

CERTIFICATION OF PERSONNEL BOARD RECORDS

I certify that attached hereto is a true and correct copy of the Findings of Fact, Conclusions of Law, and Recommended Order and Final Order in the case of **GRETA CHANDLER VS. TRANSPORTATION CABINET, DEPARTMENT OF HIGHWAYS (APPEAL NO. 2012-239)** as the same appears of record in the office of the Kentucky Personnel Board.

Witness my hand this 14th day of August, 2013.



MARK A. SIPEK, SECRETARY
KENTUCKY PERSONNEL BOARD

Copy to Secretary, Personnel Cabinet

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2012-239

GRETA CHANDLER

APPELLANT

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

TRANSPORTATION CABINET
DEPARTMENT OF HIGHWAYS
MIKE HANCOCK, APPOINTING AUTHORITY

APPELLEE

** **

The Board at its regular August 2013 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated June 24, 2013, 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 **SUSTAINED to the extent** therein.

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 14th day of August, 2013.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy mailed this day to:

Hon. William Fogle
Greta Chandler
Kathy Marshall

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2012-239**

GRETA CHANDLER

APPELLANT

VS.

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

**TRANSPORTATION CABINET
DEPARTMENT OF HIGHWAYS
MIKE HANCOCK, APPOINTING AUTHORITY**

APPELLEE

** ** *

This matter came on for evidentiary hearing on May 1, 2013, at 10:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before Boyce A. Crocker, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Greta Chandler, was present at the evidentiary hearing and was not represented by legal counsel. The Appellee, Transportation Cabinet, was present and was represented by the Hon. William Fogle. Also present was the Hon. J.R. Dobner, Agency representative. Also observing the evidentiary hearing was Ms. Carol Martin.

BACKGROUND

1. The issue for the evidentiary hearing was the disciplinary action taken against Appellant. Appellant was suspended for three days without pay by letter dated September 25, 2012, for allegations of lack of good behavior and poor work performance. The Appellee bore the burden of proof on this issue. As the party bearing the burden of proof the Appellee proceeded first in the presentation of evidence.

2. Both parties made opening statements.

3. The Appellee called **Jason Colburn** as its first witness. Mr. Colburn stated that he is a Highway Equipment Operator IV (HEO IV) in Muhlenberg County, has held that position for a little over two years and has worked for the state for about fourteen years. Mr. Colburn testified his duties as an HEO IV are to oversee the crew, make sure the job is setup properly, the job being ditching, cleaning driveway tiles, trimming trees, repairing washouts and roadside maintenance.

4. The witness was familiar with Appellant, stating she is an Highway Equipment Operator I (HEO I), the main duties being to flag traffic (flagman), drive a dump truck, operate a mower, and stated he believed she had been with the Department about a year and a half. Mr. Colburn testified that Appellant had been trained in those duties.

5. On September 13, 2012, the witness' crew was working on HWY 181 South, which is high traffic and were performing "ditching." Appellant had parked the state truck in the lane of traffic and Mr. Colburn had to ask her to move it off the roadway. She parked it in one of the adjacent land owner's dual driveways.

6. Later that day the witness stated that he looked up the hill to where Appellant was performing flag duties and noticed she was sitting down (not squatting) and this persisted for two to three minutes. Mr. Colburn got on the radio with the Appellant and told her to stand up, that it was a safety issue. The witness stated that the Appellant argued with him about this. Mr. Colburn also noticed that the Appellant's flag paddle was on the ground.

7. The witness stated this was a safety issue for the Appellant to see traffic, for the traffic to be able to see the person performing the flag duties, and for the crew performing the ditching duties. The witness explained there was at least one dump truck and workers in the road performing their duties at the time he noticed Appellant sitting down.

8. The witness stated that where Appellant was working was a bad stretch of highway, in addition to where the entire crew was working, dangerous road, lots of traffic, and that there were black marks leaving the road where Appellant was working, going off into the property owner's land. Mr. Colburn also stated there was a mowing crew in the work zone as well. Mr. Colburn testified that when he told the Appellant to stand up, she argued with him and told him she could see fine where she was, instead of just standing up as he ordered. The witness stated that the Appellant, after several minutes, did stand up. She also continued to kneel or squat, but did not sit down again for the rest of that job. The witness took a photograph of the Appellant, which counsel contended shows Appellant sitting down.

9. The witness testified there was another incident with the Appellant sitting down the very next day, September 14, 2012. This occurred on HWY 176, also a heavily traveled route. Mr. Colburn stated Appellant was observed "squatting like a duck, twisting and turning, though not sitting, and that the flag paddle which is the traffic control device was on the ground." Mr. Colburn stated that most of the day she was in a squatting position. The witness recalled Appellant had complained of having a sore back and this is why she would move around; however, the witness believed this was still very much a safety issue.

10. The witness recalled flag persons sitting down or leaning against the state truck while on the job, when the workers had the truck in the lane, if it was on a road with little or no traffic. The witness recalled that the previous supervisor, Steve Osteen, had allowed an employee to sit on the tailgate of the truck on such a road.

11. Counsel for Appellee asked Mr. Colburn about Appellant's allegation that she was being singled out because of her participation in a Transportation Cabinet investigation on a complaint by Susan Downey. The witness responded he had no knowledge as to what the Appellant may have told the investigators and he bore no personal animosity toward her. The witness testified that Appellant was a good worker, though she does sometimes have an attitude problem. On cross-examination, the witness agreed with Appellant that there are some other employees he is closer with than the Appellant, and as an illustration, some employees call him nicknames and he calls them nicknames. The witness denied that he has treated Appellant severely or unfairly in the time she has worked for the Muhlenberg County Transportation Garage. The witness agreed that he had seen people performing flagging duties sitting on the tailgate of a truck on a low-volume highway. The witness testified in response to a question from the Appellant that after the incident on September 13, 2012, that he went back to the office that day and called Madisonville (the District Headquarters) to request that Appellant go through flagging training again.

12. There was some exchange on cross-examination as to whether the mowers were in the zone at the exact time Appellant was either sitting or squatting down in the roadway on September 13, 2012. There was also an exchange as to whether the signs had been put out for the crew, for which Appellant was flagging that day and whether Appellant knew how to put out the signs.

13. The witness explained that he chose to remonstrate with her regarding his belief that she sat down on the job while flagging on September 13, 2012, via the radio. He was afraid that if he went there personally she would twist it and if he did it on the radio he would have witnesses to what he said and did.

14. The witness further denied that he had made any statement to Appellant that he could not treat her the same as others because he was buddies with her ex-husband. The witness also denied that he was buddies with Appellant's ex-husband.

15. The next witness called by the Appellee was **David Keith**. Mr. Keith is employed as a Superintendent I in the Muhlenberg County Highway Garage (MCHG). The witness testified that one of his main job duties as Superintendent I is to check complaints which sometimes involves going out on the road.

16. The witness testified that he knew the Appellant and her husband before she started work at the garage in Muhlenberg County. The Hearing Officer notes that it was determined later during the course of the evidentiary hearing that the Appellant's husband had worked in the MCHG prior to Appellant beginning her employment there.

17. The witness testified regarding the incident on September 13, 2012 (the incident with Appellant allegedly sitting down on the job as flag person), by observing that HWY 181 South where the work was being performed was a bad location with lots of traffic, lots of truck traffic, the hill, and curves. The witness stated he had been making rounds that morning and was at the scene. Mr. Keith recalled that Mr. Colburn had told Appellant over the radio that she needed to stand up. He recalled that the Appellant replied to Mr. Colburn that she was fine where she was and that she could see three signs behind her. Mr. Keith observed that it is against the rules to flag sitting down, especially on a high-volume road. The witness testified that sitting down on the road was one thing, but that refusing to get up when instructed to do so was non-compliant. The witness testified that he had never observed a flagger sitting down on the job.

18. Mr. Keith testified that at the time this occurred he was the Acting Superintendent II (as the Hearing Officer understands it the over-all supervisor for a highway garage in the county) and filled out the request for discipline. This request was admitted into evidence as Appellee's Exhibit 2.

19. Mr. Keith testified that several people from the MCHG had gone to Frankfort to speak with the Transportation Cabinet investigators regarding the Susan Downey complaint. The witness testified that the Appellant having cooperated in the investigation bore no weight as to his request for disciplinary action; he stated he had to do the same. Mr. Keith testified he did not know why Appellant had been summoned to Frankfort and did not hold anything like that against her.

20. On cross-examination, the witness agreed that he was not sure whether the Appellant was arguing with Mr. Colburn. However, he did believe an employee should comply with what the supervisor asks, especially if it is correcting improper work performance. The witness would not answer or was not sure whether Mr. Colburn "liked" Appellant. The witness denied that he ever said anything negative about the Appellant, that he has anything against her, and, in fact, stated he made positive comments about her work performance.

21. Appellant questioned Mr. Keith as to whether another worker, Stuart Cary, was laying on the tailgate of the truck when he returned to work following a tractor accident. The witness agreed about that incident; however, he was not sure if Mr. Cary was actually laying on the tailgate, but it did happen on a "low-volume" road. The witness denied at one point telling Appellant she could sit down in a truck on a low-volume road while performing flagging duties.

Mr. Keith testified that Cindy Hughes, who works in the Madisonville District Office which has responsibility for the MCHG, had come to the garage and told Mr. Keith to fill-out the form requesting discipline. The witness testified that Appellant's and her ex-husband's business was none of his business, and denied telling Appellant he had been friends with "Gary," Appellant's ex-husband, first.

22. The next witness called by the Appellee was **J.R. Dobner**. Mr. Dobner testified that he is employed as a Human Resource Administrator with the Office of Human Resource Management for the Transportation Cabinet with the Employee Compliance Branch.

23. Specifically in this case, Mr. Dobner drafted the suspension letter for the Appointing Authority's review. He described that process. Mr. Dobner testified that he recommended a three-day suspension because, in his view, sitting down or squatting while performing flagging duties is very dangerous. He noted that the policies and manuals of the Federal Highway Administration warned that such conduct is dangerous even if the flagman says that he or she can see or hear approaching traffic; that it is the approaching motorists that are of concern because of the reduced visibility if the person doing the flagging is squatting or sitting. Mr. Dobner also pointed to what he viewed to be a similar fact situation in the matter of *Sparks v. Transportation Cabinet*, a Personnel Board appeal (2010-003) that went to a hearing and was dismissed.

24. After the suspension letter had been issued to Appellant, Mr. Dobner stated that the Appellant met with him claiming that the suspension was retaliation for the interview she had with Tyra Redus and Tony Youssefi on September 12, 2012. The conclusion was that fairness dictated that they must be consistent with the punishment for the offense. Mr. Dobner asked Ms. Redus to incorporate the Appellant's allegations regarding other employees sitting down while flagging and not being punished. In the end, Mr. Dobner felt like there was not enough evidence to take disciplinary action against David Keith or Steve Osteen who had been Superintendents over the MCHG. Mr. Dobner also discussed the incident heard earlier during the testimony of David Keith in regards to Stuart Cary sitting down on the tailgate of a truck while flagging. According to Mr. Dobner, essentially the supervisors had let it slide only because of Mr. Cary having returned from an accident to work. The primary distinction Mr. Dobner drew between the Stuart Cary incident and the incident involving the Appellant was the quick filing of the reports in Appellant's case versus the significant time lapse regarding the events in the Stuart Cary incident; and concerns it would be difficult to uphold such a case.

25. Counsel for Appellee questioned Mr. Dobner regarding Transportation Cabinet's policies which were introduced into evidence as Appellee's Exhibit 4, being the General Employee Conduct (GAP-801) and Appellee's Exhibit 5 being excerpts of Traffic Control; and Appellee's Exhibit 6, excerpts regarding Flagger Procedures from the Federal Highway Administration Manual.

26. Mr. Dobner testified that the reason a three-day suspension was imposed, even though the Appellant had no prior disciplinary action, was because anything concerning health and safety would be more serious than general work performance issues or time and attendance issues. A three-day suspension was imposed to prevent this safety violation from happening again. Again, Mr. Dobner made reference to the case of *Sparks v. Transportation Cabinet* (2010-003 Personnel Board), for which he initially recommended a one-day suspension, but the Highway District had come back to him indicating they wanted a more severe punishment due to safety issues.

27. Upon conclusion of the testimony of Mr. Dobner, Appellee announced closed.

28. Appellant called **Bobby Waddell** as her first witness. Mr. Waddell has been employed by the state for over twenty-four years and is currently a Highway Equipment Operator III (HEO III) at the MCHG. Mr. Waddell described his duties, including that in the past he has flagged.

29. For the last ten months, Appellant has flagged at times for Mr. Waddell. He has found her to be non-argumentative and a good worker.

30. Mr. Waddell testified he has seen other flagmen sit in the past, including Brandon Burton, on HWY 431 South a couple of months ago. Mr. Waddell testified he did not know if any action had been taken, because Burton was one of their "pets," (meaning earlier witness Mr. Colburn). Mr. Waddell testified that when Mr. Colburn was promoted to HEO IV "it went to his head." Mr. Waddell said that it appeared to him that the Appellant was treated differently, that she seemed to get called to the office every other week. Mr. Waddell also recalled an incident that occurred on 181 North where employee Mike Robinson sat in a lawn chair and "got no time off." He also said that it did not last long as the supervisor saw him and told him to stop. Mr. Waddell testified that in his time at Transportation he has never seen anybody be immediately suspended instead of going through the steps for an infraction. Mr. Waddell agreed that it was common on the road crews to leave a truck on the highway if they could not get it off the road and that he had seen other flag people sitting on a truck or on the tailgate of a truck.

31. Mr. Waddell observed that he did not believe Jason Colburn treated Appellant fairly and also observed that there were (what the Hearing Officer would term) "cliques" at the barn. Mr. Waddell testified he did not like Jason Colburn too well, even though they used to be good friends, and again the promotion seemed to go to his head. Mr. Waddell testified he has seen Appellant when flagging squat down and stretch her legs and also offered his opinion, having previously flagged, that everybody needs a break and that Jason Colburn could not stand and flag for six hours without a break either. Mr. Waddell testified he had never seen Appellant sit down while flagging.

32. The next witness called by Appellant was **Roger Gossett**. Mr. Gossett testified he was employed as the Superintendent II at MCHG and has been in that position for two months at the time of the hearing and has approximately eighteen years in state government overall. He testified that his job duties include overseeing the Superintendent I and crew leaders and scheduling work for the crews. Mr. Gossett stated that in September 2012 he was a Heavy Equipment Operator II assigned to mechanic work in the shop in Muhlenberg County. The witness stated that he never saw Appellant be unsafe, that she was a good worker, and worked well with others.

33. Mr. Gossett stated that he had seen flaggers sitting down or leaning against a truck, agreeing with Appellant's leading question, but said he had never seen anybody receive a three-day suspension without pay for such behavior.

34. Mr. Gossett stated that David Keith now treats her better than when she first started work, that she is not a good fit with Jason Colburn and attempts to not schedule her with Colburn. Mr. Gossett stated that he does not believe the Appellant was well received when she began work at the MCHG. The witness agreed that the barn in Muhlenberg County was not "one big happy family" that it essentially was segregated into, as Appellant termed it and the witness agreed, "us" and "them." The "thems" got the worse jobs before the witness took over. The witness offered some testimony as to feelings about Appellant in the barn when she began, but especially during and after her divorce from an employee who previously worked at the barn. The witness did not agree that anybody who went to speak with the investigators in Frankfort in September 2012 was retaliated against when returning to work.

35. The witness agreed that he had thought the process, i.e. Appellant, would be a verbal warning, a written warning, then a suspension. The witness testified that he had no idea why she got disciplined for actions that others had not. The witness stated that he was "shocked" that she had been suspended.

36. The witness agreed that Appellant may be misunderstood as being argumentative when she is expressing her opinion. The witness testified there was no problem with Appellant performing the jobs that she is qualified for and he received no complaints.

37. On cross-examination, Mr. Gossett agreed that someone performing traffic control as a flagman should be visible on the job. He further agreed that it would raise a safety concern in his mind if a worker was squatting or sitting down on the ground with the flag paddle also on the ground.

38. On redirect examination, the witness stated that he would have had a conversation and it would have been documented.

39. Upon conclusion of Mr. Gossett's testimony, Appellant, **Greta Chandler**, called herself as the next witness. Appellant testified that ever since she started with the state highway department she feels she was bullied and believes this is because of her ex-husband. Appellant stated her ex-husband worked seven years there before she worked there and was transferred to the Madisonville office. Appellant stated that the "office," including David Keith, Jason Colburn, and Steve Osteen, reacted negatively when learning of the separation. Appellant offered some hearsay regarding why she believed Colburn treated her negatively. Appellant offered testimony about having difficulty with Jason Colburn's crew which escalated over time. She stated that she went to Steve Osteen about this. Appellant also testified about the difficulty in working in "a man's world" in "a man's job" in a highway barn.

40. Appellant testified that it is better now that Steve Osteen retired and especially since Roger Gossett took over as the head of the barn. Appellant offered some photographs which were admitted into evidence of what she perceived to be safety violations committed by coworkers and/or supervisors at various times. Appellant testified these photographs were taken after her suspension. Appellant testified and remains convinced that the timing of the incident for which she was given a suspension (occurring on September 13 and 14, 2012) was so close in time to when she had come up to Frankfort to speak with Transportation investigators on September 12, 2012. Appellant testified that she "knows" that David Keith has seen other workers either sitting on a tailgate or sitting on a cooler while flagging.

41. On cross-examination, Appellant agreed that she had been properly trained on how to perform flagging duties. She also admitted she had been trained not to put her paddle on the ground and sit down. Appellant admitted she had not asked for relief for a break and sat down and put her paddle down on her own accord.

42. Appellant did not agree that 181 South was a high traffic area necessarily, that they were having slow traffic on the day in question, September 13, 2012.

43. Appellant testified that she believed Jason Colburn was joking with her which she thought was odd since he does not normally joke. Appellant disputes that Colburn ever ordered her to get up and she thought it was more of a casual conversation (regarding the incident on September 13, 2012). Appellant stated that she had a grievance filed with "Tyra's office" (the Hearing Officer takes notice that this is Tyra Redus, the Executive Director of the Transportation Cabinet's Office of Civil Rights and Small Business Development).

44. In response to the Hearing Officer's question, Appellant stated she had never reported any of the people in the photographs she admitted as exhibits she contends were not following safety rules, especially Brandon Burton, because that was before Roger Gossett took over the garage and she "knew it wouldn't do any good."

45. Upon conclusion of Appellant's testimony, she had no other witnesses and her case was closed.

46. The Appellee had no case on rebuttal.

47. The parties made closing statements.

FINDINGS OF FACT

1. During relevant times, Appellant was a classified employee with status.

2. Appellant is employed as a Highway Equipment Operator I for the Transportation Cabinet in the Muhlenberg County Highway Garage "Barn" at the time of the incidents in question in September 2012.

3. By letter dated September 25, 2012 Appellant had been suspended for allegations of lack of good behavior and poor work performance. The charges were that on September 13, 2012, she had been directed by Jason Colburn to park a state vehicle off the road and in a safe distance from the vehicles traveling through the work zone.

4. The next incident on September 13, 2012, was the incident that occupied the majority of the testimony at the evidentiary hearing that concerned the Appellant sitting on the road or off the verge of the road with her flag paddle flat on the ground. This was observed by supervisor Jason Colburn and Superintendent David Keith. The charge and the testimony both contend that Appellant did not immediately respond to the direction to resume normal position for a flagger.

5. The third charge occurred the next day on September 14, 2012, when Appellant was observed to continue to sit, squat or kneel when she should have been standing while performing flagging duties.

6. The Hearing Officer finds that the first charge where Appellant had to move a truck after being directed by Jason Colburn occurred, but the Hearing Officer does not find such constitutes misconduct. It appears the Appellant moved the state vehicle when directed to do so. It also appears there were no other issues surrounding this incident that would render it worthy of any disciplinary action.

7. The Hearing Officer finds Appellant did commit the charges as alleged in the second allegation on September 13, 2012, this being the most serious of the charges when she was observed sitting down while performing flagging or traffic control duties with her flag paddle flat on the ground. This was observed by Jason Colburn and David Keith, and Appellant admits to the conduct. There is disagreement by the parties as to how long this persisted. What is not in dispute is that the conduct did occur. The Hearing Officer finds Appellant had no justification for doing such. The Hearing Officer further finds that Appellant did not immediately resume her position and was somewhat argumentative with supervisor Jason Colburn.

8. The Hearing Officer finds the incident described on September 14, 2012, where Appellant was observed to have been "squatting like a duck" with her paddle on the ground on HWY 176, did occur.

9. The Hearing Officer is aware of Appellant's claim of retaliation for her having been interviewed by the investigators for the Transportation Cabinet on September 12, 2012, in regards to former employee Susan Downey's complaint. The Hearing Officer will clarify that he is not clear whether Appellant interviewed with the OIG or with Tyra Redus' office (Office of Civil Rights and Small Business Development). Either way, the Appellant did interview with personnel in central office in Frankfort on September 12, 2012, and that these incidents occurred the next two working days thereafter for which she received disciplinary action.

10. Though close in time, the Appellant did not present any evidence other than the proximity of time that would lead the Hearing Officer to believe that she was retaliated against for having been interviewed by personnel in Frankfort regarding Susan Downey's complaint. Significantly, Roger Gossett did not believe there was any retaliation for Appellant having done so, as he himself had to be interviewed in Frankfort and had suffered no repercussions.

11. The Hearing Officer also finds that this was not retaliation as Appellant did commit the misconduct as described in the letter except for the moving of the truck, which the Hearing Officer has found that though it did occur, it was not misconduct.

12. The Hearing Officer notes that much testimony was given at the evidentiary hearing of the various "cliques" at the Muhlenberg County Highway Garage, and that some people were either "in" or "out." This would lead to being assigned traffic control or flagging as "punishment." Likewise, Appellant offered largely un-rebutted testimony and evidence both from herself and from the testimony of Bobby Waddell and Roger Gossett that David Keith and Jason Colburn were unfriendly toward her, and would assign flagging as punishment.

13. However, all of that does not change the fact of the misconduct that did occur.

14. The Hearing Officer is mindful of the testimony of J. R. Dobner who recommended the assessment of the penalty that was given to Appellant. While Jason Colburn and David Keith had begun the process, it was Mr. Dobner who made the recommendation for the amount of disciplinary action to be taken, if any.

15. Mr. Dobner testified that he compared this case with *Sparks v. Transportation Cabinet* a Personnel Board appeal (2010-003). In that case, Stewart Sparks was assigned traffic control and flagging duties and was observed sitting in the state vehicle, and would not exit to perform the flagging duties. Sparks was found by the Board to have left his post on two separate occasions and was also found to have been insubordinate with his supervisor.

16. The Hearing Officer finds that this set of circumstances described in these allegations of misconduct, which the Hearing Officer has found were misconduct, were not of the same severity as those alleged and proven against Mr. Sparks for which a three-day suspension was imposed. However, the Hearing Officer does agree with Mr. Dobner's testimony that the primary concern here was safety and ensuring that the employees adhere to the safety regulations. One way of ensuring adherence is by imposing disciplinary sanction. The Hearing Officer is mindful that Appellant and her witnesses, Mr. Gossett and Mr. Waddell, who both testified strongly on her behalf, were surprised and even shocked that she was assessed a suspension instead of some lesser corrective action. There was certainly no showing that J. R. Dobner retaliated against Appellant; he merely assessed the facts as reported and recommended a suspension based on that. In fact, Mr. Dobner testified that based on information the Appellant had provided when he met with her that an investigation be done to another employee to determine if disciplinary action would be appropriate, though Mr. Dobner testified such could not be done because of the time lag that had occurred.

17. The Hearing Officer believes that some disciplinary action is appropriate, but not the three days imposed and so finds.

CONCLUSIONS OF LAW

1. The Hearing Officer concludes as a matter of law that Appellant did commit misconduct per 101 KAR 1:345 and poor work performance as described on September 13, 2012, when Appellant was observed sitting on the ground, with her flag paddle on the ground, on what was described as a busy highway. The Hearing Officer also concludes that Appellant on September 14, 2012, committed misconduct or poor work performance by again squatting for extended periods of time and being observed with her flag paddle on the ground. The Hearing Officer is mindful of Appellant's contention that others have done it and have not been penalized. The Hearing Officer also notes that Appellant states she did not report the times she observed other employees who have traffic control or flagging duties with their flag paddle on the ground because she did not believe it would do any good. The Hearing Officer does not

doubt the Transportation Cabinet's seriousness, especially that of the dispassionate involvement of J. R. Dobner that safety concerns are of primary importance and will be dealt with consistently.

2. However, the Hearing Officer concludes that Appellant did not commit misconduct regarding the incident of moving the truck on September 13, 2012, and that the analogy of Appellant's misconduct or poor work performance regarding her traffic control duties on September 13 and September 14, 2012, are not as egregious as those committed by Stewart Sparks. Thus, the Hearing Officer concludes that a lesser punishment than the three-day suspension without pay should be imposed.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **GRETA CHANDLER VS. TRANSPORTATION CABINET, DEPARTMENT OF HIGHWAYS (APPEAL NO. 2012-239)** be **SUSTAINED to the extent** that Appellant's three-day suspension without pay be reduced to a one-day suspension without pay. That Appellant be awarded two days' back pay, other lost benefits and that she otherwise be made whole. Further, the Appellee is ordered to reimburse Appellant for any leave time she used attending the hearing and any pre-hearing conferences at the Board. [KRS 18A.105, KRS 18A.095(25), and 200 KAR 12:030.]

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 Boyce A. Crocker** this 24th day of June, 2013.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. William Fogle
Greta Chandler
Kathy Marshall