

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2016-132

AARON WALLACE

APPELLANT

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

TRANSPORTATION CABINET

APPELLEE

*** **

The Board, at its regular February 2017 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated January 19, 2017, 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 14th day of February, 2017.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. William Fogle
Mr. Aaron Wallace
Mr. J. R. Dobner

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TRANSPORTATION CABINET

APPELLEE

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This matter came on for an evidentiary hearing on December 7, 2016, at 9:15 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Roland P. Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellant, Aaron D. Wallace, was present and not represented by legal counsel. Appellee, Transportation Cabinet, was present and represented by the Hon. William H. Fogle. Also present as the agency representative was Ms. Jennifer Woods.

This is an appeal of a one-day suspension (Friday, May 13, 2016) of the Appellant from his position as a Transportation Engineering Supervisor with the Kentucky Transportation Cabinet, Department of Highways, District 3, based on allegations pertaining to an incident of April 11, 2016. The burden of proof was on the Appellee to show by a preponderance of the evidence that the disciplinary action was issued for just cause and was neither excessive nor erroneous.

The rule separating witnesses was invoked and employed throughout the course of the proceedings. The parties each presented their opening statements.

BACKGROUND

1. The first witness for the Appellee was **Jennifer Woods**. For the past 23 years Ms. Woods has been employed by the Transportation Cabinet. Since March 2016, she has held the position of Human Resource Administrator for the Cabinet, Office of Personnel Management, Compliance Branch. She described her duties, which include the review of personnel action requests and writing up final drafts of disciplinary letters.

2. The Appellant, Aaron D. Wallace, is a Transportation Engineering Supervisor in a section office for District 3. He is charged with the oversight of maintenance and construction projects, and supervises personnel to ensure they carry out their duties. He has the authority to grant or deny permission for his employees to use certain state vehicles.

3. Ms. Woods received a request from District 3 to issue disciplinary action against the Appellant, which she identified as Appellee's **Exhibit 1**. That request alleged that on April 11, 2016, state equipment had been utilized by an employee, Cory Netherton, and Appellant had permitted him to use that equipment for Netherton's personal gain. Mr. Netherton was allowed to use a Kentucky Transportation Cabinet truck to which he hooked up a trailer in order to drop off rental equipment he had used on his own property. Supporting documents had been attached to the request.

4. Ms. Woods reviewed the Appellant's timesheets as well as the GPS data. The GPS data showed the subject vehicle had been driven to All Seasons Rental and then back to the Simpson Barn. At that time, the Cabinet had not been renting any equipment from All Seasons Rental.

5. As a result, disciplinary action was taken. She identified Appellee's **Exhibit 2**, as the May 9, 2016 letter signed by James R. Dobner, Appointing Authority. The letter notified Appellant that due to the events of April 11, 2016, he had been placed on a one-day suspension effective May 13, 2016. The letter alleged Appellant had given Corey Netherton permission to use a state vehicle to return a Harley Rake, rented by Netherton for his own personal use. Netherton drove the vehicle to All Seasons Rental in Franklin, Kentucky, and dropped off the rake. He had pulled a personal trailer with a state vehicle.

6. It was determined Appellant's approval of the use of the vehicle in such a manner violated Kentucky Transportation Cabinet policy. No employee is allowed to use state property for personal gain. Such use also posed the possibility of exposing the Cabinet to potential liability.

7. The second page of the letter cited previous disciplinary or corrective action in the form of a written reprimand. She identified Appellee's **Exhibit 3** as the referenced written reprimand, issued to Appellant on January 23, 2012. The written reprimand had been issued for misuse of state equipment. Appellant had returned a state vehicle to a maintenance facility and failed to lock the vehicle. He had left the keys inside the vehicle. That evening the vehicle was stolen from the facility, but subsequently recovered. Appellant had submitted a written response to the written reprimand, which Ms. Woods identified as Appellee's **Exhibit 6**.

8. She identified Appellee's **Exhibit 4** as the written response Appellant had submitted subsequent to receiving notice of his suspension. Appellant admitted he gave Mr.

Netherton permission to use the state vehicle and that it violated policy. She considered this responsive letter prior to issuance of the suspension. A one-day suspension was issued in accordance with the Cabinet's progressive disciplinary action policy. Appellant had received a prior written reprimand in a similar matter involving a state vehicle. The issuance of a one-day suspension was the next step in the progressive scheme. Appellant admitted he violated the policy. Also, as a supervisor, Mr. Wallace had a responsibility to see that policies and procedures of the Cabinet were followed.

9. The suspension letter made reference to GAP-801. She identified Appellee's **Exhibit 5** as GAP-801, General Administration and Personnel, Employee Conduct and General Conduct. Page two of the policy states the use of state vehicles or equipment in a manner prohibited by GAP-1104-2 is prohibited.

10. She identified Appellee's **Exhibit 7** as GAP-1104-2, General Administration and Personnel, State-Owned Vehicles and Equipment; User Requirements, Assignments, and Responsibilities. She determined Appellant had violated the policy as page 4 states: "Operation of a state vehicle shall be for official state business only."

11. Upon cross-examination, Ms. Woods identified Appellant's **Exhibit 1** as a copy of the disciplinary action request packet she had received from the District. The noted verbal warning in that packet was not related to or considered in issuing the current suspension.

12. She identified Appellant's **Exhibit 2** as a second copy of the May 9, 2016 suspension letter. She agreed that the citation on page 2 of the letter alleging Appellant had violated 101 KAR 1:345 may have been in error, as that regulation merely sets out the ability of an agency to issue certain types of discipline. That regulation was set out and identified by her in Appellant's **Exhibit 3**.¹

13. Ms. Woods identified Appellee's **Exhibit 8** as GAP-808, General Administration and Personnel, Employee Conduct, Code of Ethics and Conflict of Interest. She determined that Appellant, by his acts, had violated the following prohibited activities:

"Transportation Cabinet Personnel should not engage in any activity or enterprise that is or has the potential to be inconsistent, incompatible, or in conflict with their assigned Cabinet duties and responsibilities. Activities or enterprises deemed incompatible, inconsistent or in conflict for Cabinet employees include but are not limited to the following:

- Using state time, facilities, equipment, materials, or supplies for private gain or advantage."

¹ During subsequent examination, **Exhibit 4** tendered by the Appellant was ruled inadmissible.

Appellant did not receive any private gain or advantage in this incident, but he knowingly allowed an employee to do what was prohibited.

14. The Appellee rested its case.

15. The sole witness for the Appellant was the Appellant, **Aaron D. Wallace**. Mr. Wallace is employed by the Kentucky Transportation Cabinet, District 3, Scottsville Section Office, as a Transportation Engineering Supervisor. He did not feel he had violated any of the three policies cited in the suspension letter based on the wording of the documents.

16. He identified Appellant's **Exhibit 5** as a series of his Annual Employee Performance Evaluations. He received the following overall performance evaluation scores for the following years:

2010 - 397; 2011 - 409; 2012 - 451 (the year in which he was issued the written reprimand); and 2013 - 421.

17. He has been promoted three times in the last few years and took on additional duties and responsibilities. His written reprimand and his one-day suspension were very isolated incidents when viewed against his overall work performance.

18. Appellant admits that in his present position he is expected to comply with Agency policies and, to the best of his ability ensure that his employees do the same. He permitted Mr. Netherton to act in violation of Agency policy when he permitted use of a state vehicle for a personal use.

19. Mr. Wallace requests the suspension be removed from his official personnel file as well as the District 3 file; that he be repaid wages for time spent in this matter on May 9, 2016, for 7.5 hours; compensatory time in attending the pre-hearing conference on August 31, 2016; and 7.5 hours compensatory time utilized today for the evidentiary hearing.

20. The Appellant rested his case.

21. The Appellee presented no rebuttal witnesses.

22. The case was submitted to the Hearing Office for his Recommended Order.

FINDINGS OF FACT

1. Appellant, Aaron Wallace, is employed by the Kentucky Transportation Cabinet as a Transportation Engineering Supervisor in the Scottsville Section Office for District 3. He is a classified employee with status. Among his duties, he has the authority to grant or deny permission for the use of certain state vehicles to employees under his supervision.

2. On April 11, 2016, he granted permission to one of his employees, Cory Netherton, to use a state vehicle for personal gain. Netherton hooked a trailer to the state vehicle and returned a Harley rake he had used personally, to All Seasons Rental in Franklin, Kentucky.

3. Appellant admitted he had granted Mr. Netherton permission to use the vehicle, and that he was aware Netherton would use the vehicle for a personal purpose. He also admitted he permitted Netherton to act in violation of Agency policy through the personal use of a state vehicle.

4. During the time of the alleged incident, the following policies were in full force and effect:

- GAP-801, General Administration and Personnel, General Conduct (Appellee's **Exhibit 5**);
- GAP-1104-2, General Administration and Personnel, User Requirements, Assignments and Responsibilities (Appellee's **Exhibit 7**);
- GAP-808, General Administration and Personnel, Code of Ethics and Conflict of Interest (Appellee's **Exhibit 8**).

5. Jennifer Woods, Human Resource Administrator for the Kentucky Transportation Cabinet, Office of Personnel Management, Compliance Branch; received a request from District 3 to issue disciplinary action against the Appellant. That request, with supporting documents, was contained in Appellee's **Exhibit 1**.

6. Ms. Woods reviewed the District's request, as well as the Appellant's timesheets, the GPS data related to the subject vehicle, certain policies and procedures, and the fact Appellant had received a prior written reprimand pertaining to his return of a state vehicle.

7. The Appellee employs a policy of Progressive Disciplinary Action. A one-day suspension is the next progressive step following a written reprimand.

8. Appellant filed a written response to the Request for Major Disciplinary Action (Appellee's **Exhibit 4**).

9. It was determined Appellant had violated certain policies by his action on April 11, 2016.

10. On May 9, 2016, James R. Dobner, Appointing Authority, issued Appellant a one-day suspension from duty and pay effective May 13, 2016 (Appellee's **Exhibit 2**).

11. Appellant timely filed an appeal of his 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 30 days. 101 KAR 1:345, Section 4(1).

2. Appellee issued Aaron Wallace a one-day suspension by letter of May 9, 2016, (Appellee's **Exhibit 2**). That suspension was based on an allegation of lack of good behavior, citing 101 KAR 1:345, Section 1.

3. The evidence shows that Mr. Wallace, while on state time, in his capacity as a supervisor, allowed an employee under his supervision to utilize a state vehicle for personal purposes and personal gain of that employee. Such act supports the allegations that Appellant violated the policies set out in GAP-801 (Appellee's **Exhibit 5**), GAP-1104-2 (Appellee's **Exhibit 7**), and GAP-808 (Appellee's **Exhibit 8**).

4. Appellee has shown by a preponderance of the evidence that 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 **AARON WALLACE VS. TRANSPORTATION CABINET (APPEAL NO. 2016-132)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

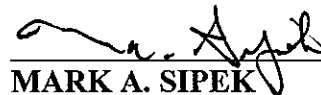
Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are 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).

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 19th day of January, 2017.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. William Fogle
Mr. Aaron Wallace
J. R. Dobner