

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NOs. 2020-141 and 2020-196**

ODA BARNES

APPELLANT

VS.

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

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

* * * * *

This matter came on for evidentiary hearing on May 21, 2021, at approximately 9:30 a.m., EST, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Colleen Beach, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by KRS Chapter 18A.

Appellant, Oda Mae Barnes, was present, and was represented by the Hon. Steve Bolton. Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Ashley Kennedy and the Hon. Olivia M. Peterson.

BACKGROUND

1. On June 10, 2020, Appellant filed a timely appeal (Appeal No. 2020-141) with the Board appealing a three-day suspension for lack of good behavior, which was issued on April 23, 2020. Appellant also alleged discrimination and stated the following:

I am a long-time female employee who has been harassed over the years by management because I do not sit quietly when management does something that is outrageous, harmful to the agency or its employees or just illegal. I am harassed by management because I am a female and for reasons of internal political policy (which is illegal).

2. On September 16, 2020, Appellant filed a timely appeal (Appeal No. 2020-196) with the Board appealing a one-day suspension for lack of good behavior, which was issued on September 11, 2020. Appellant also alleged discrimination and stated the following:

I am a long-time female employee who has been harassed over the years by management because I do not sit quietly when management does something that is outrageous, harmful to the agency or its employees or just illegal. I am harassed by management because I am a female over 40 and for reasons of internal political policy (which is illegal).

3. A pre-hearing conference was held on October 9, 2020, at which time both parties agreed these appeals should be consolidated.

4. By Interim Order dated October 16, 2020, the burden of proof was established as follows:

At issue in the evidentiary hearing shall be whether or not there was just cause for the suspensions of the Appellant and whether the penalties were excessive or erroneous. The Appellee shall have the burden of proof, which is by a preponderance of the evidence...An additional issue shall be Appellant's claims of discrimination. The Appellant shall have the burden of proof on this issue, which is by a preponderance of the evidence.

5. Appellee called its first witness. **Jeffrey Sparks** is the Quality Assurance Section Supervisor with the Department for Public Health, Office of Vital Statistics (OVS). His duties include the management of programs used by Department staff and other agencies, such as violent events tracking, birth, marriage, and divorce records, as well as the death registry. Sparks was "detailed" into his current position in August, 2019, which became permanent in October, 2020.

6. Sparks stated that he is familiar with Appellant, who is currently an Office Support Assistant II in the OVS. Currently, she is working in the death records unit, where she has been for the past year. Prior to that assignment, Appellant performed data entry in the divorce records unit.

7. Sparks stated that he works indirectly with Appellant and is not currently in her chain of supervision.

8. Sparks was asked to address an email that Appellant wrote on April 8, 2020. Sparks stated that Appellant had been upset about a confidential conversation she had overheard. She wrote to Christina Stewart, Branch Manager, about it, and carbon-copied members of upper management, that is, Sparks; Connie White, Acting Director; Jay Klein, Office of Human Resource Management Assistant Director; and Melissa Pittman, whom Sparks described as his "peer."

9. In the email, Appellant informed Stewart that C.J. Naber had told their coworker, Lisa Holder, who sat in a cubicle next to Appellant's, that another employee was being demoted. Stewart responded, in an email sent the same day, that she would speak to Naber, and added, "Thank you for keeping any information you overheard confidential." (Appellee's Exhibit 1).

10. The next day, April 9, 2020, Appellant responded to Stewart's email and wrote the following:

I don't think I was the only one that overheard him talking and I think he wanted people to hear him. It's so sad this office is being ran the way it is. You should all be ashamed because you are the reason this office is so toxic. After Jeff and CJ came to my cubicle at the end of day on March 3, and nothing was done about it. Then the rumors that CJ started and then

tried to drag my coworkers into it. All because it was what Jeff ask him to do. Just shows more harassment/discrimination from Jeff Sparks. Just like you Christina allowing Jeff to do my evaluation then refuse me documentation showing what you used for my scoring. You knew what you was doing and you proved it by signing the evaluation on January 12 or you just was not doing your job. Since it was written on my job duty's two years ago. What makes it so bad was that you and Jeff fought everything Crisy Ann, my supervisor and myself came up with for my accommodations. You knew what my job duty's was and you should have caught the mistake. Instead you just wanted to hurt me. People need to think about why Jeff Sparks left a 97,000 job at FedEx and came to state government to settle for 27,000 something bad wrong with that. Hope you all sleep well at night and don't get up every morning sick because you don't know what you're going to face when you get to work. Thanks to the Dept. of Public Health for taking care of your employees health and wellbeing. Let me add this Mr. Naber just informed us that Buffalo Trace offered hand sanitizer but the state refused because its 190 proof alcohol someone may drink it!!! It just gets worse every day thanks for keeping your employee and their family's safe in this time of Covid-19 pandemic. Please think about our children and loved ones that we leave to come to work and get us hand sanitizer and cleaning supplies for each person so everyone will not be touching the same containers." (sic)(Appellee Exhibit 1.)

11. Sparks explained the March 3 incident Appellant referred to it in the above email. He testified that he and C.J. Naber, whom Sparks supervises, went to discuss Appellant's timesheet with her. It is Naber's job to correct timesheets that have been filled out incorrectly, and there was an issue with Appellant's. They went to her desk to assist her. "[Appellant] said she understood, but then she started screaming and yelling, 'You're going to be sorry!' She continued yelling, so we backed away." Sparks stated that he had accompanied Naber as a "witness" because he had seen this "pattern of behavior" before. She had reacted in a similar fashion when he had tried to coach her in the past.

12. On April 9, 2020, Appellant also sent the following emails to Stewart (which were also carbon-copied to Sparks, White, Abrams, Klein, and Pittman):

Mr. Naber came to my cubicle to pull out three wipes from his container. Hopefully we get 3 everyday. (4:20 p.m.)

Thanks for whoever that had CJ to send us a email letting us know he had a small limited supply of cleaning wipes. So kind you you. (3:04 p.m.) (sic.) (Appellee's Exhibit 2).

13. Sparks stated that April 2020 was a "chaotic" time in the office. "We were trying to get supplies, getting staff ready for telecommuting. We had to monitor and track what we had." Sparks instructed staff not to hoard cleaning supplies.

14. On cross-examination, Sparks was asked to describe his professional relationship with Appellant. Sparks responded that prior to being detailed into the Quality Assurance position in August, 2019, he was a Registration Section Supervisor, and Appellant's second-line supervisor. In his new position, he is not in Appellant's chain of supervision.

15. Sparks was asked to explain the physical set-up of the office. He stated that it is an open office with cubicles. When he and C.J. Naber went to discuss issues with Appellant's timesheets on March 3, 2020, the discussion took place within hearing of other staff members. Sparks could not remember the nature of the problem with Appellant's timesheet that necessitated their discussion with her, but after discussing it, Appellant "was not taking the information in a professional manner. She started yelling and was causing a scene." Appellant told Sparks, "Wipe that smile off your face."

16. Sparks testified that he accompanied Naber to Appellant's cubicle to be a witness to the interaction, and because it "directly impacted [his] employee." Sparks is Naber's first-line supervisor.

17. Sparks conceded that he and Appellant "have a history." When he was her second-line supervisor, he had attempted to "coach" her on multiple occasions. He also acknowledged that their relationship has been "tricky." When asked if it was true that he was not on the best of terms with Appellant professionally, Sparks answered, "I get along with all my employees. Being a leader, I help to guide and direct staff by being there for them."

18. **Christina Stewart** is an Administrative Branch Manager of the OVS, and the State Registrar. She has worked for the OVS for the past 14 years. She is responsible for the full oversight of the office, including attending to disciplinary matters. She made the request to the Office of Human Resource Management (OHRM) to take disciplinary action against Appellant. She provided as much documentation as she could with a summary of the reasons for the request, and sent the information up the chain-of-command. She noted that she has no say into the type of discipline that a staff member receives. That decision is made solely by OHRM.

19. Stewart stated that Appellant is an Office Support Specialist II in the OVS and is currently working in the Death Registration Unit. Stewart is her second-line supervisor. Sometime in April, 2020, Appellant transitioned to working at home pursuant to an American with Disabilities Act (ADA) request. Stewart stated that she was in agreement with Appellant's change of work location and worked with ADA staff in OHRM to make it happen.

20. Stewart was asked to look at an email chain Appellant sent her on April 8 and 9, 2020. (Appellee's Exhibit 1.) Stewart acknowledged that she spoke to Naber about the matter Appellant initially complained to her about, that is, Naber's discussion of an employee's demotion. Stewart admonished Naber, "to be cautious about what he says because other people can hear conversations in the office."

21. After receiving the last email in the chain, on April 9, 2020, at 12:44 p.m., she requested that Appellant be disciplined. OHRM determined that a three-day suspension was the appropriate consequence for this email.

22. On August 4 and 5, 2020, Appellant sent emails to Christy Heilman, and carbon-copied Stewart. The chain began as a discussion of Appellant's evaluation. At the end of one email, Appellant wrote, "Brenda Abrams say my timesheet was not released." (sic). Heilman responded, "WHEN I LEFT WED. THERE WERE NO TIMESHEETS PENDING I DID NOT RETURN UNTIL MONDAY MORNING." (Appellee's Exhibit 3.)

23. Appellant answered Heilman's email with a "screen shot" (an image of a computer or smartphone screen output at a given moment in time) that read:

It is considered rude to type in all caps because IT'S LIKE SHOUTING!
Aside from that, it is generally considered **unprofessional** to deviate from the established rules of writing in a business setting."

Appellant added:

I don't know if you knew what all caps mean in a email.
I wanted to email you and tell you that I know how you sit at your desk yesterday and went on because I didn't agree with my evaluation. Also there was a temp that told me everyday I was out you would go on for hours cussing and raving. You also did this when LaTisha and Katina was working from home.

When you take a supervisor position these are things that you have to deal with and you need to be professional about it. Not sit at your desk and cuss and rave so everyone around can hear you.

Copy and past and change a few words around on someone evaluation is not correct.

Also I like to add that you have in my evaluation that I some time or most of the time and I didn't report to my coworkers and (you) my supervisor about left over certificates. When at the end of day I bring you what I have in envelopes and certificates and you never not one time counted them or stored them in the proper place I the safe. You instead would lock them in your desk or the file cabinet. So how do you say that I'm not doing my job when your the one not doing your job?" (sic) (Appellee's Exhibit 3).

24. Stewart testified that the data base systems in OVS require that data be entered in letters that are all capitalized, and staff sometimes forgets to unlock the "caps" function on their computers.

25. Stewart felt this email from Appellant was also inappropriate, and consequently sent a second disciplinary request to OHRM. Appellant received a one-day suspension for this email.

26. On-cross examination, Stewart acknowledged that it was okay for Appellant to report Naber's discussion of a staff member's demotion. Her objection to the email chain were the other statements she made in this chain, specifically in the April 9, 12:44 p.m. email. She noted that it was inappropriate for Appellant to mention the circumstances regarding Sparks leaving his former job. Stewart also felt that Appellant was "disparaging" the Department of Health and OVS's handling of the COVID-19 crisis. (Appellee's Exhibit 1.)

27. When asked what kind of relationship she had with Appellant, Stewart answered, "I have tried my best to accommodate any requests she has made. We have bent over backwards to assist her." Stewart added, "Discipline is a necessary part of my job." Stewart stated that Appellant did have a disability, but "her accommodations don't include allowing her to be rude and unprofessional."

28. Stewart stated that she has been with the agency fourteen years and, during her tenure at OVS, she has had numerous contacts and interactions with Appellant. When asked to describe Appellant's personality, Stewart answered, "She gets upset quickly and easily, and does not respond well...We must be professional despite what is going on. Other people can hear when our voices are raised."

29. As for the second email in question, written on August 5, 2020, Stewart was asked why it was considered insubordination to tell someone that writing an email in "all caps" is not proper. Stewart answered that "I think that the way it was presented, it was unprofessional. There are more professional ways to communicate than to degrade someone."

30. **Jay Klein** is Assistant Director, Office of Human Resource Management, in the Cabinet for Health and Family Services. He is also a designated Appointing Authority. Part of his job duties include handling disciplinary requests.

31. Klein stated that the disciplinary process is begun when a division director makes a request for discipline, which is typically comprised of a memorandum and any supporting evidence. After Klein receives the request, he assigns it to a staff member who writes a draft of the disciplinary letter that is reviewed by the Branch Manager. It is then sent to Klein for his final approval and signature.

32. When determining the level of discipline, Klein considers the egregiousness of the employee's conduct, whether the falsification of documents has been alleged, and whether the employee has had prior corrective action. Klein also looks at disciplinary actions taken against other employees who have committed similar misconduct.

33. On April 10, 2020, Klein received a Request for Major Disciplinary Action from Christina Stewart, Branch Manager, Department for Public Health. In her memorandum, Stewart stated that Appellant had sent emails to management that she adjudged to be "unprofessional and inappropriate." She referenced the April 9, 2020, 12:44 p.m. email and the April 9, 2020, 3:04 p.m. and 4:20 p.m. emails. (Appellee Exhibits 1 and 2.)

34. Klein forwarded the request to the Employee Relations Branch Manager, Gerald Crawford. Crawford assigned the request to a staff member, who drafted the disciplinary letter.

35. When asked why Klein felt a suspension was the appropriate discipline to take against Appellant, Klein answered that Appellant had exhibited prior incidents of inappropriate behavior. He also felt that the comments in her emails were “insubordinate, derogatory, and wrong.”

36. Klein signed a letter on April 23, 2020, informing Appellant that she was being suspended for three days. (Appellee Exhibit 5.)

37. Klein testified that Appellant’s inappropriate conduct violated the Cabinet’s Personnel Procedures 2.1, Employee Conduct policy, which informs employees that “CHFS expects its employees to maintain a high standard of conduct and professional behavior...” The policy also directs employees to “not engage in inappropriate, disrespectful, demeaning, and/or abusive behavior, such as, but not limited to:

1. Loud, abusive, profane, foul, obscene, vulgar, crude, insulting, or threatening language;
2. Inappropriate jokes or gestures; discriminatory slurs;
3. And/or any type of sexual comments (even if spoken in non-standard English/foreign languages.

(2.1 Employee Conduct, I and II, section 6.) (Appellee Exhibit 7.)

38. As for Appellant’s prior disciplinary actions, Klein stated that her disciplinary letter mentioned two written reprimands in 2019; a three-day suspension in 2018; a written reprimand in 2012; and a verbal warning in 2011. All these actions were for “Lack of Good Behavior.”

39. Klein testified that he gave these actions different “weights,” depending on how long ago the actions were taken and how serious the misconduct was. He added that the inclusion of a 2018 three-day suspension was included in error. (**Hearing Officer note:** This suspension was the subject of a successful appeal to the Personnel Board.)

40. Klein was asked to address the one-day suspension Appellant received on September 11, 2020. Klein stated that he received a memorandum requesting major disciplinary action from Christina Stewart on August 7, 2020. (Appellee’s Exhibit 8.)

41. In this memorandum, Stewart stated that Appellant sent emails to management that were “unprofessional and inappropriate.” She referenced an August 5, 2020, 12:12 p.m. email that Appellant sent to her supervisor, Christy Heilman, and to which she carbon-copied Stewart. (Appellee’s Exhibit 3.)

42. Klein assigned the request to the Employee Relations Branch, and a staff member drafted a disciplinary letter. It was sent up the chain-of-command to Klein for his approval.

43. Klein described the August 5, 2020 email as “derogatory and disrespectful.” He added that “it was sent to her own supervisor and was so inappropriate.”

44. Klein signed a letter informing Appellant that she was being suspended for one day on September 11, 2020. The letter stated that she had violated the Cabinet’s Personnel Procedures 2.1, Employee Conduct policy. (Appellee Exhibit 9.)

45. Klein explained that she received a one-day suspension for this misconduct, even though she had received a three-day suspension earlier in the year, because this email “did not have as many egregious elements” as the April 9, 2020 email. “We were trying to get the message through to [Appellant] that you can’t communicate this way. It is so unprofessional.”

46. On cross-examination, Klein was asked if he was aware of Appellant’s “emotional history.” He stated that he knew she had ADA accommodations. When asked if those accommodations included “temper issues,” Klein responded, “I remember them as organization issues, and her need to have summaries of meetings written for her.” Klein recalled that she was also given two large computer monitors to help with her work performance.

47. Klein stated that he gave the August 5, 2011 verbal warning very little weight when determining the two suspensions she received in 2020.

48. At the end of Klein’s testimony, the Cabinet rested its case-in-chief.

49. **Appellant, Oda Mae Barnes**, testified on her own behalf. She began her tenure with the Cabinet in 2001 and is currently an Office Support Assistant II with the Department for Public Health, Office of Vital Statistics. She works in what is informally called the “Death Unit,” and her job duties include mailing death certificates to funeral homes. She has worked in this unit for the past nine years. Christy Heilman has been her direct supervisor for the past eight years.

50. Appellant stated that Jeff Sparks was her second-line supervisor for a period of time beginning in 2012. In her estimation, their working relationship had been fine until 2018, when she was suspended for allegedly hiding a timesheet. She appealed that suspension to the Personnel Board, after which Sparks began to treat her differently. “Every day he was going through my baskets at work. He told me I wasn’t doing enough work. He was constantly accusing me of making mistakes. He said I was costing the state money.”

51. In August, 2019, Sparks was transitioned into another position, and he was no longer in her chain-of-command. However, he continued having “an impact” on her evaluations, Appellant stated. “If I come in late, he goes to my supervisor.”

52. Appellant was asked to address the email chain she wrote on April 8, 2020. In that email, she first complained to Christina Stewart that C.J. Naber was discussing the demotion of a staff member.

53. The next day, April 9, 2020, Appellant sent another email to the same group of people. She stated that she had been upset about the March 3, 2020 incident when Naber and Sparks came to her cubicle to discuss her timesheet. Appellant stated that Naber and Sparks thought she had come in to work at 2:30 p.m., but she actually came in at 10:30 a.m.

54. Appellant was asked what her motivation was in sending the April 9, 2020, 12:44 p.m. email. She answered that she “was letting [Stewart] know about Naber. I brought up the March 3 incident because nothing was done about it.” Appellant added that Naber had started a rumor about her - that she had brought a gun to work. She stated that she also believes that Sparks doesn’t like or respect her.

55. As for her emails regarding hand sanitizer and wipes, she was concerned that she was not receiving adequate supplies of these items. She was not intending to be disrespectful. She stated that she was trying to get someone to listen to her. “I was hoping someone in upper management would investigate and see what was going on.”

56. On cross-examination, Appellant agreed that she had filed an ADA request stating that she cannot deal with customers directly. Previously she had been in a front desk customer service position with the OVS.

57. Appellant was asked why she made comments regarding Sparks’ past salary at FEDEX. She responded that Sparks is “a bully,” and added that his drop in salary from FEDEX to state government “showed something’s going on.”

58. At the end of Appellant’s testimony, she rested her case.

59. Appellee called **C.J. Naber** on rebuttal. He has been employed by the Cabinet for the past sixteen years and is currently a Program Coordinator with OVS, a position he has held since 2019. Naber’s job duties include managing all time-keeping administrative duties for the office.

60. Naber described himself as Appellant’s coworker and stated that normally they did not have issues in their relationship.

61. Naber was asked why he and Sparks went to Appellant’s cubicle on March 3, 2020. He answered that he had sent Appellant two emails asking what time she arrived at work that day. He wanted “to make sure protocol was followed.” Appellant had not responded. He and Sparks went to speak with her directly “to get clarification about her timesheet in her supervisor’s absence.”

62. Naber stated that “When we work with [Appellant], we have to have a witness.” He added that there was nothing confidential or discipline-related about the conversation, and that he discusses timesheets in the office with staff members often. However, Appellant “escalated very quickly. She didn’t want to talk to me. Her volume raised. She wouldn’t answer my questions.”

63. Naber testified that after they saw she was agitated, he and Sparks walked away. But Appellant “stayed escalated—she had to be taken outside.”

64. On cross-examination, Naber was asked if Sparks was in Appellant’s chain-of-command in March, 2020. He stated that he wasn’t sure but thought Sparks had assumed some of the Registration Section Supervisor duties, as that position was not filled at the time.

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

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

66. 101 KAR 1:345, Sections 1 and 4, state as follows:

Section 1. General Provision.

Appointing authorities may discipline employees for lack of good behavior or the unsatisfactory performance of duties.

Section 4. Suspension.

(1) A suspension shall not exceed thirty (30) working days.

(2) An employee without status may also be suspended for a period not to exceed thirty (30) days and shall be entitled to the same provisions of notice contained in KRS 18A.095(8) with the exception of the right of appeal.

(3) When the employee is notified, copies of the notice of suspension shall be forwarded to the Commissioner of Personnel on the same date notice is delivered to the employee.

FINDINGS OF FACT

1. The Appellant, Oda Mae Barnes, is a classified employee with status who works as an Office Support Assistant II in the Cabinet for Health and Family Services, Department of Public Health, Office of Vital Statistics (OVS). She filed a timely appeal (Appeal No. 2020-141)

from a three-day suspension on April 23, 2020, and a one-day suspension (Appeal No. 2020-196) on September 11, 2020.

2. Appellant was suspended pursuant to KRS 18A.095 and 101 KAR 1:345 for lack of good behavior.

3. In accordance with the Interim Order entered October 16, 2020, both appeals were consolidated.

4. On April 8, 2020, Appellant began an email chain addressed to Christina Stewart, Administrative Branch Manager of OVS and Appellant's second-line supervisor. Appellant carbon-copied Jeffrey Sparks, Connie White, Brenda Abrams, Jay Klein, and Melissa Pittman.

5. In the first email of this chain, Appellant informed its recipients that she had overheard a coworker, C.J. Naber, discuss the demotion of another employee with Lisa Holder, whose cubicle is next to Appellant's. Appellant noted that, "It's very sad we have people in this office that does not respect or understand what confidential means." (sic). (Appellee's Exhibit 1.)

6. Stewart sent an email in response which stated, "I will talk with C.J. Thank you for keeping any information you overheard confidential."

7. The next morning, April 9, 2020, Appellant sent another email to the same recipients. Stewart found this email objectionable because of several statements it contained, which included the following:

- I don't think I was the only one that overheard him talking and I think he wanted people to hear him. It's so sad this office is being ran the way it is. You should all be ashamed because you are the reason this office is so toxic.
- You knew what my job duty's was and you should have caught the mistake. Instead you just wanted to hurt me.
- People need to think about why Jeff Sparks left a 97,000 job at FedEx and came to state government to settle for 27,000 something bad wrong about that.
- Hope you all sleep well at night and don't get up every morning sick because you don't know what you're going to face when you get to work. Thanks to the Department of Health for taking care of your employees health and wellbeing. (Appellee's Exhibit 1.)

8. After receiving this email chain, Christine Stewart sent a request for discipline to the Office of Human Resource Management. Stewart felt discipline was warranted on this matter due to Appellant's disparaging tone in the email regarding the Department of Health and

OVS. She also felt that it was inappropriate for Appellant to mention the circumstances regarding Sparks leaving his former job. (Testimony of Christine Stewart.)

9. On April 10, 2020, Jay Klein, Assistant Director, Office of Human Resource Management, received a request for Major Disciplinary Action from Stewart. In the attached memorandum, Stewart stated that she found the emails “unprofessional and inappropriate.” Klein forwarded Stewart’s request to the Employee Relations Branch. A staff member there drafted a disciplinary letter for Klein’s signature. (Testimony of Jay Klein; Appellee’s Exhibit 5.)

10. Klein determined that a three-day suspension was appropriate. He took into consideration that Appellant had “exhibited prior incidents of inappropriate behavior.” He also felt that her comments in the emails were “insubordinate, derogatory, and wrong.” (Testimony of Jay Klein.)

11. Appellant wrote a second email chain beginning on August 4, 2020, regarding the status of an evaluation. The first part of the discussion is addressed solely to C.J. Naber. At 2:15 p.m., Appellant carbon-copied Christina Stewart and Christy Heilman, Appellant’s direct supervisor. At 2:46 p.m., Appellant emailed the following statement, “I just got a email from Brenda Abrams say my timesheet was not released. How did that happen that Christy, or Christina or you did not see that by now?” (sic) (Appellee’s Exhibit 3.)

12. Heilman responded to Appellant, “WHEN I LEFT WED. THERE WERE NO TIMESHEETS PENDING. I DID NOT RETURN UNTIL MONDAY MORNING.” (sic) (Appellee’s Exhibit 3.)

13. To this response, Appellant attached a screenshot of a page of a computer screen that reads in relevant part: “It is considered rude to type in all caps because IT’S LIKE SHOUTING!! Aside from that, it is generally considered unprofessional to deviate from the established rules of writing in a business setting.” Underneath the screen shot, Appellant wrote, “I didn’t know if you knew what all caps mean in a email.” (sic)

Appellant went on to add:

I wanted to email you and tell you that I know how you sit at your desk yesterday and went on because I didn’t agree with my evaluation. Also there was a temp that told me everyday I was out you would go on for hours cussing and raving. You also did this when LaTisha and Katina was working from home.

When you take a supervisor position those are things that you have to deal with and you need to be professional about it. Not sit at your desk and cuss and rave so everyone around you can hear you.

So how do you say that I’m not doing my job when your the one not doing your job?” (sic) (Appellee’s Exhibit 3.)

14. After receiving this email chain, Christine Stewart sent a Request for Major Disciplinary Action to the Office of Human Resource Management. Stewart felt discipline was warranted for this email “due to the way it was presented. It was unprofessional. There are more professional ways to communicate than to degrade someone.” (Testimony of Christine Stewart.)

15. On August 7, 2020, Jay Klein received a Request for Major Disciplinary Action from Stewart. In the attached memorandum, Stewart stated that she found the email “unprofessional and inappropriate.” Klein forwarded Stewart’s request to the Employee Relations Branch. A staff member there drafted a disciplinary letter for Klein’s signature. (Testimony of Jay Klein; Appellee’s Exhibit 8.)

16. Klein determined that a one-day suspension was appropriate, even though Appellant had received a three-day suspension a few months earlier. Klein explained that in his estimation, the August 4, 2020 email “did not have as many egregious elements” as the earlier one. He stated that his goal for disciplining Appellant was to “try to get the message through to [Appellant] that you can’t communicate this way. It is so unprofessional.” (Testimony of Jay Klein.)

17. Klein testified that he gave very little weight to the August 5, 2011 verbal warning when he determined the level of discipline for the two suspensions. (Testimony of Jay Klein.)

18. Appellant stated that her April 9, 2020 email had been sent partly because she was upset that “nothing had been done” when Naber and Sparks had come to her cubicle to discuss her timesheet on March 3, 2020. She described Sparks as a “bully” and noted that she felt his leaving FEDEX for state government showed that “something was going on.” (Testimony of Appellant.)

19. In Appellant’s estimation, the language and sentiment in her emails did not warrant disciplinary action. The Hearing Officer disagrees. While Appellant insists that she “speaks truth to power,” she misses the point that her insensitive words, directed at her supervisors and other members of management, come across as disrespectful and insulting. Pursuant to Cabinet Personnel Procedures 2.1, CHFS employees are expected “to maintain a high standard of conduct and professional behavior.” They are also directed not to engage in inappropriate, disrespectful, or demeaning behavior, which includes using insulting language. Appellant’s statements in her April 9 and August 5, 2020 email violated that directive. (Appellant’s Closing Brief, pg. 1; Appellee’s Exhibit 7.)

20. The Hearing Officer finds the testimony of Christina Stewart and Jay Klein credible as to their belief that Appellant’s conduct on April 9, 2020, and August 4, 2020, was unprofessional and inappropriate and a violation of the Cabinet’s Employee Conduct policy.

21. The Hearing Officer finds that certain statements in Appellant’s April 9, 2020, and August 4, 2020 emails are conduct that constitutes a lack of good judgment necessary to perform her duties as an Office Support Assistant II in CHFS.

22. The Appellant offered testimony that she had a difficult relationship with a number of employees in the OVS. However, no details were presented regarding how her suspensions were the result of age or sex discrimination. Likewise, the Appellant failed to present evidence showing that she was the victim of harassment based on her sex or age. The Hearing Officer finds that the Appellant failed to satisfy her burden of proof on these issues.

CONCLUSIONS OF LAW

1. The Hearing Officer concludes as a matter of law that Appellee has shown by a preponderance of the evidence that there was just cause for the disciplinary actions taken against Appellant for the emails she sent on April 9, 2020, and August 4, 2020. By her actions, Appellant violated Cabinet Personnel Procedure 2.1.

2. The Hearing Officer concludes as a matter of law that Appellee has shown by a preponderance of the evidence that the disciplinary action taken—a three (3)- day suspension and a one (1)- day suspension—was neither excessive nor erroneous.

3. State employees may appeal to the Personnel Board if they believe they have been discriminated against based on their sex, or age over forty (40). KRS 18A.095(12) and (14)(a) and KRS 18A.140(1). Based on the Findings of Fact in this case, Appellant has failed to carry her burden of proof that any actions taken in this case were the result of age or sex discrimination.

4. Based on the same statutory provisions stated above, a state employee may appeal to the Personnel Board if they feel they have been harassed based on any of the protected classes, including age over 40 or sex. Based on the Findings of Fact, Appellant has failed to carry her burden of proof to show that any of the actions taken against her in this case constitute harassment based on the Appellant's age or sex.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeals of **ODA MAE BARNES V. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NOS. 2020-141 and 2020-196)** 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).

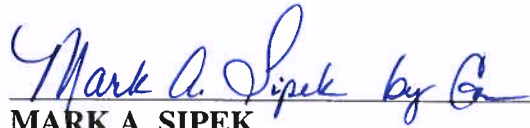
Any document filed with the Personnel Board shall be served on the opposing party.

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 Colleen Beach** this 2nd day of September, 2021.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Steve Bolton
Hon. Ashley Kennedy
Hon. Olivia M. Peterson
Hon. Rosemary Holbrook (Personnel Cabinet)