COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-288

KAREY COOPER **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 July 2016 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated May 31, 2016, 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 **DISMISSED**.

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 15th day of July, 2016.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Jennifer Wolsing
Hon. Kelly S. Wiley
Mr. Jay Klein

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-288

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CABINET FOR HEALTH AND FAMILY SERVICES **APPELLEE**

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This matter came on for an evidentiary hearing on May 2, 2016, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before E. Patrick Moores, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Karey Cooper, was present at the evidentiary hearing and was represented by the Hon. Kelly Wiley. The Appellee, Cabinet for Health and Family Services, was present and was represented by the Hon. Jennifer Wolsing.

This matter was brought for an evidentiary hearing for the purpose of developing a record on the matter as to whether the Appellant's appeal was timely filed. The hearing was held on the Cabinet's Motion to Dismiss the appeal on the basis that the Appellant failed to properly process her appeal in a timely fashion in response to the disciplinary letter issued by Howard J. Klein on July 29, 2015.

The Appellee Cabinet alleges that the Appellant, Karey Cooper, did not comply with the statutory requirements of KRS 18A.095(8)(c), that an employee being penalized with disciplinary action may file an appeal with the Personnel Board within sixty (60) days after receipt of notification of the disciplinary measure being taken.

I. STATEMENT OF THE CASE

Karey Cooper was served with notice issued in a letter dated July 29, 2015, from Howard J. Klein, the Cabinet's appointing authority, that she was being disciplined with a three-day suspension from duty and pay as a Social Service Worker I in the Department for Community Based Services, for failure to report abuse and neglect allegations.

Ms. Cooper obtained legal counsel, Kelly Wiley, with offices in Covington, Kentucky to prosecute her appeal. Ms. Wiley issued a letter dated September 28, 2015, addressed to the Executive Director-Personnel Board, Cabinet for Health and Family Services, giving notice of filing an appeal on the disciplinary action against Ms. Cooper. Ms. Wiley forwarded the appeal

by facsimile, which is permissible pursuant to 101 KAR 1:365, Section 3(2)(a). The facsimile transmittal sheet indicated the letter was faxed to the number which is to the Office of Human Resources Management (OHRM). However, the fax number shown on the letter was to a number which is not part of the OHRM office.

Subsequently, Ms. Wiley sent a letter dated October 21, 2015, to the Personnel Board informing them of the appeal and the miscommunication concerning giving notice of the appeal. That letter was likewise sent by facsimile, but was not recorded as being received and filed with the Personnel Board until November 10, 2015. Neither of the letters communicating the appeal included the Appeal Form. An Appeal Form of the Kentucky Personnel Board, signed by the Appellant on November 19, 2015, was faxed to the Board with a cover letter on November 23, 2015, which was marked as received and filed with the Board on November 23, 2015.

A pre-hearing conference was conducted before the Personnel Board on January 7, 2016, at which the Cabinet raised an issue that the appeal was untimely filed. The Appellant took the position that an Appeal Form was not attached to the suspension letter she received. An Order was issued by the Board setting the matter for an evidentiary hearing on March 8 and 9, 2016. The appeal was brought on for another pre-hearing conference on March 8, 2016 to discuss a discovery issue concerning requested documents and Appellant's request to talk with certain witnesses prior to the evidentiary hearing. The parties agreed to resolve the discovery issues and a new hearing date was scheduled for May 2 and 3, 2016, which was to include a presentation of evidence as to whether the appeal was timely filed, whether there was just cause for the three day suspension of the Appellant and whether the penalty was excessive or erroneous.

The hearing on the timeliness of the appeal was conducted at the offices of the Kentucky Personnel Board on the 2nd day of May, 2016. At the conclusion of the proof on the timeliness issue, the hearing officer informed the parties that he would take the matter under submission to review and make findings of fact and conclusions of law and that he would notify counsel for the parties later that day as to his conclusion and whether the hearing would proceed on the merits the next day. Later that afternoon, after reviewing the testimony presented, the hearing officer made his initial findings of fact and conclusion of law and verbally notified the parties' counsel that for the reasons set forth below he had found that the appeal was untimely filed and that he was sustaining the Cabinet's motion to dismiss the appeal.

II. SUMMARY OF EVIDENCE PRESENTED

1. The Cabinet's first witness was **Jennie Young**, who has served as the Human Resource Administrator for the Cabinet's Office of Human Resources Management (OHRM) since 2003. Her job involves employee relation issues and processing requests for Major Disciplinary Action (MDA) against an employee. She testified that a request for an MDA was received by Shawn Estep, who assigned the matter to her. She described the documentation she received and the Kentucky Statutes and Administrative Regulations she reviewed. At the completion of her review, she drafted a letter providing for a three day suspension of Ms. Cooper

and forwarded it to Howard J. Klein for his review and execution. The letter was ultimately forwarded to the attention of Ms. Cooper, along with an Appeal Form and an Acknowledgment Form to be signed by Ms. Cooper indicating she received the letter and forms. She stated that the Appeal Form contained the address of the Kentucky Personnel Board to whom the appeal was to be filed, but she acknowledged that the form did not contain the fax number of the Personnel Board.

2. **Kelly Skerchock** is a Service Region Clinical Associate, a position she has occupied since July 2015. She said that all the facts leading to the disciplinary action occurred before she became the SRCA. She described herself as Ms. Cooper's second-line supervisor. She testified that she received the disciplinary documents to deliver to Ms. Cooper, which she reviewed with the list of attachments to make sure she got all the required documents in the packet of information to be delivered to Ms. Cooper. She testified that she received the packet of documents at approximately 2:30 p.m. and contacted Ms. Cooper and requested that she come to her office to meet with her.

3. Ms. Skerchock testified that she asked Stacey White to join her, to serve as a witness in the meeting with Ms. Cooper and the delivery of the packet of documents pertaining to the disciplinary letter. When Ms. Cooper arrived, Ms. Skerchock presented her with the letter informing her of the suspension, and the packet of documents that accompanied the suspension letter. She testified that Ms. Cooper stated the charges in the letter were not true, and she responded that she was not in any position to discuss the merits of the suspension, stating to Ms. Cooper that her sole job was to deliver the letter to her, together with the packet of information which she went over with Ms. Cooper and explained her appeal rights to her. She testified that Ms. White witnessed the entire meeting and that Ms. Cooper was very upset and tearful. Ms. Skerchock said she was also nervous during the meeting, as it was her first MDA to process with an employee.

4. Ms. Skerchock described her relationship with Ms. Cooper as very good, and testified that she is a strong advocate of individual rights to appeal matters that may be wrongfully brought against any employee. She testified that for that reason she went over the documents listed in the attachment description of the forwarding email with her assistant, Patty Murphy, to assure that they had received and were able to print out every document listed as an attachment. She further testified that she went through the packet with Ms. Cooper, and that she specifically went over the Appeal Form with her. She testified that Ms. Cooper signed the acknowledgement letter that she had received the suspension letter, and produced said acknowledgement as an exhibit at the hearing. (Appellee's Exhibit 8.)

5. Ms. Skerchock testified that she went on the Google website and searched "how to file an appeal," and that the first thing that appeared was the Appeal Form. She also introduced into the record a copy of an e-mail letter that Ms. Cooper sent on November 24, 2015, to Jennifer Warren, the Service Region Administrator in the London Office, in which she complemented Ms. Skerchock for her leadership skills and her role in providing support to Ms.

Cooper and making her feel like a valued employee. (Appellee's Exhibit 9.)

6. **Stacy White** has served the Cabinet's Department for Community Based Services as a Service Region Administrator Associate for the past six years. Her position involves supervising foster care assignments in 12 counties, and doing matters related to personnel issues. She was asked to stop by the Boone office to assist Ms. Skerchock in delivering a suspension letter to Ms. Cooper, which she agreed to do as she was the most tenured associate and that she was available. She testified that she went over the letter and all the exhibits to the letter with Ms. Skerchock to make sure they had everything they needed. She stated that Ms. Skerchock met with Ms. Cooper and gave her the letter and explained its contents, and she then went through all the documents and exhibits to the letter with Ms. Cooper, and that all of them were given to her, including the Appeal Form.

7. Ms. White said that Ms. Cooper then proceeded to deny and disagree with the contents in the letter, and that she and Ms. Skerchock explained to Ms. Cooper that they were not there to discuss the merits of the suspension letter. She testified that Ms. Skerchock did show Ms. Cooper the Appeal Form and explained her right to appeal. She said that Ms. Cooper then signed the Acknowledgment Form in her presence and they ended the meeting. Ms. Cooper left with all the documents. Ms. White described Ms. Cooper as being very upset and crying at times during their meeting. She acknowledged that they did not provide Ms. Cooper with a fax number where the Appeal Form could be sent, but that the address for submitting the Appeal Form was clearly placed on the form.

8. **Patricia Murphy** has been a Service Region Administrator Associate for the Department since 2007. She testified that she printed all the attached documents to the suspension letter, double checked them against the listing in the forwarding email document to make sure she had them all, and gave the copies to Ms. Skerchock. She said she was not in the meeting with Ms. Cooper when she was presented the letter and documents. Ms. Murphy testified that the Kentucky government website is available to anyone and that the appeal forms are easy to access online. She said that she could easily have provided that information to anyone who asked.

9. **Howard J. Klein** is the Director of OHRM for the Cabinet, and was the appointing authority that made the decision for the suspension of Ms. Cooper, and signed the letter sent to her. He acknowledged receiving the letter dated September 28, 2015, from Ms. Wiley, which was found on a fax machine, indicating she was filing an appeal of the suspension of Ms. Cooper. He said it was not sent to the OHRM fax number. He testified that he does not remember if an Appeal Form was included with the letter. He testified that he merely thought he was receiving a copy of a notice of the appeal.

10. The Appellant, **Karey Cooper**, has served as an Investigator for the Department for the past three years. She testified that she did meet with Ms. Skerchock, but she did not remember being given an Appeal Form. She testified that she was very upset as she thought the letter had many inaccuracies, and that it had taken over ten weeks for a determination to be made on the matter. She testified that she was not given a fax number of where to send the Appeal Form, but she could not recall if she searched for the fax number of the Personnel Board or for an Appeal Form to file her appeal with the Personnel Board. However, she stated that she believed that she made a good faith effort to file her appeal in a timely manner. She acknowledged that she had no basis to contradict the testimony of the previous witnesses that she was given an Appeal Form.

III. FINDINGS OF FACT

1. The Appellant, Karey Cooper was presented with a letter dated July 29, 2015, from Howard J. Klein, Director of OHRM and the Cabinet's Appointing Authority, informing her that she was being given a three-day suspension from her work and pay. The letter informed Ms. Cooper that she had the right to appeal the action to the Kentucky Personnel Board within 60 days after her receipt of the letter, excluding the date of receipt. The letter further informed her that she must file the appeal by using the Appeal Form that the letter said was attached to the letter and direct it to the address indicated on the form. The letter also referenced the statutory and administrative regulation controlling the appeal and hearing procedures, copies of which were enclosed with the letter.

2. The letter was electronically mailed to Kelly Skerchock, together with a packet of documents consisting of the statutory and administrative regulations pertaining to appeal rights and the Appeal Form to initiate the appeal, which she was to personally hand deliver to Ms. Cooper.

3. Patricia Murphy, Stacey White and Kelly Skerchock reviewed the letter and made sure that the documents listed as included with the letter were printed and put together as a packet to present to Ms. Cooper upon presentation to her of the suspension letter.

4. Ms. Skerchock and Ms. White met with Ms. Cooper on the afternoon of July 29, 2015, to present her the letter and documents enclosed with the letter. Ms. Skerchock went over the letter and the documents relating to her appeal rights with Ms. Cooper, including the Appeal Form. Ms. Cooper signed an Acknowledgement of Receipt that she had received the suspension letter. Ms. Cooper was unable to refute the testimony from the Department's three witnesses that the Appeal Form, statute and administrative regulations concerning appeal rights were given to her.

5. A letter from the Appellant's attorney was sent by facsimile on September 28, 2015, to the Cabinet for Health and Family Services advising that an appeal was being filed on behalf of Ms. Cooper. The letter stated that no Appeal Form was provided with the suspension letter, and that one could not be located on the Cabinet's website. The facsimile was brought to the attention of Mr. Klein, who testified that he thought it was a courtesy copy.

6. The Appellant's attorney faxed a letter dated October 21, 2015, to the Personnel Board informing them of the appeal and the miscommunication concerning the previous attempt at giving notice of the appeal. That letter was not recorded as being received and filed with the Personnel Board until November 10, 2015, and it did not include the Appeal Form.

7. An Appeal Form of the Kentucky Personnel Board, signed by the Appellant on November 19, 2015, was faxed to the Board with a cover letter on November 23, 2015, which was marked as received and filed with the Board on November 23, 2015.

IV. CONCLUSIONS OF LAW

1. The Appellant argued that she did not receive an Appeal Form with the letter of notice of the disciplinary action against her, and that, therefore, her appeal was not untimely filed and the Cabinet's Motion to Dismiss should be overruled. The Kentucky Personnel Board has previously ruled that where the agency is unable to establish that it provided the appeal forms with the disciplinary letter, as required by KRS 18A.095(16)(b), such failure does not comply with the statutory mandate, and thus the time to file the appeal does not start to run on the date they receive the letter of disciplinary action. *Witt, et al v. Kentucky Authority for Education Television, et al.,* 2014 WL2191926 (KY PB 5/14/14). Accordingly a hearing was conducted to receive evidence concerning the issue as to whether the Appellant was provided an Appeal Form as required by statute.

2. The evidence presented at the fact finding hearing presented three witnesses (Patricia Murphy, Stacey White and Kelly Skerchock) that were in agreement that they reviewed the documents to be given to Ms. Cooper which included an appeal form. White and Skerchock testified that they met with the Appellant and the appeal rights were discussed with Ms. Cooper by Ms. Skerchock, and that the Appeal Form was pointed out and presented to her. The Appellant was unable to produce any evidence contradicting their testimony.

3. Appellant's counsel attempted to make a late issue of the fact that the Appellant was also not provided with the fax number of the Personnel Board where the appeal was required to be filed. However, while an appeal is permitted to be faxed to the Personnel Board there is no requirement in the Statutes or Administrative Regulations that the fax number be provided with the disciplinary letter.

4. The Appellant was aware that she was without the Appeal Form that she claimed she never received, and no evidence was given as to what actions she took to obtain the Appeal Form referenced in the letter of disciplinary action, nor was any evidence presented as to what actions she took to obtain the address or the fax number of the office where the appeal was to be filed. It was not until November 23, 2015, that the Appeal Form was filed with the Personnel Board, almost four months after her receipt of the letter giving her notice of the disciplinary action against her, with no explanation provided as to what she did to obtain the necessary Appeal Form and address where the appeal was to be filed.

5. The preponderance of the evidence established that the Appellant was provided the Appeal Form needed to prosecute an appeal with the disciplinary letter giving her notice of the action against her and that her attempt to file the appeal was untimely filed.

V. RECOMMENDED ORDER

Having considered and weighed all the evidence and the laws of the Commonwealth of Kentucky, and based upon the foregoing findings of fact and conclusions of law, it is the recommendation of the Hearing Officer that the Personnel Board enter an Order **SUSTAINING** the Motion to Dismiss filed by the Cabinet, dismissing the appeal as being untimely filed, and that said appeal be removed from the docket. The Hearing Officer recommends to the Personnel Board that the case of **KAREY COOPER VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2015-288)** be **DISMISSED.**

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 E. Patrick Moores** this 31st day of May, 2016.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Jennifer Wolsing
Hon. Kelly S. Wiley