


CERTIFICATION OF PERSONNEL BOARD RECORDS

I certify that attached hereto is a true and correct copy of the Findings of Fact, Conclusions of Law and Recommended Order and Final Order Altering in the case of **JAMES HOWITZ VS. TRANSPORTATION CABINET (APPEAL NO. 2019-100)** as the same appears of record in the office of the Kentucky Personnel Board.

Witness my hand this 22nd day of April, 2020.



MARK A. SIPEK, SECRETARY
KENTUCKY PERSONNEL BOARD

Copy to Secretary, Personnel Cabinet

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2019-100**

JAMES HOWITZ

APPELLANT

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

TRANSPORTATION CABINET

APPELLEE

** ** * * *

The Board, at its regular April 2020 meeting, having considered the record, including the Findings of Fact, Conclusion of Law and Recommended Order of the Hearing Officer dated January 13, 2019, Appellee's Exceptions, Appellant's Response to Exceptions, oral arguments, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusion of Law and Recommended Order of the Hearing Officer be altered as follows:

A. **Delete Finding of Fact** paragraph 4 and substitute the following:

4. Appellant's recall of events, and the underlying timetable thereof, varies vastly from that recited by Ms. Studler. His memory of it is that the photographing of her backside occurred early in her training, specifically in March 2017, in an effort to dissuade her from her cell phone usage. He claims that no other sexual harassment and/or harassment of any kind occurred and, after telephoning him at home to inquire about his welfare and health status during his illness about 30 days after the photographing episode, she permanently ceased communicating with him, which status remained unchanged from mid-April 2017 through his termination in March 2019.

B. **Add Findings of Fact** paragraphs 7 and 8:

7. After weighing the conflicting testimony, the Board finds that Agency failed to establish that the Appellant requested Ms. Studler photograph and supply him with pictures of her breasts. The Board finds that this allegation, if true, would have justified the Appellant's termination when taken in conjunction with the Appellant's other unacceptable behavior. However, given the evidence of record, the Board simply cannot find, by a preponderance of the evidence, that the Appellant asked Ms. Studler to send him photographs of her breasts upon two separate occasions on sequential days.

8. After weighing the conflicting testimony, the Board finds that the allegations of Ms. Kettenring that 1) the Appellant "looked up" her personal information on a website and questioned her about that information, 2) the Appellant repeatedly asked Ms. Kettenring about the location of several of her tattoos after being told that it was none of his business, and 3) the Appellant moved a small, personal refrigerator belonging to Ms. Kettenring without discussion and then, after Ms. Kettenring moved the refrigerator back to the original location, the Appellant became irate, yelled at her, and threatened to toss the refrigerator out, more credible than the Appellant's denial of same. Therefore, by a preponderance of the evidence, the Board finds that the Appellant looked up Ms. Kettenring's personal information and engaged in a conversation about the witness' personal information in a manner that made Ms. Kettenring uncomfortable. The Board finds the Appellant repeatedly asked Ms. Kettenring about her tattoos in a manner that made her uncomfortable. The Board also finds that the Appellant moved Ms. Kettenring's personal refrigerator and then yelled at her when she moved the refrigerator back to its original location.

C. **Delete Conclusions of Law** paragraphs 2, 3, and 4 and substitute the following:

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

3. Two of the employees who testified, Kim Studler and Tara Kettnering, were subjected to a series of inappropriate behavior, which the Board finds was based on the fact that they were female.

4. Here, however, the ultimate question was whether the Appellant's sexually related comments and action in taking the inappropriate "backside" photograph, 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).

5. The Board finds 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.

6. 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).

7. 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.

8. 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.

9. 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.

10. 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.

11. 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 female coworkers 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 coworkers 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.

12. 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 and actions in taking a "backside" photograph of one of his female coworkers, as set out above, constituted bad behavior under 101 KAR 1:345.

13. Appellant's inappropriate behavior, conduct to which he largely admits to engaging, must be analyzed within the framework of the applicable policies. The Board rejects the Hearing Officer's legal analysis that the appropriate Agency response to boorish behavior is guided by the degree to which the victim of the unacceptable conduct has demonstrated concern or felt threatened. It is clear that the Agency has a compelling interest in ensuring a workplace free of harassing and inappropriate behavior for all of its employees, no matter that, in the face of unacceptable behavior, a particular employee was not concerned or threatened. Stated differently, the Agency has an obligation to ensure a workplace free of harassment, whether the target of such behavior feels threatened, concerned, or harassed. Similarly, the Agency has an obligation to correct inappropriate behavior before it rises to the "severe and pervasive" level that would subject the employer to liability under the well-established sexual harassment standard. Oncale v. Sundowner Offshore Services, 523 U.S. 75, Brewer v. Hillard, 15 S.W.3d 1 (1999).

14. Because the investigative staff did not obtain the photographs underlying this appeal and did not have the benefit of conclusive corroborating evidence, the Agency's Appointing Authority was unable to consider such evidence in determining the

appropriate level of discipline for the Appellant's inappropriate behavior. However, the Board had the benefit of viewing the photographs and the testimony of the complaining witnesses when determining what level of discipline should be imposed as a result of the Appellant's unacceptable behavior. Given the unbelievable rationale offered by the Appellant for taking the photographs and given that the credible testimony offered by Ms. Kettenring establish that the Appellant engaged in a pattern of behavior that constituted a lack of good behavior, pursuant to 101 KAR 1:345. The Board rejects the Hearing Officer's conclusion that the Appellant is unlikely to repeat the inappropriate behavior that underlies this appeal. The Board specifically concludes that the Appellant repeatedly engaged in unacceptable behavior and that he must be disciplined as a result. However, given the findings that the Appellant took a fuzzy photograph of Studler's backside and that the behavior Appellant engaged in which made Ms. Kettenring uncomfortable was certainly inappropriate, but not sexually so, termination of the Appellant was unduly severe in light of all of the circumstances. The Board concludes that a thirty-day suspension is the appropriate level of discipline as it will make clear to the Appellant that his behavior was completely unacceptable and that any further significant misconduct will likely result in his dismissal from state service.

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

IT IS FURTHER ORDERED that the Hearing Officer's Recommended Order be altered and that the appeal of **JAMES HOWITZ V. TRANSPORTATION CABINET, (APPEAL NO. 2019-100)** is **SUSTAINED** to the extent herein, the dismissal be rescinded and removed from the Appellant's personnel files, and the Appellant receive a thirty (30) day suspension in place thereof. The Appellee/Agency shall reinstate the Appellant with back pay and other benefits for the period of penalization (except for the 30-day suspension) to a similar position of like pay and status; however, he should not be returned to the same position but otherwise made whole. **KRS 18A.105 and 200 KAR 12:030.**

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law, and Recommended Order, as altered and amended, be and they hereby are approved, adopted, and incorporated herein by reference as a part of this Order and the Appellant's appeals is therefore **SUSTAINED to the extent set forth herein.**

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 22nd day of April, 2020.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
SECRETARY

A copy hereof this day mailed to:

Hon. William Fogle
Hon. Paul Fauri
J.R. Dobner

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2019-100

JAMES L. HOWITZ

APPELLANT

VS.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER

TRANSPORTATION CABINET

APPELLEE

* * * * *

This matter came on for evidentiary hearing on November 6, 2019, at approximately 9:30 a.m., EST, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. John C. Ryan, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by KRS Chapter 18A.

The Appellant, James L. Howitz, was present and was represented by the Hon. Paul Fauri. The Agency/Appellee, Transportation Cabinet, was also present and represented by the Hon. William Fogle.

This appeal was the subject of at least one pre-hearing conference convened to define the issues, address any matters requiring attention, and to discuss the possibility of mediation. It was initially assigned for evidentiary hearing to be conducted on August 22, 2019, but, by agreement of the parties, was rescheduled upon two occasions. No mediation occurred.

BACKGROUND

1. By letter of March 7, 2019, over the signature of James R. Dobner, Appointing Authority Designee, James L. Howitz was dismissed from his position of Taxpayer Services Specialist II in the Agency's Department of Vehicle Regulation, Division of Motor Carriers, Tax and Financial Processing Branch, effective that date. A true copy of the letter, which details the grounds, is attached hereto and incorporated herein as **Recommended Order Attachment A**.

2. Mr. Howitz took timely appeal on May 1, 2019, wherein he urged:

By letter dated March 7, 2019 I was dismissed from my position of Taxpayer Services Specialist II with the Kentucky Transportation Cabinet.

I deny the allegations relating to Kim Studler. They are simply not true. The allegations relating to Ms. Studler's time and attendance and the

internet search are not grounds for a disciplinary action and, furthermore, certainly do not warrant a dismissal even if the allegations were true.

The termination is excessive and erroneous in view of all surrounding circumstances. It is contrary to the provisions of Chapter 18A and violates Section 2 of the Kentucky Constitution.

3. Upon convening the hearing, commensurate with its assigned burden of proof, the Agency offered the testimony of **Joseph Puckett**, Administrative Section Supervisor of the Branch in which Appellant previously served. He briefly explained the Branch's purpose, which, generally, is the collection of taxes and penalties upon and from over-the-road/commercial vehicles in coordination with the Agency's Commercial Vehicle Enforcement Division. This witness supervised both Appellant and the complaining employee, Kim Studler. He noted that each of them was, or is as the case may be, go-to individuals within the office for certain portions of the duties attendant to this Branch, which includes telephone work.

4. The witness continued that Appellant was a good, dependable employee who performed his day-to-day assignments and who routinely received excellent evaluations. He recalled that initially the workstations of he and Ms. Studler were within proximity and/or sight of each other. However, near the beginning of 2018, Ms. Studler requested and received a move to another office within the workplace, providing no specific explanation for the request at the time. Several months later, at a meeting called by the witness to discuss her notable absences from work, she volunteered that Appellant had taken a picture of her "butt" and made light of it at the time he did so. She then asserted that a week or so following the episode, Appellant approached her asking whether, "if he won the lottery, she would go out with him," to which her response was that she "was not that kind of person." Still later, she recalled, Appellant requested that she take a photograph of her breasts and send it to him, which offended her.

5. The witness continued that, upon hearing the foregoing, he conferred with the Branch Manager and requested Ms. Studler to reduce her comments to writing. The matter was referred to the Agency's Office of Human Resource Management, following which this witness had no further input other than to supply documentation as requested. He identified and introduced a September 11, 2018 email summary submitted by Ms. Studler summarizing her complaints and including confirmation of her request to change locations within the workplace. The witness also identified and filed a follow-up email of September 12, 2018, wherein the complainant, at his request, further expanded upon the circumstances and/or atmosphere covering the timeframe during which she asserted the offensive comments occurred.

6. Under cross-examination, the supervisor confirmed that the meeting at which the claims against Appellant occurred was conducted on September 10, 2018, and that its purpose was to discuss Ms. Studler's time and attendance issues. He explained that she had commenced missing considerable amounts of work, averaging at least one week each month, and he sought to discern the reason. Her explanation was that she was having migraine headaches due to stress arising from Appellant's behavior. He recalled that this was the first notification he received

about the behavior, noting that by that time she had been employed in the section for approximately one year and was trained by Appellant when she began there. Given the nature of her condition, medical leave rights were discussed and documents relating to Family Medical Leave supplied to her.

7. The witness continued that Ms. Studler had been, at the time of hearing (November 6, 2019), out upon Family Medical Leave for approximately two months. She has properly called in reporting the migraines and has always supplied the requisite doctor's statements for absences. Her assignments are routinely spread among the entire remaining staff, which numbers nine personnel.

8. The witness could not recall when Ms. Studler requested a different workstation, explaining that such is not unusual when a coworker retires and another worker seeks their job station if it is an improvement. He confirmed that she made no reference to Appellant before or after her move until the meeting, estimated to be nine months later. He recalled that, throughout that particular timeframe, she was routinely reporting for work until the absences increased and, thus, the meeting.

9. The Office of Human Resource Management did not interview the witness following the referral, but merely requested the referenced documents. He identified and introduced a cover email of September 13, 2018, by means of which he forwarded the statements/emails that he had collected from Ms. Studler and one or more other personnel complaining about Appellant. Commensurate with policy, he referred the entire matter to the Office of Human Resource Management without ever confronting Appellant concerning the allegations. He was never shown any report or recommendation, but did receive a copy of Appellant's termination letter.

10. The witness recognized and there was introduced Appellant's Annual Employee Performance Evaluations for 2016, 2017, and 2018, which he prepared. They were, for the most part, in the "Outstanding" category, although that for 2018 initially was not. He confirmed that Appellant challenged the rating and sought a reconsideration, whereupon a meeting was held to discuss his concerns. Based upon the discussions, the witness raised specified scores with explanations therefor. He explained that, in preparing the 2018 evaluation, he took into consideration the pending complaints against Appellant but, in rethinking the matter, he realized that both throughout the rating year and during the preparation timeframe, the complaints remained unresolved and had no direct bearing upon Appellant's quality of work.

11. Pressed concerning comments referring to other complaints in the 2018 evaluation, the witness expanded that two incidents unrelated to Ms. Studler were reported by a coworker concerning Appellant's behavior. When the witness undertook to discuss the concerns with him, Appellant refused to accept any blame and "stormed out" of the meeting(s). The witness had no knowledge of any resolution concerning those incidents.

12. **Kim Studler** holds the position of Taxpayer Services Specialist II in the Tax and Financial Processing Branch of the Department of Vehicle Regulation, Division of Motor

Carriers, where she commenced in February 2017. She and Appellant were coworkers; he was her trainer during her first three months of employment. She asserted that a few months into her time there, he took pictures of “my butt” with his iPad. She felt violated by this and requested that he cease doing so, although she made no request that he delete what was already done. Also, upon at least one occasion, Appellant pressed as to whether she would “go out with him” if he won the lottery. Further, in keeping with a perceived trend, she recalled that Appellant requested that she photograph and supply him with pictures of her breasts; he made this request upon two separate occasions on sequential days.

13. The witness continued that, in due course, another coworker retired and she sought and received permission to relocate her workstation into the retiree’s space. She insisted that although the comments about her person ceased, Appellant continued to treat her “badly,” discussing her work schedule and absences with one or more other workers. His ongoing behavior toward her made her work atmosphere “very difficult” and either caused or aggravated migraines from which she suffered. She felt that he was routinely “very angry” and his continuing attitude seemingly gave rise to new issues upon a daily basis.

14. The witness continued that she was hopeful that Appellant’s criticism of her would cease when she relocated her workstation away from him. However, when the behavior continued, she decided to disclose his advances and his demeanor toward her at a meeting that was convened to discuss her increasing level of absences which, she asserted, were due to the stress and the migraines. She was requested to reduce her complaints to writing and provided one or more emails summarizing the occurrences.

15. Under cross-examination, Ms. Studler acknowledged that she first reported Appellant’s behavior in September 2018, although she changed workstations in January 2018, and, to her best recollection, the improper advances and photographing occurred in approximately November 2017. She conceded that she never discussed Appellant’s behavior with anyone before the meeting, nor did she report it until then. Although familiar with the General Administration and Personnel (GAP) policy relating to dealing with employee conduct in the workplace, she did not invoke it, insisting that she was uncertain how to do so. She was aware that Appellant was complaining to coworkers about her being off work, calling her a “part-time” employee while wondering aloud why this was being tolerated. She agreed that the meeting, wherein the disclosures concerning Appellant were made, was convened to discuss her absences.

16. Appellant, through counsel, quizzed the witness at some length relative to the picture-taking episode. She recalled that he utilized his iPad from his desk and that he made multiple pictures of her backside. Appellant produced and introduced two photographs. Each of them appears to depict the majority of the upper and lower backside of an individual; the witness recognized one, but not the other. (**Hearing Officer Note:** Neither photograph is sharp or clear, but the “backside” image is unmistakable.) He pressed the witness concerning whether she recalled his having complained about her use of her cell phone while she was under training with him. She recalled “maybe a comment or two” on the subject, which did occur during training.

17. The witness continued that, following her initial complaint and email summary of September 11, 2018, in response to follow-up from Agency Human Resources and in the nature of ongoing correspondence, she supplied further information concerning Appellant's activities and those of one or more others as well as discussing workplace conditions in general. The emails ranged from mid-December 2018 through early February 2019. She agreed that Appellant made no further advances or comments of a sexual nature after the previously discussed episodes, although his complaints and comments concerning her time and attendance were ongoing until his departure.

18. **Tara Kettenring** is a Taxpayer Services Specialist II in the same Division and Branch as the prior witnesses. She commenced there on July 2, 2018, and was trained by Ms. Studler. Her primary duties involve assisting over-the-road motor carriers with payment of taxes assessed by Kentucky.

19. This witness worked alongside Appellant "for a few months" and encountered difficulties with his behavior. Specifically, she came to learn that he "looked up" her information upon a website and, thereupon, in a discussion or conversation with her, referenced her former husband by name, a subject she had carefully chosen to avoid. She felt this to be an invasion of her privacy as well as "kinda' weird," and "odd," and she was uncomfortable with it. Upon another occasion, the subject of tattoos was broached and, during the discourse, she disclosed she possesses six of them. She recalled that Appellant pressed her concerning the specific location of each of them upon her person, whereupon she declined to reveal this fact as to at least two thereof. Despite being repeatedly told that it was none of his business, he persisted in his inquiries, which made her extremely uncomfortable.

20. The witness continued that her most serious experience with Appellant concerned a small refrigerator that she positioned by her desk. Appellant, apparently displeased with either its presence or its location, moved it without discussion, whereupon she returned it to the original spot. He became irate, "yelled at me," and threatened to toss the refrigerator out. His attitude and behavior frightened her and caused her concerns for her safety. This witness also overheard one or more negative comment(s) by Appellant concerning coworker Ms. Studler's time and attendance.

21. Under cross-examination, Appellant explored with the witness whether other staff commented concerning Ms. Studler's circumstances. She confirmed that Ms. Studler had, at the time the witness came to work in the Branch, already relocated her workstation out of Appellant's immediate vicinity. She noted that this was routine when workers retired or resigned – others would often seek to move into the vacated space.

22. The witness acknowledged that when presented with the unwelcome website visit/discussion, she did not pursue any remedy or recourse, nor did she report any of the other incidents at the time they occurred. She did, upon request, distill her experiences with Appellant in an email to the supervisor on September 12, 2018. She agreed that portions of the summary pertained to the actions of another coworker as well as Appellant.

23. **J. R. Dobner** was and is, for all purposes germane to this appeal, a Designated Appointing Authority and his current duties include investigation of allegations of misconduct within the Agency along with implementation of appropriate action. It was he who issued the letters ultimately dismissing Appellant as well as having conducted a pre-termination hearing. He recalled that the episodes were initially brought to his attention by Supervisor Puckett and/or the Human Resources representative, whereupon he advised them to have the complainant (Ms. Studler) reduce the events to writing. This was accomplished and, following appropriate interviews of her and others, he reviewed the documentation and issued an Intent to Dismiss letter to Appellant on February 11, 2019.

24. Although taking note of the other allegations made by the coworker, the witness viewed her assertions of Appellant's having photographed her butt and seeking pictures of her breasts to be sufficiently serious for severe action. He pointed out that such behavior engenders a hostile work environment and, under established policy, constitutes conduct that is so severe or pervasive that it causes a reasonable person to feel intimidated or abused. The other behaviors cited in the letter, while not as serious, were nonetheless troubling given the context in which they occurred. Appellant's alleged behavior toward coworker Kettenring was also taken into consideration, supporting the determination to separate him.

25. The witness continued that at the pre-termination hearing on February 28, 2019, Appellant presented his version of events, recalling that his posture was "I've been around, I know better, and it's her word against mine." Appellant also insisted that, due to his poor physical condition and related issues, he was not interested in sexual banter or behavior. However, the witness recalled, upon reviewing the interviews of the principals conducted by staff, his instinct was that Ms. Studler had no reason to lie about Appellant or anyone else, and the letter terminating him, a copy of which he made a part of his testimony, was issued.

26. The witness continued that he considered, in light of Appellant's excellent work history, relocating him away from the Branch. While contemplating this, he reviewed three previous case files involving Agency personnel in which sexual harassment occurred by males toward females. In two of the cases, he had relocated the perpetrators and, in both instances, the behaviors did not cease and new allegations arose in the new locations. In the third instance, the offending individual resigned before action was taken. In view of the experience, he elected not to reassign Appellant.

27. Redirected to his analysis or comparison of the statements presented to the investigative team of the two principals, the witness acknowledged that no objective method was available to conclusively establish Ms. Studler's veracity, but he did not perceive that she was vengeful toward Appellant. He pointed out that in those interviews, Appellant was pressed as to "why would she lie about you?" and his reaction was that she simply desired to cause him trouble. The witness specified that Appellant's 2018 Annual Employee Performance Evaluation played no part in the analysis, since it was issued in final form after the decision was made and work performance was never a factor. Relevant provisions of the applicable policy prohibiting the depicted behavior as cited in the dismissal letter governed the disposition.

28. Under cross-examination, Appellant explored with the witness various aspects of his testimony and findings as outlined in the Intent to Dismiss and Dismissal letters. The witness confirmed that Ms. Studler's time and attendance issues were the purpose of the September 2018 meeting and that her complaints about Appellant arose therein almost incidentally, although occurring months previously without notice or alarm. He acknowledged that the photographs produced by Appellant, including the one recognized by Ms. Studler, are "not highly sexualized" in nature, since they appear to capture her entire back. (**Hearing Officer Note:** Neither the investigative staff nor the Appointing Authority apparently ever previously saw the photographs until presented by Appellant at the hearing.) He viewed that the complainant's delay in coming forward does not indicate lack of concern or absence of ongoing stress on her part. He further discussed, upon inquiry, the handling and disposition of the previous cases under his authority and his decision based upon the experience therefrom in choosing not to reassign Appellant. He acknowledged one discrepancy; the dismissal letters reflect that Ms. Studler requested that Appellant delete the photos, whereas Ms. Studler testified that she did not.

29. Appellant discussed with the witness the acknowledged absence of any reoccurrence of the remarks toward the complainant attributed to him. He acknowledged that the investigation and review did not reveal that Appellant persisted, agreeing that any offensive comments toward Ms. Studler's physical attributes ceased when she objected. The witness viewed that her failure to comply with the GAP reporting requirements, while technically a violation, did not necessarily signal that she was not disturbed or offended, nor did the delay, while lengthy, impact the disposition. Upon brief redirect inquiry, he viewed that no legitimate reason existed for taking the photos.

30. The Agency having completed its proof-in-chief, Appellant called upon **Phillip Dotson**, an Administrative Specialist III with the Agency. This employee is no longer in Appellant's former Branch, but served there during all times germane to the events under scrutiny. He commenced there in December 2016, and Appellant assisted in training him. He is referenced in Appellant's dismissal letter as having discussed Ms. Studler's time and attendance.

31. The witness recalled only one conversation between himself and Appellant concerning Ms. Studler's absences, insisting it to be simply a passing comment without any specific criticism of her personally. He explained that the workload in the Branch is extremely pressing and heavy, and the absence of any coworker results in greater burden for all others. He was unaware of any photography by Appellant, never overheard him make any inappropriate comments or remarks either to or about Ms. Studler, and never heard him criticize her specifically.

32. The witness continued that he observed that, during the time Appellant trained Ms. Studler, they appeared to coordinate well together. However, following completion of the training, and particularly after she relocated her workstation, she suddenly ceased communicating with him at all and, in due course, others in the office as well. His perception was that she "changed" and the difference in her demeanor was "night and day." Nonetheless, he recalled, during his time there she was an excellent employee when on the job as was

Appellant who, he asserted, came to work despite not feeling well, bearing more than his share of the workload.

33. The Agency conducting no cross-examination of Dotson, Appellant sought the testimony of **Amy Walker**, likewise referenced in the dismissal letter as having either conversed about or being present during dialogue pertaining to Ms. Studler's absences. She is an Administrative Specialist III, now in the Tax and Financial Processing Branch of the Division. She was previously employed alongside Appellant and interacted with him regularly before relocating within the Branch in April 2018.

34. This witness was among the staff required to assume additional duties or volume when Ms. Studler or any other personnel were absent. She acknowledged that when the circumstance occurred, comments of a general nature ensued, but neither she nor the others, including Appellant, dwelled thereon, insisting that she and they were too busy to do so.

35. Appellant, **James L. Howitz**, known as "Rocky," testified in his own behalf. He served 22 years in state government, going to the Cabinet's Department of Vehicle Regulation, Division of Motor Carriers, in the Tax and Financial Processing Branch on November 1, 2015. He directly disputed many of the allegations about him in the March 7, 2019 letter dismissing him. While acknowledging that he trained then-coworker Kim Studler, he asserted that the term thereof was February 22 through March 24, 2017, with an additional 30 days of assistance or supervision of her rather than the full 90 days she depicted. The photographing episode occurred during the first or second week of March of that year, rather than November.

36. Appellant explained that the photo sequence was a "joke," which, at the time, he perceived to be mutually-shared. He asserted that she expended, throughout the training, extensive time using her cell phone, usually while standing in the entryway of his cubicle. At some juncture he informed her, "I'm going to take a picture of the backside of you and hang it up on the wall," and her response was "go ahead, but don't put my head in it." He utilized his tablet to do so and nothing further was said about it, nor did she request that he delete anything. He thereafter attempted to print the photos from the tablet, but was unable to do so, whereupon a friend was able to transfer the pictures to his home computer. The tablet later crashed and was discarded. He showed Ms. Studler the images before the crash and she made no comment at all; he never showed them to anyone else until they were reproduced for this hearing.

37. Appellant continued that during most of 2017, he endured serious medical issues, most notably cancer and negative reactions to prescribed drugs, causing at least two days of missed work. Ms. Studler called him at home on April 11, 2017, to check on him, then expressing concern for his wellbeing. When he returned to work on April 12, 2017, she either ignored or avoided him, would not speak or respond to him, and had reinstalled an office partition that they had removed to enable her training to proceed without interference. His health episodes continued through July, during which he was hospitalized for five days, undergoing surgery in August 2017. These events rendered him impotent and without any sexual ability or desire.

38. Appellant swore that he never requested a date with Ms. Studler nor any pictures of her breasts. He recalled making one reference to a lottery; following recovery from the worst of his medical issues, he announced at work that, "If I win the lottery, I'm going to throw the biggest party and invite everybody" or similar language.

39. Appellant discussed various events attributed to him set forth in the dismissal letter involving other coworkers. He did express frustration with coworker Kettenring's refrigerator location and attempted to move it. He admitted obtaining certain information on a website about her and mentioning it to her, since she was reflected there under three different names and he felt she should be aware of it. He insisted that he took the step for the reason that previously he came to learn that certain personal information about himself was being carried thereon and he wanted to warn her that activity such as this occurred. The discussion concerning Kettenring's tattoos was in passing, and he did not press or persist in seeking personal information, contrary to the allegation. He was confronted concerning some or all of the episodes by the supervisor and heeded the warnings.

40. Appellant became aware that Ms. Studler intended to relocate her workstation in December 2017, but her silence toward him was ongoing and he did not inquire or pursue the issue. He expressed bafflement at her assertion that he was "always angry," being unaware as to the basis for this. He insisted that given his health circumstances, anger was and is not conducive to any recovery and he did not indulge therein. He acknowledged that office "chitchat" included routine discussions of absences by fellow employees, including Ms. Studler, which, he insisted, was ongoing among all personnel. He disavowed any knowledge of her sick leave accrual or other personal information, noting that as a mere coworker, he neither possessed access thereto nor did he seek it out.

41. Appellant asserted that he initially became aware of the various claims concerning his behavior toward Ms. Studler during an interview about them on January 3, 2019. He insisted that at no time prior thereto, throughout her tenure with the Branch, did she express any unhappiness or discomfort to him. He was likewise entirely unaware of the email exchanges about his actions until well after his dismissal.

42. Appellant acknowledged that his 2018 Annual Employee Performance Evaluation contained negative information that he disputed. He challenged it, and portions thereof were corrected and he concurred with the revisions. He insisted that he was and is inherently familiar with the provisions of the relevant policies, including GAP-801 and GAP-803, and never intended to violate any portions thereof. His health circumstances have stabilized to the extent possible, although he requires 14 prescribed medications and remains in considerable pain.

43. Under brief cross-examination, Appellant insisted that he was never angry, conceding that he was upset with Ms. Kettenring's refrigerator circumstance, since it was blocking a passway. Relative to the photos of Ms. Studler, he reiterated that the tablet used to create them has "crashed" and been discarded and that he forgot that they had been transferred to his home computer. He did not report Ms. Studler's cell phone activity during her training, urging that she was then on probation and any complaints could have caused her difficulty. He

reiterated that her claims as to his seeking to date her or requesting pictures of her breasts are false and never occurred.

44. The sworn testimony was thereupon concluded and the appeal stood submitted for recommended order, effective November 6, 2019.

45. KRS 18A.095(1) requires that “a classified employee with status shall not be dismissed, demoted, suspended, or otherwise penalized except for cause.”

46. 101 KAR 1:345 is the regulation relating to disciplinary actions. Section 1 thereof allows that “appointing authorities may discipline employees for lack of good behavior or the unsatisfactory performance of duties.”

47. The Agency has in place specified, well-known policies pertaining to conduct among its personnel as well as detailing reporting requirements. These include General Administration and Personnel (GAP) -801 dealing with General Conduct and GAP-803, addressing the subject of Anti-harassment/Anti-discrimination.

- A. GAP-801 provides, among other requirements, that “the Cabinet prohibits employees from engaging in any conduct that violates Cabinet policies...specifically including...“engaging in disrespectful, demeaning, abusive, or any such other inappropriate behavior, which includes but is not limited to...sexual comments.”
- B. GAP-803 defines a hostile work environment to be “a situation in which an employee cannot do his or her job without feeling harassed or threatened.” The policy provides that the conditions for this are “...determined by examining all circumstances, including:
- How frequently the alleged harassment occurs;
 - How severe the conduct is;
 - Whether it is physically threatening, intimidating, humiliating, or offensive;
 - Whether it unreasonably interferes with an employee’s work performance.
- C. The policy outlines certain prohibited activities deemed to constitute harassment. These include derogatory comments, unwanted physical contact of any kind, and behavior that sexually harasses another person. Actions deemed by the policy to

constitute sexual harassment are extensively outlined therein and include essentially any unwanted touching or comments.

- D. The policy prescribes reaction requirements by an employee feeling harassed. In addition to warning the alleged perpetrator that the questionable behavior is offensive or unwelcome and must stop immediately, the employee is mandated to report the behavior "in writing with signature" to his or her immediate supervisor with specifics such as date, time, location, details of situation, description of action, and names of witnesses. The policy appears to contain no deadline for such reporting, but appears to imply that any report should be made promptly following the occurrence.

FINDINGS OF FACT

1. At all times germane to this proceeding, James L. Howitz was a classified employee with status in the Transportation Cabinet, serving as a Taxpayer Services Specialist II in the Department of Vehicle Regulation, Division of Motor Carriers, Tax and Financial Processing Branch. A 22-year employee of the Commonwealth, he transferred to this Division and Branch in November 2015 and, despite debilitating and apparently permanent physical ailments, enjoyed excellent performance evaluations throughout his tenure there.

2. Appellant served as trainer of others coming into the Branch following his commencement there. Included among his trainees was Kim Studler, who started in February 2017. Although the proof is unclear as to when or how her physical ailments originated, she either came in with, or developed as the case may be, migraines causing her to be absent from work, eventually amounting to as much as one week each month. This circumstance led to a meeting with her supervisor, called by him on September 10, 2018, to discuss her growing absences and needs. Until that date, the Branch supervisor, under whom both Appellant and Ms. Studler served, was unaware of any issues or conflicts between these two employees, although he did previously, from time-to-time, intervene in one or more spats involving Appellant and at least one other employee. None of these resulted in any disciplinary action nor did the behavior impact Appellant's evaluations.

3. Ms. Studler complained at the September 10 meeting that Appellant harassed and offended her for a period of time, recalled by her to have occurred in approximately November of the year before, which episode(s) extended over a 10 to 14-day timeframe. These included his photographing of her "butt" with his tablet, proposing a "date," and requesting a picture of her breasts. Further, she insisted, he and others were regularly commenting upon her absences upon a regular basis. Hearing this, the supervisor requested that she prepare a written summary of the behavior, which was accomplished, and the matter thereupon referred to the Office of Human Resource Management for follow-up. Ms. Studler then remained in regular contact by email with that office, detailing complaints concerning work environment generally, but acknowledging little or no further contact with Appellant. She had also relocated her

workstation, utilizing the space of a retiree, in January 2018. Aside from the move, seen as actually routine in circumstances in which more desirable quarters become available, no witnesses testifying on behalf of any party were aware of Appellant's asserted behavior toward the coworker.

4. Appellant's recall of events, and the underlying timetable thereof, varies vastly from that recited by Ms. Studler. His memory of it is that the photographing of her backside, with which she jokingly went along with at the time, occurred early in her training, specifically in March 2017, in an effort to dissuade her from her cell phone usage. He claims that no other sexual harassment and/or harassment of any kind occurred and, after telephoning him at home to inquire about his welfare and health status during his illness about 30 days after the photographing episode, she permanently ceased communicating with him, which status remained unchanged from mid-April 2017 through his termination in March 2019.

5. The Appointing Authority, analyzing the written statements, interviews, and presumably other materials perceived as germane, considered relocating Appellant, further separating him from the complainant, but elected against the step due to negative outcomes arising from such dispositions in previous cases, which he saw as roughly parallel.

6. Appellant's former supervisor and coworkers who testified depict him variously as crotchety, nose-y, diligent, dependable, and knowledgeable.

CONCLUSIONS OF LAW

1. Two factors substantially govern disposition of this appeal: (a) the credibility of Appellant and of his primary accuser, and (b) judicious application of the relevant policies, GAP-801 and GAP-803.

2. Harassment of an employee by a coworker, especially of a sexual nature, must, of course, be dealt with promptly, and commensurate with the level and frequency thereof. Many well-established and published rules, including those developed under KRS Chapter 18A and related statutes, are in place to both define prohibited practices and to outline procedures for reporting such behavior. Some provide for zero tolerance, while others afford varying levels of sanctions. The Agency's GAP policies reflect mandates that are typically applicable throughout the Commonwealth's workforce.

3. Appellant's admitted boorish behavior must be measured against the claims thereof by his accuser within the framework of the applicable policies. More specifically, the degree to which she has, then and now, demonstrated concern or felt threatened as well as over what span of time should be scrutinized. Although her health issues, and their cause should never be minimized, the sexually-oriented episodes were, by all accounts, a one-time, isolated occurrence that ensued at least nine months prior to when, as somewhat vaguely recalled by her, or 17 months as quite specifically recalled (or disputed) by Appellant, she disclosed any discomfort to anyone concerning them, and then only incidentally. Meanwhile, also by all

accounts, she went about her duties routinely and satisfactorily throughout that time. The proof also tends to indicate that when confronted with Appellant's action(s), particularly the photographing of her backside, she shrugged off the behavior.

4. Neither the investigative staff nor the Appointing Authority viewed the subject photograph(s) nor did they have the benefit of conclusive corroborating evidence, prior to imposition of Appellant's penalization. The Appointing Authority, viewing the pictures after-the-fact, agreed them to be "not highly sexualized." Further, in light of the unlikely probability that Appellant will repeat the behavior forming the core of the decision to terminate him, any comparison of his circumstance to that of others' more serious behaviors appears unwarranted, and, thus, termination of him unduly severe.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **JAMES L. HOWITZ V. TRANSPORTATION CABINET (APPEAL NO. 2019-100)** be **SUSTAINED to the extent** that Appellant's dismissal be set aside, and he be assessed a seven-day suspension without pay in lieu thereof. He shall be reinstated to his position of Taxpayer Services Specialist III with back pay, and be otherwise made whole. The Appellee is **ORDERED** to reimburse the Appellant for any leave time he used attending the evidentiary hearing and any pre-hearing conferences at the Personnel Board. (KRS 18A.105, KRS 18A.095(25) and 200 KAR 12.030.)

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within 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 John C. Ryan this 13th day of January,
2020.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. William Fogle
Hon. Paul Fauri
Mr. J.R. Dobner



RECEIVED

MAR 12 2019

Matthew G. Bevin
Governor

COMMONWEALTH OF KENTUCKY
TRANSPORTATION CABINET

Frankfort, Kentucky 40622
www.transportation.ky.gov/

Personnel Board
Greg Thomas
Secretary

March 7, 2019

James L. Howitz

PERNR:

Re: Dismissal

Dear Mr. Howitz:

After considering your statements presented at your pre-termination hearing held on Thursday, February 28, 2019, I have not found sufficient reason to rescind or alter the intent to dismiss letter dated February 11, 2019. This letter serves as notification that you are officially dismissed from your position as a Taxpayer Services Specialist II with the Kentucky Transportation Cabinet (KYTC), Department of Vehicle Regulation, Division of Motor Carriers, Tax and Financial Processing Branch, IFTA/KIT/KYU/UDI Section effective the close of business Thursday, March 7, 2019.

In accordance with KRS 18A.095 and 101 KAR 1:345, cause exists for your dismissal based on the following specific reason:

Lack of Good Behavior. On or about November or December 2017, you used your personal tablet to take a photograph of the buttocks of a co-worker, Kim Studler, Taxpayer Services Specialist II. Studler stated that you took the photo without her permission, and she asked you to delete the photograph. In an interview with investigators from the Office of Human Resource Management (OHRM), you admitted to taking the photograph and stated that you deleted it near the time you took the photograph.

About one week later, Studler reported that you asked if she would go out with you if you ever won the lottery. Studler also reported to OHRM investigators that around the same time, maybe about a week later, you asked Studler for a picture of her breasts. Studler told you no, and you asked her at least one more time for a picture of her breasts, to which she again said no.

In January 2018, Studler requested from management that her workstation be moved away from your workstation. After the change in workstation, Studler reported that you stopped talking to her, including communication related to work, and started making disparaging comments about her time and attendance. Several witnesses, including Maranda Peach, Program Coordinator; Tara Kettenring, Taxpayer Services Specialist II; and Samantha



An Equal Opportunity Employer

Recommended Order
Attachment A

James L. Howitz

March 7, 2019

Page 2 of 2

Drennan, Taxpayer Services Specialist II, stated they have heard you and Phillip Dotson, Administrative Specialist III, discussing Studler's attendance. On January 3, 2019, Studler reported to OHRM that you had a conversation with Amy Walker, Administrative Specialist III, about Studler's attendance. Peach and Drennan overheard the conversation. Peach reported you provided Walker with detailed information about Studler's time and attendance, including the number of days missed and specifically the dates when Studler was absent. As you are not a member of management, you have no responsibility as it relates to Studler's attendance and no business reason for tracking her attendance. On a related note, Kettenring described you as being nosy, and you conducted an internet search on her. Through the search you became aware of personal information on Kettenring and then discussed that information with her. In addition, you have asked Kettenring about the location of tattoos on her body.

Your actions are in violation of 101 KAR 1:345, General Administration and Personnel Policy GAP-801, General Conduct, and GAP-803, Antiharassment/Antidiscrimination, because you failed to show courtesy and respect to co-workers; failed to ensure that the work of the KYTC was efficiently and effectively accomplished; engaged in actions that could embarrass or reflect adversely on the KYTC; engaged in disrespectful, demeaning, abusive, and inappropriate behavior; made sexual comments, unwelcome advances, and inappropriate gestures; and made remarks about another co-worker's body.

Pursuant to KRS 18A.032, you will not be certified on future registers for employment with the Department of Vehicle Regulation, unless the KYTC so requests. Furthermore, since you are being dismissed for cause, you will not be paid for your remaining annual leave.

As you are an employee with status, you may appeal this action to the Personnel Board within sixty (60) days after receipt of this notice, excluding the day of receipt. To appeal, you must complete the attached form and direct it to the address indicated on the form. Copies of KRS 18A.095 and 101 KAR 1:365 concerning appeal and hearing procedures are attached.

Sincerely,



James R. Dobner
Appointing Authority Designee

Attachment: Appeal Form

cc: Personnel Board
Personnel Cabinet
Matt Henderson, Commissioner
Brian Beaven, Division Director
Cabinet Personnel File