

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2021-143

JAMES HOWITZ

APPELLANT

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

TRANSPORTATION CABINET

APPELLEE

*** * * * * *

The Board, at its regular December 2023 meeting, having considered the record, including the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer dated October 31, 2023, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer are approved, adopted, and incorporated herein by reference as a part of this Order, and the Appellant's appeal is 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 11th day of December, 2023.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

Copies hereof this day emailed and mailed to:

James Howitz
Hon. Edwin Logan
Hon. Rosemary Holbrook (Personnel Cabinet)
J. R. Dobner

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2021-143

JAMES HOWITZ

APPELLANT

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

TRANSPORATATION CABINET

APPELLEE

* * * * *

This matter came on for an evidentiary hearing on October 27, 2022, at 9:30 a.m. EDT, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Stafford Easterling, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, James Howitz, was present in person and was not represented by legal counsel. The Agency/Appellee, Transportation Cabinet, was present and represented by the Hon. Edwin Logan. Also present as Agency representative was J.R. Dobner.

At issue during the evidentiary hearing was the Agency's three (3) - day suspension of the Appellant and whether such suspension was taken with just cause and was either excessive or erroneous. The burden of proof was with the Agency and was by a preponderance of the evidence.

BACKGROUND/ FINDINGS OF FACT

1. Following a discussion of the burden of proof and the sequestration of witnesses, the parties waived opening statements and the Agency called the Appellant, **James Howitz**, as its first witness. Howitz began by stating that he was employed as an OMS Coordinator with the Transportation Cabinet and briefly described his job duties in that role, including timekeeping and administrative duties. He then set out his experience in state government, which included several years of prior service with the Agency and with the Cabinet for Human Resources.

2. The Appellant was then directed to events underlying the suspension, which all occurred on September 14, 2021. The Appellant testified that he was in the breakroom of the District 7 Barn having a conversation with two (2) Transportation Cabinet co-workers, Jim Forsyth and Lyndell Hatmaker, about an employee who was not present at work after testing positive for COVID-19, Charles Barnes. The Appellant does not supervise any of the other three (3) employees. As alleged in the suspension letter and confirmed by the Appellant, during the conversation, the Appellant said that he was glad Barnes tested positive because that employee did not receive the COVID-19 vaccine.

3. After overhearing the Appellant's statement, another co-worker, Casey Mahoney, told the Appellant that Covid was a serious condition and that you should not wish ill on anybody who was unfortunate enough to be infected. The Appellant alleged that Mahoney told him that he was "f***ed up" for wishing ill on someone, but acknowledged that his response to Mahoney's statement was some version of "Fuck you, Mind your own business. No one was talking to you." The Appellant insisted that Mahoney cursed first. The Appellant went on to explain that he had "begged" Barnes to get a vaccine, if not for the employee's sake, for the Appellant's, given his well-publicized lack of immune system. After repeated conversations, explanations, and requests, the missing employee still refused to get a vaccine, so the Appellant believed Barnes catching COVID-19 "served him right."

4. The Appellant acknowledged that he made his statement in a shared employee breakroom and that he was aware other employees in the breakroom could overhear him, but Appellant testified that he was not talking to Mahoney and that Mahoney was not talking to Jim, Lyndel, and the Appellant. The Appellant said that Mahoney interjected himself into the Appellant's conversation and told the Appellant that he was "F***ed up" for making his statement. The Appellant acknowledged that he responded to Mahoney's cursing by making some version of the statements alleged in the suspension letter and that, in hindsight, the conversation probably could have been handled in a better way. However, the Appellant specifically denies saying that he hoped Barnes had a rough time with Covid-19.

5. The Appellant then detailed some of his past history with Mahoney, including an incident where the Appellant confronted Mahoney for playing his music too loudly and Mahoney responded by cursing at the Appellant. The Appellant alleges that he verbally reported that incident to a supervisor, but no action was taken. He believes he is being treated unfairly by the Agency.

6. The Agency then called **J.R. Dobner** as its next witness. Dobner serves as a Human Resources Branch Manager for the Transportation Cabinet. Directed to the September 30, 2021 suspension letter, Dobner testified that he reviewed the contents set out in the body of the suspension letter, reviewed comparable disciplinary actions issued by the Agency, and then recommended what he deemed to be the appropriate level of discipline; here, a three (3) -day suspension. Dobner testified in detail as to the policies the Appellant was alleged to have violated and as to some of the previous incidents that supported the imposition of a three (3) – day suspension, including determining there were additional "aggravators" that would warrant increasing the level of discipline imposed beyond what the Agency determined was the standard discipline imposed in comparable cases. Here, Dobner determined that there were no aggravators, so Dobner recommended imposing the "standard" three (3) – day suspension for the use of inappropriate language. After Dobner's review, Tracy Hyatt then reviewed the recommended discipline before deciding whether to ultimately take action as the Agency's designated Appointing Authority. Dobner explained what he saw as the difference between Mahoney's use of profanity and the Appellant's, primarily that Mahoney's use was directed towards an idea ("That's f***ed up") versus a direct attack on a co-worker ("F*** you."). He further clarified cursing versus cursing AT someone and testified that, here, the Appellant cursed at Mahoney. Dobner explained that Human Resources did not receive any reports or requests for discipline for Mahoney, which explains why the Appellant was disciplined for his use of profanity while Mahoney was not disciplined for his usage. Dobner testified about the application of progressive

discipline principles and noted that he was aware of some of the Appellant's health concerns and understood that the Appellant's frustration with his co-worker's decision(s) on vaccines was quite reasonable. Dobner also addressed some of the Appellant's prior personnel actions, including a prior thirty (30) – day suspension and subsequent transfer from a Taxpayer Specialist to an Administrative Specialist position.

7. Following a short break, the Agency next called to the stand the person who submitted the underlying request for discipline to Human Resources, the Appellant's first-line supervisor, District 7 Branch Manager **Daniel Kucela**. Kucela testified largely consistently with the events described above. He explained that Mahoney called him upset about the cursing incident and Kucela told Mahoney to leave the area and find a way to calm down. Kucela then went into the District 7 Barn and talked to both Mahoney and the Appellant about the incident. Importantly, Kucela did not recall the Appellant telling him about Mahoney using any profanity or cursing at the Appellant. Similarly, when Mahoney relayed his version of events to Kucela, Mahoney said that he told the Appellant that it was "messed up" to wish Barnes had a rough time with COVID-19 and the Appellant responded with "Fuck you." As a result, given the contemporaneous reports of both Mahoney and the Appellant, Kucela did not include any allegation(s) regarding Mahoney's use of profanity in his report or request for discipline. Kucela briefly addressed prior incidents between the Appellant and Mahoney, including an undated unreported occasion when Mahoney was playing music too loudly for the Appellant's preference and the subsequent conversation about volume level led to the use of profanity by Mahoney. Lastly, Kucela also described and adopted the informal policy distinguishing between the officially frowned-upon but not disciplined cursing in general versus the impermissible cursing AT someone and testified that, here, the Appellant cursed at Mahoney.

8. **Casey Mahoney** was the Agency's next witness. Mahoney also testified largely consistently with the events described above. After describing the conversation about Barnes how he deserved a rough time for refusing to get a COVID-19 vaccine after repeated requests, Mahoney testified that he told the Appellant that it was "messed up" that he wished ill on Barnes. Mahoney specifically denied cursing at the Appellant during the conversation, though he did leave some wiggle room for the possibility that he did as Mahoney indicated that he "blacked out" after the incident and does not remember certain events occurring thereafter, including the telephone conversation with Kucela. Directed to a photograph of the breakroom, Mahoney then described who all was present during the incident, where they were sitting, and who should have been considered part of the underlying breakroom conversation about Barnes. With that, the Agency closed its case-in-chief.

9. After extended discussion of what evidence the Hearing Officer would deem relevant to this appeal, in his case-in-chief, the Appellant called **Lyndell Hatmaker** to the stand. Hatmaker testified he had little memory of the breakroom incident and the parties had few questions for Hatmaker.

10. The Appellant, **James Howitz**, then retook the stand. The Appellant again testified largely consistently with the events described above, including acknowledging that he said that it "serves [Barnes] right" that he got COVID-19 because Barnes did not take the vaccine after repeated requests and that the Appellant told Mahoney "Fuck you" in the subsequent breakroom incident after the Appellant's statement about Barnes. The Appellant again testified that Mahoney

told him that his Barnes statement was “Fucked up,” not “messed up.” He also said that he specifically told Kucela that Mahoney cursed at him during the breakroom incident. He argues that, if he deserved discipline for his use of profanity, then Mahoney also deserved discipline for his usage.

11. After review of the evidence of record, including the testimony of the Appellant, the testimony of J.R. Dobner, and all exhibits entered into the record, the Hearing Officer deems the contents of the September 30, 2021 letter imposing a three (3) – day suspension proven by a preponderance of the evidence. As a result, the Hearing Officer finds that the Appellant’s actions constituted misconduct pursuant to 101 KAR 1:345 and justified disciplinary action. The Appellee established just cause for the three (3) – day suspension of the Appellant and that the suspension was neither excessive nor erroneous.

12. Further, while the Hearing Officer declines to rule on whether Mahoney told the Appellant that he was “messed up” or “fucked up,” the Hearing Officer further finds Kucela’s testimony credible in that he was not contemporaneously told of Mahoney’s use of profanity and, therefore, did not include any such allegation against Mahoney in his request for discipline.

CONCLUSIONS OF LAW

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

2. As demonstrated in the Background and Findings of Fact, the Agency carried its burden of proof to establish just cause for the three (3) – day suspension of the Appellant. Further, the evidence of record established that this penalty was neither excessive nor erroneous. KRS 13B.090(7), KRS 18A.095(1) and (22), and 101 KAR 1:345.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **JAMES HOWITZ V. TRANSPORTATION CABINET (APPEAL NO. 2021-143)** 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 fifteen (15) 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 Stafford Easterling** this 31st day of October, 2023.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK,
EXECUTIVE DIRECTOR

A copy hereof this day emailed and mailed to:

James Howitz
Hon. Edwin Logan
Hon. Rosemary Holbrook (Personnel Cabinet)