

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2016-048**

CLAYTON BROOKS

APPELLANT

VS.

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

TRANSPORTATION CABINET

APPELLEE

** ** ** ** **

This matter came on for an evidentiary hearing on July 13, 2016, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Hanson Williams, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Clayton Brooks, was present and was not represented by legal counsel. The Appellee, Transportation Cabinet, was present and represented by the Hon. William H. Fogle. Appearing as Agency Representative was Mavis McCowan.

This matter involves a one-day suspension given the Appellant by letter dated February 29, 2016 (copy attached as **RECOMMENDED ORDER ATTACHMENT A**). In summary, the Appellant was suspended for failing to remain at his job during a potential snow and ice event on February 16, 2016.

The burden of proof was placed upon the Appellee, by a preponderance of the evidence, to show the actions taken were appropriate under all surrounding circumstances, and were neither excessive nor erroneous.

BACKGROUND

1. The Appellee's first witness was **Kevin Arnold**. He is a Superintendent I (Assistant Foreman) at the Bourbon County Maintenance Garage. As a part of his job duties, he gives directions to his crew, which are formulated by the Foreman.

2. He testified his crew consists of nine Heavy Equipment Operators (HEOs), part of whose duties are to remove snow and ice when necessary. The Appellant is an HEO III in

his crew. The witness testified that his crew is expected to remain on the job as directed, for as long as it may be necessary to work a snow and ice event.

3. The witness then identified various exhibits which included a memo from the Cabinet's Secretary detailing how the 2015-2016 snow and ice season would be handled, and detailing the fact that a first offense for leaving without permission would be a one-day suspension. These exhibits also included a February 17, 2016 email from Arnold to other crew members memorializing the fact that the Appellant had left the snow event without permission on February 16, 2016, to referee a basketball game. (Appellee's Exhibits 1 and 3)

4. Arnold further explained that on February 16, 2016, the crew members reported to work at approximately 10:00 a.m. in anticipation of the predicted snow and ice event. Upon arrival, they were told they should plan on staying until possibly midnight; however, there was a chance, depending on the severity of the event, that they might be able to go home somewhat earlier. The witness testified the Appellant left the Maintenance area around 3:25 p.m. and signed out as leaving at 4:00 p.m..

5. Arnold then stated the events surrounding two other employees who appeared to have left early on February 16, 2016. First, Jeremy Taulbee had requested to leave early. Having found a replacement for himself, he was then allowed to leave at 10:00 a.m. by the Superintendent. Another worker, Jarrod Stephens, stayed until 8:00 p.m. However, this was when the Maintenance barn received a call releasing all workers at that time.

6. The Appellee's next witness was **Mavis McCowan**. She is employed as a Human Resource Administrator within the Cabinet. She testified she is involved in the disciplinary actions within the Employee Compliance Branch. She confirmed the Appellant had previously received approval to work outside employment as a basketball referee.

7. She further introduced exhibits showing the requests for disciplinary actions and introduced the one-day suspension letter.

8. In anticipation of Appellant's claims that he had been treated differently from others in a similar situation, McCowan introduced Appellee's Exhibits 8 and 9. These are one-day suspensions given to other Highway Equipment Operators for failing to work a snow and ice event as directed.

9. The witness next introduced Appellee's Exhibit 10, the General Administration and Personnel Policy (GAP) No. 801, Employee Conduct.

10. This policy deals with employee conduct and states, in pertinent part, “the Cabinet’s expectations for generally acceptable conduct of its workforce include but are not limited to:

Ensuring that the work of the Cabinet is efficiently and effectively accomplished by:

- Reporting for work, leaving for work, taking breaks as scheduled

McCowan then contended the Appellant’s actions constituted poor time and attendance under this policy.

11. The Appellant, **Clayton Brooks**, called himself as his only witness. He readily confirmed he left early on the day in question, in spite of being directed to remain for the snow and ice event.

12. The Appellant’s main argument is that he was treated differently from other employees in a similar situation. He specifically referred to an event of February 12, 2016, wherein his crew reported for work at 5:30 a.m. He stated that another crew member, Chuck Nicholson, reported at 7:30 a.m. for a snow and ice event. He maintains that no discipline was handed to Nicholson. In light of unknown circumstances, the Hearing Officer can only review this event which happened on February 16, 2016.

13. The Appellant closed.

FINDINGS OF FACT

The Hearing Officer makes the following findings by preponderance of the evidence:

1. The Appellant was given a one-day suspension by letter dated February 29, 2016, for violation of 101 KAR 1:345. As he confirmed, he left his position as a Heavy Equipment Operator even though he was directed to remain at work pending a potential snow and ice event.

2. The Appellant’s Position Description identified him as a Heavy Equipment Operator III, whose duties include working snow and ice events by using equipment which would clear roads.

3. Ample notice had been given to employees in the local highway Maintenance barns, including those in the Paris, Kentucky region, of the expectations to work for a snow and ice event.

4. The Appellant's actions in leaving work without permission were a violation of GAP policy 801, and constituted poor time and attendance under 101 KAR 1:345.

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, to show that the one-day suspension was appropriate under all surrounding circumstances and was not excessive.

2. The Hearing Officer concludes as a matter of law that the Appellant failed to show that others in a similar situation were treated differently regarding disciplinary actions.

RECOMMENDED ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Kentucky Personnel Board that the appeal of **CLAYTON BROOKS VS. TRANSPORTATION CABINET (APPEAL NO. 2016-048)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13.B.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 R. Hanson Williams** this 3rd day of August, 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. William Fogle
Mr. Clayton Brooks
J. R. Dobner



Matthew G. Bevin
Governor

COMMONWEALTH OF KENTUCKY
TRANSPORTATION CABINET

www.transportation.ky.gov/

February 29, 2016

Clayton Brooks

Personnel Number:

Re: One (1) Day Suspension

Dear Mr. Brooks:

Based on the authority of KRS 18A.095 and 101 KAR 1:345, you are hereby notified that you are officially suspended from duty and pay for a period of one (1) working day, effective beginning of business through the close of business on Tuesday, March 1, 2016.

In accordance with 101 KAR 1:345, you are being suspended from your position as a Highway Equipment Operator III in the Kentucky Transportation Cabinet (KYTC), Department of Highways, District Seven for the following specific reason:

Poor Time and Attendance. As part of your job duties and responsibilities as a Highway Equipment Operator III, you are assigned to drive a dump truck on a snow and ice route for Bourbon County maintenance. On February 15, 2016, you were advised by Kevin Arnold, Highway Superintendent I, that leave would not be approved at any time the crew was in snow and ice operations or if there was a potential for winter weather. On February 16, 2016, Arnold advised the crew that they would be required to stay at work until midnight due to the possibility of impending winter weather that afternoon. You had requested leave for that afternoon and were advised that your request for leave would not be approved. At 3:25 p.m. after a conversation in the parking lot with Arnold, you advised him that you were going to referee a basketball game in Grayson, Kentucky and to call if you were needed later. At that point, you left.

The KYTC is responsible for maintaining the safety of the Commonwealth's roads during adverse weather and takes that responsibility very seriously. Your job duties listed in your position description include operating a dump truck with a snow plow and salt spreader working snow and ice. On October



Recommended Order Attachment A

7, 2015, Secretary Mike Hancock issued the 2015-2016 Winter Operations Memorandum in which Hancock stressed the importance of being fully staffed in order to respond to all snow and ice situations.

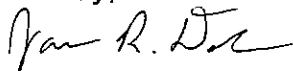
According to the 2015-2016 Winter Operations Memorandum, failing to report for snow and ice duty without approval on one occasion results in a one day suspension; therefore, you are being suspended for one day.

Your actions are in violation of 101 KAR 1:345 and General Administration and Personnel Policy GAP 801 Employee Conduct because you failed to carry out an assignment as directed by your supervisor.

For your information, the Kentucky Employee Assistance Program (KEAP) is a voluntary and confidential assessment and referral service for state employees. KEAP may help you with personal problems that may be affecting your job performance. KEAP can be reached at 1-800-445-5327 or 502-564-5788.

As you are an employee with status, you may appeal this action to the Personnel Board within sixty (60) days after receipt of this notice, excluding the day of receipt. To appeal, you must complete the attached form and direct it to the address indicated on the form. Copies of KRS 18A.095 and 101 KAR 1:365 concerning appeal and hearing procedures are enclosed.

Sincerely,



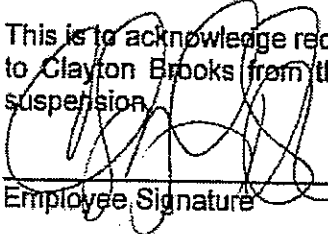
James R. Dobner
Appointing Authority

JRD/mlm

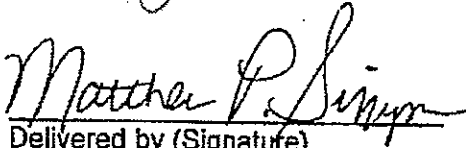
Enclosures

cc: Personnel Cabinet
Personnel Board
State Highway Engineer
Kelly Baker, Executive Director
Cabinet Employee File

This is to acknowledge receipt of a letter dated February 29, 2016 and addressed to Clayton Brooks from the Transportation Cabinet, advising of a one (1) day suspension.


Employee Signature

2-29-16
Date


Delivered by (Signature)

2-29-16
Date

Witnessed by (Signature)
(in the event the employee refuses to sign)

Date