



**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2013-015**

**PAUL SCOTT**

**APPELLANT**

**VS.**

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

**FINANCE AND ADMINISTRATION CABINET  
LORI H. FLANERY, APPOINTING AUTHORITY**

**APPELLEE**

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This matter came on for an evidentiary hearing on October 28, 2013, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Roland Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment and authorized by virtue of KRS Chapter 18A.

Appellant, Paul Scott, was present and was not represented by legal counsel. Appellee, Finance and Administration Cabinet, was present and represented by the Hon. Stewart Douglas Hendrix. Also present as Agency representative was Troy Robinson.

This is an appeal from the suspension of Appellant for five business days beginning January 22, 2013, through January 28, 2013, from his position as Network Analyst I, within the Program Management and Architecture Branch, Division of IT Governance, Office of Enterprise Technology, Commonwealth Office of Technology, Finance and Administration Cabinet. The Appellee is required to prove by a preponderance of the evidence that the five-day suspension of the Appellant was taken with just cause and was neither excessive nor erroneous.

The rule separating witnesses was invoked and employed throughout the course of the proceedings. Each of the parties presented opening statements. Preliminary matters were addressed prior to witness testimony.

The Hearing Officer inquired whether the Personnel Board file contained the complete version of the disciplinary letter. The file contained Mr. Scott's two page appeal form, with attached statement of Appellant, a two-page January 18, 2013 letter notifying Appellant of his suspension, with attachments. The second page of the disciplinary letter has a notation at the top showing that it is page 2 of 3. There is no page 3 to the letter.

Mr. Hendrix provided the Hearing Officer with a package, containing a complete three-page disciplinary letter of January 18, 2013. Upon inspection of the document provided by counsel, the Hearing Officer noted that the disciplinary letter in counsel's package differs from the one attached to Mr. Scott's appeal form. Upon examination of the packet provided by counsel, Mr. Scott stipulated that at the time of his suspension it was the three-page letter with attachments that he had received.

### **BACKGROUND**

1. The first witness for the Appellee was **Troy Robinson**, Executive Director of the Office of Administrative Services, Finance and Administration Cabinet. Mr. Robinson has held this position since March 2013 and oversees five divisions including the Division of Human Resources. In his prior employment and during the time of Appellant's suspension, he had been Division Director of Human Resources. As Division Director he was the Appointing Authority and oversaw all human resource functions for the Cabinet.

2. The chain of management first brought the incident cited in the suspension letter to Mr. Robinson's attention. An Executive Order of the Governor allowed the Finance Cabinet to receive a detail of 230 employees who were to be consolidated into that Cabinet. As part of that, Appellant had been detailed in special duty status to the Finance and Administration Cabinet, effective November 1, 2012. It is the agency where the employee resides, that is, the agency to which an employee has been detailed, which has the authority of discipline over that employee. In this case, the Finance and Administration Cabinet had authority to issue discipline to Mr. Scott.

3. He identified Appellee's Exhibit 1 as the January 18, 2013 letter with attachments that had been delivered to Mr. Scott notifying him of his five-day suspension. It was signed by Mr. Robinson as the Appointing Authority. Discipline had been issued based on the three incidents cited in the letter of November 19, November 27, and December 5, 2012.

4. The suspension was a progressive disciplinary action based on previous discipline contained in the Appellant's file. The three cited incidents involved Mr. Scott having engaged in use of loud language directed to coworkers and in one event having taken something from an employee's desk without permission. This appeared to be inappropriate behavior and constituted a lack of good behavior; actions that the Cabinet deemed unacceptable. All three incidents occurred while Appellant had been detailed to the Cabinet.

5. Mr. Robinson worked briefly with Howard J. Klein to obtain Mr. Scott's personnel files. He reviewed the Appellant's prior disciplinary records. He also tried to apply fair and consistent discipline. He took into consideration Mr. Scott's disciplinary history, the nature of the present occurrences, the timeframe between these occurrences and his previous discipline. This behavior was very similar to prior incidents for which Appellant had been disciplined. Appellant's last discipline had been a five-day suspension, issued two years ago. Because of the timeframe and Appellant's "newness" to the Finance and Administration Cabinet, Robinson did not think discipline should increase in severity. He decided to "reinstate" what the Cabinet for Health and Family Services had last issued, and issued a five-day suspension. The decisions to issue disciplinary action and the severity of the discipline rested solely with Mr. Robinson. There is nothing contained in the Cabinet's policy requiring an employee receive any notice prior to issuance of a suspension.

6. **Howard J. Klein**, the Appointing Authority and Division Director of the Division of Employee Management, Office of Human Resource Management, Cabinet for Health and Family Services, was the next witness. Mr. Klein oversees the division that deals with disciplinary actions, final grievance responses, EEO matters, and some employee training. He is directly involved in disciplinary matters, although he was not directly involved in the decision making process in this case.

7. Mr. Klein had dealt with Mr. Scott's file in the past. Mr. Scott was detailed to and became an employee under the supervision of the Finance and Administration Cabinet on November 1, 2012. When any employee, such as Appellant, is detailed in that manner, the organization to which he is detailed then has the supervisory and disciplinary authority over such person.

8. He identified the first page of Appellee's Exhibit 2 as an Acknowledgment of Request for Major Disciplinary Action (MDA), and pages 2 and 3 of that exhibit as an MDA checklist. The acknowledgement form had been created by Klein's Cabinet as a courtesy to an employee to let them know disciplinary action against them had been requested. It gives the employee another chance to provide their side of the story. Such an acknowledgement form or prior notice is not required by statute or regulation. The checklist appears on the Cabinet's intranet site to help a department and supervisor gather the information they require when considering and processing MDA. The Cabinet for Health and Family Services uses these forms on its own accord. It is not required to do so.

9. Mr. Klein reviewed Appellee's Exhibit 1. Based on his experience, and knowing that Mr. Scott's previous discipline had been a five-day suspension, issued about two years ago, a repeat of the last disciplinary action, that is, handing down a five-day suspension for the current incidences was, in Mr. Klein's opinion, proper.

10. By agreement of the parties, the testimony of the next witness, **Roxie Long**, was taken via telephone.<sup>1</sup>

11. Ms. Long, since July 2, 2012, has been employed at the Hazelwood Center, Department for Community Based Services, Cabinet for Health and Family Services. She knows the Appellant and has worked with him since she began that employment.

12. On November 19, 2012, Ms. Long had experienced difficulty trying to send an e-mail to all users of Hazelwood. She went down the hall and told Mr. Scott about her problem. From his desk, Mr. Scott logged onto Long's computer. Long mentioned to him that there were certain items on her desktop that had been put there by John Wright, which she had to have to do her job. Scott abruptly stopped her and said he was in the middle of something. He shook his finger at her approximately six to twelve inches from her face and asked her to wait.

13. Long left the office. She later returned to her desk and found that Scott had removed from her computer most everything from the desktop including the things she advised him not to remove. She then had to have John Wright remap her computer and collect the items from the recycle bin. In categorizing Mr. Scott's interaction with her on that date: "It was a verbal attack more than anything and I don't speak to people that way. I don't feel I should be spoken to that way by a fellow employee." Mr. Scott never physically touched her. His normal tone is usually a raised voice.

14. Ms. Long then informed Beatrice Brown and the MIS Department Supervisor Ben McGirt of the incident. Since that day, she tries not to have any dealings with Mr. Scott if anyone else is available to assist her.

15. The next witness, **Beatrice Brown**, by agreement of the parties, gave her testimony via telephone.<sup>2</sup> Ms. Brown has been employed at the Hazelwood Center, COT, since October 1, 2011. She knows Mr. Scott, has worked with him and interacts with him on a regular basis.

16. With reference to the incident of December 5, 2012, Ms. Brown testified that Mr. Scott normally creates the network request forms. He went on vacation and Brown did them during that time. She kept the forms on her desk and created all of them. When she came into work one day, she discovered Mr. Scott had taken the forms from her desk without telling her. When Scott next came into her office, Brown asked him about the forms. Appellant began to shout, curse, and holler about it. Brown got upset and told him he was not going to talk to her that way.

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<sup>1</sup> This procedure was employed in compliance with KRS 13B.080(7).

<sup>2</sup> This procedure was employed in compliance with KRS 13B.080(7).

17. Following the incident she called Ben McGirt, the Director, to advise him about the incident. She did not call McGirt to get Scott in trouble. Brown was a new employee at the time and just wanted to advise her Director. She had heard Scott behaved this way with others. She likes and cares about Mr. Scott; believes he is a good man, but lacks personal and professional skills. When she first came to Hazelwood, it was the Appellant who took her under his wing. He taught her a lot. There has never been any hostility between them. She is comfortable working with him. However, it still does not make it right the way he treats people.

18. She recalls little of the November 27, 2012, incident other than she was passing through the hall and Mr. Scott yelled for her.

19. The Appellee's case was closed.

20. The first and sole witness for the Appellant was the Appellant, **Paul Scott**. He testified that during his meeting with Ms. Long, he was trying to do something to help her and when she interrupted he said, "Hold on, hold on." (The witness gestured with a raised right hand and extended the index finger).

21. On November 27, 2012, Mr. Scott, upon seeing Ms. Brown cross in front of his office in the hallway, yelled out her name to get her attention. His voice was raised just enough to get her attention. He was not trying to be arrogant about it. All he wanted to do was call her attention to something. When they started talking, Ms. Brown raised her voice saying, "Don't talk to me that way." Scott denies he talked to her in any bad manner.

22. With reference to the matter of December 5, 2012, Scott, prior to going on vacation, gave Ms. Brown ten to twelve request forms. Upon his return he got an e-mail from Christa Snawder inquiring about the status of the forms. He went to Ms. Brown's office and asked her to contact Ms. Snawder. Brown said the forms were up on her file cabinet.

23. The next day, Scott got another inquiry e-mail from Ms. Snawder. He went to Brown's office who he believed was at lunch at that time. He retrieved the forms and completed them. He does not remember any of the conversation that took place thereafter. He had either e-mailed or let Ms. Brown know that he retrieved the forms in order to complete them.

24. Appellant agreed he had previously been placed on a Performance Improvement Plan (PIP) and had received past discipline for past similar conduct. He also agreed it was inappropriate for an employee to raise his voice or use foul language at work.

25. His supervisor, Mr. McGirt, never approached Appellant about these matters prior to issuance of the suspension. Scott never got a chance to defend himself before the penalty was issued. Upon cross-examination, he identified Appellee's Exhibit 3 as an Interim Review of his performance.<sup>3</sup> Upon request, he read the second paragraph into the record:

None of these behaviors are acceptable for a MIS Team member. No co-worker or Hazelwood staff person should expect to be exposed to this kind of behavior. I am especially disappointed because I had talked to Mr. Scott about his communication issues in the 2<sup>nd</sup> Interim Review. In that review, Mr. Scott was offered the opportunity to work with me on finding and attending training on improving his business/professional communications, but that offer was refused by Mr. Scott. Unfortunately, this issue seems to be deteriorating instead of improving.

Mr. Scott admits that he refused the offer.

26. Each of the parties presented a closing argument. The matter then stood submitted to the Hearing Officer.

### **FINDINGS OF FACTS**

1. The Appellant, Paul Scott, at the time of his suspension in January of 2013, was employed as a Network Analyst I within the Program Management and Architecture Branch, Division of IT Governance, Office of Enterprise Technology, Commonwealth Office of Technology, Finance and Administration Cabinet. Effective November 1, 2012, Mr. Scott had been detailed to duty with the Finance and Administration Cabinet. Under such circumstances, it is the Finance and Administration Cabinet which has authority to issue discipline to the Appellant.

2. On November 19, 2012, Ms. Roxie Long, a CHFS employee, had experienced difficulty trying to send e-mails from her state computer. She informed Mr. Scott about the problem and requested his help. She mentioned to him there were items on her desktop, placed there by John Wright, which needed to remain on her computer so that she could perform her job duties. Mr. Scott abruptly stopped her and said he was in the middle of something; shook his finger at her approximately six to twelve inches from her face and asked her to wait.

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<sup>3</sup> Although this document was not signed or dated, examination of the body of the document reveals that it was issued sometime after January 1, 2013.

3. Ms. Long left the office. When she later returned to her desk she found that Scott had removed from her computer most everything from the desktop, including those items she asked him to leave. Due to this action, John Wright had to re-map her computer and collect the items from the recycle bin.

4. Ms. Beatrice Brown, a COT employee at the Hazelwood Center, recalled little of the incident of November 27, 2012, other than she had passed through the hall where she worked when Mr. Scott yelled for her.

5. With reference to the incident of December 5, 2012, Ms. Brown came into work that day and discovered Mr. Scott had taken certain network request forms from her desk without her permission or advising her. When Scott next came to her office and Brown inquired about the forms, Appellant began to shout, curse, and holler about it. Brown responded that he was not going to talk to her that way.

6. The personnel record of the Appellant shows the following:

- November 29, 2007: A Performance Improvement Plan (PIP) was issued requiring there would be “No engagement in inappropriate, disrespectful, demeaning, and/or abusive behaviors, such as loud, profane, foul, obscene, vulgar, crude, insulting or threatening language; inappropriate jokes or gestures; discriminatory slurs; and/or sexual comments.”
- February 7, 2008: A written reprimand was issued when Appellant, while engaged in a telephone conversation with an employee, yelled at her and hung up on her.
- July 25, 2008: A two-day suspension was issued for lack of good behavior, in that Appellant had “. . . initiated a loud argument in a coworker’s office and refused to leave when asked.”
- August 5, 2008: A PIP issued identifying performance improvement areas which included “1. Raising your voice or yelling . . . 3. Inappropriate comments/cursing . . .”
- January 5, 2011: A five-day suspension was issued for lack of good behavior, as Appellant “. . . demonstrated inappropriate and unprofessional behavior and language in the workplace.”

(Attachments to Appellee’s Exhibit 1.)

7. The regulation 101 KAR 1:345, Section 1, was in full force and effect during the time of the current incidents cited in the January 18, 2013 letter of suspension.



8. The Cabinet employs a progressive disciplinary policy. However, in this instance the Cabinet, being the entity to which the Appellant had been detailed, made the decision that while it would issue disciplinary action, it would not escalate the degree of the last penalty imposed. It issued a five-day suspension.

9. On January 18, 2013, Troy Robinson, Appointing Authority for the Finance and Administration Cabinet, authored and issued to the Appellant a letter with attachments notifying Mr. Scott he had been suspended from his position as a Network Analyst I, for lack of good behavior, for five business days, effective beginning of business on Tuesday, January 22, 2013, through close of business, January 28, 2013. The letter cited specific new incidents that occurred on November 19, 2012, November 27, 2012, and December 5, 2012, as the basis for this disciplinary action. (Appellee's Exhibit 1.)

10. The Appellant timely filed his appeal with the Kentucky Personnel Board.

### **CONCLUSIONS OF LAW**

1. A classified employee with status shall not be suspended except for cause. KRS 18A.095(1). Appointing Authorities may discipline employees for lack of good behavior, or the unsatisfactory performance of duties. 101 KAR 1:345, Section 1. A suspension shall not exceed thirty (30) days. 101 KAR 1:345, Section 4(1).

2. The cabinet issued the Appellant a five-day suspension by letter of January 18, 2013. (Appellee's Exhibit 1.) That suspension was based on three separate alleged violations of 101 KAR 1:345, Section 1, lack of good behavior for incidents which were alleged to have occurred on November 19, 2012, November 27, 2012, and December 5, 2012. While there was supporting testimony pertaining to the incidents of November 19, 2012, and December 5, 2012, witness Beatrice Brown was unable in her testimony to support allegations pertaining to the November 27, 2012 incident.

3. Appellee has shown by a preponderance of the evidence that disciplinary action against the Appellant was proper. As to the question of whether the issuance of a five-day suspension was excessive or erroneous, the Hearing Officer took into consideration the lack of evidence for the November 27, 2012 allegation, as well as the Appellant's prior personnel history. Had Appellant's personnel history shown that he had not previously engaged in inappropriate behavior in the nature of yelling, raising his voice to coworkers, or cursing in the office, it is likely the suspension in this case would have been reduced from five days to three days. However, as Appellant has had a history dating back to 2007 of such behavior, and as this behavior seems not to have abated as shown by the testimony pertaining to the incidents of November 19 and December 5, 2012, there are insufficient facts to mitigate the length of

suspension. Therefore, Appellee has shown by a preponderance of the evidence that the five-day suspension of the Appellant was neither excessive nor erroneous.

**RECOMMENDED ORDER**

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Personnel Board that the appeal of **PAUL SCOTT VS. FINANCE AND ADMINISTRATION CABINET (APPEAL NO. 2013-015)** be **DENIED** and **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).

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 Roland Merkel** this 5<sup>th</sup> day of December, 2013.

**KENTUCKY PERSONNEL BOARD**

  
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**MARK A. SIPEK**  
**EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:

Hon. Stewart Douglas Hendrix  
Paul Scott