

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2016-309**

ERIC EISIMINGER

APPELLANT

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

ENERGY AND ENVIRONMENT CABINET

APPELLEE

** ** ** ** **

The Board at its regular October 2017 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated August 1, 2017, having noted Appellee's exceptions, Appellant's response, oral arguments and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be rejected and the Board issues its own Findings of Fact, Conclusions of Law and Recommended Order as follows:

INTRODUCTION

This matter came on for evidentiary hearing on May 31 and June 1, 2017, at 9:30 a.m. each day, at 28 Fountain Place, Frankfort, Kentucky, before the Hon. R. Hanson Williams, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Eric Eisiminger, was present and was represented by the Hon. Paul Fauri. The Appellee, Energy and Environment Cabinet, was present and represented by the Hon. Leesa B. Moorman. Appearing as Agency representative was Sherry Estes (Butler).

This matter involves a two-grade demotion given to the Appellant by letter dated October 11, 2016 (a copy attached hereto and incorporated herein as **Final Order Attachment A**), following his return from Special Leave with Pay for investigative purposes. The burden of proof was placed upon the Appellee by a preponderance of the evidence to show the disciplinary action was appropriate under all surrounding circumstances and was neither excessive nor erroneous.

Appellant's demotion was from Environmental Control Branch Manager (Grade 17) to Environmental Scientist IV (Grade 15). The Appellant is alleged to have engaged in a lack of good behavior and misconduct in violation of the Cabinet's Policy Statement on Anti-

Discrimination and Anti-Harassment and the Commonwealth's Sexual Harassment Policy. Specifically, he is alleged to have engaged in conduct of a sexual nature that created a hostile or offensive work environment.

BACKGROUND

FIRST DAY OF TESTIMONY

1. The Appellee's first witness was **Nina Hockensmith**. She has been the Division Director within the Agency over the Division of Environmental Program Support for approximately one year. Prior to that and mostly during the time of the allegations against the Appellant, she was the Assistant Director. She serves as the Personnel Liaison for her Division for Human Resource issues.

2. Hockensmith introduced Appellee's Exhibits 1 through 11. Appellee's Exhibit 1 is the Commonwealth's Sexual Harassment Policy, which is incorporated into the Cabinet's policy on same (Appellee's Exhibit 2). In pertinent part, the Sexual Harassment Policy states, as follows:

State law prohibits unwelcome sexual advances, requests for sexual acts or favors, with or without accompanying promises, threats, or reciprocal favors or action; or other verbal or physical conduct of a sexual nature that has the purpose of or creates 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.

3. Appellee's Exhibits 3 and 4 deal with Internet and Electronic Mail Acceptable Use Policy and Telephone and Wireless Communication Usage.

4. Under Appellee's Exhibit 3, Internet and Electronic Mail Acceptable Use Policy, Prohibited and Unacceptable Uses, "the following activities are...**strictly prohibited**:

- Using abusive or objectionable language in either public or private messages.
- ...Developing or maintaining a personal web page on or from a Commonwealth device.

5. Appellee's Exhibit 4, dated July 1, 2011, involving Telephone and Wireless Communication Usage, states, in pertinent part: "The Department's telephones and state-issued wireless communication devices are for official state business only...In addition to the restriction

on telephone usage, this policy applies to employees with texting usage, both incoming and outgoing.”

6. Appellee’s Exhibit 5 is an organizational chart of the Cabinet’s Division for Air Quality, where the Appellant was an employee. (A copy is attached hereto and incorporated herein as **Final Order Attachment B**.) This chart shows that some of the persons involved, Natasha Parker and Jennifer Spradlin, both reported to Branch Manager Eisiminger. Another person involved, Melissa Duff, was of equal and like status as a Branch Manager. Beth Mattingly, although a supervisor, did not report to the Appellant.

7. As also noted on Appellee’s Exhibit 6, witness Michelle Graves was supervised by the Appellant in his role as Environmental Control Manager.

8. Appellee’s Exhibits 7 and 8 show acknowledgement by the Appellant that he had received and understood the Cabinet’s Internet and Electronic Mail Acceptable Use Policy and the Commonwealth’s Sexual Harassment Policy. The witness testified that on July 19, 2016, Michelle Graves related to Division Director Sean Alteri comments the Appellant had made about her daughter approximately one year previously, in 2015. Supposedly, the Appellant commented that Graves’ daughter Rebecca had a “nice ass” or “nice bottom” or words to that effect. Therefore, on July 19, 2016, Hockensmith had a meeting with Michelle Graves. During this conversation, Hockensmith heard of the comments relating to Graves’ daughter and about other comments Graves heard the Appellant make in the past. Graves also reported to Hockensmith that she had previously reported the comments regarding her daughter to Melissa Duff.

9. Hockensmith introduced Appellee’s Exhibit 10, her notes from a July 19, 2016 meeting with Michelle Graves, in which she related to this witness various comments and episodes over the past year. The date of June 16, 2016, is important because that marked a move of the Department from the old building at “Fair Oaks” to the new building. After the conclusion of this meeting, Hockensmith testified she told the Appellant to stop talking and texting about personal issues.

10. Other pertinent subjects in Hockensmith’s notes include references to the Appellant having conversations with Graves regarding his exchanges with women on the “Christian Mingle” dating site; that he has made sexual comments about female coworkers; and that the Appellant supposedly related to women on the dating site that he masturbated and was a 42-year-old virgin. Hockensmith’s notes then reflected her report that Michelle Graves had maintained the Appellant had made comments about the physical attributes of other female workers: Elizabeth Mattingly, Cassandra Jobe and Margaret Hunter.

11. On re-direct, Hockensmith confirmed she was the highest level of Human Resources within the Department of Environmental Protection. She maintains she made a

recommendation to the Commissioner for the disciplinary action herein. She also added that she made a recommendation that a written reprimand be issued against Michelle Duff for not reporting the comments Graves had made to her about the Appellant.

12. Asked why no progressive discipline was used in this matter, the witness replied that the Appellant is in a leadership role and showed immaturity with the nature of some of his comments.

13. The Appellee's next witness was **Michelle Graves**. She has been employed with the Division for Air Quality as an Administrative Specialist III since 2007. Until 2014 or 2015, the Appellant was her supervisor. She testified she knew him from work and that, while working together, they had a friendly relationship and sometimes discussed their personal lives.

14. She testified that sometime in the early summer of 2015, she was standing in the hallway outside the Appellant's Branch Manager office in the Fair Oaks building when he made a comment about her daughter, saying she "has a nice ass." This was prior to the move to the new building in June 2016. Graves added that, at that time, her daughter had just begun employment in the same branch, although in a different section.

15. Graves testified the Appellant made no other comments at that time concerning her daughter, but she thought the comment was insensitive and inappropriate. However, she let it go at the time.

16. Graves then denied telling Hockensmith that she thought the Appellant was "vindictive." She stated she had not been worried about her job, as this was not her direct problem. However, she felt uncomfortable with the remark. The witness also confirmed telling Melissa Duff shortly afterward about the comment regarding her daughter.

17. The witness related another conversation which occurred in the Appellant's office in the Fair Oaks building, in which he conversed about his online dating with "Christian Mingle" website. He mentioned to her that he sometimes had a reaction, which she took to mean an erection. She stated this made her uncomfortable, and she did not participate further in that conversation.

18. She added that at some point he had commented to her in his office about liking "small-chested women." He then apparently tied this comment to Elizabeth Mattingly and Katie Wallace.

19. Graves related another incident in the old Fair Oaks building in which she was present when he was online with a girl on the dating website. Apparently this girl had been drinking and had informed the Appellant she was upset that he masturbated. Appellant related this to this witness.

20. Graves testified as to another conversation shortly after Memorial Day 2016 in the Fair Oaks building where, after a disappointing conversation with an online female, Appellant said to her, "I do not know why men put up with flighty women unless they are a 'good f--k'." Shortly afterward, he also made the comment to her that he had always heard that "red in the head, fire in the bed." The witness added that she tried to get him to stop making these types of comments to her.

21. She did this by concocting a falsehood and telling the Appellant that others had overheard some of his conversations, and that he had better stop making these comments.

22. The witness further testified that, at some point, she had heard the Appellant describe himself several times as "a 42-year-old virgin"; had heard him describe Cassandra Jobe as "hot"; and had also made the comment about Elizabeth Mattingly, that she was "smoking hot" several times.

23. Upon the naming of a new Commissioner, Graves related that Director Sean Alteri had called an impromptu meeting late one afternoon to inform staff. After the Appellant arrived late and seemed upset, Alteri asked Graves afterward about his attitude. This was when Graves first related to Alteri the "nice ass" comment about her daughter. She related that approximately two days later Alteri talked to her more about other comments and told her to go see Nina Hockensmith.

24. The witness further emphasized that this entire episode has been stressful to her, but she has suffered no retaliation from anyone.

25. On cross-examination, Graves related that after the comment about her daughter in 2015, she wanted "to be done with it." She also added that in 2015, the Appellant, as her supervisor, gave her a good evaluation.

26. The witness then described the new office where the Division moved as having an open concept with short cubicles. She indicated she was "shocked" at some of his comments, but "did not care" and the comments did not affect her work. She added that, as a result of the entire investigation and statements taken, the people in the Branch have now shut down and do not talk after the investigation was completed.

27. She confirmed the "small-breasted women" comment, stating she had heard the Appellant mention Wallace and Mattingly in this regard; however, she does not know if he said that to them directly.

28. The witness also stated she views the Appellant as a religious person and, in the context of the "42-year-old virgin" statement, she is not upset. In fact, she thinks it is admirable he is waiting for marriage.

29. The Appellee's next witness was **Cassandra Jobe**. She has been a supervisor for one year in the Regulation Development Branch, and reports to Branch Manager Melissa Duff. She has never reported to the Appellant.

30. The witness testified she was questioned by the Office of Inspector General (OIG) about comments supposedly made by the Appellant regarding an employee of hers, Corina Singleton. She related that Singleton told her in a phone training session that she had felt the temperature was hot and had said so, to which the Appellant reportedly said, "You are hot." Jobe stated she had personally heard Singleton make this remark, but not the Appellant.

31. The witness also testified that she had heard the "nice ass" comment made by the Appellant and, indeed, had conversations with him when the topic of the quote "small-breasted women" came up. This had occurred in the workplace.

32. On cross-examination, Jobe testified she did not report the comments by the Appellant, as she was not uncomfortable.

33. The next witness was **Elizabeth Harrod Mattingly**. She has been a supervisor in the Division for Air Quality, Minerals Section, for the previous two years. She stated that the Appellant has never been her Branch Manager.

34. Mattingly testified she was questioned by the OIG relative to the conversation she had with the Appellant in his office. In that conversation, she stated he told her that he wanted to improve himself and to improve his online relationship in the dating site. During this conversation, she stated he made flattering comments about her; however, she does not remember him saying she "was hot." She stated this probably happened in April 2016, and she considered his comments to be flattering.

35. She then related that Appellant had, at least once, brought up the subject of masturbation relative to a woman he was corresponding with on the dating service. She remembered Appellant had told her he related to the woman that he sometimes masturbated, to which she replied she did not think that was appropriate. He then showed her a picture of the girl he was referring to (Appellee's Exhibit 12), to which this witness replied "I am done." She stated she thought that was inappropriate in the workplace. (**Hearing Officer Note:** This picture shows a female in a bathing suit with no facial features shown.)

36. On cross-examination, the witness related that she thought nothing of any intent the Appellant may have had in showing her this picture, as it was none of her business. She did not think about reporting it to anyone.

37. The next witness was **Emma Moreo**. She has been an Environmental Scientist II in the Division for Air Quality for the previous two years. Jennifer Spradlin is her first-line

supervisor. In June 2016, the Appellant was her second-line supervisor. She had just been out of college two years. She related that in the Fair Oaks building, prior to moving to the new building, the Appellant, in the presence of Jennifer Spradlin, made what she thought were inappropriate comments to her. These comments related to conversation regarding the women at Keeneland who wore short skirts. She testified that the Appellant related that he liked women in short skirts, but later apologized to her in the same conversation by saying, "I am sorry if I offended you."

38. The Appellee's next witness was **Jennifer Spradlin**. She has been a Section Supervisor in the Division for Air Quality for the previous two years. In June 2016, the Appellant was her first-line supervisor. She related that, sometime unknown, she had overheard conversations the Appellant had with colleague B. J. Bland. Supposedly, the Appellant had related to Bland that he had "reactions" during a massage, which could be embarrassing. The witness stated that she told the Appellant that was "too much information" for her and she changed the topic.

39. She also related that, at that time, she was a new supervisor and did not know what her responsibilities were to report such comments.

40. On cross-examination, the witness contradicted the testimony of Moreo, by stating she does not recall any comments concerning Keeneland while she was in the Appellant's office, nor does she remember his apology.

41. The Appellee's next witness was **Melissa Duff**. At the time of these allegations concerning the Appellant, she was a Branch Manager in the Division for Air Quality from May 2016 through January 2017. This was the same level as the Appellant.

42. She related that Michelle Graves had told her sometime before June 2016 about the comments the Appellant had made about her daughter's "bottom." This concerned her, and she related this to the OIG during the investigation in the Summer of 2016. She also stated that Graves had shown her a picture of some woman the Appellant was interested in. (Appellee's Exhibit 12.)

43. She further related that Graves had told her that, at some point, the Appellant had related to her that he liked small, petite women. She also stated that sometime during the conversation between Graves and the Appellant, the subject of masturbation was broached.

44. On cross-examination, the witness confirmed she had received a written reprimand herself for failing to report these comments, her failure being to follow the Anti-Harassment Policy.

45. Duff stated she has known the Appellant for approximately two years, although not well. She also related that no one who had mentioned the Appellant's comments had seemed bothered by them.

46. The Appellee's next witness was **Byron "B. J." Bland**. He formerly worked in the Division for Air Quality until April 2017. He stated the Appellant was his first-line supervisor in that Division.

47. He related that prior to June 16, 2016, he had a conversation with the Appellant, during which Appellant had commented that Mattingly had "nice legs." Mattingly was present, but he is not aware of whether she heard the comment.

48. On cross-examination, the witness related he had told the OIG Investigator he had heard nothing from the Appellant concerning that he supposedly got an erection while watching television. On re-direct, the witness did confirm that, at some point, the Appellant had said he liked leaner, petite, younger women.

49. The next witness was **Natasha Parker**. She has been a supervisor in the Frankfort Regional Office since February 2015 in the Division for Air Quality. She stated that prior to October 2016, the Appellant was her supervisor.

50. She related that, at some point unknown, she remembered a conversation with the Appellant in which he stated he was still a virgin.

51. The witness testified that she is now the supervisor of the Appellant since his demotion. She feels that she has a trust relationship with him because of their previous work history and common interests. She also stated the Appellant was a very good employee and a good supervisor. He sometimes talked in general terms about his experiences dating online.

52. On cross-examination, the witness related that she was not bothered by any of the conversations with the Appellant. In fact, she thought him a Christian man. She stated he was never "in your face" with any of the sexual comments made. She further added that, while in the Army, she had been a rape and harassment counselor and, because of that experience, she saw nothing wrong with the conversations with the Appellant. She added she could not picture him making these statements with any kind of wrong meaning or intent.

53. On re-direct, Parker added that the Appellant had made no comments to her concerning erection or masturbation.

SECOND DAY OF TESTIMONY

54. The first witness on the second day of testimony was **Sean Alteri**. He has been the Director of the Division for Air Quality for in excess of three years. He related that on June

28, 2016, during an impromptu staff meeting, he had a conversation with Michelle Graves. He noticed the Appellant had arrived some five minutes late and appeared distraught. As a result, after the meeting, he conversed with Graves concerning possible troubles of the Appellant. She then related she thought the Appellant was troubled by some personal dating issues and, in the course of the conversation, told him of the comment concerning her daughter's bottom. She told him this was not meant as a complaint, but rather was concerning to her. She also related to Alteri that this comment had been made in the past, probably June or July 2015. As a result, Alteri then reported this comment to Nina Hockensmith early in July 2016.

55. On June 28, 2016, the witness stated he was not aware of any other alleged comments which had been made by the Appellant. He also added that he had concurred with the decision to demote the Appellant.

56. On cross-examination, the witness testified that Graves had told them that she and her daughter did not feel threatened by the "nice bottom" comment. She also related to Alteri that she had never spoken to the Appellant about this comment.

57. The next witness was **Cristina Violet**. She testified she had worked as an Investigator for OIG for 12 years, before leaving in April 2017. She related that during the Summer of 2016, she had conducted the investigation related to the Appellant and had prepared most of the final report.

58. The witness identified the report she conducted, which included an interview of 23 people. She stated that some of these allegations were unsubstantiated. (**Hearing Officer Note:** This report was not introduced into the record because of legal evidentiary issues.)

59. The witness related that some of the comments supposedly made by the Appellant were supported by witnesses. For example, he admitted using the state cell phone at least four times to visit an online dating site.

60. She identified Appellee's Exhibits 13, 14 and 15. These were all pictures which had been captured on his state cell phone. Appellee's Exhibit 13 was a picture of a turtle on an unidentified woman's leg; Appellee's Exhibit 14 was a picture of a woman's behind with a wet spot and the quote "Urine for a treat!!!"; and Appellee's Exhibit 15 was a picture of an unidentified woman on a surf board.

61. On cross-examination, Violet confirmed that the Appellant was very cooperative during her interviews with him.

62. The Appellee called as its last witness the **Appellant, Eric Eisiminger**.

63. The Appellant is a 20-year employee of the Commonwealth, who began in the Division of Water in Florence, Kentucky. He came to Frankfort in 2012 in the Division for Air Quality and was promoted to Branch Manager in April 2015.

64. The witness testified that, prior to his demotion, he supervised in excess of 60 employees in the Field Operations Branch. Eight or nine of these were employees in the offices in Frankfort. He reported directly to Director Alteri.

65. The Appellant testified that he had been the first-line supervisor of Michelle Graves. Her daughter was employed by the Agency, although in another section. Going through the organizational chart, the witness testified he was not the supervisor of Elizabeth Mattingly or Melissa Duff. He was the first-line supervisor of B. J. Bland and Natasha Parker. He was not the supervisor of Cassandra Jobe.

66. The Appellant also testified that since his demotion, he is now employed as a Environmental Scientist IV in Frankfort, where Natasha Parker is his current supervisor.

67. The witness confirmed he had talked with Investigator Violet of OIG. In reference to the comment regarding Rebecca Graves, he stated he had used the word "bottom" and not the word "ass." He had said to Rebecca's mother Michelle, "The only reason I say this to you is because I know you are her mother."

68. The Appellant further stated that he would discuss with Michelle Graves the feedback he had gotten back from the "Christian Mingle" website he was using. He would usually discuss this with her one time a week through February or March 2016.

69. In reference to massages he had received, Appellant testified he had only used the word "excitement" in discussing these with Graves, and not the word "erection." He allowed he may have used the word excitement, which probably insinuated to her his reaction. He stated he considered he and Michelle Graves good friends, and they had often discussed their private lives with each other.

70. The witness also confirmed he had a discussion with Cassandra Jobe, in which he stated he liked women who were smaller chested. However, he insisted that while making this comment, he had looked away from her breasts.

71. The witness then recalled a discussion held with Michelle Graves after Memorial Day 2016 concerning a girl he was dating on the online website. He had discussed the fact he was waiting for sex until marriage. He also confirmed he had asked Graves if "it was okay if I used the word masturbation," to which she replied, "yes." He also confirmed he had roughly the same conversation with Elizabeth Mattingly. The Appellant then denied any conversation concerning a "flighty girl" with Graves, and insisted he had said nothing of a "good f--k" in his

discussions with her. He also denied making the comment about being “red in the head,” while stating that Michelle Graves made this comment.

72. The Appellant denied a comment with anyone about getting an erection because of seeing women’s clothes on television. He also added that his female coworkers, including Katie Wallace, Natasha Parker and Michelle Graves, knew he was waiting to have sex after marriage.

73. With regards to his alleged comments about Elizabeth Mattingly, the Appellant stated he was seeking a way to be more confident around women and, as a part of this, decided to call Mattingly into his office to give her a compliment because he felt she deserved it. He insists he only complimented her on her hair and clothes.

74. With regard to the comment about Corina Singleton made during a training session, Appellant insisted he had not said that she was “hot.” As to Jennifer Spradlin, he did confirm that he had mentioned to her of a reaction he had during a massage.

75. The Appellant also denied he made a comment to anyone about “Keeneland short skirts.”

76. Regarding alleged improper use of his state cell phone, the witness explained he had gotten the pictures, Appellee’s Exhibits 12, 13, 14 and 15, off of a Motorola phone, but could not open them. He, therefore, sent them to his state phone to be opened at home.

77. Regarding Appellee’s Exhibit 14, the picture of the girl with the wet behind and the quote “Urine for a Treat!!!,” the witness explained this had been sent to him by a girl working at Vacation Bible School who had a little girl urinate on her.

78. On cross-examination, the witness was referred to his comment about Michelle Graves’ daughter. He explained that the comment about her bottom had been made in July or August 2015, and Michelle Graves had replied, “Yes she did.” Regarding the pictures, Appellee’s Exhibits 12, 13, 14 and 15, Appellant confirmed he had showed Exhibits 12 and 13 to Elizabeth Mattingly; had shown Exhibit 14 to no one; and added he did not recognize Exhibit 15. He added that he never saw this picture and it was not mentioned in the demotion letter.

79. The Appellant introduced Appellant’s Exhibits 1, 2 and 3. These were his Annual Employee Performance Evaluations for 2012, 2013 and 2014. These all showed he was rated as either “Effective” or “Highly Effective.” The Cabinet stipulated that his 2016 Annual Employee Performance Evaluation was rated “Highly Effective.”

80. Both sides rested at this point.

APPLICABLE REGULATIONS AND POLICIES

1. 101 KAR 1:345, Section 1, states:
Appointing authorities may discipline employees for lack of good behavior or the unsatisfactory performance of duties.
2. Commonwealth's Sexual Harassment Policy (Appellee's Exhibit 1).
3. Energy and Environment Cabinet's Statement on Anti-Discrimination and Anti-Harassment (Appellee's Exhibit 2).
4. C10 – 060 Internet and Electronic Mail Acceptable Use Policy (Appellee's Exhibit 3).

FINDINGS OF FACT

1. The Appellant, a 20-year employee, was given a two-grade demotion from Environmental Control Branch Manager (Grade 17) to Environmental Scientist IV (Grade 15) by letter dated October 11, 2016. The reason for the action was Appellant's supposed lack of good behavior and misconduct under 101 KAR 1:345 by his violations of Commonwealth and Cabinet policies relating to sexual harassment, those violations creating a hostile or offensive work environment.
2. Also included as a basis for the demotion was the alleged violations of the Cabinet's Internet and Electronic Mail Acceptable Use Policy.
3. On July 19, 2016, Nina Hockensmith learned that Michelle Graves had related to Division Director Sean Alteri comments made by the Appellant about her daughter approximately one year previously, in 2015. These comments were that her daughter Rebecca had a "nice ass" or "nice bottom." On that same day, Hockensmith learned from Graves of other comments she had heard Appellant make in the past.
4. Graves informed supervisor Melissa Duff in 2015 of the Appellant's comments about her daughter. Duff was later issued a written reprimand for failure to follow the Cabinet's Anti-Harassment Policy.
5. Graves had conversations with the Appellant intermittently in 2016 regarding his online dating experiences. These included his comment about liking "small-chested women" and sometimes having a reaction (which she interpreted as an erection).

6. Shortly after Memorial Day 2016, Appellant said to Graves, "I do not know why men put up with flighty women unless they are a good f—k." She told him he needed to stop making these comments. However, she stated his comments did not affect her work.

7. Cassandra Jobe heard the "nice ass" comment and had conversations with the Appellant about "small-chested women," although she testified that she was not uncomfortable.

8. During an April 2016 meeting in Appellant's office, Elizabeth Mattingly heard Appellant comment about her appearance, which she considered complimentary and flattering. At least once, the Appellant discussed masturbation with her relative to women on an online dating site, which she thought was inappropriate.

9. Although the testimony of Emma Moreo relating to "short skirts" at Keeneland was contradicted by both the Appellant and Jennifer Spradlin, she and her allegations are deemed to be credible.

10. Jennifer Spradlin was bothered by Appellant's conversations she overheard involving "reactions" during a massage.

11. Melissa Duff stated that no one who mentioned hearing any of the Appellant's comments seemed bothered by them.

12. Natasha Parker recalled the Appellant telling her he was still a virgin, which did not bother her. She also testified he was a good employee and supervisor.

13. Christina Violet, the OIG Investigator, said the Appellant admitted using his state phone at least four times to visit an online dating site. He did not deny this.

14. Neither Elizabeth Mattingly, Melissa Duff nor Cassandra Jobe were in Appellant's supervisory chain. Natasha Parker, Michelle Graves and Jennifer Spradlin were in his supervisory chain.

15. The Appellant's improper use of his state cell phone was a violation of C10 – 060 Internet and Electronic Mail Acceptable Use Policy, and constituted lack of good behavior under 101 KAR 1:345.

16. Based on the totality of circumstances, the Appellant's sexually related comments over an approximate two-year period were a violation of the Commonwealth's and the Cabinet's Sexual Harassment Policy and constituted bad behavior under 101 KAR 1:345.

CONCLUSIONS OF LAW

1. A classified employee with status shall not be demoted except for cause. KRS 18A.095(1). Appointing Authorities may discipline employees for lack of good behavior or the unsatisfactory performance of duties.

2. Several of the employees who testified [Michelle Graves, Cassandra Jobe, Beth Mattingly, Jennifer Spradlin, and Melissa Duff] were subjected to unwelcome sexual harassment. Clearly, any harassment felt by these employees was based on the fact they were female.

3. Here, however, the ultimate question was whether the Appellant's sexually related comments, which were in violation of the Cabinet's Sexual Harassment Policy, constitutes actionable misconduct sufficient to meet the burden set out in KRS 18A.095(1).

4. The Board concludes that, as a matter of law, different standards apply to a KRS Chapter 18A misconduct analysis and a sexual harassment civil action for damages under state or federal law. The facts of this case provide a useful opportunity to explore the difference between the analysis for KRS Chapter 18A misconduct and the analysis for a sexual harassment civil action for damages. Accordingly, to illustrate the difference in standards, the Board will address some of the sexual harassment case law developed at the federal level.

5. The Board notes *Williams v. General Motors Corporation*, 187 F.3d 553 (6th Cir. 1999) holds that sexual harassment which is sufficiently severe or pervasive to constitute a hostile work environment shall consider the totality of the circumstances. See also *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993).

6. These two cases, *Harris* and *Williams*, set out the four elements of a hostile work environment claim for damages based on sex in a civil action, and they are: (1) the employee must be a member of a protected class; (2) the employee must be subject to unwelcomed sexual harassment; (3) the harassment must be based on the employee's sex; and (4) the harassment must create a hostile work environment.

7. Further, the Board notes that even where individual instances of sexual harassment do not, on their own, create a hostile work environment, the accumulated effect of such instances may result in a Title VII violation. Civil Rights Act of 1964, Section 701 et seq., 42 U.S.C. § 2000e et seq.

8. *Harris* further holds that, though the frequency of the conduct is a relevant factor, it is not dispositive. Courts consider factors including the severity of the conduct, and, relatedly, "[w]hether it is physically threatening or humiliating, or a mere offensive utterance." *Harris*, 510 U.S. at 23, (1993). Additionally, the conduct must create an objectively hostile or abusive

work environment -- that is, an environment that a reasonable person would find hostile or abusive. See Harris, 510 U.S. at 21.

9. The Court, in *Ault v. Oberlin College*, 620 Fed. Appx. 395 (6th Cir. 2015) held that unwanted sexual comments [six over a 3-year period], not physical in nature, where female employees never perceived a threat of physical contact, were not so severe or pervasive as to create a hostile or abusive work environment.

10. Given the weight of the case law, the Board notes that, under the holding in *Harris*, the majority of the comments made by the Appellant to his female employees herein were not physically threatening, but clearly constituted humiliating or offensive utterances. The Board also notes that under the holding in *Ault, supra*, none of the female employees herein appeared to have perceived a threat of physical contact as to be so severe or pervasive as to create a hostile or abusive work environment. As a result, the Board concludes that the Appellant's actions likely would not result in monetary damages against the Agency or the Appellant if this matter were a sexual harassment civil action for money damages.

11. However, pursuant to KRS Chapter 18A, it is clear that the Agency does not have to tolerate sexually inappropriate behavior from one of its employees or be forced to wait until the employee's misconduct rises to the level of an actionable sexual harassment claim under state and federal law. Under the misconduct standard set out in KRS 18A.095(1) and given the totality of circumstances, the Board concludes, as a matter of law, that the Appellant's sexually related comments as set out above constituted bad behavior under 101 KAR 1:345. Additionally, the Appellant was guilty of lack of good behavior for violating the Internet and Electronic Mail Acceptable Use Policy.

12. Accordingly, the Agency has shown by a preponderance of the evidence that there was just cause for disciplinary action against the Appellant.

13. Moreover, after considering the evidence of record, the Board concludes, as a matter of law, the Agency has shown by a preponderance of the evidence that the two-grade demotion taken herein was neither excessive nor erroneous.

14. Lastly, the Board rejects the Hearing Officer's Findings of Facts and Conclusions of Law because the Board finds the Conclusions of Law reached in the Recommended Order below applied an incorrect standard of law. Specifically, the Board rejects the legal analysis that determined that bad behavior, as prohibited by 101 KAR 1:345, must rise to the level of an actionable sexual harassment claim before the Agency can discipline an employee. The Agency could -- and should -- attempt to correct its employee's actions well before those actions give rise to a civil action.

ORDER

IT IS HEREBY ORDERED that the appeal of **ERIC EISIMINGER VS. ENERGY AND ENVIRONMENT CABINET (APPEAL NO. 2016-309)** is **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 17th day of October, 2017.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Leesa B. Moorman
Hon. Paul Fauri
Ms. Sherry Butler



MATTHEW G. BEVIN
GOVERNOR

CHARLES G. SNAVELY
SECRETARY

ENERGY AND ENVIRONMENT CABINET

300 SOWER BOULEVARD
FRANKFORT, KENTUCKY 40601
TELEPHONE: 502-564-3350
TELEFAX: 502-564-7484

October 11, 2016

Demotion following Return from Special Leave

57-129-02/ 30046548

Personnel Number

Eff. B.O.B. Wednesday, October 12, 2016

Eric C. Eisiminger-

Dear Mr. Eisiminger:

On July 20, 2016, you were placed on Special Leave with Pay for investigation purposes. An investigation was conducted by the Office of the Inspector General for Shared Services (OIGSS), 2016-OIG-014. This investigation is now complete and you are returned to work from investigative leave beginning of business Wednesday October 12, 2016. The following describes the outcome of the investigation.

Based on this investigation, and pursuant to KRS 18A.095, you are advised that you will be demoted for cause from your position as Environmental Control Branch Manager (grade 17), Field Operations Branch, Division for Air Quality, Department for Environmental Protection, Energy and Environment Cabinet to the position of Environmental Scientist IV (grade 15), Frankfort Section, Field Operations Branch, Division for Air Quality, Department for Environmental Protection, Energy and Environment Cabinet effective beginning of business, Wednesday, October 12, 2016. As a result, pursuant to 101 KAR 2:034, your salary will be reduced from \$4521.42 per month to \$4110.38 per month. You should report to Natasha Parker, Environmental Control Supervisor, at the normal start of your workday on Wednesday October 12, 2016 for assignment of new job duties.

Pursuant to 101 KAR 1:345, Section 1 and 3, you are being demoted because you have engaged in a lack of good behavior and misconduct in violation of the Energy and Environment Cabinet's Policy Statement on Anti-Discrimination and Anti-Harassment and the Commonwealth's Sexual Harassment Policy. Specifically, you engaged in the following conduct of a sexual nature that created a hostile or offensive work environment;

- On June 28, 2016, Administrative Specialist III Michelle Graves reported to Division Director, Sean Alteri, that you said that her daughter Rebecca Graves had "a nice ass" or



words to that effect. You are Michelle Graves' supervisor and her daughter Rebecca Graves is also an employee of the Department of Environmental Protection. You made this comment to Michelle Graves in July or August 2015 in the Division for Air Quality office during the workday. On August 12, 2016 you admitted to Office of Inspector General (OIG) Investigator, Christina Violet, that you told Michelle Graves that her daughter had "a great bottom" or "nice bottom."

- During the time period of May through June 2016, you made the statement to Michelle Graves that you got "hard- ons" or words to that effect after you received messages or received photographs of women from the internet dating site, Christian Mingle. You made this statement to Ms. Graves in the Division for Air Quality office during the work day. Ms. Graves reported this comment to Assistant Director, Division of Environmental Program Support, Nina Hockensmith, on July 19, 2016. On August 12, 2016, you admitted to OIG Investigator Violet that you "may have" told Ms. Graves that photographs of women on the Christian Mingle site may have excited or aroused you.
- During the time period April through June 2016, you made the statement to Michelle Graves that you "liked the breasts" of Environmental Control Supervisor, Cassandra Jobe, or words to that effect. During this time period, you made the statement to Ms. Jobe that you were attracted to "smaller, petite, flat chested, skinny little women" or words to that effect. On August 12, 2016, you admitted to OIG Investigator Violet that you "probably" told Michelle Graves that you were attracted to thin women who are not big chested.
- During May 2016, you made the statement to Michele Graves that one of the women you were interacting with on the Christian Mingle internet dating site "did not like that I masturbate" or words to that effect. On July 19, 2016, Ms. Graves reported this comment to Assistant Director Hockensmith. Environmental Branch Manager Melissa Duff confirmed that Ms. Graves reported to her that you talked about masturbation at work. During April 2016 you told Environmental Control Supervisor, Elizabeth Mattingly Harrod, that a women whom you had met online was "uncomfortable with my self-gratification habits" or words to that effect. You made this statement to Ms. Graves in the Division for Air Quality office during the work day. On August 12, 2016, you admitted to OIG Investigator Violet that you "probably" told Ms. Graves and Ms. Mattingly Harrod that a woman whom you met on an internet dating site was concerned because you "pleasured yourself" too much or words to that effect.
- During May 2016, you made the statement to M. Graves that you "did not know why men would put up with a flighty woman unless she was a good fuck" or words to that effect. You made this statement to Ms. Graves in the Division for Air Quality office during the work day. On July 19, 2016, Ms. Graves reported this comment to Assistant

Director Hockensmith. When questioned by the OIGSS, you denied making this statement.

- During May 2016, you made the statement to Michelle Graves, "red in the head, fire in the bed" or words to that effect in reference to red-headed women. Michelle Graves had red hair. You made this statement to Ms. Graves in the Division for Air Quality office during the work day. Ms. Graves reported this statement to Assistant Director Hockensmith on July 19, 2016. When questioned by the OIGSS, you denied making this statement.
- During June, 2016, you made the statement to Michelle Graves that you got "an erection or sexual reaction because of what women were wearing on a television show" or words to that effect. You made this statement to Ms. Graves in the Division for Air Quality office during the work day. Ms. Graves reported this statement to Assistant Director Hockensmith on July 19, 2016. When questioned by the OIGSS, you denied making this statement.
- During the time period June 2015 through July 2016, you made statements that you were a "42 year old virgin" or words to that effect to Michelle Graves, Environmental Control Supervisor Natasha Parker and Environmental Scientist Katie Wallace. You made these statements in the Division for Air Quality office during the workday. Ms. Graves reported these statements to Assistant Director Hockensmith on July 19, 2016. On August 12, 2016 you admitted to OIG Investigator Violet that you discussed your decisions regarding your sexual experiences with these employees.
- During April 2016, you called Ms. Mattingly Harrod to your office and began to compliment her on her smile, body, hair, and clothes. During this meeting, you told her she was "hot". On an unknown date, you told Environmental Scientist IV, Byron Bland, that you liked Ms. Mattingly Harrod's legs" or words to that effect while she was walking in front of you in the office. On an unknown date, you told Michelle Graves that Ms. Jobe had "a great body" or words to that effect. On July 19, 2016, Ms. Graves reported to Assistant Director Hockensmith that you made statements about the anatomy of women in your workplace on numerous occasions. On August 12, 2016, you admitted to OIG Investigator Violet that you referred to Ms. Mattingly Harrod and Environmental Control Supervisor Hunter as "hot." You also admitted to calling Ms. Harrod Mattingly to your office and making the statement to her that she has "a nice body". Additionally, you also admitted that you "probably" made the statement that Mattingly Harrod has "nice legs".
- On June 8, 2016, during a training session in the Division for Air Quality Office Environmental Scientist I, Corina Singleton states that you made the statement "Yeah, you are hot" to in response to her comment about the high temperature in the training

room. Ms. Singleton reported this statement to Environmental Control Manager Duff and Environmental Control Supervisor Jobe and Environmental Control Supervisor Hunter on or around June 9, 2016. Ms. Singleton reported this statement to Michele Graves on an unknown date. Ms. Graves reported this statement to Assistant Director Nina Hockensmith on July 19, 2016.

- During June 2016, you made a statement to Environmental Control Supervisor Jennifer Spradlin that during a massage, you had a "reaction and we both got a little embarrassed" or words to that effect, insinuating that you got an erection. This statement occurred during the work day in Ms. Spradlin's office. You are Ms. Spradlin's supervisor. On August 12, 2016, you admitted to OIG Investigator Violet that you told Spradlin that you had a "response" to a massage that embarrassed both you and the masseuse. You further admitted that you were insinuating that you had an erection and that the statement was not appropriate for the workplace.
- During May 2016, Environmental Scientist I, Emma Moreo, states that you made the statement that you "liked it when girls wearing short dresses to Keeneland bend over" or words to that effect during a meeting in your office. Ms. Moreo shared this statement with her co-worker Environmental Scientist I, Eliza Bodkin. You later apologized to Ms. Moreo for making this statement. When questioned by the OIGSS, you denied making this statement.

In addition to the above violations, during the course of the investigation it was concluded that you have also violated the CIO-060 Internet and Electronic Mail Acceptable Use Policy. During the time period March 12, 2016 through June 6, 2016, you used your assigned state owned cell phone to download non work-related photographs from the Christian Mingle internet dating site that appear to be sexual in nature. On March 12, 2016, at 1:47 p.m. you downloaded to your state phone a photograph of a woman's bare legs with a turtle sitting on her left thigh. On June 4, 2016, you downloaded to your state phone a photograph of a woman's bottom with wet pants with the message "Urine for a treat." On June 6, 2016, at 11:09 AM and 11:31 AM, respectively, you downloaded to your state phone photographs of a woman in a bikini from the neck down. After you downloaded the bikini photographs, you showed these photographs to Ms. Mattingly Harrod during the workday in your office at the Division for Air Quality. Ms. Mattingly Harrod's response was to put up her hand, say "I'm done" and walked out of your office.

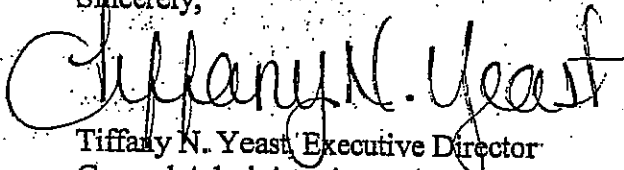
Although you denied making a few of the alleged statements, you readily admitted that you had discussed sexual topics with staff and have made statement that were inappropriate, therefore, I find it probable that all of the allegations are accurate. The inappropriate behavior that you exhibited as documented is egregious, as you are an Environmental Control Branch Manager. Specifically, your position provides technical assistance to regulated entities and supervision to over nine sections within the Field Operations Branch which employs over 60 employees. A review of your file shows you received sexual harassment prevention training on December 17, 2003 and August 12, 2015. As provided within this letter you have engaged in behavior that is unbecoming of a supervisor, inappropriate and in violation of the Energy and Environment

Cabinet's Policy Statement on Anti-Harassment. As such, your behavior constitutes misconduct in violation of 101 KAR 1:345, Section 1 and 3 and the CIO-060 Internet and Electronic Mail Acceptable Use Policy, therefore it has been determined that a demotion is the most appropriate disciplinary action.

In accordance with KRS 18A.095, you may appeal this action to the Personnel Board within sixty (60) days after the 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.

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.

Sincerely,



Tiffany N. Yeast, Executive Director
General Administration and Program Support (GAPS)
Designated Appointing Authority
Energy and Environment Cabinet

Attachment: Appeal Form

Cc: Secretary, Personnel Cabinet
Personnel file

DIVISION FOR AIR QUALITY

Sean Alteri, Director
 VACANT, Assistant Director
 Jarrod Bell, Environmental Scientist Consultant
 Rick Shewekah, Environmental Scientist Consultant
 Roberta Barnes, Education/Outreach-Public Information
 Brandii Allen, Administrative Specialist III

PROGRAM PLANNING & ADMINISTRATION BRANCH

Melissa Duff
 Manager

ADMINISTRATION SECTION

Joy Moll
 Supervisor

EVALUATION SECTION

Leslie Poff
 Supervisor

REGULATION DEVELOPMENT SECTION

Cassandra Jobe
 Supervisor

EMISSIONS INVENTORY SECTION

Margaret Hunter
 Supervisor

PERMIT REVIEW BRANCH

Rick Shewekah
 Acting Manager

CHEMICAL SECTION

Durga Patil
 Supervisor

COMBUSTION SECTION

Benjamin Matar
 Supervisor

MINERALS SECTION

Elizabeth Mattingly
 Supervisor

AIR DISPERSION MODELING SECTION

Ben Cordes
 Supervisor

METALLURGY SECTION

Linda Martin
 Supervisor

SURFACE COATING SECTION

Sajjadur Quabili
 Supervisor

PERMIT SUPPORT SECTION

Shauna Switzer
 Supervisor

TECHNICAL SERVICES BRANCH

John Gowins
 Manager

QUALITY ASSURANCE SECTION

Anthony Bedel
 Supervisor

TECHNICAL SUPPORT SECTION

Wayne Bray
 Supervisor

SOURCE SAMPLING SECTION

VACANT
 Supervisor

FIELD OPERATIONS BRANCH

Eric Eisinger
 Manager

ASHLAND FIELD OFFICE

Karen Deskins
 Supervisor

ROWLING GREEN FIELD OFFICE

Troy Tabor
 Supervisor

FLORENCE FIELD OFFICE

Clay Redmond
 Supervisor

FRANKFORT FIELD OFFICE

Natasha Parker
 Supervisor

HAZARD FIELD OFFICE

Steven Hall
 Supervisor

LONDON FIELD OFFICE

David Shivel
 Supervisor

OWENSBORO FIELD OFFICE

Mac Canin
 Supervisor

PADUCAH FIELD OFFICE

Richard Reed
 Supervisor

Spencer?

KENTUCKY DIVISION FOR
 AIR QUALITY

502-564-3999