

by KRS 18A.005(24). The Appellee further argues there was no disciplinary action and any such shifting of job duties was a result of a reorganization, which occurred in 2017.

STIPULATION OF FACTS

1. The Appellant, Kenneth Joyce, is employed as a Safety Administrator in the Cabinet's Training and Development Branch inside the Office of Administrative Services ("OAS"), Division of Human Resources ("HR").

2. Pursuant to KRS 18A.005(7), the Appellant is a classified employee holding the position of Safety Administrator.

3. The Appellant is the only Safety Administrator employed by the Energy and Environment Cabinet.

4. The Appellant's first-line supervisor is Administrative Branch Manager, Mark Kennedy.

5. The Appellant's second-line supervisor is the Director of HR, Nina Hockensmith.

6. Mr. Scott Rose is employed as an Executive Staff Advisor in the Cabinet's Office of Administrative Services.

7. Mr. Rose began his employment with the Cabinet as an Executive Staff Advisor on September 1, 2020. [**Hearing Officer Note:** The parties stipulated that Mr. Rose began his employment with the Cabinet on September 1, 2020. However, the evidence established, and the Hearing Officer specifically finds, that Mr. Rose began his employment with the Cabinet on September 1, 2019.]

8. Mr. Rose is a classified employee, pursuant to KRS 18A.005(7).

9. Mr. Rose's first-line supervisor is OAS Executive Director David Dooley.

10. Mr. Rose's second-line supervisor is EEC Cabinet Secretary Rebecca Goodman.

POSITION DESCRIPTION FOR SAFETY ADMINISTRATOR

(Effective 3/12/19)

Statement of Duties: Administers safety programs and activities for the agency. May provide implementation of safety strategies, policies and procedures. Provides oversight, expertise, training and technical guidance in all aspects of the safety program. Performs other duties as required.

Task No. 1: Develops, coordinates and implements safety programs in accordance with state and federal requirements for the Energy and Environment Cabinet. 35%

Task No. 2: Performs job site/workplace inspections to evaluate safety programs; maintains and collects accident data for safety analysis of trends to identify areas in requiring training. Conducts safety training as needed. Coordinates with division contacts to schedule medical monitoring as needed. 30%

Task No. 3: Coordinates all safety programs/activities with EEC Safety Officers. Conducts audits to ensure compliance. Provides technical interpretations to management, and recommends revisions. 25%

Task No. 4: Reviews accident reports and conducts safety investigations for compliance with agency policies and procedures; recommends corrective actions. 5%

Task No. 5: Performs other duties as assigned. 5%

POSITION DESCRIPTION FOR EXECUTIVE STAFF ADVISOR
(Effective 4/4/2019)

Statement of Duties: Provides administrative support and technical guidance to the Executive Director of the Office of Administrative Services and EEC agency heads regarding the Cabinet's safety program. Ensures policies and procedures comply with Occupational Safety and Health Administration (OSHA) guidelines and requirements. Performs other duties as assigned.

Task No. 1: Reviews federal laws and regulations and provides technical support and guidance to Executive Leadership on workplace injuries and safety. 30%

Task No. 2: Synthesizes data from all agencies within Energy and Environment Cabinet (EEC). Evaluates data to monitor consistency in tracking statistical analysis and trends on the safety performance within the Energy and Environment Cabinet (EEC). 25%

Task No. 3: Oversees the development, organization, and implementation of emergency drills within the EEC facilities across the state. Review results and ensure improvements by overseeing the development and implementation of an after action plan. Develop and conduct emergency management training for EEC staff that have an essential role in the drills. 20%

Task No. 4: Attends meetings and training sessions to update management and staff on policies and procedures for safe work practices. Serves as EEC safety records officer. 10%

Task No. 5: Assists in the development and implementation of building security plans for all EEC offices across the state. 10%

Task No. 6: Performs other duties as assigned. 5%

BACKGROUND

1. The Appellant's first witness was **Tim Fugate**. This witness has been the Director of Mine Safety within the Cabinet since March 2020. He testified that he first met with the Appellant in 2016 because they were on a safety committee together, which had been established by then-Secretary Snaveley. He explained that the goal of the committee was to establish core training in the Personnel Division as it related to meeting federal and state laws. However, he stated that the goals of this committee were never adopted. His speculation is that management decided it would involve too much staff time to implement.

2. On cross-examination, the witness admitted that he had no direct knowledge of any changes to the Appellant's duties from 2016 to the present.

3. Appellant's next witness was **Kristy Sims**. She has been a Training and Development Specialist II within the Training and Development Branch since February 2018. She served in that Branch with the Appellant and Allan Coldiron.

4. She stated that, in 2018, one of the programs the Training and Development Branch worked on was new employee orientation. During the 2018 orientation, Sims explained that the Appellant lectured on the safety portions. However, she added, in 2019, the Branch was no longer involved in the new employee orientation.

5. The witness further explained her understanding that, in 2020, the safety portion of new employee orientation was conducted by Executive Staff Advisor Scott Rose. She added that, in the 2019 new employee orientation program, she assisted Sara Marshall in conducting the safety portion. She has no knowledge of whether Scott Rose did any statewide training for new employee orientation.

6. Regarding the leadership portion of new employee orientation, the witness is not aware of any participation by the Appellant. However, she is aware that he was involved in the first aid and CPR training.

7. The witness then explained that the Appellant is the Safety Administrator for the Cabinet. She stated that there are also Safety Coordinators, which, she acknowledged are similar to Training Coordinators and she was unclear as to the relationship between Safety Administrators and Safety Coordinators.

8. On cross-examination, the witness explained that, during new employee orientation training sessions, the different members of the Safety Training Branch often presented different topics to employees. She stated there was no one main presenter and that, at times, each member covered for one another in their presentations.

9. She stated that the Appellant's part in new employee orientation typically took ten to fifteen minutes. She also observed that new employee orientation training has evolved since she has been with the Cabinet and has covered new topics since Scott Rose became a Staff Advisor.

10. Regarding any driver safety training, which was previously offered by the Safety Training Branch, she stated that this is now available on a video and there is no longer any live training presented to employees.

11. On redirect, the witness stated that she feels the Appellant now develops nothing in the way of training, other than the first aid and CPR training.

12. On re-cross-examination, the witness confirmed that she only knows bits and pieces about the Appellant's current duties. She is aware that he completes safety inspections and performs safety and injury reports. She is aware that he performs CPR and first aid training, but states that this training is not his primary function.

13. The witness opined that, in her view only, the HAZWOPER training has changed. She explained this is because this program was formerly conducted by an outside vendor, whereas the safety class is now taught in-house. She explained that the Appellant previously served as the registration manager for that program. She added that because of the current COVID-19 virus situation, more training is being conducted across the spectrum by video rather than through in-person training.

14. The Appellant's next witness was **Scott Rose**. He has been the Executive Staff Advisor in the Office of Administrative Services since September 2019. His prior safety experience was primarily in the private sector before joining state government. He indicated there is little difference between private safety and government safety, and the main goal of both such programs is to encourage workers to concentrate on their behavior.

15. He added that the Appellant has been a big asset to him because of his state government experience. He also confirmed that the HAZWOPER program has now been brought in-house, rather than being conducted by an outside vendor. He added that this is now a big benefit to the Cabinet.

16. The witness testified that, regarding the HAZWOPER program, the Appellant had initially given him a manual to become familiar with the program; however, he stated that he subsequently took certification training through an outside vendor and became certified in that program sometime during 2020.

17. On cross-examination, the witness confirmed that the Appellant is a Safety Administrator and that he, the witness, was brought in as an Executive Staff Advisor to do special projects and collect certain data. He confirmed that the Appellant did not previously perform any HAZWOPER training. The witness established that the Appellant's first-line supervisor is Mark Kennedy, and that he (the witness) is not in the Appellant's chain-of-command. He added that his first-line supervisor is OAS Executive Director David Dooley. The witness also testified that his impression is that the Appellant's job duties include keeping up with the OSHA regulations and doing outside inspections. He stated that he has not personally seen the Appellant perform any training, except for first aid training. He also added that the Appellant made no presentation in the October 2019 new employee training.

18. The witness emphasized that he sees little, if any, overlap between his duties and those of the Appellant. He cites as an example of new additional things that he has brought to the Cabinet as a new program for decreasing "tick" bites in the field. He also added that he has introduced a new type of PPE equipment and clothing for those in the field.

19. The witness confirmed that he feels the Appellant is a very good employee, and does not think he has taken any duties from him. He further stated that he believes the Appellant continues to give safety-related advice to the policy makers above him.

20. On redirect, the witness explained that he has created twenty new PowerPoint presentations for training since coming onboard. He says that almost all of the improvements that he has made have been backed by executive support.

21. On re-cross-examination, the witness confirmed that it is very important for executive leadership to back safety. He added that he does not do any trainings of his own, but rather works with Mark Kennedy and his employees training groups.

22. The Appellant's next witness was **Mark Kennedy**. He has been the Branch Manager for the Training and Development Branch since March 2018. He stated that the Appellant was one of four employees in that unit. He also added that any lectures that the Appellant would give to employee training would typically last around fifteen minutes.

23. The witness was then directed to an October 11, 2019 email that incorporated an October 4, 2019 email from this witness to the Appellant. In the October 4, 2019 email (neither emails was placed into the record), Kennedy indicated that he felt he had laid out a clear separation of duties between those of the Appellant and those of the new Executive Staff Advisor, Scott Rose.

24. Pertinent parts of the October 4, 2019 email from this witness to the Appellant concerning the explanation and differentiation of duties between a Safety Administrator and an Executive Staff Advisor were outlined. Specifically, as relating to the Safety Administrator duties of the Appellant, the email read:

The majority of your job duties relate to performing job site/workplace inspections to evaluate safety issues/concerns and collect data for safety

analysis of trends to identify areas where training may be required to ensure compliance. Your role is to then make recommendations to management based on that information. You also review all accident reports and investigation areas, and make recommendations to management where corrective actions may be needed. In addition, you coordinate with any agency division contacts to schedule medical monitoring as needed...

25. In defining the duties of the Executive Staff Advisor position, this witness stated that it would:

Provide technical guidance to agency management into areas of compliance with OSHA guidelines, tracking and evaluating data on safety performance and workplace injuries, and overseeing the development and implementation of conducting safety management training for EEC staff.

The email finished by stating that the sender felt there was a clear separation of duties between the two positions.

26. After being referred to the Position Description (PD) of the Safety Administrator (Stipulated Joint Exhibits), the witness confirmed that the Statement of Duties, which included providing oversight, expertise, training, and technical guidance in all aspects of the safety program, allowed the Appellant to provide certain training in oversight, primarily related to CPR and first aid. This had previously been provided in new employee orientation training.

27. The witness also confirmed that the Appellant had previously begun to develop a safety and health program (no details given), which was never put into effect. He also added that the Appellant was involved in sending emails daily, if necessary, regarding any accidents or injuries that had occurred in various programs.

28. Referred to the PD of Executive Staff Advisor Scott Rose (Stipulated Joint Exhibits), the witness was questioned about Task 2 involving synthesizing data as it related to the Appellant's sending data involving accidents and injuries to management. The witness was unable to clearly distinguish any difference between these two duties.

29. Regarding Task 5 on the PD of Executive Staff Advisor position, which involves developing and implementing building security plans for all EEC offices, the witness stated that he does not recall ever working with the Appellant on any building security plans or issues, and that the Appellant did not participate in any such drills involving security issues.

30. Referred to Task 3 on the PD of Executive Staff Advisor position, which involves the development of action plans following drills, the witness admitted that he has had meetings with the Appellant at various times after such drills, but these have not necessarily resulted in the development of any action plans.

31. The witness then again referred back to the contents of the October 4, 2019 email from himself to the Appellant (contained within the October 11, 2019 email from Appellant to his own account) in which the witness again stressed that he had made clear distinctions between the job duties of the Appellant and those of Executive Staff Advisor Scott Rose. Examples of the clear separation of duties explained by this witness between those of the Appellant and Rose were that the Appellant performed site inspections and performed CPR and first aid training, whereas, the Executive Staff Advisor position did not. In addition, the witness explained that the Appellant's duties involved the keeping and compilation of injury reports, whereas the Executive Staff Advisor position did not.

32. The witness was then directed to the definition of "penalization." This is included in both a glossary of terms furnished by the Kentucky Personnel Cabinet and is contained in KRS 18A.005(24).

'Penalization' is defined as follows:

Includes, but is not limited to, demotion, dismissal, suspension, fines, and other disciplinary actions; involuntary transfers; salary adjustments; any action that increases or diminishes the level, rank, discretion, or responsibility of an employee without proper cause or authority, including a reclassification or reallocation to a lower grade or rate of pay; and the abridgement or denial of other rights granted to state employees;

When questioned by the Appellant as to whether his discretion has been diminished, the witness replied that he felt it has stayed the same relative to his duties.

33. On cross-examination, the witness was referenced to the phrase in the definition of "penalization" regarding proper cause or authority. The witness responded by citing the fact that the HAZWOPER training had been moved in-house, where it has previously been performed by an outside vendor. He also mentioned that the Appellant was not involved in any security training, but instead was in safety training. In support of this, he referenced a two-minute video developed by the Appellant and Kristy Sims regarding safe driving.

34. The witness again emphasized that he feels the Appellant's duties are different from those performed by Rose in his Executive Staff Advisor position. In partial support of this, he cited the fact that he is the Appellant's first-line supervisor, while OAS Division Director David Dooley is Rose's first-line supervisor. The witness also added that he is not in Rose's chain-of-command.

35. The witness concluded by stating that he feels that the Appellant is a very valuable employee, and that, although there may have been some slight shifting of duties because of the current COVID-19 pandemic situation, he feels that some of those will eventually be re-shifted once the current situation has passed.

36. The Appellant's next witness was **Nina Hockensmith**. She has been the Division Director of Human Resources Management with the Cabinet since November 2017. She is a career employee.

37. She was the Appellant's supervisor in 2017 and testified that he shared his safety training and knowledge with other employees and was also a part of a safety committee.

38. The Appellant stated he had no additional witnesses.

39. The Hearing Officer asked if the Appellant was going to testify. In response, the Appellant replied that he would not testify but would, instead, rely upon his opening statement. He did emphasize that he had thirty years of state government experience, with sixteen of those being in the safety field.

40. At the conclusion of the Appellant's case, the Cabinet made a Motion for Directed Verdict, arguing that the Appellant had not carried his burden of proof that he had been penalized. After hearing arguments from both parties, the Hearing Officer **GRANTED** the Motion for Directed Verdict.

41. KRS 13B.090(2) states as follows:

All testimony shall be made under oath or affirmation. Any part of the evidence may be received in written form if doing so will expedite the hearing without substantial prejudice to the interests of any party. The hearing officer may make a recommended order in an administrative hearing submitted in written form if the hearing officer determines there are no genuine issues of material fact in dispute and judgment is appropriate as a matter of law.

FINDINGS OF FACT

1. The Appellant is a classified employee who holds the position of Safety Administrator in the Agency's Training and Development Branch inside the Office of Administrative Services (OAS). His first-line supervisor is Branch Manager Mark Kennedy.

2. Scott Rose is employed as an Executive Staff Advisor in the Office of Administrative Services. His first-line supervisor is OAS Executive Director David Dooley.

3. Based upon the Position Description of the Appellant's position and the Position Description of the position held by Rose, the Hearing Officer finds there is a substantial distinction between the duties performed by the holders of these two positions.

4. For example, Appellant's involvement in new employee orientation previously took 10 to 15 minutes and covered first aid and CPR training. New employee orientation has now evolved to cover additional topics and is now performed by Rose.

5. Driver safety training, in which the Appellant was previously involved, is now presented by video instead of being taught with live training.

6. The Appellant completes safety inspections and prepares safety and injury reports, whereas Rose does not.

7. Rose cites his introduction of new PPE and clothing for field personnel, something the Appellant was never involved with.

8. Mark Kennedy's October 4, 2019 email clearly distinguished between the duties performed by Appellant's position and that of Rose.

9. The Hearing Officer finds that any delineation of, or slight shifting of duties as they relate to Appellant's position, does not constitute a diminution of duties or level of direction previously held by the Appellant as defined in KRS 18A.005(24).

CONCLUSIONS OF LAW

1. The Hearing Officer concludes as a matter that the Appellant failed to carry his burden of proof by a preponderance of the evidence.

2. The Appellee moved for a directed verdict, which was granted. Pursuant to KRS 13B.090(2), there being no genuine issues of material fact, the Hearing Officer concludes that judgment is appropriate as a matter of law.

3. The Hearing Officer recommends the judgment of a directed verdict be **SUSTAINED**.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **KENNETH JOYCE V. ENERGY AND ENVIRONMENT CABINET (APPEAL NO. 2019-231)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

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

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 R. Hanson Williams** this 27th day of December, 2020.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Erritt Griggs
Mr. Kenneth Joyce
Ms. Nina Hockensmith