

RENDERED: OCTOBER 18, 2013; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2012-CA-001505-MR

TERRY FARMER

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE THOMAS D. WINGATE, JUDGE  
ACTION NO. 11-CI-00579

KENTUCKY TRANSPORTATION CABINET,  
MIKE HANCOCK, SECRETARY AND  
APPOINTING AUTHORITY,  
AND THE KENTUCKY PERSONNEL BOARD

APPELLEES

OPINION  
AFFIRMING

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

BEFORE: CLAYTON, MAZE, AND NICKELL, JUDGES.

NICKELL, JUDGE: Terry Farmer challenges a Franklin Circuit Court order affirming the Kentucky Personnel Board's (KPB) dismissal of his appeal of his job termination by the Kentucky Transportation Cabinet (Cabinet). Having reviewed the briefs, the record and the law, and having determined Farmer's termination was

neither excessive nor erroneous, was taken with just cause, and was supported by substantial evidence, we affirm.

## FACTS

Farmer worked for the Cabinet from March of 1987 until early 2010. At the time of his dismissal on May 23, 2010, he was a Transportation Engineer Supervisor responsible for inspecting structures meeting federal bridge criteria and entering structures into the National Bridge Inventory using Pontis software.<sup>1</sup> In 2005, Farmer entered the Round Hole Branch Culvert in Leslie County into the database and marked it as inventory measuring twenty-six feet in length. This culvert remained in the registry through Farmer's inspections in 2007, 2008 and 2009.<sup>2</sup> Measuring just over twelve feet (12.2 feet)<sup>3</sup> in actual size, the Round Hole Branch Culvert could be entered into the Pontis database, but it could not be classified as inventory—a designation reserved for structures exceeding twenty feet in length. Farmer disputes the Cabinet's argument that his misclassification of the culvert exposed the state to potential penalties for noncompliance. No federal funds were lost as a result of Farmer's action.

---

<sup>1</sup> A national computer database used by the federal government to award funds for repair and maintenance work. The Cabinet receives federal funding based upon the number of structurally deficient bridges located within the Commonwealth.

<sup>2</sup> According to testimony, each bridge must be inspected at least once every twenty-four months.

<sup>3</sup> This measurement was provided by Jeff Sams, Chief Bridge Inspector. Farmer acknowledged the twenty-six feet measurement he entered was incorrect and that Sams's figure was accurate. Farmer testified he calculated the length before Pontis existed and had failed to correct it. He testified structure length is irrelevant because federal funding is based on a sufficiency rating assigned by the Federal Highway Administration (FHWA).

Farmer had an interest in this particular culvert—it was adjacent to property owned by his mother in which he owns a small percentage with his two sisters; it drains water from his land; and, it was the subject of litigation between his mother and the Cabinet. Misclassifying the culvert as a bridge brought the structure within Farmer’s job responsibilities and made it eligible for federal funding. In June 2005, Farmer wrote a memorandum suggesting special funds or federal funds could be sought to replace the culvert since it was listed on the bridge inventory and the “pipes [are] rusted thru at the outlet and due to contraction scour at the inlet and outlet ends of the structure.” In August 2009, Farmer wrote another memorandum seeking “expertise to crosscheck” his information about the culvert. Both memoranda were written on Cabinet letterhead.

A wrinkle in the litigation over the culvert revealed Farmer’s misclassification of the structure. On September 24, 2009, Trinta Cox, Deputy Executive Director of the Cabinet’s Office of Human Resource Management, received an email from Tom Napier, the Cabinet’s Chief District Engineer, indicating he had received correspondence from the attorney representing Farmer’s mother and attached to it were documents on Cabinet letterhead. Napier questioned how the attorney came to possess the documents and was concerned Farmer might be using state resources for his own benefit and that of his mother.

Armed with Napier’s information, Cox contacted the Office of the Inspector General (OIG) and an investigation was launched. The investigation revealed:

1) Farmer failed to follow proper procedure and policy in securing the release of Transportation Cabinet documents; 2) he improperly attempted to influence and use state resources to gather information and evidence to improve the culvert adjacent to his property, such acts constituting a direct conflict of interest; and 3) he improperly entered the culvert into the Pontis system in an attempt to secure funding to repair or replace it.

In addition to misclassifying the culvert, the investigation also revealed Farmer had been insubordinate when responding via e-mail to a superior's request that he catch up on making his Pontis entries.<sup>4</sup>

Upon receipt of the OIG's findings, Cox confirmed the culvert was too short to qualify as a bridge and therefore outside Farmer's inspection duties. Thereafter she issued a notice of intent to dismiss letter on January 19, 2010. After two pre-termination hearings, collection of more facts, and an inspection of the culvert by another bridge inspector,<sup>5</sup> Farmer received a letter from Cox in March 2010, informing him he was officially relieved of his duties that day due to insubordination, ethical violations, and acting in direct violation of the conflict of interest statement he had signed on May 30, 1990.

## PROCEDURAL BACKGROUND

---

<sup>4</sup> There was testimony that computer glitches from July to October 2009 prevented employees from downloading files from the server to personal computers and uploading files back to the server. According to federal standards, data is to be entered into the computer database within ninety days of an inspection.

<sup>5</sup> In 2010, Jeff Sams entered information about the culvert resulting in the FHWA assigning a rating of fifty-one; in 2009, Farmer had entered data resulting in an assigned rating of thirty-seven. Bridges more than twenty feet in length are eligible for Highway Bridge Program Funds. Bridges rated between zero and fifty are eligible for replacement funding; those rated between fifty-one and eighty are eligible for rehabilitation funds.

Farmer appealed his termination to the KPB denying the allegations contained in the termination letter and insisting that even if reprimand was warranted, termination was excessive. At a two-day hearing, he denied trying to secure federal funding for the culvert for his benefit or that of his mother. He also denied using his position for his own benefit or to gain information. He testified he calculated the culvert's length to be twenty-six feet long by measuring between the end of each inlet wall and placed it on the inventory because it was in poor condition.

In February 2011, the KPB hearing officer entered findings of fact, conclusions of law, and recommended dismissing Farmer's appeal and upholding the termination. He concluded Farmer's actions violated:

- GAP-810<sup>6</sup> Prohibited Activities, "Using state time, facilities, equipment, materials, or supplies for private gain or advantage;" "Using their influence as official Cabinet employees in a matter that involves a conflict between personal and public interests or for financial gain or special privileges."
- KRS<sup>7</sup> 11A.020(1)(a), (c) and (d)[.]

KRS Chapter 11A is the Executive Branch Code of Ethics (EBCE). The cited provisions direct:

(1) No public servant, by himself or through others, shall knowingly:

---

<sup>6</sup> General Administration and Personnel Policy, previously Personnel Management Policy PM-207, Code of Ethics. (Footnote added).

<sup>7</sup> Kentucky Revised Statutes. (Footnote added).

(a) Use or attempt to use his influence in any matter which involves a substantial conflict between his personal or private interest and his duties in the public interest;

...

(c) Use his official position or office to obtain financial gain for himself or any members of the public servant's family; or

(d) Use or attempt to use his official position to secure or create privileges, exemptions, advantages, or treatment for himself or others in derogation of the public interest at large.

In addition to finding violations of the Cabinet's internal policies and procedures and the EBCE, the hearing officer also found Farmer's e-mail response to his superior's request that he enter bridge inspection data about Harlan County structures into Pontis was "insubordinate on its face." As a result, dismissal of the appeal to the KPB was recommended.

Farmer filed exceptions to the hearing officer's report and recommendation. After hearing oral argument, the KPB adopted the hearing officer's report and dismissed the appeal.

Farmer appealed the dismissal to the Franklin Circuit Court, arguing the KPB had incorrectly applied KRS 11A.020—a statute that can only be applied by the Commission. The circuit court affirmed Farmer's termination, finding it was supported by substantial evidence and the KPB had correctly considered the EBCE because Farmer had cited "no law in support of his position, and the Executive Branch Code of Ethics, found at KRS 11A, is silent on the exclusivity of

jurisdiction.” In response, Farmer moved to vacate, alter, or amend the circuit court’s order, which prompted the court to amend its ruling in part, stating the KPB lacked jurisdiction to apply KRS Chapter 11A because that authority is vested solely in the Commission. The circuit court stated,

unless the matter is first referred to the agency by the Ethics Commission pursuant to KRS 11A.100(3)(d) or referred to the Attorney General’s office for prosecution, no other state entity may enforce the provisions of KRS Chapter 11A.

The circuit court went on to say,

substantial evidence in the record as a whole does support Farmer’s termination, as the [KPB] also found that Farmer had violated the Cabinet’s internal ethic’s policy, GAP-810, irrespective of any reference to a violation of KRS Chapter 11A. Therefore, this Court **AFFIRMS** its June 29, 2012 *Opinion and Order*.

#### ANALYSIS

On appeal to this Court, Farmer claims remand is necessary and once again asserts his termination was unsupported by substantial evidence. An appellate court may affirm a trial court for any reason, so long as it is supported by the record. *McCloud v. Commonwealth*, 286 S.W.3d 780, 786 n. 19 (Ky. 2009) (citing *Kentucky Farm Bureau Mut. Ins. Co. v. Gray*, 814 S.W.2d 928, 930 (Ky. App. 1991)). When a circuit court reviews a decision of the KPB, it does so as an appellate court. *500 Associates, Inc. v. Natural Res. & Env’tl. Prot. Cabinet*, 204 S.W.3d 121, 131–32 (Ky. App. 2006) (internal citations and quotations omitted).

Our role is to determine whether the circuit court's findings affirming the administrative decision are clearly erroneous. *Id.* at 131 (citation omitted).

The circuit court found the KPB affirmed Farmer's dismissal due to violations of both KRS 11A.020 and violations of the Cabinet's internal policies and procedures found in GAP-810. Initially, the circuit court found the KPB's decision was properly based on both provisions, but ultimately determined the KPB had erred in relying on the EBCE, but termination was justified due to violations of GAP-810 alone.

GAP-810 became effective May 2009. Based on KRS Chapter 11A, it supplements, but does not replace, the EBCE. GAP-810 generally requires all Cabinet personnel to:

- Exercise good judgment, common sense, and ethical behavior
- Be independent and impartial
- Make decisions and policies within the established processes of government
- Display actions that promote public confidence in the integrity of government

Farmer violated specific provisions of GAP-810 by deliberately entering inaccurate data into the Pontis database that would potentially benefit himself and his family and did not correct it. He also used his position as a bridge inspector and state engineer to write memoranda on Cabinet letterhead to benefit him and his family. Despite the KPB's error in citing KRS 11A.020 as a reason for termination, the circuit court did not err in affirming Farmer's dismissal due to his violation of Cabinet policies and procedures expressed in GAP-810.



For the reasons set forth above, Farmer's termination was supported by substantial evidence and the decision of the circuit court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Paul F. Fauri  
Frankfort, Kentucky

BRIEF FOR APPELLEE,  
COMMONWEALTH OF  
KENTUCKY, TRANSPORTATION  
CABINET, MIKE HANCOCK,  
SECRETARY AND  
APPOINTING AUTHORITY:

William H. Fogle  
Frankfort, Kentucky

BRIEF FOR APPELLEE,  
KENTUCKY PERSONNEL BOARD:

Boyce Andrew Crocker  
Frankfort, Kentucky