COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-273

JENNIFER L. COMBS **APPELLANT**

VS.

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

CABINET FOR HEALTH AND FAMILY SERVICES **APPELLEE**

*** *** *** *** ***

The Board at its regular April 2016 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated February 22, 2016, and having considered Appellee's exceptions, Appellant's response, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be, and they hereby are approved, adopted and incorporated herein by reference as a part of this Order, and the Appellant's appeal is therefore **SUSTAINED**.

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 20th day of April, 2016.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Kathleen Hines
Hon. Shane C. Sidebottom
Mr. Jay Klein

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-273

JENNIFER COMBS **APPELLANT**

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

CABINET FOR HEALTH AND FAMILY SERVICES **APPELLEE**

** ** ** ** **

This matter came on for an evidentiary hearing on January 25, 2016, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. R. Hanson Williams, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellant, Jennifer Combs, was present and represented by the Hon. Shane C. Sidebottom. Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Kathleen Hines. Also present as agency representative was Ms. Shannon Hill.

The issue in this case was the dismissal of Appellant by letter dated August 28, 2015, a copy attached as **"Recommended Order Attachment A."** In summary, the Appellant was dismissed for lack of good behavior by allegedly intentionally falsifying Internal Mobility (IM) applicant interview forms when applying for a promotion. The burden of proof is on the Appellee, by a preponderance of the evidence, to demonstrate that the termination was justified and proper under all surrounding circumstances.

BACKGROUND

1. Appellee's first witness was **Darlene Staniford.** She is employed by the agency and has been the acting Personnel Service Regional Administrative Associate since May 2015. Her region covers Montgomery County, where the Appellant was employed.

2. The witness testified she is in charge of handling all personnel actions within that region, including reviewing registers and applications of various sorts. She is the person who ultimately made the request for major disciplinary action to the office of Jay Klein, then the Appointing Authority.

3. The witness identified Appellee's Exhibit 1 as the request for disciplinary action dated August 11, 2015. This document provides that the request for action was made against

Appellant after she had applied for a promotional position of Case Management Specialist I. She was interviewed on June 23, 2015, after which she was ultimately recommended for the position. The document further outlines that the Internal Mobility Interview form provided by the Appellant had failed to list a 30-day suspension beginning October 21, 2011, and a written reprimand received on April 7, 2010.

4. The witness then explained that the Internal Mobility Form, along with other criteria and documents, are used by the three-person interview panel who interview the applicants for promotion and look at all of those criteria together in making a decision, which involves comparing of the applicants in order to make the recommendation for the best person.

5. The witness went on to explain that 101 KAR 1:400 and KRS 18A.0751(4)(f) mandate, among other factors, that the conduct of the applicant be taken into consideration. Both Internal Mobility Interview Forms submitted by the Appellant listed neither of her disciplinary actions under "conduct."

6. The witness then entered Appellee's Exhibit 5, the Internal Mobility Form submitted by the Appellant which was used during her June 23, 2015 interview. She testified that the version of this form was dated July 14, 2010, and was outdated at the time it was submitted. That version of the form, under the category **CONDUCT** stated, "List any written reprimand received within the last two years and any suspension or other disciplinary action received at any time during your employment with the Commonwealth of Kentucky."

7. After the interview process was finished and the Appellant was recommended to receive the promotion, this witness later received an email dated July 22, 2015, from Appointing Authority Klein, that the most updated version of the Internal Mobility Form would have to be filled out again and resubmitted.

8. An August 2014 version of the Internal Mobility applicant interview form was then resubmitted by the Appellant, again leaving out any mention under "conduct" of her previous reprimand and suspension. The 2014 version, under **CONDUCT**, had no 2-year limitation on the reporting of any disciplinary actions. After the Appellant resubmitted the form, a subsequent investigation further up the chain-of-command informed this witness that the Appellant had indeed received two prior disciplinary actions. Thus, she submitted the request for major disciplinary action.

9. The witness then added that she felt the Appellant's actions violated provisions of the Personnel Procedures Handbook in the agency. (Appellee's Exhibit 11.) The pertinent provisions of the Handbook at Section 2.1, Employee Conduct, state under "Employee Conduct Guidelines that employees shall *not falsify, forge or inappropriately alter any official documents, including, but not limited to records, documents, books, papers, files, timesheets, position*

statements, photographs, microfilms, sound recordings, video recordings, magnetic storage media, computer data, and similar material."

10. On cross examination, the witness stated that the most recent version of the IM form, at the time these interviews took place, existed on-line for the employees to download and complete. This witness added that there is no real way for the agency to screen for an applicant employee's disciplinary history other than to have the employee list it themselves on the IM form for use by the interview panel. The witness explained that, after learning of the omitted information, she then discussed with Combs why this occurred. She stated the Appellant explained to her that she thought there was a two-year limitation on having to list disciplinary actions.

11. The Appellee's next witness was **Kevin Combs** (no relation to the Appellant). He has been a Field Service Supervisor within the agency for the past 17 years, and has served in that capacity in the Montgomery County office for the past two years. He testified that he supervised the Appellant from August 2013 through February 2014 and again from April through July 2015.

12. He testified he was on the three-person interview panel which interviewed the Appellant. At that time, he explained he was not aware of what specific disciplinary actions had been taken previously, but knew that she had been returned to her old position after an intent to dismiss letter had been issued.

13. The witness added that the Appellant had previously applied for a promotion in November 2013 for the Case Management Specialist I position. She was not recommended for the job at that time and listed no disciplinary actions under the "conduct" version of the IM form. He stated the Appellant later told him that she did not think the reprimand needed to be listed. Regarding the 30-day suspension, he has no recollection of her explanation.

14. On cross-examination, the witness admitted he had seen various changes to the IM form over the years. He added that he recommended the Appellant receive the promotion to Case Management Specialist I in July 2015. He deemed her to be an "excellent employee" and added he had given her a rating of "outstanding" on her 2013 evaluation. He further testified the Appellant has never lied to him, to his knowledge; he also stated she had explained to him when he first arrived at the Montgomery County office that she had received a prior disciplinary action.

15. The witness again clarified that the first version, the so called "old form" submitted by the Appellant in June 2015, limited the reporting of written reprimands to the previous two years while having no limitation on any other disciplinary action. He contrasted

this to the "updated version" dated 2014 and submitted by the Appellant, as having no time limitations on the reporting of reprimands or other disciplinary actions.

16. The Appellee's next witness was **Jay Klein**. He was the Appointing Authority at the time this action was taken against the Appellant. He explained that his office reviews requests for disciplinary actions and ultimately makes the final decision. He authored the dismissal letter in this action.

17. Asked why he decided upon dismissal, he stated that both the law and regulations mandate the elements to be contained in the Internal Mobility Form, which is considered when a promotion is at issue. He then explained that the interview panel must know that all the elements listed before them are full and accurate so as to allow selection of the best candidate. This information also allows the interview panel to follow the law. In his opinion, a person with conduct issues would not likely be selected by an interview panel.

18. The witness also explained that in other similar cases of false or omitted information regarding conduct, each case has resulted in a dismissal. The witness feels that the omission of such information is intentional and reveals a desire to trick the panel. He added he had also taken into consideration the Appellant's previous actions in making his decision to terminate.

19. On cross-examination, the witness testified that he did not discuss the Appellant's situation with either Kevin Combs or Darlene Staniford prior to making his decision. Instead, he relied on his staff for the information.

20. The witness was then directed to Appellee's Exhibit 8, the Settlement Agreement between the agency and the Appellant in March 2012, wherein the intended dismissal of the Appellant was reduced to a 30-day suspension. The witness then pointed out the SETTLEMENT AGREEMENT II (K) provided that "the parties agree to keep this settlement confidential, except as required by law." The witness then agreed that any exceptions referred to therein were not listed anywhere in the agreement.

21. The Appellee then closed.

22. The Appellant, **Jennifer L. Combs**, called herself as her first and only witness. She testified that she has been employed by the state for the past 13 years and has served as Family Support Specialist II for the previous seven years. Her duties include dealing with food stamps and Medicaid services.

23. She testified that prior to applying for the promotion, she downloaded the Internal Mobility Form from the Cabinet website. She did not list any written reprimands on that form,

for the form contained a two-year limitation on reporting those. She added she did not list the 30-day suspension on that form, because she believed the confidentiality agreement she had signed prevented her from revealing its existence. She stated she believed she could get into trouble if she revealed its contents.

24. She then testified that when Kevin Combs came to her wanting an updated Internal Mobility Form after the interview, she rushed and got it back to him within the hour. She testified she did not notice the two-year limitation on reporting written reprimands had been deleted, adding that she still thought that she did not have to disclose the 30-day suspension because of the confidentiality agreement.

25. Lastly, the Appellant testified she did not intend to omit the needed information.

26. On cross examination, the witness again addressed the "old" versus "new" Internal Mobility Forms by saying she just assumed they both contained the same limitations on disclosing disciplinary actions.

APPLICABLE LAW

1. 101 KAR 1:400 Section 1. Promotion.

   (1) Agencies shall consider an applicant's qualifications, record of performance, conduct, seniority and performance evaluations in the selection of an employee for a promotion.

   (2) Promotions may be interagency or intra-agency.

   (3) (a) An employee in the classified service, other than a career employee, may be promoted to a position in the unclassified service.

   (b) He shall not have reversion rights to a position in the classified service.

   (c) An employee who was promoted or changed as a result of other action, with no break in service, from a position in the classified service to a position in the unclassified service prior to July 15, 1986, shall retain the reversion rights he held at the time of promotion or other action. (17 Ky.R. 156; eff. 9-12-90; Am. 21 Ky.R. 463; eff. 9-14-94.)

2. KRS 18A.0751(4)(f) Personnel Board - Regulatory authority,

   (4) These administrative regulations shall provide:

   (f) For promotions which shall give appropriate consideration to the applicant's qualifications, record of performance, conduct, and seniority. Except as provided by this chapter,

vacancies shall be filled by promotion whenever practicable and in the best interest of the service

FINDINGS OF FACTS

1. At first glance, it is clear that the Appellant's failure to disclose her previous written reprimand and suspension on the Internal Mobility interview form violated the Personnel Procedure Handbook at Section 2.1.

2. A July 2010 version of the IM form was submitted by the Appellant for her June 23, 2015 interview. This version did not require listing any written reprimands more than two years old. It did require listing any other disciplinary actions during employment with the state.

3. The August 2014 version of the Internal Mobility form, resubmitted by the Appellant, had no time limitation on the listing of any disciplinary actions, including written reprimands.

4. The Hearing Officer finds plausible the Appellant's explanation that she felt bound by the confidentiality provisions of the settlement agreement. The Appellant, a non-lawyer, could not reasonably be expected to know what the phrase "except as required by law" meant in her situation.

5. After observing the Appellant's demeanor during the hearing, the Hearing Officer also finds the Appellant's explanation of failing to note that the two-year limitation on listing written reprimands had been deleted is plausible, given the circumstances.

6. The Hearing Officer further finds the Appellant's failure to list the disciplinary actions resulted from oversight, on the one hand, and lack of legal knowledge on the other.

CONCLUSIONS OF LAW

1. The Hearing Officer concludes as a matter of law the Appellee failed to carry its burden of proof to show the Appellant intentionally falsified the Internal Mobility forms involved herein.

2. The Hearing Officer would also note the Appellant has suffered not only the loss of her job, but also a promotion for which she was recommended to receive.

3. The Hearing Officer therefore recommends the Appellant's appeal be **SUSTAINED** and she be placed back in the same or similar position she held at the time of her termination.

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 **JENNIFER COMBS VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2015-273) be SUSTAINED that Ms. Combs be restored to her former position of Family Support Specialist II, or any other position for which the Appellant is qualified for and is of equivalent pay, with seniority, as if she had not been terminated, along with all other related benefits, and that she otherwise be made whole. KRS 18A.105 and 200 KAR 12:030.**

NOTICE OF EXCEPTION AND APPEAL RIGHTS

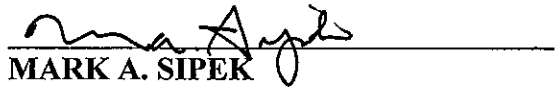
Pursuant to KRS 13.B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that 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 R. Hanson Williams** this 22nd day of February, 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:
Hon. Shane C. Sidebottom
Hon. Kathleen Hines

CABINET FOR HEALTH AND FAMILY SERVICES
OFFICE OF HUMAN RESOURCE MANAGEMENT

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Audrey Tayse Haynes
Secretary

August 28, 2015

Jennifer Combs

PERNR:

Re: Dismissal and Conclusion of Administrative Leave

Dear Ms. Combs:

After considering your statements presented at the pre-termination hearing held on August 26, 2015, and upon further investigation, I have not found sufficient reason to rescind the intent to dismiss dated August 19, 2015.

Therefore, based on the authority of KRS 18A.095 and 101 KAR 1:345, you are hereby notified that you are officially dismissed from your position as a Family Support Specialist II, in the Department for Community Based Services (DCBS), Northeastern Service Region.

Further, on August 19, 2015, in accordance with the authority of KRS 18A.095 (2)(c) and 101 KAR 2:102, Section 9 (4), the Appointing Authority placed you on administrative leave until the Cabinet for Health and Family Services' final action. As your dismissal is effective August 29, 2015, your administrative leave is hereby concluded.

You are being dismissed from your position for the following specific reason:

Lack of Good Behavior. As discovered by the Office of Human Resource Management (OHRM), in an effort to gain a promotion through deception and subterfuge, you intentionally falsified Internal Mobility Applicant Interview Forms that you signed and submitted.

Specifically, an Internal Mobility Applicant Interview Form (referred to as an IM form) is a standard tool used in the interview selection process. On February 11, 2010, you signed a Settlement Agreement that removed a two-day suspension and you specifically agreed "to accept a written reprimand for the incident that occurred on or about November 2, 2009." (See Attachment #1)

Further, on March 14, 2012, you and your attorney, James Martin, signed a Settlement Agreement that voided your dismissal and you specifically agreed "to receive a thirty-day (30-day) suspension, beginning October 21, 2011." (See Attachment #2)

On November 13, 2013, you had applied for a promotional opportunity. You signed the IM form on November 13, 2013; however, despite having entered into Settlement Agreements in February of 2010 and March of 2012, you intentionally failed to list the 2010 Written Reprimand and the 2011 30-Day Suspension. Of note, this IM form does not have any type of time limitation.

On June 23, 2015, you signed and submitted an IM form to be considered for a promotion. When you were interviewed for the position on June 23, 2015, you first provided the interview panel with an outdated IM form (Version 7/14/10). This IM form stated under the "Conduct" section, "List any written reprimands received within the last two years and any suspension or other disciplinary actions received at any time during your employment with the Commonwealth of Kentucky." On this outdated IM form, you left this section blank, and intentionally failed to list a 30-day suspension you had agreed to on March 14, 2012.

On July 21, 2015, you were given the opportunity to complete a current IM form and you completed, signed and submitted this updated IM form on the same day. Of note, this updated IM form states under the "Conduct" section, "Reprimands; Disciplinary Fines, Suspensions, Other:", and has a blank to allow applicants to fill in as appropriate. While the outdated IM form limited listing written reprimands to only the past two years, the updated IM form no longer included this limitation. However, you once again left the "Conduct" section blank. This time, you not only intentionally failed to list the 30-day suspension, but you also intentionally failed to list the Written Reprimand that you had received on April 7, 2010.

When you applied for a position in June 2015, you were provided with two separate opportunities to accurately complete IM forms that were written two different ways when it came to the section, "Conduct", and listing written reprimands, suspensions, and other forms of discipline received while employed with the Commonwealth of Kentucky. However, on the June 23, 2015 IM form, you intentionally failed to list your 30-Day Suspension, and on the July 21, 2015 IM form, you intentionally failed to list your Written Reprimand, as well as your 30-Day Suspension. When you applied for a promotion in November 2013, the IM form had no time limitations and you intentionally omitted your 30-day suspension and written reprimand. Your repeated submissions of falsified IM forms with intentional omissions were an attempt to gain promotions through deception and subterfuge.

Your actions violate the Cabinet for Health and Family Services' Personnel Procedures 2.1, Employee Conduct. Your actions constitute lack of good behavior for which you may be disciplined pursuant to 101 KAR 1:345 Section 1.

You previously received the following actions:

Date	Action	Reason
April 7, 2010	Written Reprimand	Lack of Good Behavior
October 21, 2011	Thirty (30) Day Suspension	Lack of Good Behavior

Pursuant to KRS 18A.032, you will not be certified on future registers for employment within DCBS unless DCBS so requests.

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,

Howard J. Klein
Appointing Authority

HJK:jty

Attachments

c: Secretary Tim Longmeyer, Personnel Cabinet
Mark Sipek, Personnel Board
Commissioner Teresa James, DCBS
Acting Service Region Administrator Shannon Hall, Northeastern Service Region
Cabinet Personnel File