

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2017-056

JODY BLACKBURN

APPELLANT

VS.

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

KENTUCKY TRANSPORTATION CABINET

APPELLEE

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The Board, at its regular January 2018 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated December 7, 2017, and being duly advised,

**IT IS HEREBY ORDERED** that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer 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 18<sup>th</sup> day of January, 2018.

KENTUCKY PERSONNEL BOARD

  
MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. William Fogle  
Mr. Jody Blackburn  
Mr. J. R. Dobner

**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2017-056**

**JODY BLACKBURN**

**APPELLANT**

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

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**APPELLEE**

\*\* \*\* \* \* \*

This matter came on for an evidentiary hearing on November 2, 2017, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. R. Hanson Williams, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Jody Blackburn, was present at the evidentiary hearing and appeared *pro se*. The Appellee, Kentucky Transportation Cabinet, was present and represented by the Hon. William Fogle. Appearing as Agency representative was J. R. Dobner.

The issue in this matter involves the 10-day suspension given to Appellant by letter dated January 3, 2017. The suspension, pursuant to 101 KAR 1:345, was for poor work performance and lack of good behavior for allegedly acting in an unsafe manner on November 16, 2016, on New Circle Road in Lexington, Kentucky.

The Appellee was assigned the burden of proof by a preponderance of the evidence. This matter also involves the Appellant's claim of disability discrimination, for which he was assigned the burden of proof by a preponderance of the evidence.

**BACKGROUND**

1. Appellee's first witness was **Robert Staley**. He has been a Heavy Equipment Operator (HEO) IV for the past 12 years in the Lexington District 7 office. He functions as the backup supervisor for his crew. Duties of the crew members involve operating equipment, filling potholes and plowing snow.

2. He testified that on November 16, 2016, he and his crew were performing work on and around the ramp at the junction of Harrodsburg Road and New Circle Road in Lexington. New Circle Road is a four-lane road.

3. He stated that the crew was filling potholes in the left lane (fast lane) of New Circle. At that time, the Appellant was driving the lead dump truck with two other workers and two vehicles behind him to give notice to approaching traffic. According to the witness, for no

apparent reason, the Appellant stopped his truck and walked across New Circle Road to pick up a hubcap on the right-hand side of the road. According to the witness, when making his way back across New Circle Road, the Appellant was almost hit by a car, which had to swerve to avoid an accident and avoid hitting the Appellant.

4. The witness opined that he thought these actions by the Appellant were very unsafe and, as Assistant Crew Supervisor, he places a high value on safety.

5. On cross-examination, the witness confirmed that at various times other crew members have crossed I-64 to pick up objects. He stated that workers sometimes do have to cross both lanes to set traffic signs.

6. The next witness was **Jim Lowry**. He has been a Highway Superintendent I with the Agency for approximately 20 years. He supervises the crew in District 7 in Lexington and has been trained extensively in safety procedures.

7. He confirmed that he was one of the crew members shoveling asphalt on the day in question. He confirmed Staley's account as to the location and activity going on. In addition, he stated the line of trucks constituted a moving operation in the fast lane.

8. The witness stated that, upon seeing the Appellant crossing New Circle Road, he yelled for him to come back to the work zone. Instead, he testified the Appellant continued on to the right side of the road where he retrieved a hubcap. He added that picking up items was not part of the job that day. He also confirmed Staley's report that while coming back across New Circle Road, a car had to swerve to avoid hitting the Appellant.

9. The Appellee's next witness was **J. R. Dobner**. He is the Deputy Executive Director in the Office of Human Resources at the Agency. He supervises the Personnel Unit and handles disciplinary actions. He testified he received a request to take disciplinary action in this matter.

10. The witness testified that he gave both an Intent to Suspend letter (Appellee's Exhibit 3) and the Suspension letter (Appellee's Exhibit 4). He testified that he received no response to the Intent to Suspend letter, and, therefore, proceeded with the 10-day suspension. He added that this was based upon progressive discipline, which included the Appellant having received a previous 3-day suspension on May 16, 2016. The witness also factored in that the Appellant had been directed by Supervisor Lowry to cease the activity he was performing.

11. The witness further added that he felt the Appellant's actions on the day in question constituted a violation of General Administration and Personnel Policy (GAP-801, EMPLOYEE CONDUCT) (Appellee's Exhibit 6). Pertinent parts of this policy are as follows:

The Transportation Cabinet strives to provide a safe work environment for a healthy, productive workforce. The Cabinet's expectations for generally acceptable conduct of its workforce include but are not limited to:

...

- Carrying out assignments as directed by their supervisors or requesting meetings with their supervisors to seek further direction or discuss problems with the assignments.
- ...
- Exercising special care to ensure that personal conduct is above reproach by refraining from any activity that could embarrass or reflect adversely on the Commonwealth.

12. The witness also introduced Appellee's Exhibit 8, an employee orientation list, which details the matters on which the Appellant had been advised. The section cited above was a part of this exposure.

13. The Appellant, Jody Blackburn, then called himself as his first and only witness. He testified that he has been employed as a Highway Equipment Operator I (HEO I) since mid-August 2015. Addressing the day in question, he stated that he crossed New Circle Road, looked for traffic, and then went to pick up a truck hubcap. He did not hear Supervisor Lowry tell him to return to the work zone.

14. The Appellant then made the comment that these types of things go on all the time in state workplaces. As to his claim of disability discrimination, the Appellant stated that he suffers from dyslexia. He stated that he has, at times, asked for written instructions on how to perform his job, but on November 16, 2016, was not given any written instructions.

#### **FINDINGS OF FACT**

1. On November 16, 2016, the Appellant unnecessarily left his work truck to cross New Circle Road, a four-lane road, to retrieve a hubcap.

2. His actions caused an oncoming car to swerve, almost causing an accident, which could have involved both he and the car.

3. The Appellant's actions were reckless and constituted a violation of the Agency's GAP-801, EMPLOYEE CONDUCT policy. This violation, in turn, constituted poor work performance under 101 KAR 1:345.

4. The Appellant offered no credible evidence to support his claim of disability discrimination.

#### **CONCLUSIONS OF LAW**

1. The Hearing Officer concludes as a matter of law that the Agency carried its burden of proof by a preponderance of the evidence.

2. The Hearing Officer concludes as a matter of law that the Appellant failed to carry his burden of proof by a preponderance of the evidence.

**RECOMMENDED ORDER**

The Hearing Officer recommends to the Personnel Board that the appeal of **JODY BLACKBURN V. KENTUCKY TRANSPORTATION CABINET, (APPEAL NO. 2017-056)** 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 R. Hanson Williams** this 7<sup>th</sup> day of December, 2017.

**KENTUCKY PERSONNEL BOARD**

  
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**MARK A. SIPER**  
**EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:

Hon. William Fogle  
Mr. Jody Blackburn  
Mr. J. R. Dobner