

**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NOS. 2011-254, 2012-070 AND 2012-242**

**DANIEL FUQUA**

**APPELLANT**

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

**TRANSPORTATION CABINET  
MIKE HANCOCK, APPOINTING AUTHORITY**

**APPELLEE**

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The Board at its regular August 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated June 16, 2014, having noted Appellee's exceptions, Appellant's exceptions, Appellant's response to Appellee's exceptions, Appellee's response to Appellant's exceptions, 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 altered as follows:

A. **Delete** Finding of Fact paragraph 7 and substitute the following:

7. The testimony of Steve Farmer and Katy Renfroe plainly demonstrates Mr. Farmer was having difficulty with the Appellant.

B. **Delete** Conclusions of Law paragraphs 2, 3, 4, 5, 6 and 7, and substitute the following:

2. The Board concludes that Appellant's behavior and conduct on September 22, 2011, was entirely unprofessional and was not to be expected or accepted in any workplace, much less a professional workplace in a state agency. The Board concludes the three-day suspension without pay for that conduct was entirely appropriate and was neither excessive nor erroneous.

3. The Board concludes that the Appellant's falsification of his timesheet for the period of January 22, 2012, warranted disciplinary action. Considering the Board has concluded that the three-day suspension meted out to Appellant for the unprofessional behavior and use of profanity for the incident of September 22, 2011, was proper, the Board concludes that progressive discipline allows for the ten-day suspension for falsification of timesheets and not adhering to documentation procedures for keeping time records.

4. The Board concludes that Appellant's behavior on August 2, 2012, when he was responding to the spilled hay at the "double diamond" intersection on Harrodsburg Road and his frustration and lack of courtesy to Mr. Mark Traylor was in fact a lack of good behavior and a violation of the Transportation Cabinet's personnel policy. The Board is aware the appointing authority for the Transportation Cabinet acknowledged that in and of itself this behavior on August 2, 2012, would have warranted no more than a written reprimand or a one-day suspension. However, when taken together with the previous lack of good behavior exemplified by the two earlier suspensions this Board found to be proper, the Board concludes applying progressive discipline in an attempt to correct an employee's behavior, the fifteen-day suspension for Appellant's behavior on August 2, 2012, was not excessive.

C. **Delete** the Recommended Order and substitute the following:

**IT IS HEREBY ORDERED** that the consolidated appeals of **DANIEL FUQUA VS. TRANSPORTATION CABINET (APPEAL NOS. 2011-254, 2012-070 AND 2012-242)** are **DISMISSED**.

**IT IS FURTHER ORDERED** that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer as Altered 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 8<sup>th</sup> day of August, 2014.

**KENTUCKY PERSONNEL BOARD**

  
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**MARK A. SIPEK, SECRETARY**

A copy hereof this day mailed to:

Hon. William Fogle  
Hon. Paul Fauri  
Kathy Marshall

**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NOS. 2011-254, 2012-070 AND 2012-242**

**DANIEL FUQUA**

**APPELLANT**

**VS.**

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

**TRANSPORTATION CABINET  
MIKE HANCOCK, APPOINTING AUTHORITY**

**APPELLEE**

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This matter came on for evidentiary hearing on January 7 and 8, 2014, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before Geoffrey B. Greenawalt, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Daniel Fuqua, was present and was represented by the Hon. Paul Fauri. The Appellee, Transportation Cabinet, was present and represented by the Hon. William Fogle.

The above mentioned appeals having been consolidated, at issue at the evidentiary hearing was the Appellant's three-day suspension, ten-day suspension, and fifteen-day suspension from duty and pay, from his position as a Highway Superintendent II in the Kentucky Transportation Cabinet, Department of Highways, District 7.

**BACKGROUND**

1. The Appellant, Daniel Fuqua, was suspended from duty and pay as a Highway Superintendent II in the Kentucky Transportation Cabinet, Department of Highways, District 7, on three separate occasions. By Interim Order dated May 20, 2013, the three separate appeals filed by the Appellant for each suspension were consolidated for all purposes. The issue at the evidentiary hearing was whether or not there was just cause for the suspensions of the Appellant and whether such penalizations were either excessive or erroneous under the circumstances. The burden of proof was upon the Appellee and was to be by a preponderance of the evidence.

2. The Appellant filed his appeal (No. 2011-254) with the Personnel Board on November 16, 2011, appealing from his three-day suspension from duty and pay. The Appellant filed his appeal (No. 2012-070) with the Personnel Board on March 22, 2012, appealing from his ten-day suspension from duty and pay. The Appellant filed his appeal (No. 2012-242) with the Personnel Board on October 23, 2012, appealing from his fifteen-day suspension from duty and pay.

3. The first to testify at the evidentiary hearing was **J.R. Dobner**, Policy Advisor at the Transportation Cabinet's Office of Human Resource Management since May 16, 2013.

4. Part of Mr. Dobner's duties included handling disciplinary actions and representing various appointing authorities within the Transportation Cabinet.

5. According to Mr. Dobner, the Appellant, Mr. Fuqua, is a Highway Superintendent II at the Fayette County Maintenance Facility whose primary responsibility is to supervise a road crew and make sure roadways are safe and drivable.

6. Mr. Dobner testified that in the fall of 2011 he was asked to review a request for major disciplinary action against the Appellant. Appellee's Exhibit 1 was introduced through the witness and is a copy of the three-day suspension letter which Mr. Dobner prepared for the signature of Trinta M. Cox, the Appointing Authority. In essence, the Appellant was suspended for three working days effective beginning of business October 18, 2011, and continuing through the close of business October 20, 2011, for poor work performance/lack of good behavior. According to the suspension letter, the Appellant was being disciplined for disregarding the directive of his superior to bury a deer carcass located on the back of the Fayette County Maintenance facility lot and for his use of profane language. According to Mr. Dobner, a three-day suspension was meted out because the Appellant, as a supervisor, must strictly adhere to policy, especially it involves safety and health issues. It was Mr. Dobner's opinion that the Appellant's insubordinate behavior needed to stop and that a three-day suspension would clearly make a statement. Also, according to Mr. Dobner, the three-day suspension period was based upon a previous suspension of the supervisor in Perry County who did not respond to his supervisor's directive. In that instance, the supervisor received a three-day suspension as well.

7. Appellee's Exhibits 2 and 3 were introduced into the record through the witness and are copies of photographs of a deer carcass found on the back of the Fayette County Maintenance lot. The pictures were entered over the objection of the Appellant. Also introduced into the record through the witness was Appellee's Exhibit 4, which is a copy of the request for major disciplinary action stemming from this incident.

8. Appellee's Exhibit 5 was introduced through the witness and is a copy of the ten-day suspension letter dated February 17, 2012. Mr. Dobner stated he drafted this letter for the signature of the Appointing Authority, Trinta M. Cox. Appellee's Exhibit 6 was also introduced into the record and is a copy of the Request for Corrective Action to be taken against the Appellant resulting from Appellant's failure to follow the directive of his supervisor and for falsifying time records. Mr. Dobner testified that a ten-day suspension was meted out in accordance with the Transportation Cabinet's policy of progressive disciplinary action. Mr. Dobner testified that a three-day suspension is typically followed by a five-day suspension (in accordance with the progressive disciplinary action policy), but there is no hard and fast rule.

9 Mr. Dobner testified that he relied on p. 4 of Appellee's Exhibit 6 in determining the corrective action to take against the Appellant. The October 11, 2011 memo demonstrates clearly the importance of a supervisor showing up to work on a snow day. According to Mr. Dobner, the Appellant did not have his supervisor's approval to miss work on January 22, 2012. Mr. Dobner noted that according to GPS records, the Appellant's state-issued vehicle did not move from the Appellant's residence on January 22, 2012. Also, the Appellant claimed to have worked four and a half hours, between 4:30 a.m. to 9:00 a.m., on January 22, 2012. The problem being that in addition to not coming into the maintenance barn on January 22, 2012, the Appellant's phone records indicated he only utilized his state-issued cell phone for work purposes on that day on four separate occasions (4:46 a.m., 5:16 a.m., 7:04 a.m. and 8:59 a.m.). Mr. Dobner testified that it is improper for an employee to claim time while he is sitting around at his home doing nothing.

10. Appellee's Exhibits 7 and 8 were introduced into the record through the witness. The first is GAP-801, the Appellee's General Employee Conduct Policy. Appellee's Exhibit 8 demonstrates that the Appellant had been trained on this particular policy.

11. Appellee's Exhibit 9 was introduced into the record through the witness and is a copy of the Appellant's 15-day suspension letter dated August 27, 2012. Again, Mr. Dobner drafted this letter for Tresa Straw's signature. Appellee's Exhibit 10 was also introduced into the record by the witness and is the request for major disciplinary action regarding the incident set forth on Appellee's Exhibit 9. Appellee's Exhibits 11 and 12 were also introduced in to the record through the witness. Appellee's Exhibit 11 is a copy of the letter prepared by Mark Traylor complaining about the treatment he was subjected to by the Appellant on or about August 2, 2012. Appellee's Exhibit 12 is a copy of Mr. Fuqua's response. According to Mr. Dobner, he considered the information contained on Appellee's Exhibits 10, 11 and 12 in deciding to suspend the Appellant for fifteen days. Mr. Dobner further testified that the fifteen-day suspension was chosen in accordance with the Appellee's progressive disciplinary policy. He also noted that this was the third incident involving the Appellant within an eleven-month period.

12. On cross-examination, Mr. Dobner admitted that if the incident resulting in the fifteen-day suspension had been the Appellant's first offense, rather than his third, the major disciplinary action would likely have been either a written reprimand or possibly a one-day suspension. Appellee's Exhibit 13 was introduced into the record through the witness and Mr. Dobner testified he also considered this e-mail in determining the level of disciplinary action to take against the Appellant.

13. Mr. Dobner admitted he did not know how the Fayette County maintenance crew actually disposed of animal carcasses at the time of the first incident or how the employees had been trained regarding the same. However, he did know what the written policy was at the time of said occurrence.

14. Appellant's Exhibit 1 was introduced in to the record through the witness and is a copy of typed written notes prepared following an August 10, 2011 "lot review." Mr. Dobner testified he also relied on these notes when determining the Appellant's three-day suspension.

15. Regarding the ten-day suspension incident, Mr. Dobner testified that Appellee's Exhibit 6 contained all the information he relied upon in preparing the ten-day suspension letter marked as Appellee's Exhibit 5. Appellant's Exhibit 2 was introduced into the record through the witness and indicates that Tony McGaha was not as concerned about the Appellant failing to report to the maintenance barn as he was about claiming 4.5 hours for a total of 14 minutes of phone calling. Mr. Dobner testified that had he seen this particular e-mail it may have made a difference in the level of corrective action he chose to take against the Appellant. However, Mr. Dobner noted that there was still the issue of time falsification. He also stated that although he understood the Appellant had to be available to handle telephone calls during the morning of January 22, 2012, so long as he was effectively able to do other things, the time spent being made available was not compensable. Mr. Dobner also acknowledged he was not aware of any formal policy applicable to a Superintendent having to work from home during a bad weather event.

16. On redirect, Mr. Dobner explained that supervisors are always subject to being called out during bad weather, which is why they are issued state-owned trucks and cell phones. However, they are only compensated for time in which they are engaged in such a way that they cannot effectively use the time for their own purposes. Mr. Dobner also pointed out that Appellant's Exhibit 2 still demonstrates Mr. McGaha was concerned about the Appellant not showing up at the maintenance barn, just not at the same level as he was regarding the time falsification claim.

17. Finally, on re-cross-examination, Mr. Dobner admitted he had no idea what the Appellant was doing during the 4.5 hours he claimed to be working on Sunday, January 22, 2012.

18. The next to testify was **Edward Steven Farmer**, the Branch Manager of Project Delivery and Preservation for Branch I in District 7 which covers Lexington and surrounding counties. Mr. Farmer is responsible for maintenance and construction and is the third-line supervisor over the Appellant.

19. Appellee's Exhibit 14 was introduced into the record through the witness and is a copy of Mr. Farmer's notes made after an inspection of the Fayette County Maintenance Facility. Mr. Farmer relied on his notes to demonstrate he instructed the Appellant to have the bones of a deer carcass buried and to prove he told the Appellant that doing so would be a good practice for any new employees, as well as the current crew, in the future. Mr. Farmer testified that the typewritten notes, marked as Appellant's Exhibit 1, were prepared by him after a review of the maintenance lot in Fayette County. Mr. Farmer testified that a couple of days after said lot review (August 12, 2011), he instructed the Appellant to dispose of dead animal carcasses in a proper manner.

20. Appellee's Exhibit 15 was introduced into the record through the witness and is a copy of Mr. Farmer's notes he took on September 20 and 21, 2011. Mr. Farmer relied on his notes to document he instructed the Appellant to properly dispose of a deer on September 21, 2011 and that the Appellant later told him he had taken care of it. Mr. Farmer's notes dated September 22, 2011, indicate he checked the back of the lot to see if the Appellant had disposed of the deer as instructed and found it was still on the lot, partially eaten by buzzards. Mr. Farmer testified he was not aware that in Fayette County, animal carcasses were typically disposed of by dumping them in the back of the lot for the buzzards and did not think it happened, at least not on a regular basis. According to Mr. Farmer, he had never seen such a large number of buzzards flying over the lot like he did that day. He also testified it was common practice for him to take and make notes and that since becoming the Branch Manager in 2005, he had never had problems with carcass disposal before.

21. Mr. Farmer was shown the photographs marked as Appellee's Exhibits 2 and 3 and testified he took the photographs. Appellee's Exhibit 16 was also introduced into the record and is a copy of Mr. Farmer's notes he took on September 29, 2011, documenting his attempt to inform the Appellant he had requested major disciplinary action against him for failing to abide by his directive to properly take care of the deer carcass and the Appellant's profane response to the same. According to Mr. Farmer, he considered Appellant's failure to properly bury the deer carcass as an act of insubordination and was concerned somewhat with the Appellant's language. Mr. Farmer further testified that the facts set forth in the request for major disciplinary action found within Appellee's Exhibit 4 were prepared by him and are accurate.

22. Appellee's Exhibit 17, the same being the policy for Dead-Animal Pickup, and Appellee's Exhibit 18, which are the procedures for disposing of animal carcasses found in the Environmental Handbook, were introduced in to the record through the witness. Mr. Farmer testified that supervisors are told to be familiar with the Field Operations Guide and the Environmental Handbook. He stated that copies of the same are found within the Maintenance Barn.

23. Appellee's Exhibit 19 was introduced into the record through the witness and is an e-mail chain indicating there were concerns with contamination of ground water due to the disposal method utilized at the Fayette County garage for dead animal carcasses. The e-mail chain also demonstrates that disposing of dead animal carcasses on the back of the Fayette County Maintenance lot was a regular practice as far back as August 2010 which needed to be improved upon.

24. Finally, Mr. Farmer admitted to instructing Ms. Renfroe to write-up the Appellant whenever possible. He stated this was because he was having problems with the Appellant.

25. The next to testify at the hearing was **Mark Traylor**. Mr. Traylor lives in Sadieville, Kentucky, and is employed as a Paramedic with the Frankfort City Fire Department. Mr. Traylor stated that he was hauling hay from Garrard County to his property in Sadieville on August 2, 2012. He had approximately 400 bales of hay on a 30 foot flatbed tandem-axle wagon. Mr. Traylor stated that while traveling on Harrodsburg Road in Lexington and attempting to turn left on to New Circle Road some hay bales came loose and spilled onto the roadway. A person in a van waved him off the road on New Circle and alerted him to this fact. Mr. Traylor parked his truck and wagon in the emergency lane on New Circle Road and his wife went back to Harrodsburg Road to inspect the spillage. Shortly thereafter Mr. Traylor encountered the Appellant who was not pleasant at all. According to Mr. Traylor the Appellant was ranting and raving and called him an idiot and told him he did not know what he was doing, etc. The Appellant then threatened to impound his trailer and hay, which concerned Mr. Traylor because he had borrowed the trailer from a friend and did not want it impounded. Mr. Traylor stated he never said anything to cause the Appellant to talk to him in that manner. He also stated that as far as he knew, traffic was never affected and all the spilled hay was off the road. According to Mr. Traylor, he only lost one bale of hay out of the 90 that fell. He also stated that he wrote the letter marked as Appellee's Exhibit 11 because he did not want anyone else to go through what the Appellant put him through. He also confirmed that the letter marked as Appellee's Exhibit 11 accurately reflected what occurred on that day.

26. The next to testify at the hearing was **Tony McGaha**, who is a Section Supervisor for the Lexington Section of the Transportation Cabinet. Mr. McGaha is in charge of construction and roadway maintenance in Fayette and Jessamine counties. Mr. McGaha recalled being on the Fayette County Maintenance lot with Mr. Farmer and seeing a large swarm of buzzards over head. He could not recall having seen this spectacle before. He also stated that disposing of deer carcasses on the ground for the buzzards to take care of was not proper procedure. Appellee's Exhibit 20 was introduced into the record through the witness and is an e-mail he sent to Mr. Farmer documenting what occurred during their meeting with Danny Fuqua on September 28, 2011. Mr. McGaha stated he was taken aback by Mr. Fuqua's reaction to being told that major disciplinary action had been requested against him.

27. Regarding snow and ice call-outs, Mr. McGaha testified that the Appellant, as a supervisor, is responsible for responding to any call-out and leading a shift whenever they occurred. According to Mr. McGaha, whenever a crew is called out, the Appellant is supposed to call one of the engineers and let them know. Appellee's Exhibit 21 was introduced into the record and is a copy of an e-mail sent to the Appellant by Mr. McGaha on January 2, 2012. The e-mail advises the Appellant that in the event there is a call-out for his shift, he is to report to work and lead his crew as a Superintendent II.

28. Mr. McGaha testified he prepared the documents and the memorandum marked as Appellee's Exhibit 6. According to Mr. McGaha, having just coached the Appellant regarding his responsibility during a snow and ice call-out three weeks prior, the Appellant again failed to report for duty on January 22, 2012, and allowed a Superintendent I and a few crew members to handle the call out instead. According to Mr. McGaha, this was a clear-cut case of insubordination. Further, it appeared to Mr. McGaha the Appellant claimed to have worked 4.5 hours on January 22, 2012, the same being a Sunday, while the call-out occurred. According to Mr. McGaha this claim was false because the Appellant never left his house and only made four phone calls during the time in question. Mr. McGaha testified that he asked the Appellant why he did not report to the call-out and yet still claimed 4.5 hours of work time. The Appellant's response was that he was on the phone the entire time. This caused Mr. McGaha to question said response so he requested the Appellant's phone records. He then sent the e-mail, marked as Appellant's Exhibit 2, to Mr. Farmer and Katy Renfro. According to Mr. McGaha he gave the Appellant the benefit of the doubt and rounded up the time spent on the phone to approximately an hour. He also reported that the Appellant's failure to report to work on that day was not good, but that stealing time was a lot worse. In other words, in his opinion, one was bad, but the other was real bad.

29. On cross-examination, Mr. McGaha admitted that monitoring the weather is part of the Appellant's duties and that a whole crew was not called out on January 22, 2012. Mr. McGaha also testified there is no written policy regarding the Appellant's duty to report whenever there is a snow and ice call-out.

30. Regarding the deer incident, Mr. McGaha testified it was very possible the maintenance crew had been dumping dead deer carcasses on the back of the lot for several years. He admitted to having seen buzzards flying above the lot in the past. Upon review of Appellant's Exhibit 1, Mr. McGaha stated he did walk the maintenance lot with Mr. Farmer on August 10, 2011, and did not recall seeing any deer carcasses or bones. He also stated he was not aware of what kind of training the maintenance crew received regarding disposal of "road-kill." He was, however, aware of the Field Operations procedure, marked as Appellee's Exhibit 18.

31. Mr. McGaha's testimony marked the end of the Appellee's case in chief.

32. The next to testify was **Eric Rogers**, who is a Highway Equipment Operator in the Fayette County district. Mr. Rogers testified he was involved with the deer incident set forth in Appellee's Exhibit 1. He stated that at the time in question, the Appellant called him and told him he had just spoken with Mr. Farmer about an uncovered deer. He was told to handle it so immediately after receiving the call, Mr. Rogers used a front-end loader and put two big scoops of dirt on the deer carcass. Upon review of the photograph marked as Appellee's Exhibit 3, Mr. Rogers was unable to say for certain if it was the same deer he covered up with dirt. He stated that the deer he covered up was about 50 feet from the fence line and was a fresh kill. He knew this because the buzzards, which were usually very quick about doing so, had not yet picked it clean. In the end, he did not believe the deer shown in Appellee's Exhibit 3 was the same one he covered. Mr. Rogers testified that they constantly had deer brought in to the maintenance lot from the side of the road. He also noted he had never been trained on the Field Operations Manual carcass disposal procedure marked as Appellee's Exhibit 18. Instead, he learned how to handle deer carcass from the experienced crew members. He also noted that buzzards used to fly above the back of the maintenance lot constantly, but no longer did so now that an incinerator had been installed.

33. On cross-examination, Mr. Rogers testified that the only time he was ever instructed to cover a deer carcass was when Mr. Fuqua directed him to do so back in 2010.

34. The next to testify was **Kent Glen**. Mr. Glen testified about the snow incident set forth in Appellee's Exhibit 5. At that time, Mr. Glen was a Superintendent I. On January 22, 2012, Mr. Glen received a call from the Appellant who told him the Lexington police called complaining that certain bridges had become slippery. Since there had not been a snowfall event, all that needed to be done was to check the bridges and throw salt down. He stated that the guys on the crew already knew what to do about slick bridges and there was no need for two superintendents to be there.

35. Mr. Glen next testified about the hay bale incident set forth in Appellee's Exhibit 9. According to Mr. Glen, he went to the scene along with one other crew member and helped pull bales off the road and onto the median. Mr. Glen stated that Mrs. Traylor came to check on them because she thought they were stealing the hay.

36. Mr. Glen next noted that since beginning work at the Fayette County Maintenance Barn in 1989, dead animal carcasses were brought to the back of the lot and dumped on the hill for the buzzards to take care of continuously until the September 2011 incident with the Appellant occurred. In addition, during this time period, buzzards flew over the back of the lot on a regular basis.

37. The next to testify was **Katy Renfroe**. Ms. Renfroe is now a Transportation Engineer Specialist, but between 2010 and May 2012, she was the Appellant's immediate supervisor at the Fayette County Maintenance barn. She testified that Mr. Farmer instructed her to write-up the Appellant any chance she got and to be on the watch for any violations. Although Ms. Renfroe was not involved in the Appellant's deer incident at all, she testified that deer had been buried on the lot for many years going back before she began working in Fayette County. It was only after the Appellant's incident with the deer carcass that deer were buried on the right-of-way.

38. Regarding the incident set forth in Appellee's Exhibit 6, Ms. Renfroe understood that a Superintendent II was to report to the maintenance garage during a snow and ice call-out. However, she noted it was more important for someone to quickly get out there and take care of whatever problem existed. She also stated that according to her understanding, everyone reported their time on the job a little differently.

39. The next to testify was Appellant, **Daniel Fuqua**. Mr. Fuqua has been a Superintendent II at the Fayette County Maintenance Barn since June 16, 2009.

40. Regarding the deer incident set forth in Appellee's Exhibit 1, Mr. Fuqua testified that he was never given any instruction on how to dispose of animal carcasses when he started work in 2009 and that until after this incident, the process was to dump the carcasses on the back of the lot and let the buzzards take care of them. He also testified that he has never been trained on the Environmental Handbook procedure set forth on Appellee's Exhibit 18. In fact, this policy was never even brought to his attention until after this particular incident. Appellee's Exhibit 19 denotes the time when the issue of disposing of animal carcasses in a different manner was just starting to draw attention and the possibility of purchasing an incinerator was first mentioned.

41. Mr. Fuqua testified he was not there when the pictures, marked as Appellee's Exhibits 2 and 3, were taken. Mr. Fuqua admitted that on September 20, 2011, Mr. Farmer asked him to cover up a deer carcass located on the back of the maintenance lot. He then called Mr. Rogers and instructed him to handle the matter. Mr. Fuqua denied ever having been told to remove and bury the carcass. He also added that vultures pretty much lived on the back of the maintenance lot and that this incident marked the first time the disposal of any deer carcass had ever been brought up.

42. Mr. Fuqua stated that on September 21, 2011, Mr. Farmer asked him if he had taken care of the deer and he told him it was done. The Appellant was not present when Mr. Farmer rechecked the back lot. On September 29, 2011, he was called in to Mr. Farmer's office expecting to converse about snow and ice removal. Instead, the Appellant got "blind-sided" and was asked by Farmer if he remembered the deer incident. The Appellant responded in the affirmative and then a packet was placed on Mr. Farmer's desk in front of the Appellant. He could not see it, so when he put on his glasses, all he saw was major corrective action. He knew that the paperwork had been done and immediately became upset. The Appellant admitted to cursing Mr. Farmer and telling him he would see him in Frankfort because he knew disciplinary action was coming and that he would have to appeal it.

43. When reviewing the picture marked as Appellee's Exhibit 3, Mr. Fuqua noted the carcass was located over the hill so one could not see it unless one went down there looking for it. He also noted it looked like dogs or coyotes had dug up the carcass and that there was no telling how long it had been there. Finally, Mr. Fuqua stated that after this incident, Mr. McGaha instructed him to start burying animal carcasses at the southern split of I-64 and I-75. According to Mr. Fuqua, this was done until an incinerator, which is now used every day with inmates doing most of the work, was installed during the spring of 2012.

44. Mr. Fuqua testified whenever he is informed work is needed regarding snow or ice removal, he takes care of it. However, that does not necessarily mean he reports to the barn. Instead, he may just need to call a few crew members to get the job done. If things are bad, he may come in. When there is a full call-out, the same is dictated by Mr. Farmer and issued through the district office. For full call-outs, snow removal contractors and the full crew are called in and Mr. Fuqua will report to the Maintenance Barn.

45. Mr. Fuqua stated that on the Friday before January 20, 2012, Ms. Renfroe asked him to have a few people hang around the barn until midnight to monitor the weather. Nothing happened, but Mr. Fuqua was at the barn and remained on the clock. On January 22, 2012, Mr. Fuqua received a call from Metro police stating there were some potentially slick bridges. Mr. Fuqua called Kent Glen and asked him if he wanted to take it. Mr. Glen said he would take it. Fuqua then called in a few other crew members. While the bridges were tended to, the Appellant remained at his home in front of his computer monitoring (via NOAH) the weather conditions.

Apparently NOAH indicated there was potential for freezing fog due to the high moisture content in the atmosphere. The Appellant took a few calls between 4:30 and 9:00, but Mr. Glen took care of the job. Mr. Fuqua admitted he did not report to the Maintenance Garage on January 22, 2012.

46. When the Appellant arrived at work on Monday morning, January 23, 2012, the timekeeper had already completed his reporting through regular close of business on Friday and was trying to get the weekend stuff together. Since the Appellant had not been able to report the extra time he worked on Friday evening, he lumped the time he worked Friday evening with his best estimation of the time he worked over the weekend together and claimed it all on Sunday, January 22, 2012. He stated even though this was probably wrong, he claimed his time this way because the timekeeper had already reported his time through regular close of business on Friday and changing it, although possible, would be more trouble than it was worth. According to Mr. Fuqua, he also informed both Mr. McGaha and Ms. Renfroe he was claiming his time in this manner. Finally, he admitted that whether right or wrong, he had occasionally reported his time like this before.

47. Regarding the hay bale incident with Mr. Traylor, set forth in Appellee's Exhibit 9, Mr. Fuqua stated he received a call from Metro police informing him hay had spilled at the Double Diamond on Harrodsburg Road and New Circle. Mr. Fuqua asked Mr. Glen to come help and also asked for blue lights. When he arrived, he threw as much of the hay off to the side as he could so traffic could pass. He then went to Mr. Traylor's truck and trailer which was parked in the emergency lane on New Circle Road. When he got there, Mr. Traylor was up in the pile of hay with a phone in his hand and appeared distraught. After Mr. Traylor got off his phone, Mr. Fuqua asked him what he needed. Mr. Traylor told him he had someone coming to help. Mr. Fuqua admitted to asking Mr. Traylor what he was thinking and telling him the hay was not rigged properly. The whole thing disturbed Mr. Fuqua because Mr. Traylor was a Kentucky boy and a firefighter who did not know how to properly rig hay. He could not believe that a firefighter would disregard safety so blatantly. Although he denied cussing at Mr. Traylor, the Appellant admitted to scolding him and asking him what he was thinking. He also told him he was going to get somebody killed. Finally, Mr. Fuqua denied telling Mr. Traylor he was going to have his trailer impounded because he knew he did not have the authority to do so. He did, however, tell him that had Motor Vehicle Enforcement seen his situation, they would probably impound his trailer. Appellee's Exhibit 12 is a copy of his response to Mr. Traylor's letter and complaint.

48. On cross-examination, Mr. Fuqua admitted to cursing Mr. Farmer when he was told he would be receiving a major disciplinary action for the deer carcass incident. However, he noted the door was closed and he was talking to two men he worked with every day.

49. This matter is governed by KRS 18A.095(1) which states:

A classified employee with status shall not be dismissed, demoted, suspended, or otherwise penalized except for cause.

50. The Hearing Officer has considered the entire administrative record, including the testimony and statements therein.

### **FINDINGS OF FACT**

1. Appellant, Daniel Fuqua, was suspended from duty and pay from his position as a Highway Superintendent II in the Kentucky Transportation Cabinet, Department of Highways, District 7, for three working days, effective the beginning of business October 18, 2011, through the close of business October 20, 2011. According to the suspension letter, marked as Appellee's Exhibit 1, this suspension was due to the Appellant's poor work performance/lack of good behavior. In essence, the Appellant was disciplined for failing to abide by his superior's directive and for using inappropriate language during a meeting with his superiors.

2. Appellant, a classified employee with status, timely filed his appeal (No. 2011-254) with the Personnel Board on November 16, 2011, appealing from his three day suspension from duty and pay.

3. Appellant, Daniel Fuqua, was suspended from duty and pay from his position as a Highway Superintendent II in the Kentucky Transportation Cabinet, Department of Highways, District 7, for ten working days, effective the beginning of business February 22, 2012, and continuing through the close of business March 6, 2012. According to the suspension letter, marked as Appellee's Exhibit 5, the suspension was due to the Appellant's poor work performance/lack of good behavior. Essentially, the Appellant was suspended for failing to report to the Maintenance Barn on January 22, 2012, to take care of reported slick spots over bridges and for allegedly falsifying his timesheet for January 22, 2012.

4. Appellant, a classified employee with status, timely filed his appeal (2012-070) with the Personnel Board on March 22, 2012, appealing from his ten-day suspension from duty and pay.

5. Appellant, Daniel Fuqua, was suspended from his position as a Highway Superintendent II with the Kentucky Transportation Cabinet, Department of Highways, District 7, for fifteen working days, effective the beginning of business September 4, 2012, and continuing through the close of business September 24, 2012. According to the suspension letter marked as Appellee's Exhibit 9, the suspension was due to the Appellant's alleged poor work

performance/lack of good behavior. In essence, the Appellant was suspended for failing to show courtesy and respect when relating to the public and engaging in disrespectful, demeaning and inappropriate behavior by using profane, insulting and threatening language when addressing Mr. Traylor.

6. Appellant, a classified employee with status, timely filed his appeal (No. 2012-242) with the Personnel Board on October 23, 2012, appealing from his fifteen-day suspension from duty and pay.

7. The testimony of Steve Farmer and Katy Renfroe plainly demonstrates Mr. Farmer was having difficulty with the Appellant and was looking to have him written up for any violation.

8. Prior to the deer carcass incident involving the Appellant on or about September 20, 2011, it was common practice for animal carcasses to be brought to the Fayette County Maintenance Lot and dumped on the back of the lot for the buzzards to pick the carcasses clean. On or about September 20, 2011, the Appellant was instructed by his superiors, Mr. Farmer and Mr. McGaha, to cover up a deer carcass which they had noticed lying on the back of the maintenance lot. Mr. Fuqua immediately instructed Mr. Rogers to take care of the matter. Mr. Rogers immediately took care of the matter by placing two large scoops of dirt over the deer carcass. The following day, Mr. Farmer asked the Appellant whether he had taken care of the deer carcass, and the Appellant answered in the affirmative.

9. On September 22, 2011, Mr. Farmer visited the Fayette County Maintenance Facility and found a deer carcass located on the back of the maintenance lot. On September 29, 2011, without informing him of the nature thereof, the Appellant was called to a meeting by Mr. Farmer and Mr. McGaha at which time he was presented with documentation indicating Major Disciplinary Action had been requested against him for failing to take care of the deer carcass as directed. Mr. Fuqua responded with profanity, told Mr. McGaha and Mr. Farmer he would see them in Frankfort, and left the meeting.

10. As a result of this incident, the Appellant was suspended for three days from duty and pay for insubordination and use of profanity.

11. On January 22, 2012, at approximately 4:46 a.m., the Appellant was notified by the Lexington Police Department that there were some slick bridges and overpasses in Fayette County that required the Transportation Cabinet's attention. Mr. Fuqua contacted Kent Glen, Highway Superintendent I, and asked him if he would handle the situation. Mr. Fuqua contacted three additional Fayette County Maintenance employees to help respond to the situation. Mr. Fuqua did not report to the Fayette County Maintenance Facility or the work site on January 22, 2012. Instead, he remained in his home monitoring NOAH on his home computer. He also

placed four telephone calls between 4:30 a. m. and 9:00 a.m. that morning which took approximately 14 minutes. The following Monday, January 23, 2012, the Appellant claimed 4.5 hours worked on January 22, 2012. Mr. Fuqua's testimony indicates he worked overtime on Friday evening January 20 and Saturday, January 21, and that he lumped this time together with the estimated time he worked on Sunday, January 22, 2012 when he reported his time on Monday, January 23, 2012. According to Mr. Fuqua, the 4.5 hours he reported working on January 22, 2012 are fewer hours than he actually worked on January 20, 21 and 22, 2012 combined. The Appellant informed his supervisor he would be reporting his time in this manner and did so in order to simplify the timekeeper's job. The Appellant admitted that the manner in which he reported his time for January 20, 21 and 22, 2012 was procedurally incorrect.

12. On August 2, 2012, Mark Traylor was hauling a trailer loaded with bales of hay from Garrard County to Scott County. While turning his vehicle from Harrodsburg Road on to New Circle Road in Lexington approximately 80 to 90 bales of hay spilled from the trailer and fell into the roadway. Mr. Traylor parked his vehicle and trailer on the emergency lane of New Circle Road while his wife went to check on the fallen bales of hay. The Appellant was called to the scene and came upon Mr. Traylor who was standing on top of the trailer trying to rearrange his hay. At that time, Mr. Traylor was distraught and was on the phone attempting to call for help. The Appellant expressed his frustration to Mr. Traylor for his lack of due diligence in safely securing his hay. Mr. Traylor was offended by the Appellant's words and demeanor. The Appellant admitted to talking to Mr. Traylor pretty roughly.

### **CONCLUSIONS OF LAW**

1. Appellant timely filed all three of his appeals with the Personnel Board, appealing from his three-day, ten-day, and fifteen-day suspensions, respectively.

2 Appellant was suspended for a period of three working days effective the beginning of business October 18, 2011, through the close of business October 20, 2011, for poor work performance/lack of good behavior. In essence, he was disciplined for his perceived insubordination and use of unprofessional language. The Appellee has failed to demonstrate by a preponderance of the evidence that the disciplinary action taken against the Appellant, the same being a three-day suspension from duty and pay, was neither excessive nor erroneous and was appropriate under the circumstances. The credible evidence of record indicates that the Appellant immediately acted upon the directive of his superior and took measures to properly cover a deer carcass as directed. The Appellant's subsequent use of profanity during a surprise meeting with Mr. McGaha and Mr. Farmer is clearly unprofessional. However, given these gentlemen have worked together for several years and that the language was used in a private closed door setting on a Maintenance lot, there is a mitigating factor.

3. Appellant was suspended for ten days from duty and pay effective the beginning of business February 22, 2012, through the close of business March 6, 2012, for poor work performance/lack of good behavior, when he failed to arrive at the Maintenance Barn during an emergency situation on January 22, 2012 and allegedly falsified his time record. The Appellee has failed to demonstrate by a preponderance of the evidence that the disciplinary action taken against the Appellant, the same being a ten-day suspension from duty and pay, was neither excessive nor erroneous and was appropriate under the circumstances.

4. Mr. Dobner testified that the ten-day suspension was based upon the Transportation Cabinet's progressive disciplinary action policy. Given that the Appellant's initial three-day suspension from duty and pay was both excessive and erroneous and inappropriate under the circumstances, a ten-day suspension is out of line with the Appellee's progressive disciplinary policy.

5. The Appellant received an e-mail from his supervisor on January 2, 2012, instructing him to report to the Maintenance Barn during any emergency snow and ice "call-out". However, depending on the nature of the emergency, the manpower needed to handle any given situation varies. The situation on January 22, 2012, involved slick bridges and was adequately handled by one supervisor and three crew members. A full shift and independent contractors were not needed to respond to this call-out. Further, there appears to be no written policy regarding the Appellant's duties during a call-out and whether he was required to report to the Maintenance Barn whenever a full shift is not required to handle an incident. It is unfair to discipline the Appellant for failing to follow policy which does not exist or for failing to meet expectations which have not been clearly communicated to him. As such, the Appellant's failure to report to the Fayette County Maintenance Barn on January 22, 2012, does not warrant disciplinary action.

6. The Appellant clearly falsified his timesheet when he stated he worked 4.5 hours on January 22, 2012. However, there is no evidence to suggest that the Appellant claimed more time than he worked on January 20, 21 and 22, 2012, combined. In addition, it appears that the Appellant took it upon himself to inform his supervisor that he claimed this time on January 22, in order to make it easier on the timekeeper. Also, whether right or wrong, the Appellant indicated that this type of activity has happened previously. As a supervisor, the Appellant should be aware of, and strictly adhere to, proper timekeeping documentation procedure. Failure to do so warrant's a three-day suspension from duty and pay.

7. Appellant was suspended for fifteen working days, effective the beginning of business September 4, 2012, through the close of business September 24, 2012, for poor work performance/lack of good behavior. The Appellee has failed to demonstrate by a preponderance of the evidence that the disciplinary action taken against the Appellant, the same being a fifteen-day suspension from duty and pay, was neither excessive nor erroneous and was appropriate

under the circumstances. On August 2, 2012, the Appellant failed to conceal his frustration with the way Mark Traylor rigged his hay bales and spoke to him in a less than courteous manner. In addition, the Appellant inadvertently misled Mr. Traylor to believe his trailer might get impounded. Appellant's actions constitute a lack of good behavior and were in violation of Personnel Policy, GAP-801, General Conduct. Mr. Dobner testified that had this incident been the Appellant's first it would warrant no more than a written reprimand or possibly a one-day suspension. Keeping in line with the Appellee's policy of progressive disciplinary action, the Appellant's lack of good behavior warrants a five day suspension from duty and pay.

### **RECOMMENDED ORDER**

The Hearing Officer recommends to the Personnel Board that the appeals of **DANIEL FUQUA VS. TRANSPORTATION CABINET** be:

1. **APPEAL NO. 2011-254** be **SUSTAINED** and that the three-day suspension be set aside; that Appellant be awarded three days' back pay and that he otherwise be made whole;
2. **APPEAL NO. 2012-070** be **SUSTAINED to the extent** that the Appellant's ten-day suspension be reduced to a three-day suspension from duty and pay; and that Appellant be awarded seven days' back pay and that he otherwise be made whole.
3. **APPEAL NO. 2012-242** be **SUSTAINED to the extent** that the Appellant's fifteen-day suspension be reduced to a five-day suspension from duty and pay; and that Appellant be awarded ten days' back pay and that he otherwise be made whole.
4. **Further**, to reimburse Appellant for any leave time he used attending the hearing and any pre-hearing conferences at the Board, and to otherwise make Appellant whole. KRS 18A.105, 18A.095(25), and 200 KAR 12:030.

### **NOTICE OF EXCEPTION AND APPEAL RIGHTS**

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

**Any document filed with the Personnel Board shall be served on the opposing party.**

The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

Each party has thirty (30) days after the date the Personnel Board issues a Final Order in which to appeal to the Franklin Circuit Court pursuant to KRS 13B.140 and KRS 18A.100.

**ISSUED** at the direction of **Hearing Officer Geoffrey B. Greenawalt** this 16<sup>th</sup> day of June, 2014.

**KENTUCKY PERSONNEL BOARD**

  
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**MARK A. SIPEK**  
**EXECUTIVE DIRECTOR.**

A copy hereof this day mailed to:

Hon. William Fogle  
Hon. Paul Fauri  
Kathy Marshall