

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NOS. 2019-073 and 2019-099**

LOWELL MCGOWAN

APPELLANT

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

DEPARTMENT OF AGRICULTURE

APPELLEE

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The Board, at its regular July 2020 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated May 4, 2020, Appellant's Exceptions, Appellee's Motion for extension of time to file response to exceptions, Appellee's Response to Exceptions (returned as untimely), Appellee's Response to Motion for Extension of Time to File Response (withdrawn), oral argument, and being duly advised,

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

A. **Delete** Summary of the Evidence paragraph 12, and substitute the following:

12. In early August 2018, Skidmore prepared a mid-year interim review concerning McGowan, in which he reported his work performance as very poor and substandard as to where it should be, and that McGowan did not meet the expectations of his job. He reported that McGowan completed only a small number of his mosquito fogging assignments, and many were not completed in a timely manner. He further reported that McGowan's work attendance had not been good, and that his vehicle's GPS device reflected issues of concern with whether

McGowan started and ended his workdays as scheduled and reported. He further noted that McGowan did not exhibit any initiative concerning public outreach about the KDA programs, and that he had not kept his supervisors informed of the progress of his work assignments out in the field. He reported that not only was McGowan a very poor communicator with his supervisor and branch manager, but that he failed to show up numerous times for meetings or work assignments at the Western Kentucky shop and office. Skidmore further noted that McGowan did not work well with the other field staff concerning the work assignments, and that, on one occasion, his failure to communicate resulted in duplicate applications of chemicals being made. Skidmore testified that McGowan was the least productive member of the Inspector Team.

B. Delete Summary of the Evidence paragraph 30, and substitute the following:

30. **Mark White** is the Human Resources Director for the KDA, and the designated Appointing Authority. He testified that he has been employed in the human resources field for 23 years, including with the City of Frankfort, and with the KDA since April 2016.

C. Delete Summary of the Evidence paragraph 32, and substitute the following:

32. White testified that everyone knew that they had GPS units in their state service vehicles, and its purpose. He testified that McGowan received and signed the vehicle operation policy on June 26, 2012. He said that, when McGowan had claimed multiple hours worked for which there was no GPS documentation, an audit was performed. The audit raised discrepancies in McGowan's claimed time. The audit further produced documentation of use of the vehicle on dates McGowan

claimed he did not work, which confirmed his misuse of state property. White said he used the information Wayne had given him from the audit of the written timesheets submitted by McGowan with the GPS data, as the basis to write the first letter to McGowan of a notice of intent to dismiss him.

D. **Delete** Summary of the Evidence paragraph 34, and substitute the following:

34. White issued a written reprimand to McGowan that same date, in which White reviewed the specific charges that led to the issuance of the notice of intent to dismiss, and to the disciplinary problems justifying the written reprimand. These issues included that: (1) failure to record time worked was falsifying a timesheet and would not be tolerated; (2) he was to get approval from his supervisor for days he did not wish to work; (3) he is to never ask or permit a non-state employee to assist him with his workload, as it could create liability for the Department; (4) he was to improve his communication with management and provide his supervisor daily updates on the status of his assignments; (5) his supervisor would provide him with tasks to be performed each day and he was to provide his supervisor with a daily update on how he met and completed those tasks; (6) if he was unable to complete a task in the required timeframe, he was to notify his supervisor as to the reason why and allow him an opportunity to provide the assistance needed; and (7) his failure to follow any of these directives may lead to further disciplinary action up to and including dismissal. This written reprimand was then followed up with the PIP issued to McGowan on August 6, 2018. White said the PIP was intended to be a tool to improve McGowan's work performance. White testified that McGowan was on leave during some of the latter months of 2018 due to a hand injury.

E. **Delete** Findings of Fact paragraphs 4 through 12, and substitute the following:

4. During that time, when he was in the field without the presence of a direct supervisor, McGowan began to display an attitude that he would decide what work he would do and when, and became virtually unreachable and unaccountable to his superiors in the KDA. The Branch office was experiencing difficulty in communication with McGowan, including his failure to acknowledge assignments, follow instructions, report where he was working, and the status of his assignments. He had an email exchange on April 26, 2018, with Paul Shawn Skidmore, Branch Manager of the KDA Public Pest and Recycling Branch, who was taking issue with McGowan for his lack of communication with the Branch office and failure to report on his status on work assignments. The Branch Manager repeatedly had asked McGowan for a home and email address, which McGowan never provided. McGowan responded that he had no supervision for over a year, and had never been told that Skidmore was his supervisor, to which Skidmore responded that when McGowan did not have a direct field supervisor, then, as Branch Manager, Skidmore was McGowan's immediate supervisor, and to emphasize the message told McGowan "so now you have been told."

5. John Board was appointed as McGowan's direct first-line supervisor on June 1, 2018, however, the situation with McGowan did not improve under Board's supervision. In an email dated June 4, and admitted into evidence as Appellee's Exhibit 16, Board laid out his expectations for McGowan. McGowan was informed that he was required to keep Board up-to-date on work activities. He was also advised that the condition of the facilities and vehicles were unacceptable, and that corrective action would be taken in the coming weeks. McGowan was advised that if he had any personal items at the facility, he needed to take them home because

they were going to surplus many of the items and take others to the landfill. Board advised McGowan that he was not overly concerned about how things were done in the past; however, things would be done differently in the future. Board expected a daily fleet log to be filled out at the end of each month, as well as a daily logbook to record McGowan's mileage and activities. When the paperwork was completed, they were to be emailed to Board and an official in Frankfort. McGowan was also informed specifically of his chain-of-command. On the same date, Board sent McGowan an email informing him of expectations for taking leave.

6. An investigation was initiated utilizing GPS data from McGowan's state vehicle compared to his timesheets. The investigation revealed numerous dates when McGowan reported working 7.5 or 10 hours, but GPS records revealed that his state vehicle had not been moved. On other occasions, the GPS records showed the state vehicle driven on dates when McGowan did not claim any work time. McGowan had previously signed a statement that he was aware that GPS devices were on all state vehicles.

7. KDA's Human Resource Director and designated Appointing Authority Mark White issued a written notice of intent to dismiss McGowan from his employment with KDA on July 3, 2018. (Appellant's Exhibit 3.) McGowan was accused of falsifying his timesheets and using his state vehicle for personal use. McGowan attended a pre-termination hearing with his attorney and explained that on the dates he claimed work, but his state vehicle did not move, he drove his personal vehicle. He also stated that on the dates his state vehicle was driven but he had claimed no time, he was working on those dates, but he did not claim work time. Mark White reviewed the matter further with Dana Feldman, the Executive Director of the KDA Consumer and Environmental Protection Department. They

determined that they could not disprove McGowan's explanation, and they decided to back off of the dismissal and issue a written reprimand to McGowan instead.

8. On July 26, 2018, the Appellant was issued a written reprimand. In the written reprimand from Mark White, the allegations in the intent to dismiss letter were reviewed. White wrote, "While the outcome of the hearing resulted in the intent to dismiss being withdrawn, the information provided during the hearing is concerning to the Department and warrants the written reprimand." McGowan was advised that, in the future, he was to record all hours worked. He was informed that a failure to record worked time would be considered falsifying his timesheet and would not be tolerated. He was also informed that if he wished to work a day that was not on his regular work schedule, he needed prior approval from his supervisor, John Board. He was also instructed to never permit a non-state employee to assist him with his workload. McGowan was also informed of concerns regarding his lack of communication with management. Beginning August 1, 2018, McGowan was instructed to give Board daily updates on the status of his work assignments. If he was unable to complete a task in the required timeframe, he was to notify Board as to the reasons why he could not complete the program. (Appellee's Exhibit 36.) On the same date, McGowan received another letter from Mark White following the intent to dismiss letter. He was informed that the information he provided during the pre-termination hearing was concerning to the Department. White also wrote, "Of course, the Department reserves the right to make further inquiries to verify the truthfulness of your representations to the Department, and to take further appropriate actions should additional information come to light." During the course of the hearing, KDA did not present any evidence of any further inquiries into the truthfulness of McGowan's statements, nor was any

additional information or allegations made against McGowan. (Appellee's Exhibit 35.)

9. On August 6, 2018, McGowan received his mid-year Interim Review meeting documentation from Shawn Skidmore. This document advised him of the following 17 deficiencies in his job performance between January 1 and June 30, 2018 (Appellee's Exhibit 10):

- a. Lowell has only completed a small number of mosquito assignments.
- b. Lowell has not informed supervisor or Frankfort office staff of completed work assignments in a timely manner.
- c. Lowell did not preform (sic) public outreach about the noxious weed program as required.
- d. Lowell did not schedule or contact local businesses or Cooperative Extension Agents to seek participation with the rinse and return program as required.
- e. This information on scheduling was not provided to the supervisor as required.
- f. Lowell has not shown any initiative in outreach about the programs within the branch (Mosquito fogging, Noxious Weed Spraying, Rinse & Return Program).

- g. Lowell has not adapted well to the leadership that is in position (Director, Branch Manager, Field Supervisor) as indicated by his failure to provide information about work and status as requested by the supervisor.
- h. Lowell has not kept his supervisor informed of the progress or lack of progress out in the field.
- i. Lowell communicates very poorly with his supervisor and Branch Manager.
- j. Lowell has not worked well with the other field staff whenever they travel to western Ky. To assist the work load (sic). One failure to communicate resulted in duplicate applications being made.
- k. Lowell very rarely seeks prior approval for leave time or requests leave time at all as required.
- l. Lowell's attendance has not been good this review period.
- m. Lowell's GPS vehicle reports reflect that he has issues of concern with starting and ending work days (sic) as scheduled.
- n. Lowell has failed to show up numerous times for meetings or work assignments at the Western Ky. Shop & Office.
- o. Most work assignments are not completed in a timely manner if they are even completed at all.

- p. (Assignments in Mosquito program, Weed Spraying Program, Rinse and Return program have not been completed.)
- q. Timesheets, Weekly Itinerary, Travel Vouchers, work assignments are not completed in a timely manner.

10. On August 6, 2018, McGowan also received a Performance Improvement Plan (PIP) from his supervisor, John Board. (Appellee's Exhibit 12.) The PIP identified five specific areas that needed improvement and detailed the corrective actions to be taken by McGowan within each of these areas. These areas were communication, time management, help with work tasks, work location, and work equipment.

11. A couple of weeks after the PIP was issued, McGowan underwent carpal tunnel surgery and was on sick leave until November. When he returned to duty, his work performance was still in issue and he was not demonstrating improvement. His supervisors were still having problems communicating with him, as evidenced by email communications between McGowan and Board, his failure to complete and report the status of the control programs, and his failure to properly maintain and clean the facilities and equipment under his responsibility. He also never provided the KDA a home address, although he did inform the KDA that he could receive mail at his mother's residence. The KDA supervisor, Branch Manager, and executives also continued to be concerned and troubled by his abrasive attitude and his self-declared lack of concern about the goals and work obligations of the Department.

12. On January 23, 2019, John Board provided McGowan with his year-end Interim Review meeting documentation sheet. (Appellant's Exhibit 5.) This sheet advised McGowan of 13 deficiencies in his job performance between July 1, and December 31, 2018.

- a. Employee has to be given very detailed instruction when performing daily task. Employee will not be proactive in conducting state work without direction.
- b. Employee (sic) completed jobs rate during the mosquito program was less than that of other co-workers (sic) and needs improvement.
- c. Employee hasn't adapted (sic) well to management's expectations or shown much want to do so.
- d. Employee lacks initiative in other programs of the public pest and recycling branch.
- e. Employee has sent a number of unprofessional/direct and threatening emails to managers.
- f. Employee told his manager when he would take a break/lunch on more than one occasion. Manager had to implement mandatory breaks and lunch times to correct this issues (sic) and to keep the job site from being interrupted.
- g. Employee doesn't work well with other employees and has caused interruption about his salary/comments about department programs, co-workers (sic) and management members.

- h. Employee doesn't (sic) request prior approval for leave time as required according to departmental policy.
- i. Employee has left the job site without seeking prior approval from manager.
- j. Employee has altered his schedule without prior approval of management team members.
- k. Employee has to be reminded to enter or correct hours on his timesheet after taking off without prior approval.
- l. Punctuality in recording time/sending reports or required department documents needs improvement.
- m. Due to taking off without requesting prior approval and his absentee issue, there are a number of dependability issues involved in trying to plan day today (sic) operations.

13. Also on January 23, 2019, John Board presented McGowan with his Final Performance Evaluation for 2018. (Appellant's Exhibit 5.) Board rated McGowan as either a (1) "Fails to Meet Expectations" or (2) "Barely Meets Expectations" in all categories in the evaluation except for one. The total score assigned to the evaluation was 146, which was in the Unacceptable category. McGowan claimed he was blindsided and shocked by this evaluation. He signed the evaluation and checked the box "Disagree with performance evaluation and request reconsideration."

14. Board conducted a reconsideration the following day, resulting in no change on the evaluation. McGowan disagreed with the results of the initial reconsideration and requested reconsideration by his next-line supervisor, Shawn Skidmore.

15. Prior to the reconsideration meeting with Skidmore, McGowan was informed that he should submit documentation such as service reports and other work records demonstrating that his evaluation scores improperly failed to consider those activities. (Appellee's Exhibit 8.) The Appellant submitted a three-page written statement to Skidmore, stating that he believed his rating should be "Highly Effective" or better, in the 350 to 449 range. McGowan wrote that he believed the evaluation was a personal attack and a continuation of the failed attempt to dismiss him from July 2018. On February 12, 2019, after reviewing the evaluation and McGowan's response, Skidmore decided not to make any changes to the 2018 Final Performance Evaluation score. (Appellant's Exhibit 5.)

16. McGowan filed a timely appeal from his evaluation on April 3, 2019. (Personnel Board Appeal No. 2019-073.)

17. On February 28, 2019, McGowan was served with a notice of intent to dismiss letter signed by Mark White. The basis for the dismissal was his evaluation score of 146. Pursuant to 101 KAR 2:180, Section 8, McGowan's evaluation score required that the Department of Agriculture either demote him or terminate him from employment. Testimony at the evidentiary hearing disclosed that there were no available positions to which he could be demoted. White consciously chose not to include any information regarding the GPS issues from

July 2018 and relied solely on the evaluation score as the basis for the notice of intent to dismiss letter. (Appellee's Exhibit 38.)

18. Following a pre-termination hearing, the KDA determined that McGowan's dismissal was warranted and he was issued a dismissal letter dated April 15, 2019. (Appellee's Exhibit 39.)

19. McGowan filed a timely appeal from his dismissal on April 30, 2019. (Personnel Board Appeal No. 2019-099.)

20. Both appeals were consolidated for evidentiary hearing. The KDA was assigned the burden of proof to establish the propriety of evaluation score and to establish just cause for the dismissal as well as to establish the dismissal was neither excessive nor erroneous.

21. The Board finds that KDA proved by a preponderance of the evidence that McGowan was properly evaluated. The evidence establishes that the evaluation score of 146 was supported by the evidence and McGowan's work was "Unacceptable."

22. McGowan's evaluation included Performance Planning, which outlined seven specific duties. McGowan received scores of either (1) "Fails to Meet Expectations" or (2) "Barely Meets Expectations" in all seven of these categories. The testimony of Shawn Skidmore and John Board as well as the documentary evidence establishes McGowan's poor work performance throughout 2018. McGowan did not follow the work plan that was detailed for him by his supervisors and did not inform them in a timely manner of difficulties he

encountered in performing his duties. While McGowan performed some work duties, such as applying larvicide and assisting in the baling with the rinse and return recycling program, he did not communicate with his supervisors so that they would know what he was doing. The evidence established that McGowan missed work assignments, did not effectively communicate with his supervisors, did not provide requested information regarding the rinse and return program in a timely manner, did not perform outreach regarding the Department's programs, and did not properly maintain work equipment or worksite. In addition, McGowan did not assist when his supervisors and coworkers cleaned up the worksite. McGowan failed to maintain and file pesticide application records. This finding regarding Appellant's work performance of his duties is supported by Appellee's Exhibits 1, 4, 12, 13, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and 28 as well as the testimony of Shawn Skidmore and John Board. The Personnel Board finds the testimony of Skidmore and Board to be credible, finds the above-referenced exhibits credible, and finds they establish by a preponderance of the evidence that the Appellant "Failed to Meet Expectations" or "Barely Meet Expectations" with respect to his work duties.

23. McGowan received a (1) or "Fails to Meet Expectations" on his evaluation in the categories of "Shows Initiative, Works Under Pressure, Employee Conduct, Communicates With Supervisor, Attendance, Punctuality, and Dependability/Responsibility." The evidence shows that the Appellant did not want to accept either Skidmore or Board as his supervisor, and insisted on doing things the way he had done them in the past. He did not respond to his supervisors and did not meet work deadlines. He did not conduct himself in a professional manner either with his coworkers or with his supervisors. He completely failed with respect to communicating with his supervisors as he did not keep them

informed of his activities and sometimes could not be reached for days at a time. By his own admission, the Appellant worked on days that he did not claim any work time, and also used his personal vehicle for work-related activities without approval and utilized the assistance of non-state employees with respect to his official duties. The Appellant never took advantage of an offer by the KDA to provide him with home internet, and yet, used the lack of internet or phone connection as an excuse for poor communication with his supervisors. The Personnel Board finds that KDA proved by a preponderance of the evidence that McGowan failed to meet expectations with respect to these parts of his evaluation, based on the testimony of Shawn Skidmore and John Board, and Appellee's Exhibits 5, 16, 26, and 27 as well as the exhibits referenced in the previous finding. The Personnel Board also finds Skidmore and Board's testimony credible, and the documents regarding McGowan's Communication With Supervisors, Employee Conduct, Attendance, Punctuality, and Dependability/Responsibility to be credible.

24. Having proven by a preponderance of the evidence that McGowan's evaluation score of 146 and rating of "Unacceptable" were appropriate according to the evidence, KDA established just cause for the Appellant's dismissal. There was no evidence or argument put forth during the hearing that demotion to any other position was a viable option. Thus, his dismissal was neither excessive nor erroneous.

F. **Delete** Conclusions of Law paragraph 5, and substitute the following:

5. Thus, as a classified employee with status, McGowan could only be dismissed by a showing of just cause and his employer would have to demonstrate that his dismissal was neither excessive nor erroneous.

G. **Delete** Conclusions of Law paragraphs 7 through 17, and substitute the following:

7. Having proven by a preponderance of the evidence that McGowan deserved an evaluation score of 146 and a final performance rating of “Unacceptable,” KDA has demonstrated just cause for McGowan’s dismissal. KDA has also demonstrated that his dismissal was neither excessive nor erroneous, given his evaluation.

8. In reaching its Findings and Conclusions, the Personnel Board rejects the argument by KDA that McGowan waived his right to contest his evaluation by not presenting documentation to John Board or Shawn Skidmore during the reconsideration process. KDA’s reliance on the previous Personnel Board decision of Peggy Washington vs. Education and Workforce Development Cabinet, 2009 WL 3412907 (Ky. PB 2009-085), is misplaced. In the Washington case, the employee agreed with her evaluation and she received an evaluation in the “Good” category. The McGowan case is easily distinguishable. McGowan took all necessary steps to appeal his evaluation, including disagreeing with his evaluation twice and requesting reconsideration both times. In addition, he filed a timely appeal. McGowan’s actions did not constitute a waiver of any arguments he had regarding his evaluation.

9. In addition to rejecting the argument that McGowan waived any challenge to his evaluation by not presenting documentation to John Board or Shawn

Skidmore, the Personnel Board also rejects any argument by KDA that a broad reference to “unsatisfactory work performance” in its dismissal letter allows it to subsequently rely upon particular work deficiencies not specifically enumerated in its dismissal letter to support its decision to dismiss the Appellant. KDA is required to follow the provisions of KRS 18A.095(7) and list with specificity the particular allegations they should be prepared to defend against. The Personnel Board analyzed this case with the understanding that KDA had the burden of proof to establish the correctness of the evaluation score and whether dismissal was warranted based on the Appellant’s evaluation score. The burden of proof was not on McGowan to establish that his evaluation score was incorrect.

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 that the Appellant’s appeals are **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 15th day of July, 2020.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
SECRETARY

A copy hereof this day mailed to:
Hon. Nicole Liberto
Hon. Joseph Bilby
Hon. Paul Fauri

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NOS. 2019-073 AND 2019-099**

LOWELL MCGOWAN

APPELLANT

VS.

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

DEPARTMENT OF AGRICULTURE

APPELLEE

*** **

This matter came on for an evidentiary hearing on November 12, 14, 26, and 27, 2019, at the office of the Kentucky Personnel Board, 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. E. Patrick Moores, Hearing Officer. The proceedings were recorded by audio/video equipment as authorized by virtue of KRS Chapter 18A.

The Appellant, Lowell McGowan, was present and represented by Hon. Paul A. Fauri of Frankfort, Kentucky. The Appellee, Kentucky Department of Agriculture (hereinafter "KDA"), was represented by the Hon. Nicole T. Liberto and the Hon. Joseph A. Bilby, Attorneys for Kentucky Department of Agriculture, Frankfort, Kentucky.

I. STATEMENT OF THE CASE

1. Lowell McGowan initially appealed his 2018 Annual Employee Performance Evaluation and the KDA's decision on April 15, 2019, to dismiss him from his position as an Agricultural Inspector III with the KDA's Office of Consumer and Environmental Protection, Division of Environmental Services, Public Pest and Recycling Assistance Branch, West Section.

2. McGowan's first appeal concerned his 2018 Annual Employee Performance Evaluation, which resulted in a low score and an overall rating placing him in the "Unacceptable" category wherein, upon receiving such a score, demotion or termination is required by statute. McGowan requested reconsideration. He was notified by the KDA that, after review of the evaluation, no changes would be made to his 2018 evaluation score. McGowan filed an appeal on April 3, 2019, alleging that he should have been rated as "Highly Effective," or better, and that he had been rated by a person who "had no knowledge of how the work was performed."

3. On April 15, 2019, Mark White, the Director of the KDA Division of Human Resources and the Appointing Authority, stated in the letter of dismissal to McGowan that he concluded that dismissal was appropriate, effective April 17, 2019. White stated in the letter that the dismissal was based on McGowan's alleged unsatisfactory work performance, pursuant to 101

KAR 1:345, Section 1, and 101 KAR 2:180, Section 8, for the reasons stated in the written evaluation and the low score he received.

4. McGowan's appeal of the dismissal was timely filed with the Kentucky Personnel Board on April 30, 2019. The appeal was based on the argument that he was off work for much of 2018 due to sick leave and that he did not have an immediate supervisor from June 2017 through the first half of 2018. He further appealed on the basis that the evaluation was not supported with documentation, violated the evaluation regulation, and was arbitrary in violation of Section 2 of the Kentucky Constitution.

5. A pre-hearing conference was held before a Hearing Officer on June 13, 2019, the two appeals were consolidated, and scheduled for an evidentiary hearing on October 1 and 2, 2019, which was subsequently rescheduled to November 12 and 14, 2019.

6. The issues presented at the hearing were whether the dismissal of McGowan was excessive nor erroneous and was taken with just cause in addition to McGowan's challenge to his employee evaluation. The Appellee KDA had the burden of proof by a preponderance of the evidence.

7. Following the conclusion of the hearing of all the evidence, the Hearing Officer requested, and the Board ordered, that the parties submit briefs on their respective position concerning the issues presented. Subsequently, the matter was submitted to the Hearing Officer for a findings of fact, conclusions of law, and a recommended order concerning the appeal.

II. SUMMARY OF THE EVIDENCE

1. The first witness was **Paul Shawn Skidmore**, Branch Manager of the KDA's Public Pest and Recycling Branch. He has been employed in the Department of Agriculture for twenty-three years and was McGowan's supervisor following the death of Roger Wilson. Beginning on July 1, 2017, he was promoted to Administrative Branch Manager of the Public Pest and Recycling Assistance Branch. Skidmore continued to be McGowan's immediate supervisor up through May 2018, when John Board became his direct field supervisor. He described that McGowan's job duties involved working with and supervising the application of chemicals used for mosquito control, nuisance weed programs, black fly programs, and bird control programs. His responsibilities in these programs included the application of the chemicals in the pest control programs, the chemical collection when the jobs were completed, and supervising the rinse and return of chemical containers.

2. Skidmore testified that McGowan was assigned to the western part of the Commonwealth of Kentucky, which was comprised of the far western counties in the state. He said the assignments were made for the areas to be worked by email notification to the inspectors, and that typically the state employee would work a seven-and-a-half-hour day. The inspectors normally worked out of the field offices and would do their paperwork there or at their home. They are provided with state computers that are to be used for official business only and not

personal use. They are also provided with state vehicles, which are equipped with GPS devices to monitor their location, times of use, and mileage.

3. Skidmore testified that the Mosquito Control Fogging Program was one of McGowan's responsibilities, which generally started in mid-May of each year and continued through October. He stated that the KDA would receive requests to control mosquitos in residential areas, campgrounds, and parks utilized by the public. The KDA kept track of where the requests came from and, once an application was made, the work would be inspected by the KDA.

4. Skidmore testified that the KDA also provided a noxious weed spraying program that was performed on fields in response to requests from farmers who signed up for the program during the first two months of the year. He said that a farmer can only participate in this program once every four years. The spraying would be done during the summer months with a "broad cast" spray in the fields and "spot" spraying along the fence lines.

5. Skidmore testified that they also performed a black fly control program, which involved only a short "window" of time during the year, of approximately ten days, and typically was conducted during the end of February to the first of March, in which they applied the chemical to most larva breeding areas near water and rivers.

6. Skidmore said that the KDA inspectors also supervised a rinse and return recycling of the chemical containers following the application of the chemicals on the farms, where the KDA would set up times and places for inspection of the work done, start collecting the chemical containers and materials, and bind them. The recycling of the containers and materials were done by the inspectors, who made sure the jugs were rinsed properly and not contaminated. He said the chemical pick-up program helped the farmers dispose of chemicals related to agriculture and farming operations and were stored by the KDA.

7. Skidmore testified concerning communication issues he was experiencing with McGowan concerning his failure to report problems he was having in the field and in his failure to follow instructions. He said that, in January 2018, he had also discussed with McGowan punctuality issues and the accuracy of the time McGowan claimed on his timesheet. He also discussed with McGowan his failure to promote department programs in the local extension offices that resulted in little participation in his area. Skidmore testified that McGowan had also failed to follow instructions he had been sent to provide the KDA branch office with an email address and a home address where he could be reached for sending him work assignments that were usually sent by email a couple days prior to the task's start time.

8. Skidmore testified that, by April 2018, McGowan had not responded to his requests. McGowan finally responded to Skidmore in an email in which he claimed that he did not have a direct field supervisor to report to, after Roger Wilson died in June 2017, and that he was not aware that Skidmore was his immediate supervisor. Skidmore referenced an email he sent McGowan on April 26, 2018, confirming that he, Skidmore, was the Branch Manager, adding that he had been

McGowan's immediate supervisor since July 1, 2017, and saying he told McGowan, "so now you have been told."

9. Skidmore also testified about documentation of the time McGowan claimed he was working, which was not verified by the GPS device in McGowan's truck as the device failed to confirm his claimed movements to various work sites, raising concerns that McGowan was not accurately reporting his time worked. Skidmore prepared a log that was compiled from an audit comparing McGowan's timesheets to the data recorded by his vehicle's GPS tracking device. According to the log, McGowan claimed he worked 10 hours on January 10, 2018, but no GPS activity was recorded; 10 hours work time was claimed on January 25 with no GPS activity recorded; 10 hours claimed on January 30 with no GPS activity; 10 hours claimed on January 31 with no GPS activity; 10 hours claimed on February 1 with no GPS activity; 7.5 hour claimed on February 12 with no GPS activity; 10 hours claimed on February 14 with no GPS activity; 10 hours claimed on February 21 with no GPS activity; 10 hours claimed on February 22 with no GPS activity; 10 hours claimed on April 3 with no GPS activity; 7.5 hours claimed on April 6 with no GPS activity; and 7.5 hours claimed on both May 30 and 31 with no GPS activity either day. On other occasions, McGowan reported days he did not work, claiming sick leave, yet the GPS recorded vehicle activity of 7 hours and 7 minutes on February 9, and 4 hours and 48 minutes on June 20. Other occasions reflected GPS recorded activity on the vehicle on days McGowan did not claim work time, raising the issue of his personal use of government property unrelated to his work activities.

10. Skidmore testified about an incident that occurred on May 23, 2018, in Carlisle County, pertaining to mosquito fogging. Skidmore testified that he and others in the KDA office had received a backlog of requests from Carlisle and Marshall Counties. He stated that he was unsuccessful in reaching McGowan, and that he sent him a message that they were coming down to his district field office, but that McGowan did not show up. He said McGowan later called him and stated that he was in Trigg County, but that he never gave a reason why he was unable to meet them.

11. Skidmore testified about another incident that occurred on June 5, 2018. John Board was on his second day of his job as supervisor in western Kentucky and they were following his instructions to clean up the shop, which was in disarray. Skidmore said that, at one point, McGowan said to them that he had no concern about what anybody in the Frankfort office thought. Skidmore further stated that he did not know what McGowan did there that day, as he did not see him doing anything, except using his phone's video camera to film them working in the shop; however, McGowan's timesheet reflected he worked ten hours that day.

12. In early August 2018, Skidmore prepared a mid-year interim review concerning McGowan, in which he reported his work performance as very poor and sub-standard as to where it should be, and that McGowan did not meet the expectations of his job. He reported that McGowan completed only a small number of his mosquito fogging assignments, and many were not completed in a timely manner. He further reported that McGowan's work attendance had not been good, and that his vehicle's GPS device reflected issues of concern with whether McGowan

started and ended his workdays as scheduled and reported. He further noted that McGowan did not exhibit any initiative concerning public outreach about the KDA programs, and that he had not kept his supervisors informed of the progress of his work assignments out in the field. He reported that not only was McGowan a very poor communicator with his supervisor and branch manager, but that he failed to show up numerous times for meetings or work assignments at the western Kentucky shop and office. Skidmore further noted that McGowan did not work well with the other field staff concerning the work assignments, and that, on one occasion, his failure to communicate resulted in duplicate applications of chemicals being made. Skidmore produced a chart that compared each inspector's production and completion of their assigned work, and McGowan's production compared very poorly. Skidmore testified that McGowan was the least productive member of the inspector team, adding that "it wasn't even close."

13. On July 3, 2018, the appointing authority for the KDA, Mark White, wrote a letter to McGowan, advising him of the department's intent to terminate his employment with the agency. Skidmore testified that McGowan was given a letter of reprimand instead, and, on August 6, 2018, McGowan was given a Performance Improvement Plan (PIP) to be reviewed over a six-month period, up to February 11, 2019. Skidmore said he did not create the PIP and that he did not know who did. However, he testified that he discussed the PIP with McGowan, but that any other follow-up on the PIP was done by John Board. The job performance areas selected in the PIP for improvement were: (1) communication, requiring him to "immediately improve" communication with his supervisors; (2) time management, requiring him to not falsify timesheets, but accurately reflect the actual time worked; (3) help with work tasks, directing him to not use non-state employees on his assigned work duties; (4) work location, instructing him to select one location as his office of record; and (5) work equipment, instructing him that personal vehicles or equipment were not to be used on his assigned work tasks unless he received written pre-approval from his supervisors. The requirement for him to select the work location was the result of a continuation of the on-going requests from his supervisors - since January - for a home and email address whereby he could receive required work assignments and documents and directed him to provide it by August 15, 2018. On August 9, McGowan sent his supervisor, John Board, an email informing him of his email address and that his mother's residence in Princeton, Kentucky, would be his home address for receiving his mail and where his state vehicle would be located when he was not working.

14. Skidmore testified that they saw no change or improvement in McGowan's work performance, particularly in communications with his supervisors and time management in the accuracy of his timesheets. McGowan was on administrative leave during the month of July 2018 and on sick leave recovering from surgery during the following September and October. Skidmore said that he and Board had a lot of discussions concerning McGowan's work performance.

15. On November 22, 2017, a meeting was conducted at the office of the Commissioner of the KDA, attended by David Wayne, Director of the Division of Environmental Services, John Cook, Executive Director of the Office of Consumer and Environmental Protection, and Keith Rogers, Chief of Staff of the KDA. Skidmore testified that he did not attend this meeting, but it was conducted to review the concerns he had expressed to the Division from his observations

regarding McGowan's discrepancies in his time reporting over a short period of time and complaints he had received from co-workers that McGowan was not showing up at assigned worksites. Skidmore said his biggest concern was McGowan's time reporting, which did not match the GPS recording. It was reported to McGowan, in a letter dated July 3, 2018, from the KDA Human Resources Director and Appointing Authority, Mark White, of the KDA's intent to dismiss him as it was decided at this meeting that there was sufficient evidence of "possible abuse of state time and resources." It was determined to conduct an audit comparing his timesheets to the GPS tracking reports from his state vehicle, as authorized by the policy and procedures outlined by the Finance and Administration Cabinet's Division of Fleet Management. The audit was performed during the period of November 8, 2017, through April 19, 2018.

16. Skidmore said that, in the meantime, he prepared the Employee Evaluation of McGowan on January 24, 2018, of his work performance during the calendar year 2017, based on information he received from previous Interim Evaluations that year completed by Roger Wilson and David Wayne. Skidmore gave McGowan an evaluation rating score of 412, which placed him well within the overall evaluation that his work was "Highly Effective."

17. Skidmore testified that he provided input to John Board, who prepared McGowan's Employee Evaluation for calendar year 2018. Board scored McGowan's performance evaluation for 2018 with an overall rating at 146, which meant that his work performance was unacceptable. Skidmore said in addition to the issues raised in the PIP given to McGowan in August 2017, his failure to complete assignments relating to the Black Fly Pest Control Program and the Bird program, and his failure to promote the Mosquito Control Program were a major factor that reduced his score from the 5 in the 2017 Evaluation to a 2 on the 2018 Evaluation. He said that other matters that determined his low score were: (1) his failure to properly maintain the equipment, materials and vehicles, stating that there were bags of chemicals in the shop that had not been used for 20 years, and (2) his improper servicing of equipment, which resulted in a change in the Evaluation of his operating equipment in a professional and safe manner from a 5 in 2017 to a 1 in 2018. He also received 1's on his evaluation concerning his failure to timely respond to requests for service in the Public Pest & Recycling Assistance program.

18. Skidmore testified that McGowan disagreed with the evaluation for 2018 and requested a reevaluation. Skidmore said that the Kentucky Administrative Regulations require that an employee's request for reconsideration of his Employee Evaluation must be granted. (101 KAR 2:180, Section 7.) Skidmore said he instructed McGowan to submit a written statement offering his perspective as to where the evaluation was in error, with supporting documentation, but McGowan never did, providing only verbal argument.

19. Skidmore admitted that he signed McGowan's timesheets as approved, most of which indicated he worked ten-hour days three days a week, and 7.5 hours on the fourth day. He stated that McGowan and all field employees were on "flex time" 24/7. However, when Skidmore showed his concerns about McGowan's time statements to his director, he was instructed to access the GPS records from McGowan's service vehicle, and that led to their finding discrepancies in

his reported time. The state truck not moving for consecutive days was important in determining whether McGowan was turning in false time statements.

20. **John Board III** became a supervisor of the western section of the KDA on June 1, 2018. He previously had worked in law enforcement in western Tennessee and for the U.S Enrichment Corporation for Protective Services in Paducah, Kentucky. In 2014, he enrolled in Murray State University and graduated with a degree in agriculture. He testified that when he went to work for the KDA, he was trained on conducting employee evaluations in August 2018.

21. Board testified that McGowan was the first person he supervised in the section and did so for only approximately seven months. He said that he started by sending a lengthy email on June 4, 2018, to McGowan in which he stated matters of immediate concern and objectives to be met by McGowan. He said he thought the email was a good way to start by clearly pointing out to McGowan expectations on issues and matters of concern. Among the matters discussed in the email were: (1) McGowan would be required to keep Board up to date on his work activities; (2) corrective actions needed to be taken with the condition of the facilities and units of the western Kentucky section; (3) items that were in unacceptable condition needed to be removed to the landfill; (4) his personal items needed to be taken home; (5) timekeeping for work activities, including maintaining a daily log book to record his miles and daily activities, will be reviewed and addressed; (5) daily fleet logs are to be filled out at the end of each month; (6) the backlog of requests for weed and pest control application needed to be addressed immediately; and (7) as he completed the activities he needed to email the numbers on each activity to Board. Board's email to McGowan concluded with describing the persons comprising his chain of command within the KDA. Board followed up on this email later that afternoon with another email instructing McGowan on the requirements in the state's policies and procedures for using and requesting leave.

22. Board testified that McGowan was on annual and administrative leave from the last week of June through July 2018. Board testified that, on August 9, 2018, following McGowan receiving the PIP, McGowan forwarded Board the address of his mother's residence in Princeton, Kentucky, where he would receive his mail. But McGowan wanted to have multiple addresses and Board followed up on this on August 13, 2018, informing McGowan that having more than one address was too burdensome and that he needed to select a single location where he would park his service vehicle and complete his work assignments. Nonetheless, McGowan never gave them a home address.

23. Board testified that he was part of the oversight of McGowan on his performance under the PIP, and that when they went over the PIP McGowan signed a statement that he understood the instructions in the PIP. However, Board said that McGowan continued to do things on his own and outside the PIP's instructions. Less than a week prior to his being given the PIP, Skidmore had emailed a message to McGowan that Board was his immediate supervisor and would email his assignments for work every day, from which he was not to deviate unless approved by Board. Board also stated that he gave him a printer in November 2018 to set up in his home office, and he again addressed the lack of communication from McGowan. Board testified that when he

recovered the state property from McGowan following his termination, it was in a county different from his mother's residence, the printer was still in the box, and appeared unused.

24. Board responded to the allegation McGowan made in his appeal to the evaluation that he never received any coaching or review under the PIP, by stating that the PIP and the subsequent emails showed that McGowan did receive coaching through the email discussions. Board also testified that McGowan was repeatedly encouraged that if he had any questions to call his supervisor for guidance, and that the PIP made it clear to McGowan that his communication with his supervisors "must improve immediately." However, Board testified that McGowan's responses were always abrasive and unprofessional, and that he continuously failed to document the completion of chemical applications on an individual's property, as is required by 302 KAR 27:020. Board said he was trained on this regulation, and that the regulation's record keeping requirement was complied with by the service reports they completed after every chemical application, and the employee performing the application kept a copy of the service report. However, McGowan was not complying with the regulation requirement as they were constantly having to talk to him about his failure to turn in the required reports.

25. Board cited as an example of McGowan's unprofessional communications an email exchange he had with McGowan on December 10 and 11, 2018, in which the discussion centered on his time recording. Board requested that if McGowan was going to request time off for the month that he needed to submit those days he wanted off, when he had time, to which McGowan responded with one word in all capital letters: "REALLY." Board pointed out that McGowan's abrasive response concerned him, particularly when he had previously pointed out in his second email, on June 4, 2018, to McGowan, the policies and procedure to be followed by McGowan when requesting leave time.

26. Board testified that McGowan did not comply with the instructions he was given. Board testified that, at the end of the pest and weed control seasons, it is also the responsibility of the staff to check the equipment, clean it, and store it for the next season. The cleaning procedure includes the draining of the oil from the machines, cleaning the filters with a flushing agent, checking the hoses, and the control boxes. He gave examples of McGowan's failure to maintain the facilities and equipment with photographs he took of the KDA shop facilities and equipment. The photographs showed the equipment was not maintained properly, equipment had been left outside on the grounds for months, the foliage and weeds outside the facility were overgrown and not maintained, some property was missing, that McGowan was storing some of his personal property in the state facility, filters on the sprayers were clogged and inoperable, and the facility was not kept in order. He said it was apparent that the shop did not get in such condition overnight, but the responsibility of cleanliness of the property falls on every staff member.

27. Board said he has been in the workforce since 1992, employed with the Commonwealth of Kentucky since 2016, and that he considered McGowan in the bottom 2% of all the workers he ever dealt with. He testified that, on January 23, 2019, he completed the annual Employee Evaluation on McGowan for 2018 following a discussion with Skidmore about what was going on that led to his mid-year evaluation completed on August 6, 2018. Board said that he

noted that Skidmore had reported in his mid-year evaluation that McGowan “has not adapted well to the leadership that is in position (Director, Branch Manager, Field Supervisor) as indicated by his failure to provide information about work and status as requested by supervisor” and that McGowan “has not kept his supervisor informed of the progress or lack of progress in the field. [McGowan] communicates very poorly with his supervisor and Branch Manager [and] has not worked well with the other field staff whenever they travel to western Ky. to assist the workload.” The mid-year evaluation went on to state: “Most work assignments are not completed in a timely manner if they are even completed at all.” Board testified that he was in the meeting on August 6, 2018, following the mid-year evaluation and the discussion on the PIP that was given McGowan. Board said that he evaluated McGowan based on what he observed on the days that he worked with McGowan and what he had to deal with from McGowan. Board described at times McGowan caused disruptions on job sites, was abrasive with him, yelled at fellow employees, and was “going rogue.” He said that McGowan made it apparent that he did not care about the work to be done and his responsibilities, and that he was not a team player. He gave McGowan only a 1 or 2 rating out of a possible 5 points on every job performance considered except for “Career Development” on which Board gave him a 4. Board said that it was his opinion that McGowan’s evaluation scores accurately reflected his work performance.

28. McGowan requested reconsideration of his year-end evaluation, and a meeting was held between Board and McGowan on January 24, 2019. Board stated that McGowan was given opportunities to provide documentation, such as service reports or other work records, which he did not produce, or verbal reasoning or anything of substance as to why the scores on the evaluation should be changed, but that McGowan only wanted to argue with him. Following the reconsideration of McGowan’s evaluation, Board signed that there was no change to the evaluation, which he said was “extremely lenient.” McGowan disagreed with Board’s reconsideration and requested reconsideration by the next line supervisor. The evaluation was reviewed by Skidmore on February 12, 2019, and he responded there was to be no change on the evaluation. Board said he never discussed the reconsideration with Skidmore. McGowan was placed on administrative leave, effective March 1, 2019.

29. Board said he has no involvement in terminating people, as that decision is made at the Human Resources level. He said he tried to work with McGowan throughout the PIP, by sending him emails on performing his duties. He said that if McGowan did his assigned work, there would have to be service reports on the work done. He added that, on the days McGowan reported that he worked, they often did not know where he was. Board said that he addressed this communication issue with McGowan when he became his supervisor in his email to him on June 4, 2018.

30. **Mark White** is the Human Resources Director for the KDA and the acting Appointing Authority. He testified that he has been employed in the human resources field for 23 years, including with the City of Frankfort, and with the KDA since April 2016.

31. White testified that he had previously been involved in issues concerning McGowan's time discrepancies and non-productivity with his supervisor, the late Roger Wilson. White said he had some issues with Wilson and a former employee named Beck, who also had discrepancies in his time worked as reflected with his vehicle's GPS data. He said that Wilson previously created problems by covering for Beck and McGowan when they did not do their work and concealing their non-productivity from the KDA home office, and this was apparently allowed to exist under the previous administration. White testified that he had also been receiving complaints from McGowan's co-workers in the field that McGowan was not showing up at the assigned worksites. He said that by the time this information was brought to his attention by Director David Wayne, Beck had already resigned the day before his pre-termination hearing.

32. White testified that everyone knew that they had GPS units in their state service vehicles, and its purpose. He testified that McGowan received and signed the vehicle operation policy on June 26, 2012. He said that when McGowan had claimed multiple hours worked for which there was no GPS documentation, an audit was performed. The audit raised discrepancies in McGowan's claimed time. The audit further produced documentation of use of the vehicle on dates McGowan claimed he did not work, which confirmed his misuse of state property. White said he used the information Wayne had given him from the audit of the written timesheets submitted by McGowan with the GPS data, as the basis to write the first letter to McGowan of a notice to dismiss him.

33. White testified that he felt comfortable pursuing the intent to dismiss McGowan, and that he signed the separate letters dated July 3, 2018, (1) giving notice to McGowan of the intent to dismiss his employment with the KDA, and (2) that he was being placed on administrative leave until the Department's final action. White testified that there was no paperwork that supported that McGowan was working at home on those dates where no GPS activity was indicated, or to support the use of the vehicle when he was not working. He said that McGowan requested a pre-termination hearing and appeared with legal counsel, at which McGowan claimed that he was using his personal vehicle, and that he used the vehicles of two friends, as an excuse for no GPS documentation on each of the dates where discrepancies existed. Additionally, McGowan claimed that he filled out his timesheets as he had always done, that they were approved, and that there were times he used the vehicle, but did not report his time. White testified that following that meeting he did not think they would be successful with a dismissal and that he signed the letter to McGowan, dated July 26, 2018, withdrawing the intent to dismiss, but that he would be receiving a written letter of reprimand, and that the KDA reserved the right to take further appropriate action should additional information come to their attention.

34. White issued a written reprimand to McGowan that same date, in which White reviewed the specific charges that led to the issuance of the notice of intent to dismiss, and to the disciplinary problems justifying the written reprimand. These issues included: (1) that failure to record time worked was falsifying a timesheet and would not be tolerated; (2) that he was to get approval from his supervisor for days he did not wish to work; (3) that he is to never ask or permit a non-state employee to assist him with his workload, as it could create liability for the Department; (4) that he was to improve his communication with management and provide his supervisor daily

updates on the status of his assignments; (5) that his supervisor would provide him with tasks to be performed each day and he was to provide his supervisor with a daily update on how he met and completed these tasks; (6) if he was unable to complete a task in the required timeframe he was to notify his supervisor as to the reason why and allow him an opportunity to provide the assistance needed; and (7) that his failure to follow any of these directives may lead to further disciplinary action up to and including dismissal. This written reprimand was then followed up with the PIP issued to McGowan on August 6, 2018. White said the PIP was intended to be a tool to improve McGowan's work performance. White testified that McGowan was on leave during some of the latter months of 2018 due to a hand injury, however, he said he did not know if McGowan filed a worker's comp claim.

35. White testified that he did not assist Board in drafting McGowan's Employee Evaluation for 2018. He said after the evaluation was given McGowan, he received a voice mail from McGowan at the end of January requesting a reconsideration. He said that he instructed McGowan that he needed to go through each category in the evaluation and provide documentation that disputed the low scores. He said he explained to McGowan that such documentation would include the service reports of his pest and weed control work, other work records, and verbal information that could be verified. He said that he was clear to McGowan as to what he needed to do. He testified that Skidmore also sent McGowan an email on January 30, 2019, which he copied to White, explaining the documentation he needed by February 6 for his reconsideration. White said that the three-page hand-written note that McGowan submitted was merely argumentative and claiming that he was in shock, without any documented information needed to satisfy the reconsideration requirements. White testified that this response from McGowan was not what he expected from a person about to be terminated, and he considered it insulting to the KDA. White said that McGowan had the opportunity to provide information for reconsideration, and he did not do it.

36. White testified that he chose to dismiss McGowan because there was no position in KDA available for demotion, and that he prepared the letter, dated February 28, 2019, giving McGowan notice of the intent to dismiss him from his position with the KDA. At the pre-termination meeting with McGowan, which was also attended by his attorney, they discussed the hand-written letter he had submitted with no supporting documentation and that McGowan's attorney said the basis of his letter was that he was in shock. White said he responded that he did not understand how he could claim McGowan was shocked. McGowan's attorney responded that the shock was based on the huge disparity in the score between the 2017 evaluation compared to the current 2018 evaluation. McGowan provided nothing else to cause the decision to be reconsidered. He subsequently discussed the termination with Skidmore and attorney Nicole Liberto, and they were all in agreement that, based on his work performance, McGowan should be dismissed. White reiterated that the dismissal was appropriate, and he issued the letter officially dismissing McGowan, which was sent to him by certified mail. He stated that he considered using the information that was provided in the 2018 dismissal notice as the reason for the notice of the intent to dismiss McGowan, but he chose to use the annual evaluation score to formulate the basis for the decision to dismiss.

37. **Dana Feldman** started with the KDA as the Executive Director of the KDA Consumer and Environmental Protection Department in May 2018. She had previously worked in the Kentucky Environment Cabinet, followed by service as the communications director and speechwriter for Governor Fletcher, after which she served as Director for the City of Albuquerque.

38. Feldman testified David Wayne came to her and told her that he needed to inform her about what was going on with McGowan's time records and GPS documentation. Then Skidmore and Board told her about McGowan's comment to them that he had no consciousness or concern about what Frankfort cared about. She said that when she was told about the condition of the western Kentucky shop under McGowan's supervision, she went onto Google Earth to view the shops and observed that it was a mess, with junk scattered on the property.

39. Feldman testified that she reviewed a draft of White's letter, dated July 3, 2018, giving McGowan notice of the intent to dismiss him from his position with the KDA. She testified that she thought the letter was appropriate. She said that when McGowan responded to the charges about the discrepancy with the GPS and his time records, her reaction was to take a step back and she discussed with White that they were in a situation where they could not prove or disprove the GPS discrepancy, and it was placing them in a ridiculous position. She agreed with White that they needed to back away from McGowan's dismissal, but that Board was unhappy with the decision telling them that they were too lenient. She said that White prepared a written reprimand and that she took the lead in preparing a Performance Improvement Plan (PIP), the purpose of which was to establish a very clear directive and easily understood set of expectations concerning his continued employment with the KDA. She said she had supervision of over 300 employees when she served as Director for the City of Albuquerque, and that she previously prepared PIPs. She said that everything in the PIP was a reaction to something they felt needed attention, that McGowan's attitude needed to be corrected, and that Skidmore and Board were concerned about McGowan's time and attendance and not reporting where he was going to be and what he was working on. She said they were concerned that McGowan took a lot of leave time without pre-approval, and that, on a lot of the days he took off, he would not alert his supervisor until the very day he took off.

40. Feldman said the PIP emphasized the areas that needed improvement by McGowan. She said that when the PIP was presented to McGowan, he did not express any confusion about what was expected from him, that he signed the PIP, and appeared to have consciousness of who he was to report to and how he was to do his job. Feldman testified that McGowan subsequently underwent surgery on August 28, 2018, and that he was on sick leave during September and October. She said that review periods were not specified in the PIP, but that Board followed up with McGowan by email communication and face-to-face meetings, and that she was copied on some of the emails Board sent to McGowan. She testified that the reason the review meeting scheduled in the PIP to take place on February 11, 2019, did not occur was because they were in the reconsideration mode of the evaluation requested by McGowan, and that he already had a deadline of February 6 to turn in any supporting documentation.

41. Feldman testified that she did not play a role in the preparation of the Annual Employee Performance Evaluation of McGowan for 2018, however, she did acknowledge that Board sent her a draft a couple of days before he presented it to McGowan. She said she had no conversation with Board about the evaluation rating and she made no recommendations, but she did not believe that the score needed to be changed. She said she believed Board wanted to be sure that she was aware that the score would trigger some action. She said that the executive staff discussed whether to offer McGowan a demotion instead of termination, but there was no open position available within KDA to do so, and that she had no doubt that termination was the right decision.

42. **Lowell McGowan** testified that his first encounter with Skidmore was in 2017 when he was informed that Skidmore was going to be appointed as his Branch Manager, but he was not informed that Skidmore would be his immediate direct supervisor. He said that between Wilson's death and Skidmore becoming Branch Manager in early 2017, and Board's appointment on June 1, 2018, he had no supervisor and essentially supervised himself. McGowan testified that Skidmore was his second-line supervisor, but that he had no direct supervisor, stating, "I was out there on my own." He acknowledged that Skidmore was his Branch Manager working out of Frankfort and would send him messages concerning his work by phone, text, or email, but that he was never told that Skidmore was also his direct supervisor.

43. McGowan admitted that he had no specific residential address, stating that he sometimes stayed with a girlfriend at her home, sometimes with other friends, and sometimes with his mother. He stated that one of the problems with the timekeeping of his work activity was that the flex schedule they were required to work provided no procedure to record time that carried over into the next day, and that he was eventually instructed to stop carrying his time into the next day, but to record his time worked on one day. He said that his overtime was approved as Comp time. He said that many of the days that showed time worked but no GPS activity were days that he would be working at home preparing documents, making phone calls, making contacts, preparing bills of lading, bailing containers, or setting them up for loading and pick up to a job site. He also testified that he often drove his personal vehicle to job sites, particularly on days he had to run errands or do some shopping. Other times he would use a 4-wheel vehicle when he was hauling chemicals or other items with a trailer. He noted that his time reported was always approved.

44. McGowan testified that his work normally did not require anyone to help him, but he stated there were times when, for safety sake, such as when he had to work along a river, he would have a friend join him. A frequent attendant was John Lewis, who was his former first-line supervisor. He also agreed that the shop where they stored chemicals and materials was in bad shape, and that some of his personal property was stored there. He stated that the machines used to apply the weed and pest control chemicals during the control operations would get very dirty, and that they were always being cleaned; however, water could not be applied on the building's premises because it would result in the spreading of the chemicals, thereby creating another problem. He said that he was never told that Chief Rogers had directed the shop to be cleaned up, adding that he never saw or spoke with Rogers. He also said that he was never given any

instructions concerning the cleaning of the shop, that he did not have any help to do the actual day-to-day maintenance and cleaning, and that his supervisors seemed to be more concerned about how things looked as opposed to getting the work done. However, when he had some help, the facilities were always kept in good order.

45. McGowan testified that the pie chart prepared by Skidmore, comparing his work production with other inspectors, was a joke because it covered a period of time that included when he did not work. McGowan also took issue with the claims that the photographs showed examples of poor maintenance. He further said he could not understand the problem with using and storing his personal equipment in a state facility when other persons in the KDA were allowed to do so. He stated, as an example, that he and Wilson had to use their personal mower at the facility, as they had been waiting for three years for Frankfort to provide them with a mower. He also stated that every filter on a machine will contain oil and is not an indicator of poor maintenance. He also explained that the occasion when he joined Skidmore and Board at a shop to clean it up, he was unable to be of much assistance because his arm was hurting, but he added that he did the sweeping.

46. McGowan addressed the allegation that he did not respond to emails by saying that many of them were sent to him late in the day or on occasions he was working in another county, and was unable to respond. He also testified that he never manipulated the GPS device in his service vehicle or did anything to it to cause the battery to go dead.

47. McGowan said that the last time he worked with Wilson before his death was in January 2017. He said that, prior to that, he worked with Wilson and Tim Beck every day, and that Beck left in July 2017. He stated that although Skidmore came on the scene in July 2017, he was not a hands-on supervisor, and that he got his assignments and instructions from Frankfort by fax, text, or email. He said that he supervised himself until Board was made his supervisor in June 2018.

48. McGowan testified that at the pre-termination meeting held in response to the Notice to Dismiss letter, dated July 3, 2018, they went over all the discrepancies concerning his work performance and that he came up with answers to each alleged issue. He said that, as a result of that meeting, the intent to dismiss was withdrawn and he was given a written reprimand instead. McGowan said he tried to follow the PIP as best as possible. He said that, from August 2018 to February 2019, he was never given a meeting to review his work performance despite his repeated requests for such a meeting to find out how he was doing on his job performance. He acknowledged that he and Board had numerous email exchanges, but Board never addressed the matters raised in the PIP.

49. McGowan testified that he met with Board at KSP Post 2 on January 23, 2019, got in Board's truck, and was handed his evaluation. He said he was struck by the low scores and that he asked Board if this was what he was actually going to turn in. McGowan said he spent approximately 15 minutes reading everything on the Evaluation, and he signed it that he disagreed with the whole thing. He said that when they met at the office shop trailer on the reconsideration, Board had already checked "no change" without any discussion. McGowan said he immediately

checked, "I disagree", which he said made Board mad. McGowan said that, at that time, he realized that this evaluation process did not matter, as all his previous annual evaluations had scored good, and that there was no way he could fail on everything as alleged in the document. He continued that, although it became obvious the KDA was planning on terminating him, he was completely blindsided by such a bad evaluation score. He said that none of the matters discussed in the evaluation were ever discussed with him by Board. Furthermore, he said that he was off work after August 26, 2018, and did not return to work until November. He said that he had experienced difficulty getting back to normal health following his surgery.

50. McGowan emphasized that he had made his career working with the KDA and said he was upset that Board gave him such a low score, despite having spent only a few months supervising him, and said he did not see how such a short period could allow Board to properly evaluate him. He further claimed that the evaluation process did not comply with state regulations mandated at 101 KAR 2:180, Section 8, which mandates that the evaluator shall "Present and explain all documentation relevant to an employee's performance evaluation," which he alleged was not done.

51. McGowan said that he enjoyed his work and wanted to continue employment with the KDA. He also said that he was always very busy, as western Kentucky has a major mosquito problem because practically every river in Kentucky -- the Tennessee, Cumberland, Ohio, and Mississippi Rivers -- comes to a point near Paducah. There are also major mosquito breeding grounds on which larvacide has to be applied in drain basins and ditches that are inundated by mosquitos, but that the application of the larvacide absolutely fixes the problem.

III. FINDINGS OF FACT

1. Lowell McGowan was a classified employee serving as an Agricultural Inspector III with the KDA's Office of Consumer and Environmental Protection, Division of Environmental Services, Public Pest and Recycling Assistance Branch, West Section.

2. In his position with the KDA, McGowan's primary duties and responsibilities involved working with and supervising the application of chemicals used for weed and pest control programs in twenty-two counties in far western Kentucky, and the assignments for the areas to be worked were sent to him from the branch office by fax, text, or email notification, and he typically he would work three ten-hour days and a seven-and-a-half-hour day.

3. During the years 2017 and 2018, McGowan apparently underwent a major transition in his employment situation with the death in early 2017 of his direct field supervisor, Roger Wilson, who had worked with him on a nearly daily basis, and McGowan was essentially left on his own in the field without a direct supervisor until a year later. During that time, McGowan was also experiencing major health issues that required carpel tunnel surgery on August 26, 2018, and subsequent absence from work to recover during September and October.

4. During that time, he was in the field without the presence of a direct supervisor, McGowan began to display an attitude that he would decide what work he would do and when, and became virtually unreachable and unaccountable to his superiors in the KDA. In 2017, the Branch office was experiencing difficulty in communication with McGowan, and his failure to acknowledge assignments, follow instructions, report where he was working, and the status of his assignments. He had an email exchange on April 26, 2018, with Paul Shawn Skidmore, Branch Manager of the KDA Public Pest and Recycling Branch, who was taking issue with McGowan for his lack of communication with the Branch office and failure to report on his status on work assignments. The Branch Manager repeatedly had asked McGowan for a home and email address, which McGowan never provided. McGowan responded that he had no supervision for over a year, and had never been told that Skidmore was his supervisor to which Skidmore responded that when McGowan did not have a direct field supervisor, then as Branch Manager, Skidmore was McGowan's immediate supervisor, and to emphasize the message told McGowan "so now you have been told."

5. John Board was appointed as McGowan's direct first-line supervisor on June 1, 2018, however, the situation with McGowan did not improve under Board's supervision. A question was raised about McGowan submitting falsified timesheets that were contradicted by the GPS data from the device in his service vehicle, which showed numerous dates that McGowan reported working seven to ten hours, but the GPS records revealed the service vehicle had not been moved. The GPS also recorded usage activity on the vehicle on days McGowan did not claim work time, raising the issue of his personal use of government property unrelated to his work activities. Everyone knew about the GPS devices and were aware of the policy concerning the use of the vehicle. McGowan had previously signed a statement that he had received and was aware of said policy.

6. The KDA's Human Resources Director and Acting Appointing Authority, Mark White, determined that the evidence of McGowan's falsification of his timesheets and non-productivity was sufficiently established, and on July 3, 2018, he issued a written notice to McGowan of the KDA's intent to dismiss him from his employment with the KDA. However, after a pre-termination meeting with McGowan and his attorney, and their explanations concerning the alleged discrepancies, White further reviewed the matter with Dana Feldman, the Executive Director of the KDA Consumer and Environmental Protection Department. It was determined the evidence from the GPS device was inconclusive and that they would back off the dismissal and issue him a written reprimand instead.

7. Following the issuance of the written reprimand, McGowan was subsequently issued a written Performance Improvement Plan (PIP) on August 6, 2018, which was designed to direct McGowan in specific detail regarding the improvements he needed to make in his work performance and to establish a very clear directive and easily understood set of expectations concerning his continued employment with the KDA.

8. A couple of weeks after the PIP was issued, McGowan underwent carpal tunnel surgery and was on sick leave until November. When he returned to duty, his work performance was still in issue and he was not demonstrating improvement. His supervisors were still having problems communicating with him, as evidenced by email communications between McGowan and Board, his failure to complete and report the status of the control programs, and his failure to properly maintain and clean the facilities and equipment under his responsibility. He also never provided the KDA a home address, although he did inform the KDA that he could receive mail at his mother's residence. The KDA supervisor, Branch Manager, and executives also continued to be concerned and troubled by his abrasive attitude and his self-declared lack of concern about the goals and work obligations of the Department.

9. In January 2019, Board prepared the Annual Employee Performance Evaluation on McGowan for his work during 2018, in which he rated him at the bottom on every work activity. Board had undergone training in August 2018 on preparing employee evaluations, and the score Board gave of 146 clearly meant that McGowan's work performance was unacceptable. The evaluation that McGowan had received for the previous year, 2017, was a rating score of 412, which placed him well within the overall evaluation that his work was "Highly Effective." Although no evidence of earlier evaluations was introduced into the record, McGowan's uncontradicted testimony was that his scores were always good, and that he was completely blindsided and shocked by the 2018 evaluation.

10. McGowan requested reconsideration from both the direct supervisor and evaluator, Board, and the second line supervisor, Skidmore, both of whom stated that the score was appropriate and refused to change it. The HR Director and his supervisor informed McGowan that he needed to submit some documentation, such as service reports and other work records demonstrating the scores improperly failed to consider those activities. However, McGowan never submitted any such documentation during the reconsiderations, nor were any records produced at the evidentiary hearing on the appeal. Instead, McGowan submitted a response that was merely argumentative and lacking in documentary evidence.

11. Under 101 KAR 2:180, Section 8, the score McGowan received in the 2018 Annual Employee Performance Evaluation placed him in a situation that required he was to be demoted or terminated from his employment. The testimony disclosed that there were no available positions to which he could be demoted, and the choice was made by White, the Director of the KDA Division of Human Resources and the Acting Appointing Authority, Feldman, Executive Director of the KDA Consumer and Environmental Protection Department, and Nicole Liberto, the KDA legal counsel, to dismiss McGowan. He prepared the notice of dismissal letter, dated February 28, 2019, giving McGowan notice of the intent to dismiss him from his position with the KDA.

12. A pre-termination meeting was provided to McGowan and his legal counsel, during which McGowan produced no documentary evidence to establish that the evaluation score was inappropriate, and on April 15, 2019, Mark White stated in the final letter of dismissal to McGowan that he concluded that the dismissal was appropriate, effective April 17, 2019. White stated in the letter that the dismissal was based on McGowan's alleged unsatisfactory work

performance, pursuant to 101 KAR 1:345, Section 1, and 101 KAR 2:180, Section 8, for the reasons stated in the written evaluation and the low score he received.

IV. CONCLUSIONS OF LAW

1. Disciplinary procedures of Executive Branch employees of the Commonwealth of Kentucky that qualify as classified employees, is governed under KRS 18A.095, which mandates in pertinent part:

- (1) A classified employee with status shall not be dismissed, demoted, suspended, or otherwise penalized except for cause.
- (2) Prior to dismissal, a classified employee with status shall be notified in writing of the intent to dismiss him. The notice shall also state:
 - (a) The specific reasons for dismissal including:
 1. The statutory or regulatory violation;
 2. The specific action or activity on which the intent to dismiss is based;
 3. The date, time, and place of such action or activity; and
 4. The name of the parties involved;

2. Section 7 of the foregoing statute provides:

- (7) If the cabinet or agency head or his designee determines that the employee shall be dismissed or otherwise penalized, the employee shall be notified in writing of:
 - (a) The effective date of his dismissal or other penalization;
 - (b) The specific reason for this action, including:
 1. The statutory or regulatory violation;
 2. The specific action or activity on which the dismissal or other penalization is based;
 3. The date, time, and place of the action or activity; and
 4. The name of the parties involved; and
 - (c) That he may appeal the dismissal or other penalization to the board within sixty (60) days after receipt of this notification, excluding the day he receives notice.

3. 101 KAR 2:180, Section 5, "Performance Evaluations and Ratings," provides:

- (1) Except as provided in Section 1(5)(d) of this administrative regulation, the evaluator and the employee shall meet no later than January 31 after the performance period ends to discuss the performance ratings.

(2) Eligible employees shall be evaluated in the four (4) categories described in Section 3 of this administrative regulation.

(3) All job duties identified within the categories shall be rated on a scale of one (1) to five (5), with five (5) representing superior performance.

(4) The final performance evaluation shall consist of a defined numerical rating. Point values for the overall performance rating shall be:

- (a) Outstanding: 450 to 500 points;
- (b) Highly effective: 350 to 449 points;
- (c) Good: 250 to 349 points;
- (d) Needs Improvement: 150 to 249 points; or
- (e) Unacceptable: less than 150 points.

(5) Unresolved disagreements on ratings or any aspect of the performance evaluation shall be reviewed through the reconsideration process established in Section 7 of this administrative regulation.

(6) Signatures of the evaluator, employee, and next line supervisor shall be required on the final evaluation.

- (a) The next line supervisor shall sign the evaluation after it is completed, signed, and dated by the evaluator and the employee.
- (b) For the purpose of evaluating or managing the performance of the evaluator, the next line supervisor's signature shall certify that he or she is aware of the evaluation and has reviewed it.

4. 101 KAR 2:180, Section 8. "Evaluation-based Agency Action" provides:

If an employee receives an overall rating of unacceptable, the agency shall:

- (1) Demote the employee to a position commensurate with the employee's skills and abilities; or
- (2) Terminate the employee.

5. Based on the foregoing, in this state, a civil service or similar job status is regarded as a vested right or, at least, is given the same protection as if it were. *Hopwood v. City of Paducah*, 424 S.W.2d 134 (Ky. 1968). In meeting this burden, the employer has to also protect an employer's concerns about employee insubordination, discipline, and harmony among the workforce.

6. 302 KAR 27:020 applies to the recordkeeping requirements pertaining to chemical agricultural pest control, and provides in pertinent part at Section 1, subsection 3:

(3) All private applicators, noncommercial applicators, pesticide operators, and pesticide applicators who apply pesticides shall maintain the following records:

- (a) Name and address of person receiving services;
- (b) Brand or product name of pesticides applied;

- (c) Date of application;
- (d) Purpose of application;
- (e) Size of area treated;
- (f) Crop, commodity, stored product, or type of area treated;
- (g) Name and certification number of applicator;
- (h) EPA registration number;
- (i) Location of application;
- (j) Total amount of each pesticide applied;
- (k) If application made by a trainee, the names of the trainee and supervisor;
and
- (l) Any other record as required by the label.

7. McGowan argued that the evaluation was improperly performed and did not provide any supporting documentation and was therefore arbitrary, that it failed to properly consider the work he performed, failed to properly score his duties, and that the notice of the intent to dismiss him did not contain the statutorily required specificity as to the action or activity on which the dismissal is based. He cites *Goss v. Personnel Board*, 456 S.W.2d 819 (Ky. 1970) and *Natural Resources and Environmental Protection Cabinet v. Hall*, 73 S.W.2d 504 (Ky. App. 1987), for the principle that specificity as to the reason for the intent to dismiss a merit employee is a mandatory requirement prior to taking any disciplinary action against an employee, especially in termination cases. Further, he argues that there is no proof to show that the evaluation score given by Board was correct, indicating that Board ignored the work actually performed by McGowan and his previous "Highly Effective" ratings, and rather focused on his dislike for McGowan. Additionally, McGowan argues that neither Board nor any other management person provided McGowan any supervision during the effective period of the PIP. McGowan concludes that if any disciplinary action was warranted, it should have been expressed with some type of write-up, such as a written reprimand.

8. In the *Goss* decision, *supra*, the Kentucky Court of Appeals ruled that "the statute contemplates that the notice shall be in sufficient detail to enable the employee to 'reply thereto in writing' . . . In the absence of a notice stating dates, places, and names the employee would not have a fair opportunity to reply and thus perhaps obtain reinstatement without the necessity of an appeal to the Personnel Board." 256 S.W.2d at 821.

9. The Personnel Board has previously upheld the mandatory requirement that the agency must meet its burden of proof by specifying in writing the inappropriate actions of the employee to justify the disciplinary action. See: *Aitken v. Cabinet for Health and Family Services*, 2018 WL 4037945 (KY PB 2017-001); *Blackburn v. Education and Workforce Cabinet*, 2016 WL 5869461 (KY PB 2015-279); *Howitz v. Revenue Cabinet*, 1996 WL 34442845 (KY PB 1995-564 & 1996-038); *Gershman v. Tourism Cabinet*, 1996 WL 34442816 (KY PB 1996-026).

10. The KDA has argued that McGowan waived his right to challenge KDA's actions against him arising out of his 2018 Annual Performance Evaluation scores, stating that McGowan provided none of the requested documentation for review by the KDA during his requested reconsideration, and that he only submitted a three-page handwritten note arguing that his score should have been higher, without any evidence, and asserted that the evaluation was a "callous, hard-hearted, insensitive campaign against me personally . . ." The KDA cites a decision by the Personnel Board in the matter of *Washington v. Education and Workforce Cabinet*, 2009 WL 3412907 (KY PB 2009-085), that the appellant's failure to provide the documentation that might warrant a higher score constituted a waiver of her right to challenge the evaluation score. On the other hand, an argument could easily be made by McGowan that the *Washington* decision is inappropriate to the facts of this case as he did not have the mandated specific details of his alleged wrongful conduct on which to fashion a response and could not therefore waive his right to the appeal.

11. In an unreported Kentucky appellate opinion that examined the statutory requirement under KRS 18A.095 that the proposed disciplinary action must list the specific reason for the action, including the statutory or regulatory violation, Judge Acree wrote for the Court of Appeals that "The statute is a general provision which gives appointing authorities means by which to address bad behavior of the unsatisfactory performance of all duties." *Alvey v. Com. Personnel Board*, 2008 WL 4182367 (Ky. App. 2008). After reviewing the findings of fact in this matter, there was a preponderance of evidence presented by the KDA of written notices given McGowan over nearly two years' time, of his actions that were creating problems making disciplinary actions necessary to correct his poor work performance.

12. The critical issue presented was the extent of the documentation from the KDA concerning McGowan's conduct and unsatisfactory work performance that was presented to him that gave him more than adequate notice of the action that was going to be taken against him. First, there were the emails directing him to provide a home and email address where he could be reached, which he refused to provide. Then there were emails concerning his failure to communicate and respond to the Branch Manager and provide status reports on his work assignments. Then there was the initial email sent to him on June 4, 2018, by his new direct field supervisor clearly detailing the procedures to be followed concerning his work duties, responding to inquiries, and the procedure to be followed when requesting leave. There were also emails concerning meetings and job assignments he was to perform, which he failed to comply with. There were photographs presented of the lack of maintenance and organization of the facilities and equipment under his responsibility. This was followed by the audit of his time records compared to the GPS data that eventually led to a Notice of Intent to Dismiss that detailed the discrepancies and possible fraud in his time submitted, followed by a written reprimand that indicated his failure to improve in the work areas specified would subject him to dismissal, a PIP that detailed his expected improvements, and the evaluations in 2017 and 2018, which detailed his work performance and the issues he was creating by his work performance. The second Notice of Intent to Dismiss he received in a six-month period referenced his low score on the evaluation, which mandated that disciplinary action be taken against him in the form of demotion or termination.

13. McGowan's argument in his reconsideration and during this appeal that he was "blindsided" and "shocked" by the low evaluation score defies credibility. He also argued that any action against him should merely be a written reprimand – his second in six months. If he failed to realize from all the documentation he received from his supervisor and management, leading up to the dismissal, that his work performance had to improve, then he probably could legitimately claim he was "blindsided." The KDA makes a valid point in its argument that McGowan had "grown accustomed to freedom from accountability." He had become what his supervisor Board described as abrasive, expressive on his lack of concern about KDA's goals and obligations, argumentative, and uncooperative with his co-workers in addition to the difficulties the KDA management was having with his work performance and reporting the status of the completion of his duties. In his conduct towards management, he was virtually challenging the KDA to do anything in response. When he was instructed on what to do in reconsideration of his low score, such as submitting service reports and the documentation required by 302 KAR 27:020, Section 3, he failed to do so, even failing to show in this appeal hearing how his low score was erroneous or arbitrary. He chose instead to argue, which has been reflective of his conduct over the last two years of his employment, which had to be reined in by the KDA.

14. In the matter of *Rowan County v. Sloas*, 201 S.W.3d 469, 479 (Ky. 2006), the Kentucky Supreme Court held that "in all societies, there is a line, or a "seam," between appropriate conduct and inappropriate conduct. Sometimes it is a broad line, sometimes thin. This line, or "seam," is defined or established by law." The Court went on to state, "Thus, we should always realize that every ruling we make, or "seam" we define, obscure, or adjust, has a composite effect, however large or small, on the "efficiency" of the society we live in." Id.

15. In conclusion, this Hearing Officer wishes to note that McGowan was employed by the KDA with the responsibility that involves providing a special needs service to the people of the Commonwealth of Kentucky, impacting the citizens, and the Commonwealth's vital agricultural needs. In this position of trust to which he was appointed, McGowan is in no position to wall himself off to doing his appointed duty and receive a paycheck, supervise himself, and ignore directives from his Branch Manager and other executives within the KDA, make it expressly known that he has no concern what anyone in the executive home office thinks, and otherwise be left alone and not accountable for his actions.

16. His ability and job performance were discussed on the record, but is not in issue, given the evidence introduced during this appeal. He failed to provide any evidence as to how his evaluation was erroneous or vindictive against him personally. The "appointment" of his employment conferred upon him by the KDA, on behalf of the people of the Commonwealth of Kentucky, carried with it certain responsibilities, which cannot be trifled with. The function of the services provided by the KDA is highly regulated by law and is very serious, not only to the people of the Commonwealth who provide for the position and pay for its implementation, but also to the agencies that regulate the use of the chemicals and their application that were his assigned responsibility. This does not give rise to an opportunity for a servant of the people to engage in a game of "gotcha" based upon a technicality in words in the documentation as to how he is to be notified of problems with his work performance. A person in McGowan's position and with his

experience presumptively would have known his responsibilities. The facts further reveal that McGowan was given reasonable written notice of his problems through numerous emails from his supervisor and the Branch Manager, his interim and annual evaluations, the first notice of dismissal, dated July 3, 2018 that led to a written reprimand on July 26, 2018, and a Performance Improvement Plan, issued on August 8, 2018. All of these gave him adequate notice in specific details where he was failing in his work performance and how his work performance was to improve. He was provided sufficient opportunities for rehabilitation and to salvage his job, which he arrogantly declined. His own conduct has brought about this result. It is the conclusion of this Hearing Officer that the penalty of dismissal from his employment with the KDA was appropriate and for just cause.

17. After weighing the evidence, reviewing the appropriate statutes, regulations, and institutional policies, and balancing the explanations provided and their supporting arguments presented in this disputed inquiry, it is the conclusion of this Hearing Officer, from a preponderance of the evidence, that the penalty of the dismissal imposed was appropriate and for just cause.

V. RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeals of **LOWELL MCGOWAN V. DEPARTMENT OF AGRICULTURE (APPEAL NOS. 2019-073 AND 2019-099)** 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 E. Patrick Moores**, this 4th day of May,
2020.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Nicole Liberto
Hon. Joe Bilby
Hon. Paul Fauri