

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2012-031**

MARK S. STREVELS

APPELLANT

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

**ENERGY AND ENVIRONMENT CABINET,
DR. LEN PETERS, APPOINTING AUTHORITY**

APPELLEE

** ** * * *

This matter came on for an evidentiary hearing on November 15, 2012, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Stephen McMurtry, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Mark S. Strevels, was present at the evidentiary hearing and was represented by the Hon. Barbara A. Kriz. The Appellee, Energy and Environment Cabinet (“Cabinet”) was present and represented by the Hon. Gordon Slone.

BACKGROUND

1. The Appellant, **Mark S. Strevels** (“Strevels”), appealed a two-day (2) work suspension imposed on him by the Energy and Environment Cabinet for Lack of Good Behavior on October 19, 2010; November 29, 2010; and, September 21, 2011. The Cabinet alleged, in a December 12, 2011 suspension letter from Henry List, Deputy Secretary, that Strevels had violated 101 KAR 1:345 Sections 1 and 4, and that Strevels had on these occasions been sarcastic, loud, angry, belligerent, disrespectful, insubordinate and aggressive towards **Sherry Adkins** (“Adkins”), his supervisor, when discussing work duties and responsibilities. (See December 12, 2011 suspension letter attached.)

2. Strevels is an Environmental Technologist III in the Department for Environmental Protection, Division of Waste Management, Superfund Branch.

3. On February 10, 2012, Strevels filed an appeal of his suspension to the Kentucky Personnel Board, alleging: “The assertions made in the December 12, 2011 document directing my 2 day suspension contain falsehoods, incorrect assumptions by my supervisor, and inconsistencies with regard to specific communications referenced and relative actions resultant. There was an 82 day period past the last referenced communication before the document was

drafted and within 25 days of a Division decision on a site I have asked the OIG to investigate related to the Division's handling. I believe this suspension may be influenced by my efforts to oppose what I consider violations of the statutes."

4. **The October 19, 2010 incident:** This incident began with a telephone call from Adkins to Strevels. Adkins instructed Strevels not to conduct sampling on unknown substances in a drum at the Kentucky Tie and Timber clean-up site, and informed him he had incorrectly filled out a form. Strevels responded that he knew what was in the drum and not to inspect it would complicate the disposal. Strevels testified that he was insulted that Adkins, who had less expertise and experience than he, would question how he filled out the form and how he was performing his job.

5. Adkins testified that Strevels said (sarcastically), "I know how to do my job. You just want me to fill out your little form" and "Thank you." Adkins said she was surprised by "the level of sarcasm and snideness" in Strevels' response to her.

6. Strevels testified he raised his voice in response to Adkin's requests. He said, in the telephone conversation, "I know how to do my job; why do you think that I don't know how to do my job?" Strevels testified he was pretty much ignored by Adkins, which was a habit with her and that, "She was speaking to him with not enough knowledge." The next day, Strevels said he apologized to her for raising his voice.

7. **The November 29, 2010 incident:** This incident arose out of the propriety of issuing a closure letter in the remediation of a contaminated site at Kentucky Tie and Timber. The issue was whether the county or the state was responsible ultimately to clean up the site and who should issue the closure letter, Adkins or Strevels.

8. Adkins testified that during the conversation, Strevels became "flushed and angry," asserting that "it was not right to go after the county." Adkins said Strevels "raised his voice, became confrontational, and told [her] what [she] had to do." She said, "The conversation was non-productive, so [she] left."

9. Strevels testified that he "could not issue [a closure letter] in good faith," and that his response to Adkins showed he was "under stress" and "frustrated." He denied being loud, angry or confrontational.

10. **The September 21, 2011 incident:** This incident arose out of a discussion between Strevels and Adkins over access to property adjacent to the Kentucky Tie and Timber contamination site. Strevels testified that the disagreement was not over access, but the State's responsibility for present and future remediation.

11. Adkins testified Strevels became "agitated and flushed" and, in a loud voice, Strevels said, "I know the regulations." She said he "stood up" and "began speaking louder and louder" and "walked over to the opening between her desk and the wall, and, with a red face and

head stuck out said, ‘Oh, you can yell at me and I can’t yell at you?’” Adkins denied yelling or raising her voice at Strevels.

12. Strevels testified that during the argument, he stood up and proceeded to exit Adkins’ office and, as he opened the door, Adkins said, “You can’t stick out your head and yell at me.” Strevels said that is when he stated, “Then why can you stick your head out and yell at me?”

13. **Susan Mallette**, a Strevels’ co-worker assigned to the Superfund Branch, testified she heard Strevels angrily yelling through the wall which separates her office and Adkins’. She said the noise did not disrupt her until the door to Adkins’ office opened. She described Adkins’ voice as “louder than conversational.”

14. **Daniel Phelps**, another co-worker of Strevels, testified he was sitting at his desk when he heard shouting and Strevels say, “I am only raising my voice and tilting my head because you are yelling at me.” Phelps said he was “concerned about a physical altercation.” He described Adkins’ voice as a “low mumble, never a raised voice.”

15. **Strevels’ Affirmative Defense of Retaliation:** Strevels has not made an independent claim of retaliation against the Cabinet, but asserts that a huge, on-going dispute between him and other personnel of the Superfund Branch influenced the Cabinet’s decision to suspend him. Strevels draws a connection between the dispute and the discipline. The dispute arose out of the proper way to dispose of a large spill of benzene.

FINDINGS OF FACT

1. Regarding the October 19, 2010 incident, the Hearing Officer finds, by a preponderance of the evidence, that Strevels spoke to Adkins in a sarcastic and snide, raised voice. Strevels later apologized to Adkins for his behavior and followed her directions.

2. Regarding the November 29, 2010 incident, the Hearing Officer finds, by a preponderance of the evidence, that when discussing a work issue, Strevels became angry, flushed and confrontational. The discussion ended when Adkins found the conversation unproductive. The issue was ultimately resolved in the manner advocated by Strevels.

3. Regarding the September 21, 2011 incident, the Hearing Officer finds, by a preponderance of the evidence, that during a contentious discussion of a work-related matter, Strevels became angered, flushed and loud in his discussion with Adkins. He stood up, began speaking loudly, hemmed Adkins in her desk chair, leaned toward her with his head extended and said something to the effect of “Oh, you can yell at me and I can’t yell at you?” This finding is confirmed by the testimony of co-workers, Daniel Phelps and Susan Mallette. The behavior disrupted the workplace.

4. Holly McCoy-Johnson, Executive Director for General Administration and Program Support (GAPS), testified that the Cabinet gave Strevels a written reprimand on June 28, 2010, which she characterized as similar to that which occurred on the above dates. She said Strevels was directed not to raise his voice in conversation with co-workers. She testified there was a grievance procedure for Strevels to follow if he felt wronged by Adkins.

5. Strevels argues that his dispute with Adkins in the Superfund Branch influenced the Cabinet's decision to discipline him. But, there was no evidence that any discrimination or retaliation was based upon the forbidden, illegal motivations of KRS 18A.095(12).

CONCLUSIONS OF LAW

1. The Hearing Officer concludes as a matter of law that the actions of the Appellant, Mark Strevels, toward his supervisor, Sherry Adkins, on October 19, 2010; November 29, 2010; and, in particular, on September 21, 2011, constituted Lack of Good Behavior and a violation of 101 KAR 1:345 Sections 1 and 4. What exactly is "Lack of Good Behavior" is not defined by the regulation or by KRS 18A.095, but KRS 18A.010 provides some direction to determine its definition. In that statute, the General Assembly asserts that the general purpose of KRS 18A.005 to KRS 18A.200 is, in part, to improve the morale and motivation of state employees and to gain maximum utilization of human resources. . .

2. The Hearing Officer concludes that angry, loud talk by one co-worker toward another, which the other reasonably perceives to be confrontational, sarcastic, snide and disrespectful, and the actions of standing over another co-worker with an extended head, blocking the usual exit passage of that worker, and speaking in a loud and angry tone, do not improve the morale and motivation of that co-worker or gain maximum utilization of state resources. Such behavior is disruptive of the workplace.

3. The Hearing Officer finds, as a matter of law, that the discipline of the Cabinet, a 2-day suspension, was not excessive nor erroneous in view of the surrounding circumstances, including Strevels' written reprimand of June 28, 2010, for similar conduct.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the 2-day disciplinary action of the Energy and Environment Cabinet be sustained and the appeal of **MARK S. STREVELS V. ENERGY AND ENVIRONMENT CABINET, (APPEAL NO. 2012-031)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

Any document filed with the Personnel Board shall be served on the opposing party.

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

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

ISSUED at the direction of **Hearing Officer Stephen McMurtry** this _____ day of January, 2013.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Gordon Slone
Hon. Barbara Kriz