COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NOS. 2014-122 AND 2014-123

JENNIFER R. SMITH **APPELLANT**

VS.

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

PUBLIC PROTECTION CABINET
AMBROSE WILSON, IV, APPOINTING AUTHORITY **APPELLEE**

** ** ** ** **

The Board at its regular March 2015 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated January 8, 2015, having Appellee's exceptions, Appellant's response, oral arguments and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be altered as follows:

A. **Delete** Findings of Fact numbers 12 and 13 and substitute the following:

12. The Board finds Appellant did admit at the evidentiary hearing that she had said to her coworkers on multiple occasions that she sometimes "feels like ripping people's heads off." The Board finds that making these comments, even if as Appellant testified that they were made in a "joking manner," is no joking matter, and must be taken seriously.

13. The Board finds that Appellant was never counseled on the inappropriateness of her words, that no reference to these comments was ever made in her evaluations, and that she was never disciplined for having said them. Not a single witness testified that the Appellant stated these words in a loud, angry, or agitated tone of

voice, or that Appellant had ever approached anyone in a threatening manner, or committed an overt act of physical aggression. And while Appellant did admit that she has a license to carry a concealed weapon and had told her coworkers about it (in the context of discussing her prior job repossessing vehicles), no connection was established between Appellant's owning a gun and the comments she made, except for vague assertions by her co-workers that "you can't be too careful."

B. **Delete** Conclusions of Law numbers 2 and 3 and substitute the following:

2. The Board agrees with the Hearing Officer that Appellant's comments were sufficient to warrant being placed on directed sick leave, but does not agree with the Hearing Officer that a written reprimand would be the appropriate punishment for the lack of good behavior. The Board does agree with the Hearing Officer that a lesser punishment than a ten-day suspension is appropriate and concludes that the appropriate punishment for Appellant's comments would be a three-day suspension without pay.

3. The Board concludes that the ten-day suspension of the Appellant was excessive based on the fact that the Appellant had never been counseled, disciplined, or negatively evaluated for having made the comments. In addition, the Board notes the Appellant is not alleged to have made the comments in a loud or threatening manner and was never physically aggressive with any of her coworkers. Based on these circumstances, the Board concludes the Appellee did not establish just cause for the ten-day suspension of the Appellant.

C. **Delete** the Recommended Order, and substitute the following:

IT IS HEREBY ORDERED that the appeals of **JENNIFER R. SMITH VS. PUBLIC PROTECTION CABINET, (APPEAL NOS. 2014-122 AND 2014-123)** be **DISMISSED** with regard to Appellant being placed on agency directed sick leave, and **SUSTAINED TO THE EXTENT** that Appellant's ten-day suspension without pay be amended to a three-day

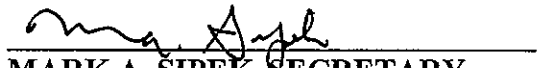
suspension without pay. The Board orders that Appellee shall award Appellant with back pay and benefits lost as a result of the ten-day suspension being amended to a three-day suspension, reimburse Appellant for any leave time used attending the evidentiary hearing and pre-hearing conferences, and otherwise make Appellant whole. **[KRS 18A.105, KRS 18A.095(25) and 200 KAR 12:030.]**

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

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 17th day of March, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day mailed to:

Hon. Paul Fauri
Hon. Cannon Armstrong
Lynn K. Gillis
Sherry Butler

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NOS. 2014-122 and 2014-123

JENNIFER R. SMITH **APPELLANT**

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

PUBLIC PROTECTION CABINET **APPELLEE**

** ** ** ** **

These consolidated appeals came on for an evidentiary hearing on November 7, 2014, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Colleen Beach, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Jennifer R. Smith, was present at the evidentiary hearing and was represented by the Hon. Paul F. Fauri. The Appellee, Public Protection Cabinet was present and represented by the Hon. Cannon Armstrong.

BACKGROUND

1. Appellant, Jennifer Smith, is a classified employee with status who is employed as an Administrative Specialist II in the Department for Housing, Buildings and Construction, Division of HVAC, Field Operations Branch.

2. Appellant was notified that she was being placed on Agency Directed Sick Leave by means of a letter dated April 9, 2014. A copy of that letter is attached hereto and incorporated herein as **Recommended Order Attachment A.**

3. Appellant filed **Appeal No. 2014-122** on June 4, 2014, appealing her placement on Agency Directed Sick Leave. Appellant's statement of appeal stated:

> On April 9, 2014, I was given a letter placing me on directed sick leave allegedly for statements that were made on April 8, 2014, which were alleged to be threatening statements, and requiring me to get medical certification to be able to return to work.
>
> I deny any allegations that were made on April 8, 2014. In addition, there is no basis to place me on directed sick leave. Therefore, I request that my record be corrected and that my timesheets be corrected for this period of time and any pay that I am entitled to during this period of time be reimbursed.

This action is arbitrary in violation of Chapter 18A of the Kentucky Revised Statutes and the regulations thereunder. The action is also arbitrary and an improper use of the directed sick leave regulation.

4. Appellant was notified that she was being suspended for ten days on May 19, 2014. A copy of that letter is attached hereto and incorporated here in as **Recommended Order Attachment B.**

5. Appellant timely filed **Appeal No. 2014-123** on June 4, 2014, appealing her ten-day suspension.

6. By Interim Order, dated July 9, 2014, the two appeals were consolidated. It was also established that at issue in the evidentiary hearing would be the actions Appellee took in placing Appellant on directed sick leave, and then later in suspending Appellant for 10 days without pay. The Appellee was given the burden of proof on both issues.

7. Appellee called its first witness. **Rebecca Hubbard** has been a merit employee for the past 18 years. Currently, she is employed by the Public Protection Cabinet, Department for Housing, Buildings and Construction. She began working there two and a half years ago as an Administrative Specialist II. Hubbard had worked in the Division of Heating, Ventilation and Cooling (HVAC) for two years, where she was Appellant's co-worker. Six months ago she transferred to the Information Branch.

8. When Hubbard was at the Division of HVAC, her duties included the coordination of the Continuing Education Program for that division, and oversight of the division's vehicles.

9. Hubbard stated that she first met Appellant when she came to work for the Division of HVAC in December, 2012. When Appellant first began her employment, Hubbard and Appellant shared an office space, which was basically an open hallway. Later, when their space became a suite of offices, Hubbard and Appellant had offices that were side by side, and shared a wall. Hubbard testified that she could hear Appellant's voice through the wall, and that it was not unusual for the employees in her office to yell out at each other without getting up.

10. Hubbard testified that on April 8, 2014, she overheard a conversation that Appellant was having on the phone, and that it "frightened" her. She wrote down what she heard, and informed Appellant's supervisor, Tim Crick, when he arrived that day at work. The next day, at Crick's direction, Hubbard wrote a note documenting Appellant's phone conversation on the 8th, as well as other comments Appellant had made in the past. Hubbard's note reads as follows:

> 1. Winter 2013 was the first comment ever made to myself and Tammy Montgomery. She said that she goes to her weekly psychiatrist appointment so that she doesn't come in here and kill us.

2. April 1 or 2, 2014 I overheard her made the comment to Tammy Montgomery that she needed to go to her weekly psychiatrist appointment so that she doesn't come in here and take our heads off.

3. April 8 @ 9:20 am – I overheard a phone conversation with a doctor's office requesting an appointment. She indicated she was ready to chop everybody's heads off and that the depression is a lot worse. She indicated that her medicine was not doing what it's supposed to because of some changes recently made with it.

She has boasted about having a concealed deadly weapons certificate on many occasions.

11. Hubbard was asked to describe Appellant's personality. Hubbard stated that when Appellant first began working at the Division of HVAC, she was fine, but her personality began changing about a year later—around December, 2013. She became "distant, depressed, and stayed in her office. She was on the phone all the time and wouldn't speak to you. It was concerning."

12. On cross-examination, Hubbard was asked why she transferred to the Information Branch in May, 2014. She responded that she "had the opportunity for advancement, to move into IT" and that she had been approached by the Commissioner. Hubbard stated that her voluntary lateral transfer (she is still an Administrative Specialist II) had nothing to do with Appellant, but admitted her transfer occurred the same day Appellant returned from directed sick leave, May 16, 2014.

13. Hubbard stated that she had complained about Appellant to Katherine McCrystal, Executive Staff Advisor, in the past, but just about "typical office stuff—not answering the phone, stuff like that."

14. Hubbard stated that she has been asked by Roger Banks, who was her first-line supervisor at the Division of HVAC, not to go into the Division of HVAC's office space anymore. Hubbard opined that Banks issued that directive to avoid any further altercation between her and Appellant.

15. Referring to the alleged statement Hubbard said Appellant made on April 1 or 2, 2014, Hubbard was asked why she had never reported it to a supervisor. Hubbard stated: "I don't know."

16. Referring to the alleged statement Hubbard said Appellant made sometime in the Winter of 2013, Hubbard testified that she also did not report this. Hubbard stated that she was aware of an employee's duty to report "threats or threatening actions" according to the Environmental and Public Protection Cabinet's "Policy Statement on Violence in the Workplace."

17. Hubbard stated that she had never informed Appellant that she could hear her conversations through their shared office wall.

18. When asked if Hubbard gets along with Appellant, Hubbard responded: "I don't like or dislike her. She is simply someone I work with. But I am afraid of her."

19. On re-direct, Hubbard was asked if Appellant had ever mentioned whether she has a license to carry a concealed weapon. Hubbard answered, "Yes, she boasted about it on numerous occasions" prior to the April 8, 2014 incident.

20. **Tammy Montgomery** is employed by the Department of Housing, Buildings and Construction, Division of HVAC. She began her employment with the Department in 1997 as a clerk, and was promoted up the ranks to her current position of Program Coordinator. Her duties include administrative support of the Director and HVAC board, management of license permits, and the division's budget. Her supervisor is Roger Banks. Montgomery stated that the employees currently in the Division of HVAC are herself, Banks, Tim Crick and Appellant.

21. Montgomery was asked to recall the events that led to the creation of the letter she wrote on April 9, 2014 (introduced as Appellee's Ex. 2). Montgomery testified that Rebecca Hubbard came into her office on April 8, 2014, stating that she was "in fear." Montgomery told Hubbard that she couldn't help her, but advised her to speak to Hubbard's supervisor, Tim Crick. Later Montgomery was asked by Crick to document in writing any concerns she had about Appellant. Her letter reads:

> Jennifer Smith has on several occasions made comments to me and other employees that she could just cut everyone (sic) heads off. This comment was just made to me last week. In the past she made a comment that the reason why she goes to therapy is to keep her blowing everyone head (sic) off. She has informed me and Rebecca Hubbard another co-worker about that she does carry a concealed deadly weapon permit.
>
> The first time I hear (sic) the comments I didn't think of it but lately it seems as thought (sic) it is an every week comment of some sort made to me or another co-worker.

22. Montgomery stated that it was common knowledge that Appellant was in therapy. Appellant openly told her co-workers when she was leaving to go to her therapy appointment. Appellant had also admitted she had a "weapons permit." Montgomery added: "With all the shootings, you do fear for your life."

23. Montgomery was asked to explain what she meant by the notation in her April 9, 2014 letter: "The first time I hear the comments I didn't think of it...." (sic). Montgomery answered that she wasn't afraid of Appellant's comments until she learned that Appellant had a weapons permit. She estimated that she began being fearful of Appellant sometime in the month preceding the date she wrote the April 9, 2014 statement.

24. Montgomery was asked if there was still tension in the office. Montgomery answered: "Not in the office, but there is still tension between (Appellant) and Rebecca Hubbard."

25. Montgomery denied that Appellant closed her office door excessively.

26. On cross-examination, Montgomery was asked if she had ever documented Appellant's statements prior to April 9, 2014. She answered "no," but added that she is engaged to Tim Crick, Appellant's supervisor. "When we are driving home, I tell him things she has said."

27. Montgomery stated that she does not have firsthand knowledge of any weapons permit that Appellant may have, but does know that she has a gun because Appellant had once told her co-workers about an incident when her husband pulled a gun on her. Montgomery stated that she had never seen the gun, nor was she aware of Appellant ever bringing it to work.

28. Montgomery stated that Hubbard is "no longer allowed in our division."

29. **Tim Crick** is employed by the Department of Housing, Buildings and Construction, Division of HVAC, where he has worked for the past 16 years. He began his employment as a HVAC Inspector I, and was promoted up the ranks to his current position of Field Operations Manager. His duties include the oversight of field staff, and inspecting consumer complaints. He has been Appellant's first-line supervisor since she began working at the Division.

30. Crick testified that when Appellant first began working in their office, she was "happy-go-lucky, joking, outgoing." Over the past year, however, she began to change. Crick stated, "She became withdrawn, kept to herself, got real quiet."

31. Crick testified that one Friday in April 2014, Rebecca Hubbard came to him expressing her concerns about Appellant. Hubbard told Crick she was worried about some comments Appellant had made, specifically when she said, "The reason I go to therapy is not to cut everyone's head off." Crick told Hubbard that he would talk to Appellant the following Monday.

32. Hubbard came to Crick again the following Monday morning and told him she had heard Appellant talking to her doctor on the phone, telling the doctor that her medication wasn't working and she needed to change it. Crick decided then that instead of speaking to Appellant, he would go directly to Kathleen McCrystal, who handles personnel issues for the Department. McCrystal advised him to get written statements concerning Appellant's behavior. Crick wrote a statement, as did Rebecca Hubbard and Tammy Montgomery.

33. Crick was asked to refer to the statement he wrote on April 9, 2014. In it Crick states:

> "I, Tim Crick, have heard Jennifer Smith on several occasions during conversation that the reason she goes to her therapist on Wednesdays is so that she don't come in and blow everyone's head off. This has happened on several occasions over the past several months. I always try to joke around with office staff to get a laugh out of them to change the mood sometimes. I have always felt that she was joking but Friday 04/04/2014 Rebecca came to me as Jennifer's supervisor with concerns with the comments that

Jennifer is saying. This day & time, you can't take anything for granted. I have had to require Jennifer to stick to a strict work schedule & she is very upset about it. Jennifer is off work a lot for doctor's appointments & calls in sick a lot." (sic)

34. Crick was asked if he had felt threatened by these statements and answered, "Not at the time."

35. Crick stated that he had heard Hubbard and Montgomery talk about Appellant's comments in the past, but neither woman had ever officially complained to him before that date.

36. After Katherine McCrystal received the statements, she came to the Division of HVAC and escorted Appellant out of the building. Crick did not speak to Appellant again until she came back from directed sick leave.

37. Crick did not discuss with Appellant what had happened. "We tried to just go on and do our work." However, Appellant let Crick know that she had seen his April 9, 2014 statement. Crick told her, "I just wrote down what you said." Appellant responded to him, "No, I didn't say blow heads off, I said rip heads off."

38. On cross-examination, Crick said his only involvement in Appellant's ten-day suspension was that he had seen the paperwork. He did not discuss the action with management.

39. Crick denied he had ever counseled or discussed with Appellant the inappropriateness of her comments, nor were they addressed in Appellant's employment evaluations for 2013 or first quarter of 2014. The problems those evaluations addressed were Appellant's need to improve "working with others as a team," and adhering to a set work schedule.

40. Crick was asked to address an email Appellant sent to Kathryn McCrystal on January 29, 2014, complaining of "harassment" Appellant alleged she was receiving from Rebecca Hubbard. McCrystal forwarded the email to Crick and asked Crick to "have a discussion with Rebecca that what [Appellant] does is not Rebecca's concern." McCrystal also noted to Crick that Appellant had gone to her because Crick and Roger Banks were out of the office.

41. Crick testified that he did not discuss the matter with Rebecca Hubbard as McCrystal had directed. Instead, he emailed the Appellant directly, voicing his displeasure that she had gone to Kathryn McCrystal instead of to him. Crick stated, "To me, this was nothing that [Appellant] should be bothering Kathryn with."

42. Crick was asked to describe the context in which Appellant had made comments he took issue with. Crick responded: "They were said in normal conversation. I didn't pay attention to her voice or demeanor."

43. Crick was asked to describe Appellant's relationship to Hubbard. Crick stated: "They are two very strong-willed women. They both bicker back and forth. If one says a smart comment, the other will come back equally."

44. Appellee called the Appellant, **Jennifer Smith**, as its next witness. Smith has worked for the Division of Housing, Buildings and Construction for the past two years, and is employed as an Administrative Specialist II. Her first-line supervisor is Tim Crick. When Crick is out of the office, Appellant reports to Roger Banks.

45. Appellant was asked to refer to the events of April 8, 2014. Appellant stated that she had called her psychiatrist's office, and spoke to the receptionist. The receptionist asked her why she needed an appointment. Appellant testified that she told the receptionist: "To check my meds." Appellant testified that she takes medications that can cause increased depression and crying spells. While Appellant affirmed that she had discussed her medication with the receptionist that morning, she denied saying that she wanted to "chop people's heads off."

46. The morning of April 8, 2014, Appellant and Rebecca Hubbard were the only employees in the office. Appellant stated that her office is next to Hubbard's, and while she can sometimes hear that Rebecca is speaking in her office, she can't always make out what is being said.

47. Appellant admitted that she had said, on occasion, "I feel like ripping people's heads off." She stated that she has made this comment to Roger Banks in the past, and has said it in general office conversation. She testified that she has also made the comment, "I go to my weekly psychiatric appointment so I don't rip people's heads off." Appellant stated that these comments have always been said in a joking manner.

48. Appellant was asked if she had a license to carry a concealed weapon. She answered that she did, and stated that she may have told her co-workers about it when they were discussing her prior job repossessing vehicles.

49. Appellant was asked if she would feel threatened if someone told her they wanted to rip people's heads off. Appellant answered, "Not if they said it in the tone I said it, and especially not if they giggled afterward. Also, it would depend if the person was angry, and whether they were approaching me."

50. On cross-examination, Appellant was asked if she did indeed have a change in her personality over the past two years. Appellant stated that for a period of time—she estimated that it began sometime in the latter part of 2013 until she returned from directed sick leave in May, 2014, she was "disgruntled." Appellant stated, "Everyone else made their own hours. When I tried to do that with my doctors' appointments, I wasn't allowed. That was my big problem at this time. I kept on voicing it, and the more I voiced it, the more I got in trouble. So, yeah, I did shut the door to my office more often. I did my job, and that was it."

51. Appellant was asked how she found out she was being placed on directed sick leave. She stated that Kathryn McCrystal came to her office on April 9, 2014, and gave her the

letter placing her on leave. Appellant signed that she had received it, and then McCrystal escorted her out the door.

52. On May 19, 2014, Appellant received a letter under the signature of Lynn Keeling Gillis notifying her that she was being suspended for ten days, beginning May 20, 2014, and continuing through close of business June 4, 2014.

53. **Lynn Keeling Gillis** is the Division Director of Human Resources at the General Administrative Program Support for Shared Services (GAPS). She is a designated Appointing Authority. She is responsible for the oversight of personnel and disciplinary actions for the Public Protection Cabinet, Labor Cabinet, and the Energy and Environment Cabinet.

54. Gillis stated that agency-directed sick leave is used when an employee is a threat to themselves or others. Because she had the statements of three employees asserting that Appellant had made comments about "blowing everyone's heads off," Gillis felt that placing Appellant on agency-directed sick leave was the appropriate response. Gillis added, "I am not a medical doctor. I was trying to keep everyone safe. I needed a medical opinion." What escalated her concern, Gillis testified, was that "the comments seemed to be building."

55. After Gillis received the written statements from Rebecca Hubbard, Tammy Montgomery, and Tim Crick, she discussed the situation with the Assistant Director and legal counsel.

56. The parties stipulated that Appellant's physician, Dr. Lyle Carlson, submitted a completed "Functional Capacity Assessment" form on April 24, 2014, which indicated that Dr. Lyle did not consider Appellant to be at risk to herself or others. Appellant was removed from agency-directed sick leave on April 25, 2014.

57. Gillis was asked why she chose to discipline Appellant by suspending her for ten days upon her return from leave. Gillis answered that agency-directed sick leave and the suspension were two separate issues. "My initial concern was to ensure everyone's safety," but she next sought to address "violations in our policy not to make threatening statements."

58. When deciding what disciplinary action to take, Gillis reviewed Appellant's personnel file and found a letter of reprimand for time and attendance issues while she was employed by a different Cabinet. Gillis stated that she looked at past cases where an employer had been disciplined for making threatening comments. In both cases, the employee had been terminated. Gillis admitted that prior disciplinary action had been taken against the employee in both cases.

59. Gillis was asked if she had ever discussed the matter in person with the three employees who wrote the statements in question (Hubbard, Montgomery and Crick). Gillis answered, "No, I worked through Kathryn McCrystal as my liaison. But I did read the statements to indicate that these employees felt threatened." Gillis clarified, "The word 'threaten' is not in the statements, but reading from the context, I felt that it was implied."

60. Gillis added that McCrystal had let her know of "some of the issues going on back there in the Division of HVAC. She stated that people felt threatened." Gillis stated that McCrystal had never informed her of the conflict between Appellant and Rebecca Hubbard.

61. **Kathryn McCrystal** is employed by the Department for Housing, Buildings and Construction. Her job duties include Human Resource management; she reports personnel actions and requests to GAPS.

62. McCrystal became aware of the allegations against Appellant on April 8, 2014. Tim Crick and Roger Banks came to McCrystal's office that day to report their concerns with some things Appellant had said to staff, or was overheard saying on the phone. McCrystal consulted with GAPS, who advised her to get statements from the complaining employees.

63. McCrystal then directed Crick and Banks to procure written statements for her. Crick, Rebecca Hubbard and Tammy Montgomery submitted their statements on April 9, 2014. McCrystal then delivered the three statements to GAPS. Her only other involvement in Appellant's placement on agency-directed sick leave was hand-delivering to Appellant the April 9, 2014 letter placing her on leave.

64. McCrystal testified that when Appellant began working at the Division of HVAC, she was "chipper, bubbly, bright." McCrystal stated that she had noticed a slight change in Appellant's demeanor over the course of her tenure at the division. "She didn't smile as much. She seemed more negative."

65. McCrystal stated she had never heard Appellant make the comments her co-workers had alleged in their written statements.

66. On cross-examination, McCrystal was asked to review an email she had sent to Tim Crick and Roger Banks on January 29, 2014. In the email, she asks Crick to discuss with Rebecca Hubbard that Appellant "is not her concern." McCrystal explained that "we try to follow the chain of command, but [Appellant's] supervisors weren't in that day, so she came to me." The email reads as follows:

> "Good morning!
>
> Jennifer just came to me over the harassment she is receiving from Rebecca. She came to me since both of you are out. Rebecca is making many comments about Jennifer being on personal calls even to our general public (there was a witness) about how sorry she was but Jennifer was busy taking a personal call to help them, but she would be happy to. She also makes comments on how she doesn't do her work. Jennifer is ready to file harassment charges against Rebecca. Can you please have a discussion with Rebecca that what Jennifer does is not her concern?"

67. When asked if McCrystal was aware of the "situation" between Hubbard and Appellant, McCrystal answered, "There are three strong-willed women in that office. I know there was conflict."

68. At the end of McCrystal's testimony, both Appellant and Appellee rested their cases.

69. KRS 18A.095(1) states:

A classified employee with status shall not be dismissed, demoted, suspended, or otherwise penalized except for cause.

70. 101 KAR 2:095, Section 9, states:

Workplace Violence Policy.

(1) Workplace violence shall be prohibited and shall include:

(a) The attempted, threatened, or actual conduct of a person who endangers or is likely to endanger the health and safety of state employees or the general public; or

(b) A threatening statement, harassment, or behavior that gives a state employee or member of the general public reasonable cause to believe that his health or safety is at risk.

(2) Examples of prohibited workplace violence shall include:

(a) Threats of harm;

(b) Brandishing or displaying a weapon or an object that looks like a weapon in a manner that would present a safety risk to a state employee or a member of the general public or threatens or intimidates them;

(c) Intimidating, threatening, or directing abusive language toward another person, either verbally, in writing or by gesture;

(d) Stalking;

(e) Striking, slapping, or otherwise physically attacking another person; or

(f) Disobeying or failing to follow the reasonable directive of a supervisor to take action or cease actions that create a risk to the health or safety of a state employee or the public or threatens or intimidates them.

(3) Violation of this section shall constitute grounds for disciplinary action and referral for criminal prosecution.

71. 101 KAR 2:102, Section 2(2)(a) states:

(2) Use and retention of sick leave.

(a) An appointing authority shall grant or may require the use of sick leave with or without pay if an employee:

1. Is unable to work due to medical, dental, or optical examination or treatment;

2. Is disabled by illness or injury. If requested by the appointing authority, the employee shall provide a statement from an appropriate medical health professional certifying the employee's inability to perform his duties for the days or hours sick leave is requested. If requested by the appointing authority, the employee shall provide a certificate from an appropriate medical health professional certifying the employee's fitness to return to duty before the employee is permitted to return to work;

3. Is required to care for or transport a member of his immediate family in need of medical attention for a reasonable period of time. If requested by the appointing authority, the employee shall provide a statement from an appropriate medical health professional certifying the employee's need to care for a family member; or

4. Would jeopardize the health of himself or others at his work station because of a contagious disease or demonstration of behavior that might endanger himself or others.

FINDINGS OF FACT

1. Appellant, Jennifer Smith, is a classified employee with status, employed as an Administrative Specialist II in the Department of Housing, Buildings, and Construction, Division of HVAC, Field Operations Branch.

2. On April 9, 2014, Appellant was placed on Agency Directed Sick leave for statements she allegedly made on April 8, 2014, and other prior occasions, as noted by two of her co-workers (Rebecca Hubbard and Tammy Montgomery), and her supervisor, Tim Crick.

3. On April 24, 2014, Appellant's physician, Dr. Lyle W. Carson, submitted a completed Functional Capacity Assessment Form, as requested by Lynn Keeling Gillis, Appointing Authority for the Public Protection Cabinet. Dr. Carson certified that he did not consider Appellant to be a risk of harm to herself or others.

4. Appellant was notified on April 24, 2014, by letter under the signature of Lynn Keeling Gillis, that she would be removed from Agency Directed Sick Leave effective beginning of business April 25, 2014.

5. On May 19, 2014, Appellant was informed by a letter under the signature of Lynn Keeling Gillis, that she was being suspended for ten days for comments she had made in the

office that were found to constitute a lack of good behavior and a repeated threat of harm in violation of 101 KAR 2:095, Section 9, the Workplace Violence Policy.

6. Gillis testified that her decision to place Appellant on directed sick leave and suspend her for ten days was based almost entirely on the statements she received from three employees in the Division of HVAC. (For reasons not explained at the evidentiary hearing, the only other employee in that Division, Roger Banks, a supervisor, apparently did not provide a written statement, nor was he called as a witness.)

7. Gillis testified that she also discussed the situation regarding Appellant with Kathryn McCrystal, who advised Gillis that "people felt threatened" by Appellant's behavior.

8. Tim Crick's April 9, 2014 statement, reviewed by Gillis, states that Appellant had said, "the reason she goes to her therapist on Wednesdays is so that she don't come in and blow everyone's head's off" (sic). Crick also wrote, "I have always felt that she was joking but Friday April 4, 2014, Rebecca came to me as Jennifer's supervisor with concern with the comments Jennifer is saying."

9. Rebecca Hubbard's April 9, 2014 statement, reviewed by Gillis, stated that sometime in the winter of 2013, Hubbard first heard Appellant say "that she goes to her weekly psychiatrist appointment so that she doesn't come in and kill us." Hubbard stated that she heard a similar statement from Appellant on April 1 or 2, 2014, and then on April 8, 2014, she overheard Appellant's conversation with her doctor's office indicating that "she was ready to chop everybody's heads off and that the depression is a lot worse." Hubbard also stated that Appellant "boasted about having a concealed deadly weapons certificate on many occasions."

10. Tammy Montgomery's April 9, 2014 statement, reviewed by Gillis, stated that "on several occasions" she had heard Appellant say "she could just cut everyone's heads off," and mentioned Appellant's license to carry a concealed weapon. Montgomery concluded her statement, "The first time I heard the comments I didn't think of it, but lately it seems as though it is an every week comment…"

11. The discord between Hubbard and Appellant was attested to by multiple witnesses, including Kathryn McCrystal (who apparently chose not to mention the situation to Lynn Keeling Gillis). In fact, the relationship between Hubbard and Appellant had deteriorated to the point that Hubbard was issued a mandate by Roger Banks (her prior supervisor) forbidding her from entering the office of the Division of HVAC after Hubbard transferred to another division. It is also significant to the Hearing Officer that McCrystal emailed Appellant's supervisor, Tim Crick, on January 29, 2014, asking him to tell Hubbard, essentially, to leave Appellant alone. What was developed at the evidentiary hearing was that Hubbard's feelings toward Appellant can only be described as antagonistic, and the Hearing Officer finds Hubbard's motivation for spearheading the movement to inform management of Appellant's "concerning" behavior to be questionable.

12. Appellant admitted at the evidentiary hearing that she had said to her coworkers on multiple occasions that she sometimes "feels like ripping people's heads off." However,

Appellant testified that she had made the comments in a strictly joking manner. That assertion was bolstered by the fact that neither Crick nor Montgomery ever seemed offended or threatened by the comments until Hubbard came to them on April 8, 2014, saying she was "frightened" of Appellant.

13. It is also noteworthy that Appellant was never counseled on the inappropriateness of these words, that no reference to these comments was ever made in her evaluations, and that she was never disciplined for having said them. It is also significant that not a single witness testified that the words were ever said in a loud, angry, or agitated tone of voice, or that Appellant had ever approached anyone in a threatening manner, or committed an overt act of physical aggression. And while Appellant did admit that she has a license to carry a concealed weapon and had told her coworkers about it (in the context of discussing her prior job repossessing vehicles), no connection was established between Appellant's owning a gun and the comments she made, except for vague assertions by her co-workers that "you can't be too careful."

14. The Hearing Officer finds that when the matter regarding Appellant was reported to Lynn Keeling Gillis, she assessed the situation by reading the statements of three Division of HVAC employees (one being Appellant's supervisor), and considered the statement from her Human Resource liaison, Kathryn McCrystal, that "people felt threatened." Relying on that information, Gillis determined that the allegations could potentially constitute workplace violence as it is defined in 101 KAR 2:095, Section 9. She then placed Appellant on agency directed sick leave, directing Appellant to procure a completed Functional Capacity Assessment form, to be completed by a board certified psychiatrist or a board licensed psychologist, certifying Appellant's fitness to return to work. As Gillis stated, "I am not a medical doctor. I was trying to keep everyone safe. I needed a medical opinion."

15. On April 23, 2014, Gillis received the Functional Capacity Assessment form, completed by Dr. Lyle W. Carson, which stated that he did not "see [Appellant] to be a risk for harm to others." Gillis informed Appellant by letter on April 24, 2014, that she could return to work the next day.

16. Upon Appellant's return from agency directed sick leave, Gillis made no further factual investigation into the allegations against Appellant. She made no effort to speak to the complaining witnesses directly, nor did she speak to Appellant herself to hear her response to the allegations made against her. On May 19, 2014, Gillis informed Appellant, by letter under her signature, that Appellant had been suspended for ten days. As grounds for the suspension, Gillis wrote: "Your statements constitute a lack of good behavior and a repeated threat of harm that violate 101 KAR 2:095, Section 9, and the Cabinet's Policy Statement on violence in the workplace."

CONCLUSIONS OF LAW

1. Appellee has shown by a preponderance of the evidence that the placement of Appellant on agency directed sick leave was done with just cause and was neither excessive nor erroneous. Relying on the statement of three Division of HVAC employees (including

Appellant's supervisor), and considering the statement from the division's Human Resource liaison, Kathryn McCrystal, that people in the office "felt frightened," Gillis properly employed the protections of 101 KAR 2:102, Section 2. The information regarding Appellant's behavior that Gillis initially received was sufficient to conclude that Appellant had demonstrated conduct that might endanger herself or others. As an Appointing Authority, Gillis was well within her authority to take the reasonable and necessary steps to diffuse any alleged volatile situation and protect the safety of Cabinet employees by placing Appellant on agency directed sick leave until Appellant produced a medical certification of her fitness to return to work.

2. The Hearing Officer finds that Appellant's comments were sufficient to warrant being placed on directed sick leave, but not sufficient to warrant a 10-day suspension. The administrative regulations pertaining to the two actions are evaluated by different standards: 101 KAR 2:102, Section 2 (2)(a)4 states that an employee may be placed on directed sick leave if he demonstrates behavior that <u>might</u> endanger himself or others. 101 KAR 2:095, Section 9(1)(b) prohibits behavior that gives a Cabinet employee <u>reasonable</u> cause to believe that his health or safety are at risk. Looking at the plain meaning of both phrases, "might" implies a "possibility"; but "reasonable" cause mandates the finding of a "good reason for thinking it is true." (Macmillan Dictionary, 2014). Appellee was correct in finding that Appellant's comments, as first presented to Lynn Keeling Gillis, demonstrated behavior that might present a risk, but the Cabinet did not bear its burden of proof to show that Appellant had committed misconduct sufficient to discipline her by imposing a ten day suspension. While Appellant's comments that she "felt like ripping people's heads off," were inappropriate and unprofessional, she testified that she had said them in a joking manner. Furthermore, Appellant had never been counseled or disciplined for having said them, nor was evidence presented that Appellant's demeanor was ever aggressive, or that she had said the words in a loud or agitated voice. The Hearing Officer concludes, therefore, that Appellant's comments were not so "threatening" as to cause a Cabinet employee to have <u>*reasonable*</u> cause to believe that his health or safety was at risk, and consequently, Appellant did not violate 101 KAR 2:095, Section 9, or the Cabinet's policy on workplace violence.

3. The Hearing Officer concludes that the ten day suspension was not taken for just cause pursuant to KRS 18A.095(1), and should be amended to a written reprimand.

<u>RECOMMENDED ORDER</u>

The Hearing Officer recommends to the Personnel Board that the appeal of **JENNIFER R. SMITH V. PUBLIC PROTECTION CABINET, (APPEAL NOs. 2014-122 and 2014-123)** be **DISMISSED** with regard to Appellant being placed on agency directed sick leave, and **SUSTAINED TO THE EXTENT** that Appellant's ten-day suspension be amended to a written reprimand. Appellee shall award Appellant with back pay and benefits lost as a result of the suspension, reimburse Appellant for any leave time used attending the evidentiary hearing and pre-hearing conferences, and otherwise make Appellant whole. **[KRS 18A.105, KRS 18A.095(25) and 200 KAR 12:030.]**

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).

Any document filed with the Personnel Board shall be served on the opposing party.

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 Colleen Beach** this 8th day of January, 2015.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Cannon Armstrong
Hon. Paul Fauri

PUBLIC PROTECTION CABINET

Steven L. Beshear
Governor

Capital Plaza Tower
500 Mero Street, 5th Floor
Frankfort, KY 40601
Phone: (502) 564-7760
Fax: (502) 564-3969
www.ppc.ky.gov

Robert D. Vance
Secretary

April 9, 2014

HAND DELIVERED AND REGULAR MAIL

Ms. Jennifer R. Smith

Dear Ms. Smith:

Pursuant to 101 KAR 2:102, Section 2, Subsection 2(a) (4), you are notified that effective immediately, April 9, 2014, you are being placed on Agency Directed Sick Leave until certified by a board certified psychiatrist that you are fit to return to duty. This decision is based on the following:

On April 8, 2014, you were heard making threats of violence against others within the offices of the Division of HVAC. Your threatening statements demonstrate behavior that you might endanger yourself or others at your work station. Please have a board certified psychiatrist or board licensed psychologist complete the attached Functional Capacity Assessment Form certifying your mental fitness to return to work. This form is to be returned to our offices by close of business April 23, 2014. Upon return of the completed Functional Capacity Assessment Form, it will be reviewed and you will be notified by me concerning return to work.

While on Agency Directed Sick Leave, you shall use your leave balances. If your leave balances are exhausted we will require that your leave be without pay. You will not be allowed in to any Public Protection Cabinet or GAPS facility, including specifically 101 Sea Hero Road, Frankfort, Kentucky and 500 Mero Street, Capital Plaza Tower, Frankfort, Kentucky unless you have scheduled an appointment with me.

For your information, the Kentucky Employee Assistance Program (KEAP) is a voluntary and confidential assessment and referral service for state employees. This service may help you with any personal problems that may be affecting your job performance. KEAP can be reached at (800) 445-5327 or (502) 564-5788.

In accordance with KRS 18A.095, you may have a right to appeal this action to the Personnel Board within sixty (60) days after receipt of this notice, excluding the date notification is received. Such appeal must be filed in writing using the attached appeal form and in the manner prescribed on the form.

Sincerely,

Lynn Keeling Gillis

Lynn Keeling Gillis
Designated Appointing Authority
Public Protection Cabinet

Attachment: Appeal Form
Functional Capacity Assessment Form

cc: Secretary, Personnel Cabinet
Personnel File

PUBLIC PROTECTION CABINET

Steven L. Beshear
Governor

Capital Plaza Tower
500 Mero Street, 5th Floor
Frankfort, KY 40601
Phone: (502) 564-7760
Fax: (502) 564-3969
www.ppc.ky.gov

Robert D. Vance
Secretary

HAND AND SENT BY REGULAR MAIL

May 19, 2014

Jennifer R Smith

Dear Jennifer,

Pursuant to KRS 18A.095, you are notified that you are suspended from duty and pay for a period of ten (10) working days. Your suspension will be effective beginning of business Tuesday, May 20, 2014 through close of business Wednesday, June 3, 2014 (10 work days). You are to return to work and duty on Thursday, June 4, 2014.

You will receive holiday pay for Monday May 26, 2014.

Pursuant to 101 KAR 1:345, Section 1 and Section 4; 101 KAR 2:095, Section 9; the Commonwealth's Workplace Violence Policy; and the Public Protection Cabinet's Policy Statement on Violence in the Workplace, you are suspended from your position as Administrative Specialist II in the Department for Housing, Buildings and Construction, Division of HVAC, Field Operations Branch, for the reasons set forth below:

Lack of Good Behavior.

I. Threat of Harm:

On April 1 or April 2, 2014, in the offices of the Division of HVAC, 101 Sea Hero Road, Frankfort, you made a threat of violence against others to Tammy Montgomery, Program Coordinator. According to Ms. Montgomery, you stated "I could cut everyone's heads off". Your statement was also overheard by fellow employee, Rebecca Hubbard, Administrative Specialist II. Ms. Montgomery reported this is

not the first time that you have made a similar comment, further stating that you have commented previously, date unknown, that the reason why you go to therapy is to keep you from blowing everyone's head off or words to that effect.

Tim Crick, HVAC Inspector Field Operations Manager, has also reported that on more than one occasion, over the past several months, that he has heard you comment that "the reason I go to a therapist on Wednesdays is so that I don't come in and blow everyone's heads off". These statements were made in the offices in the Division of HVAC.

Ms. Hubbard reported that the first time you made a comment to her and Ms. Montgomery was the winter of 2013. She reported that you commented, "I go to a weekly psychiatrist appointment so that I don't come in here and kill anyone". These statements were made in the offices of the Division of HVAC.

Additionally, Ms. Hubbard reported that on April 8, 2014 at approximately 9:20 a.m., that she overheard a phone conversation between you and a doctor's office, in which you requested an appointment. You stated that, "you were ready to chop everybody's heads off".

Your statements constitute a lack of good behavior and a repeated threat of harm that violates 101 KAR 2:095, Section 9, the Workplace Violence Policy, and the Cabinet's Policy Statement on Violence in the Workplace. A review of your personnel file indicates that you received a copy of the Cabinet's Policy Statement on Violence in the Workplace on December 18, 2012, at New Employee Orientation.

In addition, a review of your personnel file indicates two previous corrective measures have been documented. On October 11, 2011 a written Memorandum of Expectations was implemented. On February 17, 2012, a written reprimand was issued.

For the foregoing reasons you are being suspended without pay for a period of ten (10) working days. Future instances of lack of good behavior may result in disciplinary action up to and including dismissal.

You are required to attend the cabinet's training on Preventing Workplace Violence/ Anti-Harassment/ Anti-Discrimination. The date in which you are to attend is **Tuesday June 24, 2014.** You will receive a class enrollment and information e-mail prior to the class date.

During this period of suspension, you are not to contact any employee of the Public Protection Cabinet and are not to be on the property or in the offices of the Public Protection Cabinet or Division of Human Resources Management, GAPS, unless you have been scheduled for an appointment by me.

For your information, the Kentucky Employees Assistance Program (KEAP) is a voluntary and confidential assessment and referral service for state employees. This service may help you with any personal problems that may be affecting your job performance. KEAP can be reached at (800) 445-5327 or (502) 564-5788.

In accordance with KRS 18A.095, you may appeal this action to the Personnel Board within sixty (60) days after receipt of this notice, excluding the date notification is received. Such appeal must be filed in writing using the attached appeal form and in the manner prescribed on the form.

Sincerely,

Lynn Keeling Gillis
Designated Appointing Authority
Public Protection Cabinet

CC: Secretary, Personnel Cabinet
Personnel File

Attachment: Appeal Form