

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2018-165

WILLIAM WARE

APPELLANT

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

**TOURISM, ARTS AND HERITAGE CABINET,**  
**DEPARTMENT OF PARKS**

**APPELLEE**

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The Board, at its regular November 2019 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated October 1, 2019, Appellant's Exceptions, 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 1<sup>st</sup> day of November, 2019.

**KENTUCKY PERSONNEL BOARD**

  
**MARK A. SIPEK, SECRETARY**

A copy hereof this day sent to:

Hon. William Adams  
Mr. William Ware  
Ms. Misty Judy

**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
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DEPARTMENT OF PARKS**

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\* \* \* \* \*

This matter came on for evidentiary hearing on June 6, 2019, and August 2, 2019, at approximately 9:30 a.m., EST, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Colleen Beach, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by KRS Chapter 18A.

Appellant, William Ware, was present, but was not represented by legal counsel. Appellee, Tourism, Arts and Heritage Cabinet, Department of Parks, was present and represented by the Hon. William Adams. Also present as Agency representative was Shawn Estep, Acting Division Director of Human Resources, Department of Parks.

**BACKGROUND**

1. Appellant, William Ware, was employed as a Chef II at Dale Hollow Lake State Resort Park ("Dale Hollow"). On June 2, 2018, Appellant was informed that he was being suspended for five working days, effective June 8, 2018, for unsatisfactory job performance and failure to follow food service guidelines.

2. Appellant timely filed this appeal on August 1, 2018. In support of his appeal, Appellant stated that:

1. This action is based on hearsay of a seasonal employee who is friends with Park Manager Jenny Moon, having known each other in and out of work for several years.
2. Moon has reason to retaliate against me, because 6 months prior I had filed a grievance against her. In months prior to incident, Moon would have known of my active search for in-agency promotions. This action would discredit me as retaliation.

3. Facts of the quoted servsafe rules do not justify Parks position. (sic) See attached file for my complete outline of facts relevant to this case.

3. By Interim Order dated October 26, 2018, it was established that Appellee would have the burden of proof to show whether or not there was just cause for the five-day suspension, and whether that penalty was excessive or erroneous. Appellant was assigned the burden of proof on his claim that the suspension was done in retaliation for his having previously filed a grievance.

4. Appellee went first in the presentation of evidence. **Jenny Moon** is a Resort Park Manager II at Dale Hollow, a position she has held since March 2018. She has been employed by the Department of Parks for the past 16 years. She started out as a Pool Attendant, and worked her way up the ranks. She currently has financial and organizational responsibility for the entire park.

5. Moon was asked to address the events that occurred on April 13, 2018. She testified that she came in to work that morning and, as was her usual habit, dropped her purse in her office and walked down to the dining room to get coffee. When she got there, the dining room hostess, Ruth Thacker, told her, "We are having complaints about food being cold. The buffet wasn't turned on." Thacker had to void some breakfast sales because of the complaints. Thacker added that she had spoken to Appellant, who was the Park Chef, about the complaints, but his only response was "All I've done all day is see colors."

6. Moon then went to the buffet. She took a sausage link and French toast stick from the buffet and touched them with her finger. They were both cold.

7. Moon proceeded to the kitchen to discuss the situation with Joey Webb, Cook II, who was cooking *à la carte* breakfast orders. Moon asked Webb if he had checked the buffet. He said he noticed that the food was cold when he got in to work at approximately 8:00 a.m. He had seen that the buffet was not turned on, which he corrected, then went to the kitchen to fill individual breakfast orders. Moon told Webb to pull the buffet. He responded, "That's what I wanted to do to begin with."

8. Moon then went to Appellant and discussed the situation with him. His first suggestion was to heat the food back up. Moon declined to follow that suggestion, and the food from the buffet was disposed of.

9. Moon stated that she then returned to her office to call Frankfort to inform management of the incident. Her regional Assistant Director was on vacation, so she spoke instead to the other Assistant Director, David Thacker. Thacker told her to call Shawn Estep, Acting Division Director of Human Resources.

10. Moon testified that she felt disciplinary action against Appellant was warranted because he “was told by two different employees that the buffet was cold,” but he had instructed them to leave the food there. “He didn’t do anything until I called him out on it,” Moon stated.

11. Moon was asked to address the grievance Appellant filed against her. She stated that she knew Appellant had filed a grievance, but she had never read it, nor did she know what it was about. As to when the grievance was filed, Moon could only recall that Joe Mounce had still been Park Manager then (and she had been Assistant Park Manager). Mounce left Dale Hollow in January 2018, so it was some time prior to that, Moon estimated.

12. When asked if the grievance affected her treatment of Appellant, she answered “Not at all.”

13. On cross-examination, Moon stated that she had received complaints of cold food being served before, but admitted that she had not disciplined anyone for the infraction.

14. As for how much food had to be “comp’d” on April 13, 2018, Moon answered that she could not say because there are no records to document when a food transaction is voided.

15. Through Moon’s testimony, an email from Moon to Shawn Estep, dated April 13, 2018, was introduced into the record as Appellant’s Exhibit 2. The email informs Estep that she is requesting disciplinary action of Appellant for not checking the buffet after Ruth Thacker told him the buffet was turned off, and Appellant’s response to Thacker was that “All he has done this morning is see colors.” Moon added that when Webb went to find Appellant after he was directed by Moon to pull the buffet, Appellant was “in the storeroom at the computer.” In Moon’s estimation, the cost of the food on the buffet that had to be disposed of was around \$100.00. (Appellant’s Exhibit 2.)

16. In Moon’s opinion, as expressed in her email to Estep, Appellant “completely disregarded his duties as Chef, and he should be held accountable for his shortcomings in this incident. I feel we needed to issue something other than a written reprimand because this should have never happened with this many years of experience in the cooking field.” (Appellant’s Exhibit 2.)

17. Moon testified that Joey Webb was the staff member that estimated that approximately \$100 worth of food had to be thrown out.

18. Moon forwarded the written statements of Webb, Thacker and Appellant to Laurie Googe Spalding, an HR Investigator II. Appellant’s written statement to Moon, written on April 16, 2018, was introduced into the record as Appellant’s Exhibit 3. In the statement, Appellant noted:

Friday morning 4/13/18 I was the only kitchen employee on schedule from 5 a.m. until 8 a.m. (Cook II Joey Webb scheduled at that time.) I was

feeling sick with a migraine headache, the equipment was not heating up properly. I had an entire buffet to cook by myself, and 12 biscuits with sausage and bacon were due by 5:30 so I had a lot going on... Through the morning I had to keep cooking food and replenish the buffet, and also had a few orders. When Joey arrived at 8 a.m., he helped me restock the bar with bacon...at approximately 8:30, with the bar restocked, I told Joey I had to get a Baumann order in to Debbie, because it was to be placed by 10 a.m. Not long afterward Ruth Thacker came to the stockroom to tell me apparently I had forgot to turn on the buffet wells this morning because Joey just noticed it, and had turned them on. Almost immediately after, Jenny Moon came to inform me the bar was cold and she had ordered Joey to pull it... (Appellant's Exhibit 3.)

19. Moon was asked if the decision to suspend Appellant was made before she received his written statement. Moon responded, "I did not make that decision. I don't know when it was made."

20. Moon was asked to address any prior discipline taken against Appellant while at Dale Hollow. She responded that while at Dale Hollow, Appellant had only received a verbal reprimand from Dale Thacker and Michael Vito for cleanliness concerns in the kitchen.

21. On cross-examination, Moon described her relationship with Ruth Thacker. She has known Thacker since 1998 or 1999 when they worked together as servers. She did not see her again for eight or nine years. They became reacquainted when Moon became a Group Sales Coordinator. Moon was asked if she trusted Thacker. She answered, "Absolutely." Moon denied that she had ever showed Thacker any kind of favoritism.

22. Moon admitted that it was "possible" that she had referred to the men working in the kitchen as "boys."

23. On redirect, Moon was asked if anyone had offered Appellant additional help on April 13, 2018. She stated that Appellant's first-line supervisor, Scott Everett, had offered to help, but Appellant had stated that he "would be fine."

24. **Tom Brown** is employed by the Department of Parks, in their Food Service Program. He provides guidance for all aspects of the food service that Parks provides.

25. Through Brown's testimony, two pages of the "ServSafe" training manual was introduced into the record as Appellee's Exhibit 1. The manual states that all cold food must be served at 41 degrees F or lower; hot food should be served at 135 degrees F or higher. The manual also states that food held at temperatures outside the above range must be discarded after four hours.

26. Brown added that if hot food falls below 135 degrees F for less than two hours, it can be reheated to 165 degrees F for 15 seconds and then returned to the warming element. However, the warming element itself is not meant to re-heat food.

27. In Brown's opinion, the best practice is to check the temperature of food on a buffet every two hours.

28. Brown stated that if food was cold to the touch, it was probably below 135 degrees F.

29. Brown noted that food that is between 41 degrees F and 135 degrees F is considered to be "in the danger zone—cold food on a hot buffet is a serious issue."

30. On cross-examination, Brown was asked about Appellant's demotion on February 2, 2014. Brown stated that Appellant had been demoted from a Park Chef III to a Park Chef II, and was transferred from Lake Cumberland State Resort Park to Dale Hollow. The demotion occurred after the health department made the decision to close the Lake Cumberland dining operations until seventeen health code violations were corrected.

31. Brown stated that he was not aware of any complaints against Appellant during his tenure at Dale Hollow prior to the incident on April 13, 2018.

32. **Shawn Estep** is Acting Human Resource Division Director and an Acting Appointing Authority. He provides oversight over all hiring and disciplinary decisions.

33. Estep was asked if he felt "comfortable" with the five-day suspension of Appellant for the events that transpired on April 13, 2018. He said he was and had based his decision, in part, on the written statements of Joey Webb, and Ruth Thacker. Webb's statement was as follows:

I came in at 8 a.m. I was on the front line doing orders. Ruthie had said a guy said some of the items were cold. I went to check it out at the bar. Realized that the bar was off. I asked Ruthie to tell Bill [Appellant] see how he wanted to handle it. Ruthie said he said to leave it for the time being. Then Jenny ask me to take the bar so we did. Food was around 80° to 100° F. (sic) (Appellee's Exhibit 4).

Thacker's statement was as follows:

Friday 4-13-18

Customers started complaining about buffet not being any good around 9 a.m. I went to check out why, found all the food cold. I looked and it was off. I went and got Joey Webb had him to come look at it. He turned all the buffet on. Joey asked me to go and tell Bill [Appellant]. I went in

stock room where he was. I said Bill guess what you forgot to do this morning. He said what (sic) I said turn on the buffet all the food is cold. He said something about seeing colors this morning. He never came out to check on it. Linda had 5 tables complain about it. I had 4 tables. The couple that was sitting @ F2. (sic) (Appellee's Exhibit 5).

34. Estep stated that he initiated an independent review of the situation and assigned the case to Laurie Googe Spalding. Spalding drafted the Notice of Suspension for his review.

35. Estep added, "Considering [Appellant's] prior discipline, I could have done a dismissal."

36. Estep concluded that the decision to suspend was based on the food safety issue, the cost of the wasted food, and Appellant's poor conduct. "He was the Chef. He should have known to turn the buffet on."

37. On cross-examination, Appellant's performance evaluations were entered into the record as Appellant's Exhibit 7. His performance evaluation was "Good" in 2014, and "Highly Effective" from 2015 through 2017.

38. Estep stated that he did not take Appellant's statement into account when he made the decision to suspend Appellant, adding, "If you didn't turn the buffet on, and you exposed our guests, then I think a suspension is warranted."

39. When asked if he thought Moon's calling Appellant and other male kitchen staff "boys" was discriminatory, Estep answered (addressing Appellant directly), "Bill, you know Jenny [Moon] is as country as cornbread."

40. Estep did recall a grievance Appellant made against Moon in October 2017. Estep noted that he had never had a complaint against Moon except the ones made by Appellant and his "significant other." "Jenny is a tough supervisor," Estep stated, "but she is fair and firm. I think [Appellant] didn't like working for a strong woman." Estep added that Appellant had the opportunity to "advance" his grievance against Moon, but chose not to. When asked if the grievance had impacted his decision to discipline Appellant, he answered, "Absolutely not."

41. At the end of Estep's testimony, Appellee concluded its case-in-chief.

42. Appellant called his first witness. **Joey Webb** is a Cook II at Dale Hollow. He testified that he is "SafeServ" certified.

43. Webb recounted the events that transpired the morning of April 13, 2018. He stated that he arrived at 8:00 a.m., and checked in with Appellant. Appellant mentioned that he had a headache that morning and was not feeling well. There were a couple of breakfast orders waiting, so Webb went to the kitchen to fill them.

44. At approximately 8:30 or 8:45 a.m., Webb went to the buffet bar to get some bacon and sausage. He noticed then that the buffet was cold. Webb explained that the buffet had eight "wells," which were not turned on. Only the heat lamps were on. At first Webb thought there had been a breaker malfunction, but he quickly realized that the heating element had simply not been turned on.

45. Webb was concerned about the temperature of the food, so he tested it with a food thermometer. "It was a 100 degrees and falling," he testified.

46. Webb then asked Ruth Thacker to let Appellant know about the buffet. She came back a few minutes later and told Webb that Appellant told her he was having trouble with a migraine and not to worry about it. Appellant told Thacker he would take care of it.

47. Webb went back to filling breakfast orders. Approximately ten or fifteen minutes after talking to Thacker, Jenny Moon came in and told Webb to pull the bar. Appellant then appeared with a cart and began taking food off the buffet. Webb estimated that Appellant appeared around 9:05 a.m.

48. Later that morning, Moon asked Webb to write a statement regarding what had transpired that morning, which Webb did.

49. Webb was asked when food is usually set out on the breakfast buffet. He answered that if a kitchen staff person is working by himself, it would probably not get laid out until approximately 6:30 a.m.

50. Webb was asked if he had ever heard Moon say anything discriminatory toward Appellant or any other employee. He answered that once, while he was cooking, Moon had asked him to inspect one of the bathrooms. He did not think that was "totally sanitary."

51. Webb agreed that he could not say with certainty that Appellant had not turned the buffet on. The heating knobs were physically accessible to customers, as well as other staff.

52. On cross-examination, Webb stated that a heat lamp alone was not sufficient to keep food warm. He had no reason to think that the heat had ever been turned on because the knob was turned off. Webb explained that the buffet bar is in the dining room, which is a separate area from the kitchen. Consequently, the buffet cannot be readily observed from the kitchen.

53. **Millie Williams** was the Dining Room Supervisor at Dale Hollow from October, 2015 until September, 2016. While employed there, her immediate supervisor was Scott Everett.

54. Williams stated that she had been Ruth Thacker's first-line supervisor for approximately a year. She testified that she experienced numerous problems with Thacker. Thacker, along with her sister, Brenda, were among a group of employees "who ignored me and



would not follow direction. They ran to the Park Manager and other staff to complain." Specifically, they often contacted Jenny Moon for advice.

55. According to Williams, Thacker's sister "hated" Williams, and even threatened to kill her. Williams reported this behavior up the chain of command, but "nothing was done." Williams eventually resigned.

56. On cross-examination, Williams stated that she only worked with Moon for about three weeks, while Joe Mounce (then Park Manager) was on vacation.

57. **Joseph Shane Allen** was employed at Dale Hollow through Adecco Staffing services. His usual shift was 2 p.m. to closing, although he occasionally worked breakfast and lunch, if needed.

58. Allen stated that he had known Jenny Moon since she was first employed as a life guard at Dale Hollow. As for Ruth Thacker, he has known her his entire life and, in fact, she had babysat him many years ago. Allen has been acquainted with Joey Webb for four years, and stated that he had observed Joey Webb act as a "decision maker."

59. Allen had observed other employees forget to turn the buffet bar on. Specifically, he was aware that a Cook named Heath Stacey had once forgotten to turn it on. Allen testified that Moon had merely admonished him at the time, and said to Stacey, "Be careful. You know what might happen to food sitting cold on the buffet for 20 minutes."

60. Allen was asked if Moon had ever said anything disrespectful to him. He answered that once she may have called him "boy" or "young man." He had heard her call other male staff members "boys" as well.

61. On cross-examination, Allen was asked if he took offense when Moon called him "boy" or "young man." He answered "No, but after one month there, she should have known my name."

62. Allen added that he had heard Moon call female staff members "girls" before, and agreed that referring to people that way was "just her nature."

63. **Scott Everett** is currently a Chef II at Dale Hollow. Prior to assuming that position, he was the Food Services Operations Manager, and was Appellant's direct supervisor for the duration of Appellant's tenure at Dale Hollow.

64. Everett stated that he was familiar with the ServSafe guidelines. He had never seen Appellant violate the guidelines as they relate to cooking and reheating, he stated. He also had no disciplinary issues with Appellant, nor had he ever observed Appellant act unprofessionally.

65. Everett was asked if he would trust Joey Webb “to take care of things.” Everett answered, “If something was going on, I’d be up and I’d be at it. If I was doing something at the time, I would go check, but it depends on what I was in the middle of.”

66. Everett recalled that leading up to the day of the incident, Appellant had been out on vacation. Everett texted Appellant the night before to alert him that a last minute breakfast order change had been made. Everett agreed that he did not specifically offer to help Appellant that morning, but stated, “Everyone knows it is always on the table—just give me a phone call.”

67. Everett was asked if he felt that Appellant’s behavior on April 13, 2018, was “an error that could have caused potential harm to guests.” Everett responded (addressing Appellant directly), “I don’t think the actions were a violation of ServSafe guidelines, but you should have done something. You can check temperatures—you had the opportunity to do something. If you are by yourself, you watch the buffet.”

68. Everett recalled a visit once by David Thacker and another member of management. They complained about the cleanliness of the kitchen. Everett recalled Thacker saying that “if they had known the kitchen looked like this, they would not have eaten at Dale Hollow. This is a bunch of sh----.” Thacker had added that you could “eat off the floor at Lake Cumberland.”

69. Everett testified that he had never heard Jenny Moon say anything discriminatory to staff members.

70. A second day of evidentiary hearing was held on August 2, 2019. Appellant, **William Ware**, testified on his own behalf. Ware is currently a Public Accounts Auditor I with Public Accounts. He was offered the position prior to his suspension. The staff members who trained him for the auditor position, as well as his supervisors, are all women. Ware stated that “he does not have problems with strong women,” and added that his evaluations will show that he has gotten along with these women very well.

71. Prior to assuming his job at the Public Accounts, the Appellant worked for the Department of Parks for eighteen years. He was first hired as a Chef I, and was promoted up the ranks to Chef III in 2004 at the Lake Cumberland State Resort Park. He worked in that capacity for ten years. An incident occurred in 2013 when the kitchen was shut down by the State Health Department. As part of a settlement agreement, Appellant was demoted to a Chef II and transferred to Dale Hollow. (Appellee’s Exhibit 3.)

72. Appellant testified that he had “no problems” with the prior Park Managers, Joe Mounce and Mike Lynn. But when Jenny Moon returned to Dale Hollow, she began “micromanaging” his department. She made decisions that had previously been his to make. Appellant felt that she had “usurped” his authority. Appellant made verbal complaints about this behavior to his first-line supervisor, Scott Everett, and to Joe Mounce. Their response to him was “That’s just her style.”

73. Appellant stated that in the summer of 2017, Moon began increasing her harassing behavior to his department, which was all male. He filed a grievance against her in October, 2017.

74. The complaints in the grievance can be summarized as follows:

- A. Jenny Moon is on a mission to eliminate Appellant from Dale Hollow and has created a hostile working environment.
- B. Scott Everett was told by Moon to send her notes on Appellant's performance, specifically to alert her if the park runs out of food items.
- C. Moon issued a rule to "always" run a buffet for breakfast when the house count is at or exceeds 50. She issued this rule without consulting him, which he believed "undermined his authority."
- D. Moon asked Everett to address food costs on Appellant's Interim Evaluation.
- E. Moon "constantly disrespects" him, and ignores him. When she does speak, it is in a condescending tone. "She uses intimidation and coercion as a management style, and withholds information."
- F. Moon and "her clique" do not see Appellant "as worthy of being recognized," nor do they ask for his input. (Appellant's Exhibit 21.)

75. Appellant received a response to his grievance on November 6, 2017, from Joe Mounce. In it Mounce states that:

As we have previously discussed, documentation of running out of food items is something that should be tracked in any ...food service operation...In the cases you mention in your grievance the problem turned out to be poor communication.....The guideline for plus 50 in house buffet trigger is a directive from management and should be followed unless approval is gained from your supervisor, Mrs. Moon, or myself... Within the structure of the organization Mrs. Moon has direct authority to give instructions to subordinates without necessarily routing them through their direct supervisor." Mounce concluded the memo, "In your grievance you make accusations of coercion, harassment, disrespects me, condescending remarks and intimidation but I do not find evidence for support of these listed in your examples or otherwise in the course of investigation through interviews with your supervisor or Mrs. Moon that would substantiate said claims. (sic) (Appellant's Exhibit 11.)

76. Even though Appellant was dissatisfied with this response, he “decided to let it go.”

77. In the Spring of 2018, Appellant went on a two week vacation overseas. Upon returning to work on April 12, 2018, Appellant discovered that much of the food needed for the upcoming weekend had not yet been thawed. He pulled out what he thought they would need from the freezer and put it in the refrigerator to thaw. The next day, he arrived to work at 5:00 a.m. He worked to get the buffet ready. Some of the equipment “was not working as well as it should, not heating right.” Appellant also began to get a “sick migraine headache.” He then switched his attention to preparation of an order of twelve sausage biscuits. At 6:20 a.m., one of the servers, Linda, told him that a customer was upset because of an issue with the coffee. Linda asked Appellant if he would make this man a sausage biscuit to appease him. This caused the buffet to go out ten minutes late, at 6:40 a.m.

78. Appellant testified that to the best of his recollection, he turned all the burners on the buffet. He added, “The morning was a juggling act—getting out the buffet and getting out sausage biscuits.” He testified that when he did go out to the buffet that morning, he never noticed that the heaters were not on, or that the food was not warm. “The food was going out hot, and most of it had to be replaced because it was getting eaten.”

79. Appellant stated that at 8:00 a.m., the kitchen’s “number two” person, Joey Webb, arrived at work and helped him get food ready for the buffet. They worked together for approximately twenty minutes. From 8:20 to 8:30 a.m., Webb attended to the buffet on his own. Appellant had finished his food orders at 8:30, and went to work on completing some purchase orders. Webb told Appellant that “he had it under control.”

80. Appellant proceeded to the stock room area to check on supplies, then to the computer to place orders. Once the orders were complete, he “took a break.”

81. Approximately five minutes later, at 8:35 a.m., Ruth Thacker came to the stock room and said, “Guess what you forgot to do?” He answered that he had no idea. She responded, “You forgot to turn on the buffet.” According to Appellant, no one was eating the buffet at that time, and he reiterated that Webb had stated he had it under control.

82. Five minutes later, Moon approached him, asking if he had checked the buffet. According to Appellant, Moon caught him off guard because he was in the middle of doing orders. She then informed Appellant that she had instructed Webb to pull the buffet. He responded, “Well, I can re-heat it,” but Moon rejected that idea. So Appellant went to the buffet directly and took it down himself. According to Appellant he pulled “mostly empty pans.” He also noted that the water in the wells was not hot, although the heat was on. He threw the food away but stated there “was very little food, probably \$30 to \$35 dollars’ worth.”

83. By 9:00 a.m., Appellant testified, the buffet had been completely taken down.

84. At Moon's request, he sent her an email on April 16, 2017, which contained his statement of how the events transpired the morning of April 13, 2017. In the statement, he makes the following assertions: "In the rush of that morning to take care of multiple guest needs by myself, and also not feeling well, I had turned on the top heat, and seem to have forgotten the bottom heat. In restocking the bar, the top heat gave every appearance that bar was on fully. The first I had heard of any issue was right before Jenny ordered the bar pulled." (Appellant's Exhibit 12.)

85. According to Appellant, no one else discussed the matter with him until he received the Notice of Intent to Suspend on June 2, 2018.

86. Appellant stated that he wanted to make a few points for the record. First, he emphasized that he had entrusted the buffet to Joey Webb, who was a Cook II, and ServSafe certified. Appellant testified, "When I left the cook line, I turned over responsibility for the buffet to him."

87. Appellant also stated that, according to the Parks' Operational Manual, he was entitled to two (2) 15-minute breaks during the course of his workday. According to Policy 01-05, "These breaks are to be taken at the approximate midpoint between the time the employee clocks in and the beginning of their meal period and the approximate midpoint between the end of their meal period and the end of their shift." (Appellant's Exhibit 15.) It was Appellant's contention that he was actually in the middle of an authorized break at 8:30 a.m. "I was also taking care of orders, so it could be argued that it wasn't really a break, but I was sitting down, so that's okay. I delegated responsibility to Joey Webb."

88. Appellant stated that Moon was "aggravated" that, at some time prior to the 4/13/18 incident, he had had to be absent from work to attend a previously approved leadership training class in Frankfort. In this leadership seminar, Appellant testified, he "studied behaviors in class that he also saw from Moon. "I felt I was justified in my conclusion that I was being harassed by Moon. I simply asked that it stop."

89. Appellant also took issue with Moon's accusation that the temperature of the buffet violated SafServe rules when Moon had once advocated serving potato chips past their sell-by date.

90. Appellant also noted that the staff schedule on April 13, 2018, arranged for him to be the only employee in the kitchen from 5:30 a.m. until 8:00 a.m. On other days, many more staff members, up to five, were scheduled to work in the kitchen during the same timeframe. "That seems discriminatory," Appellant concluded.

91. Appellant stated that the grievance he filed against Moon "had not been taken seriously." Appellant felt an investigation should have been undertaken. "But Estep wrote me off as 'he doesn't like strong women.'" Appellant noted that in his current position of Public Accounts Auditor I, his entire chain of command "is all strong women," and he still received a positive Interim Performance Review.

92. On cross-examination, Appellant was asked to refer to the statement he wrote on April 16, 2018, explaining the events that had transpired three days earlier. Appellant admitted that the statement did not say he had been on break when it was discovered the buffet had gone cold. (Appellant's Exhibit 12.)

93. As for Appellant's written grievance against Moon, he stated that he did not appeal it to the next level, although the Cabinet's "Harassment Prevention Policy" states that an employee may notify the Cabinet Secretary if "agency officials do not comply with the procedures set forth in this policy." (Appellant's Exhibit 20.)

94. Appellant's issue with Moon's rule regarding mandatory buffets if the guest count is fifty or over was that Moon made this decision without consulting him. "I wasn't complaining about a change, but include me in the conversation," he stated.

95. At the end of his testimony, Appellant rested his case.

96. The Cabinet re-called **Jenny Moon** on rebuttal. Moon testified that since she became Park Manager, she had processed approximately fourteen disciplinary actions, ranging from verbal reprimands to dismissals.

97. She denied that she had ever drank alcohol while working at the park, but admitted that she had consumed liquor at a golf and boating event at an August Park Managers' meeting.

98. Referring to the April 13, 2018 incident with Appellant, Moon stated that Appellant had never informed her that he was on break at the time the buffet was closed.

99. KRS 18A.095(1) provides that "a classified employee with status shall not be dismissed, demoted, suspended, or otherwise penalized except for cause."

100. 101 KAR 1:345(1) authorizes an appointing authority to discipline an employee for "lack of good behavior and the unsatisfactory performance of duties." Section 4 relates to the imposition of a suspension and mandates that no suspension shall exceed 30 days.

### **FINDINGS OF FACT**

1. Appellant was a classified employee with status, employed as a Chef II at Dale Hollow State Park. He was suspended for five days on June 2, 2018, for unsatisfactory performance of duties and failure to follow food service guidelines. He filed the appeal of his suspension on August 3, 2018, and also alleged that he had been retaliated against for having previously filed a grievance.

2. The events that led to Appellant's suspension occurred on April 13, 2018. While the evidence concerning what transpired that morning is somewhat conflicting, the Hearing

Officer finds that Appellant came in to work that day at 5:00 a.m. He prepared food for the buffet which he put out at 6:40 a.m. The buffet bar heating wells were not turned on. While the heat lamps were on, that alone was not enough to maintain the food at the proper temperature. (Testimony of Appellant.)

3. The Hearing Officer finds that Joey Webb, a Cook II, discovered that the food was not warm sometime between 8:30 and 8:45, when he turned the heating wells back on. Webb directed Ruth Thacker to ask Appellant what he wanted to do about the buffet. Thacker spoke to Appellant who informed her that he was "seeing colors." Appellant did not come out to check the buffet. (Testimony of Joey Webb, written statement of Ruth Thacker, Appellee's Exhibit 5.)

4. The Hearing Officer finds that Jenny Moon arrived in the dining room a little after 9:00 a.m. when Thacker told Moon her customers were complaining that the food on the buffet was cold. Moon tested the food herself. She determined that it was, in fact, below an acceptable temperature. She directed Webb and Appellant to pull the food. (Testimony of Jenny Moon.)

5. The Hearing Officer notes that Appellant's testimony at the evidentiary varies in significant ways not only from the testimony of Webb and the statement of Thacker, but from his own statement, which he wrote three days after the event transpired. At the hearing, he asserted that he had been on an official "break," when the cold food was brought to his attention. He also asserted that Webb was responsible for the buffet not him, as Webb had told him he had the buffet "under control." In his April 16, 2018, written statement to Moon, Appellant asserted that he had "a lot going on" that morning, and he "had turned on the top heat, and seem to have forgotten the bottom heat." (Appellant's Exhibit 12.)

6. The Hearing Officer finds that Appellant failed to properly address the issue of the cold buffet food. Whether he was feeling unwell, was on a break, was in the process of placing an order, or even if he had had a very busy morning, it was Appellant's job to ensure that the buffet was served hot. After Thacker informed him the situation, he should have gone to the buffet straight away to correct the problem. Instead, he chose to stay at his computer after the food temperature was brought to his attention. (Testimony of Jenny Moon, Statement of Ruth Thacker.) As a Chef II, with eighteen years of experience, Appellant bore the ultimate responsibility for the proper management of the breakfast buffet.

7. The Hearing Officer finds that Appellant failed to satisfactorily perform his job duties on April 13, 2018.

8. The Hearing Officer finds that Appellant failed to satisfy his burden of proof on his claim that his suspension was done in retaliation for his having filed a grievance against Jenny Moon some time in 2017, when she was Assistant Park Manager.

9. In order to show retaliation in the employment context, Appellant must show that (1) he engaged in a protected activity; (2) his employer knew he engaged in the protected activity; (3) thereafter, his employer took some employment action adverse to the employee; and

(4) there was a causal connection between the protected activity and the adverse employment action. Smith v. City of Salem, Ohio, 378 F.3d 566, 570 (6<sup>th</sup> Cir. 2004). The Hearing Officer finds that even assuming *arguendo* that the first three prongs of the *prima facie* case of retaliation in the employment context were met, Appellant did not prove any causal connection between Appellant's grievance about Jenny Moon and the five-day suspension. As discussed above, it was established at the evidentiary hearing that the breakfast buffet had gotten unacceptably cold, and that it was Appellant's responsibility to correct that problem, which he failed to do. The Hearing Officer finds that the Cabinet demonstrated a legitimate, non-retaliatory reason for the suspension. Appellant has failed to show that "but for" the protected activity, filing a grievance, the adverse action would not have occurred.

### CONCLUSIONS OF LAW

1. The Hearing Officer concludes that the Cabinet established just cause for the five (5) day suspension against the Appellant, and has shown that the penalty was neither excessive nor erroneous. Appellant's failure to properly monitor the temperature of the breakfast buffet on April 13, 2018, and his failure to timely respond to notice that the food had reached an unacceptable temperature, constitutes a lack of good behavior and the unsatisfactory performance of duties.

2. The Hearing Officer concludes that Appellant did not demonstrate a causal connection between his grievance regarding Moon's behavior and his suspension. The Hearing Officer concludes, therefore, that Appellant failed to meet his burden of proof to show retaliation.

### RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **WILLIAM WARE V. TOURISM, ARTS AND HERITAGE CABINET, DEPARTMENT OF PARKS (APPEAL NO. 2018-165)** 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 Colleen Beach** this 1<sup>st</sup> day of October, 2019.

**KENTUCKY PERSONNEL BOARD**

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

A copy hereof this day mailed to:

Hon. William Adams  
Mr. William Ware