

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD

DAVID K. PRITCHARD (Appeal No. 2015-037) AND
JIMMY TREAS (APPEAL NO. 2015-042)

APPELLANTS

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

TRANSPORTATION CABINET

APPELLEE

*** **

The Board, at its regular August 2016 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated July 6, 2016, Appellants' Exceptions and Request for Oral Argument, Appellee's Response to Appellants' Exceptions, oral arguments and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be, and they hereby are approved, adopted and incorporated herein by reference as a part of this Order, and the Appellants' appeals are 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 17th day of August, 2016.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. William Fogle
Hon. Scott M. Miller
Mr. J. R. Dobner

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD

DAVID K. PRITCHARD (Appeal No. 2015-037)
JIMMY TREAS (Appeal No. 2015-042)

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AND RECOMMENDED ORDER**

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APPELLEE

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This matter came on for an evidentiary hearing on January 14, 2016, at 10:00 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Geoffrey Greenawalt, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellants, David K. Pritchard and Jimmy Treas, were present and represented by the Hon. Scott Miller. Also present on the Appellants' behalf was Mr. John Stovall with Teamsters Local 783. The Appellee, Transportation Cabinet, was present and represented by the Hon. William H. Fogle.

By Interim Order dated April 24, 2015, the appeals of *David K. Pritchard vs. Transportation Cabinet* (Appeal No. 2015-037) and *Jimmy Treas vs. Transportation Cabinet* (Appeal No. 2015-042) were consolidated for all purposes.

By Interim Order dated October 30, 2015, the issue at the evidentiary hearing was the Appellants contention that they were penalized by the assignment of overtime by the Appellee, and further the allegation that such violated Personnel Memorandum 13-09. As the parties who proposed a course of action be taken or a benefit be granted, the Appellants were assigned the burden of proof, which was to be by a preponderance of the evidence.

BACKGROUND

1. Appellant David K. Pritchard filed his appeal with the Personnel Board on March 2, 2015, alleging "Other Penalization," the same being the unfair practice of denying his request to be granted overtime inspecting contract mowing and tree cutting crews.

2. Appellant Jimmy K. Treas filed his appeal with the Personnel Board on March 4, 2015, also alleging "Other Penalization," the same being the unfair assignment of overtime hours inspecting contract mowing and tree cutting crews.

3. The first witness to testify was Appellant **Jimmy K. Treas**. Mr. Treas testified that he started with the Kentucky Department of Transportation, Highway Division, on January 16, 2001, and is currently a Highway Equipment Operator IV. His duties include the ability to operate all the equipment the state has in its possession, to inspect equipment, and to be a crew leader if on the road working with a crew. Mr. Treas works in Graves County, which uses contract labor to clear snow and cut grass.

4. Mr. Treas testified he has been an inspector of contract ice removal workers, and has gone with contract crews to make sure they stayed on the state right-of-way and that there was no damage to any state right-of-way. His duties as an inspector included monitoring the work being performed and filling out an inspection form. According to Mr. Treas, there were no special skill involved, and all he had to do was to be sure to go over the checklist with the contractor.

5. Mr. Treas filed a grievance on December 18, 2014, with his supervisor, Robbie Courtney. The grievance speaks for itself and was entered into the record and marked as Appellants' Exhibit 1. In essence, Mr. Treas' grievance was that Mr. Clarence "Gene" Rodgers, who also worked as an Equipment Operator in Graves County and who had less seniority than he, had been assigned all the overtime associated with inspecting contract mowers and tree cutters and that the overtime was never offered to him. According to Mr. Treas, overtime was available for inspecting the mowing contractors and he had requested he be given the same from his previous supervisor on several occasions. When he did not receive any of the overtime, this led him to file his grievance.

6. According to Mr. Treas, had overtime been made available to him, he definitely would have worked it because it pays more than his base rate, which was \$15.90 per hour. Mr. Treas testified that as a mowing contract inspector, he would have been required to travel to all 12 counties in District 1.

7. On cross-examination, Mr. Treas admitted he had no proof he had requested overtime from Mr. Bobby Wade, who was his previous supervisor. Also, Mr. Treas clarified that he has inspected state owned mowing work, but has never inspected contract mowing work. According to Mr. Treas, he was told he would not be allowed to do the inspection work because he was such a good Equipment Operator and the state didn't want to lose him.

8. The next to testify was Appellant **David K. Pritchard**, who has been with the Kentucky Department of Transportation, Highway Division, since January 16, 2008, and is currently an Equipment Operator III out of Graves County. His duties were to operate all heavy equipment and to perform light repair work, etc.

9. It was Mr. Pritchard's understanding that inspecting contract mowing and tree cutting work involved making sure the work was being done between required mile markers and documenting any damages or other unusual events that may have occurred. According to Mr. Pritchard, he believes he could perform the duties of the Inspector.

10. Mr. Pritchard testified he, Mr. Treas, and Clarence "Gene" Rodgers, who is also a Heavy Equipment Operator III, work out of the same location. According to Mr. Pritchard, he only saw Mr. Rodgers operate a dump truck. Instead of operating heavy equipment, it appeared Mr. Rodgers worked inspecting contract mowing almost all of the time.

11. Mr. Pritchard testified that his usual work shift begins at 7:00 a.m. and ends at 3:30 p.m. The mowing inspectors' workday begins before 7:00 a.m. and continues until after 3:30 p.m. It can also take place on weekends. According to Mr. Pritchard, in 2010 he requested from his then-supervisor, Bobby Wade, to be assigned inspection overtime work. The request was refused. He went on to ask Jason Looper, a District Engineer, the same and was again refused. In each case, he was told the work had always been done by one person and that is the way it would continue to be done.

12. Mr. Pritchard filed a grievance on January 14, 2015, complaining of Mr. Rodgers getting all the overtime involved with the mowing and tree cutting inspections. This grievance was marked and entered into the record as Appellants' Exhibit 2.

13. Mr. Pritchard testified he had worked previously on an inspector's job similar to that of contract mowing and tree cutting back with a contract ice removal crew in 2009. He also worked as mowing support with a state crew of contractors, at which time he was required to put out signs and record where and how much acreage was mowed. Mr. Pritchard noted Mr. Rodgers' current inspection job entails even less physical labor because it does not involve the physical placement of signs.

14. According to Mr. Pritchard, overtime pay is time and a half along with premium time (depending on the days the inspection duties are performed, including holidays, weekends, graveyard shift, etc.). Mr. Pritchard testified he verbally requested the overtime and that he had nothing in writing to demonstrate he had ever done so.

15. Appellants' Exhibit 3 was introduced into the record and documents the overtime worked by the Appellants and by Mr. Rodgers during 2014. If read correctly, Mr. Rodgers logged 792.5 hours of overtime in comparison to Mr. Treas' 59.25 hours and Mr. Pritchard's 29 hours.

16. On cross-examination, Mr. Pritchard acknowledged he first requested overtime in 2010. He also acknowledged that had he been assigned to the inspections duties, his regular crew would have been without his services as a Heavy Equipment Operator. In other words, when assigned to the inspection duties those duties are performed in place of one's job duties.

17. On redirect examination, Mr. Pritchard testified that contract mowing was set up months in advance, so the Transportation Cabinet would know which contractors were going to mow and where.

18. Appellants' Exhibit 4 was introduced into the record and is a copy of the April 15, 2013 letter from former Personnel Cabinet Secretary, Tim Longmeyer, with attached Personnel Memo 13-09 and Planned Overtime Frequently Asked Questions (FAQS). As indicated therein, in order to qualify as Planned Overtime, two elements must be met: (1) Either the Supervisor or Management must be aware of the need for the overtime at least 72 hours ahead of the time the work is required to be performed; and (2) The overtime work must be of a nature that it can be assigned to a number of individuals and is not specifically required to be assigned to a particular employee because of factors like facility assignment, shift assignment, population served, continuity of services, etc. If overtime meets these two criteria, it constitutes Planned Overtime subject to this policy. According to Mr. Pritchard there were no special skills required of the mowing or tree cutting inspectors. All inspectors had to do was fill out forms. On re-cross-examination, Mr. Pritchard also admitted that the hours of contract mowing were not predetermined, and there was no way to know exactly how many hours the mowing would entail.

19. The next witness called by the Appellants was **John Stovall**, with the Teamsters Union. As Mr. Stovall was not on the Appellant's Witness list, the Appellee objected to him testifying and the objection was sustained. However, the parties did stipulate that the Agreement Between the Commonwealth of Kentucky and Teamsters Local 783, marked and entered as Appellants' Exhibit 5, was a true and accurate copy of the same.

20. The next to testify was **Mr. Jamie Willett**. Mr. Willett works for the Department of Transportation, Highway Division, in Graves County and is also an Equipment Operator IV. He testified that he mainly runs heavy equipment, but that he has inspected contract ice removal work back in 2009.

21. Mr. Willett testified he has never inspected contract mowing or tree cutting work. However, in the Fall of 2014, while they were out marking trees to be cut, John Broderhausen asked him if he would be interested in doing so in the future. Mr. Willett was not interested in the job because he didn't want to commit to all the time that was required. According to Mr. Willett, Mr. Rodgers was the only one who ever inspected the mowing contractors and the job had never been posted on the Transportation Cabinet website. Finally, Mr. Willett testified that the contract mowers usually worked from dusk to dawn.

22. The next to testify was **Mr. Herald Gibson**, who is the Kentucky Transportation Cabinet, District 1, Transportation Branch Manager. Mr. Gibson has been an engineer for 35 years and has been employed by the Transportation Cabinet for over 17 years. His employment duties included the administrative management of construction, new construction, and road maintenance. According to Mr. Gibson, Mr. Pritchard remains a Heavy Equipment Operator while Mr. Treas has recently been promoted to an Engineering Support Group Maintenance Supervisor in McCracken County.

23. Mr. Gibson testified that up until several years ago, the Transportation Cabinet did all its own mowing. However, with the reduction of the work force, it had hired contractors to get the mowing done. According to Mr. Gibson, there are usually three to four mowing contracts and they are typically bid every three to four years. These contracts do not set forth the times of day that the mowing is to occur. Most of the contract contains boiler plate language and have no restrictions on when the contractors can mow (with the exception of certain holidays). The Transportation Cabinet's role is simply to administer the contract. The chosen inspectors are trained and assigned.

24. According to Mr. Gibson, Mr. Rodgers' inspection assignment came about in 2012 or 2013 after experiencing trouble with one or two contractors. According to Mr. Gibson, during this time, some contractors were actually dismissed. As such, the Transportation Cabinet became concerned with uniformity of services. This is when Mr. Rodgers came into the picture. According to Mr. Gibson, either Henry Luken or John Broderhausen chose Mr. Rodgers for the assignment. Apparently the call went out to all those interested in performing the inspection duties. Those interested were encouraged to go to their respective Foreman and supervisory Engineer to get their blessings. For reasons unknown to Mr. Gibson, Mr. Rodgers was made available in Graves County through Mr. Broderhausen. According to Mr. Gibson, there were between 16 and 18 employees district wide that could perform the inspection job.

25. When asked why Mr. Rodgers was used almost exclusively, Mr. Gibson stated that would be a good question for Mr. Broderhausen. To Mr. Gibson's understanding, Mr.

Rodgers had been trained and appeared to be good at the inspection job and got along well with all of the contractors. A big factor is the inspection job is a very time-consuming task which is not for everyone. The task also needs to be consistently performed and the inspector needs to have the trust of the contractors. In addition, pulling certain people away from their usual daily tasks can be a management concern, which can adversely affect the crew that person usually works with. According to Mr. Gibson, the overall main concern is always the health and safety of the public.

26. According to Mr. Gibson, both Appellants were exceptional equipment operators. Mr. Treas, as a Heavy Equipment Operator IV, was also a "boots on the ground" leader and played an important part in carrying out daily maintenance activities. As such, it was important to have him there and available.

27. Mr. Gibson reviewed the Appellants' grievances marked as Appellants' Exhibits 1 and 2 and noted his response to each was found on page 4 of each said exhibit. Mr. Gibson testified the Transportation Cabinet tries to improve the mowing program every day, and that consistency in the program is important, particularly with inspectors. According to Mr. Gibson, very few people came forward when the inspector's job was offered and those who tried would eventually just back off. The bottom line being that in order to build the trust, continuity and consistency required, one had to be comfortable with the task.

28. As the Chief District Engineer, Mr. Gibson testified he was instructed to be fair and equitable in giving out overtime. He stated that now the pecking order with seniority takes precedence, and the supervisor must evaluate how much overtime to give out. According to Mr. Gibson, the concept of planned overtime is a gray area defined by two particular points. According to him, he doesn't know if his district has ever had actual planned overtime.

29. The Chief District Engineer has to approve overtime if an employee is to work over 10 hours per day. It is known in advance that the mowing inspector will have to work overtime. However, this overtime is not considered "Planned Overtime" even though they know overtime will be necessary. When asked to explain, Mr. Gibson noted that they were now so understaffed it is hard to loan out people by taking them off their regular duties. According to Mr. Gibson, it has not yet been determined who will be performing the inspections for next year as Mr. Rodgers has retired.

30. Appellants' Exhibit 6 was introduced into the record and was entered for purposes of demonstrating the schedule guidelines for mowing and trimming from Swartz Mowing Inc. during 2013. Appellants' Exhibit 7 was introduced into the record and is a copy of one of the daily inspection reports completed by Mr. Rodgers on May 4, 2015.

31. Mr. Gibson reiterated that, in this instance, the inspector's job does not meet the definition of planned overtime as set forth in the Memorandum marked as Appellants' Exhibit 4. Specifically, point number 2, under Continuity of Services, Mr. Gibson testified that this has to be maintained and is best done by one individual. This also applies with any shift assignment. In other words, according to Mr. Gibson, you have to weigh the best interests of the business (keeping the best workers on a job site) with fairness and equity to allow everyone to make more money. Finally, Mr. Gibson testified that Mr. Rodgers had 11 months less seniority than Mr. Treas, but had more seniority than Mr. Pritchard.

32. This matter is governed by KRS 18A.095(1) which states;
(1) A classified employee with status shall not be dismissed, demoted, suspended, or otherwise penalized except for cause.

33. KRS 18A.005(24) which states;
(24) "Penalization" means demotion, dismissal, suspension, fines, and other disciplinary actions; involuntary transfers; salary adjustments; any action that increases or diminishes the level, rank, discretion, or responsibility of an employee without proper cause or authority, including a reclassification or reallocation to a lower grade or rate of pay; and the abridgment or denial of other rights granted to state employees;

34. Personnel Memo 13-09 (see Appellants Exhibit 4).

35. The Hearing Officer has considered the entire administrative record, including the testimony and statements therein.

FINDINGS OF FACTS

The Hearing Officer makes the following findings by preponderance of the evidence:

1. Appellant Jimmy K. Treas, a classified employee with status, filed his appeal with the Personnel Board on March 4, 2015, appealing from "Other Penalization," specifically, the unfair allocation of overtime hours associated with inspecting contract mowing and tree cutting work performed in the Transportation Cabinet, District 1.

2. Appellant David K. Pritchard, a classified employee with status, filed his appeal with the Personnel Board on March 2, 2015, from "Other Penalization," specifically, the unfair

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distribution of overtime associated with inspecting contract mowing and tree cutting work in the Transportation Cabinet, District 1.

3. Pursuant to Interim Order dated April 24, 2015, the appeals of *David K. Pritchard vs. Transportation Cabinet* (Appeal No. 2015-037), and *Jimmy K. Treas vs. Transportation Cabinet* (Appeal No. 2015-042), were consolidated for all purposes.

4. Pursuant to Interim Order dated October 30, 2015, the issue before the Personnel Board was the Appellants' contentions that they were penalized by the assignment of overtime by the Appellee, Transportation Cabinet, and further, the allegation that same violated Personnel Cabinet Memorandum 13-09 (see Appellants' Exhibit 4).

5. During the times in question, Appellant Jimmy K. Treas was a Heavy Equipment Operator IV with seniority dating back to January 16, 2001. Mr. Treas worked out of the Graves County Maintenance facility.

6. During the times in question, Appellant David K. Pritchard was a Heavy Equipment Operator III who also worked out of the Graves County Maintenance Barn.

7. According to Harold Gibson, Clarence "Gene" Rodgers was also a Heavy Equipment Operator III and worked out of the Graves County Maintenance facility. Also according to Mr. Gibson, Mr. Rodgers had more seniority than Appellant Pritchard and less than Appellant Treas. Further, Mr. Gibson testified that Mr. Rodgers' assignment as the sole contract mowing and tree cutting inspector came about in 2012 or 2013 following after the Appellee experienced difficulty with some of the mowing contractors.

8. Personnel Memo 13-09 became effective May 1, 2013 (see Appellants' Exhibit 4).

9. Pursuant to Personnel Memo 13-09, to qualify as "Planned Overtime" two elements had to be met. The first was that a supervisor needed to know at least 72 hours ahead of time when overtime was going to be needed. In this instance, the supervisors knew several months in advance that the contract mowing work had to be inspected, which would result in significant overtime (as mowing contractors typically worked from dawn to dusk). The Appellee also knew that whenever someone performed the inspection work they would not be available to perform their regular work duties. The second element was that the work had to be of a nature that it could be assigned to a number of individuals and not specifically required to be assigned to a particular employee because of factors like facility assignment, shift assignment, population served, continuity of services, etc. In this instance, it appears that several employees, including

the Appellants, were qualified to perform the inspection duties. However, the Appellee has a legitimate interest in maintaining its continuity of services, not only with its contractor inspections, but with the critical day-to-day operations of the Maintenance barn, and although the Appellee knew it needed to be fair when assigning overtime, it also has an overriding duty to ensure the safety of the public by providing quality and timely road maintenance services. The importance of continuity of services is specifically noted in Memo 13-09 which states that nothing in this proposal shall impact the continuity of services provided, and the manner in which overtime is handled shall always be in the best interest of the Commonwealth.

10. The evidence suggests that both Appellants were excellent Heavy Equipment Operators/leaders and would be missed if taken away from their regular job duties. There is limited-to-no testimony regarding Clarence Rodgers' skills other than he had been witnessed operating a dump truck, and nothing to suggest that his continued absence from his regular work assignments negatively affected the Appellee's day-to-day maintenance operations.

CONCLUSION OF LAW

The Appellants have failed to demonstrate by a preponderance of the evidence that Personnel Memo 13-09 (see Appellants Exhibit 4) was improperly or unfairly administered or that they were penalized when the Appellee assigned Clarence "Gene" Rodgers the entirety of the contract mowing and tree cutting inspection work. Instead, by so doing, the continuity of services provided by the Appellee was not impacted, thereby serving the best interest of the Commonwealth.

RECOMMENDED ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Kentucky Personnel Board that the appeals of **DAVID K. PRITCHARD (APPEAL NO. 2015-037) AND JIMMY K. TREAS (APPEAL NO. 2015-042) VS. TRANSPORTATION CABINET** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13.B.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

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response to any exceptions that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal, a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

Each Party has thirty (30) days after the date the Personnel Board issues a Final Order in which to appeal to the Franklin Circuit Court pursuant to KRS 13B.140 and KRS 18A.100.

ISSUED at the direction of Hearing Officer Geoffrey Greenawalt this 6th day of July, 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. William H. Fogle
Hon. Scott M. Miller
J. R. Dobner