

CERTIFICATION OF PERSONNEL BOARD RECORDS

I certify that attached hereto is a true and correct copy of the Final Order Rejecting Hearing Officer's Findings of Fact, Conclusions of Law and Recommended Order in the case of **KIM SUTHERLAND VS. TRANSPORTATION CABINET (APPEAL NO. 2014-187)** as the same appears of record in the office of the Kentucky Personnel Board.

Witness my hand this 24th day of June, 2015.



MARK A. SIPEK, SECRETARY
KENTUCKY PERSONNEL BOARD

Copy to Secretary, Personnel Cabinet

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-187**

KIM SUTHERLAND

APPELLANT

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

**TRANSPORTATION CABINET
MIKE HANCOCK, APPOINTING AUTHORITY**

APPELLEE

** ** *

The Board at its regular June 2015 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated March 16, 2015, having noted oral arguments of the parties and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer are rejected and the Board issues its own Findings of Fact, Conclusions of Law and Recommended Order as follows:

INTRODUCTION

This matter came on for an evidentiary hearing on January 15, 2015, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before Colleen Beach, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellant, Kim Sutherland, was present and not represented by legal counsel. Appellee, Transportation Cabinet, was present and represented by the Hon. William Fogle. Also present as Agency representative was the Hon. J.R. Dobner.

BACKGROUND

1. Appellant, Kim Sutherland, is a classified employee with status who is employed as an Administrative Specialist III with the Kentucky Transportation Cabinet, Department of Vehicle Regulation, Division of Driver Licensing, Driver Education Support Section.

2. Appellant was notified that she was being suspended for five days due to misconduct by means of a letter dated August 19, 2014. A copy of that letter is attached and incorporated herein as **Final Order Attachment A**.

3. Appellant timely filed Appeal No. 2014-187 on August 27, 2014, appealing her five-day suspension.

4. It was established by Interim Order, dated October 8, 2014, that the Appellee, Transportation Cabinet, shall bear the burden of proof to demonstrate that the disciplinary action was neither excessive nor erroneous and was taken with just cause.

5. Appellee called its first witness. **J.R. Dobner** is the Policy Advisor for the Cabinet's Office of Human Resource Management, a position he has held for the past two years. Dobner's duties include oversight of drafting disciplinary letters before they are forwarded to Carol Beth Martin, Executive Director of the Office of Human Resource Management.

6. Dobner testified that he is familiar with Appellant because he drafted her December 11, 2013 written reprimand, and received the request for disciplinary action for the suspension that is the subject of this appeal.

7. Dobner stated that Appellant is an Administrative Specialist III in the Department of Vehicle Regulation, Division of Driver Licensing, Driver Education Support Section. The three areas in which Appellant works are the Alcohol Treatment Program, State Traffic Schools, and the Graduated License Program. In her capacity as an Administrative Specialist III, she answers the phone and answers questions individuals have about their driver's licenses. Her job also includes the documentation of these phone calls in the "resolution field section" of the Information Technology Service Management System (ITSM).

8. Dobner explained the circumstances that led to Appellant's five-day suspension: The Division of Driver Licensing has a general call center that deals with "garden variety" questions. If more expertise is needed, the call is forwarded to a staff member with more specialized knowledge. On July 31, 2014, a call from a private individual, E.H., was forwarded to Appellant.

9. E.H. first spoke to an employee in the call center ("CSP") inquiring into the status of his driver's license. E.H. had gone through the criminal process for a DUI, and also had to reschedule a missed State Traffic School appointment. The call center employee told E.H. that his license was still active. For some reason (Dobner did not know why), E.H.'s call was forwarded to Appellant. Appellant informed E.H. that his license was not active, and then wrote in her documentation of the call: "I fibbed and told him DUI was on the record, although CSP had admitted that it wasn't."

10. Dobner testified that Appellant had been disciplined with a written reprimand on December 11, 2013, for inappropriate emails and nine instances of "inappropriate comments regarding the customers you assisted in the resolution field section of the ITSM." (Written reprimand, Appellee's Exhibit 2.) Dobner added that records from the ITSM database are subject to Open Records Request.

11. Dobner stated that Appellant's behavior regarding E.H. was a violation of General Administration and Personnel Policy 801, specifically, Appellant failed to:

- "Carry out assignments as directed by their supervisors or requesting meetings with their supervisors to seek further direction or discuss problems with the assignments" and
- "Showing courtesy, respect, and promptness in relating to fellow employees and members of the public."

(GAPS 801, Appellee's Exhibit 4.)

12. Dobner was asked why Appellant was given a five-day suspension. Dobner answered that the Division of Driver Licensing was making a concentrated effort to increase its employees' level of accuracy, quality of work, and professionalism. In addition, Appellant had a previous corrective action, but her inappropriate behavior continued. Dobner stated: "We need to give her a road map of what could happen if this behavior continues. A one-day suspension would not prepare her for the consequence if this happens again. Her professionalism is lacking."

13. **Kenneth Pruitt** is an Administrative Section Supervisor in the Department of Vehicle Regulation, Division of Driver Licensing. His job duties include the management of State Traffic School, the Graduated License Program, and the DUI/Alcohol Treatment Program. He supervises seven employees, one of whom is the Appellant.

14. Pruitt was asked to describe Appellant's job duties. He stated that she is primarily responsible for ensuring the accuracy of data regarding citizens who have been involved with DUIs. She also assists, as needed, with phone calls regarding State Traffic School and the Graduated License Program.

15. Part of Appellant's job is to document the results of every phone inquiry she handles. This documentation is put into a computer system which logs the details of every call.

16. Pruitt testified that on July 31, 2014, an incident occurred regarding Appellant's handling of a phone call that led to his requesting that a disciplinary action be taken.

17. That day an individual named E.H. phoned the call center asking about the status of his license. The call center employee told E.H. his license was "in force," which was true according to the information contained in the Driver History Evaluation Report (Appellee's Exhibit 6). E.H. was transferred to Appellant who told E.H. that his license was suspended. Then Appellant wrote on the computer log:

I fibbed & told him DUI was on the record, although CSP had admitted that it wasn't. he said he has 3 more weeks to finish program. took record down to Jenny to get DUI added. (sic)

(Appellee's Exhibit 7.)

18. Pruitt stated that after Appellant "lied to the individual, she went down to the Court Records Department to get his license officially suspended." The proper protocol would have been for Appellant to tell E.H. the truth - - that his license was actually "in force." She should have said to him: "As of right now, you are not suspended, but your suspension could post at any time."

19. At the end of Pruitt's testimony, the Appellee rested its case.

20. Appellant called her first witness. **Michael Neal** is an Administrative Branch Manager for the Driving History Record and Education Branch, Department of Vehicle Regulation. Appellant has worked in this branch for the past eight years.

21. Neal was asked to review Appellee's Exhibit 6, a "Driver History Evaluation Report" for E.H. Neal stated that according to the report, Appellant's license was not suspended until the day he phoned the Call Center, July 31, 2014.

22. On cross-examination, Neal was asked to explain the consequence a driver faces for failure to attend State Traffic School. Neal answered that once a driver has been scheduled to attend a class, and he fails to do so, his license is suspended until he pays a \$40 fee and reschedules to attend another class.

23. Neal was asked if it is the responsibility of a Division of Driver Licensing employee to correct a driver's records when that employee finds out a DUI has not been properly reported and entered into the Drivers Licensing database. Neal answered in the affirmative and agreed that it was part of Appellant's job. Neal explained that when a DUI is reported to the Transportation Cabinet by the state court handling the offense, if the information is not properly submitted, the Transportation Cabinet rejects the report until the right information is supplied, which is apparently what happened in E.H.'s case.

24. Through Neal's testimony Appellant's evaluation for 2012 and 2013, and her evaluations of the first two interim periods of 2014 (January 1 through August 31, 2014) were submitted. Appellant's score for 2013 was "413," which put her in the "Highly Effective" category. Neal concluded: Appellant "has good work performance, that is not in question." (Appellant's Exhibit 5.)

25. The Appellant, **Kim Sutherland**, testified on her own behalf. She is an Administrative Specialist III for the Department of Vehicle Regulation, Division of Driver Licensing, Driver Education Support Section. Appellant testified that she spoke to E.H. on the phone on July 31, 2014, after an employee at the Call Center had transferred the call to her. E.H. told her that he had missed his scheduled State Traffic School class because of a DUI he had received. E.H. stated that he was about to finish his Alcohol Treatment classes and only had three more to go.

26. Appellant looked at E.H.'s Driver History Evaluation Report, an on-line database. She noticed that his DUI was not on the record. While she was speaking to him on the phone, she pulled up the court record of his "Operating a motor vehicle under the influence of alcohol" charge, which was resolved on April 25, 2014, with a "guilty" plea in Harlan District Court. (Appellant's Exhibit 3.)

27. Appellant told E.H. she would reschedule his missed traffic school class. She also told him his license was suspended because in her "determination" it was. It should have been suspended for his failure to complete a scheduled State Traffic School class, as well as for his DUI conviction on April 25, 2014. According to Appellant, E.H. faced two reinstatement fees of \$40 each if his license was suspended twice.

28. Appellant stated that while E.H.'s driver's license record technically stated that it was "active," that notation was incorrect. She testified that she told E.H. his DUI was on record when in actuality it was not. She added: "It was my determination that it was not in his best interest for me to tell him his DUI wasn't there. It would have caused him to pay an extra \$40 for a reinstatement fee."

29. As soon as Appellant ended the call with E.H., she went directly to the Court Records Section of her division and advised them E.H.'s April 25, 2014 DUI needed to be added to his Driver History Evaluation Report, which they did.

30. KRS 18A.095(1) reads:

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

31. 101 KAR 1:345, Sections 1 and 4, read 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.

32. General Administration and Personnel (GAP) Policy 801 reads in relevant part:

The Cabinet's expectations for generally acceptable conduct of its workforce include but are not limited to:

- Carrying out assignments as directed by their supervisors or requesting meetings with their supervisors to seek further direction or discuss problems with the assignments.
- Showing courtesy, respect, and promptness in relating to fellow employees and members of the public.

FINDINGS OF FACT

1. Appellant, Kim Sutherland, is employed as an Administrative Specialist III with the Kentucky Transportation Cabinet, Department of Vehicle Regulation, Division of Driver Licensing, Driver Education Support Section.

2. Appellant was suspended for five days effective August 20, 2014, for poor work performance. Appellant filed a timely appeal from her suspension on August 27, 2014.

3. Appellant's job duties included answering calls from drivers licensed in Kentucky who have questions about state driving programs or the status of their license.

4. On July 31, 2014, Appellant received a call from E.H. who called to check the status of his driver's license. According to the Driver History Evaluation Report (Appellee's Exhibit 6), E.H.'s license was still active in the system.

5. Appellant testified that she looked at E.H.'s Driver History Evaluation Report and noticed that his DUI had not been posted on the report. While she was speaking to him she verified on a separate database that E.H. had pled guilty to "Operating a motor vehicle under the influence of alcohol" charge on April 25, 2014.

6. By Appellant's own admission, she gave E.H. false information. She told him his license had been suspended, when, in fact, it was still active in the system. Kenneth Pruitt, Appellant's supervisor, testified that the proper protocol would be to tell E.H. the truth that his license was active, but to clarify with him that the license suspension could post at any time.

7. Appellant wrote in the "resolution field" of the office database which serves as documentation of these calls:

told him that I would reschedule his STS (State Traffic School) & be expecting a letter in 2-4 wks. verified pob. I fibbed & told him DUI was on the record, although CSP had admitted that it wasn't. he said he has 3 more weeks to finish program. Took record down to Jenny to get DUI added. (sic) (emphasis added).

(Appellee's Exhibit 7.)

8. When Appellant got off the phone with Appellant, she advised the Court Records Section of her division that E.H.'s April 25, 2014 DUI needed to be added to his Driver History Evaluation Report.

9. Michael Neal, Administrative Branch Manager for the Driver History Record and Education Branch, testified that E.H.'s DUI may have failed to post onto his Driver History Evaluation Report initially because the state court handling the offense may not have properly submitted the information regarding the offense, which may have caused the Transportation Cabinet to reject the report until the proper information was supplied. Appellant properly submitted the information regarding E.H.'s DUI to the Court Records Section, and his license was suspended on July 31, 2014. (Appellee's Exhibit 6.)

10. Appellant received a written reprimand on December 11, 2013, for forwarding an inappropriate e-mail to five coworkers, and for nine instances of inputting inappropriate comments on the "resolution field" section of the Information Technology Service Management System.

11. J.R. Dobner, Policy Advisor for the Cabinet's Office of Human Resource Management, testified that a five-day suspension was chosen as the appropriate level of discipline in Appellant's case because despite the previous corrective action, her behavior of writing inappropriate comments continued. Dobner added: "We need to give her a road map of what could happen if the behavior continues. A one-day suspension would not prepare her for the consequence if this happens again. Her professionalism is lacking."

12. While the Board is mindful that it is Appellant's position that she told E.H. that his license was suspended in order to save him an additional \$40 for a second license reinstatement fee, the words she wrote in the ITMS resolution field, are particularly egregious in light of the written reprimand she received in December, 2013:

I fibbed and told him his DUI was on the record. Although CSP admitted that it wasn't. (sic)

That reprimand put Appellant on notice that her comments on the ITMS "should remain professional," and that further incidences of this kind of behavior would result in disciplinary action. Admitting that she told E.H. incorrect information and then documenting that falsehood on an official document is unprofessional and a violation of GAP-801.

13. The Board finds, however, that the five-day suspension Appellant received for poor work performance to be excessive under the circumstances. The Board concurs with the Hearing Officer that Appellant's statements on the ITMS were unprofessional and would justify disciplinary action. The Board disagrees that a five-day suspension is necessary to impart that message, noting Appellant's ultimate goal was to notify the customer as to what would happen very shortly regarding the DUI and ensure that the action was properly recorded by the Transportation Cabinet.

CONCLUSIONS OF LAW

1. Appellant's unprofessionalism handling the phone call from E.H. on July 31, 2014, satisfied the elements of poor work performance pursuant to 101 KAR 1:345.
2. Appellant's poor work performance meets the for cause requirements of KRS 18A.
3. The Board concludes that the five-day suspension was excessive for the reasons stated in Findings of Fact paragraph 13 above.

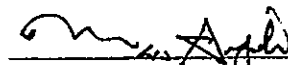
ORDER

The Board orders that the appeal of **KIM SUTHERLAND VS. TRANSPORTATION CABINET (APPEAL NO. 2014-187)** be **SUSTAINED to the extent** that the five-day suspension without pay is reduced to a three-day suspension without pay. The Board further **ORDERS**, Appellant shall be restored all pay, benefits and made whole with respect to the restoration of the two working days. Appellee shall also reimburse Appellant for any leave time she used attending the hearing, any pre-hearing conferences, and oral argument at the Board. [KRS 18A.105, 18A.095(25), and 200 KAR 12:030.]

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 24th day of June, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPER, SECRETARY

A copy hereof mailed this date to:

Hon. William Fogle
Kim Sutherland
Kathy Marshall



Steven L. Beshear
Governor

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

Michael W. Hancock, P.E.
Secretary

August 19, 2014

Kim Sutherland

Personnel Number: 172443

Re: Five (5) Day Suspension

Dear Ms. Sutherland:

Based on the authority of KRS 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 the beginning of business August 20, 2014 and ending the close of business August 26, 2014. In accordance with 101 KAR 1:345, Section 1, you are being suspended from your position as an Administrative Specialist III with the Kentucky Transportation Cabinet (KYTC), Department of Vehicle Regulation, Division of Driver Licensing, Driver Education Support Section, for the following specific reason:

Poor Work Performance. On July 31, 2014, you received a call from Edward Hensley. Hensley called to check the status of his class D license. You informed Hensley that you would reschedule his State Traffic School (STS) and that his license was suspended due to a recent DUI. However, his license was still in active status in the system. You falsely informed Hensley that his license was suspended. In the comments section of Hensley's call record you wrote, "I fibbed & told him DUI was on the record. Although CSP (customer service person) had admitted that it wasn't".

You have been counseled by management that information that is given to drivers and/or entered in a record needs to be accurate. Your actions are in violation of 101 KAR 1:345, Section 1, and the General Administration and Personnel Policy (GAP 801) by not carrying out assignments as directed by your supervisor and giving false information to a driver and then documenting that you had done so in the driving record.

You received a written reprimand on December 11, 2013 for lack of good behavior.

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

Kentucky

Final Order Attachment A

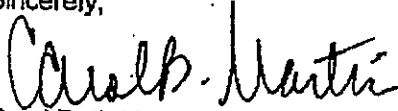
APPELLEE'S
EXHIBIT

Kim Sutherland
August 16, 2014
Page Two

For your information, the Kentucky Employee Assistance Program (KEAP) is an assessment and referral service for state employees. KEAP can help you with any personal problems that may be affecting your job performance. Participation is voluntary and confidential. You can reach KEAP 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 the 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.

Sincerely,



Carol Beth Martin
Appointing Authority

CBM:acr

Attachments

cc: Personnel Cabinet
Personnel Board
Rodney Kuhl, Commissioner
Carolyn Brown, Division Director
Michael Neal, Administrative Branch Manager
Cabinet Employee File