

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-312**

DAVID BAUMAN

APPELLANT

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

**TRANSPORTATION CABINET
MIKE HANCOCK, APPOINTING AUTHORITY**

APPELLEE

**** ** ***

The Board at its regular June 2015 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated May 6, 2015, Appellant's exceptions, Appellee's response, oral arguments, 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 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 24th day of June, 2015.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. William Fogle
David Bauman
Kathy Marshall

**COMMONWEALTH OF KENTUCKY
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This matter came on for evidentiary hearing on April 1, 2015, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before Stephen T. McMurtry, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, David Bauman, was present and was not represented by legal counsel. The Appellee, Transportation Cabinet, was also present and represented by the Hon. William Fogle.

BACKGROUND

1. On October 1, 2014, Carol Beth Martin, the Appointing Authority for the Cabinet, suspended Bauman for one day for violation of 101 KAR 1:345 (lack of good behavior) and General Administration and Personnel Policy GAP-801, because he allegedly “tried to obstruct the investigation of Megan Jones, Highway Superintendent I, by discussing the interview process of the investigation with subordinate employees and failing to address Ms. Jones’ use of inappropriate language in the workplace.”

2. Kevin Sandlin, a Highway Equipment Operator, wrote in his October 30, 2012 resignation letter that Jones “used racial slurs when referring to people of different cultural backgrounds, used inappropriate sexual comments, and lewd language when describing sexual acts.” The Cabinet claimed Bauman admitted he heard Jones refer in a joking manner to Laura Stevens, whom she supervised, as a “whore,” but failed to “address this matter with Ms. Jones.” And in violation of GAP 801, he tried to obstruct an investigation of Jones by “discussing the interview process with subordinate employees . . .”

3. Bauman appealed his suspension on December 1, 2014, raising the following defense of his actions:

I am writing this letter as my appeal to the one day suspension levied against me on Oct. 7, 2014 for numerous reasons. However, in order to be concise at this time, I will direct my concerns to the issues that allegedly occurred.

In response to the fact that I encouraged witnesses to provide as little information as possible is blatantly false. After a year of Mr. Sandlin's allegations sitting dormant on the Branch Manager desk I didn't remember any particulars to share. The only thing I said to any of the witnesses, on the advice of my Branch Manager, was to the two employees that were not even employed at the same time as Mr. Sandlin. I informed them to tell the (OCRSBD) as much. They could not comment on something they knew nothing about. How any of that can be construed as trying to obstruct an investigation is beyond me. Furthermore, I consider it an attack on integrity.

In response to not addressing Ms. Jones comment to Ms. Stephens I didn't deem its intent as malicious or insulting, especially since they both were laughing. Although the terminology might seem inappropriate in a different setting, the word itself can be heard on T.V. any given night. On our playing field (maintenance & construction) as long as conversing is not offensive or abusive to anyone it's considered good morale, something that's at a premium in our workforce. My 25+ years of experience, 10 as a Supervisor, let me know when to address verbal abuse. If I fail to do so there is a chain of command procedure to follow in order to resolve the issue. But that in itself is another of the reasons that this whole procedure was mishandled from the beginning.

I'm looking forward to have the chance to explain all the circumstances surrounding this total breach of protocol that took place during this debacle which resulted in my suspension.

4. GAP-801 prohibits an employee from "Engaging in conduct to impede or obstruct an official KYTC investigation . . ."

5. 101 KAR 1:345, Section 1, states: "Appointing authorities may discipline employees for lack of good behavior or the unsatisfactory performance of duties."

6. GAP-801 prohibits "Engaging in disrespectful, demeaning, abusive, or any such other inappropriate behavior, which includes but is not limited to: . . . vulgar, crude, . . language, inappropriate jokes . . . and sexual comments."

7. The Cabinet called **J. R. Dobner**, Policy Advisor of the Office of Human Resource Management, to testify. Dobner said Bauman was a Highway Superintendent II, a foreman, for Campbell County and supervisor of Megan Jones. He introduced the investigation file of the October 29, 2012 charges made by Kevin Sandlin that included the allegation Megan Jones sexually harassed persons under her supervision and used vulgar, racial and sexual language in the workplace. During the investigation, in particular an interview of the Appellant, Bauman stated he heard Jones say “whore” jokingly to Laura Stephens. The report concluded that several witnesses stated Bauman discussed the investigation with them and prior to the interview told them to answer the investigator’s questions but not to volunteer information.

8. Dobner introduced a prior March 2004 disciplinary action against Bauman imposing a one-day suspension for vulgar and disrespectful language toward a fellow employee. He introduced the files of three disciplinary actions against other Highway Superintendents for inappropriate use of language. One superintendent received on January 16, 2013, a three-day suspension for using sexually implicit language in conversations with female employees. Another Highway Superintendent received a December 18, 2013 written reprimand for failing to take steps necessary to prevent harassment by an employee who called a fellow worker a “pipe bomb,” “bottle rocket” and “firecracker.” A third superintendent received a December 9, 2013 five-day suspension for calling his fellow worker these explosive nicknames. The Cabinet determined the employee called these nicknames was self-conscious of a bodily disfigurement received in a previous fireworks accident. Dobner explained that the Cabinet was not tolerant of employees who used inappropriate language in the workplace and expected the supervisors to immediately and aggressively stop such conduct.

9. Dobner explained that several on-going discrimination lawsuits against the Transportation Cabinet under the Kentucky Civil Rights Act justified strict enforcement of the GAP policies. Dobner said that Bauman had received training on August 22, 2013, regarding a supervisor’s duty to document and correct such discriminatory and harassing behavior.

10. The Cabinet called two employees, **David Ziegler** and **Rodney Lippert**, Heavy Equipment Operators, who testified they were interviewed by Bauman before they gave statements in the 2012 Megan Jones investigation conducted by the Cabinet’s Office of Human Rights. Ziegler testified that Bauman told him to “just answer the questions yes or no and don’t volunteer information.” Ziegler said he was not intimidated, but “felt Bauman was trying to protect Jones.” Rodney Lippert said Bauman told him to “give yes or no answers, nothing else.” He said he “felt Bauman was trying to coach him.” This last statement contradicted a Finding of Fact in the Office for Civil Rights investigative report regarding Megan Jones.

11. **David Bauman** testified he heard Megan Jones call Laura Stephens, whom she supervised, a “whore,” but in a “joking manner” at which both laughed. Bauman justified overlooking the incident saying, “It’s a construction site, a different plane. Let’s not live in a bubble. It’s not a monastery.” When asked about coaching Ziegler and Lippert prior to their being questioned by the Cabinet’s Office of Civil Rights, he said, “I told them to tell the truth, but not to volunteer testimony.”

FINDING OF FACT

There is no substantial conflict in the testimony presented by the Cabinet and by Bauman. The background information expressed above is adopted as the Findings of Fact in this appeal.

CONCLUSIONS OF LAW

1. The Appellant, David Bauman, violated 101 KAR 1:345 by failing to supervise Megan Jones, in some manner, for calling Laura Stephens a “whore,” even if spoken in jest, and in advising David Ziegler and Rodney Lippert not to volunteer information to the investigators of the Office of Civil Rights in its investigation of Megan Jones. These actions by Bauman constitute “poor work performance,” rather than “lack of good behavior” as charged by the Cabinet.

2. The Cabinet’s GAP-801 prohibits “foul” or “crude” language and “sexual comments” without regard to the context in which such language is spoken. “Whore” is a foul and crude word and a sexual comment bringing Jones’ statements to Laura Stephens squarely under the prohibitions of GAP-801. Although a highway worksite is not a monastery, it is a crucible for lawsuits. No matter how innocent crude, foul or sexual comments are, sooner or later a worker will take offense and the Cabinet will be sued. That is the culture in which we live and work today.

3. GAP-801 prohibits conduct intended to impede an investigation of the Office of Civil Rights. Bauman’s advice to Ziegler and Lippert not to volunteer information clearly was an attempt to impede the investigation of Megan Jones. It is the kind of advice a lawyer gives his/her client before a hostile deposition or cross-examination.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **DAVID BAUMAN VS. TRANSPORTATION CABINET (APPEAL NO. 2014-312)** 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).

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

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 Stephen T. McMurtry** this 6th day of May, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. William Fogle
David Bauman