

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2019-003

MICHAEL MIDDLETON

APPELLANT

VS.

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

TRANSPORTATION CABINET

APPELLEE

*** **

The Board, at its regular October 2019 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated September 11, 2019, and being duly advised,

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

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this 16th day of October, 2019.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. William Fogle
Mr. Michael Middleton
Mr. J. R. Dobner

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2019-003

MICHAEL MIDDLETON

APPELLANT

VS.

FINDINGS OF FACT, CONCLUSION OF LAW
AND RECOMMENDED ORDER

TRANSPORTATION CABINET

APPELLEE

*** **

This matter came on for evidentiary hearing on June 12, 2019 at 9:30 a.m., at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before Geoffrey B. Greenawalt, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Michael Middleton, was present at the evidentiary hearing and was not represented by legal counsel. The Appellee, Transportation Cabinet, was present and was represented by the Hon. William Fogle.

By Interim Order dated April 2, 2019, the issue at the evidentiary hearing was whether or not there was just cause for the Appellant's three-day suspension and whether such penalty was excessive or erroneous under the circumstances. The Appellee was assigned the burden of proof, which was to be by a preponderance of the evidence.

BACKGROUND

1. The Appellant, Michael Middleton, filed his appeal before the Personnel Board on January 8, 2019, appealing his suspension from duty and pay for three working days (effective the beginning of business December 13, 2018, and ending at the close of business on December 18, 2018) from his position as a Highway Superintendent II with the Kentucky Transportation Cabinet in Harlan County, Kentucky.

2. The first to testify was **Priscilla McCowan**, who is a Human Resource Administrator with the Kentucky Transportation Cabinet with twenty years of human resource experience. As part of her job duties, Ms. McCowan is charged with investigating requests for disciplinary action and drafting recommended written disciplinary letters for the Appointing Authority's review and execution.

3. According to Ms. McCowan, the Appellant is a Superintendent II at the Harlan County Maintenance Facility. This position is also referred to as "Head Foreman." As "Head Foreman," the Appellant is responsible for ensuring that the roadways in Harlan County are in good repair, free of obstructions, and are otherwise safe for the traveling public. According to Ms. McCowan, the Appellant knew that part of his job duties required him to be available outside his usual work schedule to handle emergencies.

4. Appellee's Exhibit 1 was introduced into the record and is a copy of the Job Class Specification for the Highway Superintendent II. Under the Job Class Specification, it is stated that the Appellant was to be able to work extended hours.

5. Appellee's Exhibit 2 was introduced into the record and is a copy of 101 KAR 2:095. Section 3(3) indicates that the Appellant may be required to work hours and days other than regular days and hours, including overtime.

6. Appellee's Exhibit 3 was introduced into the record and is a copy of General Administration and Personnel Policy No. 205 (GAP-205) regarding work schedules. Under GAP-205, a supervisor may require employees to work hours and days other than normal if it is in the best interest of the Cabinet. According to Ms. McCowan, it is the policy and practice of the Transportation Cabinet that employees, including the Appellant, are expected to respond to any call-outs during off hours in order to handle emergencies that may crop up.

7. Appellee's Exhibit 4 was introduced into the record and is a copy of the Appellant's three-day suspension letter, dated December 6, 2018. The suspension letter was drafted by Ms. McCowan and signed by the Appellee's Appointing Authority Designee, James R. Dobner. In essence, the Appellant was suspended for three days because he failed to respond to two emergency call-outs. The first occurred on the weekend of August 18, 2018. Following this incident, on August 27, 2018, the Appellant's immediate supervisors met with him and reiterated that he was to respond to emergency call-outs in a timely manner. On October 21, 2018, despite having been recently directed to respond to call-outs, the Appellant again failed to respond to an emergency call-out.

8. According to Ms. McCowan, a three-day suspension was chosen as the penalization herein because it involved a supervisor with heightened responsibility and could have jeopardized the safety of the driving public. She testified that, because of this, the penalization was reasonable and consistent with similar infractions involving other employees that resulted in disciplinary action.

9. Appellee's Exhibit 5 was introduced into the record and is a copy of General Administration and Personnel Policy No. 801 (GAP-801) concerning general and employee conduct. According to Ms. McCowan, the Appellant failed to follow this policy because he did not carry out his assignment as directed. Ms. McCowan explained that although the Appellant was never directed to complete the emergency assignment (because he chose not to respond to the call-out), he was, nonetheless, in violation of GAP-801 because he had previously been directed to respond to the call-outs, for which he had been issued a state work phone, and failed to do so.

10. Appellee's Exhibit 6 was introduced into the record and is an email from the Appellant to his immediate supervisors wherein the Appellant admitted to having failed to respond to the call-out in October 2018. Ms. McCowan stated that the excuse contained therein was not acceptable because the Appellant does not get the luxury of sleeping through a call. He had been issued a state work phone to answer. That was why the phone was given to him and he is to answer it whenever he is called. By not doing so, he put the driving public at risk.

11. Appellee's Exhibits 7 through 11 were introduced into the record as examples of disciplinary actions taken by the Appellee under similar circumstances to that of the Appellant's. These documents speak for themselves.

12. The next to testify at the hearing was **Robert Perkins** who is the Section Engineer for District 11, which covers Bell and Harlan Counties. Mr. Perkins is the Appellant's immediate (first line) supervisor.

13. Appellee's Exhibit 12 was introduced into the record and is a copy of a Request for Corrective or Major Disciplinary Action against the Appellant, which was prepared by Mr. Perkins after Appellant failed to respond to call-outs on August 18, 2018, and October 21, 2018.

14. According to Mr. Perkins, he had been having difficulty getting employees, including the Appellant, to respond to emergency call-outs and finally had to do something about it. Mr. Perkins stated that, on August 27, 2018, after the Appellant failed to respond to the call-out on August 18, 2018, he and David Fuson (the Appellant's second line supervisor) met with the Appellant and made sure that he and his assistant foreman knew they were to be available for all call-outs. It was only after the Appellant failed to respond to the call-out for a second time on October 21, 2018, that the disciplinary action request, marked as Appellee's Exhibit 12, was pursued. According to Mr. Perkins, it is important for the Appellant and his coworkers to respond to requests for call-outs for the safety of the traveling public. These

things just cannot be ignored because there are liability issues for everyone.

15. The next to testify was **David Fuson**, who is the Branch Manager working out of the Manchester District Office. Mr. Fuson is Robert Perkins' immediate supervisor and is the Appellant's second-line supervisor.

16. According to Mr. Fuson, in late August 2018, he and Mr. Perkins met with the Appellant regarding his failure to respond to call-outs. During the meeting, the importance of responding to these call-outs was reiterated. After the Appellant again failed to respond to a call-out in October 2018, disciplinary action was taken. According to Mr. Fuson, since the Appellant has been suspended, the problem with employees not responding to call-outs appears to have been solved.

17. David Fuson's testimony marked the end of the Appellee's case in chief.

18. The next to testify was the Appellant, **Michael Middleton**. Mr. Middleton is a Highway Superintendent II at the Harlan County Maintenance Garage. He has held this position for approximately five years.

19. Mr. Middleton admitted that he missed the October 2018 call-out. Appellant's Exhibit 1 was introduced into the record. According to the Appellant, this document was introduced because it was his understanding that James Ball, Brandon Kelly, and Jimmy Browning were not disciplined for failing to respond to the subject call-out.

20. Appellant's Exhibit 2 was then introduced into the record and are copies of the Appellant's Annual Employee Performance Evaluations for the last five years. According to Mr. Middleton, these evaluations are proof that he was a good employee. He stated that, during his nineteen and a half years of service with the Transportation Cabinet, he has not had any disciplinary action taken against him. According to Mr. Middleton, because of his work history, something less than the three-day suspension would have been more equitable under the circumstances. Mr. Middleton stated that the disciplinary action should have been started with a written reprimand or something considerably less than a three-day suspension.

21. On cross-examination, the Appellant admitted he did not request that any disciplinary action be taken against Jimmy Browning, James Ball, or Brandon Kelly for failing to respond to the subject call-out.

22. The Hearing Officer has considered the entire administrative record, including the testimony, and any exhibits therein.

23. This matter is governed by KRS 18A.095(1) which states:

A classified employee with status shall not be dismissed, demoted, suspended, or otherwise penalized except for cause.

FINDINGS OF FACT

The Hearing Officer makes the following Findings of Fact by a preponderance of the evidence.

1. The Appellant, Michael Middleton, a classified employee with status, timely filed his appeal with the Personnel Board on January 8, 2019, appealing his three-day suspension from duty and pay as a Highway Superintendent II with the Transportation Cabinet, District 11.

2. Pursuant to the Interim Order dated April 2, 2019, the issue before the Personnel Board was whether or not there was just cause for the three-day suspension given to the Appellant and whether that penalty was excessive or erroneous under the circumstances. The Appellee was given the burden of proof, which was to be by a preponderance of the evidence.

3. As the Highway Superintendent II in Harlan County, the Appellant has a duty to adhere to the policy and procedures of the Transportation Cabinet. It is clearly the Transportation Cabinet's policy that all highway maintenance employees, including the Highway Superintendent II, were expected to work additional time outside their ordinary work hours when necessary.

4. The Appellant was issued a cell phone by his employer, the Transportation Cabinet, with the expectation that he was to answer the phone when it rang. The Appellant was aware at all times that he was expected to respond in a timely fashion to any call-out requests made outside of his ordinary work schedule.

5. On August 18, 2018, Robert Perkins attempted to reach the Appellant to handle an emergency situation outside the Appellant's usual work schedule. The Appellant did not respond to Mr. Perkins' call. On or about August 27, 2018, Robert Perkins and David Fuson held a meeting with the Appellant wherein the importance and expectations regarding responding

to emergency call-outs outside his usual work schedule was reiterated. On October 21, 2018, David Fuson tried to reach the Appellant outside his usual work schedule to handle debris on a roadway inside of Harlan County. Per his own admission, the Appellant failed to respond to this call.

6. The failure to respond to emergency call-outs was an ongoing problem within District 11 and throughout the state. As evidenced by Appellee's Exhibits 7 through 11, the Appellant's three-day suspension was consistent with disciplinary actions taken against other Transportation Cabinet employees under similar circumstances and was otherwise neither excessive nor erroneous under the circumstances.

7. Given the importance of maintaining safe roads for the traveling public, coupled with the Appellant's heightened responsibility as a supervisor to adhere to and administer all of the Appellee's policies and procedures, there was just cause for the Appellee to suspend the Appellant for three days from duty and pay from his position as a Highway Superintendent II when he failed to respond to two emergency call-outs without a valid excuse.

CONCLUSION OF LAW

The Appellee has demonstrated by a preponderance of the evidence that the three-day suspension of the Appellant was neither excessive nor erroneous and was taken with just cause.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **MICHAEL MIDDLETON V. TRANSPORTATION CABINET (APPEAL NO. 2019-003)** 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 Geoffrey B. Greenawalt** this 11th day of September, 2019.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. William Fogle
Michael Middleton
J. R. Dobner