KENTUCKY PERSONNEL BOARD
MINUTES OF AUGUST 8, 2014

1. The regular monthly meeting of the Kentucky Personnel Board was called to order by Chairman Doug Sapp on August 8, 2014, at approximately 9:30 a.m., 28 Fountain Place, Frankfort, Kentucky.

Board Personnel Present:

Wayne "Doug" Sapp, Chairman
Larry B. Gillis, Vice Chairman
David B. Stevens, Member
David F. Hutcheson, Jr., Member
Tommy W. Chandler, Member
Donald W. "Don" Blevins, Member
Amanda Cloyd, Member
Mark A. Sipek, Executive Director and Secretary
Boyce A. Crocker, General Counsel
Linda R. Morris, Administrative Section Supervisor
Cynthia Perkins, Administrative Specialist

2. READING OF THE MINUTES OF REGULAR MEETING HELD JULY 11, 2014

The minutes of the last Board meeting had been previously circulated among the members. Chairman Sapp asked for additions or corrections. Mr. Blevins moved to approve the minutes, as submitted. Judge Chandler seconded and the motion carried 6-0. The Board members signed the minutes.

[Dr. Stevens arrived at 9:40 a.m.]

3. EXECUTIVE DIRECTOR'S REPORT

Mr. Sipek advised that the members received a copy of the Franklin Circuit Court's Opinion and Order on Betty Runner. The Court agrees with the Board's recommended order dismissing the appeal. Mr. Sipek stated that this may be her last appeal.

Mr. Sipek stated that the Personnel Board's Annual Report is being prepared. Specifically, staff is waiting on grievance information from the agencies to be compiled. Mr. Sipek stated that he hoped to present the report for the Board's approval at the September 2014 meeting.

At the conclusion of Mr. Sipek's report, Chairman Sapp called for the Personnel Cabinet's report.

4. PERSONNEL CABINET'S REPORT

Ms. Dinah Bevington, Executive Director, came forward to present the Personnel Cabinet's report.

Ms. Bevington stated that the Kentucky Employees Charitable Campaign (KECC) kicked off their annual campaign for 2015. State employees can make donations to designated Kentucky charities.

The Personnel Cabinet is accepting nominations for the Governor's Ambassador Awards until the end of August. This is a way to honor state employees or citizens who have impacted the state. Information is available on the Cabinet's website.

Ms. Bevington advised that the Kentucky Employee Health Plan open enrollment will begin in October 2014. The Personnel Cabinet is working with a new provider, Anthem. Detailed information will be presented at a future meeting by Commissioner Joe Cowles.

Following the Personnel Cabinet's report, Chairman Sapp then called the parties forward for the first oral argument.

5. ORAL ARGUMENTS

A. **Charles Benge v. Justice and Public Safety Cabinet (Corrections)**

Present for oral arguments were counsel for Appellant, the Hon. Elmer George, and counsel for Appellee, the Hon. Angela Cordery. After presenting oral arguments, the parties answered questions from the Board.

B. **Liberty Campbell v. Justice and Public Safety Cabinet (Corrections)**

Present for oral arguments were counsel for Appellant, the Hon. Charles Kelly Kilgore, and counsel for Appellee, the Hon. Amber Arnett. After presenting oral arguments, the parties answered questions from the Board.

C. **Michael Lynn v. Justice and Public Safety Cabinet (Corrections)** (2013-171)

Present for oral arguments were the Appellant, Michael Lynn, and counsel for Appellee, the Hon. Amber Arnett. After presenting oral arguments, the parties answered questions from the Board.

[Chairman Sapp called for a five-minute break from 10:45 – 10:50.]

D. **Kimberly Rulo v. Personnel Cabinet** (2013-285)

Present for oral arguments were counsel for Appellant, the Hon. Paul Fauri, and counsel for Appellee, the Hon. Whitney Meagher. After presenting oral arguments, the parties answered questions from the Board.

6. **CLOSED SESSION**

Mr. Gillis moved that the Board go into Executive Session for the purposes of discussing complaints, proposed or pending litigation, and deliberations regarding individual adjudications. Dr. Stevens seconded. Chairman Sapp stated that the motion had been made and seconded for the Personnel Board to retire into closed Executive Session, passed by a majority vote of the members present, with enough members present to form a quorum. Pursuant to KRS 61.810(1) (c), (f), and (j), the Kentucky Open Meetings Act, the Board will now retire into closed Executive Session. Specific justification under the Kentucky Open Meetings Act for this action are as follows, because there will be discussion of proposed or pending litigation against or on behalf of the Board; and deliberations regarding individual adjudication. The motion carried 7-0. (11:45 a.m.)

Dr. Stevens moved to return to open session. Mr. Gillis seconded and the motion carried 7-0. (12:45 p.m.)

7. **CASES TO BE DECIDED**

The Board reviewed the following cases. At that time, the Board considered the record including the Hearing Officers' findings of fact, conclusions of law and recommendations, any exceptions and responses which had been filed, and oral arguments where applicable.

A. **Charles Benge v. Justice and Public Safety Cabinet (Corrections)** (2013-217)
(Moved from July meeting)

Ms. Cloyd moved to note Appellant's exceptions, Appellee's response, and oral arguments and to accept the recommended order dismissing the appeal. Dr. Stevens seconded and the motion carried 7-0.

B. **Liberty Campbell v. Justice and Public Safety Cabinet (Corrections)** (2013-226)

Mr. Hutcheson moved to note Appellee's exceptions, Appellant's response and oral arguments and to defer this matter to the next Board meeting. Judge Chandler seconded and the motion carried 7-0.

C. **Michael Lynn v. Justice and Public Safety Cabinet (Corrections)** (2013-171)

Mr. Hutcheson moved to note Appellee's exceptions and oral arguments, and to accept the recommended order sustaining the appeal to the extent that the suspension of Appellant be reduced from three days to two days. Dr. Stevens seconded and the motion carried 5-2, with Chairman Sapp and Mr. Blevins opposing.

D. **Kimberly Rulo v. Personnel Cabinet** (2013-285)

Mr. Hutcheson moved to note Appellant's Exceptions, Appellee's exceptions, Appellant's response to Appellee's exceptions, Appellee's response to Appellant's exceptions and oral arguments and to defer this matter to the next Board meeting. Judge Chandler seconded and the motion carried 6-0, with Mr. Gillis recusing.

E. **Anthony Bledsoe v. Labor Cabinet** (2013-201)
(Deferred from July)

Judge Chandler move to note Appellee's exceptions and oral arguments and to accept the Final Order, as attached to the minutes, sustaining the appeal to the extent the Appellant is compensated for one half hour of time he worked while acting in his official capacity, but otherwise dismissing the appeal. Mr. Blevins seconded and the motion carried 6-0, with Mr. Gillis recusing due to a personal relationship with a witness.

F. **Daniel Fuqua v. Transportation Cabinet** (2011-254, 2012-070 and 2012-242)
(Deferred from July)

Mr. Gillis moved to note Appellee's exceptions, Appellant's response to Appellee's exceptions and Appellant's exceptions, Appellee's response to Appellant's exceptions, and oral arguments and to accept the Final Order, as attached to the minutes, dismissing the appeal. Mr. Blevins seconded and the motion carried 7-0.

G. **Brenda Zahn v. Cabinet for Health and Family Services** (2013-219)
(Deferred from July)

Mr. Blevins moved to note Appellee's exceptions, Appellant's response and oral arguments and to accept the Final Order, as attached to the minutes, dismissing the appeal. Ms. Cloyd seconded and the motion carried 7-0.

H. **Paul James v. Kentucky State Fair Board** (2013-265)

Judge Chandler moved to accept the recommended order dismissing the appeal. Dr. Stevens seconded and the motion carried 7-0.

Show Cause Orders – Appeals Dismissed – No Response Filed

I. Melanie L. Johnson v. Cabinet for Health and Family Services (2013-128)
J. Colin Woolfork v. Justice and Public Safety Cabinet (Corrections) (2013-090)

Mr. Hutcheson moved to find that the Appellants had not responded to the show cause orders and that the recommended orders be accepted *en bloc* dismissing the appeals for failure to timely prosecute the appeals. Mr. Gillis seconded and the motion carried 7-0.

Show Cause Order - Appeal Dismissed – Response Filed

K. Kevin Brodie v. Justice and Public Safety Cabinet (Corrections) (2014-126)

Mr. Hutcheson moved to note the Appellant's response and to remand this matter to the active docket for further proceedings. Mr. Blevins seconded and the motion carried 7-0.

8. WITHDRAWALS

Dr. Stevens moved to accept the following withdrawals of appeals *en bloc* and dismiss the appeals. Ms. Cloyd seconded and the motion carried 7-0.

A. Nathaniel Coleman v. Justice and Public Safety Cabinet (Corrections)
B. Jehna Cornish v. Finance and Administration Cabinet and Personnel Cabinet
C. Denise Lilly v. Education and Workforce Development Cabinet
D. Kevin McIntosh v. Transportation Cabinet
E. Jerry Williams v. Justice and Public Safety Cabinet (Juvenile Justice)
F. Eric Frazier v. Justice and Public Safety Cabinet (Corrections)
G. Terry B. Fredricks v. Education and Workforce Development Cabinet
H. Velicia Martindale v. Finance and Administration Cabinet
I. Michael Mateja v. Tourism, Arts and Heritage Cabinet (Ky. State Fair Board) (2 appeals)
J. David Riggins v. Transportation Cabinet (2014-144)
K. Robyn Whittemore v. Cabinet for Health and Family Services and Personnel Cabinet

9. SETTLEMENTS

Dr. Stevens moved to accept the following settlements *en bloc* as submitted by the parties, and to sustain the appeals to the extent set forth in the settlements. Judge Chandler seconded and the motion carried 7-0.

A. Bobbie Hatfield v. Cabinet for Health and Family Services
B. Sarah Palmer v. Cabinet for Health and Family Services

10. **OTHER**

Proposed Settlement Agreement Guidelines

Chairman Sapp stated that Mr. Sipek prepared the Settlement Agreement Guidelines which were previously copied to the members for review.

Mr. Sipek stated that he took into account discussions from prior meetings, so that the Board has enough information and that the record is clear why a settlement is rejected or approved. Mr. Sipek briefly went over the guidelines.

Mr. Gillis had requested that additional language be added to #2. Specifically, that the Personnel Cabinet's signature on the settlement agreement ". . . represents to the Board that the terms of the settlement can be accomplished in the personnel and payroll systems." Mr. Gillis stated that parties may balk at #5, which includes a reason or rationale for reducing a disciplinary action, specifically, if the settlement was not approved by the Board.

As to the last item on the list concerning the agreements be provided to the members no later than Tuesday prior to the Board meeting, Chairman Sapp stated he does not want to delay settlements, and would agree to accept them electronically no later than Thursday by noon. Chairman Sapp stated that he does not oppose settlements, but would like more information to justify approving them. Judge Chandler stated he agrees with the guidelines, that they are not "set in stone" and that the Board is willing to work with the agencies.

Chairman Sapp stated that Mr. Sipek did a great job addressing the Board's issues and that there is nothing in the guidelines for agencies to be fearful of. Mr. Sipek stated that he will provide a copy of these guidelines to Dinah Bevington for feedback.

There being no further business, Dr. Stevens moved to adjourn. Mr. Hutcheson seconded and the motion carried 6-0. (1:10 p.m.)

Wayne D. Sapp, Chairman

Larry Gillis, Vice Chairman

David B. Stevens, Member

David F. Hutcheson, Jr., Member

Tommy W. Chandler, Member

Donald W. Blevins, Member

Amanda Cloyd, Member

COMMNWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2013-201

ANTHONY BLEDSOE **APPELLANT**

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

LABOR CABINET
LARRY L. ROBERTS, APPOINTING AUTHORITY **APPELLEE**

** ** ** ** **

The Board at its regular August 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated June 11, 2014, having noted Appellee's exceptions, 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** Conclusion of Law paragraph 12 and substitute the following:

12. The Board concludes that in view of Appellant's clean prior disciplinary history, the level of professionalism he had shown up to this incident, and by the support of his supervisor, Ms. Lancaster, that the disciplinary action of a suspension was in fact appropriate. The Board concludes that the twenty-day suspension imposed on the Appellant was neither excessive nor erroneous and was supported by the evidence. The Board rejects the Hearing Officer's conclusion that the twenty-day suspension was in any way excessive or erroneous. The Board concludes the twenty-day suspension of the Appellant was taken for good cause especially in light of the finding that the Appellant had ample opportunity to withdraw from the premises, get into his vehicle and leave the site.

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

IT IS HEREBY ORDERED that the appeal of **ANTHONY BLEDSOE VS. LABOR CABINET (APPEAL NO. 2013-201)** be **SUSTAINED to the extent** that Appellant be appropriately compensated for the one-half-hour of time he worked while acting in his official capacity during the incident of April 25, 2013, but otherwise his appeal should be **DISMISSED.**

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 appeal is **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 12th day of August, 2014.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK, SECRETARY

A copy hereof this day mailed to:

Hon. Cannon Armstrong
Anthony Bledsoe
Lynn K. Gillis
Sherry Butler

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NOS. 2011-254, 2012-070 AND 2012-242

DANIEL FUQUA **APPELLANT**

VS.

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

TRANSPORTATION CABINET
MIKE HANCOCK, APPOINTING AUTHORITY **APPELLEE**

** ** ** ** **

The Board at its regular August 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated June 16, 2014, having noted Appellee's exceptions, Appellant's exceptions, Appellant's response to Appellee's exceptions, Appellee's response to Appellant's exceptions, 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** Finding of Fact paragraph 7 and substitute the following:

7. The testimony of Steve Farmer and Katy Renfroe plainly demonstrates Mr. Farmer was having difficulty with the Appellant.

B. **Delete** Conclusions of Law paragraphs 2, 3, 4, 5, 6 and 7, and substitute the following:

2. The Board concludes that Appellant's behavior and conduct on September 22, 2011, was entirely unprofessional and was not to be expected or accepted in any workplace, much less a professional workplace in a state agency. The Board concludes the three-day suspension without pay for that conduct was entirely appropriate and was neither excessive nor erroneous.

3. The Board concludes that the Appellant's falsification of his timesheet for the period of January 22, 2012, warranted disciplinary action. Considering the Board has concluded that the three-day suspension meted out to Appellant for the unprofessional behavior and use of profanity for the incident of September 22, 2011, was proper, the Board concludes that progressive discipline allows for the ten-day suspension for falsification of timesheets and not adhering to documentation procedures for keeping time records.

4. The Board concludes that Appellant's behavior on August 2, 2012, when he was responding to the spilled hay at the "double diamond" intersection on Harrodsburg Road and his frustration and lack of courtesy to Mr. Mark Traylor was in fact a lack of good behavior and a violation of the Transportation Cabinet's personnel policy. The Board is aware the appointing authority for the Transportation Cabinet acknowledged that in and of itself this behavior on August 2, 2012, would have warranted no more than a written reprimand or a one-day suspension. However, when taken together with the previous lack of good behavior exemplified by the two earlier suspensions this Board found to be proper, the Board concludes applying progressive discipline in an attempt to correct an employee's behavior, the fifteen-day suspension for Appellant's behavior on August 2, 2012, was not excessive.

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

IT IS HEREBY ORDERED that the consolidated appeals of **DANIEL FUQUA VS. TRANSPORTATION CABINET (APPEAL NOS. 2011-254, 2012-070 AND 2012-242)** are **DISMISSED.**

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 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 8th day of August, 2014.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK, SECRETARY

A copy hereof this day mailed to:

Hon. William Fogle
Hon. Paul Fauri
Kathy Marshall

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2013-219

BRENDA ZAHN **APPELLANT**

VS.

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

CABINET FOR HEALTH AND FAMILY SERVICES
J. P. HAMM, APPOINTING AUTHORITY **APPELLEE**

** ** ** ** **

The Board at its regular August 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated May 6, 2014, having noted 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 rejected and the Board issues its own Findings of Fact, Conclusions of Law and Recommended Order as follows:

INTRODUCTION

This matter came on for an evidentiary hearing on February 20, 21 and 24, 2014, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before R. Hanson Williams, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellant, Brenda Zahn, was present at the hearing, and represented by the Hon. Robert Bullock. Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Jennifer Wolsing. Also appearing as Agency representative was Terry Brogan. Also present at the hearing was Aleetha Ellis, a Human Resources representative from Fresenius Medical Care and the Hon. Douglas Kemper, attorney for Fresenius.

This matter involves the dismissal of the Appellant by the Appellee by letter dated August 30, 2013, to be effective August 31, 2013, attached hereto as **Final Order Attachment A**. As such, the burden of proof was placed upon the Appellee by a preponderance of the evidence to show that the dismissal was appropriate under all surrounding circumstances and was neither excessive nor erroneous. In summary, the Appellant was dismissed for lack of good behavior and unsatisfactory performance of duties by allegedly providing or making available an e-mail schedule of surveys which would provide advance notification to Fresenius Medical Care (FMC) facilities; by engaging in a conflict of interest in failing to disclose that her son worked at a FMC facility; and finally, lack of good behavior and unsatisfactory performance of duties by

allegedly inappropriately involving herself in an official survey process and procedure by redacting violations from official documents in an attempt to influence the survey process.

JOINT STIPULATIONS

1. Prior to the beginning of the hearing, the parties introduced the following Joint Stipulations into the record:

    1. Date Appellant was Hired: December 1, 2008
    2. Date Appellant Last Physically Worked: May 8, 2013
    3. Date Appellant was Last Officially Employed: August 31, 2013
    4. City Appellant was Last Employed in: Lexington
    5. County Appellant was Last Employed in: Fayette
    6. Job Title Appellant Last Held: Human Services Surveyor Supervisor
    7. Appellant's Last Rate of Pay: $4,312.25 per Month.
    8. Appellant's Union Status: Non-Union
    9. Appellant's Status (full or part time): Full Time
    10. Name of Appellant's Direct Supervisor (at termination): Andrea Willhite
    11. Title of Appellant's Direct Supervisor (at time of job separation): Regional Program Manager
    12. Both parties agree that any document produced by the Cabinet to Appellant Brenda Zahn is an authentic Cabinet record kept in the course of regularly conducted activity.
    13. Either party may submit for introduction into evidence the tape recording of any individual witness interview conducted by OIG Investigator John Dudinskie, subject to any objection, and ruling by the Hearing Officer, as to the evidentiary content contained therein.
    14. Fresenius Medical Clinic has 63 facilities in Kentucky.

2. Second Joint Stipulations:

    1. The official name of the clinic sometimes referred to as "Fresenius-Grayson" or "FMC-Grayson" is Bio-Medical Applications of Kentucky, Inc. This corporation also does business as Fresenius Medical Care Grayson.

    2. The official name of the clinic sometimes referred to as "Fresenius-Winchester Road," "Renal Care," or "FMC-Winchester Road" is: Kentucky Renal Care Group, LLC. This corporation also does business as Kentucky Renal Care-Lexington East, or Fresenius Medical Care Lexington East."

3. In addition, the parties jointly stipulated that the DVDs containing the copy of Andrea Willhite's February 14, 2014 deposition may be introduced as evidence into this matter. Also, the parties jointly agreed that the witness statements of Paula Elliott, Greg Hardesty, and Kim Hawkins, said statements taken under oath, may be introduced as evidence in this matter.

BACKGROUND

1. There are 63 Fresenius facilities operating in Kentucky. The ones most directly affected in this appeal are ones denominated as Lexington East, North and South. Additionally, there is mention of a Fresenius facility in Grayson.

2. In this Order there will be made mention of surveys of renal care facilities operated by Fresenius. In this matter, it should be known that the Office of Inspector General (OIG) inspects these facilities and, if needed, writes a Statement of Deficiencies (SOD). The individual deficiencies noted are called TAGS.

3. Appellee's first witness was **Brandi Culver**. She is a Registered Nurse and has been employed at the FMC Lexington East facility for approximately four years. At the facility, she worked with Brendan Zahn, son of the Appellant. The witness' supervisor at the time was Shannon Henson.

4. The witness testified that sometime in the spring of 2013, she observed Brendan Zahn and Henson discussing upcoming inspections of the facility. She observed that Brendan appeared worried and she later found out it was because the facility had discovered when the inspectors were coming. She stated that Brendan appeared worried about his mother's job.

5. The witness went on to state that Brendan explained to her that he had gone home one day and observed a piece of paper on the kitchen table containing dates. He related to her that his mother said, "Oops" and walked away from the table, leaving the paper upon it. He told the witness that he then looked at the paper and subsequently took this paper containing the survey dates and gave it to supervisor Shannon Henson.

6. Culver stated that while telling her this tale of events, then Brendan appeared distraught. He also informed her that he had subsequently talked with an OIG Investigator named John Dudinskie about this matter. The witness claims that Brendan told her that she did not have to talk to the OIG and advised her that if called to appear before the Personnel Board, she could "take the fifth."

7. On cross-examination, the witness related that the Lexington East facility knew the state was coming to inspect the North facility by virtue of the dates contained on Brendan's paper. She commented on Brendan's story about receiving the paper by relating that he said his mother said, "Oops," but did not hand the paper with the survey dates to Brendan.

8. The witness also added that in her interview with Investigator Dudinskie, she felt pressure to tell the truth, but told him she could not remember all the specifics of her talk with Brendan.

9. The Appellee's next witness was **Shannon Henson**. She has been employed at a medical facility in Danville since 2013. However, prior to that time, she was a floor nurse employed at the Fresenius East facility from June 2009 until promoted to Clinical Manager in May 2013. She was the supervisor of Brendan Zahn at that facility. She was also terminated in late May 2013.

10. The witness recalled that she had a phone conversation with Brendan about future OIG inspection dates. Apparently he informed her he had a handwritten note with the locations and dates noted for surveys. After being informed by him of this, this witness went to the Lexington East facility where she found some papers left under her door. One of these papers was in a calendar setting. These papers were also in e-mail and handwritten form. The witness disclosed that she later spread these papers out and reviewed them with Brendan. She testified that after doing so, he advised her to shred these papers, whereupon she did.

11. The witness then introduced Appellee's Exhibit 1, an April 11, 2013 e-mail. Among others, this e-mail was copied to Brenda Zahn and contained the revised schedule of surveys to be conducted for the rest of April and May 2013. Upon seeing this document, the witness related that she then showed this to supervisor Joya Anderson and an employee named Gregg Hardesty. She also stated that she later talked to Investigator Dudinskie about this list.

12. At some point, the witness testified that Brendan Zahn called her and told her to "stick to their story." The witness concluded by saying that she does not know the Appellant.

13. On cross-examination, the witness related that after seeing a list of survey dates, she subsequently found out from another employee that the OIG Inspectors were at the South facility. The witness stated that the Lexington East facility had already had their survey, so she reasoned that the surveyors were soon to be on their way to the North facility. She added that her supervisory duties extended to both the East and North facilities.

14. This witness then stated that she told Brendan to let her know if he found out anything from his mother concerning any upcoming inspections at the North facility.

15. The witness then addressed the documents which she found under her door by stating that she did not know how long those documents had been there before she first saw them. She also added that Brendan never specifically told her he got the information from his mother.

16. On redirect, the witness testified that Brendan asked her to shred these documents containing the dates and locations of surveys. The witness then introduced Appellee's Exhibit 2, a text message dated May 1, 2013, purportedly from Jan Keeling. This document purports to inform the witness that someone is giving Fresenius a "heads-up" to the fact that the surveyors are coming to the North "Leestown" facility the following week.

17. Appellee's next witness was **Gregg Hardesty**. He is an Operations Manager for the Lexington area of Fresenius. On or about April 18, 2013, this witness had a conversation with Shannon Henson at the FMC on Winchester Road in Lexington. In that conversation, Henson told the witness that she knew the "state" or the OIG was coming to the Winchester facility the following week. Henson also told this witness that she knew the state was coming to the Lexington North facility in Lexington on another date. Thereafter, Henson showed this witness a piece of paper with handwritten notes on it. The paper was not the April 11, 2013 e-mail. [Appellee's Exhibit 1.]

18. Appellee's next witness was **Paula Elliott**. Prior to her current employment, she worked as a Nephrology Nurse Practitioner for Dr. Craig Stafford in Lexington, Kentucky. As part of her job, she regularly visited many FMC locations, including the Lexington North facility and the Winchester Road facility in Lexington.

19. During one such visit to the Winchester Road facility in the spring of 2013, the witness had a conversation with Shannon Henson, who was the manager of the Winchester Road facility, although she filled in as manager of the Lexington North facility. Henson told this witness that she knew the date the OIG was coming to inspect the Lexington North facility. Henson also knew the inspection date for the Winchester Road facility.

20. Elliott then overheard Henson planning to make sure that the Lexington North facility was fully-staffed on the date of the inspection. When this witness asked how she knew the Lexington North inspection date, Henson replied that she "had her sources." She did not specify that her source was within the OIG.

21. Appellee's next witness was **Kim Hawkins**. She is a Human Services Surveyor Supervisor for the OIG. She has worked in that office since 2000, but has been in her current position since August 2001.

22. She testified that on May 14, 2013, she met with OIG Investigator John Dudinskie in her office in the OIG Lexington location. Upon arrival, Dudinskie told this witness that he needed to search Brenda Zahn's office for something as part of his investigation of her case. While she was present, Dudinskie searched Zahn's office but could not find what he needed.

23. The witness then assisted Dudinskie in attempting to find an e-mail with the surveyors' names, dates and facilities. She and Dudinskie then found this e-mail in Andrea Willhite's red binder in her office. This binder contained the list of survey dates involved herein.

24. The witness then identified the April 11, 2013 e-mail from Susan Moberly to various OIG employees, including Brenda Zahn, regarding the schedule for April and May 2013. She noted that the handwritten notes on the bottom of this memo were apparently in Andrea Willhite's handwriting. She also testified that Moberly commonly sent out survey dates to all Human Services Surveyor Supervisors, including Ms. Zahn and any surveyors who accompanied Moberly on her surveys.

25. Appellee's next witness was **Joya Anderson**. This witness was formerly employed at FMC as Director of Operations from April 9 through September, 2013. The witness advised that she knew Shannon Henson and recalls discussing some OIG survey dates with her. She related that Henson showed her a handwritten paper, which indicated the OIG was to be at various clinics the week of May 6, 2013, conducting surveys.

26. On cross-examination, the witness testified that she only saw a handwritten document. From the dates she observed, she reasoned that the North and South Fresenius facilities were the only ones who should probably be expecting an annual survey. She added that Henson seemed concerned about when the North survey would take place, but does not know if Henson was trying to find out from her if she knew of any dates.

27. On redirect, the witness added that she knew the May 6th date referenced pertained to the North facility.

28. Appellee's next witness was **Jan Keeling**. She is employed by the OIG and was previously a surveyor in that office from June 2012 through August 2013. She testified that she surveyed various health care facilities, including the dialysis treatment centers operated by Fresenius. The witness referred to Appellee's Exhibit 2, a text message dated May 3, 2013, to her from her sister. This is the message indicating there is inside information coming from within OIG. The witness stated that upon receiving it, she showed it to her supervisor, Andrea Willhite.

29. The witness then introduced Appellee's Exhibit 3, a word document composed from handwritten survey notes. This document contained a deficiency write-up conducted by Keeling from the Fresenius/Grayson facility and had been reviewed after completion by the Appellant.

30. This witness added that of the four TAGS making up the deficiency, the Appellant had deleted three of them, which she claims was unusual. She also added that, in her opinion, the deletions made were over nothing meaningful. She also confirmed that these deficiencies were all dialysis related.

31. On cross-examination, the witness confirmed that the Appellant was an assistant Regional Program Manager (RPM). She also advised that the person who normally reviewed her write-ups was the Appellant. Although this witness claims that Zahn's previous experience had been primarily as a surveyor in long-term care, she also admitted that the Appellant had the authority to delete deficiencies, as this was a judgment call. She also added that she was not aware of any requirement that the RPM talk to the individual surveyor first before making deletions.

32. The witness then testified that the SODs are due out on the tenth working day following the survey. In this case, the tenth day for these deficiencies was Good Friday, 2013. She commented that state employees had one-half day off on that day. She implied that the process may have been somewhat rushed because of the time off due employees. She also added that she had her individual SODs in the proper format as of 8:00 a.m. that Friday morning.

33. The Appellee's next witness was **John Dudinskie**. He has been employed by the OIG as an Investigator Supervisor for the past four years. Prior to that time, he served with the Frankfort Kentucky Police Department for seventeen years in various capacities and has previously worked with the Attorney General's office as an Investigator. In addition, he has received training through the Offices of the FBI and the Drug Enforcement Administration (DEA).

34. The witness identified Appellee's Exhibit 4, a copy of his Investigative Report concerning the matter herein. He stated that the investigation initially started as a result of a text message sent to Jan Keeling from her sister, alleging there was a tip-off to Fresenius of upcoming surveys. (Appellee's Exhibit 2.)

35. After concluding his investigation, the witness testified that he had concluded that the advance notice of upcoming surveys had come through Brendan Zahn from information received from his mother. He added that he believed the interviewees he dealt with, because most of the information they supplied was against their own interests.

36. The witness stated that he believed the testimony of Brandi Culver because of the way that she related what Brendan Zahn had told her; mainly, that, "His mother had documents in their house and said, 'oops,' and thereafter walked away leaving the incriminating documents for him to see."

37. He then added that Shannon Henson had identified Appellee's Exhibit 1, an April 11, 2013 e-mail from Susan Moberly to others, including Brenda Zahn, which gave a list of dates and locations for upcoming surveys. He added that he never found this e-mail in the Appellant's office after his search of it. He also added that witness Joya Anderson had admitted to being tipped-off to these surveys and testified that she stated she had relied on a statement from Henson as to who supplied the advance notice. [Henson indicated in her testimony her information came through Brendan Zahn.]

38. The witness was then directed to p. 20 of his report, wherein he reported that upon questioning the Appellant, she stated that Keeling may have had reason to give false testimony because (1) Keeling had previously worked at Fresenius and wanted to get even with them, and (2) Zahn had rejected some of Keeling's survey "TAGS" and asked her to redo those. In this witness' opinion, Zahn's accusations against Keeling were without merit.

39. Asked to address the conflict of interest allegations against the Appellant, the witness replied that he had examined the questionnaires of employees who were asked to disclose any possible conflict of interest between their position and the facilities to be surveyed. He stated he found the only employee to have asserted such a conflict of interest was the Appellant, who listed her son as a Registered Nurse at Fresenius Lexington, Kentucky. He stated this potential conflict of interest caused grave concern because the April 11, 2013 memo indicated that a survey was to occur the week of May 6, 2013, at the RCG Lexington North facility.

40. On cross-examination, the witness stated that he investigated the Appellant's claims of innocence. Having already discounted her claims against Keeling, he focused on the Appellant because he was made aware by Sharon Henson that Brendan Zahn apparently conveyed to her that he had the advance information. Henson then surmised that he must have gotten it from his mother. He again confirmed that this copy of the April 11, 2013 e-mail with the dates was never found either on the Appellant's computer or in her office. He concluded by stating that there was no initial information that anyone else was involved in the leak other than the Appellant.

41. The witness also testified that he felt that at the beginning of his interview with Shannon Henson, that she was not completely truthful. However, he thinks she was truthful in later interviews.

42. In her first interview, with the Investigator, Henson told him that an e-mail and a handwritten piece of paper were left on her desk by an unknown person. The "sender" and "receiver" names were blacked out on the e-mail. She denies that Brendan Zahn handed it to her and stated it was marked "confidential" when she found it. She added that while she was on her way to work on that unknown date, that Brendan Zahn called her, informing her that he had found a paper and thought she needed to see it." He also told her that "Mom does not have

access to get this." The witness then added that she does not know if the source of the paper and e-mail was Brendan or someone else.

43. She did emphasize that Brendan never told her that any of this information came from his mother. She does not think that he shared the information with anyone else. She testified that on another date she showed the paper to Joya Anderson, and then shredded the paper.

44. She also told the investigator that her office had gotten a call from staff at the Lexington-South Fresenius facility, where an audit was then ongoing, telling her office that the surveyors were probably coming to survey Lexington-North soon.

45. The witness then stated that she and Brendan knew that the state had already completed its survey of East previously. Since they had been made aware that the surveyors were at the Lexington-South facility, it was easy to assume that the North facility would be next. This witness does not recall any specific dates on the e-mail or calendar, but just reasoned that the week of May 6 would be a good bet for the North survey.

46. Importantly, this witness admitted telling Joya Anderson that she suspected the information had come from Brendan Zahn. She was aware that his mother had no contact with the dialysis units, and did not know that she was a supervisor with knowledge of the upcoming schedules.

47. She again stated that Brendan told her that he did not get the information from his mother and she was under the impression he had found the paper at his house. Of the two papers she saw, the witness does not recall which had the dates and facilities mentioning "the week of May 6." She added that the content of the e-mail was different from that of the handwritten paper she saw. She only saw the name "Kentucky Renal Group" with the dates attached, and does not know if those were the survey dates of that clinic.

48. Henson then admitted that she told some managers previously that the inside information had come from Brendan. She added that Brendan told her, "He takes full responsibility for the information," but again insisted he did not get it from his mother.

49. Again, the witness told Dudinskie that she assumed Brendan got it from his house, although it could have been his car. She confirmed that he told her his mother would not have information like that.

50. Dudinskie then denied that he had suggested to the witnesses what their testimony should be. He confirmed that Brendan Zahn repeatedly denied to him getting any information from his mother and confirmed that the Appellant herself repeatedly denied giving any information to her son.

51. The witness was then asked about the Fresenius facilities. He indicated that initially he did not know how many facilities were under the Fresenius umbrella, but later learned that Fresenius was all one company with multiple businesses operating under them. He also added that he did not know the extent of Appellant's knowledge about the intertwining of all these clinics and facilities under the Fresenius banner.

52. He concluded that during his investigation, he learned that the Appellant did have the authority to delete the "TAGS" on the Statement of Deficiencies. He stated that he also felt that the Appellant had a conflict of interest.

53. On redirect, the witness stated that he further believed that the Appellant was responsible for the leak of information by virtue of the fact that April 11, 2013 e-mail (Appellee's Exhibit 1) came from her e-mail account, because her name was on the very top of the e-mail message. He noted that this e-mail was allegedly initiated by Susan Moberly to others, including the Appellant.

54. The witness concluded by stating that there was no signs of any alcohol or drug abuse by any of the witnesses whom he interviewed.

55. The Appellee's next witness was **Terry Brogan**. At the time of the incidents herein, he was a Staff Advisor for the OIG. His duties included overseeing personnel and budget matters, as well as investigations. He related that the OIG regulates many facilities, including long-term and non-long-term care facilities. Some of these non-long-term care facilities are the dialysis centers involved herein.

56. He testified that an important part of the regulation of these facilities is that the surveyor's visits are to be unannounced. He added that the kidney dialysis facilities have a three-year cycle of surveys, meaning one is done sometime within a three year period. He went on to explain that in doing a survey, the surveyors look for deficiencies, and if found, write-up those deficiencies and then institute a plan of correction. He stated that a deficiency is called a "TAG."

57. He went on to add that part of the Appellant's former duties as an Assistant Regional Program Manager was to train the surveyors and to fill-in when needed for the Regional Program Manager.

58. The witness then elaborated on the dismissal letter of Appellant, stating that she was dismissed because: (1) She leaked information of upcoming surveys which violated the confidentiality provisions of state and federal law; (2) she provided false information to the OIG Investigator; and (3) she violated the Cabinet's conflict of interest policies.

59. After reviewing Dudinskie's report, the witness then made a request for major disciplinary action to the Appointing Authority's office. This witness feels that the Appellant violated Personnel Procedure 2.1, Employee Conduct, II.(1) altering official documents and (7) removing official documents from the workplace without proper authorization.

60. He also felt the Appellant had violated the following provisions of Personnel Procedure 2.1, Employee Conduct, II (10) Ethics, in that the Appellant had created a conflict between personal and public interests; and (16) had given false testimony to Investigator Dudinskie.

61. The witness then testified he also felt the Appellant had violated Cabinet policy 2.10, Privacy and Security of Protected Health, Confidential and Sensitive Information II(16) by disclosing confidential information of upcoming surveys.

62. The witness then introduced Appellee's Exhibit 8, the Cabinet's Conflict of Interest policy. He acknowledged that Appellant had signed the questionnaire indicating that her son did work at Fresenius. The witness then identified Appellee's Exhibit 9, an April 11, 2013 memo to the Appellant from Connie Payne, Director of the Division of Health Care, in which she informed the Appellant that she was determined to have a conflict of interest with respect to "Fresenius-Lexington and Baptist Hospital-Richmond." Asked if the conflict of interest for the Appellant only related to those two facilities, the witness opined that because Fresenius uses their employees by moving them around to all their different facilities from time-to-time that a conflict of interest did exist for the Appellant. The witness then introduced Appellee's Exhibit 11, KRS 216.530, a state statute which provides that inspections of long-term care facilities are to be unannounced. The witness clarified this by stating that a letter from the federal Center for Medicaid Services (CMS) states that the dialysis units are to be considered long-term care facilities for this statute.

63. On cross-examination, the witness was directed to several of the stipulations filed herein, which provide that Fresenius-Grayson is also known by the name Bio-Medical Applications of Kentucky, Inc. and as Fresenius Medical Care Grayson. The stipulations also provide that the "Fresenius-Winchester Road" is known as Renal Care or "FMC-Winchester Road" and by Kentucky Renal Care Group, LLC. The stipulation also provides that the corporation does business as Kentucky Renal Care-Lexington East, or Fresenius Medical Care-Lexington East. Also the stipulations provide that FMC has 63 medical facilities within Kentucky. [Hearing Officer Note: Although at the time of the stipulations, Fresenius had 63 facilities, it must be presumed as of April 2013 they had a very substantial number of different entities operating, although it may or may not have been 63 clinics.]

64. On cross-examination, the witness explained that Appellant had no prior disciplinary actions and has been employed with the Cabinet for approximately twelve years. He stated that to his knowledge, progressive discipline was not employed in the decision to terminate. He further added that he initially determined that because of the leak, the Appellant was the only one who could have provided this information and he determined that she had listed a possible conflict involving her son. He does not know how Investigator Dudinskie proceeded in his investigation.

65. On redirect, the witness testified that no progressive disciplinary action was employed because of the seriousness of the violation in disclosing confidential information.

66. Appellee's next witness was **Susan Moberly**. She is employed by the OIG at the Eastern Enforcement Section in Lexington as a Nurse Consultant Inspector (NCI). During her three-year tenure, she has inspected non-long-term care facilities, such as the dialysis centers mentioned herein. She has been trained inspecting these dialysis units and has done approximately ten surveys within the last year.

67. She confirmed that she authored Appellee's Exhibit 1, the April 11, 2013 memo outlining the dates and facilities to be surveyed. She stated that she probably gave the surveyors under her direction a calendar page outlining dates and facilities prior to this memo.

68. In her opinion, she felt that the Appellant must have known what FMC meant as far as all the facilities operating under its banner. She identified Appellee's Exhibit 3, as being a word document generated by Jan Keeling following a survey at the FMC-Grayson facility. She confirmed that she performed this survey along with Keeling and this document memorializes the findings of that survey.

69. The witness then discussed the "principles of documentation" protocol which is used as guidance in determining how to write-up the deficiencies found. These principles are to include various related policies, relevant documents, and interview results in the write-up.

70. The Appellant is alleged to have deleted three of the four TAGS which were written by Keeling following the Grayson survey. Asked to address whether these TAGs had been properly deleted, the witness stated that of those contained in Appellee's Exhibit 3, the first TAG (p. 1) was okay as far as the substance of it; the second TAG (p. 2) should have shown more information regarding the preventive maintenance required, but was nothing major; the third and fourth TAGs (pp. 3 and 4) were sufficient as to substance, but needed more recommendations.

71. The witness added that the normal procedure is that when TAGs have been deleted by a reviewer, the reviewer usually calls the surveyor to discuss the deficient TAG. However, there is no rule or policy saying that a surveyor must be contacted before a TAG is deleted.

72. On cross examination, the witness agreed that the Appellant had the authority to remove the TAGs and acknowledged that such is often a judgment call on the part of the reviewer. She also confirmed that the "principles of documentation" protocol was within Zahn's expertise.

73. The witness also testified that she herself has helped Keeling with her TAGs before and admitted that she felt that she could write these TAGs better than Keeling. The witness then explained that an SOD is due out to the facilities within ten working days after the survey is completed. She confirmed that March 29, 2013, was Good Friday, meaning that state employees were to receive one-half day off. This also was the day on which these particular SODs were to be sent out. She is not aware of whether the short timeframe on this last day influenced the release of the SODs.

74. Appellee's next witness was **Gae Vanlandingham**. She is employed by the OIG at the Eastern Enforcement Branch in Lexington and at relevant times herein, was an NCI in Quality Review. As such, she would review and revise the SODs submitted by surveyors and would work with the facilities on their plans of correction.

75. She confirmed that March 29, 2013, was Good Friday and a half-day off for employees. She was not at work on that day. She does not recall talking about the FMC Grayson survey with Zahn on that day and denied that she told the Appellant to "delete the TAGs and get out of there" since it was Good Friday. She stated that she would not have ordered the Appellant to delete the TAGs and admitted that deletion of the TAGs was a judgment call for the Appellant to make.

76. She also added that because it was the last day for the deficiencies to be sent, the options were to hold the TAGs, contact the surveyor, or send them out one-day late. She advised that supervisor Andrea Willhite would have to have been contacted if the SODs were to go out late.

77. The Agency's next witness was **Andrea Willhite**. She has been the Assistant Director of the Division of Health Care within the OIG for the previous six months. Prior to that time, she was the Regional Program Manager for three years at the Eastern Enforcement Branch in Lexington. One of her primary duties involved scheduling surveys.

78. She testified that it was not uncommon for the surveyors to give the SODs to the supervisors on the tenth and final day. She urged her reviewers to contact the surveyors before making any deletions, but admitted that the Appellant had the authority to delete TAGS on her own.

79. The witness confirmed that the Appellant was working in the absence of Gae Vanlandingham on Good Friday, March 29, 2013. She was aware that there were SODs due out that day, but does not recall discussing any of those with the Appellant. Neither does she recall asking the Appellant to contact her son for policy questions relating to dialysis, as that would have been a conflict of interest.

80. Regarding the conflict of interest allegation, this witness does not think that the Appellant should have been involved with anything dealing with Fresenius, as she reads Appellee's Exhibit 8 (Conflict of Interest Questionnaire) broadly and thinks it should apply to any Fresenius facility. She also feels that Appellee's Exhibit 9, April 11, 2013 memo from Connie Payne supports her position.

81. On cross-examination, the witness confirmed that she had worked with the Appellant for approximately ten years, both as a surveyor and as the Assistant RPM. She was the Appellant's supervisor in April 2013. She also confirmed the evaluation ratings for 2009 and 2012 entered into evidence earlier.

82. Regarding deletion of TAGs, the witness stated there was no formal policy requiring the reviewers to talk with the surveyors before deleting same. She also noted there is no particular written policy regarding the security of the scheduling memo. She noted that the surveyors could access the scheduling memos through their computers from home, but emphasized they could only access their computers and not the computers of others.

83. The witness then testified that there was a board hung in Gae Vanlandingham's office on which the surveyors' assignments were posted and also where due dates of SODs were listed. The witness admitted that she did not know that Fresenius consisted of multiple sub-corporations and stated she was aware of no requirement for surveyors to dig into the corporate structure of companies to determine conflicts.

84. Regarding the deletion of TAGs from the FMC-Grayson survey, the witness stated that Jan Keeling said, "That was a nursing judgment." She also added that she herself has probably removed TAGs without talking to surveyors first. The witness then testified that most SODs, including those of Keeling, do need corrections after the first draft. She confirmed that any reviewer would use their skills in judging the surveyors skills in writing an SOD.

85. The witness then opined that she believes that any company or sub-corporation affiliated with Fresenius would present a conflict of interest with regard to the Appellant's son and herself. Asked how anyone could know all sixty-three affiliates of Fresenius, the witness indicated that she still thought it was the responsibility of the surveyor or the reviewer to know such a thing.

86. Appellee's next witness was **Jay Klein**. He has been the Appointing Authority for the Cabinet for the past thirteen years and makes the final decisions on any disciplinary actions. He related that upon receiving a request for disciplinary action, the staff reviews the request, and writes up a recommendation which is reviewed by the legal staff and the EEO Branch before coming to him for final decision.

87. He gave as his reasons for deciding upon dismissal: (1) providing confidential information of upcoming surveys to the facility, which he deemed egregious in and of itself; (2) lying to the investigator for the OIG; (3) having a conflict of interest by virtue of her son's employment. He added the first reason would in and of itself be sufficient for dismissal.

88. The witness stated that he had reviewed the OIG Investigative Report and had listened to tapes of some interviews. He explained that the past disciplinary history of the Appellant was irrelevant because of the egregiousness of providing the information. He also explained that he had reviewed one or two evaluations of the Appellant, which showed that she was an outstanding employee.

89. The witness explained that he was convinced that the information leak had originated from the Appellant and he also felt a conflict of interest existed because her son, who worked for Fresenius, could have worked at any of their facilities.

90. On cross-examination, the witness was directed to the dismissal letter. He acknowledged that on p. 1, wherein the Appellant was cited for lack of good behavior, the statute cited [KRS 216.530] refers to a long-term care facility. He admitted that the Grayson Facility was not such a facility. The witness also admitted that regarding the three bases for dismissal listed in the letter, that the first and second were related and, therefore, if there was no advance information given to a facility, there would have been no charge of giving false testimony to the Investigator. He also added that if there had been no advance knowledge given, the only possible disciplinary action given may have been a short suspension for having a conflict of interest.

91. Addressing the conflict of interest allegation, the witness acknowledged that he was not aware that there were possibly sixty-three Fresenius facilities operating, but still thinks the conflict of interest policy would apply to all the corporate names and facilities operating. Even if there were different names, this witness still thinks the conflict would apply.

92. The witness added that he was not familiar with the Bio-Med Applications name or the Kentucky Renal Care LLC name. He then admitted that one could not be responsible for knowing all names associated with Fresenius, but he felt an employee should know of the parent company.

93. Regarding Appellee's Exhibit 9, the determination by Director Connie Payne that a conflict of interest existed for the Appellant, Klein stated that she had the authority to make such a judgment. He did not agree with the Appellant's assertion that the determination in this memo limited the conflict of interest to only the Lexington Fresenius facility. He stated that the Appellant should have more closely checked for conflict because she knew her son worked at various FMC facilities.

94. The Appellee then closed its case in chief.

95. The Appellant's first witness was **Brendan Zahn**. The witness is currently employed at DaVita Dialysis Clinic in Northern Kentucky. Prior to that time, he was employed at the Fresenius East-Lexington facility. There his supervisor was Shannon Henson. The witness explained that he had been terminated in May 2013 after being accused of giving confidential information of upcoming surveys.

96. The witness testified that supervisor Henson worked at both the North and East Lexington facilities of Fresenius. In January 2013, Henson commented to him that the North clinic was due to have a survey. She mentioned that she knew the East clinic was not due for a survey until sometime in 2013, as they had one within the previous three-year cycle. That left only the South and North clinics which might be surveyed by the OIG.

97. The witness testified that in March 2013, staff at the South location informed members at the Fresenius East location that the state inspectors had arrived there. The witness explained that he then left a handwritten note on Henson's desk informing her that the state was at the South location, with the implication being that the North clinic should expect a survey within the next several months. The witness insisted that he did not leave any slip of paper under Henson's door. He also asserts that his mother, the Appellant, never saw this handwritten note until it was shown to her by her attorney. He added that, according to his knowledge, it was never shown to her by Investigator Dudinskie.

98. The witness then testified that several days after he left this note for Henson, she asked him if his mother knew when the state was coming to the South clinic. He stated that later that same day, his mother told him she did not know and she could not provide it if she did know. He also added that he had no conversation with Shannon Henson about whether she should shred the documents which she had in her possession.

99. The witness then described three interviews which he had with Investigator Dudinskie. He stated during the first one, Dudinskie told him that manager Henson had stated that everything indicated that he had tipped off the clinic about the upcoming inspection. After this interview, the witness saw Brandi Culver and told her Dudinskie had said that someone anonymously reported the information that had been leaked.

100. He adamantly denied telling Culver that his mom had said, "oops" and showed him the paper indicating the upcoming survey dates. During his second interview with Dudinskie, the witness stated that he was asked if an e-mail had been involved stating the dates of inspection, to which he answered, "no." During his third interview with Dudinskie, the Investigator told the witness that he had found an e-mail with the pertinent dates and then accused him of having received this information from his mother, which he denied.

101. When he later contacted Henson to inquire if his nursing license might be an issue, he found that she had also been terminated.

102. **Personnel Board Note**: The remainder of Brendan Zahn's testimony was taken under seal beginning at 10:16 a.m. Brandi Culver was recalled to the stand and also testified under seal. This testimony concluded at 11:44 a.m. The Personnel Board shall provide a brief summary of this testimony necessary for the determination of this case.

103. Brendan Zahn testified that Brandi Culver was under the influence of prescription drugs when he spoke with her following his first interview with Dudinskie. He testified she seemed jittery and distracted.

104. Brendan Zahn denied ever giving Shannon Henson the April 11, 2013 e-mail detailing the upcoming dates and facilities to be surveyed. He also denies that he told her to shred any papers. He also denies telling Culver to not testify or to "take the fifth."

105. **Brandi Culver** adamantly maintains she is sure that Brendan Zahn conveyed to her he had received the paper with the survey dates on it from his mother. [**Personnel Board Note:** This is the end of summary of the sealed testimony.]

106. Appellant, **Brenda Zahn**, was the next witness. At the time of her termination, she was employed by the OIG in the Eastern Enforcement Branch in Lexington. She had held the position of Assistant Regional Program Manager for ten years and has been employed with the state for twelve years.

107. Her duties included covering in the absence of the Regional Program Manager (RPM) and also she is involved in scheduling, supervising, training and does quality reviews of facilities. As part of her job, she also reviews the SODs submitted by the surveyors. Her supervisor at the time of termination was Andrea Willhite.

108. Appellant confirmed that the SODs must go out within ten days after the exit interviews at the facilities. She has no previous disciplinary actions and submitted two year-end evaluations. Appellant's Exhibit 3 was her 2009 evaluation which gave her an "outstanding" rating and Appellant's Exhibit 4 was her 2012 evaluation, which gave her a rating of "highly effective."

109. The witness testified that on May 8, 2013, she was first informed by her son, Brendan, that there had been a possible leak of information concerning upcoming surveys. He informed her that an Investigator told him that the leak had come through him and he had been given the information by her. Appellant then told her supervisor, Willhite, of what she had been told. Later that same afternoon, Willhite advised Appellant an investigation of her would occur and she was escorted out of the building.

110. The witness then stated that a schedule of upcoming surveys in facilities was considered confidential information. She was very aware that those surveys were to be unannounced and was also aware that a breach of the confidentiality could lead to termination or to criminal prosecution.

111. The witness then went on to say that sometime in March 2013, her son had called her saying that his supervisor, Shannon Henson, wanted to know if the state was going to be coming to the North facility which she (Henson) supervised. She informed her son at that time that Henson should know better than to ask for that kind of information.

112. The Appellant then adamantly denied taking any papers home with her which contained upcoming survey dates, and further denied ever giving her son any dates when the FMS facilities would be surveyed. She stated that she would have had nothing to gain and everything to lose by disclosing such information.

113. Regarding the April 11, 2013 e-mail containing upcoming dates, the witness maintained that she first saw this when Investigator Dudinskie questioned her and she denied that it had come from her and denied giving it to Fresenius. She noted that the e-mail was authored by Susan Moberly and admitted that it may have come at some point to her computer.

114. The witness described the offices where she worked as not having locks to the individual doors. She claims it is a mystery to her as to how her name appears on the April 11 e-mail. She surmises that someone could have come into her office after she left on April 11; however, this e-mail was never found on her hard drive by Dudinskie.

115. The witness also noted that typically, when something is printed from her computer or forwarded to others that her name does appear on the top. She also added that the April 11, 2013 e-mail was found in a red binder stored in Andrea Willhite's office.

116. The witness then addressed the conflict of interest allegations. She noted that on Appellee's Exhibit 8, Conflict of Interest Questionnaire, she had disclosed that her son was employed at a specific Fresenius facility in Lexington. As to Appellee's Exhibit 9, she noted that the April 11, 2013 memo to her from Connie Payne, Director of the Health Care Division, determined that she only had a conflict of interest with respect to Fresenius-Lexington and Baptist Hospital-Richmond. No mention was made of any other Fresenius facilities.

117. The Appellant then addressed the office situation on March 29, 2013, a Good Friday holiday. The state employees had half of that day off. She noted that coworker Gae Vanlandingham was off that day and Appellant had to cover her job, which included reviewing certain surveys done previously. She stated that four SODs were due out that day, with one of them being the FMC-Grayson survey.

118. The witness stated that there is some system called the Aspen Central Office System which is used to keep track of surveys and dates SODs are to go out. Appellant testified that she checked with the system before dealing with the FMC-Grayson review and found there was no SOD in the system. She then called Susan Moberly and was informed the survey on that facility was due out on March 29. The SOD for that facility was listed as FMC-Grayson and not as a Fresenius facility. The Appellant then expanded upon the "Principles of Documentation." She stated that the write-ups after the surveys must show evidence of non-compliance. These are to be based upon observation, details, and are to contain a plan to correct any problems found. She added that the SODs in question, done by Jan Keeling, did not follow the "Principles of Documentation." She stated that Keeling was not well versed in these principles and noted that she, as the reviewer, had the authority to delete the SODs. She also noted that Investigator Dudinskie did not have the expertise to disagree with her as to why she deleted the SODs.

119. The witness concluded regarding the conflict of interest allegation by saying that she later found out after filling out the questionnaire, that Fresenius had approximately sixty-three clinics or facilities operating under its banner.

120. On cross-examination, the witness confirmed that she was aware of the conflict of interest policies and was also aware that an interviewee should not be giving false information to OIG Investigators.

121. **Terry Brogan** was then called as a rebuttal witness by the Agency. He admitted that the April 11, 2013 e-mail with the dates did not appear on the Appellant's hardware. He does not know with certainty if she received this and also confirmed that the OIG investigation did not find it in her office. Rather, it was found in Willhite's red binder and then apparently sent on to Fresenius by someone.

122. Brogan further testified that the document admittedly shredded by Henson was not the same one found by the OIG because that one had handwriting at the bottom. Henson further informed him that this was not the same document she had originally received.

123. He also testified that Willhite informed him that the handwriting on the bottom was hers and noted that Moberly had authenticated the April 11, 2013 e-mail. To summarize, the original document showing the dates was shredded and not available to anyone.

FINDINGS OF FACT

1. The Office of Inspector General (OIG) for the Cabinet for Health and Family Services conducts inspections of certain medical facilities, including dialysis centers. The date of the inspection is not to be known by the facility as they are supposed to be surprise inspections to see that the facilities are operating properly under Cabinet guidelines. OIG employees are required to keep the date of these inspections confidential and not to release any information to the facilities.

2. On April 11, 2013, OIG Nurse Consultant Inspector, Susan Moberly, sent an e-mail to various OIG employees with the names, dates and surveyors responsible for upcoming inspections. [Appellee's Exhibit 1.] The recipients of the e-mail included the Appellant, Brenda Zahn, who was employed as an Assistant Regional Program Manager for the OIG. The e-mail stated that the Fresenius-Lexington North facility would be inspected the week of May 6, 2013. According to Cabinet policy and OIG practice, these schedules were to remain unannounced to the facilities and kept strictly confidential.

3. In April 2013, Brendan Zahn, who was employed as a Registered Nurse at the Fresenius-East Lexington facility, left two documents for Shannon Henson in her office. Ms. Henson was Brendan Zahn's supervisor and was employed as a Clinical Manager at Fresenius-East and Fresenius-North. One document was a copy of the e-mail from Susan Moberly identified as Appellee's Exhibit 1. The other document was handwritten with information about scheduled inspections by OIG.

4. Shannon Henson shared the information she learned about the upcoming inspections. She spoke with Gregg Hardesty, the Operations Manager, for Lexington area Fresenius. She told him when OIG would inspect the Fresenius location in Winchester, as well as the Lexington-North facility. She also showed Hardesty one of the papers she had received regarding these inspection dates. Ms. Henson also shared this information with Joya Anderson, FMCs Director of Operations. This included information that OIG would be inspecting Fresenius-North the week of May 6, 2013. Both Hardesty and Anderson described seeing a handwritten document from Henson. Henson also shared information with Paula Elliott, a

Nephrology Nurse Practitioner, that she knew when Lexington-North would be inspected and that she "had her sources."

5. On May 1, 2013, Jan Keeling, a Nurse Consultant Inspector for the OIG, received a text message from her sister, Carol Blair, who worked for Dialysis Clinic, Inc. In the text message, Blair told Keeling that she had reliable information that someone on the inside for the state was giving Fresenius a "heads-up" they were going to inspect the Lexington-North facility the following week. Ms. Keeling notified her supervisor, Andrea Willhite, who notified OIG Division Director Connie Payne. Thereafter, the OIG initiated an internal investigation which was conducted by John Dudinskie.

6. Mr. Dudinskie's investigation included multiple interviews with Shannon Henson. Ms. Henson revealed that she learned in advance of the OIG inspection through Brendan Zahn. Mr. Zahn had left two pieces of paper in her office regarding this inspection. One she later identified as an April 11 e-mail which Mr. Dudinskie showed her. (Appellee's Exhibit 1.) Ms. Henson acknowledged that this was a copy of the e-mail she had seen, although the copy she was given by Brendan Zahn she shredded. Henson described the e-mail to Dudinskie and identified it after he obtained a copy. The copy of Appellee's Exhibit 1, which Dudinskie found during his investigation, was marked as Appellee's Exhibit 1. This document was found in a binder in Andrea Willhite's office. The e-mail contained Brenda Zahn's name at the top indicating that it had been printed off the Appellant's computer.

7. Dudinskie also interviewed Brendan Zahn on multiple occasions. Mr. Zahn denied that he had inside information regarding the inspection of the Lexington-North facility. He denied that he told Ms. Henson when the inspection would be or that he obtained any information from his mother. He did admit to giving a handwritten document to Shannon Henson predicting that the Lexington-North inspection was coming up soon. He stated he based this information on the fact that OIG had recently inspected Lexington-South facility and the Lexington-North was due for an inspection. The Lexington-East facility where Brendan Zahn worked had been inspected in a previous year and was not due for a current year inspection.

8. Brendan Zahn told Brandi Culver, a coworker at FMC Lexington-East that he had gone home and observed a piece of paper on the table containing dates of upcoming inspections. He took this paper with the survey dates and gave it to Shannon Henson. Brendan Zahn told Ms. Culver that he had spoken with OIG Investigator John Dudinskie about this matter. Mr. Zahn told Culver she did not have to talk to the OIG and advised her that if she was called as a witness before the Personnel Board, she could "take the fifth."

9. Brendan Zahn claimed that Brandi Culver was under the influence of drugs and distracted at work when he spoke with her regarding Investigator Dudinskie.

10. The Appellant, Brenda Zahn, denied giving her son any information about upcoming surveys of Fresenius facilities. She denied taking any papers home with inspection dates and denied giving her son any such information. She did not remember the e-mail marked as Appellee's Exhibit 1, however, she stated it may have come from her computer.

11. The Personnel Board finds that Brendan Zahn leaked information of upcoming inspections to Shannon Henson while they were both employed at Fresenius.

12. The Board finds credible the testimony of Shannon Henson, Brandi Culver, Gregg Hardesty, Joya Anderson, and Paula Elliott. These witnesses provided testimony establishing that staff at Fresenius were aware in advance of the date of the inspection of the Fresenius-North facility. Henson and Culver provided credible testimony that this information came from Brenda Zahn. Witnesses from Fresenius who testified regarding this matter, put their careers and reputations at risk by providing this information. For this reason, the Board finds their testimony credible.

13. The Board does not believe Brendan Zahn's denial that he provided this information. The Board finds Brendan Zahn's testimony self-serving and clearly designed to protect his mother from losing her job. The Board finds Brendan Zahn's allegation that Brandi Culver was on drugs and misunderstood his statements following his interview with John Dudinskie desperate and not worthy of belief.

14. The Board finds, based on a preponderance of the evidence, that Brendan Zahn obtained the information from the Appellant regarding the upcoming inspection of Fresenius-North. Clearly the Appellant had access to the information and by her testimony she knew that her son's supervisor was anxious to obtain this information in advance of the inspection. No other plausible explanation was given as to the source of this information. Lastly the Board finds that the Appellant provided this information based on Brendan Zahn's testimony. Clearly Brendan Zahn was the source of the information. The Board finds that had Brendan Zahn obtained this information from anyone other than the Appellant, he would have so stated to save his mother's job.

15. The Board finds that the Appellant's actions in revealing to her son the dates of the upcoming inspection constitutes misconduct pursuant to 101 KAR 1:345 and violates CHFS Personnel Procedures 2.1, Employee Conduct, and 2.10, Privacy and Security of Protected Health Confidential and Sensitive Information. The Personnel Board further finds that based on all of the testimony of record, including that of the Appointing Authority, Jay Klein, this offense in and of itself constituted just cause for the Appellant's dismissal. The Board further finds that dismissal under these circumstances was neither excessive nor erroneous.

16. The Board also finds that the Appellant violated Cabinet policy and committed misconduct when she lied to Inspector Dudinskie during the OIG investigation.

17. The Board does not find that the Appellee proved the conflict of interest charge and agrees with the Hearing Officer's findings regarding this issue. **These Findings are restated and renumbered (paragraphs 18, 19, and 20) as a part of this order.**

18. Regarding the conflict of interest charge, the Hearing Officer finds that in the spring of 2013, there were many multiple facilities operating under the Fresenius banner. Not all of these facilities were easily identified as being run by Fresenius. There were perhaps as many as 63 such facilities.

19. Although Cabinet witnesses Terry Brogan, Andrea Willhite, and Susan Moberly opined they felt the Appellant should have been aware of a conflict between her son's employment with Fresenius, the Hearing Officer finds that, under the circumstances herein, it is totally unreasonable to have expected a Cabinet surveyor to have been aware of all such facilities operating under the Fresenius banner. The Hearing Officer further notes that Appellee's Exhibit 9, an April 11, 2013 memo to the Appellant from Connie Payne, Director of the Division of Health Care, informed the Appellant that she was determined to have a conflict of interest with respect to "Fresenius-Lexington and Baptist Hospital-Richmond." Clearly, the Appellant was put on notice as to a conflict existing there and this finding was the result of her having previously answered a conflict of interest questionnaire in which she noted her son was employed there. The Hearing Officer finds there was no conflict of interest under the circumstances.

20. Regarding deletion of certain TAGS in a Statement of Deficiencies prepared by Jan Keeling, the Hearing Officer finds that not only did the Appellant possess the expertise to do so, but she also possessed the authority and discretion to do so. Certainly Dudinskie was in no position to make such a determination. Both Keeling and Gae Vanlandingham, as well as Susan Moberly, admitted the decision to delete TAGS was a nursing judgment within the Appellant's authority.

21. The Board finds just cause for the Appellant's dismissal despite the fact that she had twelve years of employment for the Appellee without any past disciplinary actions. Nonetheless, because of the seriousness of her misconduct, dismissal is the appropriate action in this case.

CONCLUSIONS OF LAW

1. Based on the Findings of Fact, the Board concludes that the Appellee proved by a preponderance of the evidence that the Appellant committed misconduct pursuant to 101 KAR 1:345 and there was just cause for her dismissal based on the fact that she revealed confidential information of upcoming inspections to her son and ultimately to Fresenius-North, the target of the investigation.

2. The Appellee proved by a preponderance of the evidence additional misconduct in that the Appellant lied to Investigator John Dudinskie during the OIG investigation. This action also constitutes misconduct pursuant to 101 KAR 1:345 and contributes to a finding that there was just cause for the Appellant's dismissal. The Board finds just cause for the Appellant's dismissal pursuant to KRS 18A.095(1) and finds that her dismissal was neither excessive nor erroneous as described at KRS 18A.095(22)(c).

3. The Board concludes that the charge of conflict of interest was not proven and thus did not play a role in the determination of just cause for the Appellant's dismissal.

4. The Board concludes that the Cabinet's reliance on KRS 11A.020, Executive Branch Code of Ethics, in the dismissal letter was misplaced as only the Executive Branch Ethics Commission has the authority to determine a violation of KRS Chapter 11A. *Terry Farmer vs. Transportation Cabinet* (No. 2012-CA-001505-MR). Thus the allegations that the Appellant violated this statute played no role in the Board's determination of just cause for the Appellant's dismissal.

ORDER

IT IS HEREBY ORDERED that the appeal of **BRENDA ZAHN VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2013-219)** is **DISMISSED.**

IT IS FURTHER ORDERED that the testimony of Brendan Zahn and Brandi Culver taken on February 24, 2014, from 10:16 a.m. to 11:44 a.m. shall remain under seal. Because the Hearing Officer's Findings of Fact, Conclusions of Law, and Recommended Order contain a lengthy detailed summary of this testimony, the Personnel Board **ORDERS** that only the Board's Final Order shall be available on Westlaw and the Personnel Board's Website. The Board makes this determination because the Hearing Officer's Findings of Fact, Conclusions of Law, and Recommended Order contain information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy and thus is protected from being made public pursuant to KRS 61.878(1)(a).

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 12th day of August, 2014.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Jennifer Wolsing
Hon. Robert Bullock
J.P. Hamm

APPELLEE'S EXHIBIT 5

CABINET FOR HEALTH AND FAMILY SERVICES
OFFICE OF HUMAN RESOURCE MANAGEMENT

Steven L. Beshear
Governor

275 East Main Street, 5C-D
Frankfort, KY 40621
502-564-7770
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www.chfs.ky.gov

Audrey Tayse Haynes
Secretary

August 30, 2013

Brenda K. Zahn

Re: Return from Administrative Leave and Dismissal

Dear Ms. Zahn:

After considering your statements presented at the pre-termination hearing held on August 13, 2013, I have not found sufficient reason to rescind the intent to dismiss dated July 30, 2013.

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 Human Services Surveyor Supervisor, in the Office of Inspector General.

Further, on July 31, 2013, in accordance with the authority of KRS 18A.095 (2)(c), the Appointing Authority placed you on administrative leave until the Cabinet for Health and Family Services' final action. As your dismissal is effective August 31, 2013, your administrative leave is hereby concluded.

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

Lack of Good Behavior and Unsatisfactory Performance of Duties. As reported by Inspector General Mary Begley, you failed to secure confidential Cabinet information and inappropriately, unprofessionally, and intentionally provided, or made available, an email schedule of surveys for the purpose of providing advance notification to Fresenius Medical Care facilities (hereafter FMC) of an upcoming Cabinet for Health and Family Services Office of Inspector General (OIG) survey in violation of KRS 216.530 which reads as follows:

> (1) All inspections of long-term care facilities performed by the cabinet shall be unannounced. All inspections of long-term care facilities shall be conducted in accordance with the rules and regulations promulgated by the cabinet in accordance with KRS Chapter 13A setting forth the parameters of such inspections. Except for complaint investigations, inspections shall be performed no later than seven (7) to fifteen (15) months after the previous inspection.
>
> (2) A person having knowledge of or conducting inspections of long-term care facilities shall not, with intent to violate subsection (1) of this section, notify or cause notice to be made to an owner, operator, licensee, or representative of a licensee of any scheduled or contemplated inspection. A violation of this subsection by a state employee shall be cause for dismissal under KRS Chapter 18A.

On April 11, 2013, OIG Nurse Consultant/Inspector (NCI) Susan Moberly submitted an upcoming survey schedule via email that included facility names, dates, and the surveyors responsible for completing the inspections of the noted facilities. Ms. Moberly's email was sent to you, OIG Assistant Director Melanie Poynter, OIG Assistant Director Andrea Willhite, OIG Human Services Surveyor Supervisor Kim (Kimberly) Hawkins, and cc'd to OIG NCI Jan Keeling. Pursuant to KRS 216.530, the CHFS Employee Privacy and Security of Protected Health, Confidential, and Sensitive Information Agreement (which you most recently signed on January 25, 2013), and as a recognized practice in OIG, these schedules are to remain unannounced to the target facilities and are strictly confidential.

On May 1, 2013, NCI Keeling received a text message from her sister, Carol Blair, an employee of Dialysis Clinic Incorporated that stated, "Hey Sis. I got reliable information that someone from the inside of the State Surveyors is giving Fresenius [FMC] a heads up on when you all are coming. Like you all are supposed to be going to Leestown next week and they are getting things ready and some things falsely. That is serious business."

On the evening of May 1, 2013, Ms. Keeling telephoned her supervisor, Ms. Willhite, to report the allegation of advance notification of a scheduled survey. On May 2, 2013, Ms. Willhite notified OIG Division Director Connie Payne of the allegation and OIG initiated an internal investigation.

On May 8, 2013, FMC Facility Manager Shannon Henson stated at her interview that she received an email (which was left on her desk in her office) and that "If I suspected it (the email) came from anyone, it came from Brendan [your son Brendan Zahn", who resided with you and is an employee of FMC. On May 14, 2013, Ms. Henson confirmed that Mr. Zahn told her that he had left a note on her desk for her. When asked specifically if the information appeared to be a schedule of OIG surveys, Ms. Henson responded, "Yes." When asked again if she knew the information came from Brendan, she responded, "Yes, I knew it came from Brendan." Ms. Henson also admitted that Brendan said to her that, "he just found it at his house." When questioned as to the content of the email, she responded, "It had auditor's names in it that's all I know." Ms. Henson viewed a copy of the email Ms. Moberly had sent on April 11, 2013 which had the survey schedule on it and stated, "Yes, that's it"; thus, confirming the email was the email Mr. Zahn had left on her desk.

On May 21, 2013, Brandy Culver, an employee at FMC stated that Mr. Zahn stated that his mother arrived at their home carrying documents related to upcoming OIG surveys, including FMC locations. Ms. Culver stated Mr. Zahn stated that you had acted like you had dropped the information by mistake in front of Mr. Zahn and said, "oops", thus permitting Mr. Zahn access to the confidential information contained within the subject April 11, 2013 email.

Your actions violate CFR 42 – Public Health Section 488.307, Unannounced Surveys; KRS 216.530, Inspections of long-term care facilities to be unannounced – Frequency – Prohibition of prior notice of inspection; KRS 11A.020, Executive Branch Code of Ethics; the CHFS-219, *Employee Privacy and Security of Protected Health, Confidential and Sensitive Information Agreement* you signed as having read and understood on January 25, 2013 and February 6, 2012; and the CHFS Personnel Procedures 2.1, Employee Conduct, and 2.10, Privacy and Security of Protected Health, Confidential and Sensitive Information. Further, your actions constitute lack of good behavior and unsatisfactory performance of duties for which you may be disciplined pursuant to 101 KAR 1:345, Section 1.

Lack of Good Behavior and Unsatisfactory Performance of Duties. As reported by Inspector General Mary Begley, you intentionally provided false testimony to an OIG investigator.

On May 31, 2013, OIG investigator John Dudinskie conducted an interview with you. Mr. Dudinskie presented a copy of the email that was verified by Ms. Henson at FMC as the email she had received showing the OIG survey schedule. Mr. Dudinskie asked you how your son (Brendan

Zahn) could have gotten the email to which you falsely responded, "He couldn't have gotten it." Mr. Dudinskie asked you if you gave it to your son (Brendan Zahn) and you falsely responded, "No." Mr. Dudinskie also asked you if you took it home to which you falsely responded, "No, I keep my schedules in my top right hand drawer." Of note, on May 14, 2013, Mr. Dudinskie and OIG Human Services Surveyor Supervisor Kim Hawkins searched your work space including the top right hand drawer of your desk and found no copies of any survey schedules.

Your actions violate KRS 11A.020, Executive Branch Code of Ethics; the CHFS Personnel Procedure 2.1, Employee Conduct; and the CHFS OIG Admonition of Rights which you signed as having read and understood on May 9, 2013, and May 31, 2013. Further, your actions constitute lack of good behavior and unsatisfactory performance of duties for which you may be disciplined pursuant to 101 KAR 1:345, Section 1.

Lack of Good Behavior and Unsatisfactory Performance of Duties. As reported by Inspector General Mary Begley, you inappropriately involved yourself in official survey processes and procedures concerning a facility where you had a direct conflict of interest and redacted violations from official documents in an attempt to influence the survey process.

On January 25, 2013, you signed and dated an Office of Inspector General (OIG) Conflict of Interest Questionnaire, which is incorporated into OIG Policy Number OIG-004, Conflict of Interest Policy. The Conflict of Interest Policy states, "The purpose of this policy is to ensure each division within OIG maintains appropriate, accurate, and current information regarding possible employee conflicts of interest with health care facilities, providers and child care and child placing agencies."

Question two of this document specifically asks, "Is any member of your immediate family employed, or has any member of your immediate family been employed, full or part-time, within the last 2 years, in a health or child care facility, pharmacy or service to be surveyed? This includes employment as agency staff, corporate officer, consultant, or other type of agent for the facility. (Immediate family includes: spouse, significant other, parent, child, sibling, step-parent, step-child, step-brother, step-sister, father-in-law, mother-in-law, son-in-law, daughter-in-law, grandparent or grandchild.)" You responded to this question by checking the answer, "Yes". You further provided information listing Fresenius – Lexington, as a facility where your son (Brendan Zahn) was employed as a Registered Nurse (RN) and Baptist Hospital in Richmond where your sister is employed as an RN.

On March 15, 2013, Nurse Consultant/Inspector (NCI) Jan Keeling, a subordinate surveyor in the Eastern Enforcement Branch, completed an official survey of the Fresenius Medical Care Facility (FMC) at 286 State Highway 1947 in Grayson, Kentucky. Ms. Keeling would typically submit her surveys to NCI Gae Vanlandingham for review and approval. However, in this instance, Ms. Vanlandingham was unavailable and Ms. Keeling submitted a Statement of Deficiencies (SOD) to you, as the designee for Ms. Vanlandingham, regarding her survey and those deficiencies were noted as follows:

1. Based on observation, interview, and the facilities policy it was determined the facility failed to ensure a clean and sanitary environment. The storage room and technical room had supplies stored on the floor.

2. Based on observation, interview, and the facilities policy it was determined the facility failed to ensure preventive maintenance was performed per facility policy and manufacturer's recommendation on the Solution Delivery System (SDS), Heating Air Conditioning (HVAC), and exits [sic] lights.

3. Based on observation, record review, and the facilities policy it was determined the facility failed to adjust the estimated dry weight for one of nine sample patients. Patient #1's post treatment weight was one (1) to two (2) kilograms (kg) under his/her dry weight and the Physician had not been notified for a new estimated dry weight (EDW).

4. Based on observation, interview, and manufacturer's recommendation's [sic] it was determined the facility failed to ensure dialysate concentration for patient use was stored in accordance with manufacturer's recommendations. Two barrels of dialysate concentrate were observed to be not tightly closed on 03/15/13.

During your review, you inappropriately amended the survey to reflect that, of the four SOD's originally identified by Ms. Keeling, only one was appropriate and you deleted the first three SOD's. The remaining SOD (#4) noted that the FMC Grayson facility violated KRS 494.40(a), ACID BULK STORAGE TANKS – SAFETY CONTROLS, and that the facility failed to ensure proper storage of the acid concentrate according to manufacturer's recommendations.

On March 29, 2013, you, on behalf of Assistant Director Andrea Willhite, inappropriately submitted letters to the FMC Grayson facility detailing only the single deficiency and included instruction for a plan of correction of such deficiency.

Ms. Willhite confirmed that all four originally noted deficiencies were appropriate and that the deficiencies should not have been removed.

Your actions of involving yourself in a survey for a company for which your son worked violate the KRS 11A.020, Executive Branch Code of Ethics; the OIG Policy OIG-004, Conflict of Interest, and the CHFS Personnel Procedure 2.1, Employee Conduct. Further, your actions constitute lack of good behavior and unsatisfactory performance of duties for which you may be disciplined pursuant to 101 KAR 1:345, Section 1.

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:gil

Attachments

cc: Secretary Tim Longmeyer, Personnel Cabinet
Executive Director Mark Sipek, Personnel Board
Inspector General Mary Begley, OIG
Cabinet Personnel File
Honorable Robert Bullock