

COMMONWEALTH OF KENTUCKY  
EXECUTIVE BRANCH ETHICS COMMISSION  
AGENCY NO. 13-013  
ADMINISTRATIVE ACTION NO. 13-EBEC-0325



EXECUTIVE BRANCH ETHICS COMMISSION

COMPLAINANT

vs.

**HEARING OFFICER'S REPORT**  
**AND**  
**RECOMMENDED ORDER**

THOMAS BURLING

RESPONDENT

\* \* \* \* \*

**I. INTRODUCTION**

THIS MATTER pertains to a telephonic prehearing conference, held on April 14, 2014. The Respondent, Thomas Burling, had been directed in an Order, dated March 11, 2014, to appear and show cause as to why he should not be held in default, pursuant to KRS 13B.080(6) for failing to comply with the Orders of this Hearing Officer. As will be discussed, the Respondent had been properly noticed and summoned with a copy of a Initiating Order and Allegation of Violations (Initiating Order), as filed by the Complainant, Executive Branch Ethics Commission (the Ethics Commission).

The Hons. Katherine H. Gabhart and John R. Steffen appeared on behalf of the Ethics Commission. Thomas Burling failed to appear at the show cause proceeding. Prior to the Prehearing Conference, the Ethics Commission filed on April 7, 2014, a written Motion for Default (to which no response was made) requesting the entry of a default Hearing Officer's Report and Recommended Order for consideration by the Ethics Commission, pursuant to KRS 13B.110. Attached to the Motion were copies of the various efforts of the Ethics Commission to serve a copy of the Initiating

Order and Allegation of Violations on the Respondent.

**II. FINDINGS OF FACT**

After reviewing the entire record and based on a preponderance of the evidence thereof, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

1. Thomas Burling (Burling) is a former employee of the Commonwealth of Kentucky, Transportation Cabinet, and for purposes of the action taken by the Ethics Commission was at all relevant times a “public servant” as that term is defined in KRS Chapter 11A, also known as the Kentucky Ethics Act

2. Pursuant to KRS 11A.080(1)(c), the Ethics Commission on or about May 14, 2013, attempted to provide Burling with notice of the fact it had opened a preliminary investigation as to possible violations of the Ethics Code. Thereafter, the Ethics Commission issued an Initiating Order on or about September 9, 2013, in which it informed Burling it was initiating an administrative proceeding pursuant to KRS Chapter 13B to determine if he had violated the Ethics Code for the following offenses in violation of Chapter 11A:

- a. Selling scrap metal owned by the state to private vendor for private gain
- b. Misusing a state issued credit card
- c. Misusing a state charge account / stealing of office supplies
- d. Using state prisoners to perform work on his personal property
- e. Falsifying time sheets on several occasions
- f. Using a state vehicle for personal use
- g. Falsifying an application for promotion by failing to disclose a prior felony conviction

3. The Ethics Commission attempted to served Burling a copy of the Initiating Order on September 9, 2013, at his last known address of 3145 Silvia Ct, Willard, OH 44890. Service was accepted by Marvin E. Cole a resident at that address. (Complainant’s Motion for Default Exhibit No.

4.)

4. On December 13, 2013, the Administrative Hearings Branch issued a Notice Assigning Case and Order Setting Filing Requirements and Scheduling Prehearing Conference in which Burling was informed that a telephonic prehearing conference would be held on December 30, 2013, at 1:30 p.m. ET. The Notice also directed Burling to provide the Administrative Hearings Branch with a telephone number by which he could be reached. The Notice Assigning Case was sent by regular mail to the address supplied by the Ethics Commission. This document was sent to Burling in conformity with the requirements of KRS 13B.050.

5. Burling failed to be available by telephone on December 30, 2013, at 1:30 p.m. ET, and did not comply with the Hearing Officer's directive to provide the Administrative Hearings Branch with a telephone number. At the request of the Hearing Officer, and as evidenced by Exhibits 5 -7 of the Ethics Commission Motion for Default, the Ethics Commission, in conformity with KRS 454.210, attempted on February 4, 2014, a so-called "long arm service" of the Initiating Order by serving a copy of the document on the Kentucky Secretary of State for service on Burling at his Ohio address of 3145 Silvia Ct, Willard, OH. The Secretary of State accepted service but ultimately "returned" the document via its website as being "undeliverable" on March 24, 2014.

6 On January 2, 2014, the Hearing Officer issued an Order Rescheduling Prehearing Conference in which Burling was informed that a telephonic prehearing conference would be held on February 10, 2014, at 1:30 p.m. ET. The Order also directed Burling to provide the Administrative Hearings Branch with a telephone number where he could be reached. The Order Rescheduling Preliminary Conference was sent by regular mail to the address supplied by the Ethics Commission. This document was sent to Burling in conformity with the requirements of KRS 13B.050.

7. Burling failed to be available by telephone on February 10, 2014, at 1:30 p.m. ET and did not comply with the Hearing Officer's directive to provide the Administrative Hearings Branch with a telephone number. During the Conference, the Hearing Officer was informed by counsel for the Ethics Commission of its efforts to re-serve the Initiating Order via the Secretary of State but at the time of the prehearing conference, it did not have any information as to whether the Initiating Order and Summons had been received by the Respondent.

8. Accordingly, on February 11, 2014, the Hearing Officer issued an Order Rescheduling Prehearing Conference in which Burling was informed a telephonic prehearing conference would be held on March 10, 2014, at 1:30 p.m. ET. The Order also directed Burling to provide the Administrative Hearings Branch with a telephone number where he could be reached. The Order Rescheduling Preliminary Hearing was sent by regular mail to the address supplied by the Ethics Commission. This document was sent to Burling in conformity with the requirements of KRS 13B.050.

9. Burling failed to be available by telephone on March 10, 2014, at 1:30 p.m. ET and did not comply with the Hearing Officer's directive to provide the Administrative Hearings Branch with a telephone number. At the prehearing conference, counsel for the Ethics Commission informed the Hearing Officer it had received word via the Secretary of State's website that the summons and Initiating Order had been deemed "undeliverable." At the request of counsel for the Ethics Commission, the Hearing Officer, on March 11, 2014, issued an Order for Burling to Appear and Show Cause, which was also sent to Burling's last known address. The Notice instructed Burling to be available by telephone on April, 14, 2014, at 2:30 p.m. ET, and show cause as to why a default order should not be entered against him in favor of the Ethics Commission. The Notice further

instructed Burling to provide a telephone number by which he could be reached.

10. On April 14, 2014, at 2:30 p.m ET, the Hearing Officer convened the Show Cause Hearing with Hons. Katherine Gabhart and Steffen appearing on behalf of the Ethics Commission. Burling was not available by phone and did not comply with the Hearing Officer's directive to provide the Administrative Hearings Branch with a telephone number.

11. KRS 13B.080(6) provides that a party, who is properly served under KRS 13B.050, may be held in default if he fails to appear or participate in a prehearing conference or otherwise fails to comply with an Order of the Hearing Officer. In this case, Burling, despite being properly served pursuant to KRS 13B.050 and KRS 452.210 (2), failed to be available by phone for the prehearing conference held on December 30, 2013, February 10, 2014, March 10, 2014. Additionally, he failed to comply with the Hearing Officer's Order to Appear and Show Cause, as issued on March 11, 2014, by not being available by phone for the prehearing conference held on April 14, 2014. Since Burling failed to comply with the Orders of the Hearing Officer, he is in default and by virtue of his default has admitted the allegations set out in Paragraph 2 of this Report and Recommended Order and the Allegation of Violations attached to the Initiating Order.

### **III. CONCLUSIONS OF LAW**

Pursuant to KRS 13B.060 and in light of Burling's failure to be available by telephone for the show cause telephonic conference on April 14, 2014, as ordered, the Hearing Officer concludes as a matter of law that Burling is in DEFAULT and the allegations set out in the Initiating Order and Allegation of Violations are DEEMED admitted.

### **IV. RECOMMENDATION**

Based on the forgoing, the Hearing Officer recommends that the Ethics Commission enter

an order finding Burling in default for which the Ethics Commission may impose a public reprimand and a civil administrative penalty of five thousand dollars (\$5,000) per violation for a total aggregate amount of thirty-five thousand dollars (\$35,000).

**V. NOTICE TO PARTIES OF EXCEPTION AND APPEAL RIGHTS**

Pursuant to KRS 13B.110(4):

A copy of the hearing officer's recommended order shall also be sent to each party in the hearing and each party shall have fifteen (15) days from the date the recommended order is mailed within which to file exceptions to the recommendations with the agency head.

Pursuant to KRS 13B.120(2):

the agency head may accept this recommended order and adopt it as the agency's final order, or it may reject or modify, in whole or in part, the recommended order, or it may remand the matter, in whole or in part, to the hearing officer for further proceedings as appropriate.

Pursuant to KRS 13B.120(4):

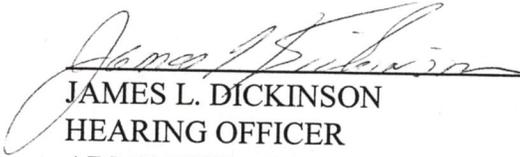
the agency head shall render a final order in an administrative hearing within ninety (90) days after the hearing officer submits a recommended order to the agency head, unless the matter is remanded to the hearing officer for further proceedings.

Pursuant to KRS 13B.140:

All final orders of an agency shall be subject to judicial review in accordance with the provisions of KRS Chapter 13B. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business.

Pursuant to KRS 23A.010(4), "Such review [by the Circuit Court] shall not constitute an appeal but an original action." Some courts have interpreted this language to mean that summons must be served when filing an appeal petition in the Circuit Court.

SO RECOMMENDED this 11<sup>th</sup> day of April, 2014.

  
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JAMES L. DICKINSON  
HEARING OFFICER  
ADMINISTRATIVE HEARINGS BRANCH  
OFFICE OF THE ATTORNEY GENERAL  
1024 CAPITAL CENTER DR., STE. 200  
FRANKFORT, KENTUCKY 40601-8204  
(502) 696-5442

**CERTIFICATE OF SERVICE**

I hereby certify that the original of this ORDER was served this 11<sup>th</sup> day of April, 2014, by messenger mail, to:

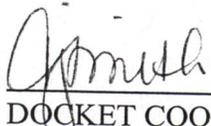
DEBBIE BRISCOE  
EXECUTIVE ASSISTANT  
EXECUTIVE BRANCH ETHICS COMM  
#3 FOUNTAIN PLACE  
FRANKFORT KY 40601

for filing; and a true copy was served by first-class mail, postage prepaid, to:

THOMAS BURLING  
3145 SILVIA CT  
WILLARD OH 44890

and by messenger mail, to:

KATHRYN H GABHART  
JOHN R STEFFEN  
EXECUTIVE BRANCH ETHICS COMM  
#3 FOUNTAIN PLACE  
FRANKFORT KY 40601

  
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DOCKET COORDINATOR