COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-082

ELLENORE CALLAN **APPELLANT**

VS.

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

CABINET FOR HEALTH AND FAMILY SERVICES **APPELLEE**

** ** ** ** **

The Board at its regular April 2016 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated January 28, 2016, having noted Appellee's exceptions, Appellant's response to exceptions 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 number 8 and substitute the following:

8. The Board finds Appellant presented insufficient evidence so as to allow a finding supporting the Appellant's claim of retaliation as it regards the issuance of the two written reprimands.

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

IT IS HEREBY ORDERED that the appeal of **ELLENORE CALLAN V. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2015-082)** is **SUSTAINED to the extent** that the 2014 year-end evaluation be removed from Appellant's personnel files and any supporting documentation likewise be removed from her personnel files, and for Appellant

to receive any and all other relief which may be appropriate. If the written reprimands, and any responses thereto are otherwise in Appellant's personnel file, they may remain. The Board orders Appellee shall reimburse the Appellant for any leave time she used attending the evidentiary hearing and any pre-hearing conferences at the Personnel Board pursuant to KRS 18A.095(25), and to otherwise make Appellant whole. The Board specifically finds that the written reprimands should remain in Appellant's personnel files. KRS 18A.105 and 200 KAR 12:030.

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer, as Altered, be, and they hereby are, approved, adopted and incorporated herein by reference as a part of this Order and the Appellant's 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 20th day of April, 2016.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK, SECRETARY

A copy hereof this day mailed to:

Hon. Kathleen Hines
Hon. Michael Callan
Jay Klein

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-082

ELLENORE CALLAN **APPELLANT**

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

CABINET FOR HEALTH AND FAMILY SERVICES **APPELLEE**

** ** ** ** **

This matter came on for an evidentiary hearing on November 2 and 4, 2015, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. R. Hanson Williams, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Ellenore Callan, was present at the evidentiary hearing and was represented by Hon. Michael Callan. The Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Kathleen Hines. Also present was agency representative Earl Gresham.

This matter involves the year-end evaluation given the Appellant for 2014. Appellant is appealing two written reprimands, which are intertwined with the evaluation score given to the Appellant. Although written reprimands are not normally appealable [KRS 18A.020(2)(c)], this matter was allowed to proceed to hearing because the Appellant has alleged retaliation in the giving of these reprimands, which were an integral part of producing her year-end evaluation score of 218 (needs improvement).

The burden of proof to show that the 2014 calendar year evaluation score was appropriate and proper was placed upon the Appellee by a preponderance of the evidence. The burden of proof as to any claims of retaliation related to the issuance of the written reprimands was placed upon the Appellant by a preponderance of the evidence.

BACKGROUND

1. The agency's first witness was **Gregg Stratton**. He has been employed with the agency for approximately two and a half years. He has been the Branch Manager over a branch within the Department of Medicaid Services from April 2014 until present.

2. He described his duties as overseeing the Medicaid programs and managing a staff of 10, when fully staffed. He was the Appellant's supervisor. He testified that Appellant

was a Nurse Consultant Inspector (NCI), who was in charge of the Home Health and Hospice Model II Waiver programs.

3. The witness introduced Appellee's Exhibits 1 through 6. Appellee's Exhibit 1 is the year-end evaluation of the Appellant, said evaluation ending November 30, 2014. The other exhibits were the first interim evaluation, dated May 23, 2014; the second interim evaluation, dated September 6, 2014; and the third interim evaluation dated January 30, 2015. This third evaluation covered the evaluation period from September through November 30, 2014. In addition, Appellee's Exhibit 5 was the December 5, 2014, written reprimand and Appellee's Exhibit 6 was the October 31, 2014, written reprimand, both given to the Appellant.

4. The annual performance evaluation is graded on a performance planning document which lists various duties and expectations, which are expected of the employee. For purposes of this appeal, the ratings are given on a score ranking from 1 through 5. For purposes of this appeal, only those scores less than 3 were examined.

5. Under the duty of monitoring the QIO survey/audits of the Home Health, Clinical monitor of the Home Health, Model Waiver II and Hospice programs and providers, the Appellant was expected to perform second-line monitoring of 10% of the Home Health surveyed agencies. The witness testified that the Appellant's auditing duties were actually performed as a second-line monitor of the first-line nurses who performed these survey/audits. He testified he gave her a score of 2, because when she left the program on November 30, 2014, she had left a high percentage of packets uncompleted. Furthermore, he assessed that she had performed no site visits in 2014.

6. The second duty involved herein was for the Appellant to respond to QIO field nurse surveyors and providers related to the on-site surveys/audits. The witness gave her a score of 1 on this duty, as he felt, again, that she had left a great deal of work uncompleted on her departure date. He had expected that at least 11 out of 12 packets would have been completed by that date.

7. Under the duty of "Other duties as assigned by management" the witness rated the Appellant a 2. The witness explained that he felt that when the Appellant was asked to do certain things, he felt she had refused to follow-through because she did not feel it was part of her duties. He cited, as examples, August 18 and 19, 2014 emails to the Appellant and her response that date to him. Apparently these emails involved an attendant care issue which the witness asked Appellant to look into and respond. Her response was that this was an issue for another department, as they had the information and she did not. The witness considered this response to be a refusal to follow-up with the case.

8. Stratton next testified as to the duties involving dependability and responsibility. He gave her a rating of 2 in this category, stating that she was far behind on her work. The Appellant was also given scores less than 3 in the categories of "Shows Initiative", "Communication", "Teamwork", "Employee Conduct", and "Attendance." No testimony was given to explain or support these scores.

9. The witness next testified about the 1st Interim Evaluation, covering the period from January 1, 2014, through April 30, 2014. In summary, this evaluation was largely complimentary toward the Appellant, with the only other pertinent comment being she was not current on the 10% monitoring threshold, which was attributed to the amount of other duties she has been assigned.

10. The 2nd Interim Evaluation covered the period from May 1, 2014, through August 31, 2014. Important items noted here were the failure to perform any home visits and not always appearing to take ownership in the programs she coordinates. However, it is also noted that she maintains her databases and completes other duties as assigned or requested. Other duties and expectations were performed competently.

11. The 3rd Interim Evaluation covered the period from September 1, 2014, through November 30, 2014. This evaluation was completed by Stratton on January 30, 2015. Pertinent notations of this period included the Appellant being behind on many of the review packets and not providing any site visits during the year. Additionally, she was cited for not always appearing to take ownership in the programs she coordinates, and for having two occurrences of "no call/no show." In addition, reprimands of October 31, 2014, and December 5, 2014, were cited as being a part of this interim evaluation.

12. The Appellant's Written Reprimand of December 5, 2014, was issued for insubordination resulting in unauthorized leave without pay. The reprimand was given because the Appellant did not appear for work on Monday, November 10, 2014, or Monday, November 17, 2014. Normally this was a flex day which she took off. However, the reprimand was given because of the feeling that the Appellant had disregarded an agency directive that all flextime be suspended for the month of November.

13. Appellant's second Written Reprimand was given for inappropriate, disrespectful and unprofessional language and conduct and insubordination. The first incident apparently occurred during a meeting between the Appellant and Stratton, in which he felt she had threatened him by telling she could "throw me under the bus" for the 2nd Interim Evaluation. Another incident apparently occurred on October 14, 2014, during a meeting with Stratton, the Appellant, and Assistant Director Earl Gresham. The witness maintains Appellant remained argumentative and demanded that Mr. Gresham quit staring at her. Also, after the meeting concluded, this witness recounted a conversation between he and the Appellant in which she supposedly said, "What's going on here? What the f--- is going on? Are you all playing good cop, bad cop?"

14. Finally, the witness concluded by saying the year-end evaluation score he gave the Appellant was 218, and that it stayed the same after request for reconsideration.

15. On cross-examination, Stratton identified Appellant's Exhibit 2, the 2013 year-end evaluation. Appellant received a score of 451(Outstanding) on this. The evaluator was Earl Gresham and the second-line evaluator was former Director Karen Martin.

16. Referring to the first two interim evaluations for 2015, the witness admitted these were largely positive. He went on to add that he believes that the Appellant probably did ask for

changes in her performance plan in 2014. She did this by email on April 30, 2014, and requested to meet, but he admits he never met with her in 2014 to address the proposed changes.

17. Directed to Appellant's Exhibit 8, which the witness had previously cited as an example of the Appellant attempting to pass off work to others, Stratton admitted the Appellant had questioned him on his interim remarks. He also stated that at the conclusion of the 2nd Interim Evaluation of 2014, he did not advise the Appellant of all of her rights according to the Personnel Procedures Handbook. Instead, he ended his meeting with her, stating that she had "refused to sign it" and called fellow colleague Sherri McKinney to sign in Appellant's place. This is not acceptable as, on refusal to sign by an employee, a supervisor is required to witness the refusal to sign.

18. Stratton had previously testified that prior to giving evaluations, he gave each employee a self-evaluation form to be returned prior to his doing the evaluation. The Appellant replied by email on September 26, 2014, that she had not had time to complete this prior to the interim evaluation. The witness then admitted that Appellant had given him her self-evaluation form after he had done the evaluation. He also stated that in this form, she had advised him of her updated responsibilities and duties, both those of herself and others.

19. The witness then reiterated that during a meeting with himself, Appellant and Earl Gresham, she accused Gresham of "staring me down" and again stated that she had used "f-word" in the meeting with him afterward. He also added that he had read her responses to her interim evaluations, and had attached them to her evaluation and sent them on up the chain.

20. Regarding the written reprimand of October 31, 2014, the witness admitted that the term "throw me under the bus" was used by the Appellant. He interpreted this to mean that it was a violation of the workplace violence policy, and thereafter included this in her year-end evaluation. He also testified that he took this matter up with Earl Gresham, but admits he was never contacted by any security or law enforcement agency, which should have been the case if one is cited as violating the workplace violence policy.

21. The witness then went on to state that the Appellant had filed a written response to the first Written Reprimand. (Appellant's Exhibit 5.) Referred to Appellant's Exhibit 11, an October 8, 2014 memo from the Appellant to Esther Snider requesting that someone review missing documentation, the witness admitted this may have been part of the basis for the first reprimand, dealing with insubordination and lack of willingness to accept responsibility.

22. Directed to Appellee's Exhibit 3, the 2nd Interim Evaluation, which the Appellant refused to sign, Stratton was unable to say whether this occurred because of her frustration with the lack of direction or failure to change her performance plan. Referring to the second Written Reprimand of Appellant for not complying with the flextime schedule and directives, the witness stated that on November 14, 2014, the Commissioner's Office sent a departmental-wide email canceling all flextime scheduled for November 2014. The witness then clarified that all such timesheet questions are to go to the division timekeeper. He is aware that the Appellant did approach the timekeeper, but did not feel she had the authority to approve any changes. He then added that the Appellant received the second reprimand because she had taken off on the first

two Mondays in November, which was her usual flextime, but which he felt was in violation of the directive.

23. He also added that he had changed the Appellant's timesheet for November 2014 because of these flextime issues.

24. The witness then pointed out that on the 3rd Interim Evaluation for the period of September 1, 2014, through November 30, 2014, Earl Gresham had retracted the comments regarding violation of Workplace Violence Policy. However, a review of the 2014 final year-end evaluation dated January 30, 2015, by Stratton, shows that the comment regarding the Appellant's violation of workplace violence policy was made a part of the final evaluation. He admitted that this comment concerning the workplace violence policy violation was probably taken into consideration when the first written reprimand was issued, and therefore, probably carried over into the final evaluation.

25. Stratton then testified that Appellant had filed a response to the final evaluation by document dated January 30, 2015. (Appellant's Exhibit 23.) In this document, it is apparent that the Appellant listed several duties and responsibilities which had been either left off her performance plan or were not included in her year-end evaluation.

26. Although this witness had previously testified that he could not find out from the Appellant what work she was doing or not doing, Appellant's Exhibits 27 and 28 appear to show otherwise. Appellant's Exhibit 27 is a November 20, 2014 email from the Appellant to Stratton responding to requests for the status of various survey packets. Appellant's Exhibit 28 is a January 6, 2014 email from the Appellant advising former Director Karen Martin of her progress and that she was working at home. This was copied to Assistant Director Earl Gresham.

27. The witness testified that sometime in November 2014, he became aware the Appellant would be transferring to another position effective December 1, 2014. He then confirmed that her 2014 year-end evaluation was actually performed on January 30, 2015, and then further modified on February 6, 2015. The witness concluded by saying that he is now aware that, according to 101 KAR 2:180(4)(d), he should have performed her final evaluation before she left for her new position.

28. On re-direct, the witness testified that the ability to work flextime is a privilege, not a right. He also felt that there was no need for more guidance to be given the Appellant regarding flextime, since there had been previous emails addressing this.

29. On re-cross, the witness testified that he only received the email from the Appellant advising him of the work done and to be completed on November 20, 2014. He again stated he had never received this after asking for it earlier. He also added that the numbers submitted by the Appellant as to packets to be completed were incorrect.

30. The witness was then directed to Appellant's Exhibit 28, a series of emails ranging from January through September 2014. These emails were from the Appellant to former Director Martin, to Earl Gresham, and primarily to Stratton. These emails, furnished on a

regular basis, show the Appellant was keeping the witness aware of either needed time off, flextime or working either at the office or at home on various work assignments.

31. The Appellee's next witness was **Earl Gresham**. He has been the Assistant Director in Medicaid Services since July 2013. His duties include oversight of the overall operations and the waiver programs. He was the second-line supervisor of the Appellant.

32. Gresham testified that he saw the Appellant's request for reconsideration after the year-end evaluation and identified his response to that (Appellee's Exhibit 7). In this document, the witness noted that in the "job tasks" portion of the performance plan, he had corrected various numbers given to Stratton by the Appellant as to the number of remaining surveys to be completed. Gresham found that the actual numbers were higher, but noted that the corrections/changes to these numbers did not result in a correction of score for the performance evaluation.

33. Likewise, the witness pointed out that the language referring to violation of the Workplace Violence Policy was not included in the first Written Reprimand and was struck from the 3rd Interim Evaluation. Likewise, such references to workplace violence were not mentioned in the final year-end evaluation.

34. Next, the witness testified that, as per the Personnel Procedures Handbook, the written reprimands were attached to the year-end evaluations. Lastly, he stated he agreed with the evaluation scores given by Gregg Stratton.

35. On cross-examination, Gresham identified Appellant's Exhibit 2, a year-end 2013 evaluation of the Appellant. He confirmed that he was the evaluator for this period, and gave her a score of 451 (Outstanding). However, he added, former Director Karen Martin had instructed him to give that score. The witness was then directed to the Personnel Procedures Handbook. He confirmed that Section 6.1, Section 5(d) requires that former evaluators complete the 3rd Interim Reviews and year-end evaluations before the employee's transfer, if the transfer is after November 1 of any year. **[Hearing Officer Note: In this case, the 3rd Interim Evaluation was completed January 30, 2015.]**

35. The witness also acknowledged in the procedures handbook that II, Section 7 provides that employees may attach written responses to their performance documentation only if they sign the evaluation forms. This further details that if employees refuse to sign, evaluators shall locate a witness at or above the evaluator level to witness the document. **[Hearing Officer Note: Herein, when Stratton deemed that Appellant had refused to sign her interim evaluation, he located a colleague, Sherri McKinney, who was not above the evaluator level.]**

36. The witness testified about the second reprimand, which was based upon the unauthorized use of flextime. He testified the Appellant had been on flextime since July 2013, and there had been no problems with use of flextime until November 2014. Although the Appellant did not report for work the first two Mondays of November (her usual flex days), he stated that he and Stratton did not discuss with her the use of flextime until the third week. The

witness concluded by stating that, in his opinion, the Appellant deserved the rating she received because she had generally failed to meet the basic job functions and requirements of her job.

37. He also added that even though the evaluation was not done until January 30, 2015, in excess of time permitted by the procedures handbook, it would have made no difference in the scores she received. The Cabinet announced closed.

38. The Appellant, **Ellenore Callan**, called herself as her first witness. The Appellant has been a Registered Nurse for 23 years. She began state employment in 2002, working for the Office of Inspector General for two years. From 2004 through November 30, 2014, she worked as a Nurse Consultant Inspector (NCI) with the Division of Community Alternatives within the Department of Medicaid Services.

39. She testified that prior to her 2014 year-end evaluation, which gave her a score of 218 (Needs Improvement), for the previous 12 year-end evaluations she had had received six ratings of "Outstanding" and six ratings of "Highly Effective." Additionally, in her new position, which she transferred to effective December 1, 2014, she has received positive ratings on her first two Interim Evaluations for 2015.

40. The Appellant's 1st Interim Evaluation, covering the period January 1, 2014, through April 30, 2014, was completed by new Supervisor, Gregg Stratton, on May 23, 2014. The Appellant's 2nd Interim Evaluation, covering the period May 1, 2014, through August 31, 2014, was completed by Supervisor Stratton on September 26, 2014. The Appellant's 3rd Interim Evaluation, covering the period September 1, 2014, through November 30, 2014, was completed by Supervisor Stratton on January 30, 2015, with the final year-end evaluation also being completed on that date.

41. 101 KAR 2:180 covers the Employee performance evaluation system. In pertinent part, it reads as follows: Section 1, General Provisions. "(2) Except as provided in subsection (4)(d) of this section, performance evaluations shall be completed no later than January 31 after the end of the annual performance period."

42. 101 KAR 2:180, Section 1(4)(d) reads: "If an employee changes job or reports to a different supervisor after November 1 of the performance year, the annual evaluation shall be completed by the former supervisor prior to the job change."

43. As stated previously, the Appellant transferred effective December 1, 2014, and the 3rd Interim Evaluation and year-end evaluation were not completed until January 30, 2015, by Supervisor Stratton.

FINDINGS OF FACT

1. Gregg Stratton had been the Appellant's supervisor for less than a year when he performed her 2014 year-end evaluation.

2. Appellant left her position effective November 30, 2014, to accept a position elsewhere.

3. The Appellant received written reprimands dated October 31, 2014, and December 5, 2014, both of which supported some of the low rankings in the year-end evaluation.

4. The Appellant asked for changes to be made in her 2014 performance plan; however, Stratton never met with her to address these.

5. Stratton admitted that after the Appellant questioned him regarding his remarks on the 2nd Interim Evaluation, he did not advise her of her rights pursuant to the Personnel Procedures Handbook. Likewise, when he deemed the Appellant had refused to sign the 2nd Interim Evaluation, he failed to follow the proper procedure for having this witnessed.

6. Stratton performed the Appellant's 2014 evaluation on January 30, 2015, even though 101 KAR 2:180(4)(d) mandated it should have been done before she left her position on November 30, 2014.

7. The Hearing Officer finds these were sufficient flaws in the evaluation process so as to render the Appellant's 2014 year-end evaluation null and void.

8. The Hearing Officer finds there were insufficient credible facts presented so as to allow a reasonable finding as to the Appellant's claim of retaliation.

CONCLUSION OF LAW

The Appellee failed to carry its burden of proof to show the Appellant's evaluation was appropriate and done properly.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **ELLENORE CALLAN V. CABINET FOR HEALTH AND FAMILY SERVICES, (APPEAL NO. 2015-082)** be **SUSTAINED to the extent** that the 2014 year-end evaluation be removed from her personnel files and the supporting documentation, including the two written reprimands, likewise be removed from her personnel files, and for Appellant to receive any and all other relief which may be appropriate, to reimburse Appellant for any leave time she used attending the hearing and any pre-hearing conferences at the Board, and to otherwise make Appellant whole. KRS 18A.105, 18A.095(25), and 200 KAR 12:030.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a

response to any exceptions that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

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

The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

Each party has thirty (30) days after the date the Personnel Board issues a Final Order in which to appeal to the Franklin Circuit Court pursuant to KRS 13B.140 and KRS 18A.100.

ISSUED at the direction of **Hearing Officer R. Hanson Williams** this 28th day of January, 2016.

KENTUCKY PERSONNEL BOARD

Joyce A. Crocker for

MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Kathleen Hines
Hon. Michael Callan