

**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2014-194**

**THOMAS MARK TARTER**

**APPELLANT**

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

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

**APPELLEE**

**\*\* \*\* \***

The Board at its regular July 2015 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated March 17, 2015, Appellant's exceptions, Appellee's response, 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 Appellant's appeal is 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 14<sup>th</sup> day of July, 2015.

**KENTUCKY PERSONNEL BOARD**

  
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**MARK A. SIPEK, SECRETARY**

A copy hereof this day sent to:

Hon. Leesa Moorman  
Hon. Paul Harnice  
Lynn K. Gillis  
Sherry Butler

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This matter came on for evidentiary hearing on February 2, 2015, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before Roland P. Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Thomas Mark Tarter, was present and represented by the Hon. Paul Harnice. The Appellee, Energy and Environment Cabinet, was present and represented by the Hon. Leesa Moorman. Also present as Agency representative was Ms. Lynn Keeling Gillis.

The issue in this case was whether there was just cause for the disciplinary action taken against the Appellant, that is, demotion from the position of Environmental Control Manager, pay grade 16, with a salary of \$4,018.40 to the position of Geologist Registered, pay grade 15, with a salary of \$3,827.06 per month, and whether such penalty was excessive or erroneous. The burden was on the Appellee to prove its case by a preponderance of the evidence.

The rule separating witnesses was invoked and employed throughout the course of the proceeding. Both parties waived presentation of opening statements. The parties stipulated to joint admission of the following exhibits:

- Joint Exhibit 1: the August 1, 2014 letter from Holly McCoy Johnson, designated Appointing Authority, to Thomas Mark Tarter, advising the Appellant of his demotion;
- Joint Exhibit 2: the July 23, 2014 Final Report from the Office of Inspector General for Shared Services;
- Joint Exhibit 3: OIG Report 2014 -- OIG-014 Exhibit Summary;
- Joint Exhibit 4: Environmental and Public Protection Cabinet Policy, Policy State on a Drug-Free Workplace, EPPC-040.

### **BACKGROUND**

1. The first witness for the Appellee was **Travis Sanders**. Mr. Sanders has been employed with the Department for Natural Resources for thirteen years and is currently an Administrative Specialist III. As part of his duties he takes care of motor pool vehicles and sees to their maintenance. He takes the motor pool vehicles to local shops for repairs and maintenance. He works directly for the Commissioner's office.

2. Barry Glass, a division employee, had a state assigned vehicle which required repair. It had been towed to Goodyear. On June 19, 2014, Mr. Sanders and Donald Tyson drove to Goodyear to pick up that vehicle.

3. The vehicle had been repaired, but was dirty. The interior was stained, dirty and contained trash. While Tyson separately drove back to the office, Sanders took the vehicle to the car wash to get it cleaned. When the car wash was completed, he entered the vehicle and noticed a pill bottle. He picked up the bottle and noticed something was in it. He opened up the bottle and observed what he thought to be marijuana roaches or the ends of joints. He placed the top back on the bottle and placed the bottle on the console. He was not certain whether it was indeed marijuana. He drove back to the Hudson Hollow facility, locked the vehicle, and locked the motor pool gate. He also locked up the vehicle itself.

4. He identified p. 15 of Joint Exhibit 3 as a photograph taken from the parking lot of Arby's on Hudson Hollow Road looking across to the fenced in area he identified as the motor pool "cage." That is the location where the subject vehicle had been locked up.

5. When Sanders returned to his duties after retrieving the vehicle, Billy Ratliff, the Director of DME, stopped and asked him about the vehicle's status. He advised Ratliff the vehicle had been long overdue for an oil change and was in dirty condition. Ratliff got upset about that.

6. Sanders then went to the Appellant's office. He knew Appellant to be the supervisor of Barry Glass and that it was Glass' vehicle in which he had made this discovery. Sanders gave Tarter the vehicle keys and told him he found a pill bottle with what looked like roaches in it. Tarter looked shocked and said, "Okay."

7. Travis Sanders then went to the office of Corey Sanders and told him what he had found.

8. Later in the day, Director Ratliff asked Travis Sanders what he had found. Sanders was then directed to draft a timeline. He identified p. 4 of Joint Exhibit 4 as an e-mail he sent to the Commissioner after Mr. Ratliff directed him to do so on June 20, 2014. He also identified p. 11 of Joint Exhibit 3 as indicating the vehicle had been checked into Goodyear on June 16 and retrieved on June 19, 2014.

9. The parties stipulated that both the Appellant and Gary Glass were employees of the Non-Coal Branch.

10. The next witness was **Donald Ray Tyson, II**. Mr. Tyson is employed by the Department of Natural Resources, Mine Reclamation Enforcement, Explosive and Blasting Branch, where for the past five years he has been an Internal Policy Analyst II. He briefly described his duties. Wes Jones, the Assistant Director, and Billy Ratliff, the Director, were in his line of supervision.

11. On June 19, 2014, Sanders told Tyson what was found in Barry Glass' vehicle. Mr. Tyson then went directly to Mr. Tarter and asked if he wanted to talk about what was found in Glass' vehicle. Appellant responded, "What are you talking about?" Tyson stated, "I think you know what we are talking about." He then told Appellant a pill bottle had been found in Glass' vehicle with what was believed to contain marijuana. He asked Tarter what he was going to do about that. Tarter replied, "I'm not going to do anything." Tyson told Tarter he thought he ought to tell Mr. Ratliff. Tarter replied, "I'm not going to tell Billy." Tyson then said he would tell him and again Appellant said he was not going to tell anyone.

12. Tyson then went to Mr. Ratliff's office and told him about the entirety of the conversation he had just had with the Appellant. He also told Ratliff that apparently contraband had been found in Glass' vehicle; that he himself had gone to Appellant and asked him what he would do and Appellant replied he would do nothing.

13. Ratliff directed him to write and submit a written statement. The witness identified p. 3 of Joint Exhibit 3 as that statement he authored.

14. Appellant, in his conversation with Tyson, said he had suspicions of what was in the pill bottle. Tyson himself had no knowledge what it contained. As a state employee, however, he believed he had a duty to report drugs if drugs had been found.

15. **Billy A. Ratliff**, who since July of 2011 has been Director of Mine Reclamation and Enforcement, was the next witness. He briefly described his duties and the operations of the Division. Barry Glass was an employee in his Division as is the Appellant and Donnie Tyson. Mr. Tarter had been Branch Manager of the Non Coal Branch. He had been promoted to that position in October 2011 from his prior position as a Geologist Registered. Due to the subject

events, he was demoted from grade 16 to grade 15. Ratliff had been involved in the promotional process and had recommended Appellant to that promotion.

16. Tarter supervised approximately six employees including Glass. Mr. Glass was a Field Inspector for 44 counties in the Commonwealth. Glass had a state-assigned vehicle he took home with him. Employees with such vehicles are charged with the responsibility to keep the oil properly changed, have the vehicle regularly maintained, and to operate it safely.

17. On the morning of June 19, 2014, Mr. Sanders came to the witness' office and reported he had just picked up Glass' vehicle from Goodyear. The truck was in pretty bad shape and had been 15,000 miles between oil changes.

18. Thereafter, Ratliff called Tarter into his office and asked him to look into it. They then received the maintenance records on the vehicle. He identified p. 9 of Joint Exhibit 3 as the e-mail he received from Ms. Michaels.

19. Later on June 19, 2014, Tyson came into the witness' office. Mr. Tyson advised he had been told that while the vehicle was at the carwash, a pill bottle with Barry Glass' name on it had been discovered and it contained two marijuana roaches. Ratliff asked Glenda France, Branch Manager in the Coal Branch, to come to the office with a pad and pencil. He wanted to talk to Mark Tarter and have a witness present.

20. In his meeting with Mr. Tarter, he asked Appellant whether someone told him they found a pill bottle containing roaches in Glass' vehicle. Appellant responded, "Yes." He was asked what he did with it. Appellant responded, "I got them and I threw them away in a garbage can." When asked where he threw the items away, Appellant responded, "Just down the road." He would not be specific. He was asked why he did not come to Ratliff to tell him. Appellant responded, "I was just trying to protect one of my people."

21. Ratliff told him this was a serious matter and that they have a drug-free workplace policy. The matter needed to be investigated. Appellant told him he was not thinking. Ratliff could not believe that Tarter did not tell him previously.

22. Ratliff reported the matters to Commissioner Hohmann. The Commissioner directed Ratliff to secure written statements from everyone involved and to turn those documents over to him. Ratliff complied.

23. Ratliff also asked Sanders why he had not reported this during his earlier conversation. Sanders replied that he had reported it to Mark Tarter and thought he had done what he was supposed to have done.

24. The witness identified Joint Exhibit 3 as containing the written statements he received from the individuals. Page 7 shows documents sent to him by Appellant on June 20, 2014, at approximately 3:00 p.m. pertaining to the vehicle maintenance. There was no mention of the pill bottle. P. 6 shows the first formal statement made on the matter by the Appellant on June 23, 2014.

25. Ratliff requested Appellant again explain to him by e-mail. Appellant then sent the June 23 e-mail.

26. After receiving all the statements, Ratliff prepared a timeline shown on pp. 1 and 2 of Joint Exhibit 3. In his testimony, he indicated there was a typographical error and that it should have read Donnie Tyson had been told by Corey Sanders what was found in the pill bottle.

27. All these documents were sent onto the Commissioner. The Commissioner contacted the Office of Inspector General (OIG) and requested an investigation. After the investigation had been completed, Mr. Ratliff received and reviewed a copy of the OIG report (Joint Exhibit 2). He thereafter recommended Appellant be demoted due to communication issues and trust issues. He believed this was "pretty serious" and should have been reported. He had previously counseled Appellant about communication issues through prior employee evaluations. This was pointed out in his testimony pertaining to Appellee's Exhibits 1, 2, and 3.

28. At the time he recommended a demotion, he did not take into consideration Appellant's past performance. He only considered the matters immediately surrounding the events of June 19, 2014. This included Appellant's statement that he did not report the matter because he was protecting his employee and apparently had made a bad judgment. Appellant failed to answer Ratliff's questions directly and did not use good judgment. Appellant never denied what he had done.

29. On June 23, 2014, the witness and Wes Jones went to the upper lot and accessed the locked vehicle. In the vehicle they found a sandwich bag under the seat containing a couple of roaches. Ratliff took the bag and showed it to the Commissioner. The bag was then given to OIG.

30. Subsequently, Ratliff asked Wes Jones to get the truck cleaned. When Jones took the truck to be cleaned, another marijuana roach was found. This roach was turned into the Commissioner. It had been in bad shape and disintegrating. The Commissioner stated that they had already turned things into the OIG so they should just get rid of this additional roach. The witness then flushed it down the toilet.

31. Counsel for the Appellee explained that Joint Exhibit 3 constitutes the entirety of what is identified in the OIG report as "Exhibit 1."

32. Mr. Ratliff denied in his interview to the OIG that he had ever called Appellant any names over this incident. He was not aware whether Appellant had any prior disciplinary action over the length of his employment. He never advised anyone up the chain of command that any particular policy had been violated by the Appellant.

33. Upon his review of the demotion letter, p. 2, paragraph 4, Mr. Ratliff agreed that this recitation was what happened between himself and the Appellant. Appellant never told him that he had thrown away the pill bottle at Arby's.

34. **Rodney Beck**, who since 2000 has been employed as an Investigative Special Agent III for OIG for Shared Services, was the next witness. He explained his job duties which included conducting personnel investigations for the Labor Cabinet, Public Protection Cabinet, and the Energy and Environment Cabinet. He and Deputy Inspector General John Holiday had been assigned the matter of investigating the alleged contraband in this case.

35. They made initial contact with the Appellant on June 23, 2014. Appellant physically showed them the fenced in motor pool area and the actions he took. Appellant told them that after being informed by Mr. Sanders of a pill bottle in the vehicle with possible marijuana, Tarter recovered the bottle and made a conscious effort not to look at it. He had walked with it towards Arby's. He demonstrated to the investigators that he opened the bottle and "slung" whatever was in it, out. He then went over to Arby's and showed where he threw the bottle in the trash receptacle. At one point he said he was sure the bottle belonged to Glass.

36. The investigators looked around on the ground where Tarter said he had emptied the bottle. They did not see anything other than cigarette butts.

37. Holiday and Tarter went into the Arby's. Holiday spoke to an employee and was told the trash receptacle was emptied three times a day. It therefore made no sense to search the receptacles.

38. Later that afternoon, Mr. Ratliff, who found a bag with roaches from the vehicle, turned that bag over to OIG. OIG did not test the contents of the bag because there was no established chain of custody.

39. The investigators conducted the remaining interviews on June 25, 2014. Mr. Sanders stated he had gone to retrieve Glass' vehicle from Goodyear. He saw it was dirty and took it to the carwash. Once it came out of the carwash he noted a pill bottle on the console. He grabbed the bottle and could tell something was in it. He opened the bottle and saw what he

described as marijuana cigarettes. He closed the bottle, came back to the office and informed Mr. Tarter.

40. Mr. Glass reported that it was not unusual for there to be a pill bottle in his vehicle as he takes medications. He denied he used marijuana or any illicit drugs. After that date the investigators were made aware that Glass had submitted his notice of retirement.

41. Mr. Ratliff did not add anything to the written statements he had already provided.

42. Mr. Beck identified Joint Exhibit 2 as the report from OIG. OIG made no determinations whether any policies were violated. The recommendations in the report were made either by the Inspector General or the Deputy Inspector General. Holiday and Beck conducted and wrote down the interviews. Mr. Beck has reviewed the report and agrees with it in its entirety.

43. **Lynn Keeling Gillis** was the next witness. She has been employed with the Agency for about twelve years, serving the past two years as Division Director with the Labor Cabinet and in GAPS. She briefly described her job duties including handling human resources matters for three Cabinets. This includes the Energy and Environment Cabinet. She and Holly McCoy Johnson, are Acting Appointing Authorities for the Energy and Environment Cabinet.

44. When a human resources matter comes to them, the witness and Holly McCoy Johnson confer and review it, along with the Secretary's office and the legal department. If there is a need, an investigation is requested. Such investigation was requested here.

45. Ms. Gillis had examined the OIG report. She then recommended disciplinary action. The type of discipline was discussed among the committee. At first, they had discussed dismissal, but believed that due to Appellant's time with the state, such action would be too harsh. She agreed with a recommendation of demotion.

46. Upon her examination of Joint Exhibit 1, Ms. Gillis believed that the Appellant had violated the Drug-Free Workplace policy (Joint Exhibit 4). She based this opinion on what is described in Section A of the policy, and in particular the prohibition of "possession" of those substances. The Appellant did have "likely possession of illegal drugs." She based this opinion on comments given by Appellant to the OIG; he also made some inconsistent statements which led her to believe he strongly suspected he had drugs in his possession when he retrieved the bottle. He stressed the following which appears on p. 2 of the OIG report:

- That Tarter had looked at the bottle and noticed it was blood pressure medicine;
- He shook the bottle and whatever was inside he believed was "microscopic";



- He walked the contents of the bottle off state property;
- He was confident the bottle belonged to Glass;
- He did not make a conscious effort to look at the bottle.

She could not reconcile why someone would throw away the bottle's contents if it indeed contained a person's blood pressure medicine.

47. There is no policy per se on how one is to behave as a supervisor. Trainings for supervisors are conducted. A supervisor's responsibility is to his agency. There exists a Drug-Free Workplace policy. Even if a supervisor suspected one might have drugs in their possession, they needed to do the right thing and report it up the chain of command. This is a primary duty of a manager.

48. The drugs were not the issue in this disciplinary action. The Agency could not determine if there were drugs because the Appellant threw the contents of the bottle away. Appellant strongly suspected there were drugs and he decided to throw the contents away rather than turn it over. How can the Agency trust him when he conducts inspections, to do the right thing, if he cannot be trusted to turn over what he thinks are illegal substances?

49. She believed the demotion was consistent with similar other actions where demotions had been issued as discipline. Prior to instituting the demotion she reviewed other cases. One case involved a supervisor at the Public Protection Cabinet who behaved inappropriately when he used racial and sexual comments. Another case involved a supervisor at the Labor Cabinet who violated confidentiality by having given an applicant the actual questions for a job interview.

50. The Agency did not take disciplinary action against Barry Glass. It was in a difficult position. Any evidence it might have had access to was improperly disposed of and destroyed by the Appellant.

51. Tarter and his acts had also been insubordinate. He was well aware of the chain of command. When dealing with possible illegal activity, such activity has to be reported. Also, when he was questioned, he made vague and evasive comments about this to Director Ratliff.

52. Appellant had engaged in a lack of good behavior. This is particularly true when he first found out the potential existence of marijuana in the pill bottle. He should have told his Director what was going on and not dispose of the evidence. He also refused to communicate specifically where he had disposed of the bottle and its contents.

53. There is no specific policy or procedure to address this situation. But Appellant should have taken matters to his own supervisor. When Tarter got information about the possibility of drugs in the pill bottle and when he retrieved the pill bottle, he himself took possession of the substances.

54. She testified that the Drug-Free Workplace policy does not address whether withholding of information or disposing of contraband is a policy violation. Appellant, however, had a duty to report the matter so it could be investigated. He can gather the basic facts on his own.

55. She had looked at Appellant's entire file when considering the matter. The file included employee evaluations and the Performance Improvement Plan (PIP). She felt, however, that it was the intentional omission of pertinent information which by itself substantiated the demotion. She had reviewed and considered the performance evaluations and the PIP (Appellee's Exhibits 1, 2, and 3) and had factored these into her decision.

56. The next witness was **Thomas Mark Tarter**, the Appellant. Since August 1, 2014, Mr. Tarter had been employed with the Department of Surface Mining, Non Coal Branch, as Geologist Registered. The previous three years he was the Branch Manager, prior to his demotion.

57. Mr. Tarter stated he had placed the pill bottle in a trash can at Arby's. He did that because he did not want it on state property or in the vehicle. No one needs to bring their intoxicants to work with them. He had a preconceived notion when he took possession of the bottle that it contained intoxicants. Thinking about it later, however, he really did not know what was in the bottle.

58. He told Mr. Ratliff that he removed the bottle from the vehicle and threw it in a trash can off the premises. He testified that he did this for the "protection, for all of us." He knew that if there was something in the pill bottle that "it would be like an ax murder." He was trying to get through the incident. He was not trying to protect Barry Glass from punishment. He was trying to determine what the appropriate punishment would be.

59. When he retrieved the bottle he did not look at the name on it, nor did he look inside. He shook it and felt that what was in there was not a pill or tablet. It was not heavy and did not rattle. When he reached the sidewalk, he emptied the bottle in the grass. He walked on to Arby's and put the pill bottle in the trash. It was a bad choice. He had not gone there to remove evidence.

60. After Travis Sanders told him he found what he thought was marijuana in the vehicle, Tarter sat at his desk and thought about it. Moments later, Donnie Tyson came in and asked if he was going to tell Billy Ratliff about it. He responded, "I don't want to." He dreaded it. But yes he knew he had to do it.

61. He surmised that one of the "No's" he responded to Tyson was that he wanted to tell Billy it was his role. He wanted to get his own story straight. He had nothing to tell anyone at the time as he was still in the deliberation process.

62. Mr. Tarter testified he thinks he made a bad decision, but that it did not warrant the punishment he received. There was no directive how to respond in this type of situation.

63. He himself had never found Glass to be in possession of marijuana nor did he ever know him to have used or possessed it.

64. The Hearing Officer requested Mr. Tarter review the statement he gave to the OIG, shown on pp. 2-4 of Joint Exhibit 2. He was asked if there was anything in that statement with which he currently has disagreement. Mr. Tarter testified he has no real issue with it except for the statement made therein that he had no doubt at the time the pill bottle belonged to Glass. He also clarified that on p. 3, paragraph 3, he believes he spoke with Barry the first time by telephone on Thursday and then in person the following Friday morning.

65. The Appellee rested its case. Appellant presented a Motion for Directed Verdict. The motion was **DENIED**. Appellant called no witnesses and rested its case.

66. Both parties waived presentation of closing statements and briefs. The matter stood submitted to the Hearing Officer for his recommended order.

### **FINDINGS OF FACT**

1. Appellant, Thomas Mark Tarter is a classified employee with status. At the time of the events which led to the disciplinary action, he was employed by the Department of Surface Mining, Non Coal Branch, Energy and Environment Cabinet, as a Branch Manager. He had also been the supervisor of Barry Glass.

2. In June of 2014 a state vehicle that had been assigned to employee Barry Glass had been towed to the Goodyear shop in Frankfort, Kentucky, for repairs. Travis Sanders (Administrative Specialist III), in charge of taking care of motor pool vehicles, and Donald Tyson (Internal Policy Analyst II) drove to Goodyear on June 19 to pick up the vehicle.

3. Sanders saw the vehicle was dirty. He took it to a local carwash. When the carwash was completed, Sanders entered the vehicle and saw a pill bottle. He opened the bottle and saw what he believed to be marijuana roaches. He closed the bottle and placed it on the console. Sanders drove the vehicle to the Hudson Hollow facility, locked the vehicle, and locked the motor pool gate.

4. Sanders then went to Appellant's office and handed him the keys to the vehicle. Sanders told Mr. Tarter he had found a pill bottle with marijuana roaches inside.

5. Travis Sanders left Appellant's office, went to the office of Corey Sanders, and told Sanders he had discovered a pill bottle containing marijuana roaches in the vehicle assigned to Barry Glass.

6. Later that day, Billy A. Ratliff (Director of Mine Reclamation and Enforcement), after having spoken with Travis Sanders, directed him to draft a timeline. That timeline is contained in a June 20, 2014 e-mail (Joint Exhibit 4, p. 4).

7. Donald Tyson approached Appellant and asked what he was going to do about the matter. Tarter feigned a lack of knowledge. Tyson specifically stated a pill bottle containing marijuana had been found in Glass' vehicle. Tarter told him he was not going to do anything about it.

8. Tyson went directly to Billy Ratliff and reported the conversation he had with Appellant. He also told him contraband had apparently been found in a pill bottle with Barry Glass' name on it, in Glass' vehicle. Ratliff directed Tyson to write a statement. That statement is Joint Exhibit 3, p. 3.

9. On or about June 19, 2014, Ratliff and Glenda France (Branch Manager in the Coal Branch) met with Appellant. Appellant admitted someone told him a pill bottle containing marijuana roaches had been found in Glass' vehicle. Tarter also admitted he had retrieved the pill bottle and thrown it away in a trashcan; he did so to "... protect one of my people."

10. Ratliff reported the matter to Commissioner Hohmann. The Commissioner directed Ratliff to secure written statements from everyone involved. Those statements are contained in Joint Exhibit 3. Ratliff then sent the statements to the Commissioner.

11. On the afternoon of June 20, 2014, Appellant sent Ratliff an e-mail pertaining to the maintenance of this vehicle (Joint Exhibit 3, p.7). There was no mention of the pill bottle.

12. On June 23, 2014, Appellant provided Ratliff his first formal statement on the matter (Joint Exhibit 3, p. 6).

13. Commissioner Hohmann sent all documents to the Office of the Inspector General (OIG) and requested an investigation. The investigation was assigned by OIG to Rodney Beck (Investigative Special Agent II) and Deputy Inspector General John Holiday.

14. Beck and Holiday interviewed Appellant and all employees involved. Appellant told them, and physically showed them, how he retrieved the pill bottle from Glass' vehicle, left the motor pool lot, opened the bottle and emptied its contents on the ground. He walked the investigators across the street to Arby's and showed the trash can where he disposed of the bottle.

At the hearing, Appellant testified he agreed with the recitation of the statement he had given to the OIG, as shown in Joint Exhibit 2, pp. 2-4, with the exception of: (a) that he has alleged to have stated he had no doubts at the time the pill bottle belonged to Glass; and (b) he believes he first spoke with Glass about the matter by telephone on a Thursday, and then in person the following Friday morning.

15. After completion of the interviews, the investigators were notified Billy Glass had submitted his notice of retirement.

16. The investigators wrote and submitted their report (Joint Exhibit 2).<sup>1</sup>

17. Mr. Ratliff received and reviewed the OIG report. He thereafter recommended up his chain of command that discipline in the form of a demotion be issued.

18. Lynn Keeling Gillis (Division Director with the Labor Cabinet and an employee in GAPS) and Holly McCoy Johnson are acting Appointing Authorities for the Energy and Environment Cabinet. They reviewed the OIG report, accompanying statements, prior similar disciplinary cases against other employees, Appellant's entire file including employee evaluations and a Performance Improvement Plan. At first, their "committee" decided dismissal was too harsh. It was decided Appellant would be demoted.

19. On August 1, 2014, Holly McCoy Johnson issued a letter to Appellant advising he would be demoted for cause from his position as Environmental Control Manager (grade 16) to the position of Geologist Registered (grade 15), effective beginning of business August 4, 2014. The demotion was based on an allegation of lack of good behavior, including acts of insubordination, deliberately failing to use the chain of command, and violation of the Policy Statement on a Drug-Free Workplace (Joint Exhibit 4) by withholding information and disposing of alleged contraband found in the state vehicle of an employee supervised by the Appellant (Joint Exhibit 1).

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<sup>1</sup> Joint Exhibit 3 constitutes the entirety of what is identified in the OIG report as "Exhibit 1."

20. Appellant timely filed his appeal of the disciplinary action with the Kentucky Personnel Board.

### **CONCLUSIONS OF LAW**

1. The issue in this case is whether there was just cause for the disciplinary action taken against the Appellant, Thomas Mark Tarter, and whether it was excessive or erroneous. The Appellant was demoted from the position of Environmental Control Manager, pay grade 16, with a salary of \$4,018.40 a month to the position of Geologist Registered, pay grade 15, with a salary of \$3,827.06 per month. The burden of proof was on the Appellee to prove its case by a preponderance of the evidence.

2. Thomas Mark Tarter is a classified employee with status. A classified employee with status may not be demoted or otherwise penalized except for cause. KRS 18A.095(1).

3. A “penalization” includes, but is not limited to, demotion and any action that diminishes the level, rank, discretion or responsibility of an employee without proper cause; and the abridgement or denial of other rights granted to state employees. KRS 18A.005(24).

4. “Preponderance of evidence” means: “. . . evidence, which as a whole, shows that the facts sought to be proved is more probable than not. With respect to burden of proof in civil actions means greater weight of evidence, or evidence which is more credible and convincing to the mind.” Black’s Law Dictionary, 5<sup>th</sup> Ed., p. 1064. The ultimate burden of persuasion in all administrative hearings is met by a preponderance of the evidence in the record. Failure to meet the burden of proof is grounds for a recommended order from the Hearing Officer. KRS 13B.090(7).

5. In the August 1, 2014 letter from Holly McCoy-Johnson, designated Appointing Authority for the Energy and Environment Cabinet, she cited the following grounds for the demotion: “. . . that you engaged in acts of insubordination, deliberately failed to use the chain of command and violated the Policy Statement on a Drug-Free Workplace (EPPC-040) by withholding information and disposing of alleged contraband found in a state vehicle of an employee for which you supervise.”

6. At the time of the alleged incidents, Appellee had in full force and effect its Policy Statement on a Drug-Free Workplace, EPPC-040 (Joint Exhibit 4). The pertinent parts of that policy state:

A. The unlawful manufacture, distribution, dispensation, possession or use of any controlled substance is strictly prohibited in the workplace and any employee found to be in violation will be subject to disciplinary action by the Appointing Authority for misconduct, which may include sanctions up to and including dismissal from state service, in accordance with State Law.

...

D. An employee found to be in violation of drug-free workplace requirements may face disciplinary action up to and including dismissal or may be required to satisfactorily participate in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency.

7. It is abundantly clear from the evidence that Appellant was made aware by third parties that Barry Glass, an employee he supervised, may have been in possession of contraband in the form of marijuana, when a pill bottle was found in Glass' state-issued vehicle containing what appeared to have been marijuana roaches. Although Tarter testified that he wanted time to conduct his own investigation and question Glass, such testimony is contradicted by the fact that after taking possession of the vehicle keys, he went to the motor pool lot, gained access to the vehicle, removed the pill bottle from the vehicle, walked off state property and disposed of the bottle's contents, and then walked across the street to the Arby's to dispose of the pill bottle in one of the restaurant's trash receptacles. Those actions make Tarter's testimony on this issue, less than credible. More credible is the statement he gave to the OIG Investigator when he told him that he was trying to protect one of his employees.

8. Appellee's witness, Lynn Keeling Gillis, testified Appellant had violated the Policy Statement on a Drug-free Workplace by having had "possession" of a controlled substance in the form of marijuana, when he gained physical access to the pill bottle from Glass' vehicle. In examining that policy, the Hearing Officer does not believe that Tarter himself was in violation of the policy. If marijuana was in the pill bottle, then it is more likely that Barry Glass had violated the policy. Tarter merely having had physical access and retention of the pill bottle does not show that he was in possession of a controlled substance.<sup>2</sup>

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<sup>2</sup> While some witnesses testified they saw what they thought to be marijuana roaches, the "roaches" were never located nor were they tested to determine whether indeed it was marijuana.

9. What is clear is that Mr. Tarter, in his capacity as Branch Manager of the Non Coal Branch, was aware of the Drug-Free Workplace Policy and that what had been reported to him by Travis Sanders and Donald Ray Tyson, placed him on notice that there was a possible violation of the policy by one of his own employees. Instead of reporting the matter up his chain of command, or indeed conducting a bona fide investigation, his first act was to tell others that he was not going to do anything about the matter. His second act was to retrieve the bottle and dispose of potential contraband. Once he disposed of the alleged contraband, it was clear his intent was to end the matter.

10. Tarter compounded his acts on the morning of June 19, 2014, when he was called into the office of Billy A. Ratliff, Director of Mine Reclamation and Enforcement. At that time, Ratliff discussed with Tarter the condition of Glass' vehicle. Ratliff asked Tarter to look into the matter. With knowledge of the existence of the pill bottle, Tarter failed to report this to his supervisor.

11. Later that day Ratliff and Glenda France had a meeting with Tarter. Tarter then acknowledged he knew about the pill bottle containing alleged contraband. When asked what he did with it, he responded he had thrown it away in a garbage can. When asked where he threw the items away, Appellant evaded direct answer by stating "just down the road." He would not be specific. He also told Ratliff that he was just trying to "protect one of my people."

12. By such acts, the Appellant committed acts of insubordination, deliberately failed to use the chain of command, withheld information, disposed of alleged contraband found in the state vehicle of an employee he supervised, and thereby impeded an investigation.

13. Considering the totality of the evidence, Appellee has shown by a preponderance of the evidence that there was just cause for disciplinary action against the Appellant, and that such disciplinary action in the nature of a demotion one grade, was neither excessive nor erroneous.

#### **RECOMMENDED ORDER**

The Hearing Officer recommends to the Personnel Board that the appeal of **THOMAS MARK TARTER VS. ENERGY AND ENVIRONMENT CABINET (APPEAL NO. 2014-194)** 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 Roland P. Merkel** this 17<sup>th</sup> day of March, 2015.

**KENTUCKY PERSONNEL BOARD**

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

A copy hereof this day mailed to:

Hon. Leesa Moorman  
Hon. Paul Harnice