

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 **ROBERT COLVIS V. DEPARTMENT OF FISH AND WILDLIFE RESOURCES (APPEAL NO. 2022-166)** as the same appears of record in the office of the Kentucky Personnel Board.

Witness my hand this 1st day of March, 2024.

Mark A. Sipek

**MARK A. SIPEK, SECRETARY
KENTUCKY PERSONNEL BOARD**

Copy to Secretary, Personnel Cabinet

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2022-166**

ROBERT COLVIS

APPELLANT

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

DEPARTMENT OF FISH AND WILDLIFE RESOURCES

APPELLEE

***** ***** ***** ***** *****

The Board, at its regular March 2024 meeting, having considered the record, including the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer dated January 23, 2024, 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 **SUSTAINED**.

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 4th day of March, 2024.

KENTUCKY PERSONNEL BOARD

Mark A. Sipek
MARK A. SIPEK, SECRETARY

A copy hereof this day emailed and mailed to:

Hon. Donna L. Dixon
Hon. Daniel Schulman
Hon. Rosemary Holbrook (Personnel Cabinet)

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2022-166

ROBERT COLVIS

APPELLANT

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

DEPARTMENT OF FISH AND WILDLIFE RESOURCES

APPELLEE

** ** ** ** ** **

This matter came on for an evidentiary hearing on January 10, 2024, at 9:30 a.m., ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky before Mark Sipek, Hearing Officer. The proceedings were recorded by audio video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Robert Colvis, was present, and was represented by the Hon. Donna L. Dixon. He was also accompanied by his wife, Julie Colvis. The Appellee, Department of Fish and Wildlife Resources, was present, and was represented by the Hon. Daniel Schulman. Also present for the Appellee was the appointing authority, Troy Robinson.

BACKGROUND

1. The Appellant filed this appeal on December 5, 2022, from a four (4) -day suspension. During a pre-hearing conference, this matter was scheduled for an evidentiary hearing with the burden of proof assigned to the Appellee.

2. The Appellant was suspended for an alleged sexually inappropriate remark to a female coworker. The Appellant contended he did not intend to make a sexual comment.

3. The Appellee called **Sarah Christian** (Christian) as its first witness. Christian is a Wildlife Biologist II in the Purchase Region Branch, Wildlife Division, Department of Fish and Wildlife Resources (KDFWR).

4. On September 28, 2022, Christian met the Appellant at the Tractor Supply in Mayfield. The Appellant asked to meet her to give her barbecue for her and her coworker.

5. Christian's testimony about what happened was the same as her written report of October 7, 2022, that was introduced as Appellee's **Exhibit 1**. Her report reads as follows:

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On Wednesday September 28th, 2022, I met up with Rob Colvis at the Tractor Supply in Mayfield. First thing that morning I went to Carlisle County to pick up elk samples. He called me on my way back to the Murray Office to see if I would meet him in Mayfield because he made some pulled pork that he wanted to share with me and Max the regional technician. I thought that was fine since I had to drive through Mayfield anyways to get back to the office. I had also planned to look at Tractor Supply for fuel tanks. When I arrived we just exchanged normal workplace conversation. I remember talking about CWD check stations and where each of us planned to work. The previous week I had my wisdom teeth removed which led to him asking me how the recovery process was going. I remember saying something about how it was frustrating because I still couldn't open my mouth very wide, so I still wasn't able to eat much. This led to Rob making the comment "oh, I bet your husband hates that." When the statement was originally made, I did not realize how he meant it. On my drive back to the office I realized he meant it in a sexual manner. This made me feel very uncomfortable.

I have always felt like things were a little off while working around Rob, but this is the first time he has made a direct comment. I waited until Wednesday October 5th, 2022 to report it to my supervisor John Zimmer because I didn't want to cause any conflict in the workplace. Being a newer employee I was also scared of how the reporting process would go. As a female in a mostly male career field, I have worked with a lot of men and have never felt this uncomfortable around someone at work. I continued to feel uncomfortable about the situation and finally decided I should say something. John validated my concerns and let me know that I did the right thing by talking to him about it.

6. Christian graduated from college with a Bachelor's degree in Wildlife Biology and Conservation Law Enforcement in May of 2020. She started working for KDFWR as an interim employee in April of 2021. She became a merit employee in January of 2022. She shared an office with the Appellant in Murray, Kentucky for a period of time. She does not work with the Appellant often.

7. Christian has not spoken with the Appellant about this incident. She testified that he was speaking in a joking manner when he said "oh, I bet your husband hates that." She also acknowledged other people could interpret the Appellant's comment differently. She interpreted it as a sexual remark and felt uncomfortable. She was unable to articulate why she "felt things were a little off working around" the Appellant.

8. **John Zimmer**, the Wildlife Program Coordinator and Christian's supervisor, heard from Christian about the events of September 28, 2022, on October 5, 2022. He reported the incident to his supervisor, Derek Beard.

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9. **Derek Beard**, the Assistant Wildlife Director, testified he asked Christian to complete a written report. Beard reported the incident to Ben Robinson and Troy Robinson.

10. **Ben Robinson**, the Wildlife Division Director, testified he reviewed this incident with Troy Robinson and recommended that they dismiss the Appellant. He testified it is important to support employees like Christian who are courageous enough to come forward after an incident like this. He also testified he took into account the Appellant's 2017 five (5) -day suspension including the sexual harassment component.

11. **Troy Robinson**, an Assistant Director and the Appointing Authority, was the Appellee's final witness. He learned about this incident from Beard and made sure they obtained a written statement from Christian. He also spoke with Christian and her statement was consistent with her written statement.

12. Robinson spoke with the Appellant about the incident over the phone. The Appellant did not deny making the statement "oh, I bet your husband hates that." Robinson described the Appellant as "surprised" or "taken aback" about the incident. Robinson believed the Appellant did not mean the statement the way Christian perceived it.

13. When asked if the Appellant's statement was a violation of the sexual harassment policy, Robinson stated "it is what it is." Robinson testified it was not the Appellant's statement or his intent but it was Christian's perception that determined what disciplinary action should be taken. Robinson stated that is how he has been taught to review this type of incident.

14. Robinson prepared the four (4) -day suspension letter dated November 1, 2022, that was admitted into evidence as Appellee's **Exhibit 2**, and attached to this order as **Recommended Order – Attachment A**. He took into account the Appellant's disciplinary history including the five (5) -day suspension issued to the Appellant in 2017 (Appellee's **Exhibit 3**.) He also introduced a copy of the Kentucky Employee Handbook – pages 7 and 8, Sexual Harassment Policy and Policy Statement on Harassment Prevention, as Appellee's **Exhibit 4**.

15. Robinson issued the four (4) -day suspension to the Appellant via a Teams Meeting. The Appellant was respectful but indicated he disagreed with the suspension. According to Robinson, the Appellant again stated his statement did not mean what Christian perceived it to be.

16. The Appellant testified on his own behalf. He is employed as a Wildlife Biologist III. He mostly works independently and is responsible for taking care of a two thousand four hundred (2400) -acre Wildlife Management Area.

17. He testified he works an average of twenty (20) minutes per week with Christian. He stated they occasionally work a few hours together. He never had any issues with Christian before this incident.

18. The Appellant contacted Christian and arranged to meet her at Tractor Supply in Mayfield, Kentucky to give her and a coworker some pulled pork barbecue. They both had work related reasons to be in Mayfield. He stated that on his own initiative, he gives away barbecue as a way of thanking the people he works with.

19. After giving Christian the barbecue, the Appellant asked her how her recovery was going from having her wisdom teeth pulled. The Appellant stated Christian said she was frustrated because she could not open her mouth very wide and could not eat well. The Appellant stated, "I bet your husband doesn't like that." The Appellant testified he meant this statement sarcastically. He meant Christian's husband would like the fact that he would be able to eat most of the barbecue.

20. The Appellant stated that Christian did not react in any way. They continued their conversation about hunting and other matters until they parted. The entire meeting lasted about thirty to forty (30 to 40) minutes.

21. Some days later, the Appellant received a call from Troy Robinson. Robinson questioned the Appellant about the exchange with Christian in Mayfield, Kentucky. He told Robinson he did not say anything sexually inappropriate to Christian.

22. On or about November 1, 2022, the Appellant was called to John Zimmer's office. Troy Robinson conducted a Teams Meeting with the Appellant and Zimmer. The Appellant read the four (4) -day suspension letter and stated he did not understand why he was being suspended. He stated he was baffled and did not believe he had done anything wrong.

23. The Appellant acknowledged he was suspended in 2017 for being under the influence of alcohol on the job. He accepted his discipline in regards to that incident and did not file an appeal. He has since undergone three (3) treatment programs and has been sober for two (2) years.

24. In contrast, he disagreed with the 2022 suspension and filed this appeal.

FINDINGS OF FACT

1. The facts in this case are not in dispute. The Hearing Officer adopts a portion of Troy Robinson's four (4) -day suspension letter to the Appellant as the basic facts:

On September 28, 2022, you and Ms. Christian met during work hours in Mayfield, Kentucky. The conversation had been work-related, until you asked how the recovery process was going, relating to her having her wisdom teeth removed the previous week. She replied stating it was frustrating because she still couldn't open her mouth very wide, so she still wasn't able to eat much. You then made the comment, "Oh, I bet your husband hates that."

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2. The Hearing Officer finds that the Appellant's statement could have been intended as a sexual remark or could have been intended as a remark relating to the Appellant's difficulty eating.

3. The Hearing Officer finds the Appellant's testimony credible that he did not intend his statement as a sexual remark.

- a. The Hearing Officer finds the Appellant as a believable witness throughout his testimony and specifically about his September 28, 2022 statement to Christian.
- b. Neither witness to the September 28, 2022 statement described any sexual context to their conversation.
- c. There was no testimony that the Appellant and Christian had ever had a sexual conversation before. The Appellant is not alleged to have ever made a sexual remark to Christian.
- d. The Appellant has consistently maintained that he did not intend a sexual remark. He did so in his initial statement to Troy Robinson as well as in his statements to Zimmer and Robinson during the Teams Meeting. He also denied any sexual meaning on his Appeal Form. Finally, the Appellant stated that under oath, he meant his statement in a sarcastic manner that Christian's husband would like that he could have most of the barbecue.
- e. Troy Robinson's testimony that the Appellant did not mean this as a sexual remark.
- f. The Appellant's testimony that he was saying sarcastically that Christian's husband would like to be able to eat all of the barbecue was believable and plausible. Clearly, the Appellant took pride in his barbecue and would assume Christian's husband would "love" to be able to eat most of it.

4. The Hearing Officer finds Christian's testimony credible that she interpreted the Appellant's statement as a sexual remark and that she was made uncomfortable. She appropriately reported this incident to her supervisor.

5. The Appellee appropriately investigated this incident.

6. The Kentucky Employee Handbook, Sexual Harassment Policy, (Appellee's **Exhibit 4**) reads in part as follows:

State law prohibits unwelcome sexual advances, requests for sexual acts or favors, with or without accompanying promises, threats, or reciprocal favors or actions; **or other verbal or physical conduct of a sexual nature** that creates or has the intention of creating a hostile or offensive working environment. Examples of prohibited conduct include, but are not limited to, lewd **or sexually suggestive comments, off-color language or jokes of a sexual nature**; slurs and other verbal, graphic or physical conduct relating to an individual's sex; or any display of sexually explicit pictures, greeting cards, articles, books, magazines, photos or cartoons. (Emphasis added)

7. The Appellant did not violate the Sexual Harassment Policy because he did not engage in verbal conduct of a sexual nature, he did not make a sexually suggestive comment and he did not tell an off-color joke or a joke of a sexual nature. Because the Appellant's statement was not inherently sexual and was not intended as a sexual remark, he did not violate the Sexual Harassment Policy. The fact that Christian interpreted the Appellant's statement as sexual does not make it a policy violation or misconduct.

8. The Appellee should be commended for its investigation in this matter and taking into account both the "intent" and the "impact" of the Appellant's statement. Nonetheless, this is a rare case where the statement was not sexual, there was no sexual intent and, thus, no Sexual Harassment Policy violation occurred.

9. Because the Appellant did not violate the Sexual Harassment Policy and did not commit misconduct, there was no just cause for the Appellant's suspension and the suspension was excessive and erroneous. The additional training assigned to the Appellant was appropriate.

10. The conduct that led to the Appellant's 2017 suspension was not similar in any respects to the 2022 allegations. On October 2, 2017, the Appellant was found in the office with the lights off and was told to "wake up." On October 16 and 17, 2022, the Appellant was reported smelling of alcohol by his supervisor. On October 19, 2022, the Appellant was "stumbling, slurring speech, and needing to hold something to support" himself. He also was unable to hook up a trailer, attach hydraulic lines to a tractor, and back up a trailer to load a boat. On the return trip from the worksite, he made an inappropriate comment to a female coworker stating he was horny and hoped his wife would be horny when he got home. Minutes after he left work he was charged with driving under the influence of alcohol. Evidence of the 2017 suspension was only admitted over Appellant's objection for purposes of progressive discipline and possible penalty enhancement. It was not admitted for purposes of showing it was more likely than not that the Appellant intended to make an inappropriate remark in 2022.

CONCLUSIONS OF LAW

1. The Appellee failed to carry its burden of proof that there was just cause for the Appellant's four (4) -day suspension. KRS 13B.090(7).

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2. The Appellee failed to carry its burden of proof that the four (4) -day suspension of the Appellant was neither excessive nor erroneous. KRS 13B.090(7).

3. The Appellant did not violate the Commonwealth's Sexual Harassment Policy and his statement did not constitute a lack of good behavior. 101 KAR 1:345.

4. The Appellant's 2017 five (5) -day suspension (Appellee's **Exhibit 3**) was admitted over Appellant's objection as part of "all the surrounding circumstances" consistent with KRS 18A.095(22)(c) and *Eric Kirst vs. Justice and Public Safety Cabinet, Department of Corrections*, 2021 WL 410883 (KY PB). This previous disciplinary action was not admissible to establish it was more likely than not that the Appellant intended to make an inappropriate sexual remark in 2022. Admission for this purpose is prohibited by KRE 404(b).

5. Because all the events underlying this Appeal occurred before the effective date of Senate Bill 153, all references to KRS Chapter 18A are to the sections in effect at the time of the events associated with this Appeal.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **ROBERT COLVIS VS. KENTUCKY DEPARTMENT OF FISH AND WILDLIFE, (APPEAL NO. 2022-166)** be **SUSTAINED**. The four (4) day suspension is to be set aside and removed from the Appellant's personnel record. The Appellee is **ORDERED** to reimburse the Appellant for four (4) days' pay; reimburse the Appellant for any leave time he used attending the hearing and pre-hearing conferences at the Personnel Board, and to otherwise make the Appellant whole. (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 fifteen (15) 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.

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SO ORDERED at the direction of the Hearing Officer this 23 day of January, 2024.

KENTUCKY PERSONNEL BOARD

mark a. sipek

MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day emailed and mailed to:

Hon. Donna L. Dixon
Hon. Daniel Schulman
Hon. Rosemary Holbrook (Personnel Cabinet)



KENTUCKY DEPARTMENT OF FISH & WILDLIFE RESOURCES

Rich Storm
Commissioner

#1 Sportsman's Lane
Frankfort, Kentucky 40601
Phone (502) 564-3400
Fax (502) 564-0506

Brian Clark
Deputy Commissioner
Gabe Jenkins
Deputy Commissioner

November 1, 2022

Robert J. Colvis

Dear Mr. Colvis:

Pursuant to KRS 18A.095 you are notified that you are suspended from duty and pay for a period of four (4) working days, effective beginning of business on Wednesday, November 2, 2022, through the close of business on Monday, November 7, 2022. The days you are scheduled to be off work during this time period are November 2, 3, 4 and 7. You are to return to work at your regularly scheduled time on Tuesday, November 8, 2022.

Pursuant to 101 KAR 1:345, Section 1, you are being suspended from your position as Wildlife Biologist III, in the Purchase Region Branch within the Wildlife Division, Kentucky Department of Fish and Wildlife Resources (KDFWR), for lack of good behavior in the workplace. Specifically for the following reason:

On October 7, 2022, it was brought to my attention that you had made an inappropriate comment to Sarah Christian, Wildlife Biologist II, Purchase Region Branch, Wildlife Division. On September 28, 2022, you and Ms. Christian met during work hours in Mayfield, Kentucky. The conversation had been work-related, until you asked how the recovery process was going, relating to her having her wisdom teeth removed the previous week. She replied stating it was frustrating because she still couldn't open her mouth very wide, so she still wasn't able to eat much. You then made the comment, "Oh, I bet your husband hates that." This statement was offensive to Ms. Christian and it made her feel very uncomfortable.

On October 17, 2022, I called you to discuss this situation and to get your recollection of the conversation. After you confirmed that you did meet Ms. Christian at the Tractor Supply in Mayfield Kentucky, I asked if you made any offensive comments to her. You stated "No." I asked if you all had a discussion regarding her recovery of having her wisdom teeth removed, you said you did remember that. I asked you if during the wisdom teeth recovery conversation, did you recall her stating how frustrated she was because she still couldn't open her mouth very wide and was not able to eat much, which you did recall that part of the conversation. I

asked you if you responded to her by saying, "Oh, I bet your husband hates that.", you stated "I might have said that, but in a joking way." You then said, "If I offended her, I did not mean to offend her." You also stated that she had no reaction to the comment and that you have joked with her before.

KDFWR and the Commonwealth of Kentucky do not tolerate harassment or unprofessional behavior of a sexual nature in the workplace. Pursuant to the Executive Branch Employee Handbook (page 9), sexual harassment and discrimination are prohibited and may be grounds for disciplinary action. You most recently completed the Preventing Sexual Harassment training on April 11, 2022 and completed the online ODET Anti-Harassment Awareness training on November 21, 2021. As such, you knew or should have known that these comments and behaviors were not professional and inappropriate in the workplace.

I find that this disciplinary suspension and additional education is the appropriate course of action to address your behaviors. You are required to complete the following online classes within the next 30 days:

ODET Anti-Harassment Awareness
Harassment Prevention Made Simple
Identifying and Preventing Sexual Harassment
Tackling Sexual Harassment at Work

Your personnel file contains a previous disciplinary action to include a five (5) day suspension issued on December 11, 2017, for lack of good behavior, as well as a corrective action in the form of a written reprimand issued on June 12, 2017.

Finally, you are advised that your behavior as outlined in this letter is unacceptable and will not be tolerated. Any future behaviors of this nature will result in additional disciplinary action up to and including dismissal.

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

In accordance with KRS 18A.095, you may appeal this action to the Personnel Board within sixty (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,



Troy Robinson
Assistant Director and Designated Appointing Authority
Kentucky Department of Fish and Wildlife Resources

Attachment: Appeal Form

**cc: Secretary, Personnel Cabinet
Rich Storm, Commissioner, KDFWR
Brian Clark, Deputy Commissioner, KDFWR
Ben Robinson, Division Director, Wildlife Division
Personnel File**