stated he has also seen Mr. Hylton transport people who are not state employees in a state vehicle. Mr. Carey stated that he has reported these events to his supervisor Mr. Barnett. He stated that on February 27, 2012, he found a note tacked to his office door which he felt was threatening in nature. He alleged the note was from Mr. Hylton.

8. Ms. Ogden acknowledged that the Appellant is the supervisor of both Mr. Hylton and Mr. Carey.

9. Ms. Ogden stated that she knew they would have to carefully examine Mr. Carey's allegation. She was aware that Mr. Carey had applied for the MSS position and had not received it. He accused the Department of pre-selecting Mr. Barnett and filed a grievance which he took to the Commissioner's level.

10. Ms. Ogden testified that she discussed these matters with her supervisor and the Appointing Authority, Lynn McGowan-McNear. After consultation with the Legal Department it was decided that Ms. Ogden and Ms. McGowan-McNear would conduct an investigation at the KSD into these allegations. They interviewed Mr. Carey, Shawn Brown, Mr. Barnett, Mr. Hylton and Tracy Carroll. At that point, they consulted with the Legal Department and sent some follow-up e-mails. At the conclusion of the investigation, Ms. Ogden sent an e-mail to various parties regarding the investigation. This e-mail was introduced into the record as a part of Appellee's Exhibit 11. Ms. Ogden summarized their statements as follows:

a. Bryan Hylton admitted to borrowing gas for his own use with the permission of his supervisor, Tommy Barnett. He stated it was the end of the month, he was out of gas and he replaced the gas the next day. He admitted to sleeping in the laundry room, but only during his break and lunch. He admitted driving a state vehicle to his home because he had forgotten his license. He admitted to working on his truck in the garage during his break time with his own materials.

b. Mark Carey witnessed Mr. Hylton using KSD's gas on December 7, 2011, and provided a video. Mr. Carey witnessed Mr. Hylton sleeping in the laundry room on a number of occasions for longer than break or lunch hours. These incidents lasted from September 2011 through February 2012. He also witnessed Mr. Hylton working on his personal vehicle in the state garage for more than an hour, as well as towing another employee's vehicle with a state vehicle and trailer from campus. He alleged he witnessed Mr. Hylton transporting non-employees in a state vehicle.

c. The Appellant, Tommy Barnett, stated he was aware Mr. Hylton used KSD's gas in his own vehicle and admitted he had given him permission to do so with the stipulation that it be replaced. He was aware Mr. Hylton was sleeping in the laundry room and admitted one incident where he had to wake Mr. Hylton up after sleeping an hour past his lunch period. On that occasion he allowed Mr. Hylton to take thirty-minute lunches the following two days to make up the time. Mr. Barnett stated that he removed the cots from the laundry room in February 2012. He also stated that he was aware that Mr. Hylton had driven his vehicle to his home, and he had a discussion with Mr. Hylton and told him he was not to drive the vehicle off campus without permission. Mr. Barnett became aware of Mr. Hylton working on his truck after Mr. Carey had informed him; Mr. Hylton told him he used his own material and was doing it on his break. Mr. Barnett admitted that Mr. Hylton needed closer supervision and he was not aware

of the fact that Mr. Carey had video footage of some of these matters. He stated he had given Mr. Hylton a verbal reprimand, but had not put anything in writing.

d. Shawn Brown was a reluctant witness; however, he confirmed that Mr. Hylton was sleeping in the laundry room and would ask him to wake him up at times. He observed Mr. Hylton working on his personal vehicle, but did not know if it was on his break or lunch time. He observed Mr. Hylton taking a state vehicle and leaving the KSD campus; however, he does not know why. He observed Mr. Hylton putting gas in his vehicle, using a red jug; however, he was not sure if the jug belonged to KSD or not.

e. Tracy Carroll told Ms. Ogden that she was informed about Mr. Hylton sleeping in the laundry room by Mr. Barnett and asked for solutions. Mr. Barnett proposed removing the cots from the laundry room. Ms. Carroll was informed about the gas and the state vehicle use by Mr. Barnett and she felt he had addressed the situation. Ms. Carroll was not aware of video footage that Mr. Carey had.

11. Ms. Ogden and Ms. McGowan-McNear recommended a one or two-day suspension for Mr. Barnett. She felt as a supervisor he should have known that Mr. Hylton should not be using state resources, fuel or otherwise, regardless of the justification or the fact that it was re-paid. They did not feel he had the authority to allow Mr. Hylton to use state materials. When they checked to see if Mr. Hylton had re-paid the fuel, they discovered that it happened twice, once in December and once in January. There was a receipt indicating the fuel was replaced in January, nothing was found for December. They believe that there were more than one or two instances of Mr. Hylton sleeping on the job and using a state vehicle to travel off school grounds for non-work related business. They felt that Mr. Barnett had been negligent in his duties as a supervisor by doing nothing more than talking to Mr. Hylton.

12. Ms. Ogden and Ms. McGowan-McNear recommended a one or two-day suspension for Mr. Hylton.

13. They also recommended the establishment of an additional position in the maintenance department when Mr. Barnett was promoted to supervisor, his position was never filled.

14. Ms. Ogden said she sent Principal Rodney Buis their recommendations. He agreed with their recommendation regarding Mr. Hylton. Mr. Buis stated he was not aware these things had been going on. He agreed that there needed to be consequences for Mr. Barnett, but did not agree with the recommendations. He felt that Mr. Barnett was one of the most outstanding employees on campus. He stated he has never received an oral or written reprimand of any kind. He stated that Mr. Barnett has never received any type of training on supervisory duties, procedures or progressive discipline. He recommended that they start with a verbal

reprimand with Mr. Barnett. He was sure that if Mr. Barnett was told what to do that he would fix this problem.

15. Ms. Ogden testified that she initially thought there might be some validity to Mr. Buis' position. She stated that she changed her mind, however, when she noticed that Mr. Barnett had continued to allow employees to use their two 15-minute breaks in the morning rather than take one in the morning and one in the afternoon after she and Ms. McGowan-McNear had told him this was against labor laws. She stated that Mr. Barnett stated that is always the way it had been done around KSD and did not change because the investigation was not yet finished. She also stated that she had concerns that this was the case because Mr. Barnett continued to insist that he had the authority to allow Mr. Hylton to use state materials such as gas, when he did so with his permission. Ms. Ogden testified Johnny Collett, the Director of the Division of Learning Services, and Felicia Smith, the Associate Commissioner, agreed to move forward as outlined in HR's recommendations with a one-day suspension for Mr. Barnett and a two-day suspension for Mr. Hylton.

16. Ms. Ogden testified that the decision was to proceed with these disciplinary actions. A copy of the one-day suspension against Mr. Barnett was introduced as Appellee's Exhibit 12.

17. The Appellee next called the Appellant, **Harlan Tommy Barnett**. Mr. Barnett testified that he supervises four people and sees his main duty as overseeing the management of the campus grounds.

18. The Appellant testified he was aware that Mr. Hylton had been previously disciplined for personal use of a state computer. With respect to the current allegations, he testified that he was aware that Mr. Hylton had used state gas for a personal vehicle two times. He was also aware that he had worked on his car on state property one time and that he had driven a state car on two occasions. He was not aware of Mr. Hylton driving a state car with unauthorized individuals in the car.

19. The Appellant testified that he issued Mr. Hylton a verbal reprimand for sleeping and for use of the grounds to work on a car. He also stated that he issued one for driving a state vehicle. He testified that he believed he issued the reprimand for driving a state vehicle on January 20, 2012, and the use of the state garage on January 27, 2012. Before these verbal reprimands he spoke with his supervisor and talked with Martha Robertson in HR, he stated that neither suggested that a verbal reprimand was not the appropriate disciplinary action.

20. The Appellant testified that he did not review Mr. Hylton's personnel file before deciding what to do.

21. The Appellant reviewed his personnel evaluations for 2009 through 2012. He agreed that supervision of employees was one of his duties. He also agreed that he was supposed to be aware of state policies and procedures and to try and make sure that the employees he supervised complied with policy. In his 2012 evaluation he was required to supervise and support all KSD campus policies including the Fleet policy. He described the Fleet policy as requiring that individuals not use state vehicles for personal use.

22. The Appellant testified that he attended training in 2009, which included information on progressive discipline and performance evaluations. (Appellee's Exhibit 13A.) The Appellant stated he had appropriate training to act as a supervisor and that he had not asked for additional training except that he had asked for more time to review policy manuals which was tough to do with his job expectations.

23. The Appellee called **Tracy Wilson Carroll** as its next witness. Ms. Carroll has been employed at the KSD since April 17, 2011, and she is the Appellant's supervisor.

24. Ms. Carroll testified that she is aware of the fact that Mr. Hylton had a previous disciplinary action. She stated that she did not know the specifics. She stated that Mr. Hylton, who is deaf, was a former student at the KSD. She stated that there are issues with employees, such as Hylton, who previously were students at KSD and now make the transition to employee. She stated that she felt this could often be a difficult transition.

25. Ms. Carroll testified that the Appellant made her aware of the issues with Hylton by no later than the next day after he became aware of these incidents. She stated she discussed these issues with the Appellant, but that they did not look at Mr. Hylton's file. Ms. Carroll testified she was aware the Appellant had given verbal reprimands to Hylton. She agreed with the approach of treating each of these issues differently. She pointed out that Mr. Hylton has difficulty with English. She stated that even when he meets with an interpreter Mr. Hylton has difficulty understanding issues. She stated that the best approach is to treat each situation differently and make sure that Mr. Hylton understands what is expected of him.

26. Ms. Carroll testified that she assisted in evaluating Hylton's conduct to determine the appropriate disciplinary action. She did not have any problem with the way the Appellant handled this situation. She felt that he would do a better job now after learning more about these issues. She did not think that a suspension was appropriate against the Appellant and believes that a verbal reprimand would have been sufficient.

27. Carroll testified that an incident where Mr. Hylton was allowed to use state gas to drive his personal vehicle home, she believed it was 2.5 gallons that was involved. She stated that it was a cold day and the main concern was to see whether or not Mr. Hylton could get home and get back the following morning. She understood that all along Mr. Hylton knew he had to



pay back for use of the gas.

28. She stated she was also aware after the fact of the incident where Mr. Hylton used a state vehicle to drive home to check on his mother. Ms. Carroll testified she did not view this as an unauthorized use of state resources. She stated that Mr. Hylton's mother has brain cancer and that he is a single father. She stated that her understanding is that Mr. Hylton's mother keeps Mr. Hylton's child and that he received a call that he needed to go to her.

29. Ms. Carroll saw this as a larger problem than Mr. Barnett's supervision of Mr. Hylton. She felt that there was a lack of understanding with all employees in Operations about the Fleet policy. She stated that when she discovered this she felt that the way to handle it was to have all supervisors review the Fleet policy with all employees so that they were clear as to what their responsibilities were. With respect to the state gas, she stated while this could be viewed as an unauthorized use of state resources, she saw it as nothing more incidental than an employee accidentally taking a state pen home in their purse and bringing it back the next day.

30. Ms. Carroll testified that she believed that Mr. Carey was frustrated when he filed the complaint about Mr. Hylton. She described an incident that occurred in early February when there was a dispute over who was responsible for cleaning a bathroom that was used by Mr. Carey, Mr. Hylton and Shawn Brown. She stated that they could not come up with a solution and had to involve the two supervisors, the Appellant and the Housekeeping supervisor. She stated that in Operations they are short a number of staff and that everybody has to help out. She stated that Mr. Carey, who is a carpenter, has difficulty with this concept. She stated that it is always a struggle to get him to perform other duties, such as mowing grass, which he does not see as part of his job. She stated that it reached the point where they have stopped asking Mr. Carey to help. She stated that she did not see any pictures or video that Mr. Carey had regarding Mr. Hylton until the investigation conducted by the HR Department.

31. She stated she was aware of the allegations of Mr. Hylton working on his personal vehicle, sleeping in the laundry, use of the state gasoline, and the threatening note. She stated that on some of these issues she informed her supervisor, who at the time was Soraya Matthews.

32. Ms. Carroll described the Appellant as a reliable employee who does what is right and always does his best. She stated she believed both she and Appellant have learned from this situation.

33. Introduced over objection during her testimony was Appellant's Exhibit 1, documentation concerning a verbal reprimand the Appellant gave Mr. Hylton for using a state vehicle for personal business on January 18, 2012.

34. The Appellee next called **Johnny Collett**, the Director of the Division of Learning Services with the Department of Education. He has been employed with the Department for four years. He stated that his supervision includes the KSD.

35. He became aware of the allegations of Mr. Hylton using state gas in a personal vehicle in February of 2012. In March of 2012, he learned the results of the investigation after reviewing this matter with his supervisor, Felicia Smith, the Associate Commissioner. They decided that a one-day suspension would be appropriate for Mr. Barnett and two days for Mr. Hylton.

36. He testified that he believed a suspension was appropriate for Mr. Barnett based on principles of progressive discipline and based on the seriousness of the offense. He specifically mentioned that he thought there seemed to be a lack of understanding by Mr. Barnett as to exactly how management viewed these issues and how decisions were made. He testified that he was aware there had been open records requests made regarding the use of state resources.

37. The Appellee's next witness was **Felicia Smith**, the Associate Commissioner for the Office of Next Generation Learners. By agreement of the parties, Ms. Smith read a statement into the record. She stated that she was informed of the complaints against Mr. Barnett and Mr. Hylton and reviewed the investigative summary. She was aware that the management at KSD did not agree with a disciplinary action being taken against Mr. Barnett, nonetheless, she felt that as a supervisor it was his job to address these issues with Mr. Hylton and that a one-day suspension was appropriate under the circumstances.

38. In response to questions from the Hearing Officer, Ms. Smith testified she was not aware that Ms. Carroll was informed of these situations by Mr. Barnett. She also testified that it was her understanding that Mr. Barnett had the authority to actually suspend Mr. Hylton.

39. The Appellee called as its last witness, **Lynn McGowan-McNear**. Ms. McGowan-McNear is the Director of the Office of Resource Management and the Appointing Authority. She testified that Mr. Barnett was disciplined because she did not believe that Ms. Carroll learned about these allegations until after the fact. She stated that Mr. Barnett was the supervisor of Mr. Hylton and their investigation did not reveal that Mr. Barnett kept Ms. Carroll in the loop regarding the problems he was having with Mr. Hylton.

40. Ms. McGowan-McNear also testified that these issues should have been reported to Human Resources who knew better about Mr. Hylton's history and could have taken appropriate steps with respect to the misconduct in this case. In summary, she testified that the one-day suspension to Mr. Barnett was justified because he failed in his role as supervisor to ensure that Mr. Hylton followed the rules or that appropriate action was taken when he did not

follow the rules.

41. The Appellant called **Wilton McMillan** as his first witness. Mr. McMillan is the Director of Outreach and is responsible for the Interpreters Program. Mr. McMillan is hearing impaired and testified through an interpreter.

42. Mr. McMillan testified that following his suspension, Hylton came to him and he was upset over the two days loss of pay. He stated that Hylton comes to talk to him from time-to-time because they can communicate in the same language, American Sign Language (ASL). He stated that Hylton comes to him to make sure he understands what he is supposed to do. He stated that in this instance Hylton did wrong and that Hylton understands that now. He stated that Appellant has a difficult job as supervisor communicating with Hylton. Mr. McMillan stated that he has to communicate things several times before he knows for sure that Hylton understands what he is talking about.

43. The Appellant, **Harlan Tommy Barnett**, was the last witness. He testified that he did the best he could supervising Bryan Hylton. He felt that Mr. Hylton had developed some bad habits while he was employed in Housekeeping, prior to coming under the Appellant's supervision. The main issue he has worked with Mr. Hylton on is tardiness and time and attendance. He states he has continued problems communicating with Mr. Hylton; however, following a lot of hard work he has some success in improving Mr. Hylton in these areas.

44. The Appellant reiterated that he discussed the matters at issue in this appeal with Tracy Carroll and Martha Robertson, the HR representative at KSD. He testified that neither had any problem with his approach to handling these issues with Mr. Hylton. He specifically referenced the two verbal reprimands he gave Mr. Hylton and introduced Appellant's Exhibits 1 and 2 as the written documentation associated with these reprimands.

45. Introduced as Appellant's Exhibit 1a, was the statement Mr. Barnett filed in support of his appeal in this matter. He reiterated in his testimony the statement in the exhibit that on January 5, 2012, there was a late afternoon blizzard at KSD. At the end of the workday, Mr. Hylton's vehicle had no fuel and would not start. Mr. Hylton had to pick up his son from daycare. The Appellant made the decision to allow Mr. Hylton to use approximately 2.5 gallons of gas to get him and his son home during that evening. Mr. Hylton replaced that amount in full. He told Ms. Carroll about this incident the following morning.

46. The Appellant stated that he would handle this situation differently if it arose again. He stated that he would not utilize state gas to assist Mr. Hylton and would figure out some other way to get him home. His written statement and his testimony the Appellant stated that he works hard supervising the four employees that he has and performing all the duties he has.

47. Lastly, the Appellant stated that he does not believe that he has shown favoritism to Mr. Hylton. He stated that he has worked with Mr. Carey while he recuperated from a work-related injury. The Appellant closed by stating he felt he would be a better supervisor in the future.

### **FINDINGS OF FACT**

1. Appellant, Harlan Tommy Barnett, has been employed at the Kentucky School for the Deaf (KSD) since July 2007. He was appointed a Maintenance Section Supervisor (MSS) in March 2009. [Testimony of Rebecca Ogden, Appellant and Appellee's Exhibits 1 and 3.]

2. In his position as an MSS, the Appellant supervised four employees. Prior to this appeal, the Appellant had received three evaluations as an MSS; he received two "Highly Effectives" and one "Outstanding." [Testimony of Rebecca Ogden, Appellant and Appellee's Exhibits 13, 14 and 15 and Appellant's Exhibit 1a.]

3. On February 29, 2012, Lynn McGowan-McNear and Rebecca Ogden (Director and Assistant Director of the Division of Resource Management) began an investigation regarding allegations that Bryan Hylton, an employee at KSD, was sleeping on the job, stealing gas and working on his personal vehicle in a state garage bay during work time and leaving a threatening note. These complaints originated with an e-mail from Martha Robertson, the HR Representative at KSD, based on complaints from Mark Carey. [Testimony of Rebecca Ogden, Appellee's Exhibits 6, 7 and 8.]

4. As a result of their investigation, Ms. McGowan-McNear and Ms. Ogden recommended disciplinary action against the Appellant and Mr. Hylton. Their recommendations were reviewed by Johnny Collett, the Director of Learning Services, and Felicia Smith, the Associate Commissioner of the Office of Next Generation Learners. With their input, the decision was made to suspend the Appellant for one day and Mr. Hylton for two days. [Testimony of Rebecca Ogden, Lynn McGowan-McNear, Johnny Collett, and Felicia Smith and Appellee's Exhibit 11.]

5. On April 26, 2012, the Appellant received notice that he had been suspended for one day. He was suspended through 101 KAR 1:345, Section 1, for the following reason:

Unsatisfactory behavior and unsatisfactory performance of duties; specifically you are being suspended because you failed to properly execute your duties as a manager.

[Testimony of Rebecca Ogden, Lynn McGowan-McNear, and Appellee's Exhibit 12.]

6. The Appellant was alleged to either knowingly allow Hylton to engage in the following activities or to fail to take appropriate action upon receiving reports of these activities: to use state gasoline for his personal vehicle; to use the state garage to work on his personal vehicle; and to drive a state vehicle off KSD campus for personal reasons. The Appellant was also alleged to have failed to ensure that his employees were taking breaks in accordance with written directives issued by KSD leadership. It was alleged that Appellant allowed employees to take a single thirty-minute break in the morning rather than two separate 15-minute breaks in the morning and afternoon.

7. The Appellee also alleged that the Appellant participated in Hylton falsifying a timesheet in violation of KRS 18A.145(4), specifically, referring to Mr. Hylton sleeping during working hours. It was alleged that the Appellant's employees repeatedly reported to him these allegations regarding Mr. Hylton and he failed to take any action to address Mr. Hylton's inappropriate conduct. It was alleged he did not investigate the claims made by his employees, nor did he report the claims to his immediate supervisor until February 2012. [Testimony of Rebecca Ogden, Lynn McGowan-McNear, and Appellee's Exhibit 12.]

8. At the end of the workday on January 5, 2012, after a late afternoon blizzard, Mr. Hylton could not start his vehicle because he was out of gas. The Appellant allowed him to use approximately 2.5 gallons of gas from a state gas can at KSD to start his vehicle so that he could pick up his son from daycare, go home and return to work the following morning. [Testimony of Appellant, Tracy Carroll, and Appellant's Exhibit 1a.]

9. There was an allegation of another incident of Mr. Hylton using state gas for his personal vehicle in December of 2011. It is unclear when the Appellant became aware of this incident. [Testimony of Rebecca Ogden and Appellant.]

10. Mr. Hylton refilled the gas can at his expense on January 30, 2012. [Testimony of Appellant, Rebecca Ogden and Appellee's Exhibit 10.] Bryan Hylton worked on his personal vehicle one time at the KSD garage. There was no proof he used any state materials and it did not interfere with his work assignments as he did it during his break. The Appellant did not find out about it until after the fact and told Mr. Hylton not to do it anymore. [Testimony of Appellant and Appellant's Exhibit 1a.]

11. Bryan Hylton used a state vehicle for personal business on January 18, 2012, when he received a call regarding his mother's health. His mother was suffering from cancer and caring for Hylton's son. Hylton is a single parent. Apparently he used the state vehicle to drive home and check on his mother. Appellant found out about this after the fact and informed his supervisor Tracy Carroll. They discussed this issue and the Appellant gave Mr. Hylton a verbal reprimand. Martha Robertson, the HR representative at KSD, was also consulted

regarding this decision. [Testimony of Appellant, Tracy Carroll and Appellant's Exhibit 1.]

12. Bryan Hylton would sometimes sleep at KSD. On occasions he slept during his lunch hour; there were occasions when he overslept past the allotted time. The Appellant became aware of this issue after the fact and discussed it with his supervisor Tracy Carroll. The Appellant issued a verbal reprimand to Mr. Hylton and the cot in the laundry area was removed. [Testimony of Rebecca Ogden, Appellant, Tracy Carroll and Appellant's Exhibits 1a and 2.]

13. No firsthand evidence was introduced that the Appellant failed to ensure employees were taking their breaks in accordance with a written directive from KSD leadership. No written directive was admitted into evidence. Appellant's supervisor, Tracy Carroll, testified that some flexibility must be used in giving breaks to Operations staff at KSD because it is not like a predictable office work environment. [Testimony of Tracy Carroll.]

14. No evidence was introduced that Mr. Hylton's timesheets were falsified or that Appellant participated in any such falsification. [Testimony of Appellant and Appellant's Exhibit 1a.]

15. No evidence was introduced that the Appellant failed to take action or investigate any claims made by his employees regarding Mr. Hylton. The evidence demonstrated the opposite, that the Appellant looked into all matters and discussed them with his supervisor, Ms. Carroll and Ms. Robertson from HR. [Testimony of Appellant, Tracy Carroll, and Appellant's Exhibit 1a.]

16. Despite having failed to prove the majority of the charges in the April 26, 2012 suspension letter, the Appellee established just cause for the one-day suspension of Appellant. The Hearing Officer finds that the Appellant knowingly allowed Mr. Hylton to use state gas to drive his personal vehicle which was a violation of state policy and 101 KAR 1:345. This was worthy of disciplinary action. The Hearing Officer finds just cause for the one-day suspension of the Appellant from this one incident and finds that the penalty was neither excessive nor erroneous despite the Appellant's excellent work record.

17. The Hearing Officer finds just cause despite the fact that one of the Appellee's decision-makers had the mistaken belief that the Appellant actually had independent authority to suspend Mr. Hylton without referring this matter to the Appointing Authority.

18. The Appellant is faced with supervising challenging employees, including Mr. Hylton and Mr. Carey. The testimony was that it was especially difficult to communicate with Mr. Hylton and the Appellant has done his best and has had some success in improving Mr. Hylton's time and attendance. [Testimony of the Appellant, Tracy Carroll and Wilton McMillan.]

### **CONCLUSIONS OF LAW**

1. Based on the Findings of Fact, the Appellee met its burden of proof in establishing just cause for the one-day suspension of the Appellant, based on the fact that he allowed Mr. Hylton to use state gas to drive his personal vehicle. The Hearing Officer concludes that the penalty was neither excessive nor erroneous. This Hearing Officer makes this finding despite the fact that the Appellant's supervisors at KSD did not believe that a suspension was necessary and that the Appellant would correct his behavior with a verbal reprimand. KRS 18A.095(1) and (22).

2. In reaching the Findings of Fact, the Hearing Officer did not rely on hearsay statements from the Appellee's investigation. This evidence includes statements by Mark Carey and Shawn Brown to the investigators. Neither Mr. Carey nor Mr. Brown testified and pursuant to KRS 13B.090(1), this hearsay testimony, although admissible, could not form the basis for Findings of Fact unless other evidence on these matters was introduced.

### **RECOMMENDED ORDER**

The Hearing Officer recommends to the Personnel Board that the appeal of **HARLAN T. BARNETT VS. EDUCATION AND WORKFORCE DEVELOPMENT CABINET, DEPARTMENT OF EDUCATION, (APPEAL NO. 2012-138)** 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 Mark A. Sipek** this 28<sup>th</sup> day of May, 2013.

**KENTUCKY PERSONNEL BOARD**

  
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**MARK A. SIPEK**  
**EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:

Hon. Lisa K. Lang  
Harlan T. Barnett





EDUCATION CABINET  
DEPARTMENT OF EDUCATION

Steven L. Beshear  
Governor

Capital Plaza Tower  
500 Mero Street  
Frankfort, Kentucky 40601  
Phone: (502) 564-4770  
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Terry Holliday, Ph.D.  
Commissioner of Education

April 26, 2012

H. Tommy Barnett

#190596  
Hand Delivered

Dear Mr. Barnett:

Pursuant to KRS 18A.095, you are notified that you are suspended from duty and pay for a period of one (1) working day effective beginning of business on Tuesday, May 1, 2012 through close of business Tuesday, May 1, 2012. You are to report back to work at the beginning of your shift on Wednesday, May 2, 2012.

Pursuant to 101 KAR 1:345, Section 1, you are being suspended from your position of Maintenance Section Supervisor for the following reason:

Unsatisfactory behavior and unsatisfactory performance of duties; specifically you are being suspended because you failed to properly execute your duties as a manager.

While every private short coming does not warrant adverse employment action, conduct which harms the legitimate interests of state government does. Discipline is appropriate in this case because you compromised your professional responsibilities when you 1) failed to appropriately manage state resources; 2) failed to properly supervise your employees; and 3) failed repeatedly to take the steps necessary to address serious issues with your employee, Bryan Hylton.

As a maintenance section supervisor, you are responsible for purchasing supplies and materials for the operation of the Kentucky School for the Deaf (KSD). As set forth in your performance plan, you are "responsible for purchasing supplies and materials and maintaining an adequate inventory/supply of materials" and the expectation is that you will do so by following state guidelines. You failed to properly execute these duties and responsibilities when you either knowingly allowed the following activities to occur or failed to take appropriate action upon receiving reports of those activities to ensure that the activities did not continue:



1. KSD employee Bryan Hylton was using gasoline purchased with state funds for his personal vehicle.
2. KSD employee Bryan Hylton was using a state garage to work on his personal vehicle.
3. KSD employee Bryan Hylton drove a state vehicle off of the KSD campus for personal reasons.

As a manager, you do have discretion to make certain decisions regarding employees you supervise; however, it is not within your discretion and authority to allow those employees to use state resources for personal gain. Your failure to ensure that your employees were complying with state law regarding utilization of state resources gives the impression to other state employees and the general public that it is acceptable for state employees to utilize state resources for personal gain as long as that employee replaces the resource expended at a later date. This failure to enforce state law Kentucky Revised Statutes (KRS) 11A.005 and 11A.040 as it relates to utilization of state resources is unacceptable and constitutes unsatisfactory behavior for a manager at the KSD.

Additionally, as a maintenance section supervisor, you are responsible for ensuring the efficient/effective operation of the maintenance section at the KSD. You failed to execute this duty by failing to ensure that your employees were taking their breaks in accordance with the written directive issued by the KSB/KSD leadership. Specifically, you were aware that your employees were taking a single thirty minute break in the morning rather than two separate fifteen minute breaks in the morning and afternoon respectively contrary to KSB/KSD policy as well as state government policy, but did nothing to address the issue.

Furthermore, you were aware of reports that KSD employee Bryan Hylton was sleeping in the KSD laundry room during his scheduled work hours for the period of September 2011 through February 2012. In fact, you acknowledge that you had personal knowledge of at least one occasion in which Mr. Hylton slept in the KSD laundry room for a one hour period past the time he was required to report to work after lunch. As a manager, it is your responsibility to address these types of situations. You failed to do anything at all until February 2012 when you simply removed the cots from the KSD laundry room. Moreover, Mr. Hylton's sleeping during working hours but not claiming leave time for those periods when he was not working is in willful violation of KRS 18A.145(4) which provides that "no person shall make any false statement, record, or report regarding hours, days, or other time worked by an employee". As supervisor, if you were aware that Mr. Hylton was sleeping during working hours and not utilizing leave time for those occurrences, and you authorized his timesheet by signing it you are also in violation of KRS 18A.145(4) by falsifying his timesheet. If charged criminally, this falsification would constitute a misdemeanor offense which is punishable by fine and up to one (1) year in jail.

As a manager, you are also responsible for the proper and timely completion of all meetings required in the evaluation process; and fair and equitable treatment of all employees as it relates to the evaluation of performance. It is important for supervisors to treat all employees equally and fairly. Your employees have repeatedly reported to you that Mr. Hylton was utilizing state resources for his own personal gain and that he was sleeping on the job. Despite these reports, you failed to take any action to address Mr. Hylton's inappropriate (and in some cases illegal) conduct. You did not investigate the claims made by your employees nor did you report the claims to your immediate

supervisor until February 2012. Your employees have provided to me dated video footage showing that Mr. Hylton took gas intended for KSD vehicles for his own personal use. I have also viewed dated video footage showing that Mr. Hylton frequently took naps during his working hours in the KSD laundry. While you may not have had personal knowledge regarding all of the incidents, you were on notice that there was a problem. Your employees elevated their concerns to this level because they have no confidence that you would address them.

As set forth above, your decisions concerning the staff's utilization of state resources for personal reasons and usage of break times, as well as your actions or lack thereof regarding this specific employee have been inappropriate and constitute unsatisfactory behavior for an employee and manager of the Kentucky School for the Deaf. Your failure and negligence to properly follow policy and procedure concerning the usage of state resources by staff has given the impression that it is acceptable for state employees to utilize state resources for their own personal gain as long as the employee is on his/her break or lunch hour and he/she replaces the resource. Again, as a manager you do have the discretion to make certain decisions regarding your staff; however, it is not within your authority to give permission to staff to use state resources for personal gain. Please be advised that continued decisions made in this manner may result in more severe disciplinary actions taken against you, up to and including dismissal.

You are strongly encouraged to avail yourself of the services offered by the Kentucky Employee Assistance Program (KEAP). KEAP is a program dedicated to helping employees find solutions to the personal problems that may hinder work performances. The Kentucky Department of Education will approve reasonable and appropriately requested use of your leave time for the purpose of seeking assistance through KEAP.

In accordance with KRS 18A.095, you may appeal this action to the Personnel Board within (60) days after receipt of this notice, excluding the date notification is received. Such appeal must be filed in writing using the attached appeal form and in the manner prescribed on the form.

Sincerely,



M. Lynn McGowan-McNear, Appointing Authority  
Kentucky Department of Education

cc: Tracy Carroll, Administrative Section Supervisor  
Personnel File