

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2019-111

EDWARD VIA

APPELLANT

VS.

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

TRANSPORTATION CABINET

APPELLEE

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The Board, at its regular January 2020 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated November 27, 2019, and being duly advised,

**IT IS HEREBY ORDERED** that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer 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 15<sup>th</sup> day of January, 2020.

KENTUCKY PERSONNEL BOARD

  
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MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. William Fogle  
Mr. Edward Via  
Mr. J. R. Dobner



2. She received a telephone call from Transportation Engineering Branch Manager Tom Wright. He stated Via had taken leave during the snow and ice season, which leave is usually prohibited; that Via had not requested permission to take that leave. Ms. McCowan began an investigation.

3. Mr. Via is employed in the Oldham County Maintenance Facility, District 5, as a mechanic. Disciplinary action was issued as a result of this incident. Mr. Via is a part of central staff and required to be on duty during the snow and ice season. The Cabinet is responsible for public safety by clearing the roads during hazardous weather conditions. As a mechanic, Appellant is required to be on the job. There are restrictions for the use of leave time during the snow and ice season.

4. Appellant's supervisor, Chris Fendley, did not give Appellant permission to take leave during that time. One must have approved leave, especially during snow and ice season. Appellant failed to get approval.

5. Andrew Hall, a supervisor in the Oldham County barn, served as a "de facto" supervisor, as Fendley is physically located at another site. Hall oversees the day-to-day tasks. Hall asked Appellant if he had obtained approval from his supervisor to take this leave. Appellant indicated "Yes." Appellant knew at that time he had not gotten approval for this leave. That formed the basis of the suspension. Ms. McCowan identified Appellee's Exhibit 1 as the April 24, 2019 letter authored by James R. Dobner, Appointing Authority Designee, notifying Appellant he had been suspended for one working day, April 25, 2019, for lack of good behavior.

6. She identified Appellee's Exhibit 2 as an October 16, 2018 memorandum issued by Greg Thomas, Secretary, to the Executive Management of the Transportation Cabinet. That document described the 2018-2019 Winter Operations and the requirements regarding leave approval during that year's snow and ice season. All employees were required to be on snow and ice duty from November 1, 2018, through April 1, 2019. The memo described the disciplinary consequences in the event an employee failed to be available. A first offense warranted a one-day suspension.

7. She identified Appellee's Exhibit 3 as General Administration and Personnel, GAP-801, Employee Conduct, General Conduct. This is a policy of general conduct that applies to all Transportation Cabinet employees. Appellant violated this procedure by failing to comply with leave procedures established by both the Cabinet and Appellant's supervisors.

8. She testified the one-day suspension was the appropriate disciplinary measure. Appellant had deceived one supervisor, letting him believe another supervisor had already approved his leave, when such was not approved. Ms. McCowan cited three prior circumstances in other cases that resulted in similar types of disciplinary action (Appellee's Exhibit 4, against

Cedric Y. Hale, resulting in a 30-day suspension; Appellee's Exhibit 5, against Douglas E. Campoamor, resulting in a 5-day suspension; and Appellee's Exhibit 6, against William C. Barton, resulting in a 5-day suspension).

9. The next witness for the Appellee was **Chris Fendley**. For the past three years, Mr. Fendley has been employed by the Transportation Cabinet as the District 5 Equipment Supervisor. He manages the Equipment Section of Crew 212 in the District 5 office and manages the maintenance of all equipment. He also has supervisory duties. He was the second-line supervisor in Appellant's chain of supervision. Appellant's first-line supervisor, Jeff Webb, was off work at the time of the incident, so Mr. Fendley also performed the duties of first-line supervisor. Also, at that time, the Superintendent II, Andrew Hall, acted in Oldham County as a "de facto" supervisor of that location.

10. He does not specifically recall having engaged in a conversation with Appellant in the fall of 2018 about Appellant advising of an upcoming vacation in the winter. Fendley could not approve a wintertime leave request. Although employees could take vacation during that time, they would have to stay in the area, as the vacation was subject to revocation during the snow and ice season. Fendley testified he never gave Appellant permission to take off during the winter of 2019 or to leave the area. He identified Appellee's Exhibit 7 as the March 12, 2019 email he sent to Matt Bullock, after having been requested to give a written statement about this situation.

11. Nothing prevents an employee from taking vacation during the snow and ice season. However, an employee has to stay in the area and would be subject to recall to come back to work. Employees do take time off, but they stay in the area. The Appellant was not called for snow removal during the time he took off.

12. **Andrew Hall** was the next witness. For the past 11 years he has been employed by the Transportation Cabinet as a Superintendent II at the Oldham County Maintenance Facility. His duties include oversight of day-to-day operations of the crew and the maintenance facility in Oldham County. Appellant works at that location as a mechanic.

13. During 2018 and 2019, there was a general practice that allowed Mr. Hall to sign employee timesheets and approve leave requests. When asked for a written statement about the events of this matter, he submitted a February 28, 2019 email to Matt Bullock, which he identified as Appellee's Exhibit 8. In late December 2018, Mr. Via came to Hall's office and advised he was going to take a cruise the upcoming January 20 through January 28, 2019. Hall asked Appellant if he had spoken to Section Supervisor Chris Fendley about it and gotten his permission. Appellant responded, "Yes." Hall was then under the impression that Fendley had given his approval to Appellant's January leave. Appellant filled out a leave sheet. Under the impression that Fendley had given approval, Hall signed the leave sheet.

14. Appellee's case was closed. Appellant offered his testimony on his own behalf.

15. **Appellant, Edward Via**, is employed by the Transportation Cabinet in the Maintenance Division, Crew 212, District 5, at the Oldham County Maintenance Facility as a Mechanic. He maintains and repairs all the Transportation Cabinet vehicles.

16. In 2018, he suffered a back injury and was off work for about six months. He returned to work on September 16, 2018. At that time, his wife had scheduled a cruise for them to take the following January. When Appellant returned to work, he spoke to Chris Fendley and told him about the cruise. At that point, Fendley did not say yes or no as to whether Appellant would be granted leave.

17. In January 2019, Andrew Hall asked Appellant if he had completed a leave sheet. Hall used to be Appellant's immediate supervisor in Oldham County. Appellant, at that point, sat down, completed a leave sheet, gave it to Hall, and Hall signed it. Hall asked Appellant if he had talked to "Chris." Appellant responded, "Yes, I talked to him." Appellant then testified he was not sure if Hall signed the leave sheet or not. Mr. Via denies he ever told Hall that Fendley approved taking time off in January.

18. On January 19, 2019, a snow and ice removal event occurred. Appellant was home at the time, but not called in to work. On January 20, he and his wife took a flight to Florida, then went on their cruise. He returned back to work the following week.

19. During his 14 years of employment at the Cabinet, Mr. Via had no prior history of discipline. Appellant then closed his case.

20. The Hearing Officer recalled to the stand **Priscilla McCowan**. She testified that it is possible to approve vacations during the snow and ice season with the understanding that "you have to stay around town" and be available; "if we call you, you have to come back to work." One cannot leave the country because, by doing so, you become unavailable. The use of sick leave during that time, with a doctor's statement, is okay.

21. Appellant was disciplined for: (1) deceiving a supervisor with a false statement; and (2) taking leave without submitting it to and being approved by Mr. Fendley. He was required to get approval from Fendley for that week, as Fendley was his supervisor. Hall was not to sign the leave form under those circumstances.

22. **Appellant Edward Via** re-took the stand to respond to Ms. McCowan's testimony. He claimed he had received three "write-ups" for this single incident. The first one had been approved by Mr. Mohammad, but was not issued. Appellant testified that it was a verbal write-up, which he refused to sign. The second write-up was an attempt to discipline him

for two days, but it was not approved. The current discipline of a one-day suspension was the third "write-up."

23. Appellee recalled **Priscilla McCowan**. She testified Appellant had not been issued a written reprimand in this matter. The one-day suspension was the only disciplinary action issued regarding this incident. When the matter first came up, the form Appellant refused to sign was a Request for Major Disciplinary Action. That document advised Appellant in a meeting that the Cabinet was going to pursue major disciplinary action.

24. No further witnesses testified. The parties waived presentation of closing arguments.

### **FINDINGS OF FACT**

1. Edward Via, the Appellant, is a classified employee with status. He is employed by the Transportation Cabinet in the Oldham County Maintenance Facility, District 5, as a Transportation Auto/Truck Technician IV. He maintains and repairs Transportation Cabinet vehicles.

2. On October 16, 2018, Greg Thomas, Secretary of the Cabinet, issued a "2018-2019 Winter Operations" memorandum (Appellee's Exhibit 2). This memo emphasized the importance of employees assigned to snow and ice duty reporting to work when called and working all shifts assigned, unless given prior approval by a supervisor. It also advised employees that disciplinary action could be issued for failure to work snow and ice duty without prior approval.

3. The snow and ice season in this matter was from November 1, 2018, through April 1, 2019.

4. General Administration and Personnel policy, GAP-801, Employee Conduct, General Conduct, included a requirement that all Transportation Cabinet employees comply "...with leave procedures as established by both the Cabinet and the employees' supervisors." (Appellee's Exhibit 3).

5. Appellant's first-line supervisor was Jeff Webb. At the time of the incident, Mr. Webb was off from work. Chris Fendley was Appellant's second-line supervisor. When Webb was off work, Fendley performed Webb's supervisory duties. Superintendent II Andrew Hall acted as a "de facto" supervisor in Oldham County, as that was the location of his workstation.

6. Employees could take pre-approved vacation time during the snow and ice season, but they had to “remain in the area” in order to be contacted in the event the vacation would be revoked due to weather and there was a need for personnel.

7. When Appellant first spoke to Fendley in the fall of 2018 about the cruise, Appellant admitted Fendley said neither “Yes” nor “No.”

8. Mr. Fendley did not give Appellant permission to take a leave or vacation during the 2018-2019 snow and ice season.

9. In late December 2018, Appellant approached Andrew Hall and advised he was going on a cruise January 20-28, 2019. Hall asked Appellant if he had gotten permission to do so from Chris Fendley. Appellant responded, “Yes.” Appellant then completed a leave sheet. Hall, under the impression from Appellant’s representation that Fendley had approved the leave, signed the leave sheet (Appellee’s Exhibit 8).

10. A snow and ice event occurred on January 19, 2019. Appellant was at home, but he was not called in to work. He and his wife left for vacation the following day and returned a week later.

11. At the time of the incident, the following policies were in full force and effect:

- General Administration and Personnel, GAP-801, Employee Conduct, General Conduct; and
- 2018-2019 Winter Operations, a memorandum issued by Secretary Greg Thomas (Appellee’s Exhibit 2).

12. Appellant had no previous disciplinary action against him.

13. On April 24, 2019, James R. Dobner, Appointing Authority designee, issued a one-day suspension to the Appellant for a lack of good behavior, in particular, for violations of 101 KAR 1:345, GAP-801, and District 5 leave reporting procedures. Per the testimony of Priscilla McCowan, Human Resource Administrator for the Transportation Cabinet, Appellant had been disciplined for deceiving a supervisor with a false statement, and taking leave without submitting it to and being approved by Mr. Fendley.

14. Appellant timely filed his appeal of the suspension with the Kentucky Personnel Board.

**CONCLUSIONS OF LAW**

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

2. At the time the Appellant, Edward Via, was suspended, he was a classified employee with status.

3. Appellee, Transportation Cabinet, issued Edward Via a one-day suspension by letter of April 24, 2019 (Appellee's Exhibit 1). That suspension was based on an allegation of lack of good behavior, citing KRS 18A.095 and 101 KAR 1:345, Section 4.

4. The evidence showed that on October 16, 2018, Greg Thomas, Secretary of the Transportation Cabinet, issued to the Executive Management of the Transportation Cabinet a memorandum pertaining to the 2018-2019 winter operations. That memo described how, in order to provide essential services to Kentucky during the winter period, it must be ensured employees assigned to snow and ice duty report to work when called upon, work all shifts assigned unless given prior approval from their supervisor, and perform winter operations as safely and efficiently as possible.

Furthermore, any request for annual leave may be denied, even if requested in advance, or rescinded if previously-approved, if road and weather conditions or the forecast of conditions are so adverse that the employee's attendance would be necessary for the crew to adequately perform its snow and ice duties. This determination is the responsibility of management staff. Disciplinary action for the failure to work snow and ice duty without prior approval may follow the progression listed below: 1<sup>st</sup> offense – 1 day suspension; 2<sup>nd</sup> offense – 5 day suspension; and 3<sup>rd</sup> offense – Further disciplinary action up to dismissal. (Appellee's Exhibit 2).

Such information was imparted to all employees of the Transportation Cabinet, including Appellant.

5. The evidence also showed that Chris Fendley, second-line supervisor to the Appellant, at that time was acting first-line supervisor in the absence of Jeff Webb. There is no evidence that Mr. Fendley, at any time during a conversation with Appellant prior to the end of 2018, ever approved Appellant taking time off during the 2018-2019 winter operations.



6. Andrew Hall was a Superintendent II in the Oldham County barn and served as a “de facto” supervisor at the physical location. The evidence shows that in late December 2018, Mr. Via came to Hall and advised he was going to take a cruise during January 20-28, 2019. When Hall asked Appellant if he had spoken to Chris Fendley and gotten his permission, Hall recalls Appellant having made an affirmative representation of approval by Fendley. Hall was then under the impression that Fendley, having given his approval to Appellant’s January leave, that he (Hall) could then sign a leave sheet for Appellant. Appellant filled out a leave sheet and Hall signed it.

7. In his own testimony, Mr. Via admitted that during the fall 2018 conversation with Mr. Fendley, Fendley did not say yes or no as to whether Appellant would be granted that leave. He also acknowledged that in January 2019, in the conversation with Andrew Hall, Appellant related that when Hall asked him if he had spoken to “Chris” about the leave, rather than being fully forthcoming about Fendley not having approved or denied such leave, Appellant merely responded, “Yes, I talked to him” and said nothing more. This led Hall to reasonably believe that Via had secured approval from Fendley. Based on that false or misleading representation, Hall signed approval on the leave sheet.

8. Appellant and his wife left for vacation on January 20, 2019, and he returned to work a week later. He was thereafter issued a one-day suspension, on the lowest end of the disciplinary scale, for having deceived a supervisor with a false statement and taking leave without submitting it to and being approved by Mr. Fendley, in violation of 101 KAR 1:345, General Administration and Personnel Policy, GAP-801, General Conduct, and District 5 Leave Reporting Procedures.

9. Appellee has shown by a preponderance of the evidence there was just cause for disciplinary action against the Appellant, and has also shown by a preponderance of the evidence that the disciplinary action taken, that is, a one-day suspension, was neither excessive nor erroneous.

**RECOMMENDED ORDER**

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Kentucky Personnel Board that the appeal of **EDWARD VIA V. TRANSPORTATION CABINET (APPEAL NO. 2019-111)** 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 27<sup>th</sup> day of November, 2019.

**KENTUCKY PERSONNEL BOARD**

  
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**MARK A. SIPER**  
**EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:

Hon. William Fogle  
Mr. Edward Via  
Mr. J. R. Dobner