

CERTIFICATION OF PERSONNEL BOARD RECORDS

I certify that attached hereto is a true and correct copy of the Findings of Fact, Conclusions of Law and Recommended Order and Final Order in the case of **TONY MOORE VS. TRANSPORTATION CABINET (APPEAL NO. 2019-212)** as the same appears of record in the office of the Kentucky Personnel Board.

Witness my hand this 20th day of May, 2020.



MARK A. SIPEK, SECRETARY
KENTUCKY PERSONNEL BOARD

Copy to Secretary, Personnel Cabinet

B. **Delete** the Recommended Order and substitute the following:

The Hearing Officer recommends to the Personnel Board that the appeal of **TONY MOORE V. TRANSPORTATION CABINET (APPEAL NO. 2019-212)** be **SUSTAINED** and that the five-day suspension be set aside and removed from Appellant's personnel file; that Appellant receive back pay for the five days and any leave time he used to attend pre-hearing conferences and hearings at the Board, along with all other related benefits, and that he otherwise be made whole. [KRS 18A.105, KRS 18A.095(25), and 200 KAR 12:030.]

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

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 20th day of May, 2020.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Edwin Logan
Mr. Tony Moore
Mr. J. R. Dobner

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2019-212

TONY MOORE

APPELLANT

VS.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER

TRANSPORTATION CABINET

APPELLEE

* * * * *

This matter came on for evidentiary hearing on February 21, 2020 at 9:30 a.m., ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Colleen Beach, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by KRS Chapter 18A.

Appellant, Tony Moore, was present and was not represented by counsel. Appellee, Transportation Cabinet, was present and represented by the Hon. Edwin Logan. Also present as Agency representative was Mr. J.R. Dobner.

BACKGROUND

1. Appellant, Tony Moore, is a classified employee with status, employed as a Right-of-Way Program Specialist II. He appealed a five-day suspension for lack of good behavior on September 25, 2019. Appellant provided the following statement of facts relating to his appeal:

I am appealing the five day suspension I served beginning August 12, 2019 through August 16, 2019 for lack of good behavior in regards to while at work utilizing the personal cell phone of Mike Price, Right-of-Way Agent Supervisor, to send sexually explicit messages. These claims were made in retaliation, to an on going investigation into Price's behavior in the work place. The claim is erroneous and the suspension was issued without just cause and on circumstantial evidence. The suspension was issued without due process and the claims are false.

2. Appellant was notified of his suspension by means of an August 6, 2019 letter from James R. Dobner, Appointing Authority Designee, which is attached hereto and incorporated herein as **Recommended Order Attachment A**.

3. Appellee, having the burden of proof, called **James R. (J.R.) Dobner** as its first witness. Dobner was the Deputy Executive Director of the Office of Human Resource Management at the Kentucky Transportation Cabinet (KYTC) at the time this suspension was issued to Appellant. He is currently Branch Manager of the Employee Compliance Branch. He has worked in state government personnel for the past 16 years, 11 of which have been with the Cabinet.

4. Dobner testified that the event that ultimately led to Appellant's suspension came to his attention on January 10, 2019, when he learned that a complaint had been made regarding employee behavior in Highway District 4. Paul Sanders, Executive Director of Highway District 4 in Elizabethtown, informed management of a complaint made by Shawna Shuffett, an employee of District 4. Shuffett alleged that her coworker, Marsha Atwood, took her cell phone, read text messages on the phone, and shared the substance of the messages with other employees.

5. Investigation into this complaint was assigned to Julia Cunnagin, an Investigator in the Civil Rights Branch of KYTC. Pursuant to the investigation she conducted, it was discovered that other misconduct had occurred in District 4. Specifically, six other employees told Cunnagin it was common practice for employees to access their coworkers' cell phones. It was also alleged by Mike Price, the Right-of-Way Supervisor, that Appellant had taken his personal cell phone one day and sent a sexually explicit message on it to Price's wife. Appellant was issued a five-day suspension on August 6, 2019, for this behavior.

6. Throughout Dobner's testimony, the following General Administration and Personnel Policies on Employee Conduct were entered into the record: GAP-801, General Conduct, and GAP 803, Antiharassment/Antidiscrimination. Dobner stated that both policies had been in effect since 2008, and added that all employees receive these. In fact, GAP-803 is re-distributed every year at the time of an employee's annual evaluation.

7. Dobner testified that Cunnagin's investigation uncovered multiple instances of improper behavior by multiple employees. Dobner decided to take disciplinary action for any conduct "where an employee in District 4 was unkind or ugly to another employee." He separated employee actions into "direct" activity or "indirect" activity. Employees who committed bad behavior deemed to be "direct" were given five-day suspensions. Employees whose actions were "indirect" received three-day suspensions.¹

8. Dobner described the behavior of other employees who received five-day suspensions. Shawna Shuffett sent a text message to a coworker regarding an abortion clinic,

¹Dobner described examples of what he determined to be "direct" and "indirect" activity. Direct activity included an employee calling a co-worker a rude epithet; an action deemed "indirect" was an employee putting up a poster that said "Disabled dog," referring to a disabled employee's taking a therapy dog to work. The sign was posted in an area where the disabled employee would not have seen it.

and told her "This is where you need to go." She also said to the employee, who was not feeling well, "You must be pregnant and not know who the father is."

9. Marsha Atwood also received a five-day suspension for an inappropriate discussion about a coworker's anatomy, and for taking Shuffett's phone and sharing the contents of Shuffett's text messages with other employees.

10. Dobner stated that he saw Appellant's behavior to be similar to Atwood's as they both involved the wrongful taking and misuse of a coworker's cell phone. The only difference, in Dobner's estimation, between Appellant's behavior and Atwood's was that Shuffett filed a complaint against Atwood after Atwood's behavior toward her, but Price did not. Price described Appellant's behavior as "joking." However, when determining the appropriate level of discipline, Dobner looked at "the conduct itself, not how people reacted to it."

11. As for the discipline meted out to Mike Price, the Right-of-Way Supervisor, Dobner stated that Price received a 30-day suspension because he had ultimate responsibility for the culture and behavior in the District.

12. Dobner was asked to specifically address Appellant's conduct. Dobner answered that Appellant's actions were "part and parcel of the unprofessional behavior" prevalent in District 4. "When other employees pull pranks on people who are not employees of the Cabinet, that is, Price's wife, it doesn't present the most professional impression to the public." Dobner added that the misconduct was substantiated by two other witnesses, namely Price and Atwood.

13. On cross-examination, Dobner was asked what discipline was received by Roger Crew, who was based in Frankfort and had allegedly taken other employees' cell phones and ipads. Dobner answered that Crew did not receive any punishment.

14. Dobner was asked what discipline was received by Ali Horn, who allegedly had committed misconduct related to cell phone usage. Dobner answered that she received no punishment.

15. Dobner was asked why Appellant's punishment was harsher than four other employees (Crew, Horn, Smith and Bottoms). Dobner answered that none of them had sent sexually explicit text messages to a coworker's wife.

16. Dobner was asked why Appellant's suspension letter did not include the date, time and place of Appellant's alleged conduct, as is required by KRS 18A.095(8)(c)(2) and (3). Dobner answered that the event was alleged by Price to have occurred approximately a year before, but "Price didn't know the exact date." When asked if that information would typically be in a suspension letter, Dobner responded, "To the extent that we have the date, we put them in there as best we can."

17. Dobner was asked if he recommended Appellant's "involuntary transfer" from June 3, 2019, to July 24, 2019. Dobner confirmed that he had because he felt it was best to separate Appellant and Shawna Shuffett during the investigation. "We did not want additional incidents to occur. We have a custom of doing this." Dobner added that he did not see it as a punishment. "I was just trying to keep things quiet in an area that is troubled."

18. **Mike Price** is the District 4 Right-of-Way Supervisor. While he is not Appellant's supervisor, he and Appellant work in the same building.

19. Price was asked to describe Appellant's use of his cell phone. Price answered that in May 2016, he was sitting at his desk when his office phone rang. It was his wife on the line. She asked who had Price's cell phone. He asked her why she wanted to know. His wife responded that she had received a text message that Price would not have sent. Price testified that he then looked over to another work area. He saw Appellant, Ali Horn, Marsha Atwood, and some other employees sitting around a table and laughing. Appellant then admitted to Price that "he had done it." Price asked Appellant what he had sent and Appellant "just laughed."

20. Price stated that he did not think his cell phone was password protected at that point in time.

21. He had not given Appellant permission to use his phone. To the best of Price's recollection, the text message that Appellant sent said, "When I get home we're going to have crazy sex - oral sex - I will bend you over the table in every room of the house."

22. Price stated that his wife is not a state employee.

23. Price did not file a complaint about the incident. He brought it to the attention of Ms. Cunnagin during her 2019 investigation of Shawna Shuffett's complaint when she asked him to provide examples of improper cell phone use.

24. Price was asked if Appellant's actions offended him. He answered "No, but it offended my wife. At that time, she had just attended a Christian retreat, the Emmaus Walk, and it was a very spiritual time for her."

25. On cross-examination, Price was asked exactly when this event allegedly occurred. Price testified that it happened on the first Monday or Tuesday of May 2016. He is sure of the date because he looked at a calendar to see when his wife attended the retreat—the incident happened shortly after she returned.

26. Price was questioned why he did not give that date to the investigator, Ms. Cunnagin. Price answered, "I did." When it was noted that the date was not in Cunnagin's report, Price responded, "Lots of things were not in the report."

27. Price was asked if he had conversations regarding the office behavior before the investigator arrived. Price stated that the office had "received notice not to talk about it." He added that he did go to Appellant once to talk, in "friendly terms," about whether Appellant and his wife were having problems. Price denied he had been threatening or was trying to retaliate against Appellant. Price thought he had talked to Appellant in a way that Appellant respected. Price noted, "Once the table turned and when we knew about the affair, everything went south."

28. On re-cross-examination, Price was pressed to further elaborate on this conversation with Appellant. Price added that he and Appellant had also discussed "where Shuffett's allegations were at." Price explained that he had only seen a piece of paper on Shuffett's desk that documented that she had filed a complaint. He was not aware of any further details regarding it. He added that he was discussing the matter with Appellant "as much for his sake as for mine. I don't know what these girls have. When you make them all mad at you, they might show your wife pictures or something."

29. Price did not recall exactly when that conversation occurred, but did remember that it was "a long time" after the incident with the cell phone.

30. **Marsha Atwood** is employed in the Right-of-Way Division of District 4. She was asked to describe what happened in May 2016, regarding Appellant's use of Price's cell phone. Atwood testified that a group of employees were sitting around the break table. The employees present were Atwood, Appellant, Roger Crew, and Ali Horn. Appellant had Price's phone and sent a text. Atwood did not see the text message. Price told the group it was "inappropriate." Atwood stated that she remembered it occurred "around the time Price's wife did the Emmaus Walk."

31. At the end of Atwood's testimony, Appellee rested its case.

32. Appellant called his first witness. **Dean Loy** is the Director of the Division of Right-of-Way, Utilities and Rails, in the Department of Highways. He has worked for the Cabinet for more than 23 years.

33. Loy was asked if he issued Appellant's five-day suspension. He responded, "Not really. I delivered it, but I did not issue it."

34. As for whether Loy told Appellant to appeal it, Loy clarified that what he said was "If it was me, I would probably appeal. I thought the length of the suspension, five days, was a little bit excessive."

35. Loy was questioned why Appellant's workstation was changed from Elizabethtown to Frankfort. Loy testified that he "and J.R. [Dobner] talked about it. We both decided it would be best. This was not a change of workstation, however, because [Appellant's]

workstation is actually Frankfort. He is allowed to work out of Elizabethtown. We have several people who are allowed to work outside of Frankfort, but this is a privilege. It can be better for logistics to have them work in the District... [Appellant's] privilege was suspended due to the investigation. It was not a punishment, but a temporary move back to his original workstation." Loy added that Appellant is allowed to work 7 a.m. to 3 p.m., and he was given a state vehicle to drive the extra miles.

36. Loy stated that he could not "say either way" if he had ever, in 17 years, seen Appellant touch Mike Price's cell phone.

37. On cross-examination, Loy stated that he did inform Dobner that he felt Appellant's disciplinary action was excessive. He thought some of the other disciplinary actions employees in District 4 received were also excessive.

38. **Shawna Shuffett** is a Right-of-Way Agent II. She has been employed by the Cabinet for the past two and a half years.

39. She stated that her office is located on the second floor of the District 4 building, next to Mike Price's office.

40. Shuffett testified that she had never seen Appellant use Price's phone.

41. Shuffett received a five-day suspension for the following misconduct: her participation in a conversation Price recorded on his cell phone; the allegation that she harassed Marsha Atwood; and telling Malorie Smith to get an abortion.

42. At the end of Shuffett's testimony, Appellant rested his case. [**Hearing Officer Note:** Appellant made the decision not to testify on his own behalf.]

43. In his closing argument, Appellant stated that his suspension letter was not done in accordance with KRS 18A.095 in that it did not inform of the date, time, or place of his alleged misconduct. The day of the evidentiary hearing, February 21, 2020, was the first time Appellant learned of when the misconduct was alleged to have taken place and, in fact, Appellant did not recall the incident.

44. Appellant asserted that the level of the disciplinary action against him, a five-day suspension, was extreme. Other employees who engaged in actions similar to the one he is alleged to have done received a one-day suspension, or were not disciplined at all.

45. Appellant further asserted that Price did not testify that he saw Appellant send the text message, and any person at the table could have sent it.

46. In its closing argument, counsel for Appellee stated that a suspension letter's failure to document the specific date or time of the alleged misconduct is not a violation of KRS 18A.095, if that information is not known.

47. Appellee asserted the incident did occur as Appellant had admitted the behavior to Price. Another witness, Marsha Atwood, recalled that Appellant had Price's cell phone immediately before Price's wife called the office to complain about it.

48. KRS 18A.095(1) states:

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

49. 101 KAR 1:345, Sections 1 and 4, state as follows:

Section 1. General Provision.

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

Section 4. Suspension.

- (1) A suspension shall not exceed thirty (30) working days.
- (2) An employee without status may also be suspended for a period not to exceed thirty (30) days and shall be entitled to the same provisions of notice contained in KRS 18A.095(8) with the exception of the right of appeal.
- (3) When the employee is notified, copies of the notice of suspension shall be forwarded to the Commissioner of Personnel on the same date notice is delivered to the employee.

50. KRS 18A.095(8) states as follows:

A classified employee with status who is demoted, suspended, or otherwise penalized shall be notified in writing of:

- (a) The demotion, suspension, or other penalization;
- (b) The effective date of the demotion, suspension, or other penalization;
- (c) The specific reason for the action including:
 - 1. The statutory or regulatory violation;
 - 2. The specific action or activity on which the demotion, suspension, 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
- (d) That he or she has the right to appeal to the board within sixty (60) days, excluding the day that he or she received notification of the personnel action.

FINDINGS OF FACT

1. Appellant, Tony Moore, is a merit employee with status in the classified service. He filed a timely appeal from a five-day suspension from his position effective August 12, 2019.

2. Appellant was suspended from his position of Right-of-Way Program Specialist II, Kentucky Transportation Cabinet, for Lack of Good Behavior.

3. Appellant was suspended for allegedly accessing the cell phone of a coworker, Mike Price, without permission, and sending sexually inappropriate text messages to Price's wife.

4. Mike Price testified that he received a phone call from his wife one afternoon in which she complained that she had received a text from his cell phone that she assumed was not actually sent by him. Price stated that he looked out his office door and saw some employees sitting around a table and laughing. According to Price, Appellant admitted that he had sent the text, which was sexually inappropriate.

5. Marsha Atwood, a coworker, testified that she saw Appellant with Price's cell phone, but did not see the text message.

6. Price testified that this event occurred in May, 2016. He recalled the date because it happened shortly after his wife had gone on a Christian retreat. Price never filed a grievance against Appellant for this action.

7. The incident came to the attention of J.R. Dobner, then-Deputy Executive Director, Office of Human Resources, pursuant to an investigation conducted by Julia Cunnagin, an Investigator in the Civil Rights Branch of KYTC. The investigation was initiated to address a complaint by Shawna Shuffett regarding the behavior of Marsha Atwood.

8. Price testified that Cunnagin had asked him to cite examples of improper cell phone usage in the office. As one example, he mentioned Appellant's text message to his wife.

9. Price testified that he told Cunnagin the date the event took place, but this information did not appear in Cunnagin's report.

10. J.R. Dobner testified that Price had estimated that the event had taken place approximately a year before, but he could not recall the exact date.

The suspension letter Appellant received, dated August 6, 2019, is under the signature of J.R. Dobner, Appointing Authority Designee. The letter reads in relevant part: During the investigation, it was determined that while at work you have utilized the personal cell phone of Mike Price, Right of Way Agent Supervisor, to send sexually explicit text messages to his wife. Both Price and Marsha Atwood, Right of Way Agent III, witnessed you engaging in this conduct. (Appellee's Exhibit 1.)

11. Appellant chose not to testify. In his closing argument, he stated that the day of the evidentiary hearing, February 21, 2020, was the first time he had learned when the incident was alleged to have taken place. He also stated that he did not, in fact, recall the incident.

12. The Hearing Officer finds that Appellant's suspension letter did not notify the Appellant of the date, time, and place of the action on which the suspension was based, which is a violation of KRS 18A.095(8)(c)(3). Dobner stated that the omission of this information in the letter was due to Price's inability to recall these details. Dobner did state that Price told him it had happened "approximately a year ago," but even that information does not appear in the suspension letter. Dobner's testimony was contradicted by the testimony of Price himself who testified unhesitatingly that it occurred approximately four years ago, after his wife had attended a Christian retreat.

CONCLUSIONS OF LAW

1. The Hearing Officer concludes as a matter of law that the suspension of Appellant should be set aside because the suspension letter did not fulfill the requirements of KRS 18A.095(8). The letter did not include the date, time, and place of Appellant's alleged use of Mike Price's phone. The Hearing Officer rejects the explanation by J.R. Dobner that the date, time, and place was unknown, as the primary witness testifying to the incident, Mike Price, testified when and where the event happened, and that he had given this information to the Civil Rights Branch Investigator, Julia Cunnagin.

2. The Hearing Officer also concludes that even if the suspension letter had included the required information, the record does not support a five-day suspension under the facts of this appeal. Appellee did not meet its burden of proof to show that Appellant was suspended for cause. First, the complaining witness, Mike Price, never filed a grievance after the event, nor was evidence presented that he ever brought the incident to the attention of Appellant's supervisor. More importantly, the alleged incident of misconduct was said to have occurred over three years before Appellant was suspended for it. Considering how long ago the incident occurred, the deficiencies in the disciplinary letter, and that no corroborating evidence was offered regarding the exact wording of the texts Appellant allegedly sent, the Hearing Officer finds that Appellee failed to carry its burden of proof to show that a five-day suspension was appropriate under all the surrounding circumstances.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **TONY MOORE V. TRANSPORTATION CABINET (APPEAL NO. 2019-212)** be **SUSTAINED to the extent** that the five-day suspension be set aside and removed from Appellant's personnel file; that Appellant receive back pay for the five days and any leave time he used to attend pre-hearing conferences and hearings at the Board, along with all other related benefits, and that he otherwise be made whole. KRS 18A.105, KRS 18A.095(25), and 200 KAR 12:030.

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 Colleen Beach** this 20th day of April, 2020.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Edwin Logan
Mr. Tony Moore
Mr. J. R. Dobner



Matthew G. Bevin
Governor

COMMONWEALTH OF KENTUCKY
TRANSPORTATION CABINET

Frankfort, Kentucky 40622
www.transportation.ky.gov/

Greg Thomas
Secretary

August 6, 2019

Tony E. Moore

PERNR:

Re: Five (5) Day Suspension

Dear Mr. Moore:

Based on the authority of 18A.095 and 101 KAR 1:345, Section 4, you are hereby notified that you are officially suspended from duty and pay for five (5) working days, effective beginning of business Monday, August 12, 2019, through close of business on Friday, August 16, 2019. In accordance with 101 KAR 1:345, Section 1, you are being suspended from your position of Right-of-Way Program Specialist II in the Kentucky Transportation Cabinet (KYTC), Department of Highways, Division of Right-of-Way and Utilities, Relocation Branch, for the following specific reason:

Lack of Good Behavior. Shawna Shuffett, Right-of-Way Agent II, filed a complaint stemming from an incident that occurred on January 10, 2019. Although you were not involved in that particular incident, the subsequent investigation conducted by the KYTC Civil Rights Branch determined that you engaged in misconduct. During the investigation, it was determined that while at work you have utilized the personal cell phone of Mike Price, Right-of-Way Agent Supervisor, to send sexually explicit text messages to his wife. Both Price and Marsha Atwood, Right-of-Way Agent III, witnessed you engaging in this conduct.

Your actions are in violation of 101 KAR 1:345, General Administration and Personnel Policy GAP-801, General Conduct, and GAP-803, Antiharassment/Antidiscrimination, because while at work you used a co-worker's personal cell phone to send sexually explicit and inappropriate text messages to the co-worker's wife, engaged in activity that could embarrass or reflect adversely on the Commonwealth, and engaged in inappropriate behavior including inappropriate language.



An Equal Opportunity Employer

Recommended Order
Attachment A

Tony E. Moore
August 6, 2019
Page 2 of 2

Any further incidents of misconduct or poor work performance may result in disciplinary action, up to and including dismissal.

For your information, the Kentucky Employee Assistance Program (KEAP) is a voluntary and confidential assessment and referral service for state employees. This service may help you with any personal problems that may be affecting your job performance. KEAP can be reached at 1-800-445-5327 or (502) 564-5788.

As you are an employee with status, you may appeal this action to the Personnel Board within sixty (60) days after receipt of this notice, excluding the day of receipt. To appeal, you must complete the attached form and direct it to the address indicated on the form. Copies of KRS 18A.095 and 101 KAR 1:365 concerning appeal and hearing procedures are enclosed.

If you have any questions, please contact the Employee Compliance Branch at (502) 564-4610.

Sincerely,



James R. Dobner
Appointing Authority Designee

Attachments: Appeal Form

cc: Personnel Cabinet
Andy Barber, State Highway Engineer
Dean Loy, Division Director
Agency Personnel File