

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2017-048**

JASON WISE

APPELLANT

VS.

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER**

TRANSPORTATION CABINET

APPELLEE

** ** ** ** **

This matter came on for an evidentiary hearing on June 15, 2017, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Hanson Williams, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

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

This matter involves the dismissal of the Appellant from his position as Carpenter Supervisor with the Transportation Cabinet, Office of Support Services, Division of Facilities Support, by letter dated February 17, 2017. **(A copy attached hereto as Recommended Order Attachment A.)**

The burden of proof was placed upon the Appellee to show just cause for the disciplinary action and to show that it was neither excessive nor erroneous.

At the beginning of the hearing, the Appellant stated for the record that he was not contesting the charges of lack of good behavior, which included falsifying timesheets and smoking marijuana in a state vehicle while on work time. However, the Appellant stated that he was contesting the severity of the discipline imposed.

BACKGROUND

1. The Appellee's first witness was **Ashlee Graham Leonard**. She has been an Investigator with the Office of Inspector General (OIG) within the Cabinet for the previous three years. Her duties are to work fraud, waste, and abuse cases. The witness testified that as a result of a confidential informant, three employees, including the Appellant, were placed under investigation for suspicion of lack of good behavior.

2. She testified that the Report of Investigation (Appellee's Exhibit 1), which she authored, had consisted of GPS tracking of the Appellant's state vehicle, and also through personal surveillance of his activities.

3. As a result of the GPS tracking and personal surveillance, it was determined that on March 4, March 30, March 31, April 26, May 18, and May 25, 2016, the Appellant had engaged in non-work activities by driving to various places, including stops for personal business, and then had falsified his timesheet on these dates.

4. In addition, Leonard testified the investigative report showed that on November 1 and November 2, 2016, the Appellant was interviewed by Investigators David Owen and Mike Duncan. During at least one of these interviews, "you admitted to smoking marijuana in your state-issued vehicle while coworkers Cummins, Kessler, and Smoot were present." You also acknowledged you would ride around in your state-issued vehicle smoking marijuana approximately twice per week, which had been occurring for approximately one year.

(Hearing Officer Note: The Appellant, both at the beginning of the hearing and in his testimony later, confirmed the truth of these allegations in the OIG report.)

5. On cross-examination, the witness stated that the Appellant's crew was the only one which had been reported and the only one which was investigated for such activities.

6. Appellees next witness was **Mike Duncan**. He is a Staff Assistant in the OIG. He confirmed the testimony of Ashlee Leonard as to the admissions by the Appellant. In addition, the witness testified that an Altoid can found in the Appellant's truck was tested for residue and showed the presence of cocaine residue. He then stated this was not tied/linked to any specific person, including the Appellant.

7. Appellee's next witness was **Gray Tomblyn**. He is Executive Director of the Office of Supply Services. His duties include overseeing the maintenance of the facility and overseeing that Cabinet policies are followed.

8. He testified that as a supervisor, he was concerned about drug use in state vehicles because of the risk of liability to the Agency. In addition, he stated it was also embarrassing to the Agency and he supported the dismissal of the Appellant.

9. Appellee's next witness was **J. R. Dobner**. He has been employed with the Office of Human Resource Management in the Agency for the previous nine years and is the Appointing Authority designee. He made the decision to impose the dismissal.

10. He testified that after being contacted by OIG, he reviewed their investigative report regarding this matter before making his decision. The witness introduced the Intent to Dismiss and Dismissal letters, contained in the record herein. He stated the primary issues concerning him were time and attendance and the use of marijuana while on state time and in a state vehicle.

11. Dobner said that at the pre-termination hearing, the Appellant appeared and advised him that he had been in therapy since December 2016 and was no longer using marijuana. He continues to be in therapy. The witness also stated the Appellant had admitted to him of stopping in various places while on work time, for the purpose of conducting personal business.

12. Mr. Dobner expressed that he felt the Appellant had been honest and straightforward with him. He added that at the time of dismissal, the Appellant had been approximately two months away from achieving 20 years of service. The witness realized that the 20-year mark would mean a great deal to the Appellant as far as insurance and other benefits which he might receive.

13. The witness went on to explain that, in his view, the use of marijuana in a state vehicle while working and the frequency and length of use, was the key factor in making the decision to dismiss. Dobner then introduced various policies which he felt had been violated by Appellant. (Appellee's Exhibits 11, 13 and 14).

A. General Administration and Personnel Policy (GAP-801), General Conduct, provides, in pertinent part, that: Employees are to exercise "special care to ensure that personal conduct is above reproach by refraining from any activity that could embarrass or reflect adversely on the Commonwealth." (Appellee's Exhibit 11.)

The Cabinet prohibits employees from engaging in any conduct that violates Cabinet policies or involves the violation of criminal or civil laws of the Commonwealth or the federal government. Specifically prohibited acts include but are not limited to:

- Appearing on the job under the influence of alcohol, a controlled substance, or any other intoxicating substance.
- Conducting personal business on state time.
- Using state vehicles or equipment in a manner as prohibited by GAP-1104-2.

B. Policy GAP-808 Code of Ethics and Conflict of Interest, provides the same prohibitions on activities as GAP-801. (Appellee's Exhibit 13.)

C. Policy GAP-1104-2 relates to State Owned Vehicles and Equipment, User Requirements, Assignments, and Responsibilities, (Appellee's Exhibit 14.) This provides in pertinent part that operators of state vehicles shall comply with the following policies:

- Operation of a state vehicle shall be for official state business only. Incidental use associated with official business away from the employees headquarters city is strictly limited and may include incidental travel millage.

The policy provides that Cabinet employees operating state vehicles shall not:

- Carry illegal drugs or alcoholic beverages in state vehicles.

14. The witness then testified as to the disposition of cases against fellow crew members involved. He stated that Kessler was dismissed, John Smoot resigned and Cummins was on unpaid leave for personal reasons.

15. Mr. Dobner further stated that he attempted to compare the situation here with other similar cases. He explained that the 2009 case of Brad Pike involved a dismissal which was upheld. This involved the person driving a state vehicle with a cooler of alcoholic beverages and no prescription for a controlled substance. He cited the case of Tammy Gallagher, who had been selling Oxycontin from a state vehicle. He further explained the case of Kevin Lawson, a technologist, who had been driving a state vehicle while attempting to unsuccessfully purchase drugs, and who had later wrecked his state vehicle.

16. On cross-examination, the witness was questioned as to whether he believed people could be rehabilitated or changed. He stated that from personal experience he certainly knew it could happen, but as an Appointing Authority, he could not take the chance of subjecting the Cabinet to future liability. He also added that he had received no reports of misconduct involving the Appellant prior to the incident herein.

17. The Cabinet announced it closed.

18. The Appellant, **Jason Wise**, then called himself as his only witness. He testified he had been employed with the Agency prior to the time of his dismissal for nineteen years and eight months. He left the Agency as a Carpenter Supervisor.

19. The Appellant again admitted to the allegations contained in the Dismissal letter. He further testified that he considered himself a good employee with no prior disciplinary problems. He added that he had been seen by the Kentucky Employees Assistance Program (KEAP) in November 2016. He stated he is currently in therapy and no longer uses any form of drugs.

20. The Appellant then introduced his collective Appellant's Exhibit 1. These Annual Employee Performance Evaluations cover the period of 2002 through 2007 and the year 2016. These evaluations all show the Appellant to have been rated "Good" or "Highly Effective."

21. The Appellant also introduced Appellant's Exhibit 2, a collective exhibit showing payment receipts for his visits to a therapist, from November 2016 through February 2017.

22. The Appellant closed.

FINDINGS OF FACT

The Hearing Officer makes the following findings by preponderance of the evidence:

1. The Appellant was dismissed from his position as a Carpenter Supervisor by letter dated February 17, 2017 for lack of good behavior pursuant to 101 KAR 1:345.

2. The allegations of misbehavior included smoking marijuana on state time while in a state vehicle, using a state-assigned vehicle for personal use and falsifying time records.

3. During interviews with OIG investigators, and at the evidentiary hearing, the Appellant admitted the veracity of the charges.

4. The Appellant was some four months short of twenty (20) years of service at the time of his dismissal. By all accounts, except for the behavior herein, the Appellant has been an average or better employee with no prior disciplinary actions.

5. The Appellant has been in therapy for his drug usage since late 2016.

6. The Appellant's actions constitute lack of good behavior pursuant to 101 KAR 1:345.

CONCLUSIONS OF LAW

1. The Hearing Officer concludes as a matter of law the Agency has carried its burden of proof by a preponderance of the evidence.

2. While the Hearing Officer is sympathetic to the Appellant's attempt to reverse his life style, he is also struck by the depth and logic of J. R. Dobner's reasoning for the dismissal. The Agency simply cannot afford the risk of liability to it if the actions herein of smoking marijuana in a state vehicle while on state time are considered.

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 **JASON WISE VS. TRANSPORTATION CABINET (APPEAL NO. 2017-048)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

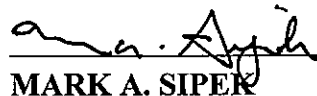
Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are 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 Hanson Williams** this 20th day of July, 2017.

KENTUCKY PERSONNEL BOARD



MARK A. SIPER
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. William Fogle

Mr. Jason Wise

J. R. Dobner



Matthew G. Bevin
Governor

COMMONWEALTH OF KENTUCKY
TRANSPORTATION CABINET

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

Personnel Board

FILE COPY

Received
MAR 02 2017

Greg Thomas
Secretary

February 17, 2017

Jason T. Wise

PERNR: 1

Re: Dismissal

Dear Mr. Wise:

After considering your statements presented at your pre-termination hearing held on Thursday, February 16, 2017, I have not found sufficient reason to rescind or alter the intent to dismiss letter dated February 6, 2017. This letter serves as notification that you are officially dismissed from your position as a Carpenter Supervisor with the Kentucky Transportation Cabinet (KYTC), Office of Support Services, Division of Facilities Support, General Maintenance Section effective the close of business Monday, February 20, 2017.

In accordance with KRS 18A.095 and 101 KAR 1:345, cause exists for your dismissal based on the following specific reason:

Lack of Good Behavior. The KYTC Office of Inspector General (OIG) received a complaint of employee drug use and time and attendance abuse. Ashlee Graham, OIG Investigator, was assigned to investigate. Based on Graham's findings, and your own admission, you smoked marijuana on state time and in a state-assigned vehicle, used a state-assigned vehicle for personal use and claimed time worked to which you were not entitled.

Graham conducted surveillance and ran Global Positioning System (GPS) reports on state vehicle, T0897. The vehicle is assigned to the Division of Facilities Support and is utilized by you, Guy Kessler, Carpenter II, and Mike Cummins, Carpenter Finish. Based on the GPS data, surveillance, and interviews with you, Kessler, and former Highway Safety employee John Smoot, Graham determined that you, Kessler, Cummins, and Smoot would ride together in T0897 and spend time just driving around, stopping at several residences, and sometimes smoking

marijuana while in the vehicle and on state time. Graham determined that you made stops at the following locations not related to work:

1. Bobby Dawson's residence on
2. Your residence at
3. Cummins' residence at
4. A residence on
5. A Harley-Davidson shop at 2073 Bryant Road in Lexington, KY.

In addition, you, Kessler, and Cummins would stop at the Highway Safety warehouse on Wilkinson Boulevard and pick up John Smoot, who works in a different department and had no work-related reason to associate with you during the work day. The four of you would then ride around in the state vehicle.

You were interviewed on November 1, 2016 by David Owen, OIG Contract Investigator, and Kevin Shipp, Special Investigative Agent Supervisor, and you were interviewed a second time on November 2, 2016 by Shipp and Mike Duncan, OIG Special Assistant. During your second interview you admitted to smoking marijuana in T0897 while Cummins, Kessler, and Smoot were present. You acknowledged you would ride around in T0897 smoking marijuana about twice per week. You further estimated that the activity had been occurring for approximately one year.

Graham reviewed the GPS data for T0897 for March 4, 2016, March 30, 2016, March 31, 2016, April 26, 2016, May 18, 2016, and May 25, 2016, and she included her findings in her report.

On March 4, 2016, you documented on your timesheet that you worked from 7:00 a.m. to 3:30 p.m. with a lunch from 11:00 a.m. to 11:30 a.m. You, Kessler and Cummins used T0897 for the following activities not related to work:

1. Left a Speedway on Versailles Road in Frankfort, KY at approximately 1:24 p.m.,
2. Traveled directly to the Harley-Davidson shop at 2073 Bryant Road in Lexington, KY, arrived there at approximately 1:56 p.m., and departed at approximately 2:11 p.m.,
3. Traveled directly to the Highway Safety warehouse on Wilkinson Boulevard in Frankfort, stopped there at approximately 2:47 p.m., and
4. Departed the Highway Safety warehouse at approximately 2:56 p.m., traveled around Frankfort, and then returned to the warehouse at approximately 3:40 p.m.

¹ Dawson is your brother.

On March 30, 2016, you documented on your timesheet that you worked from 7:00 a.m. to 3:30 p.m. with a lunch from 11:00 a.m. to 11:30 a.m. You, Kessler and Cummins used T0897 for the following activities not related to work:

1. Departed the Highway Safety warehouse at approximately 9:41 a.m., traveled through Bagdad, Pleasureville, Shelbyville, and Eminence before stopping at Pic Pac on Steele Street in Frankfort at approximately 11:32 a.m.,
2. Departed the Pic Pac at approximately 11:54 a.m. and eventually stopped at Dawson's residence on _____ at approximately 12:31 p.m.,
3. Departed Dawson's residence at approximately 12:41 p.m., drove to Lexington, stopped briefly at a Shell station on Man O' War Boulevard at approximately 1:49 p.m., and then stopped at the Harley-Davidson shop at approximately 1:51 p.m.,
4. Departed the Harley-Davidson shop at approximately 2:04 p.m. and returned to Frankfort at approximately 2:42 p.m., and
5. Traveled to Cummins' residence on _____ and stayed there from approximately 3:14 p.m. to 3:20 p.m.

On March 31, 2016, you documented on your timesheet that you worked from 7:00 a.m. to 3:30 p.m. with a lunch from 11:00 a.m. to 11:30 a.m. You, Kessler and Cummins used T0897 for the following activities not related to work:

1. Departed the Highway Safety warehouse at approximately 11:12 a.m.,
2. Stopped at a BP station on US-127 in Frankfort from approximately 11:26 a.m. to 11:44 a.m.,
3. Traveled around Frankfort until stopping at a residence on _____ and remained there from approximately 12:49 p.m. to 12:54 p.m.,
4. Returned to the Highway Safety warehouse at approximately 1:05 p.m., departed at 1:09 p.m., drove around Frankfort before again traveling by the Highway Safety warehouse at approximately 1:42 p.m., and
5. Traveled to Lexington, stopped at the Harley-Davidson shop from approximately 2:12 p.m. to 2:28 p.m., and then returned to the Division of Facilities Support office at approximately 3:08 p.m.

On April 26, 2016, you documented on your timesheet that you worked from 7:00 a.m. to 3:30 p.m. with a lunch from 11:00 a.m. to 11:30 a.m. You, Kessler and Cummins used T0897 for the following activities not related to work:

1. Departed Hardee's on US-127 in Frankfort at approximately 9:46 a.m., traveled through Waddy, Shelbyville, Pleasureville, Bethlehem, Gratz, and Owenton before returning to Frankfort and stopping at a work site at approximately 11:18 a.m.,

2. Later you departed a work site at approximately 11:46 a.m., traveled to Dawson's residence and stopped there at approximately 12:26 p.m.,
3. Departed Dawson's residence at approximately 12:36 p.m. and stopped at your residence on at approximately 1:11 p.m., and
4. Departed your residence at approximately 1:14 p.m., traveled around Frankfort making a stop at CVS Pharmacy on Main Street in Frankfort at approximately 1:38 p.m. and the BP station on Fair Oaks Lane in Frankfort at approximately 2:25 p.m. before returning to the Division of Facilities Support office at approximately 2:30 p.m.

On May 18, 2016, you documented on your timesheet that you worked from 7:00 a.m. to 3:30 p.m. with a lunch from 11:00 a.m. to 11:30 a.m. You, Kessler and Cummins used T0897 for the following activities not related to work:

1. Stopped on Hahn Drive in Frankfort from approximately 12:24 p.m. to 12:32 p.m.,
2. Stopped at a residence on at approximately 12:48 p.m.,
3. Departed the residence at approximately 12:50 p.m., stopped at Pic Pac on Steele Street at approximately 12:54 p.m. and returned to the Highway Safety Warehouse at approximately 1:20 p.m.,
4. Departed the Highway Safety warehouse at approximately 1:21 p.m., traveled around Frankfort, and returned to the Highway Safety warehouse at approximately 2:20 p.m.²

On May 25, 2016, you documented on your timesheet that you worked from 7:30 a.m. to 4:00 p.m. with a lunch from 11:00 a.m. to 11:30 a.m. You, Kessler and Cummins used T0897 for the following activities not related to work:

1. Stopped at your residence on from approximately 9:35 a.m. to 9:39 a.m.,
2. Returned to the Division of Facilities Support office at approximately 9:56 a.m.,
3. Departed the Division of Facilities Support office at approximately 10:20 a.m., traveled around Frankfort, and returned to the office at approximately 10:55 a.m.,
4. Departed the Division of Facilities Support office at 11:17 a.m. and stopped at the credit union on Regan Street at approximately 11:25 a.m.,
5. Departed the credit union at approximately 11:26 a.m. and stopped at a residence on at approximately 11:32 a.m.,
6. Departed the residence at approximately 11:41 a.m. and stopped at Cummins' residence on at approximately 11:56 a.m.,

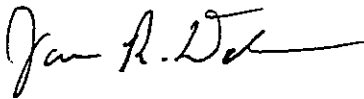
² Graham witnessed Smoot being dropped off at the Highway Safety warehouse at this time.

7. Departed Cummins' residence at approximately 12:02 p.m. and stopped at your residence on _____ at approximately 12:35 p.m.,
8. Departed your residence at approximately 12:37 p.m., traveled through Bagdad, Pleasureville and Waddy before returning to the Division of Facilities Support office at approximately 2:44 p.m.³

Your actions are in violation of 101 KAR 1:345, General Administration and Personnel Policy GAP-801, General Conduct, GAP-808, Code of Ethics & Conflict of Interest, and GAP 1104-2, State-Owned Vehicles and Equipment, because you engaged in activity that could reflect adversely on the KYTC, failed to exercise good judgment, used state time and a state vehicle for personal use, carried illegal drugs in a state vehicle, and smoked in a state vehicle.

As you are an employee with status, you may appeal this action to the Personnel Board within sixty (60) days after receipt of this notice, excluding the day of receipt. To appeal, you must complete the attached form and direct it to the address indicated on the form. Copies of KRS 18A.095 and 101 KAR 1:365 concerning appeal and hearing procedures are also attached.

Sincerely,



James R. Dobner
Appointing Authority Designee

cc: Personnel Cabinet
Gray Tomblyn, Executive Director
Terry Denny, Deputy Executive Director
Cabinet Personnel File

³ Only one stop was made during this time from approximately 1:09 p.m. to 1:11 p.m. at a Chevron Food Mart in Pleasureville.