

does not tolerate harassment of any kind. And our role at the Department of Agriculture is to *protect* customers, which makes your conduct all the more egregious.

Additionally, you implied that you were illegally pre-selected into a classified position due to politics. You also suggested that because of your political connections, you would be insulated from any consequence to your actions. These comments run afoul of the very spirit of KRS 18A. And as you are aware, this Department was recently the subject of a very serious and necessary audit. This audit recommended that this sort of conduct should be eradicated from the workplace. You have jeopardized KDA's credibility, abused the trust that was placed in you and it is clear the Department must take disciplinary action and remove you from the field.

B. **Delete Background, paragraph 9, and substitute the following:**

9. **Greg Griffith**, part-owner of Penrod Lumber and Hardware and its President, testified that Jacobs visited the store in October 2012 to do an audit of prices listed on the merchandise, but deferred the audit for thirty days. He returned November 5, 2012, to find that new inventory had not been priced and pricing for old inventory from a recent bulk purchase had not been completed. Griffith testified that Jacobs, finding that the hardware store failed again, came to the checkout counter where he was serving customers, "butted in front of the customers and said, in effect, that the store had failed the audit and you will be fined \$100." Jacobs offered him a document to sign that confirmed the audit failure, but for some reason having to do with a low computer battery, Griffith and Jacobs went to Jacobs' truck to sign the document. Griffith testified that Jacobs, while at his truck, said, "Women are just different, niggers are different, Indians are different."

C. **Delete Background, paragraph 15, and substitute the following:**

15. **Holly Harris VonLuehrte**, the Appointing Authority for the Department of Agriculture, described the events which led to her writing the December 28, 2012 demotion letter. VonLuehrte based her letter on the written reports of Jason Glass and Lanny Arnold dated December 18, 2012, and discussions with Commissioner James Comer, Ricky Jacobs and Greg Griffith. She said Larry Cox participated in the investigation. VonLuehrte stated that Commissioner Comer was at first so angry with

Jacobs that he wanted to fire him, but later on the advice of VonLuehrte, Comer agreed that demotion was the proper disciplinary action.

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

2. The Board concludes as a matter of law that Jacobs' statement, as recounted in Finding of Fact paragraph 3 made to Greg Griffith, "Women are just different, niggers are different, Indians are different" constitutes lack of good behavior and, in the context of this case, unsatisfactory work performance. The Board concludes this statement, when taken as a whole, constitutes a Lack of Good Behavior, and the punishment of demotion was not erroneous or excessive, and was well deserved.

E. **Delete** the Recommended Order, and substitute the following:

IT IS HEREBY ORDERED that the appeal of **RICKY JACOBS VS. DEPARTMENT OF AGRICULTURE (APPEAL NO. 2013-007)** is **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 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 18th day of December, 2013.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day mailed to:

Hon. Dan Egbers
Hon. Nicole Liberto
Hon. Whitney True Lawson

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2013-007**

RICKY JACOBS

APPELLANT

VS.

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

**DEPARTMENT OF AGRICULTURE
JAMES R. COMER, APPOINTING AUTHORITY**

APPELLEE

** ** *

This matter came on for an evidentiary hearing on July 9, 2013, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before Stephen T. McMurtry, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by KRS Chapter 18A.

Appellant, Ricky Jacobs, was present and represented by the Hon. Whitney True Lawson. Appellee, Department of Agriculture, was present and represented by the Hon. Daniel F. Egbers.

BACKGROUND

1. Appellant, Ricky Jacobs, appealed a December 28, 2012 demotion by the Department of Agriculture from Inspector III to Inspector I in the Division of Regulation and Inspection, Weights and Measures, at a reduced salary of \$30,313, for lack of good behavior and poor job performance.

2. The demotion letter in part stated:

Lack of good behavior and unsatisfactory work performance by using racial and gender slurs in violation of the Commonwealth of Kentucky's Policy Statement on Harassment Prevention (attached as Exhibit 1), inappropriately invoking politics during a regulatory inspection in disregard tot KRS 18A.140(1) and (2) as reported by Greg and Carol Griffith, Larry Cox, Benson Bell, Jason Glass and Lanny Arnold:

...

Your behavior constitutes poor work performance, prohibited harassment in the form of offensive and unwelcome gender and racial slurs and the inappropriate insertion of politics into regulatory activities. This behavior embarrassed the Commissioner, the Department of Agriculture, your supervisors, your co-workers and the taxpayers we serve. Additionally, it removed any credibility from any inspection report generated

from your visit. The Commonwealth of Kentucky does not tolerate harassment of any kind. And our role at the Department of Agriculture is to *protect* customers, which makes your conduct all the more egregious.

Additionally, you implied that you were illegally pre-selected into a classified position due to politics. You also suggested that because of your political connections, you would be insulated from any consequence to your actions. These comments run afoul of the very spirit of KRS 18A. And as you are aware, this Department was recently the subject of a very serious and necessary audit. This audit recommended that this sort of conduct should be eradicated from the workplace. You have jeopardized KDA's credibility, abused the trust that was placed in you and it is clear the Department must take disciplinary action and remove you from the field.

3. Jacobs appealed the demotion on January 14, 2013, stating:

I have been demoted to Agriculture Inspector I in the metrology lab of the Division of Regulation and Inspection, Weights and Measures. This demotion was based on false and unfounded allegations made against me by the owners of Penrod Lumber in Simpsonville, Kentucky. During an inspection of the store, I was accused of using racial and gender slurs. In addition, accusations were made that I improperly asserted political connections during conversations with the owner, Mr. Griffith. In investigating these allegations, the Department failed to question Bob Ginter, who accompanied me to Penrod Lumber on my third and final inspection. Moreover, I was never questioned or spoken to concerning the veracity of these statements. Further inquiry would have proven the allegations as false and my subsequent demotion unwarranted and improper.

4. The relevant Kentucky Administrative Regulations, statutes and policies are:

- A. 101 KAR 1:345, Section 1, General Provisions.

Appointing authorities may discipline employees for lack of good behavior or the unsatisfactory performance of duties.

B. KRS 18A.140(2)

No person shall use or promise to use, directly or indirectly, any official authority or influence, whether possessed or anticipated, to secure or attempt to secure for any person an appointment or advantage in appointment to a position in the classified service, or an increase in pay or other advantage in employment in any such position, for the purpose of influencing the vote or political action of any person.

5. As an Agricultural Inspector III, Jacobs conducted audits of businesses subject to price verification in several Kentucky counties. The inspector scans a sample of items offered for sale and if the items record a price higher or lower than the price indicated on the shelf, that discrepancy is documented by the inspector in a summary report. If there is more than a 2 percent variation based upon the sample, the store fails inspection. The owners are given up to thirty (30) days to comply or be fined. Follow-up inspections occur until the problem is corrected.

6. Jacobs inspected Penrod Lumber and Hardware in Simpsonville, Kentucky, Shelby County, on October 10 or 12 (the evidence is conflicting), 2012. Gregory and Carol Griffith own Penrod Lumber and Hardware. The store failed the first inspection, and Jacobs advised Gregory Griffith that he would return within thirty days for a second inspection. Jacobs returned on November 5, 2012, for the follow-up inspection at which time he met Carol Griffith, who explained to Jacobs that the business had recently acquired the entire inventory of another hardware store and was in the process of marking the items for sale with the correct price.

7. **Carol Griffith**, part-owner of Penrod Lumber and Hardware, testified that she met Ricky Jacobs on November 5, 2012, at the store when he was in the process of scanning the prices marked on the merchandise to determine if they matched those recorded in his scanner. Griffith testified that she was in the process of marking out all of the prices listed on the recently acquired merchandise received in bulk from another retailer. Jacobs told her that she could either mark out the prices indicated on the old merchandise or price it to correspond to the prices listed on the shelves. Carol Griffith said that the task of pricing or marking out old pricing was more than the personnel in the store could timely accomplish.

8. Ms. Griffith stated she began to follow Jacobs as he scanned the prices when he became agitated exhibiting an "air" about him that made her feel "small and stupid." She became upset and summoned her husband. She said she overheard Jacobs say to him, "If you've got a problem, take it straight to the Commissioner." She thought he said as well, "You will be fined \$100." Ms. Griffith testified that Jacobs had previously been there on October 12, 2012, and she understood that the store had thirty days to mark out all of the old prices or price them correctly. She was not present on the 12th. Ms. Griffith said Jacobs returned on December 7, 2012, with a Field

Supervisor, Bob Ginter. They went straight to a wall containing brand new merchandise not yet priced. There was a sign on the wall instructing customers to take wanted items to the front counter to be priced. Ms. Griffith said to Jacobs and Ginter, "If you are going to check those items, you might as well fine us." Ms. Griffith testified that several days after the December 7, 2012 inspection, she and her husband met with two inspectors, Mr. Arnold and Mr. Glass. Her husband "went over" the account of what had happened at the hardware store during Jacobs' inspection. She said they were told by Glass and Arnold that they had three months to complete the pricing of the merchandise, but as of the date of the Personnel Board hearing, there had not been a subsequent inspection.

9. **Greg Griffith**, part-owner of Penrod Lumber and Hardware and its President, testified that Jacobs visited the store in October 2013 to do an audit of prices listed on the merchandise, but deferred the audit for thirty days. He returned November 5, 2013, to find that new inventory had not been priced and pricing for old inventory from a recent bulk purchase had not been completed. Griffith testified that Jacobs, finding that the hardware store failed again, came to the checkout counter where he was serving customers, "butted in front of the customers and said, in effect, that the store had failed the audit and you will be fined \$100." Jacobs offered him a document to sign that confirmed the audit failure, but for some reason having to do with a low computer battery, Griffith and Jacobs went to Jacobs' truck to sign the document. Griffith testified that Jacobs, while at his truck, said, "Women are just different, niggers are different, Indians are different."

10. Greg Griffith said that he was shocked and angry about the obvious reference to his wife. He said Jacobs was talking about his wife and he did not like it.

11. Griffith testified that Jacobs came back the third time on December 7, 2012, bringing Ron Ginter with him. He said to Ginter, "Things were not fixed." And for a third time he knew that the store would fail the inspection. He had put up a sign on one of the walls indicating that the items in that area would have to be priced at the check-out counter. Jacobs returned to the counter where he told him that the store had failed the audit and, for the second time, cut in front of his customers.

12. Griffith then said to Jacobs that the Commissioner would be interested in what he (Jacobs) had said to him the last time and asked for the Commissioner's phone number. Jacobs had told him on the second visit, "Go to the Commissioner if you don't like what I'm doing." Jacobs said he did not know the Commissioner's number, however, he was able to get a number to call from Ron Ginter.

13. Several days later, Griffith called the Commissioner's office and talked to Vince Gill, the Commissioner's assistant. He told Gill what Jacobs had said and the details of his encounter. On the 14th of December, 2012, Mr. Arnold and Mr. Glass came to the store, looked around and discussed with Griffith what Jacobs had said and done during the previous inspections.

14. Greg Griffith testified that around Christmas of 2012, he received a call from the Department of Agriculture and, during the conversation, told the caller that he did not want Jacobs fired.

15. **Holly Harris VonLuehrte**, the Appointing Authority for the Department of Agriculture, described the events which led to her writing the December 28, 2012 demotion letter. VonLuehrte based her letter on the written reports of Jason Glass and Lanny Arnold dated December 18, 2012, and discussions with Commissioner James Comer, Ricky Jacobs and Greg Griffith. She said Larry Cox participated in the investigation. VonLuehrte stated that Commissioner Comer was at first so angry with Jacobs that he wanted to fire him, but later on the advice of VonLuehrte, Jacobs agreed that demotion was the proper disciplinary action.

16. VonLuehrte stated that she regarded the matter as a question of veracity. Who is telling the truth about what Jacobs said, Griffith or Jacobs? She said Jacobs was shocked after reading his demotion letter which she personally handed to him. He denied using racial and gender slurs at Griffith's store and asserted his lack of racial prejudice by saying that he had inspected stores in the "blackest of the black neighborhoods." On one occasion he admonished a fellow employee who uttered a racial slur during an inspection. Jacobs said, "Leave 'em alone because they could get us shot." VonLuehrte regarded this statement as evidence of racial prejudice.

17. VonLuehrte testified that Jacobs said, after reading his demotion letter, that he planned to call his State Senator and Representative. She believed this lent credence to the charge that Jacobs had inappropriately invoked politics when confronting the Griffiths during the store inspections.

18. VonLuehrte said she believed Greg Griffith. She found him reluctant to talk about the matter, but otherwise credible. She said that he did not try to avoid the \$100 fines or lobby to change the inspection process. Based on these observations, she concluded that Jacobs was not telling the truth and Griffith was.

19. VonLuehrte said that Jacobs is now back in the field, meeting the public and doing inspections of large scale meters.

20. **Jason Glass**, an Administrative Branch Manager for the Department of Agriculture, overseeing the field staff for Weights and Measures, testified that on December 14, 2012, he and Lanny Arnold went to Penrod Lumber in Simpsonville, Kentucky, to investigate the controversy surrounding the inspections performed by Ricky Jacobs. Greg Griffith, the owner, had complained to the Department. Glass testified that Griffith told him Jacobs had made these statements: "If he (Griffith) didn't like what he was doing he could call the Commissioner himself. He knew how

politics worked, that's how he got his job." Further, during the second inspection of November 5, 2012, when beside Jacobs truck, Jacobs said, "I know that is your wife and women are different. But, niggers are different, Injuns are different and white people are different." The statements were recorded in a report dated December 18, 2012, prepared by Glass for Benson Bell.

21. Glass explained that the Department moved Jacobs back into the field where his talents are put to better use, but still doing inspections.

22. **Lanny Arnold**, Assistant Director for the Department of Agriculture, Weights and Measures, and Jacobs' third-line supervisor, testified that he accompanied Glass to Simpsonville to talk to Greg Griffith about Jacobs' audit of his store.

23. He stated that he authored the second and third paragraphs of Glass' December 18, 2012 report to Bell. In the report, Arnold recounts the December 7, 2012 visit with Ricky Jacobs and Bob Ginter, in Frankfort, when Jacobs advised Director Benson Bell and him that they may be receiving "a complaint from Penrod Lumber that [he] made derogatory comments about different groups of people, [but] the only thing [he] might have said was, 'women are different and they don't understand.'"

24. Jacobs also reported at this meeting that Greg Griffith questioned being fined, to which he (Jacobs) replied, "If you have a problem with the fine, you need to skip everyone else and make your complaint straight to the top with Commissioner Comer." Jacobs said Griffith asked for the Commissioner's phone number which he did not have.

25. Appellant, **Ricky Jacobs**, testified that he first inspected Penrod Lumber on October 10, 2012. The store failed the inspection. He advised the store attendant, Charles Graff, that he would return within thirty days and explained how to correct the pricing discrepancies. Jacobs said he returned on November 5, 2012, when he encountered Carol Griffith. As he began his inspection, Ms. Griffith became "combative" expressing her belief that government "had it out for small businesses." Penrod's failed the second inspection.

26. Jacobs then talked to Greg Griffith about the inspection failure. Because Jacobs' computer was losing power he asked Mr. Griffith to go to his truck where he could complete the process of preparing the associated paperwork. At the truck, Jacobs testified, he could not remember exactly what he said, but expressed to Mr. Griffith that he was having a hard time communicating with Griffith's wife Carol, and thought the two of them could better address the issue of the inspection failure. Jacobs denied ever using the word "nigger," "injun," or "Indian."

27. Jacobs returned to Penrod's on December 7, 2012, for a follow-up inspection accompanied by his field supervisor, Bob Ginter. Upon entering the store, he met Ms. Griffith who informed them that the store was not prepared for the inspection. Jacobs said he encountered Mr. Griffith standing behind the counter where he [Griffith] demanded his [Jacobs'] name and the Commissioner's phone number. Jacobs testified Griffith told him that the Commissioner would be interested in hearing his comments during the November inspection concerning African Americans and women.

28. Jacobs testified he gave Mr. Griffith his name and had Bob Ginter give him the phone number of the Office of Weights and Measures in the Department of Agriculture.

29. Jacobs said that Mr. Griffith made other complaints about him, such as cutting in line in front of customers to inform him that Penrod's had failed the inspection and would be fined. Jacobs said Griffith told him that if he did it again he was going to "throw his ass out the door." As the situation became heated, Jacobs and Ginter left the store, did not complete the inspection, and went immediately to the office of Benson Bell, the Director of Division of Weights and Measures, in Frankfort. There Jacobs informed Bell, as well as Lanny Arnold who was present, that they should be expecting a complaint from Mr. Griffith charging that he [Jacobs] had made inappropriate comments about certain groups of people. Jacobs stated to them that the only thing he might have said to Mr. Griffith was that "Women are different, they don't understand."

30. Regarding the meeting with Holly VonLuehrte, Jacobs denied saying to her that he had "worked in the blackest of the black" neighborhoods inspecting stores. He told her that he had often worked in black neighborhoods without incident. He said he did recount one experience of being in an African-American neighborhood. He explained that he had objected to a fellow inspector using a racial slur and expressed the fear that "[They] could get shot." He said the comment was "societal, not racist."

31. **Robert Ginter**, Jacobs' Field Inspector, accompanied Jacobs to the third inspection of Penrod's apparently because of the problems arising from the second Penrod inspection. Ginter said he could not remember everything Griffith said when they arrived at the store, but he [Mr. Griffith] asked for the Commissioner's number and stated he was going to call a state representative. Ginter said he informed Mr. Griffith that they were ending the inspection and were going to leave. He confirmed that he and Jacobs drove back to Frankfort and met with Benson Bell and Lanny Arnold to explain what had happened. He said that he could not remember everything Jacobs said to Bell, but he did say, "They are going to say I [Jacobs] made statements about certain people."

FINDINGS OF FACT

1. Holly VonLuehrte, the Appointing Authority, charged in her December 28, 2012 letter of demotion that Ricky Jacobs had said, "I understand politics. That's how I got my job. If you have a problem with it, you can take it straight to the Commissioner." The demotion letter also charged that Jacobs during the third inspection refused to give his name and the Commissioner's phone number to Greg Griffith. This statement, VonLuehrte said, violated KRS 18A.140(1) and (2) constituting lack of good behavior and unsatisfactory work performance.

2. By a preponderance of the evidence, the record shows that Jacobs said, "If you have a problem with it, you can take it straight to the Commissioner." This was said in the context of Mr. Griffith's complaints about the way Jacobs was performing his inspection of Penrod's, not how he got his job with state government.

3. On November 5, 2012, while performing a "Weights and Measures" inspection at Penrod Lumber in Simpsonville, Kentucky, Ricky Jacobs said to the owner, Greg Griffith, "Women are just different, niggers are different, Indians are different." The finding is made by a preponderance of the evidence. Although the Appellant and the Appellee gave cogent reasons for and against this finding, the Hearing Officer finds that Jacobs' denial of Holly VonLuehrte's written, investigative recounting of his experiences in African-American neighborhoods was untruthful. Jacobs attempted to modify VonLuehrte's account of his experiences in African-American neighborhoods to make them less racist, if at all. If Jacobs spoke an untruth in recounting this conversation with Holly VonLuehrte, he likely spoke an untruth in recounting the conversation with Greg Griffith.

4. This gives rise to the legal maxim *falsus in uno, falsus in omnibus*, as expressed in English, if the fact-finder finds the witness has testified falsely in some material matter, he is free to disregard the witness's testimony in other respects. 58 Am.Jur., Witnesses, §872.

CONCLUSIONS OF LAW

1. There is no evidence that Jacobs violated KRS 18A.140(1) and (2), in the performance of inspecting Penrod Lumber and Hardware. For Jacobs to refer Greg Griffith to the Commissioner of Agriculture if he [Griffith] objects to his [Jacobs] job performance, is not behavior that violates KRS 18A.140(1) or (2). Nor does it violate the provisions of 101 KAR 1:345, Section 1. KRS 18A.140 (1) and (2) prohibit using political favoritism for appointment, advantage, or promotion, and the prevention of demotion within the classified service. This statute is completely inapposite to behavior of Jacobs in the performance of his job at Penrod's.

2. Jacobs violated the Kentucky Department of Agriculture's policy statement on "Harassment Prevention," which violation constitutes lack of good behavior and, in the context of this case, unsatisfactory work performance. This conclusion applies only to Jacobs use of the word "nigger" prohibited according to the policy "as being both offensive or unwelcome conduct including: . . .vulgar . . .language . . ." in the workplace. The language "women are different" and "Indians are different" are statements much too ambiguous to be found "vulgar" and, therefore, prohibited.

3. The punishment of demotion is erroneous and excessive as provided by KRS 18A.095(22)(c), because the Department failed to prove significant allegations in its December 28, 2012 demotion letter. It failed to prove that Jacobs said, "Women are difficult to work with, but not as bad as niggers or Indians," clearly a sexist and racist statement. And it failed to prove a violation of KRS 18A.140(1) and (2).

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **RICKY JACOBS VS. DEPARTMENT OF AGRICULTURE (APPEAL NO. 2013-007)** be **SUSTAINED to the extent** that the Board overturn the demotion of Ricky Jacobs of Agriculture Inspector I and otherwise make him whole. The Hearing Officer recommends that Jacobs receive a thirty (30) day suspension without pay for lack of good behavior and unsatisfactory work performance.

Further the Hearing Officer recommends that Jacobs be reimbursed for any leave time he used attending the hearing and any pre-hearing conferences at the Board [KRS 18A.095(26)].

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 24th day of September, 2013.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Daniel F. Egbers
Hon. Nicole Liberto
Hon. Whitney True Lawson