

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2017-001

HELEN AITKEN

APPELLANT

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

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

*** **

The Board, at its regular May 2018 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated April 5, 2018, Appellant's Exceptions, Appellee'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 are approved, adopted and incorporated herein by reference as a part of this Order, and the Appellant's appeal is therefore **DISMISSED**.

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this 14th day of May, 2018.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Mona Womack
Hon. Robert Rowland
Mr. Jay Klein

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
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**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER**

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

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This matter came on for an evidentiary hearing on May 31 and December 20, 2017, at 9:30 a.m., ET, at 28 Fountain Place, Frankfort, Kentucky, and January 23 and February 8, 2018, at 9:30 a.m., ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Roland P. Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Helen Aitken, was present and represented by the Hon. Robert Rowland. The Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Mona Womack. Also present as Agency representative was Commissioner Steven Veno.

The issue is whether or not there was just cause to dismiss Appellant from her position as an Administrative Specialist II in the Department for Income Support, effective November 15, 2016, based on allegations of lack of good behavior, and whether such penalty was excessive or erroneous. The burden of proof was on the Appellee to prove its case by a preponderance of the evidence.

The parties waived presentation of opening statements. Previously, the parties jointly submitted a document titled "Stipulation of Facts" containing 10 separate items. Some of the items are factual stipulations, while others are statements, or a prayer for relief. The document was accepted as a joint pleading and stipulation of facts. The parties requested that Exhibits 1 through 4 referenced by the Stipulation of Facts and simultaneously submitted with that document be admitted into evidence. The parties then agreed that Exhibit 4 was not a factual exhibit and, therefore, should not be admitted. The following exhibits were identified by the Hearing Officer and admitted as follows:

- Exhibit 1. A letter dated November 14, 2016, addressed to Helen Aitken as signed by J. Alan Sisk, Executive Director, notifying Appellant she had been terminated from her employment position.¹

¹ This exhibit was subsequently relabeled "Joint Exhibit 1."

- Exhibit 2. The KYIBRS Report of the Commonwealth of Kentucky together with attachments.
- Exhibit 3. A letter dated Thursday, October 20, 2016, addressed "To whom it may concern" and signed by Helen C. Aitken; a letter dated Friday, October 21, 2016, addressed "To whom it may concern" and signed by Helen C. Aitken.

The parties stipulated to admission of Exhibits 1, 2 and 3.

BACKGROUND

1. The first witness called by the Appellee was the **Appellant, Helen Aitken**. When hired, Ms. Aitken began her probationary period with the Cabinet for Health and Family Services. When her probation ended, she was hired as a Disability Adjudicator in April 2014. She described her duties in that position, which she held for more than one year. Her latest Annual Employee Performance Evaluation reflected that her total score had been in the "Needs Improvement" range. At that time, she felt she had not understood how to perform her job, so she requested a voluntary demotion to the mailroom. On August 30, 2016, she became an Administrative Specialist II assigned to the mailroom. She described the duties she performed in that position.

2. On February 14, 2016, Ms. Aitken had suffered a fall at Walmart and broke her thumb. She underwent surgery on March 21, 2016. She took medical leave until the end of May, entered rehabilitation, and returned to work in August 2016. She had been prescribed narcotics for pain and, subsequently, developed a narcotics addiction. Once her prescription ended, she bought the pain medications illegally. It was November 15, 2016, when she was ultimately dismissed from her position by the Cabinet.

3. Ms. Aitken had been taking care of her grandparents and had use of their Commonwealth Credit Union credit card to purchase their groceries and medical-related expenses. As her narcotics problem progressed, she used money to pay for her own living expenses and "other things" as she failed to apply her own income to her own bills. She took approximately \$12,000 from her grandparents through the use of their credit card. The drugs she purchased in May, June, and July 2016 were purchased without a prescription.

4. Commonwealth Credit Union demanded Appellant pay back the money she received through her grandparents' credit card. She was indicted by the Franklin County Grand Jury and pled not guilty to the charges. The prosecution is currently suspended, conditioned on her restitution of the funds within a two-year period. An Agreed Order had been entered in that

case (part of Exhibit 3). Once restitution is paid in full, the charges will be dismissed with prejudice.

5. Appellant is requesting in this Personnel Board appeal that she be restored to employment with the Department of Income Support in the mailroom. She testified that what happened outside work did not affect her job performance. The drugs had no effect on her previous difficulty in the performance of her job as a Disability Adjudicator.

6. She was at work from February 14 until March 21, 2016. She then received approved FMLA leave for eight weeks following her surgery. She returned to work approximately May 20, 2016, until July 8, 2016. She felt she had developed a chemical dependency and, in July, submitted FMLA paperwork to her immediate supervisor. She engaged in drug rehabilitation and was off work from July 11 through late August 2016, when she returned to work. The parties previously stipulated that she was on leave from July 6 through August 31, 2016.

7. Prior to returning to work, she made inquiries about job options available to her because she felt she could not do the job of a Disability Adjudicator. She was assigned a position in the mailroom as Administrative Specialist II. Following her rehabilitation, she has experienced no further issues regarding the pain medications. She had never taken the pain medications during the day or while at work. She only took such medication, Percocet, at night.

8. The next witness was **Steven Veno**. Since May 2013, Mr. Veno has been employed by the Cabinet for Health and Family Services as Commissioner for the Department of Income Support. That Department administers two federally-funded programs: Child Support Enforcement Program and Disability Determination Services Program, which disability program is funded 100% by the federal Social Security Administration. "DDS" examines medical information to determine an applicant's eligibility for Social Security Administration disability benefits. This examination is done primarily by the Disability Adjudicators, who review medical evidence and other documents.

9. An Administrative Specialist employed in the mailroom, such as Appellant, has access to incoming mail, some of which is from medical consultants (doctors), contains medical examinations, and information from the Social Security Administration. She would also have access to outgoing information. She had access to the Social Security Administration mainframe and the records contained in that federal system. Such information included Social Security numbers, HIPAA-protected information, and individual's names and addresses.

10. In Appellant's Department, the Social Security Administration grants the Cabinet authority to hire staff. The Cabinet does not hire anyone without first conducting a Homeland Security Presidential Directive 12 background check, required for all employees. If the

Personnel Board were to award Appellant her job back, Appellant would have to undergo fingerprinting and this background check, as well as a credit report investigation. On her application, the Department, as well as Ms. Aitken herself, would have to report the pending prosecution from the Franklin Circuit Court, whether she had ever been arrested and the reason for same. Commissioner Veno believed that the federal government, under these circumstances, probably would not approve her employment. He cited other examples of applicants who were not approved by the federal government for hire. Employment in the Child Support Program also requires an FBI background check.

11. Commissioner Veno had reviewed the case file as it moved through the Cabinet's disciplinary process. He believed Appellant's actions were in violation of the Cabinet's Code of Conduct, which requires employees maintain a high degree of integrity, both inside and outside the Cabinet. Appellant had failed the public trust by having been arrested for fraud, and by taking \$12,000 from her grandparents to buy illegal drugs. The Cabinet cannot have someone who has committed fraud, work in an atmosphere where they are allowed access to personal and medical information that could enable identity theft.

12. Commissioner Veno testified he believed the state police had arrested the Appellant. Appellant's attorney showed the witness the KYIBRS Report (Exhibit 2). Commissioner Veno testified Appellant had admitted she took money from her grandparents' Commonwealth Credit Union account and the Credit Union had demanded the monies returned. He then stated he had not seen any documents that showed whether Appellant had been arrested.

13. A discussion then ensued among the Hearing Officer and counsel for the parties regarding the parties' respective understandings of the stipulations they had submitted. The Hearing Officer believed that while there were some facts to which the parties had stipulated, the stipulations were short on evidentiary facts. Commissioner Veno responded to a question by the Hearing Officer as to whether the Cabinet had relied on Exhibit 2 when it decided to terminate the Appellant. Commissioner Veno confirmed this in the affirmative. The Hearing Officer then asked the parties whether Stipulation 2 meant the parties agreed that the Cabinet had relied on those documents when it terminated the Appellant, or that, in addition to same, Exhibit 2 constituted facts to which the parties agreed and stipulated. The Hearing Officer also stated his opinion that the dismissal letter itself was merely a set of allegations. Appellant's attorney responded that he did not stipulate that the documents of Exhibit 2 constituted facts to which he had stipulated; he had not stipulated that his client committed credit card fraud or engaged in illicit drug use, particularly since she had pled not guilty to the indictment. Appellant was not stipulating to the factual accuracy of Exhibit 2; he had only stipulated that the Cabinet relied on Exhibit 2 when it dismissed the Appellant.

14. Counsel for the Cabinet, Ms. Womack, stated that was not her understanding. She stated if there is a material misunderstanding between the parties regarding the stipulations, the

proceedings should be adjourned to allow the parties to proceed accordingly, putting on full evidence without stipulations. She further stated the dismissal itself was not based on Appellant's indictment; it was based on her actions and her knowledge of her actions.

15. The Hearing Officer asked Commissioner Veno whether J. Alan Sisk, the person who signed the dismissal letter, was the Appointing Authority at that time. Commissioner Veno testified Mr. Sisk was the Appointing Authority.

16. The Hearing Officer reviewed with the parties, the Stipulations of Fact, to determine which stipulations would remain and which would be withdrawn. The parties agreed that Stipulation Items 2, 3, 8, 9 and 10, as well as Exhibits 2 and 3, would be withdrawn as stipulations. Stipulation 1 would be retained as a Stipulation of Fact, and Exhibit 1 would remain admitted, with the parties stipulating it is the dismissal letter signed by J. Alan Sisk, the Appointing Authority; and that Stipulations 4, 5, 6 and 7 would be retained as Stipulations of Fact.²

17. The request to suspend the proceedings on Day 1 and schedule a second day of evidentiary hearing was **SUSTAINED**. It was agreed that Day 2 of the evidentiary hearing would be held on August 28, 2017, at 9:30 a.m., ET, at the offices of the Kentucky Personnel Board. At such time, these proceedings will continue with Appellant's counsel cross-examining Commissioner Veno. Further dates for exchange of witness and exhibit lists, as well as any motions and responses thereto, were set out in the separate Interim Order issued May 31, 2017.

18. The second day of evidentiary hearing was held on December 20, 2017, beginning at 10:30 a.m., ET, at 28 Fountain Place, Frankfort, Kentucky. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

19. The Appellant, Helen Aitken, was present and represented by the Hon. Robert Rowland. The Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Mona Womack. Present as Agency representative was Terry Brogan. Ms. Womack advised that in the interim, Commissioner Steven Veno was no longer employed by the Commonwealth, nor was he present for the hearing on this date. The Hearing Officer reminded the parties that at the conclusion of the first day of hearing, Appellee, in its case, had completed the direct examination of Commissioner Veno, and the second day was to begin with Appellant's cross-examination of the witness. Ms. Womack stated she would telephone Commissioner Veno to determine his availability. Mr. Rowland emphasized he did wish to cross-examine Veno and if the witness could not be present on this date, he moved to strike Mr. Veno's testimony for failure to appear to be cross-examined. The Hearing Officer noted that at the conclusion of the first day of testimony, Commissioner Veno was made aware that he was required to be present at the beginning of the second day for the purpose of Appellant's cross-examination. The Cabinet

² This was memorialized in the May 31, 2017 Interim Order.

indicated it was prepared to go forward with the remainder of its case in the event Mr. Veno was unavailable. Ms. Womack proposed that, in the event Mr. Veno could not be personally present for the second day of hearing, his cross-examination be conducted by telephone or, in the alternative, the hearing be continued to allow in-person cross-examination.

20. The Hearing Officer reviewed with the parties the matters contained in the May 31, 2017 Interim Order. The parties concurred, pursuant to the statement in the Interim Order, that: (a) Stipulation of Facts, Item numbers 2, 3, 8, 9, and 10, as well as Exhibits 2 and 3 were withdrawn; (b) Item number 1 would be retained as a Stipulation of Fact; (c) Exhibit 1 shall remain admitted and the parties stipulated it is the dismissal letter signed by J. Alan Sisk, the Appointing Authority; (d) Item numbers 4, 5, 6 and 7 shall be retained as Stipulations of Fact.

21. The next witness for the Appellee was **Darren Kinman**. For the past 9 years, Mr. Kinman has been employed as a Trooper by the Kentucky State Police at Post 12 in Frankfort, Kentucky. Part of his duties include the investigation of criminal conduct. He identified Appellee's Exhibit 1 as the case file for the report he took on July 19, 2016, from Kenneth Aitken. Mr. Aitken had come to Post 12 and described his case to Trooper Kinman. Mr. Aitken, who was Appellant's grandfather, had in-hand paperwork from the Commonwealth Credit Union (CCU). CCU would open a credit card fraud case once they received a police report. Trooper Kinman told Mr. Aitken that the State Police opened a case to determine whether or not there were grounds for criminal prosecution. Mr. Aitken, who is married to Myra Aitken, approved proceeding with the matter.

22. CCU had provided Mr. Aitken multiple affidavits, one for each credit card Mr. Aitken claimed had been used fraudulently. As shown in the Trooper's report, the totals charged on those credit cards were \$2,920.50, plus \$805.12, plus \$3,398.50, plus \$4,834.50.

23. Trooper Kinman began his investigation. The Appellant came to Post 12 for a consensual interview and Trooper Kinman explained the allegations to her. Ms. Aitken stated she had received two credit cards back in May to purchase prescription drugs for her grandparents. She had returned one card, but retained a second card. Over a six-month period in 2016, she used the card to make personal ATM cash withdrawals, as well as general purchases.

24. Trooper Kinman then went to CCU to view videotape recordings and still photos of CCU ATMs. He testified that only some of the transactions listed in the affidavits pertained to CCU. Upon his review, he confirmed the Appellant appeared in still photographs, as did the vehicle registered to her. Trooper Kinman took all this information to the Franklin County Prosecutor.

25. Appellant, in her interview, had told the Trooper she used the card for groceries, gas and cash withdrawals. She had some type of surgery and became addicted to pain pills. She

was buying pain pills here and there off the street. The card usage was without the consent of the owner, Myra Aitken. Kenneth Aitken held Myra's Power of Attorney.

26. Trooper Aitken scheduled a Grand Jury date with the prosecutor and presented his case at that time. On September 13, 2016, the Grand Jury found cause to issue an indictment (Appellee's Exhibit 2).

27. The Trooper's report contains a copy of the Agreed Order issued by the Franklin Circuit Court (Indictment No. 16-CR-00297). In the Plea Agreement, a diversion was created whereby Appellant was required to: (a) repay the entirety of the money to the Commonwealth Credit Union over 24 months; (b) remain law-abiding; and (c) remain gainfully employed.

28. The Cabinet announced it had no additional witnesses. Ms. Womack asked that judicial notice be taken of the Cabinet's personnel policy. Mr. Rowland had no objection. Rather than take judicial notice, the Hearing Officer admitted a copy of the Personnel Policy 3.1 Employee Conduct as Appellee's Exhibit 3. He stated that, pending the cross-examination of Steven Veno, the Appellee's case remained open. Ms. Womack advised that Mr. Veno would be available now by telephone, or in person later that day. Appellant stated she was unable to appear later that day due to a previous appointment. Appellant requested Mr. Veno be compelled to appear in person and did not consent to conducting the cross examination by telephone.

29. The Hearing Officer **OVERRULED** Appellant's prior Motion to Strike the testimony of Steven Veno. Due to the parties' time restrictions and the unavailability of the witness on this date, all agreed it was necessary to schedule a third day of hearing. The rescheduling of the hearing was accomplished through the issuance of a separate Interim Order.

30. The third day of evidentiary hearing was held on January 23, 2018, beginning at 9:30 a.m., ET, at the new office of the Kentucky Personnel Board, 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky. The proceedings were recorded by audio/video equipment, and were authorized by virtue of KRS Chapter 18A.

31. The Hon. Robert Rowland stated he had just heard from his client, Helen Aitken, who advised she was ill with the flu and could not be present for today's hearing. This day's hearing was to begin with Appellant's cross-examination of former Commissioner Steven Veno and, thereafter, with the presentation of Appellant's case-in-chief. Mr. Rowland requested the hearing being continued to another day. The Hon. Mona Womack acknowledged the flu was widespread, and requested that, should the Hearing Officer continue the hearing, Ms. Aitken be required to provide a note from her physician pertaining to her illness and current unavailability. It was also noted for the record that Mr. Veno was present per subpoena for purposes of Appellant's cross-examination.

32. An Interim Order issued January 23, 2018, **SUSTAINED** Appellant's request for a continuance, and required Appellant provide a note from her physician. The fourth day of evidentiary hearing was scheduled by agreement of the parties. Former Commissioner Veno was recognized back to appear at the fourth day of hearing.

33. The fourth day of evidentiary hearing was held on February 8, 2018, beginning at 9:30 a.m., ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky. The proceedings were recorded by audio/video equipment, and were authorized by virtue of KRS Chapter 18A.

34. Pursuant to the Interim Order, Appellant Helen Aitken produced a document from her treating physician, which was admitted as Hearing Officer Exhibit 1 for the purpose of showing her compliance with the previous Interim Order.

35. The first witness this day was **Steven Veno**. Mr. Veno, currently retired from employment, had previously been the Commissioner of the Department for Income Support, a position he held for six years and nine months continuously, until his October 1, 2017 retirement.

36. After learning about the incident involving Appellant, he sent a memorandum to the Office of Human Resource Management (OHRM) and requested Major Disciplinary Action be taken. In that memo, he indicated the knowledge he had at that time. He identified Appellant's Exhibit 1 as the October 12, 2016 Request for Major Disciplinary Action he authored and sent. His Department had learned Appellant had fraudulently taken money from her grandparents. He read into evidence the entirety of Appellant's Exhibit 1, beginning with the second paragraph. The grounds stated in that memorandum for disciplinary action were Appellant's failure to report she had been charged with a felony, in violation of Employee Procedures 2.1, Employee Conduct, Section II(14). Appellant had reported the matter on October 10, 2016.

37. Upon his review of Appellant's Exhibit 2, Mr. Veno identified same as what appeared to be a copy of the Criminal Summons issued and served upon Appellant. He acknowledged it showed Appellant was served with the document on October 10, 2016, the same day she reported the charge to her supervisor.

38. Veno's duty was to advise OHRM what he had learned. It was up to OHRM to thereafter conduct an investigation and make a determination of the appropriate disciplinary action.

39. When he learned of the incident, he met with his Human Resource employee, Terry Brogan. Brogan advised Veno what happened, and that the State Police were involved. He told Veno about the allegations against Appellant, of having fraudulently taken over \$10,000 from her grandparents' account. Appellant had admitted to having a drug problem at the time.

She was also in negotiations with the Commonwealth Attorney. It was decided the Department would contact OHRM with the information they had and file a Request for Major Disciplinary Action (MDA).

40. When asked to explain how Appellant's actions resulted in a "change to public's confidence...", Mr. Veno replied Appellant was alleged to have taken money from her grandparents' account. She admitted to having a drug problem. Her position within Disability Determination Services allowed her access to personal information, health information, and health insurance information, which were all put at risk, and upon which he had to act in his capacity as Commissioner. It was required by the Social Security Administration to safeguard that information.

41. He had no reason to believe Appellant failed to perform her job duties. As far as he knew, there were no problems or issues of performance. Earlier, Appellant had taken a voluntary demotion. He did not know the details of her performance. No allegations had been made against Appellant regarding her job performance.

42. He was asked to, and did read into evidence, the contents of KRS 18A.146, Felony Conviction Grounds for Disciplinary Action:

- (1) As used in this section, "state employee" means a person regularly appointed to a position in the state service, whether classified or unclassified, for which he is compensated on a full-time or part-time basis.
- (2) Subject to the provisions of KRS 18A.095, any state employee who is convicted of a felony may be subject to any disciplinary action deemed appropriate, including dismissal from the state service.

43. At the time, Mr. Veno understood Appellant had been in negotiations with the County Attorney to hold off going forward with the pending charges, contingent on her taking care of her drug problem and repaying the money she had taken. He understood she had not had a criminal conviction. However, he supported termination due to the potential risk to security of personal information dealt with in the Department.

44. When the Department requests major disciplinary action, OHRM conducts a full investigation. It is typical that such an investigation could discover issues of which Veno was not aware at the time he made the Request for Major Disciplinary Action. OHRM determines the level of discipline. Veno did not have input into the level of discipline in this case, nor did he have any involvement in drafting the termination letter (Joint Exhibit 1).

45. The Appellee rested its case.

46. Appellant presented her case-in-chief, and called **Terry Brogan** as her first witness. For the past three years, Mr. Brogan has been employed by the Cabinet for Health and Family Services, Department for Income Support, as Executive Staff Advisor. He oversees and takes care of all personnel matters for the Department.

47. In this case, he gathered information and provided same as quickly as he could. He drafted the first memorandum requesting major disciplinary action. He spoke to the Appellant prior to drafting the MDA, in order to get her side of the story.

48. It was Mr. Brogan who drafted the body of the request (Appellant's Exhibit 1). At that time, he and Veno supplied the information to OHRM. Brogan had spoken with Appellant and her supervisor. Appellant told him the criminal investigative process was ongoing, she admitted she had a drug problem, took money from her grandparents, and used the money to purchase some of her drugs. From that information, the Request for MDA was drafted and the Department notified OHRM to proceed.

49. OHRM asked Mr. Brogan to go to Court and pick up a copy of the Court's records. He did so and tendered those documents to OHRM. He had no role in deciding what disciplinary action was to be issued.

50. Appellant had previously received a voluntary demotion because she had struggled with her previous position. It was a shock to Brogan when he learned of these other issues.

51. He supported the decision to terminate Appellant from employment. Appellant admitted to him and to her supervisor that she stole money from her grandparents and used the money to purchase some of the drugs because she had a drug addiction. All of this put her job with the Department at total risk. She was able to view clients' health records and medical conditions, social security numbers, and all client personal information. They could not have someone with an addiction or idea that they could take \$10,000 from their grandparents, work in the Department and have access to all client information. She was definitely a risk. He acknowledged Appellant had not been convicted of fraud, as she entered an agreement with the Commonwealth Attorney.

52. The next witness was **Appellant, Helen Aitken**. At the time Ms. Aitken was terminated from employment, she had been employed by CHFS, Department for Income Support. Previously, she had worked as a Disability Adjudicator, but took a voluntary demotion to a position in the mailroom, a position she held to the date of termination. She began in the mailroom in August 2016, and testified she had access to personal information, as well as information from the office of the Social Security Administration.

53. She believes she was dismissed for failure to report the charge against her. Mr. Brogan told her that, as she was being indicted and had failed to report that indictment within five days, an investigation would be conducted. Appellant had not been served with any notice of criminal charges by the time she met with Brogan.

54. On October 10, 2016, the same day she met with Brogan, Appellant and her attorney went to Court, then on to the police station, where she was served with the Criminal Summons. Appellant now understands, today, that she was dismissed for lack of good behavior.

55. Ms. Aitken had taken leave time and voluntarily went to a drug treatment program at the "Ridge." She was not convicted of the charge, nor of any other felony. She entered an agreement with prosecution to pay restitution by a certain date and, in return, the charge would be dismissed.

56. Prior to requesting a demotion due to stress, Appellant was still able to perform her job duties. The current issue did not affect her ability to do her work.

57. In July 2016, when she spoke with the State Police, she was advised an investigation was being conducted pertaining to credit card fraud. That investigation was based on allegations made by her grandfather. The officer wanted Appellant's side of the story.

58. Upon examination of Joint Exhibit 1, Appellant understands that letter did not dismiss her for a failure to report the charge. Her felony indictment has been deferred for two years, contingent on certain conditions being met (see Appellee's Exhibit 1: Agreed Order).

59. Appellant rested her case. The Appellee presented no witnesses in rebuttal. The parties chose to submit closing arguments through briefs, and a briefing schedule was set by separate Interim Order.

FINDINGS OF FACT

1. At the commencement of the first day of evidentiary hearing, and with corrections made by the parties thereafter, the parties stipulated to the following facts:

- The Appellant was employed by the Appellee as an Administrative Specialist II in the Department for Income Support until her dismissal, effective November 15, 2016;
- The Appellant was on leave March 21 through May 19, 2016. This period included 11 days of sick leave sharing from sick leave donations. 121.25 hours were coded as Family Medical Leave (FML) in April, 114 hours were coded as FMLA in May;
- The Appellant was on leave from July 6 through August 31, 2016. 130.25 hours were coded as FML in July, and 160 were coded FML in August;

- Appellant has never been disciplined or otherwise put on notice for any issues related to her job performance while employed by the Commonwealth of Kentucky;
- The Appellant seeks reinstatement to her position or a position of like status and pay, without loss of pay for the period of her penalization, or otherwise make her whole.

2. Helen Aitken, the Appellant, was a classified employee with status. She had been employed by the Cabinet for Health and Family Services as an Administrative Specialist II in the Department for Income Support, where she worked in the mailroom through her termination on November 15, 2016.

3. On February 14, 2016, Appellant suffered a fall while at a Walmart. Following surgery to her thumb, she entered rehabilitation. She returned to work in August 2016, at which time, she admits, she had developed a narcotics addiction to her prescribed medication.

4. At the same time, Appellant had been taking care of her grandparents. They authorized her use of their Commonwealth Credit Union (CCU) credit card to purchase groceries and incur medical-related expenses on their behalf.

5. Appellant admitted in testimony that she used her grandparents' credit card to pay for her own living expenses and "other things" in the sum of approximately of \$12,000. As reported by Kentucky State Police Trooper Darren Kinman, the exact amount taken was \$11,958.62.

6. Appellant was indicted by the Franklin County Grand Jury (Appellee's Exhibit 2). She pled "Not Guilty." A Diversion Agreement was entered, and an Agreed Order was issued by the Court. The Order required Appellant to: (a) repay the entirety of the money to CCU over 24 months; (b) remain law abiding; and (c) remain gainfully employed. (Appellee's Exhibit 1).

7. Appellant, in her job in the mailroom, had open access to incoming mail. Some of that mail contained information from medical service providers, as well as from the Social Security Administration. She also had access to outgoing information. She had access to the Social Security Administration mainframe and records in that federal system, which included Social Security numbers, HIPAA-protected information, and individuals' names and addresses.

8. In the programs administered by the Department for Income Support, the federal government requires all prospective employees undergo a strict Homeland Security background check, which includes fingerprinting, credit and background checks, and responding to questions whether one has ever been arrested and the reason for same.

9. Terry Brogan, Executive Staff Advisor, charged with supervision of personnel matters for the Department for Income Support, gathered information pertaining to Appellant's indictment. He also spoke with Appellant and Appellant's supervisor. He presented all this information to then-Commissioner Steven Veno.

10. Brogan drafted a Request for Major Disciplinary Action at the request of Veno, which was approved and sent by the Commissioner to the Appointing Authority and the Office of Human Resource Management (OHRM). (Appellant's Exhibit 1). The request was based on information known at that time and an allegation Appellant had failed to report she had been charged with a felony, thus constituting a violation of Personnel Procedures 2.1, Employee Conduct, Section II(14). (Appellee's Exhibit 3).

11. OHRM had the duty to conduct an investigation, determine whether disciplinary action would be taken and, if so, the level of such disciplinary action.

12. On October 26, 2016, Appellant was notified of the Appellee's intent to dismiss her from employment. A pre-termination hearing was held November 9, 2016. Following the pre-termination hearing, Appellee, through J. Alan Sisk, Executive Director and Appointing Authority, notified Appellant by letter dated November 14, 2016, that she had been officially dismissed from her position as an Administrative Specialist II in the Department for Income Support, effective November 15, 2016.

13. Appellant was not dismissed for her failure to report her indictment. She was dismissed based on allegations of lack of good behavior, by having engaged in unlawful activity and fraud, which, it is alleged, violated the Cabinet for Health and Family Services' Personnel Procedures 2.1, Employee Conduct, Section 1 (Appellee's Exhibit 3) and lack of good behavior in violation of 101 KAR 1:345, Section I.

14. Appellant timely filed her appeal of the dismissal with the Kentucky Personnel Board.

CONCLUSIONS OF LAW

1. A classified employee with status shall not be dismissed, demoted, suspended, or otherwise penalized except for cause. KRS 18A.095(1). Appointing authorities may discipline employees for lack of good behavior or the unsatisfactory performance of duties. 101 KAR 1:345, Section 1. At the time of her termination from employment, Appellant, Helen Aitken, was a classified employee with status.

2. Appellant, as an employee of the Cabinet for Health and Family Services, was subject to its Personnel Procedures 2.1, Employee Conduct, Section 1 (Appellee's Exhibit 3).

That policy was in full force and effect at all times during the events described herein. In Section I, Purpose, that Policy states:

CHFS expects its employees to maintain a high standard of conduct and professional behavior, including outside of work, to maintain the public's confidence in the integrity of its government and public servants. (See Guide to the Executive Branch Code of Ethics) Actions in violation of this duty as a public servant may lead to corrective or disciplinary action, up to and including dismissal.

The November 14, 2016 termination letter also cites lack of good behavior as a ground for termination (Joint Exhibit 1). CHFS Personnel Procedures 2.1, Employee Conduct, Section 2(5), defines "Lack of Good Behavior" to include that an employee shall "not illegally use, possess, solicit, or sell prescription medication, alcohol, and/or illegal drugs or narcotics." (Appellee's Exhibit 3).

3. As stated in KRS 13B.090(7):

...The agency has the burden to show the propriety of a penalty imposed or the removal of a benefit previously granted...The party with the burden of proof on any issue has the burden of going forward and the ultimate burden of persuasion as to that issue. The ultimate burden of persuasion in all administrative hearings is met by a preponderance of evidence in the record. Failure to meet the burden of proof is grounds for a recommended order from the hearing officer.

4. In her testimony, Appellant admitted: (1) when her prescription narcotic pain medication ended, she began to illegally purchase pain medications; (2) she had been taking care of her grandparents and had the use of their Commonwealth Credit Union credit cards to purchase their groceries and medical-related expenses. She used one of the cards to pay for her own living expenses and "other things"; purchased drugs for herself without a prescription in May, June, and July 2016; she took approximately \$12,000 of her grandparents' money in this manner; and (3) she is in the process of paying restitution to the Commonwealth Credit Union.

5. Kentucky State Police Trooper Kinman testified: (1) Appellant, in her interview, told him she had used one of her grandparents' Commonwealth Credit Union credit cards to make personal ATM cash withdrawals and general purchases; and (2) she had been buying pain pills "here and there" off the street.

6. While a recitation of the Franklin County Grand Jury having returned an indictment against Ms. Aitken is included, the dismissal letter of November 14, 2016, focused on

the behavior of Appellant that led to the indictment, and admissions she made to Trooper Kinman during the investigation, as well as her response to the acknowledgement of the Request for Major Disciplinary Action. (Joint Exhibit 1). Appellant was not dismissed due to the actions of the Franklin County Grand Jury in referring an indictment, but due to the actions and behavior in which she engaged leading up through the investigation.

7. In her brief, Appellant alleges that her case is similar to the Kentucky Personnel Board case of *Estate of William McClellan v. Justice and Public Safety Cabinet, Department of State Police*, Appeal No. 2013-154. However, upon closer examination, it is clear that case is clearly distinguishable from the case at bar. In the June 10, 2013 Notice of Dismissal letter issued to Appellant McClellan, the Appellee dismissed him on grounds of lack of good behavior, which was solely based on an indictment having been returned by the Caldwell Circuit Grand Jury. In that case, Appellee stated such an indictment provided "...probable cause to believe that you have committed a Class C Felony..." There was no reference to specific behavior that led to the indictment, nor allegations of any admissions made by McClellan. The holding in that case is restricted to the much narrower reason for interpretation, as it was the indictment against McClellan that constituted the sole basis for dismissal.

8. A preponderance of the evidence has shown that Appellant, having been placed in a position of trust by her grandparents, admitted to having breached that trust by engaging in the fraudulent use of her grandparents' Commonwealth Credit Union credit card to make ATM cash withdrawals, pay for various of her own personal living expenses, and purchasing (without a prescription) illegal drugs "here and there" on the street. Such actions violated the Cabinet for Health and Family Services' Procedures 2.1, Employee Conduct, and constituted lack of good behavior as defined under that same policy.

9. Appellant has alleged that the termination letter (Joint Exhibit 1) is defective, as it failed to set out the specific reason for the action, as well as the specific action or activity on which the dismissal was based. KRS 18A.095(7)(b)(2). Such allegations are without merit. The dismissal letter cited the admissions Appellant made during the investigation, prior to her dismissal. It also set out the behaviors in which she is alleged to have engaged prior to the indictment, all of which are fully set out on page 2 of the letter. The Appellee has fully complied with the requirements of KRS 18A.095(7)(b)(2). There was no procedural defect.

10. The evidence also shows that Ms. Aitken was not dismissed for attending drug rehabilitation during her FMLA leave period.

11. Appellee has proven by a preponderance of the evidence that there was just cause to dismiss Appellant from her position as Administrative Specialist II in the Department for Income Support, effective November 15, 2016, based on allegations of lack of good behavior, and that such penalty was neither excessive nor erroneous.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **HELEN AITKEN V. CABINET FOR HEALTH AND FAMILY SERVICES, (APPEAL NO. 2017-001)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

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

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

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

ISSUED at the direction of **Hearing Officer Roland P. Merkel** this 5th day of April, 2018.

KENTUCKY PERSONNEL BOARD



MARK A. SIPER
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Mona Womack
Hon. Robert Rowland