

COMMONWEALTH OF KENTUCKY
EXECUTIVE BRANCH ETHICS COMMISSION
AGENCY NO. 10-007
ADMINISTRATIVE ACTION NO. 10-EBEC-0165

EXECUTIVE BRANCH ETHICS COMMISSION

COMPLAINANT

vs.

FINDINGS OF FACT, CONCLUSIONS OF LAW,
RECOMMENDED ORDER
AND NOTICE OF EXCEPTION AND APPEAL RIGHTS

TERRY FARMER

RESPONDENT

* * * * *

An Administrative Hearing was held in this matter on October 23-24, 2012. The Complainant Kentucky Executive Branch Ethics Commission was represented by Kathryn H. Gabhart, General Counsel, with John Steffen, Executive Director, as Co-Counsel. The Respondent, Terry Farmer, was represented by Paul F. Fauri, Law Place Inc. The Hearing was presided over by Susan S. Durant, Hearing Officer, Administrative Hearings, Office of the Attorney General. The following witnesses testified: John Witt, Contract Investigator for the Transportation Cabinet Inspector General; Adam Knuckles, Transportation Engineer Supervisor, Project Delivery and Preservation Branch; Ruth Wells, mother of Terry Farmer; Michael West, Bridge Section Supervisor, Maintenance, District 11; Michael Calebs, Branch Manager, Project Delivery and Preservation, District 11; Jeffrey Sams, Chief Bridge Inspector, Division of Maintenance; Ann Stansel, Records Custodian, Executive Staff, Transportation Cabinet; Cass Thomas Napier, Executive Advisor, State Highway Engineer's Office, formerly Chief District Engineer, District 11; Shelby Kinhead, Attorney at Law, Kinhead & Stiltz; William H. Fogel, Deputy Executive Director, Transportation Cabinet; and David Steele, Transportation Engineering Branch Manager, Bridge Preservation.

The issue in this matter is whether Terry Farmer as a Transportation Engineer II, violated KRS 11A.020(1) and/or KRS 11A.040 (1).

FINDINGS OF FACT

1. Terry Farmer was a Transportation Engineer Supervisor/ Engineer II in District 11 in the Kentucky Transportation Cabinet at the time that the events that are the subject of this matter took place. Throughout the period, c. 2005-2010, Farmer resided with his mother, Ruth H. Wells and her husband, on an approximately 175 acre farm, on State Route 2009 in Leslie County, Kentucky, which is one of the eight counties in District 11. The Wells raise buffalo on the land. Farmer has lived on the farm for decades. He has an economic interest as well as an inchoate hereditary interest in the land. Ex. 1 at 4. According to Michael West, Bridge Section Supervisor, Maintenance, District 11, DVD of the Hearing on October 23 at 3:05 (Hereinafter cited as DVD Oct23___), Farmer, who was a Bridge Inspector, generally worked in Harlan and Bell Counties.

2. Roundhole Branch flows through the farm within sight of the Wells' house. As it falls from the surface-mined area on the higher land above the farm and reaches the flatter land, it slows down thus causing the water to drop the debris it accumulates before it flows under Route 2009 through a culvert. This case concerns Farmer's attempt to have the Roundhole Branch culvert improved to prevent Wells' and his interests from flooding.

3. The culvert is a 2-barrel 6' x 4' metal pipe arch double culvert. Ex. 1 tab 1. See Ex. 11. A culvert is defined in the *Recording and Coding Guide for the Structure Inventory and Appraisal of the Nation's Bridges* as:

A structure designed hydraulically to take advantage of submergence to increase

hydraulic capacity. Culverts, as distinguished from bridges, are usually covered with embankment and are composed of structural material around the entire perimeter, although some are supported on spread footings with the streambed serving as the bottom of the culvert. Culverts may qualify to be considered "bridge" length.

Ex. 10 at viii. Culverts are measured along the center line of the roadway. The measurement should be made between the inside faces of the exterior walls. Ex. 10 at 28-29. So the length of a two-pipe culvert would be measured from the inner side of the outside wall of one pipe to the inner side of the outside wall of the other pipe, *i.e.*, (←)--(→). West Tr. at XX. According to West DVD Oct23 2:23; Michael Calebs, Branch Manager, Project Delivery and Preservation, District 11, DVD Oct23 at 4:01; and David Steele, Transportation Engineering Branch Manager, Bridge Preservation, DVD Oct24 3:29; the state keeps no inventory of culverts that are less than bridge length. According to Calebs, culvert replacement is done locally through Maintenance or sometimes the job is bid out. Culverts are generally low priority.

4. A bridge is defined as:

A structure including supports erected over a depression or an obstruction, such as water, highway, or railway, and having a track or passageway for carrying traffic or other moving loads, and having an opening measured along the center of the roadway of more than 20 feet between undercopings of abutments or spring lines of arches, or extreme ends of openings for multiple boxes; it may also include multiple pipes, where the clear distance between openings is less than half of the smaller contiguous opening.

Ex. 10 at viii. It is to be noted that a culvert can be classified as a bridge if it is longer than 20'.

5. According to West, it takes five years of training to be certified as a bridge inspector. DVD Oct23 2:16. State Transportation Bridge Inspectors do not usually inspect culverts. DVD Oct23 2:33. If they are inspected they are to be labeled "non-inventory." DVD

West Oct23 2:22; DVD Sams Oct24 9:16. Bridges are carefully and routinely inspected and placed on the National Bridge Inventory (NBI) and are catalogued in the PONTIS system. *See* Ex. 1 tab 6. The structure type and material, age and service, geometric data, inspection frequency, length, condition, load rating, etc. are entered on a Structure Inventory and Appraisal Sheet. That inspection data is put into PONTIS which electronically determines the sufficiency rating of the bridge and whether and how urgently a bridge needs to be replaced according to Cass Thomas Napier, Executive Advisor, State Highway Engineer's Office, formerly Chief District Engineer, District 11. DVD Oct24 12:10.

6. NBI provides a rational means of using federal funds for bridge repair and replacement. DVD Napier Oct24 12:10. Steele testified that the process begins at the District level. Every two years, Planning, Bridges, the Chief District Engineer, and the Project Development Coordinator meet and prioritize the needs for the District. DVD Oct24 3:33; *see also* DVD West Oct23 3:04. Then that priority list in regard to bridges goes to Steele to prioritize for the state. In Kentucky, the prioritization ultimately goes into the Six-Year Plan, or Highway Plan, for the use of state and federal funds as determined at the state central office level. DVD Steele Oct24 3:33-3:35; DVD Calebs Oct23 3:38, 3:43. If a state is not in compliance with the national bridge inspection standards, federal funds for the state can be jeopardized according to Jeffrey Sams, Chief Bridge Inspector, Division of Maintenance. DVD Oct24 10:07. According to Steele, state as well as federal maintenance funds for bridges are also carefully prioritized. DVD Oct24 3:36.

7. Ruth Wells testified that she began worrying about Roundhole Branch flooding her property seven or eight years ago. In 2005, Terry Farmer, who was a Transportation

Engineering Supervisor at the time, began a two-pronged approach to try to solve the flooding problem on his and his mother's property.

8. First apparently, Farmer used his position as a Bridge Inspector to fill out a Structure Inventory and Appraisal Sheet for the culvert at Roundhole Branch where it flows under KY 2009 on the family property. Ex. 1 tab 6; DVD West Oct23 2:58. He indicated that the culvert was 26' which made it long enough to be placed on the NBI. He also entered data to indicate that the "bridge" was in sufficiently poor condition so that it would qualify for replacement. His evaluation resulted in a sufficiency rating of 37 and anything below 50 means that rehabilitation or replacement is necessary. DVD Steele Oct24 3:56. He placed it on a 12 month or annual inspection schedule. On March 13, 2008, and on January 28, 2009, Farmer inspected the "bridge" as Substandard. Ex. 1 at tab 6; DVD West Oct23 3:15; DVD Sams Oct24 9:55.

9. In September 2009, after Farmer and his mother created a legal issue with Transportation Cabinet over the culvert, Michael West, Bridge Section Supervisor for District 11, visited the culvert near Farmer's home. He measured it to be 16' or less. DVD Oct23 2:25. On November 23, 2009, John Witt, the Investigator for Transportation, who had some surveying and engineering background, measured the Roundhole Branch culvert at Greasy Creek Road, KY 2009, and determined that it was 14'. Ex. 1 at 6. On February 22, 2010, Jeffrey Sams, Chief Bridge Inspector for the Commonwealth, at the request of David Steele, Branch Manager for Bridge Preservation, performed a Quality Control Quality Assurance inspection. Sams determined that the culvert was a 12.2 feet long non-inventory structure. He assessed the condition of the culvert as Fair, "all primary structural elements are sound, but may have minor

section loss, cracking, spalling or scour.” He assessed the Headwall and Channel as Satisfactory, “structural elements show some minor deterioration.” Ex. 11. *See* Ex. 10 at 38 for definitions. He thought that the culvert should be assessed every other year rather than annually. Sams’ evaluation calculated to a sufficiency rating of 51 which meant; that the “bridge” did not qualify for replacement. Farmer’s evaluation calculated to a sufficiency rating of 37 which made the “bridge” eligible for replacement. DVD Sams Oct24 10:09-10; DVD Steele Oct24 3:55-56. *See* Ex. 15. Napier, who was the Chief District Engineer in District 11 from April 2008-September 2011, agreed that the culvert should be replaced in the future but it was not of a high priority. DVD Oct24 12:23.

10. All of those who testified stated that the Roundhole Branch culvert was less than 20', and thus should not have been on the NBI.

11. Also in 2005, Farmer approached the culvert problem more directly by having Jeff Kelly do a drainage analysis. Farmer then sent an intradistrict memorandum to Lee Barrett, the Acting Area Engineer in Clay and Leslie Counties, about the poor condition of the culvert:

This structure was recently placed on our inventory due to the length qualifying for inventory purposes and due to the pipes being rusted thru at the outlet and due to contraction scour at the inlet and outlet ends of the structure.

An analysis completed by the Design section discovered that the existing structure could not carry the runoff for the required 25-year storm. A recommendation was made by the Design section to install a 15' wide x 5' high concrete box culvert. The cost of installing this by contract would be approximately \$150,000. In case that special funds cannot be procured for this, we could perhaps request that this be replaced with Federal funds.

Ex. 1 at tab 1.

12. Calebs testified that the suggested box culvert was extravagant for the drainage

area. DVD Oct23 4:05.

13. Farmer's 2005 letter to Lee Barrett did not result in the action he requested. So, after a heavy rainfall on August 12, 2009, Farmer again tried to urge the state to replace the culvert on Roundhold Branch. On August 17, 2009, Farmer sent a memo to Adam Knuckles, Design Section Supervisor, District 11. Farmer attached his correspondence with Jeff Kelly in 2005 and provided some of his own calculations concerning discharge and headwater depth.

Farmer's excited closing paragraph stated:

Could you apply your expertise to cross check everything? Please reply back in writing? I'll need documentation in the bridge file! My thanks in advance for your response! I'm requesting that you have everything ready, by Thursday (8/20), but if you can't anytime in the near future is fine!

Ex. 1 at tab 1.

14. Knuckles testified that Farmer's memo was the first time he had had a request from the Bridge Office. DVD Oct23 11:47. Knuckles stated that it was neither his nor Jeff Kelly's usual job to do such calculations. DVD Oct23 12:18. He viewed it with such suspicion that he asked his supervisor if he should do it. DVD Oct23 11:51. The requested turn-around time was unusually quick. DVD Oct23 11:48. Knuckles testified that it took him 1½ days to do the requested cross-checking. DVD Oct23 11:48. He concluded that Kelly's calculations were accurate and that Farmer's calculations were somewhat inflated. He agreed that the current culvert configuration was inadequate. Knuckles' responsive memo to Farmer was dated August 19, 2009. Ex. 1 tab 1.

15. Farmer's requested quick turnaround time was driven by the fact that he, his mother, and his step-father had a meeting on August 21, 2009, with attorneys at Kinkead & Stiltz

PLLC, in Lexington. At that meeting Farmer's June 9, 2005, memo to Barrett, his August 17, 2009, memo to Knuckles, and Knuckles' August 19, 2009, response to Farmer were given to the law firm. Those memos were the basis of a September 9, 2009, demand letter from Wayne F. Collier of Kinkead & Stiltz, to Tom Napier, Executive Director, Chief District Engineer, District 11. The demand letter said in part: "The damages to Ms. Wells' property are directly attributable to the inadequate design of the bridge and double culvert. The Highway Department has acknowledged that the current configuration of the double culvert is inadequate." Ex. 1 tab 1.

16. After a second demanding letter from Collier, Napier responded that the Department realized that there was a problem with water overtopping the road. He concluded:

The department has many commitments and many similar projects, which currently are unfunded, and thus, cannot be accomplished. Prioritization and procurement of an appropriate fund source will be required before a firm commitment to replacing this structure can be made.

Ex. 1 tab 1. On October 2 and on October 5, 2009, Collier wrote two more letters demanding remediation of the property. He set a deadline of October 9, 2009, for the Department to give a positive response. Ex. 1 tab 1. Ultimately in the fall of 2009, the Wells, represented by Kinkead & Stiltz, filed an inverse condemnation action against the Transportation Cabinet in Leslie Circuit Court. Ex. 19.

CONCLUSIONS OF LAW

17. On May 14, 2010, the Executive Branch Ethics Commission signed an Initiating Order in this matter charging Terry Farmer as an employee of the Department of Highways, Transportation Cabinet, Commonwealth of Kentucky, with violating KRS 11A.020(1) and KRS 11A.040(1).

18. **KRS 11A.020(1)** states:

- No public servant, by himself or through others, shall knowingly:
- (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;
 - (b) Use or attempt to use any means to influence a public agency in derogation of the state at large;
 - (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.

19. Clear and convincing evidence was presented in this case that Terry Farmer used his position as an Engineer in the Transportation Cabinet to further his and his mother's economic interests. The uncontradicted evidence was that Farmer had an economic interest and an expected future ownership interest in the farm through which Roundhole Branch drained and on which he lived. Beginning at least in 2005, Farmer used his position and time and energy as a bridge inspector to place the Roundhole Culvert on the NBI. As a trained and experienced bridge inspector, Farmer knew that Roundhole Culvert did not qualify for the federal list and further he exaggerated the culvert's condition so that it would qualify more quickly for repair or replacement. DVD Sams Oct24 9:44. He used his time and resources as an employee to inspect the culvert annually when it did not merit annual inspection and he did a drainage analysis when it was not his job. DVD West Oct23 2:16, 2:33, 3:05; DVD Calebs Oct23 3:47. Farmer should have known that such personal involvement in improving the culvert on his land was prohibited under the Transportation Cabinet's General Administration and Personnel (GAP) 810. Ex. 5. *See also* DVD Napier Oct24 12:29. In short, he placed Roundhold Culvert in a queue in which it should not have been; in a better position than it should have been; and eligible for funds to

which it was not entitled. He did it, as the family attorney wrote, to prevent the risk of “the loss of valuable topsoil, livestock and improvements”—the same risk faced by many other Kentucky landowners with property adjacent to non-inventory culverts.

20. Further, Farmer used his position with Jeff Kelley in 2005 and with Adam Knuckles in 2009 to have a “free” evaluation done to pressure the Department. The evidence proved that Farmer played on the good will and expertise of Knuckles to get a “free” engineering opinion that he intended for his family to use and that was eventually used to sue the state. Farmer himself created and had others create documents for his personal benefit outside of the normal departmental procedures. DVD Calebs Oct23 3:47. *See also* DVD Witt Oct23 11:27.

21. Bridge repair and replacement is generally approached by the state in a rational and organized manner. DVD Napier Oct24 12:06-08; DVD Steele Oct24 4:15. The testimony was consistent that throughout the District culverts and bridges needed to be replaced and there was not enough money to fulfill all of the needs and desires of all property owners and highway users. DVD Witt Oct23 10:48-49; DVD Calebs Oct23 4:13; DVD Napier Oct24 12:58; DVD Steele Oct24 4:13. Farmer attempted to place his family’s desires above others in District 11. Farmer was attempting to get a \$150,000 replacement culvert without any consideration as to where that \$150,000 should best be spent within the District or within the state. Certainly the value of the Wells’ land and stock and improvements would have been better protected from natural events if he had been successful. And, on the bare convenience level, a new culvert would mean that Farmer and the Wells would have a consistent choice of turning right or left out of their driveway because the road would no longer flood. Others who did not have inside access to the Highway Department would have no such benefits.

22. Terry Farmer knowingly violated KRS 11A.020(1) and should be fined \$5,000.

23. **KRS 11A.040(1)** states:

A public servant, in order to further his own economic interests, or those of any other person, shall not knowingly disclose or use confidential information acquired in the course of his official duties.

24. It is to be noted that the Ethics statutory concern over confidential information would apparently not be limited to public records. It would appear to include confidential knowledge kept within the public servant's mind. In this instance, however, the charged confidential information was contained in public records as defined in GAP-1101:

A public record is any paper, card, book, map, photograph, tape, disc, diskette, recording software, or other documentation—regardless of physical form or characteristics—that is prepared, owned, used, in the possession of, or retained by a public agency.

Also according to the same GAP-1101 policy:

Disclosure of requested information is determined by the nature of the information itself, not by the identity of the requester or by the purpose for seeking the information.

The procedure for obtaining copies of or inspecting public records is through an open records request, which, in the Transportation Cabinet, is through filling out TC 11-205, *Request to Inspect Public Records* or by writing a letter. According to GAP-1101, information of a nonconfidential nature is to be released.

25. Terry Farmer was familiar with the requirements and nature of open records requests because he had used the procedure sixteen times to obtain information since 2005. DVD Stansel Oct24 11:18. *See also* Ex. 12, 13, 14.

26. The three documents that Farmer is charged with unethically disclosing were the

June 9, 2005, memo from Farmer to Lee Barrett; the August 17, 2009, memo from Farmer to Knuckles; and the August 19, 2009, memo from Knuckles to Farmer. It is clear that these three documents were generated by Farmer for his family's purposes by using his influence and knowledge as an employee. It was also clear that he obtained the memos and gave them to his attorney without going through the open records process.

27. The Hearing Officer concludes, however, that any violation of Transportation's personnel policies in regard to failing to obtain documents through GAP-1101, *i.e.* an open records request, is not relevant to this matter. What is significant under KRS 11A.040(1), is whether the information in the records was confidential. KRS 61.878, which sets out the exemptions from disclosure under the Open Records act provides no definition of "confidential" information.

28. GAP-809, however, defines Confidential or Sensitive Information thus:

[I]nformation protected from disclosure by law, regulation, policy or which an individual is generally accepted by society to have a reasonable expectation of privacy in, whether such information is obtained from or embodied in or by any media, document, writing or written data, material, or compilation.

One of the illustrative examples of confidential or sensitive information is:

Any information (including engineer estimates and other internal cost estimates) the disclosure of which would violate, obstruct, or interfere with the principles of law and equity, ...specifically as those principles and laws relate to procurement under the Kentucky Model Procurement Code....

Ex. 4.

29. In the whistleblower action, *Terry M. Farmer v. Commonwealth of Kentucky, Transportation Cabinet*, Farmer's Request for Admission No. 1 defined "Confidential

Information” as “information that is protected from disclosure by law.” The Cabinet, in response to the Requests for Admission No. 1 admitted that the three memos in question “do not fall within the definition of “Confidential Information.” Ex. 20.

30. A document can change the status of its confidentiality if confidentiality is defined as “protected from disclosure by law.” So that a document with confidential information could routinely be considered confidential because of its content, but then would have to be provided in a litigation context if it was considered sufficiently relevant and discoverable or ordered provided by a judicial officer. Or, as Ann Stansel, Records Custodian for the Transportation Cabinet testified, preliminary recommendations and field estimates are confidential, but once a project is let then the documents associated with the project become non-confidential. DVD Oct24 11:26, 11:57. Essentially a document can lose its confidential, nonreleasable nature because of the circumstances.

31. It is concluded that the two 2009 memos have no indicators of confidentiality. They are essentially drainage analyses. The 2005 memo, however, was described by Ann Stansel, Records Custodian for the Transportation Cabinet, as “preliminary.” DVD Oct24 11:35. It contained preliminary information about a proposed culvert replacement. It contained the exact location, a recommended design for a 15' by 5' concrete box culvert replacement, an approximate cost of installation, and two suggested sources of funds. It is a preliminary procurement or project document as defined in GAP 809 at p. 2. Farmer disclosed confidential information to Kinkead & Stiltz to further his and his family’s economic interests.

32. Terry Farmer knowingly violated KRS 11A.040(1) and should be fined \$5,000.

RECOMMENDED ORDER

On the basis of the above Findings of Fact and Conclusions of Law, it is recommended that Terry Farmer be publically reprimanded and ordered to pay a \$10,000 fine.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110 (4) you have the right to file exceptions to this recommended decision:

- (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.

In order to preserve a right to review by the circuit court, case law requires that a litigant must file exceptions with the board or agency if there is anything in the recommended order with which a party does not agree and desires to appeal.

You have a right to appeal the Final Order of the agency pursuant to KRS 13B.140 which reads in part:

- (1) All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. 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. Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.

Pursuant to KRS 23A.010(4), "Such review [by the Circuit Court] shall not constitute an appeal but an original action." The Court of Appeals has suggested that an appeal to circuit court is commenced upon the filing of the appeal petition and the issuance of a summons within the 30-day time period for filing an appeal.

SO RECOMMENDED on *May 13, 2013.*

Susan S. Durant

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CERTIFICATE OF SERVICE

I hereby certify that the original of this ORDER was mailed this 13th day of May, 2013, by messenger mail, to:

DEBBIE BRISCOE
EXECUTIVE ASSISTANT
EXECUTIVE BRANCH ETHICS COMM
#3 FOUNTAIN PLACE
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for filing; and a true copy was sent by first-class mail, postage prepaid, to:

PAUL F FAURI
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232 ST CLAIR ST
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and, by messenger mail, to:

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DOCKET COORDINATOR

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