

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NOS. 2014-053 AND 2014-277

ROBERT EDWARDS

APPELLANT

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

LABOR CABINET
LARRY L. ROBERTS, 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 18, 2015, 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 appeals are 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. Cannon Armstrong
Robert Edwards
Lynn K. Gillis
Sherry Butler

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
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VS.

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** ** *

These consolidated matters came on for evidentiary hearing on March 19, 2015, at approximately 9:35 a.m., at 28 Fountain Place, Frankfort, Kentucky, before John C. Ryan, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by KRS Chapter 18A.

Appellant, Robert Edwards, was present and was not represented by legal counsel. The Agency, Labor Cabinet, was also present and was represented by the Hon. Cannon Armstrong. Sherry Butler was present as Agency representative.

The earlier of these appeals, No. 2014-053, was filed in March 2014 and challenges a demotion which was implemented due to Appellant's calendar year end 2013 evaluation. The second appeal, No. 2014-277, challenges a subsequent ten-day suspension. One or both matters have been the subject of at least three pre-hearing conferences. The Hearing Officer initially recommended that the appeal of the demotion be dismissed, but the Board rejected the recommendation and the matter was remanded to the active docket on October 13, 2014. The two appeals were thereupon consolidated for purposes of conduct of evidentiary hearing.

BACKGROUND

1. Prior to March 1, 2014, Robert Edwards held the position of OSH Compliance Officer III with the Labor Cabinet, Department of Occupational Safety and Health with a salary of \$3,122.82 monthly. By letter of February 18, 2014 over the signature of Lynn Keeling Gillis, Designated Appointing Authority, he was demoted to the position of OSH Compliance Officer II, new salary \$2,974.12 monthly following assessment of an "Unacceptable" 2013 year-end performance evaluation rating. That letter, which details the basis for the action, is attached as **Recommended Order Attachment A**.

2. Mr. Edwards took issue with this action by appeal initiated on March 24, 2014 under the appropriate category of "demotion" and wrote:

I was demoted last month and I feel that it was not correct. In the attached letter it stated the reason why I feel it was wrong.

Appellant attached a summary of his circumstance explaining, among other things, that in June, 2012 he fell down a flight of stairs at his home and suffered serious head injuries therefrom, resulting in memory loss and urging other work-related issues resulting in poor evaluations since that time.

3. On September 26, 2014, again from the office of Lynn Keeling Gillis, Mr. Edwards was assessed a ten-day unpaid suspension for asserted unsatisfactory work performance. That letter detailed four inspection assignments conducted by Appellant in the course of his duties which management viewed were variously improperly handled on-site, in the follow-up, and/or in his preparation of reports documenting inspections. The letter contained a lengthy recitation of perceived defects generated as a result of his actions, or lack thereof as the case may be.

4. Appellant took timely challenge of that action under the appropriate category of "suspension" on November 3, 2014 and attached a two-page summary of his grounds. He alleges, essentially, that his supervisor is "... trying to 'come after me' by requiring me to do things during an inspection that she is not requiring other employees that are under her." His summary further details what he views supports the asserted discriminatory behavior. He also reiterates his injury history as underlying a diminished ability to perform the duties.

5. Upon convening the evidentiary hearing the Agency, under its assigned burden of proof, offered brief opening comments and thereupon presented the testimony of **Elizabeth Shannon Lancaster**, who is Safety supervisor with the Kentucky Labor Cabinet in the Division of OSH Compliance. She has served with the Commonwealth, always with the Labor Cabinet, for twenty years, having commenced at OSH Compliance in 1995 and rising through the ranks to attain the supervisory position in early 2007. She depicted that her division enforces the safe operation of construction sites of industry operating within the public sector through application of specified safety regulations which govern the industry. This is accomplished through the visiting of the sites by compliance officers for the purpose of assuring that safe procedures are being engaged by the operator.

6. The witness explained that those inspectors under her supervision are designated as Compliance Officer II and/or Compliance Officer III. Those holding the position of Compliance Officer II are expected to handle basic, routine-type inspections without supervision or participation by other officers and to thereupon prepare reports and citations where called for. Their documentation should support their conclusions, including any citation recommended. Those personnel should ordinarily be able to handle inspections which involve a modest degree of difficulty or complexity. Personnel with a Compliance Officer III ranking are assigned more complex inspections, such as where a fatality has occurred, or if the particular site is high profile, has been publicized in the media, or is otherwise the subject of intense scrutiny requiring more detailed reporting and documentation.

7. The witness recalled that Appellant transferred to her division from another division of the Agency and she already knew him for the reason their offices were in the same building. He commenced under her supervision in November, 2011 and came in as a Compliance Officer III due to his experience and longevity in the other branch. He underwent a somewhat standard adjustment period wherein he essentially was accompanied by another, more experienced compliance officer in the conduct of the duties. This went on for approximately six weeks, whereupon he came to her insisting that he felt ready to commence performing the inspections on his own. She assigned him one or more relatively simple sites, which she described for the record, and his work-ups were then reviewed for accuracy and completeness. Although there were some issues with his writing at that time, discussions ensued and those jobs were completed. She noted in that regard that ordinarily a Compliance Officer III would be assumed to be sufficiently skilled and should not require the same treatment as a trainee or a new hire just coming on. However, despite coming in under the III category, it soon became apparent that Appellant's work would require close scrutiny.

8. The witness continued that during the year 2012, his first full year in the position, it was clear that Appellant was trying very hard to perform the duties, but his inspections and documentation were consistently inadequate and insufficient to support whatever he recommended, particularly where citations were involved. She observed no improvement throughout that year. She insisted that she and other management personnel undertook to work with him, repeatedly requesting of him to alert management as to what he needed to improve his output. He provided little or no feedback seeking any help. There was no measurable improvement either for 2012 or in 2013.

9. The witness introduced Appellant's 2012 Performance Evaluation and noted therefrom that he attained a 202 score, which fell into the "Needs Improvement" category. She pointed out that he had agreed with the evaluation and signed off thereon. She recited from this evaluation that during the first interim term, from May, 2012; Appellant was still being coached as to the basic requirements of the position with notable deficiencies observed. Similarly, during the second interim review the workup indicates that he was still learning those aspects, despite

his perceived skills coming into the position. Further, there was no observable improvement from the previous term, although some credit was assessed for Appellant's efforts toward raising his skill level. She recalled that Appellant was again placed with another compliance officer to shadow, it being viewed that perhaps if he were in a position to observe how the process should be properly performed, he would absorb sufficient knowledge to demonstrate improvement. However, no progress was observed.

10. The witness offered Appellant's 2013 Performance Evaluation and pointed out that that score for the year-end was 145, placing his production in the "Unacceptable" category. She described the circumstance leading to this conclusion, including meeting with Appellant at that time to discuss the score. She recalled that she posed to him whether he understood the rating and whether he had questions concerning it. Pressed about it, Appellant simply agreed, commenting that "it's not a lie" and thereupon signed off despite being informed of the regulatory ramifications.

11. The witness expanded that during 2013 a total of three Interim Reviews were conducted with him and in each instance the same cluster of deficiencies were noted, with no improvement, and each workup contained a litany of deficiencies in his work product. She cited representative examples in the course of her testimony, such as that on-site inspections conducted by Appellant were not sufficiently thorough to enable the Division to react thereto and that his documentation and reports were severely lacking in sufficient detail to support any follow-up or action. She recalled that as of September, 2013 it seemed clear to her that Appellant was not capable of performing the duties and expectations of a Compliance Officer III. During at least a portion of that calendar year she commenced to print out the reports which Appellant did prepare, red-line them thoroughly, and then discuss with him what was needed and what he should do to bring them into compliance with Agency requirements. This did not result in measurable improvement.

12. The witness continued that a series of Performance Improvement Plans (PIP) was generated in an effort to blueprint express, specific guidelines that might aid Appellant to bring his inspections and his reporting up to expectations. She introduced a set of four PIPs ranging from January, 2013 for each quarter thereafter through March, 2014. She depicted therefrom a variety of needy areas in Appellant's work product, generally dealing with his use of incorrect forms, "extremely" deficient documentation, and failure of documentation to match or support his conclusions, with some forms simply missing entirely. She noted that the litany of shortfall items never varied throughout each quarter or term and, notwithstanding express, detailed efforts to blueprint what was needed, Appellant did not comply. The regulatory mandated demotion then ensued in February, 2014.

13. The witness explained that notwithstanding the demotion, the complexity and nature of the duties assigned Appellant actually remained unchanged. This occurred for the reason that due to his history of poor performance, his workload mix had already been modified to a less complicated level as part of the on-going effort to improve the quality of his production. The effect of the demotion from Compliance Officer III to Compliance Officer II was to more closely match his duties and assignments being performed at the time, although this was not the express basis for the demotion. Despite all the foregoing, Appellant's performance and quality of work did not improve and in due course he received a three-day suspension and thereafter the ten-day suspension, now under appeal.

14. The witness introduced and discussed the September 26, 2014 letter assessing Appellant a ten-day suspension. She addressed various portions of the 4.5 page summary of asserted defects arising from at least four specified inspection sessions assigned to and conducted by Appellant. Essentially, in each of the cited instances, defects in either conduct of the inspection itself or its report gave rise to numerous shortcomings requiring that one or another aspect be redone. The witness, as supervisor, also commenced generating incident logs in each instance whenever she was required to red-line a report and return it for corrections, additions, or follow-up. These so-called incident logs undertook to document, in each instance, the issues and deficiencies of the particular report which needed to be revised or corrected to bring it into compliance for enforcement.

15. The witness cited one of the planned inspections assigned to Appellant, identified as Asahi Forge, as an example. The report which he prepared from this visit was handed back and forth between herself and Appellant at least four times before deemed as substantially complying with the relevant PIP in place at the time. She explained that this report, red-lined three times previously, either contained extensive defects finally rectified or, more likely she opined, ongoing defects which Appellant repeatedly failed to correct.

16. The witness explained that the mission of the Agency is jeopardized if inspections are defective. Specifically, there is risk to the employees of the entity under inspection and the public if Appellant's work product does not measure up. There could be on-going undetected hazards for employees that "... could result in serious physical harm or death." She further noted that in the event defects are not sufficiently or properly documented violations might be dismissed if brought to hearing, depreciating the credibility of the Compliance Officer and the Agency. There were also instances of Appellant having cited an incorrect regulation, placing any citation of the asserted violation at risk. Further, the Agency is under strict requirement to issue citations within six months of a final inspection, but the delay in getting Appellant's work complete and correct jeopardized meeting this timeframe.

17. The witness introduced records indicating that Appellant was afforded sufficient training to have been able to perform the assignments directed to him, urging that lack of training was not the issue. She also offered as part of her testimony a charting of inspections conducted by all personnel under her supervision, demonstrating that Appellant's output lagged behind that of most of the other Compliance Officers engaged in similar duties.

18. Under very brief cross-examination, the supervisor recalled that of the series of reports turned in by Appellant, only one or at most two were accepted as properly completed and sufficiently thorough. Pressed as to whether his work product deteriorated following a head injury which he suffered in June, 2012, the witness recalled that the work product both before and after the head injury required extensive red-lining, revisions, and close supervision. She disputed that Appellant was held to more strict timeframes than his fellow Compliance Officers.

19. **Lynn Keeling Gillis** is Division Director for Human Resources for the Labor Cabinet and also functions on behalf of other agencies in a similar capacity. She has held this position for approximately two years, but possesses approximately twelve years experience in Human Resources and personnel matters.

20. She reviewed the letter issued to Appellant on February 18, 2014 demoting him from OSH Compliance Officer III to Compliance Officer II. She explained that his 2013 year-end evaluation, which scored below 150 points, left her no choice under the relevant regulation but to either dismiss him or demote him. In light of his status as a long-term employee who had performed well in the past, it was perceived that he might be successful in a lesser demanding position and the demotion option was selected.

21. The witness also reviewed and explained a subsequent letter of September 26, 2014, also issued by her, assessing Appellant with a ten-day suspension. This occurred after review of his personnel file, the series of PIPs, the relatively recent demotion, and a prior three-day suspension all for essentially the same reasons, namely lack of improvement in his work product. She viewed that the reported mediocre quality of his output, as being chronic and on-going, with little or no improvement despite notable effort invested therein by management, supported the ten-day suspension. It was also in keeping with the progressive discipline policy in place. She did not meet with or confer with Appellant concerning the penalization in advance of assessment thereof. Appellant did not quiz this witness and the Agency's proof-in-chief was thereupon concluded.

22. Appellant presented testimony by **Anthony Bledsoe**, who is a Safety Specialist with the Agency. He is a seventeen-year employee and works out of the same quarters as Appellant. He recalled one or more occasions wherein the manager, Ms. Lancaster, approached Appellant with one or another document, tossed it on Appellant's desk, and informed him in a loud voice, "This is not right."

23. The witness undertook to describe the procedure ordinarily required for inspections. He recalled that if the particular entity being inspected is in compliance, a final report is due within five days of the closing conference, namely a final meeting wherein the inspector and the entity under inspection sign off. If a citation is to be issued, the report is due within twelve days. He acknowledged that in some instances his own projects have consumed longer terms and he was not disciplined for being late but merely advised to complete his reports on time in the future. He ratified that any citations must be issued within six months.

24. Appellant pressed the witness concerning his observation of his demeanor and behavior following a fall in which Appellant sustained a head injury. The witness was aware that Appellant was injured, having donated leave time for him when he was off recuperating. The witness observed that since the injury Appellant's reaction times and responses to questions and inquiries are noticeably longer. He also observed that Appellant is not now as inquisitive in meetings nor does he actively participate in the dialog. He recalled that Appellant has also come to him with greater frequency seeking help about certain aspects having to do with the regulations and the content of reports, as well as certain types of corrections that should be made either in the inspected premises or relating to the accuracy of the reports. It was the impression of the witness that management is requiring more extensive detail and thoroughness from Appellant than from his coworkers.

25. Under very brief cross-examination, the witness ratified that the manager, Lancaster, has commenced red-lining his own reports in recent months.

26. **Gary Davis** has served with the Agency since 2007 and currently holds the position of Compliance Officer III. He is Appellant's coworker but functions under a different supervisor. He asserted that previously his work desk was physically located next to that of Appellant's. At the time, Appellant's supervisor, when approaching him, became so boisterous and loud when conversing with him that the witness requested that he be relocated away from the area. He insisted that the supervisor, Lancaster, regularly berated Appellant in this manner.

27. This witness was familiar with Appellant's demeanor and behavior both before and after his fall resulting in a head injury. He viewed that the injury severely impacted Appellant and that he should have been placed in therapeutic rehabilitation before returning to the duties and possibly thereupon retrained. From his observation, this did not occur.

28. The Agency conducted no cross-examination of the witness and Appellant, **Robert Edwards**, offered testimony concerning his appeals. He recited that he previously was with the Education and Training Branch of the Agency for twelve years, depicting his duties there as the teaching of classes, drafting of manuals, and conduct of training sessions and inspections. He urged that at that time his performance evaluations were in the "Excellent"

category. When he moved to the Compliance Branch, he transitioned from presentment to receipt of training and ultimately commenced conducting inspections. Shortly thereafter, his evaluations began to deteriorate.

29. Appellant alluded to a head injury suffered from a fall in June, 2012. He never fully recovered therefrom, experiencing notably slower motor skills and response to inquiries. He viewed that the supervisor, Lancaster, ignored his injury and, in fact, increased pressure upon him, in excess of that applied to coworkers, to conduct or detail inspections and generate more extensive reports. He insisted that having to repeatedly redo the reports decreased his productivity and he consequently was conducting fewer inspections than his fellow officers

30. Appellant continued that he undertook to follow and comply with the PIPs which management created for him. It was unclear to him what he was doing incorrectly, since when the reports came back to him red-lined he made the corrections suggested, turned them in, and they nonetheless were again returned as though he made no corrections. Further, he urged, some reports would be marked up but with no suggestions about what was wrong. He viewed that work conditions are hostile and that he is being singled out.

31. Under cross-examination, Appellant acknowledged that he received training variously, adding that due to his memory loss he does not recall what courses he completed. He agreed that the memory loss arising from his injury is a concern but insisted that if returned to his Compliance Officer III position he could perform the tasks required. Pressed as to his efforts to obtain reasonable medical accommodation arising from his injury, Appellant reacted that he has applied therefor but is awaiting a doctor's statement, to-date unavailable due to the fact that his previous, regular doctor retired. He conceded that he only recently supplied the requisite materials to management. He agreed that management gave him the forms for this in January 2013 but he did not then follow-up.

32. The Agency further quizzed Appellant concerning the documentation surrounding his injury, recovery, and efforts at accommodation. He acknowledged that in August, 2012 shortly after his fall he provided a certificate from his doctor authorizing him to return to work. Thereafter, in May, 2013 he supplied a follow-up medical report reflecting that he could be employed without limitation and in early 2015 was certified as physically fit for performing the duties. He reiterated that until quite recently he has never provided sufficient documentation to support a reasonable accommodation. Appellant explained that recently memory testing was conducted and that he failed the test. He indicated that medical advisors have informed him that more extensive testing will be required to determine the nature and extent of his memory issues.

33. Appellant's proof being completed, the Agency offered rebuttal testimony from **Sherry Butler**, Designated Appointing Authority. She numbers among her duties the position of ADA Coordinator with the Agency and in that regard has familiarized herself with Appellant's medical circumstances through review of his file. She observed therein that a request for accommodation was received from him in January, 2013, very soon after a dismal performance evaluation. He was supplied the appropriate forms to commence the process to obtain the requisite information to determine what, if any, limitations applied but there was no response from him then. In March, 2013 Appellant obtained an annual physical checkup, required of Compliance Officers, and his report indicates that all was well. However, his physician reported that Appellant would need to follow-up with a neurologist to deal with certain complaints. In April, 2013 the Agency did receive a report from a neurologist that Appellant suffered no physical limitations, but recommending that he be examined by a psychiatrist in light of his head injury. Appellant was thereupon instructed to obtain a psychiatric fitness for duty report and, in July, 2013 such a report was supplied reflecting no limitations for duty.

34. The witness continued that nothing else of a medical nature was received from Appellant until March, 2014 when he submitted a renewed request for reasonable accommodations and was again supplied the requisite forms. He did not respond thereto until September, 2014 when he was assessed the ten-day suspension, whereupon follow-up effort was made to obtain relevant information to enable management to review whether reasonable accommodation might be feasible.

35. The witness continued that at one point Appellant contacted her directly and she supplied still another set of forms seeking information to enable management to assess his circumstances. She recalled that in November, 2014 her office was presented with what amounted to Appellant's entire medical file, but it did not contain any medical recommendations or requests by any physician that he be accommodated. Finally, she noted, in early 2015 Appellant commenced to provide potentially useful medical information which was under analysis by appropriate personnel at the Agency at the time of hearing. The witness was unable to comment as to what disposition might be made of either the request or Appellant's continuation in the assigned duties. The sworn testimony was thereupon concluded and the matter stood submitted for a recommended order.

36. KRS 18A.095(1) provides: "A classified employee with status shall not be dismissed, demoted, suspended, or otherwise penalized except for cause." Both demotion and suspension are penalizations within the statutory definition.

37. KRS 18A.110 is the omnibus statutory provision authorizing and directing the Personnel Secretary to generate and promulgate relevant regulations implementing the evaluation system. 101 KAR 2:180 is the relevant regulation in place governing the employee performance evaluation system. Section 3 thereof pertains to performance planning and prescribes the formula for the creation and implementation of performance improvement plans. Another section details the steps that either must be or may be implemented by an evaluator (supervisor) to aide an employee in the understanding and performance of the duties expected of him. Section 8 requires:

Evaluation-based Agency Action. If an employee receives an overall rating of unacceptable, the agency shall:

- (1) Demote the employee to a position commensurate with the employee's skills and abilities; or
- (2) Terminate the employee.

Under Section 5 of the regulation, less than 150 points places a performance rating in the "Unacceptable" category.

38. 101 KAR 1:345 is the regulation relating to imposition of disciplinary actions. Section 1 thereof empowers appointing authorities to discipline its employees for lack of good behavior or the unsatisfactory performance of duties. Section 4 deals with suspension and provides that a suspension may not exceed thirty days.

FINDINGS OF FACT

1. At all times germane to these two appeals Appellant, Robert Edwards, was a classified employee with status, holding the position of OSH Compliance Officer II with the Labor Cabinet since March 1, 2014. He came to the Compliance Branch in November, 2011, having transferred from the Education and Training Branch where he satisfactorily served for approximately 12 years. Appellant came over with a ranking of Compliance Officer III, the perception at that time being that he should require little or no threshold training in light of his experience and perceived skill level.

2. The proof is somewhat equivocal as to Appellant's startup performance in the Compliance Officer position, other than his supervisor reports that he underwent what was considered to be a somewhat standard and routine learning curve. He was supplied with one or more training courses, but in light of his existing training and experience Appellant was not required to undergo the entirety of the beginner's scale of training. He reported to the supervisor

that he viewed he possessed sufficient knowledge and skills to perform the Compliance Officer III duties within about six weeks of his transfer. This was apparently incorrect.

3. The manager strongly urges that Appellant never possessed or developed the necessary aptitude or ability to satisfactorily perform the duties of a Compliance Officer III. She reports that from the outset his field safety inspections of the private industry operations falling under supervision of the Agency were lacking and his reports faulty. She undertook to counsel with him and rectify these shortcomings and in due course placed him under a series of Performance Improvement Plans (PIPs). Little or no improvement occurred. In June, 2012 Appellant suffered a serious head injury in a fall, which may have contributed to his inability to perform the assigned tasks.

4. Appellant's performance evaluation report for the year-end 2012 ranked him with a 202 score, placing him at the "Needs Improvement" level. He signed off as agreeing with this rating. After a full year of PIPs which apparently did not take, Appellant's 2013 performance evaluation resulted in a 145 score, thereby falling into the "Unacceptable" level and triggering the regulation which requires the Agency to either demote or dismiss him. Appellant signed off as agreeing with the evaluation with knowledge of the ramifications thereof.

5. Given his previous longevity and satisfactory performance with the Agency in the prior branch, management elected to demote Appellant to the less demanding Compliance Officer II ranking, thereby decreasing the amount of responsibility and nature of inspections required to be completed, but reducing his salary as well. However, his performance continued to fail to measure up, never attaining a level wherein which management was comfortable in certifying his work without close and constant revision. In September, 2014, following a series of what it deemed to be botched inspections and/or reports with inadequate completion of assignments, the Agency assessed Appellant a ten-day suspension, purportedly based upon its progressive discipline policy. The proof is that he previously received a three-day suspension arising from the same issues, which he did not challenge.

6. Whether or not Appellant is eligible for reasonable accommodation arising from a medical condition caused by the June 2012 fall remained unresolved at the time of evidentiary hearing. He has been somewhat dilatory and/or delinquent in that regard, signaling a desire for accommodation but failing to promptly follow through in providing the information required to enable management to review his circumstances. However, documentation on the subject was forthcoming in early 2015 and pending at the time of hearing of these appeals.

7. The Hearing Officer finds the testimony of all witnesses, including Appellant, to be credible.

CONCLUSIONS OF LAW

1. 101 KAR 2:180 affords agencies and management little flexibility as to disposition of the circumstances of an employee once a performance evaluation score triggering the regulation is established. If the worker receives a score of less than 150 points upon his year-end evaluation, he must be either demoted or terminated. The time to challenge the action is not after it occurs, but at the time the score is assessed, seeking a review of the elements composing it. Appellant did not challenge his poor 2013 evaluation score, agreeing at the time that it was reflective of the level of his performance. The resultant demotion cannot now be overturned or set aside. As noted above, neither the Agency nor the Personnel Board are afforded any discretion under the regulation, especially in view of the election by the Agency to exercise the lesser of the two penalties and retaining Appellant in the service.

2. On the other hand a suspension, both as to the need and the severity, does involve some exercise of discretion by management. Most agencies employ a well publicized progressive discipline policy concerning the issuance of reprimands, fines and suspensions, the announced purpose being not so much punitive as an effort to demonstrate to the employee the perceived seriousness of the transgression. The Agency must of course establish that the transgression occurred.

3. Proper performance of the duties assigned to Appellant is critical to ensure the safety of workers and to a lesser extent the public. If his performance is faulty injury or death could result. Even he understands this, the clear signal being that he is sincere but unable to meet the standards assigned to accomplish the mission of the Agency. Appellant's argument, that his supervisor is more harsh toward him than others, falls short of demonstrating that a penalization for repeated failure to perform the job was unjustified. However, it seems clear that discipline, standing alone, is not a solution toward rectifying his poor showing in this position.

4. The actions of the Agency, in demoting Appellant under the regulation requiring such action following an "Unacceptable" performance evaluation was neither excessive nor erroneous in light of the overall circumstances. Further, assessment of the ten-day suspension without pay was within the discretion of the Agency and is neither excessive nor erroneous in light of the overall circumstances.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **ROBERT EDWARDS VS. LABOR CABINET (APPEAL NOS. 2014-053 and 2014-277)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

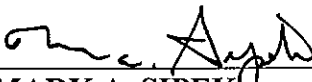
Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are 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).

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 John C. Ryan** this 18th day of May, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof mailed to:

Hon. Cannon Armstrong
Robert Edwards

STEVEN L. BESHEAR
GOVERNOR



LARRY L. ROBERTS
SECRETARY

LABOR CABINET
OFFICE OF THE SECRETARY
1047 U.S. 127 SOUTH
FRANKFORT, KY 40601
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www.labor.ky.gov

Hand Delivered and Regular Mail

February 18, 2014

Mr. Robert E. Edwards

Personnel Number

Dear Mr. Edwards:

Pursuant to KRS 18A.095, you are advised that you will be demoted for cause from your position as an OSH Compliance Officer III, position number 31006359 with the Labor Cabinet, Department of Occupational Safety & Health to the position of OSH Compliance Officer II (number to be established), with the Labor Cabinet, Department of Occupational Safety & Health, effective beginning of business March 1, 2014. As a result and pursuant to 101 KAR 2:034, your salary will be reduced from \$3,122.82/month to \$2,974.12/month.

Pursuant to 101 KAR 2:180, Section 8, if an employee receives an overall rating of unacceptable, the agency shall:

- (1) Demote the employee to a position commensurate with the employee's skills and abilities; or
- (2) Terminate the employee.

Your demotion is justified based upon the following specific reason:

Your 2013 year-end evaluation reflects a final score of 145 points resulting in an overall performance evaluation rating of *Unacceptable*.

Your supervisor, Shannon Lancaster, met with you on January 16, 2014, to discuss your 2013 year-end evaluation. During your final evaluation meeting, you were advised that your final score totaled 145 points, resulting in an overall performance evaluation rating of *Unacceptable*. Upon review you signed your 2013 year-end evaluation and within Section D. Employee Response, you marked the option that you *Agree with performance evaluation* and signed the evaluation for acknowledgement. Ms. Shannon stated to you at the conclusion of your

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Recommended Order Attachment A

APPELLEE'S
EXHIBIT

#13

performance evaluation that you had the right to ask for reconsideration of the evaluation. You did not request reconsideration.

The Interim Meeting Documentation forms reflect that you met with your supervisor, Shannon Lancaster, May 29, 2013, September 20, 2013 and January 16, 2014, to discuss your performance. During those meetings, you were advised that you were not performing the duties that are expected of your job classification.

In addition, a Performance Improvement Plan was prepared and implemented for the period of January 16, 2013 through March 29, 2013. A second Performance Improvement Plan prepared and implemented for the period of March 29, 2013 through June 28, 2013. A third Performance Improvement Plan was prepared and implemented for the period of September 20, 2013 through December 31, 2013. Each of these Performance Improvement Plans were reviewed and accepted by you as acknowledged by your signature.

A review of your personnel file indicates that you completed the Employee Performance Evaluation System online training on March 21, 2013 and acknowledged an understanding that an employee who receives an overall rating of "Unacceptable", the agency shall demote the employee to a position commensurate to their skills and ability or terminate their employment.

For the forgoing reasons, you are notified of the agencies decision to demote you to the position of OSH Compliance Officer II, effective March 1, 2014

For your information, the Kentucky Employee Assistance Program (KEAP) is 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,



Lynn Keeling Gillis
Designated Appointing Authority
Labor Cabinet

cc: Secretary, Personnel Cabinet
Personnel File

Attachments: Appeal form