

CERTIFICATION OF PERSONNEL BOARD RECORDS

I certify that attached hereto is a true and correct copy of the Findings of Fact, Conclusions of Law and Recommended Order and Final Order in the case of **CATHY BROWN V. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2019-284)** as the same appears of record in the office of the Kentucky Personnel Board.

Witness my hand this 16th day of February, 2022.



MARK A. SIPEK, SECRETARY
KENTUCKY PERSONNEL BOARD

Copy to Secretary, Personnel Cabinet

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2019-284

CATHY BROWN

APPELLANT

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

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

* * * * *

The Board, at its regular February 2022 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated November 30, 2021, Executive Director's letter to Appellee, re: Exceptions Untimely Filed, Appellant's Objection to the Filing of Exceptions, Appellee's Motion to Consider Exceptions, Appellee's Supplement to Motion to Consider Exceptions, Appellant's Response to Motion to Consider Exceptions and Supplement to the Motion, oral arguments on the motion, Appellee's Exceptions, Appellant's Response to Appellee's 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** the Background paragraph 77 and substitute the following:

77. There is no law or requirement that an Executive Order must issue first in order to initiate or delegate appointing authority. The purpose of an Executive Order referencing an appointment is required by the Kentucky Constitution to be filed, in particular, Section 91. She confirmed that the location of the registration of the Executive Order is known as the Executive Journal.

B. **Delete** the Conclusions of Law paragraph 7 and substitute the following:

7. Appellee has argued an individual "...may hold appointing authority over a KRS Chapter 18A employee, such as Appellant, by either 1) virtue of their position as the agency head or, 2) delegation from that agency head. Accordingly, a person who has appointing authority has either inherent authority or delegated authority."

- C. **Delete** the header before Conclusions of Law paragraph 12 and substitute the following:

The Question of Inherent Authority:

- D. **Delete** the Conclusions of Law paragraph 14 and substitute the following:

14. Under these circumstances, the Hearing Officer finds that there was no express or inherent authority possessed by Secretary Brown to usurp the agency head authority of Deputy Secretary Friedlander. While the appointment of a Secretary of the Governor's Executive Cabinet includes express duties and authority for that position holder, including oversight of meetings with the various program Cabinet agency heads, absent that person also being appointed by the Governor as an Agency Head, such person has no authority, express or implied, to perform any acts within the agency organization.

- E. **Delete** the Conclusions of Law paragraph 18 and substitute the following:

18. The December 26, 2019 letter was clearly an attempt to clarify and amend a part of the allegations made in the December 13, 2019 letter, based on additional information provided by Appellant regarding the days she had not been at work. As it has been concluded above that the December 13, 2019 letter was

void *ab initio*, the December 26, 2019 letter cannot correct a prior document that is void. The subsequent letter was issued after Appellant served the full term of her suspension.

F. **Delete** the NOTICE OF EXCEPTION AND APPEAL RIGHTS and substitute the following:

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.

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer, as Altered, are approved, adopted, and incorporated herein by reference as a part of this Order, and the Appellant's appeal is **SUSTAINED**, that her five (5) - day suspension be rescinded, that she be restored any backpay, benefits, and otherwise

be made whole, and that this matter shall be expunged from Appellant's personnel records. The Appellee is **ORDERED** to reimburse the Appellant for any leave time she used attending the evidentiary hearing and any pre-hearing conferences at the Personnel Board. KRS 18A.105, KRS 18A.095(25) and 200 KAR 12.030).

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 16th day of February, 2022.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
SECRETARY

A copy hereof this day mailed to:

Hon. Paul Fauri
Hon. Ashley Kennedy
Hon. Olivia Peterson
Hon. Rosemary Holbrook (Personnel Cabinet)
Jay Klein

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2019-284

CATHY BROWN

APPELLANT

VS.

FINDINGS OF FACT, CONCLUSION OF LAW
AND RECOMMENDED ORDER

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

This matter came on for evidentiary hearing on March 23, 2021, May 14, 2021, and September 13 - 14, 2021, 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. By prior agreement of the parties, the proceedings were conducted via Amazon Chime video teleconferencing software in accordance with COVID-19 guidelines.

Appellant, Cathy Brown, was present and was represented by the Hon. Paul F. Fauri. Appellee, Cabinet for Health and Family Services, was present and was represented by the Hon. Olivia Peterson and the Hon. Ashley Kennedy. Appearing as Agency representative was Christina Stewart.

The issue on appeal is whether there was just cause for the five (5) - day suspension of Appellant, effective December 16 through December 20, 2019, from her position as a Program Coordinator with the Appellee's Department for Public Health, Division of Epidemiology and Health Planning, Office of Vital Statistics, and whether such action was excessive or erroneous. The burden of proof was on Appellee to establish just cause for the five (5) - day suspension and that the penalization was neither excessive nor erroneous by a preponderance of the evidence.

The rule separating witnesses was invoked and employed throughout the course of the hearing.

As a preliminary matter, before the evidentiary hearing began, counsel for Appellee stated that proposed witness Brittany Ledet was unavailable for the March 23, 2021 hearing date. Appellee requested admission of a certain exhibit upon which Ledet would have testified. Appellant did not stipulate to admission of the exhibit and requested Ledet's testimony. Appellee indicated it could enter the exhibit by another witness and, therefore, would not need to call Ledet. Counsel for Appellant stated that Appellant wanted Ledet to testify and noted that, on her witness and exhibit list, Appellant had specifically reserved the right to call all witnesses listed on the Appellee's witness and exhibit list. After considering the arguments, the Hearing Officer ruled

that, should Appellant require Ledet's testimony, Appellant could call her to testify and would be responsible to arrange such testimony.

The Hearing Officer stated that within the last ten (10) days he had received each of the parties' supplemental witness and exhibit lists, with the document filed by the Appellee having been received the day before the March 23, 2021 hearing date. Appellant requested time to review that document in order to decide whether to object to same. Appellant was granted thirty (30) minutes to review the document and a short recess was taken.

When the hearing reconvened, Appellant's counsel stated he had no objection to the submission of Appellee's Supplemental Witness and Exhibit List but reserved the right to object to specific exhibits when same were presented during the course of the hearing. Appellee's counsel agreed to make Ledet available on day two of the hearing, should Appellant require her testimony.

Both parties announced they were ready to proceed. Opening statements were presented by the parties.

Appellant then presented a Motion. Appellant's counsel stated the appeal had been filed on December 18, 2019, during the time Appellant was serving her suspension. The original suspension letter alleged Appellant took an unauthorized document on August 16, 2019. Counsel for Appellant stated Appellant was not at work on August 16, 2019, and she denied the remainder of the allegations. Counsel further stated that it was when Appellant denied being at work that Appellee tried to modify the charges. Counsel noted that, implicitly acknowledging that the date contained in the original suspension letter was inaccurate, on December 26, 2019, Howard J. Klein, Assistant Director, Office of Human Resource Management, issued a document attempting to modify the allegations of the original suspension letter that referenced the occurrence dates. By the time of that attempted modification, however, this appeal had already been filed with the Personnel Board, a reply had been filed, and the parties were proceeding relying on an allegation of an act having occurred on August 16, 2019. Appellant's position is that during the course of this hearing, Appellee should be held to proving charges related solely to the events of August 16, 2019, the date set out in the original, flawed suspension letter and that the attempted amendment of the original suspension letter was legally ineffective and should not be considered by the Board. The Hearing Officer held his ruling in abeyance pending hearing the evidence and possible ultimate recommendation on the issue.

BACKGROUND

1. Appellee called its first witness, **Christina Stewart**. Stewart is employed by the Commonwealth of Kentucky, Department for Public Health, Division of Epidemiology and Health Planning, Office of Vital Statistics. She is the Branch Manager of the Office of Vital Statistics (OVS) and has held that position since October 16, 2007. She also serves as the State Registrar.

2. In Stewart's employment, she has oversight of OVS. The Office is responsible for the security of all documents filed therein, and the security and protection of all employees. She also oversees employee conduct. As her standard practice, when an employee issue is brought to

her attention, depending on the severity, she addresses the matter directly with the employee. She then decides whether the employee requires additional training and/or consults with the Office of Human Resource Management (OHRM) to determine if discipline is appropriate; then, if discipline is appropriate, she would consult with OHRM to determine whether that discipline should be a verbal reprimand, written reprimand, or Major Disciplinary Action (MDA), the latter of which would originate from OHRM.

3. Appellant is a Program Coordinator and works directly with hospital and local health department staff regarding birth records. She also works with funeral homes regarding interments and disinterments.

4. Stewart identified Appellee's Exhibit 1 as a string of emails originating from Appellant during the period of September 17 through September 19, 2019. She identified Appellee's Exhibit 2 as a Department for Public Health Request for Approval with a redacted version of a Personnel Action Request (PAR) for Jesse R. Trinkle. When Stewart received the September 17, 2019 email from Appellant, she became aware of Appellant's possession of Trinkle's PAR. Appellant indicated it was with some documents she had picked up; the documents were scanned into her scan folder, according to her routine, and she came across the PAR when she looked at her scanned files. She attached the PAR in an email to Stewart.

5. Stewart identified Appellee's Exhibit 3 as a corrected PAR for Trinkle, reflecting the correct Division Director, Dr. Connie Gayle White. Stewart initialed this document on August 16, 2019.

6. A PAR is used in the hiring process. The document identifies the individual selected for an employment position at OVS. It contains all relevant information for the proposed individual: that individual's name, social security number, pay grade, county, work and home addresses, and salary information. The first page of Appellee's Exhibit 3 is the writing form used for approvals of the PAR. The PAR is the second page attached to Appellee's Exhibit 3. Appellee's Exhibit 3 was the version circulated for review and approvals for the hire of Jesse R. Trinkle.

7. Stewart identified Appellee's Exhibit 4 as an email chain originating from Appellant to Stewart advising she had scanned the documents. Stewart responded to same, and Appellant replied in turn on September 17, 2019. Appellant then brought the unredacted version of Appellee's Exhibit 2 to Stewart's office that day.

8. Stewart then spoke with Jeff Sparks and Brittany Ledet to get a better understanding of what may have happened. She gathered all the information she could and spoke with the individuals involved. She then sent the information to her upline management to find out if they had any recommendations. The witness testified that, if OHRM sends down a recommendation, she follows through with a written request for appropriate discipline in a letter requesting MDA. After that, she has no say in the type of/amount of discipline imposed. That decision comes from OHRM.

9. On November 19, 2019, Stewart made a written request for MDA and addressed it to Klein. (Appellee's Exhibit 5). In that request, Stewart stated Appellant made a copy of a PAR form "that she somehow obtained" from a printer. Appellant then scanned the PAR and possessed the document for a certain period of time. The PAR in Appellant's possession contained Trinkle's private and confidential information.

10. All OVS employees signed confidentiality agreements on an annual basis and promised not to divulge confidential information. The suspension letter alleged Appellant gave a copy of the PAR to her attorney, Steven G. Bolton. It was Stewart's understanding that the PAR sent to Appellant's attorney was unredacted. An investigation was then begun by OHRM.

11. Stewart identified Appellant's Exhibit 1 as her emails of September 19, and September 20, 2019, to Klein at OHRM requesting disciplinary action against Appellant. In one of the emails, she stated Appellant had possession of personnel documents since August 16, 2019. The email also stated that providing a copy of the PAR to an outside third party is considered a breach of confidential information. Stewart then testified she did not know whether the version of the PAR sent to Appellant's attorney was unredacted. The only copy of that document that was given to Stewart was redacted. She presented it up the chain the way that document had been presented to her.

12. Stewart and Appellant met and spoke about the matter on September 18, 2019. Appellant also provided a statement to Sparks on September 19, 2019.

13. Stewart testified that her MDA request took information from a memorandum she typed regarding all information she knew or that was provided to her. OHRM was to review it and advise her of any required changes. If language would have been suggested to her, she would normally add it to the request.

14. On October 11, 2019, Jack Barnett, Brenda Abrams, and Christy Heilman met to discuss the interview of Appellant. During Stewart's testimony, it was revealed to the parties that a written transcript from that recorded interview had been generated by OHRM and had been reviewed by persons who made the disciplinary decision itself. Upon finding out the document existed, Appellant requested a copy of the written transcript of that interview because it is referred to in the MDA. Appellee's counsel argued that the audio recording of the interview is the best evidence of what occurred. The Hearing Officer determined that, as the decisionmakers had seen and read the transcript, the parties and the Hearing Officer are entitled to see what the decisionmakers saw. Over the lunch break, Appellee provided a copy of the transcript to Appellant and the Hearing Officer.

15. Stewart testified she did not utilize the transcript in the preparation of her request for MDA. She did not participate in the preparation of the suspension letter, as that was prepared by OHRM. She did receive a copy of the letter once it had been issued.

16. Stewart is not sure when Appellant obtained possession of the subject PAR. She just knows Appellant had it because she emailed it to Stewart. Appellant admitted to Stewart she had given a copy of it to her attorney.

17. Appellee's next witness was **Jack Barnett**. Since January 16, 2011, Barnett has been employed by the Commonwealth of Kentucky, Office of Human Resource Management, as a Program Investigative Officer II. He may also have held the title of Human Resource Administrator during the time in question, but his duties have remained the same through his current position.

18. Generally, when a request for Major Disciplinary Action comes in, Barnett's supervisor assigns the matter to an investigator. The investigator then reviews the information already provided for completeness and then conducts follow-up interviews/document requests, if additional information or documents are required. A letter is then drafted that is reviewed by the supervisor and other appropriate individuals up the OHRM chain of command. Barnett's office also investigates grievances.

19. Barnett first met Appellant while investigating an issue pertaining to Appellant's grievances on a separate matter. An interview was conducted primarily for that matter and not the allegations that led to the suspension. For purposes of the interview, Barnett had been requested to help Brenda Abrams. He was not working any other investigation at the time.

20. In the separate grievance Barnett was investigating, Appellant had issue with some of her job duties and alleged she was not getting overtime when she requested it. She further alleged her employer had listed her title incorrectly on a document. When Barnett got the case, he was advised Appellant had attached a PAR to some emails. He was instructed to find out more about the PAR because Appellant wanted to use it in her grievance.

21. On October 11, 2019, Barnett, Abrams, and Heilman met with Appellant and made an audio recording of that meeting. (Appellee's Exhibit 6). Barnett had listened to the audio version of the interview and testified it was a correct and accurate recording of that meeting.

22. During the interview, Appellant told Barnett that she had received a request for information on certain interments. She took those documents and scanned them into her computer. She reviewed the scans and found one document, Trinkle's PAR, that was not part of any of her cases.

23. Barnett did not help interview anyone else. He did not write up a report or provide any assistance with the suspension letter. He had no further involvement in the case.

24. Barnett identified Appellant's Exhibit 4 as a December 23, 2019 email he received from Appellant. In that email, Appellant stated that the suspension letter she received accused her of taking a document from the printer on August 16, 2019; that she was not in the office that Friday, or even the following Monday. Barnett testified that he did not advise anyone about the August 16, 2019 date as cited by Appellant.

25. Appellee's next witness was **Howard J. Klein**. Klein is a designated Appointing Authority and Assistant Director in the Appellee's Office of Human Resource Management. He has held that position for approximately twenty (20) years. Currently he is the Assistant Director at the Division of Employee Management, within OHRM. His duties include oversight of the Equal Employment Opportunity (EEO) Branch and disciplinary matters. He reviews proposed final drafts his branch puts together on requests for MDA for various departments within the Cabinet. Typically, a department sends in a request for MDA with supporting documentation. Klein assigns the matter to Branch Manager, Gerald Crawford. Crawford then assigns investigation of the request for MDA to one of his staff. If the staff member has further questions or needs more information, they will request it for purposes of drafting a disciplinary letter. Klein also reviews similar cases from past years for purposes of determining the appropriate level of discipline.

26. Crawford reviews the draft disciplinary letter the staff member has put together. If Crawford is satisfied, he delivers it to Klein for final review and signature. Some factors considered by Klein in determining whether to approve that letter include the fact pattern, severity of the occurrence, and comparison of the occurrence to past similar cases as well as the subject employee's disciplinary history. Discipline could include suspension of one (1) to thirty (30) days, demotion with loss of pay, or termination.

27. This was a case of breach of confidentiality. A request for MDA would have come in from the Department of Public Health, Division of Epidemiology and Health Planning. After Crawford approved what was written, the matter was brought to Klein for his review, including a draft of a suspension letter. Klein determined a five (5) - day suspension was appropriate since Appellant had prior discipline as well as written reprimands. The actual fact pattern also involved a breach of confidentiality.

28. Appellant was notified of her suspension by letter dated December 13, 2019. (Appellee's Exhibit 8). That letter was signed by Tresa S. Straw, identified as the designated appointing authority at the time, during a time when state government was experiencing a transition to a new Governor. New signature forms had not yet been approved, which forms are generated every four (4) years or when there is a change in Governors. Klein read and approved the letter and brought it to Straw. Straw read, approved, and signed it.

29. After the issuance of the original suspension letter, Klein had subsequently received more information from Appellant on how she had obtained Trinkle's PAR. Based on that new information, Klein determined a correction to the original suspension letter was required. On December 26, 2019, he authored a letter of correction to the December 13, 2019 suspension letter.¹ Klein testified that the original suspension letter, Appellee's Exhibit 9, did not comport to his actions; that he did indeed send his December 26, 2019 letter of correction to Appellant, however, attached to it was page 2 of the December 13, 2019 suspension letter. Instead of handwritten

¹ Appellee's originally presented Exhibit 9 was a copy of Klein's December 26, 2019 correction letter attached to the copy of the four (4) page December 13, 2019 suspension letter, page 2 of which had a handwritten correction in the second paragraph.

corrections, the version he had attached had typewritten corrections on that page 2. The document, presented by the Cabinet as a proposed exhibit, was not admitted into evidence. However, by agreement of the parties, Appellee's Exhibit 9 containing a copy of the December 26, 2019 letter from Klein, with attached typewritten page 2 of the December 13, 2019 suspension letter, was admitted into evidence.

30. The witness testified that the legal basis for the discipline underlying this appeal was Appellant's breach of confidentiality when she sent Trinkle's PAR to her attorney. In doing so, Appellant had violated the employee Code of Conduct, in particular the Privacy and Security Policy 2.10, as well as the Annual Confidentiality Agreements she signed. Klein identified Appellee's Exhibit 10 as copies of the Cabinet for Health and Family Services Employee Privacy and Security of Protected Health, Confidential and Sensitive Information Agreement, signed by Appellant on January 21, 2016, January 31, 2017, January 29, 2018, and January 31, 2019.

31. Klein understood the version of Trinkle's PAR that Appellant sent to her attorney was unredacted. Appellant was suspended five (5) days for violating the Personnel Procedures Handbook and Confidentiality Agreements by sending confidential employee information to a third party, which third party was not an employee of the Cabinet, and which was not in the course of Appellant's work duties.

32. Klein was then excused from the Amazon Chime conference while counsel and the Hearing Officer conducted a discussion on the Cabinet's correction letter. During that conversation, it was determined that the first day of evidentiary hearing should be concluded. All witnesses who were previously listed on the parties' witness list and who were yet to give testimony were recognized back for future hearing dates. The Hearing Officer advised that, if new witness and exhibit lists are to be filed, that the parties submit same at least five (5) days prior to the next day of hearing. Klein was also recognized back to offer testimony at the start of the second day of hearing.

33. At the start of the second day of the evidentiary hearing on May 14, 2021, Appellee's corrected two (2) - page Exhibit 9, was admitted into evidence. The witness, **Howard J. Klein**, continued with his testimony.

34. With regard to Appellee's Exhibit 8, Klein testified that Tresa Straw, at the date of issuance of the suspension letter, was the designated appointing authority for Appellee. Appellant's counsel requested that the documents evidencing Straw's and Klein's respective signature authority, as designated appointing authorities, be produced. Arrangements were made to comply with that request.

35. Regarding Appellant's Exhibit 1 and the emails of September 19, 2019, upon receipt, Klein directed others to process their request through the proper channels. Such a request should first go to that employee's Division Director, then to their Office head. OHRM would not have begun any type of action from this email alone. They needed more details.

36. Klein stated that, although possession of the PAR was difficult to determine, the delivery of the document to Appellant's attorney by Appellant "was the heart of the matter."

37. Klein identified Appellant's Exhibit 5 as an official time statement for Appellant. He agreed that the statement showed Appellant had been on vacation on August 16 and 19, 2019, and, therefore, was not at work on those days.

38. Appellant had admitted she sent the PAR to her attorney. The version of the document shown in the **Appellee's Exhibit 2, without redactions**, is what Klein saw, and when he saw it, nothing was redacted. The document would have accompanied the request for MDA sent to OHRM by OVS. (emphasis added).

39. Klein concluded Appellant sent her attorney an unredacted document based on her statement and the statement of Bolton that he had received it. The statement Klein considered was from Appellant's interview with Barnett and Bolton apparently made his statement to Investigator Hines. Klein saw the unredacted PAR long before these emails but not with the Hines' emails. When asked a hypothetical question by Appellant's counsel, Klein agreed that, had the PAR sent by Hines to Bolton been an unredacted copy, that act would probably have been a violation of policy.

40. Klein did not have direct knowledge that the PAR had been unredacted when it was sent to Bolton. He relied on his staff and, from the information they provided, he concluded the document was unredacted.

41. Klein testified that page 3 of the original suspension letter (Appellee's Exhibit 8) explains the personnel policies Appellant violated by her acts. Policy 2.1 involves Employee Conduct. Policy 2.10 involves Privacy and Security. The suspension letter did not identify which specific parts of Policy 2.1 were violated but cited the policy as a whole. The policy gives a general statement that employees are expected to exhibit good conduct followed by different examples of behavior that is in violation.

42. The suspension letter cited numbers 1, 8, and 11 in Section I of Policy 2.10 as having been violated by Appellant. He believed Appellant also violated her Confidentiality Agreements as well as the general requirement of good behavior of state employees per 101 KAR 1:345.

43. Appellant's Exhibit 6, the document evidencing designated appointing authority signature approval for Straw, and Appellant's Exhibit 7, the similar authorizing documents for Klein, were admitted into evidence.

44. Klein identified Appellee's Exhibit 11 as a true and correct copy of Policy 2.1, Employee Conduct, which policy is a part of the Personnel Procedures Handbook to which all employees have access. Klein relied on this policy in his decision to suspend Appellant. The policy follows 101 KAR 1:345, which states employees are to be professional and of good

behavior. That tenet, stated in Section I, Purpose, and Section II, Employee Conduct Guidelines, of the policy, gives several examples of lack of good behavior.

45. Klein identified Appellee's Exhibit 12 as a true and correct copy of Policy 2.10, Privacy and Security of Protected Health, Confidential, and Sensitive Information. This policy goes hand-in-hand with the Confidentiality Agreement signed every year by the Cabinet's employees. It is also a part of the Personnel Procedures Handbook.

46. Appellant, having possession of a document to which she had no right, breached the confidentiality policy. She used it without a right to possess the document. In the overview section of Policy 2.1, it is alleged Appellant violated paragraphs 1, 8, and 11.

47. Had an Open Records Request been made, provision of a redacted PAR would not have been a violation of policy. But in this case, no Open Records Request was made by Appellant. According to Klein, Appellant had no right to take the Cabinet's property and provide it to her attorney, regardless of whether it was redacted or unredacted.

48. The Cabinet closed its case-in-chief.

49. Appellant called as her first witness, **Kathleen Hines**, Chief Privacy Officer. After a few moments of silence, Appellant's counsel stated he thought the Appellee had called Hines as their witness. Cabinet counsel advised they were not calling Hines as a witness and, thus, she was not present.

50. Appellant had listed "all witnesses to be called by Appellee" among her witnesses. Appellee had listed Hines as a witness. The Hearing Officer advised the parties that the party who calls a witness to testify has the responsibility to secure that person's attendance. If that witness appears on the other parties' witness list, counsel normally cooperate in the provision of witness attendance. Appellant was granted a ten (10) - minute recess for counsel to confer to determine how to secure Hines' testimony.

51. After the recess, Hines was not called to the stand. Appellant called the **Hon. Steven G. Bolton**. Bolton is a duly licensed attorney in the Commonwealth of Kentucky. Appellant is a client of Bolton's in various cases pending before the Personnel Board. Bolton withdrew his representation from the current case when he learned he was going to testify as a witness.

52. Bolton was familiar with page 2 of an October 22, 2019 letter he received from Hines. At that time, Bolton was Appellant's attorney. He received the letter from Hines indicating Appellant had emailed to Bolton a copy of a document which was a PAR. Bolton had no idea what Hines was talking about. During this time, Bolton had a lot of things going on and his emails stacked up. At that point, he had not opened or read Appellant's email.

53. Bolton was also familiar with a string of emails around November 5, 2019, between he and Kathleen Hines. The only copy of the PAR he had at the time was that document that Hines

had sent to him. He had not opened the email from Appellant and did not see any attachments to that email. Hines' email was the only exposure Bolton had to the document in question. He had no idea what the nature of the document was, other than what he was told by Hines. With reference to Appellant's email, Bolton stated, "Haven't seen the document. Deleted it from my email string and to this day I have no idea what it was that Ms. Brown sent me, other than by third party information." Bolton went on to testify that page 3 of Appellant's Exhibit 8 is the document he received with the letter from Hines. When asked if it was unredacted, he answered, "yes."

54. Bolton identified Appellant's Exhibit 9 as a string of emails between he and Hines during November 2019.

55. In reviewing what was marked as the Appellee's Exhibit 13, Bolton testified it appeared to be a correct copy of a September 19, 2019 request for production of documents, an Open Records Request he had sent to the Cabinet. This Exhibit was admitted as Appellee's Exhibit 13.

56. Upon his review of what was marked as Appellee's Exhibit 14, Bolton did not recall getting a response to his Open Records Request. In viewing Bates stamped page 75 of the document, he agreed it appears to be a response to his Open Records Request. He had no recollection of the PAR document that appears at Bates stamped page 77. He had no reason to dispute that he received this document, which was signed by a "White." He did not recall the documents that were produced with this set of documents, although he had no reason to dispute that document having been sent to him.²

57. As Bolton had advised he had time constraints and as it was already late in the day, the Hearing Officer suspended questioning and recognized Bolton back for the third day of evidentiary hearing.

58. Bolton was recalled to the stand during the third day of testimony. Upon re-reviewing the documents, Bolton testified that he had made a discovery request to the Cabinet (Appellee's Exhibit 14, pages 73-74). The Cabinet responded to that request by its letter of December 25, 2019, and attached documents (Appellee's Exhibit 14, pages 75-91).

59. He recognized Appellant's Exhibit 3 as a copy of a September 20, 2019 email sent to him by Appellant, his then-client. He testified he never opened this email, or the attachments made a part thereof. When he received a follow-up email from the Cabinet in November telling him his client had sent him certain confidential information with the September 20, 2019 email, he still had not opened his client's email by that time. Then, when the Cabinet contacted him, he deleted his client's email with attachments.

60. Bolton was shown two (2) PAR forms referencing Trinkle. Appellee's counsel showed the witness these forms and pointed out that the top signature line identified a different

² The Appellee's Exhibit 14 was not admitted into evidence as of the second day of evidentiary hearing. It was admitted later during the course of the hearing.

signatory. Bolton saw they were different but could not say one was sent to him by Appellant, as he had never seen it.

61. He identified Appellee's Exhibit 22 as Appellant's response to the Cabinet's first discovery request, bearing his signature and mailed to the Cabinet on November 1, 2019. He also recognized the attached PAR for Trinkle, which had been attached to his responses. He acknowledged this form had a signature line on the first line for Sara Robeson. He agreed the form appears to be the same form as shown in Appellant's Exhibit 3. He testified that he received this form from the Cabinet and not from his client.

62. Counsel for Appellee then showed the witness an electronic version of a string of emails from Appellant's Exhibit 9. [**Hearing Officer note:** Appellant's Exhibit 9 had not been admitted into evidence at this time]. Counsel stated that Appellee continued its objection to admission of Appellant's Exhibit 9, as that document differed from the electronic document she was now exhibiting to the witness. After examining the electronic version, Bolton testified that the October 22, 2019 letter to him from Hines consisted of one (1) page. He agreed the electronic version had this single page letter with an attachment.

63. Bolton was also shown the electronic version of an October 31, 2019 document, with an attachment. Bolton testified that he received this as an email from Hines on October 31, 2019, and that it contained a PDF attachment. He remembers receiving a letter from Hines dated October 22, 2019. His first response to her was on November 5, 2019. He believes Hines had sent him a redacted copy of the subject confidential document. To him it looked like the document had been "professionally redacted." She may have sent it to him on November 5, 2019. When he responded to Hines, he told her Appellant had not provided a hard copy of the document and therefore, he had nothing from his client to return. The only person from whom he had received a copy of the document was Hines. He read aloud a part of his November 5, 2019 email response: "However, with the redaction of employee specific information such as social security numbers and home address, I see no privacy concerns as this form would be available via an Open Records Request or Motion for Production of Documents. I'll be happy to redact the applicable information and send you a copy of the redacted form. I have no interest in violating Mr. Trinkle's right to privacy."

64. When he received the first communication from Hines about the document, he did not know what she was talking about. He then went through his list of emails. He found an email from Appellant but did not open it. He deleted that email because he was told there was sensitive information to which he was not supposed to be privy. His deletion included any attachments to that email. He had no personal knowledge of what was in that email as he never saw it.

65. Appellant had provided Bolton with reams of paper. He tried to read everything she sent in. Sometimes he scanned her documents without reading them because there were no pressing hearing dates scheduled. He believed that if he had that document, that he would send it back to Hines. He never found an unredacted form. He only saw the redacted form which had been provided by Hines.

66. A discussion ensued between counsel for the parties whereby the Hearing Officer interjected. The discussion became more intense, and the Hearing Officer implemented a recess of the proceedings. When the recess was concluded, the Hearing Officer placed on the record his explanation of the process he employs in determining Findings of Fact. He read a portion of KRS 13B.090(1) regarding the requirement that Findings of Fact be constructed based on the evidence on the record and explained what that meant. Evidence on the record does not exist until the record is opened by the Hearing Officer. Discovery answers are not part of the record unless presented as an Exhibit and admitted. Findings of Fact are based solely on the evidence "on the record," meaning that evidence received and admitted, whether exhibits or testimony, during the hearing. The Hearing Officer noticed an exception under KRS 13B.090(5) regarding "official notice". He indicated his ability to take official notice of facts that are not in dispute "...or of generally recognized technical or scientific facts within the agency's specialized knowledge." Before such action, the Hearing Officer must notify all the parties of any facts so noticed and their source, and the parties are to be given the opportunity to contest facts officially noted. The Hearing Officer also stated he could not, as requested by counsel, make a Finding of Fact during the course of the evidentiary hearing. This would be wholly improper as the "record" is still in the process of being developed. The Hearing Officer emphasized again that he considers admitted exhibits, the credibility of witnesses and their testimony, as well as the legal arguments presented in the parties' post hearing briefs. Appellant's **Exhibit 8**, at this point of the proceedings, remains as a "not admitted" document and is not currently within the purview of the Hearing Officer's consideration.

67. Bolton continued his testimony. Upon examination of Appellee's Exhibit 22 and Appellant's Exhibit 3, he stated that they appear to be the same document, Trinkle's unredacted PAR, but that he has no knowledge of any document alleged to have been provided by Appellant. He believes the "scribbled" redacted version of the document had been provided by Hines.

68. With reference to Appellee's Exhibit 22, at page 70, Trinkle's PAR, Bolton did not remember ever receiving that document from Appellant. He testified that Hines and he had a meeting, and it might have been at that meeting that he received the copy of the PAR. He reiterated that, in his email back to Hines on November 6, 2019, he advised her that if he received such email or document from his client, he had not opened it; if he finds such communication, he would immediately delete it. The only PAR form regarding Trinkle he had seen was what he had received from Hines. He could not recollect whether Hines provided the document to him electronically or gave it to him at their meeting.

69. He stated he must have gotten an unredacted copy of the PAR from Hines and that the unredacted copy is the one he must have received from her. He remembers laughing about it because the issue pertained to confidential information and Hines sent that PAR to him. He thought, "Why would you do that? If it was confidential, why are you sending it to me? I don't have any interest in seeing this." That was his understanding on the date of that particular email.

70. When asked if he had not identified an unredacted PAR form in his November 5, 2019 responsive email to Hines (Appellant's Exhibit 9), Bolton testified that, at that date, he was not yet in possession of an unredacted copy. Hines had given him the unredacted copy at the

meeting. He did not recall where he obtained the “professionally redacted” copy of the form. He himself never redacted anything.

71. At this point of the proceedings, Appellant presented a motion to admit Appellant’s Exhibit 10, a response to discovery with attached “confidential document” in a sealed document. The Appellee objected. The witness was excused from the hearing room pending the parties’ discussion of the motion with the Hearing Officer. Appellee contemplated she had mistakenly provided a copy of the unredacted form to Counsel for the Appellant, Paul F. Fauri, along with other documents pursuant to his discovery request. After discussion, a decision on admission of Appellant’s Exhibit 10 was held in abeyance as the Hearing Officer determined the best evidence pertaining to the meeting and transaction could possibly be the testimony of Hines.

72. The Hearing Officer noted that Hines was included as a witness on Appellee’s witness list but neither party had called her to testify. The Hearing Officer cited KRS 13B.080(1) and determined that the “prompt and orderly” conduct of the hearing as well as assisting in gathering facts necessary to this hearing would require the attendance of Hines as a witness. In order to prevent undue prejudice to either party, the Hearing Officer would limit Hines’ testimony to whether she had a personal meeting with Bolton, what had occurred at that meeting, and whether she ever provided Bolton an unredacted copy of Trinkle’s PAR. Counsel for the parties would thereafter be permitted to follow up with questions of the witness that would be strictly limited to the initial area of inquiry.

73. Bolton returned to the hearing room to continue his testimony. He identified the suspension letter provided to him by Appellant. He had asked to recuse himself from representing her. Although the second page of the suspension letter alleged that Bolton admitted certain facts pertaining to his client, Bolton testified he never made any such admissions.

74. On the third day of the evidentiary hearing, Appellee called **Mary Elizabeth Bailey** to testify. Bailey started work in state government in 1995, including a period serving as an Administrative Specialist for the Worker’s Compensation Branch in the Personnel Cabinet. She then left the Personnel Cabinet in 1999, for employment with the Department of Military Affairs, where she stayed until 2005. She then returned to the Personnel Cabinet as Director of the Division of Employee Management. In 2011, she was appointed Commissioner of the Department of Human Resources Administration and Human Resources Administrator and she has continued to serve in those roles for the past ten (10) years.

75. Governor Andy Beshear was sworn in as Governor on December 10, 2019. Prior to the swearing-in, Bailey obtained signature authorization forms, one form for each Executive Branch Cabinet. Following Beshear’s swearing-in, after midnight, she obtained the Governor’s signature on those forms, which delegated authority to one person in each Cabinet to conduct business as usual for those Cabinets until other individuals were appointed. That night, she notified the agencies that the authorization forms had been signed and that the individuals could continue their human resource functions. The next business day, she sent a copy of those forms to each respective agency and kept the original documents on file.

76. She read into evidence KRS 18A.005(1), the definition for "appointing authority." She testified that an "agency head" is the person who heads an agency by virtue of their position. Appointing authority can be given either by law or designation from the agency head. A delegation of appointing authority can only be made by an agency head, who then signs a form that specifically sets out the type of authority being designated.

77. There is no law or requirement that an Executive Order must issue first in order to initiate or delegate appointing authority. The purpose of an Executive Order referencing an appointment is required by the Kentucky Constitution to be filed, in particular, Section 9. She confirmed that the location of the registration of the Executive Order is known as the Executive Journal.

78. She identified Appellee's Exhibit 15 as the Executive Branch Organizational Chart constructed by her office. The head of the Executive Branch is the Governor of Kentucky. Under the Governor is the Secretary of the Executive Cabinet. Under the Secretary of the Executive Cabinet are twelve (12) Executive Branch Cabinets, which together comprise the Executive Cabinet. The Executive Branch Cabinets report directly to the Secretary of the Executive Cabinet. The Secretary of the Executive Cabinet carries out the policies and procedures set forth by the Governor with respect to the Cabinets existing in the Executive Branch.

79. The Governor appoints an individual to the position of Secretary of the Executive Cabinet, pursuant to the authority given the Governor under KRS 11.040(3). She read the purpose of the Secretary of the Executive Cabinet from the statute. That person's duties are simply those that are set out by the Governor. Subsection 2 of the statute addresses the Office of the Secretary. The Secretary and that person's staff are a separate structure in state government.

80. Here, Governor Beshear appointed J. Michael Brown as Secretary of the Executive Cabinet. The Governor made this known by a press conference held November 21, 2019. (Appellee's Exhibit 16). J. Michael Brown received notice of his intended appointment in November, prior to Beshear having been sworn in as Governor.

81. Commissioner Bailey then identified Appellee's Exhibit 17 as an Order of Certification completed by David Nicholson, Jefferson Circuit Clerk, issued January 13, 2020, in Louisville. In that document, Nicholson certifies that the Oath of Office Order attached to the Order of Certification for J. Michael Brown, Secretary of the Governor's Executive Cabinet, was entered by his office on December 10, 2019. Page 2 of that exhibit is a document memorializing the oath of office administered to and taken by Secretary Brown. Secretary Brown appeared on December 10, 2019, in Frankfort, Kentucky before the Hon. Denise D. Brown, Judge, Jefferson Family Court, and took the oath that is required by Section 228 of the Kentucky Constitution. Upon taking the oath, pursuant to statute, Secretary Brown became the "Agency Head" of the Executive Cabinet.

82. She identified Appellee's Exhibit 18 as an Executive Order signed by Governor Andy Beshear, dated January 8, 2020, with an effective date of December 10, 2019. The Order created retroactive authority back to and including December 10, 2019. Such order memorialized

the appointment of Secretary Brown as Secretary of the Governor's Executive Cabinet, effective December 10, 2019. The witness asserted that the filing of an executive order has no bearing on its effective date. Secretary Brown was sworn in December 10, 2019. The January 8, 2020 date was the date the Executive Order was filed with the Secretary of State. Bailey believes the executive order was actually signed by the Governor on December 10, 2019, but, for whatever reason, was not filed with the Secretary of State until January 2020. She was not certain whether she saw the Governor sign this executive order or any other executive orders. Secretary Brown obtained authority for his office when he took the oath of office on December 10, 2019. Secretary Brown then had authority over the Executive Branch Cabinets, including CHFS, to designate someone, within this and the other Cabinets, to carry out the functions of the Cabinet. Here, Secretary Brown designated Tresa Straw as the person to carry out the necessary functions of CHFS. The witness stated there are a series of positions to which an appointment by executive order is not required. Nevertheless, those appointments are effective on the appointment date.

83. On the night Governor Beshear was sworn in, there was no appointment of a Secretary for CHFS. She identified Appellee's Exhibit 19 as a Personnel Action Notification (PAN) whereby on December 10, 2019, Eric Friedlander, through rehire and appointment, was appointed Deputy Secretary of CHFS. This appointment was memorialized by executive order with a noted effective date of December 10, 2019, and the date of order inserted by the Secretary of State as January 14, 2020. (Appellee's Exhibit 20). The PAN is the document that is submitted when any type of personnel action is taken for executive branch employees.

84. In this instance, as of December 10, 2019, Friedlander, as Deputy Secretary of CHFS, had appointing authority over all functions pertaining to CHFS as no Secretary of CHFS had been appointed at that time. Therefore, in the absence of the Secretary, Friedlander was the "Agency Head" of CHFS. Incidentally, Friedlander was subsequently appointed Secretary of CHFS and another PAN was subsequently processed noting Friedlander's appointment to Secretary. (Appellee's Exhibit 21).

85. Bailey read into evidence the last sentence of KRS 194A.040(2), which states, "The secretary shall designate a person to act as deputy to exercise the duties of the office in case of absence." Bailey stated the Governor can appoint a Deputy Secretary and this statutory provision has nothing to do with employment in that position. Appointing a Deputy Secretary is not restricted to the Secretary of that Cabinet. The statute contemplates scenarios when an appointed Secretary is absent, thereby requiring someone to act in their place. She continued that Section 69 of the Kentucky Constitution gives the Governor authority to appoint deputy secretaries to various Cabinets, as the Governor is Chief Magistrate and Supreme Executive over the Executive Branch.

86. She identified Appellee's Exhibit 7 as the Personnel Cabinet's signature authorization form signed by Eric Friedlander as agency head on December 16, 2019, designating OHRM's Howard J. Klein with certain signature authority. By this document, Klein did not have full signature authority, but was limited to those items shown as having been checked off; his delegated authority did include the authority to sign on matters pertaining to the disciplinary actions, including suspensions. The witness stated that Klein's authority did not take away any authority that Straw also held at the time. Multiple people may have signature authority at the

same time within an agency and signature authority continues until it is revoked. She identified Appellant's Exhibit 6 as the Personnel Cabinet Signature Authorization Form signed by Secretary Brown as Agency Head, on December 10, 2019, designating Tresa Straw with certain signature authority.

87. Bailey was present on December 10, 2019, just after midnight when Governor Beshear was sworn in. Secretary Brown was also present at the time. Governor Beshear signed the oath of office document after having taken his oath. Bailey was not present, however, when Secretary Brown took the oath as she did not stay for the entire ceremony.

88. Oftentimes there are executive orders that have a retroactive effective date. Bailey testified she had seen instances where a Governor signs an executive order that has retroactivity to an earlier date. In her position as Commissioner, Bailey has always gone by the effective date as the date one is appointed to a position, regardless of when such executive order had been filed with the Secretary of State.

89. She identified Appellee's Exhibit 18 as the Executive Order issued and signed by Governor Andy Beshear, appointing Secretary Brown as the Secretary of the Governor's Executive Cabinet. It shows an effective of December 10, 2019. It also shows it was received and filed by the Secretary of State on January 8, 2020.

90. She identified Appellee's Exhibit 20 as the executive order signed by Governor Beshear with an effective date of December 10, 2019, appointing Eric Friedlander as Deputy Secretary of the Cabinet for Health and Family Services. The document shows that the Secretary of State received and recorded that executive order on January 14, 2020. She testified she could not say for a fact that the Governor had signed this on December 10, 2019. In her position, she just goes by the effective date. She does not know when the subject executive orders were signed by the Governor.

91. During a gubernatorial transition, a PAN would not be processed by the Personnel Cabinet without a Governor's Executive Order first existing. The issuance of an executive order would be a prerequisite for processing a PAN.

92. The duties of the Secretary of the Executive Cabinet are "whatever the Governor tells him to do." She stated that there was no written memorialization of this person's specific duties. The Governor is not going to make a list of the duties. The Secretary is allowed to perform any human resources action in any executive cabinet.

93. There is no statute that requires that an executive order appointing a Secretary of the Executive Cabinet issue before the intended Secretary takes the oath of office. When asked to identify the mechanism the Governor uses to authorize that an intended officer take an oath of office, Bailey testified she usually looks for the oath and the executive order before they issue the PAN. The oath by itself is sufficient for issuance of the PAN.

94. The next witness called by Appellant was **Brittany Ledet**. Ms. Ledet is currently employed by CHFS in the Office of Human Resource Management as the Human Resource Administrator. She has held this position for about one (1) month. She previously served as a Human Resource Administrator III. She had previously been employed in the Office of Vital Statistics as an Administrative Specialist III and held that position during the time of the events pertaining to the current appeal. She left the Office of Vital Statistics in November 2019.

95. She identified Appellant's Exhibit 11 as an email chain in which she had been involved during November of 2019, while employed at OVS. She had been asked by Jason Mengodoht, Investigator, to provide certain information. She testified that the PAR for Trinkle had been completed on August 16, 2019.

96. Upon her examination of Appellee's Exhibit 2, she identified page 1 as the routing page for the PAR that appeared on page 2. The PAR was a promotion to a new position. She printed this document on August 16, 2019. Subsequently, she learned that there had been a change in the position of Division Director, which necessitated her changing information on the forms she had just printed. She identified the newly drafted documents as Appellee's Exhibit 3 (pages 3 and 4).

97. Appellant had not returned any paperwork to Ledet. Appellant had given the subject paperwork to Christina Stewart on approximately September 17, 2019. Ledet surmised Appellant could have taken these papers on or around August 16, 2019, however, the witness did not know that at the time, but came to that understanding by September 17, 2019. She reported Appellant took the documents on August 16, 2019. Stewart was Branch Manager at that time.

98. The witness was asked about the statement she made in her September 19, 2019 email to Sparks, copied to Stewart, "It is apparent that Cathy's plans are malicious towards Jesse; now that she has all his personal information – I do not know what she plans on doing with this, but I am almost certain it is not good and most certainly unethical." (Appellee's Exhibit 1, page 6). She was asked how she made this conclusion and responded it was from Appellant's facial expressions and language she used during their previous discussion. Appellant also had the subject document in her possession and took it from a printer; such document was not to be in her possession. This email reflected the witness' interaction with Appellant. She believed Appellant was very snarky in her comments and exhibited corresponding body language and tone. Appellant responded that things are left on the copier and anyone has access to it. Furthermore, she cynically said, "Thanks, I really needed that information." Appellant had admitted to Ledet that she had obtained the PAR.

99. No further witnesses were called to testify by Appellant. Appellee had no further witnesses. The Hearing Officer then called **Kathleen Hines** to testify. Appellant presented an objection to the Hearing Officer calling this witness. After hearing arguments of counsel, the objection was overruled. The Hearing Officer then inquired of the parties whether they consented to obtaining Hines' testimony by means of Amazon Chime, as Hines was currently located at her home. Both parties indicated their consent to elicit such testimony through Amazon Chime. The

Hearing Officer noted for the record, having secured each parties' consent, the prerequisites of 13B.080(7) had been met and Hines' testimony would be elicited via Amazon Chime.

100. The next witness was **Kathleen Hines**. Since September 2018, Hines has been employed by CHFS as Chief Privacy Officer.

101. She had email contact with Appellant's previous counsel, Hon. Steve Bolton, and left a voice mail that he did not return. She never met with Bolton face-to-face. "I don't even know what he looks like."

102. Hines has not seen an unredacted PAR for Trinkle. She never saw the "completely clean" or the "professionally redacted" version of the PAR. She saw one, "that had some Xs on it;" that is, the only version she saw was one that looked like someone tried to redact it with Xs through some of the information. The redacted version she saw did not have solid black blocks over the information.

103. She did not provide a copy of the X-redacted version to Bolton. She was aware of the X-redacted version before she made her first request to Bolton to return it. She asked for any copy of that document to be returned. She did not know who put the Xs on that document.

104. On October 22, 2019, she had originally mailed a letter to Bolton asking for a return of any PAR in his possession. She received no response. On October 31, 2019, she sent a reminder email to Bolton and attached to the email a copy of the letter of October 22, 2019, previously mailed to him. There was no other attachment to this email. She had received the X-redacted copy of the PAR from Klein at OHRM a few days prior to her October 22, 2019 letter to Bolton. She never sent any copy of the PAR to Bolton. It would have been counter intuitive, and she never sent a letter to anyone regarding a breach of confidential information accompanied by a copy of any document in question.

105. There were no further witnesses called by the parties. The parties reserved their closing arguments for written briefs. Counsel for Appellant renewed Appellant's Motion to Sustain the appeal based on insufficiency of the signature authority of the appointing authority. The Hearing Officer reserved ruling on the motion pending receipt of the briefs. A briefing schedule was set by separate Interim Order.

FINDINGS OF FACT

1. There are two (2) Personnel Action Request (PAR) forms at issue in this case, both of which pertain to Jesse R. Trinkle. Trinkle was selected and hired as a Resource Management Analyst II in the Office of Vital Statistics (OVS).

2. A PAR is a document used in the hiring process. It identifies the individual selected for a specific employment position and includes that person's social security number, pay grade, county, work and home addresses, and salary information. A Department for Public Health

Request for Approval form containing signature and date lines for various individuals reviewing the PAR (or "routing page") is usually attached to the PAR.

3. Here, on or about August 16, 2019, Brittany Ledet, in her position (at that time) as Administrative Specialist III in the Office of Vital Statistics, prepared a PAR with an attached routing page for Jesse R. Trinkle. (Appellee's Exhibit 2). She later learned that Sara Robeson was transferring out of her position as Division Director and Dr. Connie Gayle White would assume that position. Ledet revised the form and printed out the revised version. (Appellee's Exhibit 3). She was also the one who later reported that Appellant took the subject document on August 16, 2019, as that is the date Ledet sent the forms to the printer.

4. Appellant, Cathy Brown, is a classified employee with status. At the time she filed her appeal, she was employed by the Cabinet for Health and Family Services, Department for Public Health, Office of Vital Statistics, as a Program Coordinator. She works directly with hospitals and local health department staff regarding birth records and with funeral homes regarding interments and disinterments.

5. Sometime in August 2019, while at work, Appellant received a stack of disinterment papers that had been placed in her inbox. She scanned those documents to her computer's "scan" folder. She later discovered the PAR for Trinkle had been among the scanned documents. She retrieved the paper document PAR that was among the disinterment papers and saw that it was unredacted. She then marked out the personal information on the paper copy by scribbling on it.

6. Appellant made at least two (2) copies of this PAR. She gave the "original" copy to Christina Stewart and kept one copy to attach to her grievance. On September 20, 2019, she emailed Bolton her grievance and attachments, which included the PAR. She did not remember whether the copy she emailed to her attorney was redacted.

7. The copy of the Trinkle PAR she emailed to her attorney was the one that had a signature line for Sara Robeson. Before she emailed this copy to her attorney, Appellant did not have permission to retain possession of such document, utilize such document for purposes outside the scope of her job duties, or disclose, transmit, and/or deliver such document to a third party.

8. Evidence has shown that Appellant was on leave and not at work on either August 16 or August 19, 2019.

9. On September 17, 2019, Appellant sent an email to her supervisor, Christina Stewart, Branch Manager of the Office of Vital Statistics, advising:

"Christina,

I had scanned documents received into my Scan folder as I usually do. I came across the attached document in going through my scanned files to determine the status of the documents (whether something needing to be processed, or something to put in Pending file).

I came by to give this to you, but you were not here when I checked a couple of times. I don't know whether you are coming in late, or out all day since I've been removed from the Attendance emails. I noticed the out for an appointment message when I entered your name in the email to field. I am taking this document on Jesse Trinkle to Brittany Ledet." (Appellee's Exhibit 1, pages 8-9).

Appellant had attached a document to the email pertaining to employee Trinkle. Stewart testified the document was a PAR naming Trinkle to Resource Management Analyst II.

10. Later, on September 17, 2019, Appellant informed Stewart that as Ledet was not at work this date, she would bring the document to Stewart. (Appellee's Exhibit 4). Appellant delivered to Stewart the unredacted version of the PAR with the accompanying routing page, which Stewart testified was identical to the Appellee's Exhibit 2.

11. On or about September 19, 2019, Bolton filed an Open Records Request directed to the CHFS requesting he be provided "any and all documentation including correspondence, memoranda and personnel records in the possession or control of the Cabinet for Health and Family Services, Department for Public Health, Office of Vital Statistics or Personnel Branch...pertaining to the hiring and/or promotion of Jesse R. Trinkle to the position of Resource Management Analysis II..." (Appellee's Exhibit 14).

12. On or about September 20, 2019, Appellant filed a grievance against her employer. (Appellant's Exhibit 3). She attached to her grievance a copy of the Trinkle PAR that had a signature line for Sara Robeson. That same day, she sent an email to her then-attorney, the Hon. Steven Bolton, attaching a copy of the grievance and the Trinkle PAR. (Appellant's Exhibit 3).

13. On September 25, 2019, the Cabinet responded to Bolton's Open Records Request that included a redacted copy of the Trinkle PAR. (Appellee's Exhibit 14). However, this PAR was the corrected version listing Dr. Connie Gayle White as the Deputy Commissioner instead of Sara Robeson.

14. On October 11, 2019, in the presence of Brenda Abrams and Christy Heilman, Jack Barnett, Program Investigation Officer II for OHRM, interviewed Appellant regarding the grievance she had filed September 20, 2019. Barnett had already been instructed to find out more about the subject PAR, as he was told Appellant intended to use it in her grievance. (Audio Disc of Interview-Appellee's Exhibit 6).

15. During the interview, Appellant told Barnett she had received a request for information on certain documents; took those documents and scanned them into her computer; and reviewed the scans and found one (1) document, the PAR, that was not part of any of her cases.

16. On or about November 1, 2019, Bolton filed a response to the CHFS's discovery request in a separate Personnel Board appeal involving Cathy Brown, Appeal No. 2018-243. Included in the response was a redacted "scribbled" copy of Trinkle's PAR listing Sara Robeson

as a signatory. This PAR appears to be identical to the PAR that was attached to Appellant's September 20, 2019 grievance. (Appellee's Exhibit 22).

17. On November 19, 2019, after making further inquiries with others, Christina Stewart sent a written request for Major Disciplinary Action to Howard J. Klein, Assistant Director of OHRM (Appellee's Exhibit 5). Stewart was not aware whether the PAR copy Appellant allegedly sent to Bolton was redacted or unredacted. She was also not certain when Appellant obtained possession of the PAR.

18. Governor Andy Beshear was sworn in as the Governor of Kentucky just after midnight on December 10, 2019.

19. J. Michael Brown was appointed Secretary of the Governor's Executive Cabinet pursuant to Executive Order 2020-0012, which was filed with the Kentucky Secretary of State on January 8, 2020. The Executive Order indicates the appointment was effective December 10, 2019. (Appellee's Exhibit 18). Secretary Brown took his oath of office on December 10, 2019, as evidenced by the "Oath of Office" document signed by the Hon. Denise B. Brown, Judge of the Jefferson County Family Court. (Appellee's Exhibit 17).

20. Appellant's Exhibit 6 is the Personnel Cabinet Signature Form signed by Secretary Brown on December 10, 2019, purporting to give Tresa Straw, Chief of Staff, authorization to perform certain signature authority as designated on the form including signature authority "for ALL Position/Personnel Actions Below," including "Notices of Discipline-Demotions, Suspensions, Disciplinary fines." (Appellant's Exhibit 6).

21. Appellant's Exhibit 7 is the Personnel Cabinet Signature Authorization Form signed by Eric Friedlander as "Cabinet/Agency Head" on December 16, 2019, purporting to give Howard J. Klein, Assistant Director of OHRM, authorization to perform certain signature functions as designated on the form. The form indicates intended authorization to sign "notice of discipline/demotions, suspension, disciplinary fines." (Appellant's Exhibit 7).

22. On December 13, 2019, Tresa Straw, self-identified as the "designated appointing authority" issued a letter to Appellant advising her that she was suspended from duty and pay for a period of five (5) working days, effective December 16, 2019, through December 20, 2019, for lack of good behavior. Testimony showed that it was Klein who determined that a five (5) – day suspension was appropriate. It was alleged Appellant had violated certain policies and procedures. (Appellee's Exhibit 8).

23. Those cited policies and procedures, which were in full force and effect at the time of the suspension letter, were:

- CHFS Personnel Procedure 2.10, Privacy and Security of Protected Health, Confidential and Sensitive Information. Appellee's Exhibit 12;

- CHFS Personnel Procedure 2.1, Employee Conduct. Appellee's Exhibit 11;
- DCBS Division of Family Support Operations Manual, Volume 1, General Administration;
- MS 0015, Ethics Policy for Family Support Employees;
- MS 0150, Confidentiality Requirements; and
- CHFS Form 219 Employee Privacy and Security of Protected Health, Confidential and Sensitive Information Agreement (Appellee's Exhibit 10).

24. Appellant filed her appeal of the five (5) – day suspension with the Personnel Board on December 18, 2019. At that date, Counsel of record for the Appellant was the Hon. Steven Bolton.³

25. On December 23, 2019, Appellant sent Investigator Barnett an email of clarification: that she was not in the office on Friday, August 16, 2019, or the following Monday, August 19, 2019; and that she had previously told him she was not sure what date she had the PAR in her possession. (Appellant's Exhibit 4). Importantly, Appellant's timesheet shows she took 7.5 hours annual leave on August 16, 2019, and 7.5 hours annual leave on August 19, 2019. (Appellant's Exhibit 5).

26. Based on the additional information received from Appellant, Klein authored a letter of correction on December 26, 2019, attempting to correct the December 13, 2019 suspension letter. (Appellee's Exhibit 9). He agreed in his testimony that Appellant had been on vacation August 16, and 19, 2019, and not at work on those days.

CONCLUSIONS OF LAW

Signature Authority of Tresa Straw:

1. The Office of the Secretary to the Governor's Executive Cabinet (hereafter "OSGEC") was created by statute. KRS 11.040. In its creation, the Legislature made it clear such office was not a part of the Office of the Governor, but it did constitute a separate agency of state government. Also, "the secretary so appointed shall have such rights, duties and responsibilities as may be assigned by the Governor." KRS 11.040(2). The Secretary, who is appointed by the Governor "...shall be responsible for implementing all policies of the Governor, coordinating all activities of the Governor's Executive Cabinet, and advising and consulting with the Governor on all policy matters affecting the state." KRS 11.040(3). The Secretary also has the authority to appoint principal assistants "...as may be necessary to execute the functions of the office." KRS 11.040(4).

³When it became apparent that Bolton would be required to testify in this appeal as a fact witness, he withdrew his representation of Appellant. Appellant thereafter hired the Hon. Paul Fauri to represent her.

2. The Governor's Executive Cabinet (separate from the OSGEC) is comprised of the Secretaries of the eleven (11) program Cabinets (see: KRS 12.250), the Governor's Executive Cabinet (see: KRS 11.065), the Chief Information Officer, the State Budget Director, the Governor's Chief of Staff, and the Lieutenant Governor. KRS 11.065(1). This Executive Cabinet is a part of the Office of the Governor and not a separate department or agency of the state. KRS 11.065(2).

3. The Governor's General Cabinet (separate from OSGEC and the Governor's Executive Cabinet) is comprised of "heads of the constitutional and statutory administrative departments and program cabinet secretaries enumerated in KRS 12.020." The General Cabinet is attached to the Office of the Governor and is not a separate department or agency of the state. KRS 11.060(1). The Secretary to the OSGEC is not mentioned in this statute, is not a member or a participant in the Governor's General Cabinet, and has no express or implied duties pursuant to this statute.

4. Each program Cabinet has an Office of the Secretary. Such Secretary, once appointed by the Governor (and who takes the Oath required by the Kentucky Constitution), is the head of that specified Cabinet. KRS 12.255. As "Agency Head," the Secretary is also the Cabinet's Appointing Authority. KRS 18A.005(1). The Secretary of a Cabinet has certain express duties and responsibilities to the Governor. KRS 12.270(1). The Secretary also has certain express duties and authority in the operation of his/her specified Cabinet. KRS 12.270(2)(3)(4). That authority includes the designation to another person "...to act on behalf of the agency..." with respect to certain actions including "...other position actions." Such designation, however:

"...shall be in writing and signed by both the agency head and his designee. Prior to the exercise of appointing authority, such designation shall be filed with the secretary." KRS 18A.005(1).

5. The designation to another person of signature authority for the Cabinet must follow the written requirement of KRS 18A.005(1). Here, the Personnel Cabinet's Signature Authorization Form purporting to designate authority from Secretary J. Michael Brown to Tresa Straw is in evidence. (Appellants' Exhibit 6). Such form shows Secretary Brown intended to designate Tresa Straw with signature authority "...for ALL positions/personnel actions..." including notice of discipline in the form of suspensions, from and after December 10, 2019.

6. The Secretary of the Cabinet for Health and Family Services has additional specified duties and authority, including the delegation of "...any duties of the office of secretary to employees of the cabinet as the secretary deems necessary and appropriate, unless otherwise prohibited by statutes." KRS 194A.025(2). The CHFS Secretary also has express duties and authority in the areas of internal organization of offices and departments, creation of positions, and election of coverage under unemployment insurance. KRS 194A.040.

7. Appellee has argued an individual "...may hold appointing authority over a KRS Chapter 18A employee, such as Appellant, by either 1) virtue of their position as the agency head

or, 2) delegation from that agency head. Accordingly, a person who has appointing authority has either inherit authority or delegated authority.”⁴

Examination of Express Authority:

8. Mary Elizabeth Bailey, Commissioner of the Department of Human Resources Administration in the Personnel Cabinet, testified an “Agency Head” is the person who heads an agency by virtue of their position; that appointing authority can be given by law or designation from an Agency Head; and that delegation of appointing authority can only be made by an Agency Head who then signs a form that specifically sets out the type of authority being designated. She opined Secretary Brown had authority over all Executive Branch Cabinets, including the Cabinet for Health and Family Services, to designate someone within this and other Cabinets, to carry out the necessary functions of that cabinet, and that, here, he designated Ms. Straw as that person.

9. At the time Secretary Brown signed the signature authorization form, the position of Secretary of the Cabinet for Health and Family Services was vacant. KRS 63.190 specifically states:

“In every case where there is no other provision of law for the filling of a vacancy in any office, the vacancy shall be filled by appointment by the Governor.”

10. There is no evidence in this record that the Governor at any time expressly assigned any rights, responsibilities, or duties to Secretary Brown to also assume the vacancy of Agency Head of CHFS. While the Governor had the exclusive authority to fill that vacancy (which he did effective May 1, 2020), the Governor could have appointed Secretary Brown to simultaneously hold that position along with Brown’s position as Secretary of the Governor’s Executive Cabinet. The Governor did not do this.

11. The Hearing Officer concludes Secretary Brown was at no time given express authority to act as the Agency Head of the CHFS.

The Question of Inherit Authority:

12. Eric Friedlander had been appointed as Deputy Secretary of the CHFS by December 10, 2019. As Bailey testified, Friedlander as Deputy Secretary, had authority to act as Agency Head in the absence of a CHFS Secretary, effective December 10, 2019.⁵ This meant that, as Agency Head, he could designate signature authority to others. Friedlander did, in fact, properly designate certain signature authority on December 16, 2019 to Howard J. Klein. (Appellee’s Exhibit 7).

13. How many “Agency Heads” may one (1) agency have? The Hearing Officer finds that the answer is one (1) at a time. Had there existed an appointed Secretary for CHFS on

⁴ Appellee’s Response to Appellant’s Renewed Motion to Sustain Appeal, page 6.

⁵ Friedlander was subsequently appointed as Secretary of CHFS effective May 1, 2020. (Appellee’s Exhibit 21).

December 10, 2019, then it would have been that Secretary - and not Deputy Secretary Friedlander - who possessed designation of signature authority on that date. While KRS 194A.040(2) sets out the ability of the Secretary to designate a person to act as Deputy "...to exercise the duties of the office in the case of absence," it remained in the scope of Governor Beshear's authority to appoint a Deputy Secretary; in this case, Friedlander, as the position of Secretary was vacant. Since there was no Secretary on that date, Deputy Secretary Friedlander was the sole person who, in the absence of a Secretary, could perform the functions of a Secretary or other Agency Head, including designation of signature authority.

14. Under these circumstances, the Hearing Officer finds that there was no express or inherit authority possessed by Secretary Brown to usurp the agency head authority of Deputy Secretary Friedlander. While the appointment of a Secretary of the Governor's Executive Cabinet includes express duties and authority for that position holder, including oversight of meetings with the various program Cabinet agency heads, absent that person also being appointed by the Governor as an Agency Head, such person has no authority, express or implied, to perform any acts within the agency organization.

15. It is therefore concluded that Secretary Brown, whose sole position was that of Secretary of the Governor's Executive Cabinet, did not have authority in any manner to delegate signature authority on December 10, 2019, to Tresa Straw. The evidence shows that since Eric Friedlander was Deputy Secretary on that date, and there was no evidence he had designated such authority at that time to anyone else, such authority was solely with Deputy Secretary Friedlander. The December 10, 2019 attempt by Secretary Brown to designate signature authority to Tresa Straw (Appellant's Exhibit 6) is null and void *ab initio*.

16. As concluded above, Eric Friedlander was appointed Deputy Secretary of CHFS, effective December 10, 2019, by Governor Beshear. On December 16, 2019, Deputy Secretary Friedlander executed a Personnel Cabinet Signature Authorization Form designating Howard J. Klein to have authority to perform certain functions for the Cabinet, identified on that form (Appellant's Exhibit 7). Such authority included signing notice of discipline, including suspensions. Klein possessed this authority when he signed the December 26, 2019 letter to Appellant (Appellee's Exhibit 9).

17. The Hearing Officer has previously addressed the efficacy of the Cabinet's December 26, 2019 "Letter of Correction" in his April 1, 2021 Interim Order and reiterates here the following:

"The Cabinet would have been within its rights to dismiss or withdraw any or all the charges, but there appears to be no persuasive authority that authorizes a Cabinet to amend charges pending a KRS 13B appeal by changing a significant due process requirement of notice to Appellant of the date of an alleged incident, absent a motion to amend. The Cabinet failed to file a Motion to Amend the charges. Also, the December 26, 2019 letter, in form and substance described by Mr. Klein, failed to provide Appellant full notice of the statutes or regulations alleged to have been violated, or

that Ms. Brown had 60 days after receipt of the December 26 letter to appeal the action to the Kentucky Personnel Board.”

18. The December 26, 2019 letter was clearly an attempt to clarify and amend a part of the allegations made in the December 16, 2019 letter, based on additional information provided by Appellant regarding the days she had not been at work. As it has been concluded above that the December 16, 2019 letter was void *ab initio*, the December 26, 2019 letter can not correct a prior document that is void. The subsequent letter was issued after Appellant served the full term of her suspension.

19. By the conclusions stated above, the December 26, 2019 letter would also be deficient to stand alone as a new notice of suspension.

20. The Hearing Officer had previously overruled Appellant’s Motion to Sustain Appeal as a Matter of Law, as there were scant facts in evidence at that date leaving several existing questions of fact. Now that all facts pertinent to the case have been presented by testimony and exhibits, the Hearing Officer concludes the suspension of Appellant should be set aside as an improper designation of signature authority existed between Secretary Brown and Tresa Straw, nullifying Straw’s ability to authorize suspension of a classified KRS 18A employee with status. Furthermore, as such action is void, the attempt by Klein to authorize a correction of a void *ab initio* action is of no effect.

21. As the attempt to designate signature authority to Tresa Straw is void, Appellee has failed to carry its burden of proof by a preponderance of the evidence.

22. Based on the Conclusions above, Appellant’s Motion to Sustain Appeal as a Matter of Law is rendered **MOOT**.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **CATHY BROWN V. CABINET FOR HEALTH AND FAMILY SERVICES, (APPEAL NO. 2019-284)** be **SUSTAINED**, that her five (5) - day suspension be rescinded, that she be restored any backpay, benefits, and otherwise be made whole, and that this matter shall be expunged from Appellant’s personnel records. Appellee is **ORDERED** to reimburse Appellant for any leave time she used attending the evidentiary hearing and any pre-hearing conferences at the Personnel Board. KRS 18A.105, KRS 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 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 Merkel** this 30 day of November 2021.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Paul F. Fauri
Hon. Ashley Kennedy
Hon. Olivia Peterson
Hon. Rosemary Holbrook (Personnel Cabinet)