

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 Altering in the case of **SHAWNA SHUFFETT VS. TRANSPORTATION CABINET (APPEAL NO. 2019-168)** as the same appears of record in the office of the Kentucky Personnel Board.

Witness my hand this 15th day of July, 2020.



MARK A. SIPEK, SECRETARY
KENTUCKY PERSONNEL BOARD

Copy to Secretary, Personnel Cabinet

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2019-168**

SHAWNA SHUFFETT

APPELLANT

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

VS.

TRANSPORTATION CABINET

APPELLEE

*** **

The Board, at its regular July 2020 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated May 7, 2020, Appellee's Exceptions, Appellant's response, and being duly advised,

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

A. **Delete** Finding of Fact number 7 and substitute the following:

7. There is no credible proof of record that the Appellant ever joined in hiding or taking photos with a coworker's cell phone. More importantly, the suspension letter does not include the date, time, and place of the allegations nor the names of the parties involved.

B. **Add** Finding of Fact number 12.

12. The Board finds that the five-day suspension is excessive. The Board finds, in light of all the surrounding circumstances, a three-day suspension is the appropriate penalization. These circumstances include: 1) the longstanding history of inappropriate conduct in the Right-of-Way Unit at District 4, prior to

Appellant's hire date, 2) the lack of proof that the Appellant ever joined in hiding or taking photos with a coworker's cellphone, and 3) the fact that the Appellant had long since discontinued the use of foul language and other misbehavior at work, prior to her suspension.

C. **Delete** Conclusion of Law and substitute the following:

1. The Appellee has demonstrated by a preponderance of the evidence that there was just cause to suspend the Appellant for her lack of good behavior, which occurred prior to September 4, 2018. [KRS 18A.095(1)].

2. The Appellee failed to establish that the five-day suspension of the Appellant was not excessive under all the surrounding circumstances. The Board concludes that the five-day suspension was excessive and that a three-day suspension was the appropriate penalization for the Appellant's misconduct. [KRS 18A.095(22)(c)].

3. The allegation that the Appellant ever joined in hiding or taking photos with a coworker's cellphone does not contain the specificity required by KRS 18A.095(8). Specifically, lacking in the suspension letter are the date, time, and place of the action or activity, and the name of the parties involved.

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

IT IS HEREBY ORDERED that the appeal of **SHAWNA SHUFFETT V. TRANSPORTATION CABINET (APPEAL NO. 2019-168)** is **SUSTAINED** to the extent that her five (5) day suspension from duty and pay as a Right-of-Way Agent II in the Transportation Cabinet, Department of Highways, District 4, be reduced to a three (3) day suspension and that she be reimbursed for two days of lost pay and benefits. Further, **to reimburse Appellant for any leave time she used attending the hearing and any pre-hearing conferences at the Board and to otherwise make Appellant whole. [KRS 18A.105, KRS 18A.095(25), and 200 KAR 12:030]**

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer as **ALTERED**, be and they hereby are approved, adopted, and incorporated herein by reference as a part of this order and the Appellant's appeal is therefore **SUSTAINED to the extent herein.**

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

SO ORDERED this 15th day of July, 2020.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Edwin A. Logan
Shawna Shuffett
J. R. Dobner

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2019-168

SHAWNA SHUFFETT

APPELLANT

VS.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER

TRANSPORTATION CABINET

APPELLEE

** ** * * *

This matter came on for an evidentiary hearing on January 10, 2020, at 9:30 a.m. (ET), at 1025 Capital Center Drive, Suite 105, 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.

Appellant, Shawna Shuffett, was present and was not represented by legal counsel. Appellee, Transportation Cabinet, was present and represented by the Hon. Edwin Logan.

By Interim Order dated October 17, 2019, the issue at the evidentiary hearing was whether or not there was just cause for the five-day suspension of the Appellant and whether that penalty was excessive or erroneous. The Appellee was assigned the burden of proof, which was to be by a preponderance of the evidence.

BACKGROUND

1. The Appellant, Shawna Shuffett, filed her appeal with the Personnel Board on August 12, 2019. She was appealing from her suspension from duty and pay for five working days (effective beginning of business July 18, 2019 and ending at the close of business on July 24, 2019), from her position as a Right-of-Way Agent II in the Kentucky Transportation Cabinet, Department of Highways, District Four.

2. The first witness called by the Appellee to testify was the Appellant, **Shawna Shuffett**. Ms. Shuffett testified that she had worked in the Transportation Cabinet as a Right-of-Way Agent II in District Four for approximately two years at the time of her suspension.

3. Appellee's Exhibit 1 was introduced into the record and is a copy of the suspension letter dated July 9, 2019, wherein Ms. Shuffett was suspended for five working days for lack of good behavior.

4. The suspension letter generally alleges that, while at work, the Appellant regularly used vulgar and profane language, would initiate inappropriate conversations with her coworkers, and joined in hiding or taking photos with coworkers' cell phones.

5. The letter also sets forth three specific allegations. As to the first allegation, the Appellant denied that she made any comments to Marsha Atwood about breastfeeding her son. As to the second allegation, the Appellant testified that she was trying to be helpful when she sent a text of a picture of an abortion clinic to Malorie Smith given that abortion clinics also advise people about pregnancies. As to the last allegation, the Appellant admitted to taking part in the videotaped conversation provided by Mike Price.

6. Appellee's Exhibit 2 was introduced into the record and is a copy of GAP-801, which is intended to regulate employee conduct. Appellee's Exhibit 3 was introduced into the record and is a copy of GAP-803, which relates to anti-harassment and anti-discrimination matters.

7. Ms. Shuffett testified that she had no record of discipline while being employed. She also testified that she filed an EEO complaint alleging harassment. According to the Appellant, the investigative report stemming from the Appellant's complaint ended up being more of a smear campaign against her and wrongly concluded that she was the person who had behaved inappropriately. The Appellant noted that her coworkers, Marsha Atwood and Malorie Smith, stopped speaking to her as soon as they were told by Mike Smith that she had filed an EEO complaint.

8. Ms. Shuffett admitted that, prior to September 4, 2018, she used profane language while in the office that was potentially offensive. She testified that, following September 4, 2018, she stopped using any such language while at work. She explained that, on September 4, 2018, the Engineering Branch Manager, Brad Bottoms, spoke to her about the language that she was using and how loud she was speaking. From that day forward, the Appellant has not used profane language while on the job.

9. Ms. Shuffett testified that, from day one on the job, sexual comments were frequently made in the office. Ms. Shuffett also testified she never touched anybody's cell phone.

10. Ms. Shuffett testified that, before she filed her EEO complaint, the atmosphere in the office was not very serious. Such atmosphere was permitted mostly by Mike Price, the Right-of-Way Agent Supervisor in the office. According to Ms. Shuffett, this kept people from working too hard and promoted an overall negative work environment. Ms. Shuffett also noted that there were a lot of things said and done in the office that were not mentioned or addressed in the EEO investigative report, including various instances of Mike Price showing inappropriate videos.

11. The next to testify was **J.R. Dobner**. At the time of the suspension letter marked as Appellee's Exhibit 1, Mr. Dobner was the Deputy Executive Director of the Office of Human Resource Management with the Transportation Cabinet. Essentially, Mr. Dobner handled all Transportation Cabinet personnel matters.

12. Mr. Dobner testified that GAP-801 and GAP-803, marked as Appellee's Exhibits 2 and 3, respectively, were in effect at the time in question. Mr. Dobner testified that, after reviewing the EEO investigative report, he concluded that a five-day suspension of the Appellant was appropriate. Mr. Dobner wrote and signed the suspension letter marked as Appellee's Exhibit 1.

13. Mr. Dobner testified that other employees in the District 4 Right-of-Way office ended up receiving disciplinary action as a result of the EEO investigation. He testified that Mike Price was given a thirty-day suspension after initially issuing an intent to dismiss letter. Marsha Atwood was suspended for five days and Malorie Smith was suspended for one day. He also testified that this disciplinary action was consistent with previous disciplinary actions taken as a result of similar activity. According to Mr. Dobner, the types of conversations alleged can be considered insults and demeaning, so he goes directly to suspensions rather than issuing written reprimands.

14. Mr. Dobner watched the Price video referred to in Appellee's Exhibit 1 and, when all things were considered, believed that there was sufficient evidence to warrant the Appellant's five-day suspension.

15. Mr. Dobner considered the Appellant's personnel record, which contained no evaluations due to timing issues, and noted that the Appellant had never been disciplined. He also noted that her first day of work was August 16, 2017. Finally, Mr. Dobner looked into how much the work environment was a management issue versus an individual personnel problem. According to Mr. Dobner, although the Appellant's work environment was not to be considered hostile, the pervasive bad language, as defined by GAP-803, found therein could have possibly allowed for such an action to be taken.

16. On cross-examination, Mr. Dobner testified that everything contained in the suspension letter was correct and had not been contradicted by the EEO Investigative Report. He also indicated he was concerned that the Appellant's coworkers would try to gang up against her to save their own skin. However, in the end, he believed the information contained in the Investigative Report was accurate.

17. The next to testify was **Julie Cunnagin**, who, at the time in question, served as a Program Investigative Officer II in the Office of Civil Rights. Ms. Cunnagin testified that she investigated the Appellant's harassment complaint and produced a 33-page investigative report as a result. According to Ms. Cunnagin, the Appellant's claims were unsubstantiated.

18. Ms. Cunnagin testified that, based upon her investigation, the Appellant did in fact make comments to Marsha Atwood about her breastfeeding, as these comments were witnessed and substantiated by other coworkers. Ms. Cunnagin further testified that, having reviewed the text message containing a picture of an abortion clinic, it was clear to her the Appellant had not intended for it to be helpful when she sent it to Malorie Smith.

19. On cross-examination, when asked why certain allegations had not been mentioned or addressed in her report, Ms. Cunnagin testified that her report makes apparent that lewd comments had also been made by others against the Appellant while she was on the job. However, it was clear that the entire office was involved in using profane and offensive language, including the Appellant, and that the Appellant had not been specifically targeted.

20. On redirect, Ms. Cunnagin testified that the Appellant did not acknowledge using any inappropriate language while in the office. As a note, Ms. Cunnagin's 33-page Investigative Report was not introduced into the record.

21. The next to testify was **Marsha Atwood** who is a Right-of-Way Agent Leader in District Four and a coworker of the Appellant.

22. Ms. Atwood testified that, on multiple occasions and with others present, the Appellant made comments about her breastfeeding her son. Although Ms. Atwood considered the Appellant's comments to be offensive, she tried to let them go and never told her to stop. According to Ms. Atwood, the Appellant has harassed everyone in the office with inappropriate comments.

23. On cross-examination, Ms. Atwood testified that Mike Price did not necessarily encourage or create an environment of misconduct at work. However, since 2014, this type of atmosphere had been pervasive. Ms. Atwood went on to admit that she also participated in the office shenanigans in order to take up for herself. According to Ms. Atwood, the Appellant would have stood out if she did not participate in this type of locker room talk.

24. The next to testify was **Malorie Smith**. Since April 2018, Ms. Smith has been employed as a Right-of-Way Agent II in District Four. According to Ms. Smith, the Appellant was not a reserved person by nature but, by the end of 2018, she had started to stay away from the office.

25. Ms. Smith testified that anytime she mentioned that she was not feeling well, the Appellant would respond by saying it was probably the result of being pregnant. Ms. Smith also stated that she heard the Appellant say something to Marsha Atwood about breastfeeding on many occasions. According to Ms. Smith, she just tried to brush this type of language off and, because she was still on probation, she did not want to ruffle any feathers. As a result, she never complained about anything to anybody.

26. On cross-examination, Ms. Smith testified that she and the Appellant did have personal conversations regarding affairs, etc., which explained why the Appellant was comfortable “busting her chops and razzing her.” However, as mentioned previously, this all stopped around September 2018.

27. According to Ms. Smith, she was told on numerous occasions that, with regard to the comments made by others while at work, she just needs to leave her feelings at the door. She was also noted that, while Mike Price did not necessarily encourage, create, or expect the poor behavior that went on while at work, “he never put a stop to it either.” Ms. Smith went on to admit to participating in the videoed conversation referred to in the suspension letter marked as Appellee’s Exhibit 1. Finally, Ms. Smith testified that the submission of Ms. Cunnagin’s EEO Investigative Report had a chilling effect and that the atmosphere in the office is now very tense.

28. Ms. Smith’s testimony marked the end of the Appellee’s case in chief.

29. The first to testify on behalf of the Appellant was **Brad Bottoms**, who works for the Appellee as the Branch Manager of Project Development in District Four. He is the Appellant’s second-line supervisor.

30. Mr. Bottoms testified that, on September 4, 2018, he overheard the Right-of-Way staff talking very loudly. He addressed the group and told them to quiet down. According to him, since then, there have been no further problems.

31. Mr. Bottoms testified that he was aware of the locker-room-type atmosphere in the Right-of-Way Division going back as far as 2012. According to him, up until the Appellant filed her EEO complaint, it did not affect productivity. Mr. Bottoms testified that he reviewed Ms. Cunnagin’s report and he found no specific inaccuracies regarding the Appellant’s behavior.

32. The next to testify was **Ali Horn**, who worked under Mike Price between August 2008 and December 2017. Ms. Horn testified that inappropriate language was used frequently in the Right-of-Way Division. In her opinion, Mr. Price did not expect everyone to use bad language, but noted that everyone in the Right-of-Way Division got along, so no one ever took offense to the language that was being used. She also noted that the Right-of-Way group never held back with

their lewd comments. Ms. Horn she never complained about the language being used at work and stated that you had to be able to take it as well as dish it out. She also said that if you were uncomfortable with that, you just needed to get up and leave. Finally, Ms. Horn stated that she trained the Appellant and that the two of them never had any inappropriate conversations between them during that time.

33. The next to testify was **Roger Crew** who worked under Mike Price until December 2017. According to Mr. Crew, inappropriate comments and conduct were common in the Right-of-Way unit. However, if Marsha Atwood or Mike Price were not in the office, all was typically quiet. According to Mr. Crew, Mr. Price was comfortable with the foul language used in the office and that, while he did not necessarily expect one to use it, he certainly did nothing to stop it. Mr. Crew also testified that he and the Appellant never had any inappropriate conversations.

34. The next to testify was **Tony Moore** who worked under Mike Price between 2002 and 2017. According to Mr. Moore, inappropriate conduct was common well before the Appellant had been hired. According to Mr. Moore, the Right-of-Way group never held back from these types of conversations and, in his mind, Mike Price helped create the atmosphere and encouraged it. In his opinion, Mike Price and Marsha Atwood were the worst offenders when it came to initiating inappropriate conversations. Mr. Moore testified that, when it was just him and the Appellant working together, inappropriate conversations never took place. Mr. Moore stated that everyone in the Right-of-Way group was guilty of this type of behavior at some point or another and that you “either had to go along to get along or, if you did not participate, you would end up being ostracized.”

35. Mr. Moore’s testimony marked the end of the Appellant’s rebuttal and the evidentiary record was closed.

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

37. 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 by preponderance of the evidence:

1. The Appellant, Shawna Shuffett, a classified employee with status, timely filed her appeal with the Personnel Board on August 12, 2019, appealing from her five-day suspension in duty and pay as a Right-of-Way Agent II in the Transportation Cabinet, Department of Highways, District Four.

2. Pursuant to an Interim Order, dated October 17, 2019, the issue before the Personnel Board was whether or not there was just cause for the five-day suspension of the Appellant and whether that penalty was either 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. GAP-801, marked as Appellee's Exhibit 2, prohibits engaging in disrespectful, demeaning, abusive, or any such other inappropriate behavior, which includes loud, profane, foul, obscene, vulgar, crude, insulting, or threatening language, inappropriate jokes or jesters, or sexual comments.

4. GAP-803, marked as Appellee's Exhibit 3, prohibits subjecting another person to unsolicited and unwelcome sexual overtones or conduct, either verbal or physical, in the workplace.

5. The suspension letter, marked as Appellee's Exhibit 1, alleges generally that the Appellant used vulgar and profane language on a regular basis and often initiated inappropriate conversations with her coworkers and supervisors. It also alleges that she joined in hiding or taking photos with coworker's cell phones. It further alleges that the Appellant made inappropriate comments to Marsha Atwood regarding the breastfeeding of her son, sent an inappropriate text to Malorie Smith with a picture of an abortion clinic, and participated in an inappropriate conversation that was videotaped.

6. It is clear from the evidence of record that locker room talk and sophomoric behavior were commonplace in the Right-of-Way unit at District Four for many years prior to the Appellant's hire date. The evidence of record also demonstrates that the Appellant willingly participated in these inappropriate activities, including those specifically alleged in her suspension letter, marked as Appellee's Exhibit 1, up to and until to September 4, 2018. The date of the videotaped conversation is unknown. The remaining specific allegations last occurred in June 2018 and September 4, 2018.

7. There is no credible proof of record that the Appellant ever joined in hiding or taking photos with a coworker's cell phone.

8. According to the testimony of J.R. Dobner, the Appellant's behavior constituted a violation of GAP-801 and GAP-803.

9. The Appellant's workplace behavior up until September 4, 2018, constituted a lack of good behavior as alleged in the suspension letter marked as Appellee's Exhibit 1.

10. The record indicates that the Appellant was not alone when it came to the use of foul language and behaving inappropriately in the Right-of-Way Division in District 4, at least up to and until September 4, 2018.

11. Mr. Dobner considered the Appellant's behavior to be insulting and demeaning, which caused him to skip the written reprimand option and go straight to a suspension. According to Mr. Dobner, in this instance, based on the Appellant's behavior, the five-day suspension was appropriate and consistent with previous disciplinary actions taken by the Appellee in response to similar situations. In making his decision, Mr. Dobner reviewed the Appellant's personnel file, the EEO Investigative Report, and actually viewed the contents of the offensive video and the text referred to in the suspension letter. There is no evidence Mr. Dobner took into consideration that, by the time of her suspension, the Appellant had long since discontinued the use of foul language and other participation in any further misbehavior while at work.

CONCLUSION OF LAW

The Appellee has demonstrated by a preponderance of the evidence that there was just cause to suspend the Appellant for her lack of good behavior, which occurred prior to September 4, 2018. The Appellant clearly fell in line with the prevailing atmosphere in the Right-of-Way Division in District 4 during her first year of employment. However, by the time of her suspension, and to her credit, the Appellant's behavioral issues had long since been resolved. The undersigned considers the Appellant's self-corrective action to be a major mitigating factor and concludes that her five-day suspension from duty and pay was excessive.

RECOMMENDED ORDER

Based on the foregoing Findings of Fact and Conclusion of Law, the Hearing Officer recommends to the Kentucky Personnel Board that the appeal of **SHAWNA SHUFFETT VS. TRANSPORTATION CABINET (APPEAL NO. 2019-168)** be **SUSTAINED TO THE EXTENT** that her five (5) day suspension from duty and pay as a Right-of-Way Agent II in the Transportation Cabinet, Department of Highways, District Four, be reduced to a one (1) day suspension and that she be reimbursed for four days of lost pay and benefits. Further, **to reimburse Appellant for any leave time she used attending the hearing and any pre-hearing conferences at the Board and to otherwise make Appellant 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).

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 7th day of May, 2020.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Edwin Logan
Shawna Shuffett
J. R. Dobner