



**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2015-226**

**JUSTIN GRAVES**

**APPELLANT**

**VS.**

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

**TRANSPORTATION CABINET**

**APPELLEE**

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This matter came on for an evidentiary hearing on October 12, 2016, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Stephen T. McMurtry, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Justin Graves, was present and was represented by the Hon. Ken Garrett. The Appellee, Transportation Cabinet, was present and represented by the Hon. William H. Fogle.

**BACKGROUND**

1. Justin Graves was a Highway Equipment Operator II with the Department of Highways, District 3. On September 8, 2015, Carol Beth Martin, Appointing Authority for the Transportation Cabinet, notified Graves that he was dismissed from his employment effective September 8, 2015, for failing a random drug test administered on August 13, 2015, by Southern Medical Labs, Glasgow, Kentucky, as required by the Cabinet's Drug and Alcohol Testing Program for Commercial Drivers License holders. Martin further notified Graves that the failure violated 101 KAR 1:345; General Administration Personnel Policy, GAP-801; 49 CFR Part 40 and 49 CFR Part 382.

2. Graves filed a timely appeal on September 4, 2015, alleging:

I am getting terminated or dismiss for a failed drug test and I told Jill Hamon that woman that give test didn't allow me too read papers or form and she even left parts blank and miss Jill wanted me to come and resign, and wouldn't listen to my concerns (sic)

3. **James "J.R." Dobner**, Deputy Executive Director of the Office of Human Resource Management for the Transportation Cabinet, testified in justification of the Cabinet's dismissal of Graves. He said Graves, an Equipment Operator II, had multiple responsibilities in that position: Road Maintenance, Traffic Control, Snow, Ice and Debris Removal, and Flagging, functions that required a Commercial Driver's License (CDL).

4. Dobner introduced and explained the Cabinet's Drug and Alcohol Testing Handbook for CDL Employees which contains rules published by the US Department of Transportation to be implemented by "all large employers of CDL holders including rules for mandatory drug testing and prohibition of amphetamine use [among other controlled substances] while on duty." He said the Cabinet had a policy of "zero tolerance" that would result in dismissal of the employee if the test result exceeded the federal regulation testing threshold, one of which was any positive test result for amphetamines. Dobner introduced an agreement signed by Graves and the Cabinet on June 7, 2012, certifying that he understood the "zero tolerance" policy for drug use.

5. Dobner introduced and explained a Drug Test Report received by the Cabinet that stated Graves had failed a random urine test that indicated positive for amphetamines and methamphetamines. Southern Medical Labs of Glasgow, Kentucky obtained the urine specimen on August 13, 2015. A lab in Louisiana conducted an analysis of the urine between August 14, 2015, and August 17, 2015, and Kim Lykins, D.O., performed a medical review of the process in Harrisburg, North Carolina. A chain of custody document accompanied the bottled urine specimens marked with the "Specimen ID Number." Dobner justified the Cabinet's zero tolerance policy, explaining that Graves or any other (safety sensitive) CDL holder would automatically lose his license for such drug use, but could go through a substance abuse program to regain the license and return to duty, a process that takes an indeterminate period of time. He testified that to wait for rehabilitation was problematic because a suspended employee might not complete the rehab program, and for those who did, the period to complete the program was not predictable. He said hiring a replacement more quickly filled the vacant position. He said he had reviewed cases of similarly-situated CDL employees who had failed drug testing. All of them had either resigned or retired. Some had refused to take the test and were dismissed.

6. On cross-examination, Graves' attorney had Dobner explain the Federal Drug Testing Custody and Control Form, a document of four carbon-backed pages that selectively imprinted the information written on the top page onto four under pages. The top page, Copy 1, was the Test Facility copy; Copy 2, the Medical Review Officer copy; Copy 3, the Collector copy; Copy 4, the Employer copy; and Copy 5, the Donor copy. Dobner explained that step two of the form required the collector to check a box that affirmed the urine specimen had a temperature between 90 to 100 degrees Fahrenheit, as measured by a temperature strip in the specimen bottle. This was to ensure the donor employee had voided the urine in the testing facility and had not obtained it from a clean source outside the lab. Dobner examined the Test

Facility copy, the Medical Review Officer copy and the Donor copy to conclude that the mark on the first copy was different than the mark on the second copy and the Donor copy had no mark at all. Dobner concluded that the first two copies had been marked at different times because one was not a carbon imprint of the other and the Donor copy had not been marked.

7. Further on cross-examination, Graves' attorney asked Dobner if the specimen collector read the certification at step five to Graves before he signed it. Dobner replied that he did not know. On redirect Dobner said, "It is not required that the collector read the certification to the donor." The certification, which is to be signed by the donor, states: "I certify that I provided my urine specimen to the collector; that I have not adulterated it in any manner; each specimen bottle was sealed with tamper-evident seal in my presence; and that the information provided on this form and on the label affixed to each specimen bottle is correct."

8. **Justin Graves** testified that when he gave a urine specimen for testing to the medical lab there were 10 to 20 others to be tested from Metcalf, Barren, and Monroe Counties. He arrived at 8:00 a.m. and tested at 9:05 a.m. He initialed the label attached to the bottom of the form before the labels were attached to the specimen bottles. He said the collector gave him a specimen bottle. He deposited the urine specimen in the bottle and placed it on a table. He testified the collector did not read the certification to him, rather she asked him to sign it without giving him an opportunity to read it. He denied ever ingesting amphetamines or methamphetamines. He denied watching her place the labels on the specimen bottles and place them in a "plastic bag."

9. **Dennis Curtis**, a Transportation Cabinet employee, testified he was at the Southern Health Lab in Glasgow on the morning of August 13, 2015, to be tested along with Graves. He said the facility was busy as there were at least ten persons waiting to be tested.

10. By agreement, the parties took the deposition of **Jennifer Turben** on September 28, 2016. Turben is a phlebotomist with Southern Medical Labs in Glasgow and certified to collect urine samples for the Cabinet. She testified that when urine is collected following the procedures found on the back of the Donor's copy of the form, only one person is allowed in the room with the collector. She identified the Federal Drug Testing Custody and Control Form and explained the four-step testing process written on the back of the Donor copy. In particular she explained that a specimen bottle has a temperature strip in it to assure that the urine is 90 to 100 degrees Fahrenheit. She said, "It can tell if it's too cold, if, you know they tried to bring it in with them. You know, if it's cold, obviously it's not new." She explained the first step of sealing the specimen bottles with the labels initially attached to the bottom of the first page of the form. Then step two is an assertion by the collector that the urine was between 90 to 100 degrees Fahrenheit. This assertion is found on the Test Facility copy and the Medical Review Officer copy but not on Graves' Donor copy. Turben surmised that the collector, Emily Roderick, neglected to check the temperature box. Thereafter, while reviewing the form, she checked the

two Form copies available but not the donor's copy. Turben stated that Graves would have seen the collector mark the copy that goes to the Medical Review Officer because that form is put in the bag with the specimen bottles and then sealed in the donor's presence. She said, "You can't take that form back out of that bag and add anything to it."

### **FINDINGS OF FACT**

The Hearing Officer makes the following findings by a preponderance of the evidence:

1. Emily Roderick, the collector with Southern Medical Labs, neglected to check the temperature box located at step two of the Test Facility copy. She reviewed the form for errors to discover the temperature box had not been checked. She then separately checked the Test Facility copy and the Medical Review Officer copy, but not the Donor copy. She then put the Medical Review Officer copy in the "bag" with the urine specimen and sealed it. This process was done in Graves's presence.

2. Although the drug testing procedure of checking the temperature box was not performed as intended, the procedure, as done, was substantially performed so as to assure Graves that his urine specimen was fairly collected and tested in his presence. Checking the temperature box is a procedure designed for the benefit of the Cabinet. A misstep in assuring that the specimen has a temperature between 90 – 100 degrees Fahrenheit would most probably benefit a donor who is bringing to the lab urine to be tested from a clean source.

3. Graves did not read the certification that states that he provided his urine specimen to the collector unadulterated, each specimen bottle was sealed in his presence and the information provided on the form and on the label affixed to the specimen bottle was correct.

4. The Federal Drug Testing Custody and Control Form and the Cabinet's Drug Testing Handbook for CDL Employees do not require that the collector read to the donor the certification prior to his signing it. The collector, Emily Roderick, "did not by any means prevent Graves from reading the certification" before he signed it.

### **CONCLUSION OF LAW**

Graves violated the Cabinet's General Administration and Personnel Policy on Employee Conduct, GAP-801, by engaging in conduct that violated a policy of the Cabinet prohibiting a CDL employee from testing positive for amphetamines or methamphetamines while on duty. That violation constituted a violation of 101 KAR 1:345, lack of good behavior.

**RECOMMENDED ORDER**

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Kentucky Personnel Board that the appeal of **JUSTIN GRAVES VS. TRANSPORTATION CABINET (APPEAL NO. 2015-226)** be **DISMISSED**.

**NOTICE OF EXCEPTION AND APPEAL RIGHTS**

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

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

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

**ISSUED** at the direction of **Hearing Officer Stephen T. McMurtry** this 24<sup>th</sup> day of January, 2017.

**KENTUCKY PERSONNEL BOARD**

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

A copy hereof this day mailed to:

Hon. William Fogle  
Hon. Ken Garrett  
J. R. Dobner