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 **KIMBERLY DICKERSON VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2014-027)** as the same appears of record in the office of the Kentucky Personnel Board.

Witness my hand this 17th day of December, 2014.

MARK A. SIPEK, SECRETARY
KENTUCKY PERSONNEL BOARD

Copy to Secretary, Personnel Cabinet

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-027

KIMBERLY DICKERSON **APPELLANT**

VS.

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

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

** ** ** ** **

The Board at its regular December 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated November 6, 2014, having noted 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, and they hereby are approved, adopted and incorporated herein by reference as a part of this Order, and the Appellant's appeal is therefore **SUSTAINED to the extent** therein.

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 17th day of December, 2014.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Rebecca Wooldridge
Hon. Rebecca Graham
J. P. Hamm

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-027

KIMBERLY DICKERSON **APPELLANT**

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

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

** ** ** ** **

This matter came on for evidentiary hearing on August 28, 2014, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before Roland P. Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Kimberly Dickerson, was present and represented by the Hon. Rebecca Graham. The Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Rebecca Wooldridge. Also present as Agency representative was Ms. Lesa Dennis.

This appeal was taken from the disciplinary action against the Appellant, that is, demotion from the position of Social Services Clinician to Family Support Specialist I, from pay grade 14 to pay grade 10 with a 20 percent decrease in pay. The burden of proof was on the Appellee to show by a preponderance of the evidence that the disciplinary action was taken with just cause and was neither excessive nor erroneous.

Previously, and by agreement of the parties, the Personnel Board issued a Qualified Protective Order. All matters set out in that Order are hereby incorporated by reference herein in the entirety.

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

Appellant presented a motion to exclude any and all mention of the first charge that had originally been alleged against her client, upon which an intent to dismiss had been issued. That charge was eventually dropped and the disciplinary action reduced to a demotion. Counsel stated any mention of that first charge was irrelevant and prejudicial. Appellee responded to the motion. The Hearing Officer, having considered the arguments of counsel, **OVERRULED** the motion. The parties then presented their respective opening statements.

BACKGROUND

1. The first witness for the Appellee was the Appellant, **Kimberly Dickerson**. Ms. Dickerson is currently employed by the Cabinet for Health and Family Services as a Family Support Specialist I. Prior to her demotion of January 1, 2014, she was employed in Permanency and Protection as a Special Investigator with a title of Social Service Clinician I, a position she held for five to six years. She possesses a Masters Degree in Social Work (MSW).

2. About February 20, 2014, Appellant's husband had been diagnosed with cancer. He passed away on July 14. Ms. Dickerson has been off work since February 20 on sick leave through May. She thereafter was off work on donated sick leave and is unsure of her current status.

3. As a Social Service Clinician I part of her responsibilities included the use of Prevention Plans. A Prevention Plan lets family members know of a Social Worker's concerns about their situation. Requests are made of a family during investigations. She has written many Prevention Plans. Prevention Plans are written on Prevention Plan forms provided by the Cabinet.

4. She identified Appellee's Exhibit 1 as the Prevention Plan form she used and wrote on in this matter. The document contains her signature with the notation "MSW" after her name. The document refers to "R.W." who, throughout the course of these proceedings will be referred to as the "child." The child is the great-great nephew of Appellant's husband. At that time she and her husband had legal custody of the child who was five years old. The document was also signed by "L.R." the child's maternal grandmother. This document was written and signed in early June 2013. The content of the document was read into evidence.

5. The child had been returned to the home of Appellant following a visit with the grandmother. Appellant and her husband entered an agreement with the grandmother that all contact between the child and the child's biological parents would be supervised. She had hoped that by doing so, contact with the biological parents would gradually be reestablished for the child. It was hoped the contact would contribute to a decrease in the child's behavioral problems.

6. Appellant came to learn that some of the earlier visits of the child with his grandmother also included visits with the biological parents and the child's older sibling. She discussed that on the telephone with the grandmother. They were fine with that contact. The grandmother advised that the biological parents were trying to pressure her to let the child come to their house unsupervised and that "Kim won't care." Appellant had a twenty-year history with this family and she certainly did care, particularly about the ongoing drug issues. She told the

grandmother that she would write her a statement reflecting their agreement: The child can visit the biological parents but only when such visits are supervised. She decided to write a statement as the legal custodian so the parents could not have unsupervised contact.

7. One day in early June 2013, the grandmother arrived at Appellant's house, three hours earlier then previously arranged, to pick up the child. Appellant's husband called her at work in the Cabinet's Elliott County office where she was that day. Appellant's normal office is in Boyd County. In her position, Appellant served the fifteen counties of the Northeast Region. She resides in Elliott County. He told her the grandmother had arrived and was ready to leave with the child. He asked what to do. Appellant told her husband to advise the grandmother to drive to the Elliott County office and for her to call when she arrived; that Appellant would then run out and see the grandmother.

8. The Prevention Plan form was handy and available at that time. Appellant was in the middle of performing a number of tasks at work. Knowing the grandmother would soon arrive, she grabbed a Prevention Plan form because it provided a carbon copy, so both parties could have a copy of their agreement. The form was within Appellant's reach and she carried several of them with her wherever she goes. There was no legal pad handy. She quickly wrote down the contents of their agreement on the form and ran out the door. The purpose of this document was to help the grandmother in dealings with her daughter and son-in-law.

9. When Appellant started her employment with the Cabinet fourteen years ago, she was a Family Support Specialist I at a pay grade 10. At the time of her demotion she had been at pay grade 14.

10. Appellant had obtained legal custody of the child in April or May of 2011 when the child was three and a half years old. The child's grandmother and biological parents reside in Magoffin County, which is outside Appellant's professional service region.

11. At the time the document was written by the Appellant, she was not aware if there were any ongoing DCBS cases. The parents had no court ordered visitation nor did the grandmother. The child had an older half-sibling that had been adopted by the grandmother. He also had a younger sibling who was in the permanent custody of Appellant's husband's niece. Supervised visits between the child and his biological parents, in the presence of the grandmother, had begun prior to the write-up of Appellee's Exhibit 1. When Appellant wrote up the document she had no thought of any repercussion relating to her job. She testified these forms had also been used by her and others to write notes and reminders, primarily because these forms are readily available.

12. A Prevention Plan is not a binding contract or legal document. It makes requests and suggestions to family members in a case. It can be used in an on-going investigation. There need not be an open court case to use the Prevention Plan. If a family member does not abide by the Plan, the Cabinet decides whether to open a case, develop a case plan, and/or take it to court. Absent court intervention there is nothing that can be done when a family member does not abide by the Prevention Plan.

13. When the grandmother signed Appellee's Exhibit 1, she was not intimidated to do so, nor did she object or hesitate. Appellant did not hold herself out to the grandmother as a social worker or act in her official capacity at that time. The grandmother knew where Appellant worked. Once the document was given to the grandmother, the grandmother never mentioned it again. This document was never made a part of any Cabinet records.

14. On July 22, 2013, Appellant began the process of transferring the child's custody to the grandmother. That custody was officially transferred on August 22, 2013.

15. When the investigation into this matter started, Appellant was put on desk duty and her responsibilities were generally lifted. She received notice of Major Disciplinary Action (MDA). In November she received notice of an intent to dismiss. She requested and participated in a pre-termination hearing in December. As a result of that hearing, the first charge was dropped and she then received a notice of demotion. At the time of that disciplinary action she had one prior written reprimand in January 2013. Her evaluations throughout the course of her professional career, with the exception of one, were all rated "Highly Exceeds."

16. Appellee's Exhibit 1 had not been completed as fully as a true Prevention Plan ordinarily would have been completed. It did not set out any potential consequences, nor were any other boxes on the form filled out. She did not know whether the grandmother had ever presented Appellee's Exhibit 1 to the biological parents. There is nothing on that document to show that it is connected to or comes from the Commonwealth of Kentucky or the Cabinet for Health and Family Services.

17. **Shannon Hall**, Personnel Service Region Administrative Associate (SRAA) for the Northeast Service Region, was the next witness. His duties include investigating and reporting on disciplinary matters.

18. He was made aware of the current situation through the Office of Ombudsman. A complaint had been filed with that office, which in turn referred the matter to the Office of Inspector General (OIG). While the OIG investigation was not concerned with the Prevention Plan issue, that matter did come to light during the OIG investigation and was referred to Cabinet investigators. Mr. Hall conducted a separate investigation.

19. During the investigation he spoke to the Appellant and the grandmother. The grandmother had told him the Prevention Plan had been negotiated between her and the Appellant and that she felt it was "the law" and was done on the part of Ms. Dickerson to cover herself. When asked if she felt it was done as a professional or personal matter, the grandmother said, "both." When asked if any part caused her to feel intimidated, she responded in the negative.

20. The grandmother advised him that on that day in June 2013 she arrived at Appellant's home to pick up the child, three hours earlier than planned and met with Mr. Dickerson. Mr. Dickerson called his wife at the Elliott County DCBS office and thereafter told the grandmother to stop by the office to converse with Appellant about some paperwork. The grandmother did stop by that office between 9:30 and 9:45, met briefly with Ms. Dickerson and then left.

21. Mr. Hall also met with the Appellant. Appellant told him she had met with the grandmother, and grabbed the form out of convenience as it was something she could use so they both would have a copy.

22. Upon completion of his investigation, he submitted a written report. He concluded Appellant's use of the Prevention Plan form was a conflict between her professional and personal goals. "The boundaries were blurred in this case." She had personal reasons for entering into this agreement.

23. He testified the Cabinet does employ progressive discipline, depending on the egregiousness of the act. Such discipline usually starts with a written reprimand and accompanying Performance Improvement Plan (PIP). The next step could include a subsequent PIP, suspension, demotion or dismissal. In his experience, the lowest level of suspension he has seen has been two days with the most being fifteen days.

24. He found Appellant to have violated SOP 1.1, SOP 1.8, and the Personnel Procedures Handbook, Section 2.1.

25. The next witness was **Lesa Dennis**. For seventeen and a half years, Ms. Dennis has been employed by the Cabinet for Health and Family Services. Since 2011 she has served as Service Region Administrator (SRA) for the Northeast Service Region. She oversees the Division of Family Support and the Division of Protection and Permanency.

26. The Prevention Plan form is a DCBS form used to negotiate with families the steps that they will take to keep children safe at a particular home. When the parents sign the document they agree to abide by its terms to assure the child's safety. It is explained to caregivers that if the plan is not followed, more progressive steps could be taken to ensure the child's safety, including placement outside the home or court involvement.

27. Under no circumstances may a social worker draft a Prevention Plan for their own family member, per the standards of practice. Ms. Dennis was not certain what the grandmother thought when she was presented the document. There was no open case at that time pertaining to the child. If the Cabinet is not working with a family through an open case, there would be no reason to issue a Prevention Plan. The act was an ethical violation, a violation of social work standards, and SOPs.

28. Originally, a different allegation had been brought to their attention by the Office of the Ombudsman. The matter was then referred to the OIG. It was the OIG who brought the matter of the Prevention Plan to their attention.

29. Ms. Dennis spoke to Mr. Hall about the matter and directed him to initiate an investigation. She also informed her supervisor. Because of this matter and the pending prior allegation, Ms. Dickerson was placed on desk duty.

30. Mr. Hall submitted his report to the Office of Human Resource Management (OHRM). Dennis then received a decision to issue an intent to dismiss. She and Mr. Hall delivered that letter to the Appellant.

31. Upon further questioning, Ms. Dennis stated she looked into the matter and found Appellant did not search the Cabinet's computer data bank to look for information on this family or the child. The grandmother, upon request, had provided this document to the OIG Investigator. The document had never been a part of any Cabinet file or record.

32. The next witness was **Jennie Young**. Since 2003, Ms. Young has served as Human Resource Administrator, OHRM, Cabinet for Health and Family Services. Her duties include the review of requests for MDA. Since 2005 she has performed investigations and, if warranted, drafted letters for MDA.

33. Shawn Estep, Branch Manager, had assigned this case to Ms. Young. She reviewed the memo in the packet, gave the employee the opportunity to respond and reviewed documents provided both by the Cabinet and the employee. She had questions and requested further documents from the Department and the Appellant. She interviewed the Appellant and witnesses. She also examined the log of MDAs dating back to 2001 in order to look for similar acts and to be consistent in issuance of discipline. She recommended the disciplinary action and

drafted the letter.

34. During her interview with the Appellant, Ms. Dickerson had told her she was in a hurry and grabbed the first sheet of paper she could find. She also knew that form would provide a copy for each of the parties. She did not want to use blank paper and have to use the state copy machine. However, it was found that previously she had used the state fax machine to fax a power of attorney to the grandmother. Appellant admitted during the interview she should not have used the Prevention Plan form.

35. The initial disciplinary letter drafted by Ms. Young had two charges, including the matter of the Prevention Plan, with an intent to dismiss.

36. She identified as Appellee's Exhibit 2, Cabinet for Health and Family Services, Standards of Practice Online Manual, Section 1.1, Ethical Practice. She identified as Appellee's Exhibit 3, Cabinet for Health and Family Services, Standards of Practice Online Manual, Section 1.8, Prevention Planning. She identified as Appellee's Exhibit 4, Section 2.1 Employee Conduct, from the Cabinet for Health and Family Services. All these policies were in full force and effect at the time of the alleged acts.

37. With reference to Appellee's Exhibit 2, she testified, in her opinion, Appellant had violated Procedure, DCBS Employees: Section 13; and Protection and Permanency Professionals: Sections 12, 15, 16, and 17. The grandmother had been bothered by the biological parents for unsupervised visits with the child telling the grandmother, "Oh Kim won't mind, Kim won't mind." The grandmother wanted something to show the parents that Kim did mind. So Appellant wrote something that "officially" said there could not be unsupervised visits, because, Ms. Young believed there was a prior court order preventing unsupervised visits and that Appellant knew that. However, Ms. Young never saw such court order. Appellant used the form for her private interest.

38. Appellant signed the form and had the grandmother sign the form in a Cabinet office, also for her private interests. She used her position as a social worker and made it appear that it was the Cabinet who did this.

39. Appellant was not cited for misuse of state time. It could not be determined how much time Appellant used during the transaction. The Cabinet does not dock an employee if a matter takes less than 15 minutes. Ms. Young stated allegations of misuse of time were not in her disciplinary letter and not part of the charge.

40. She testified Appellant had violated Section 16 as no supervisor or management had been made aware of this.

41. She testified Appellant had violated Section 17 as there had not been an open case with the grandmother. The grandmother gave her a statement that others knew about this. Young concluded that as they were not clients of the Cabinet, they were basically the "general public." The grandmother said she told Appellant she needed something in writing because the parents were hassling her. Young surmised the document was drafted to show that the Cabinet did not want certain things to happen.

42. With reference to Appellee's Exhibit 3, she testified Appellant had violated procedure, used during the investigations/FINSAs, the SSW: Section 1. Appellant made a decision as a social worker that concerns about the child's safety were compromised. She was the child's caregiver. She told Young she knew there was a court order preventing unsupervised visits by the biological parents. This policy does not allow for the use of a Prevention Plan outside the parameters stated therein. This particular client was not on Appellant's caseload, nor was any case open at that time. There was no on-going case.

43. With reference to 2.1, Employee Conduct, she testified Appellant violated I. Purpose; II. Employee Conduct Guidelines, Lack of Good Behavior (1); and Ethics (10). The manner in which Appellant was involved was outside of work. The Prevention Plan is used inside work. Her use of this document diminished the public's confidence.

44. If one uses the form just to write a note as one would on a piece of paper, and the note has nothing to do with domestic violence or the case of a child, or the identity of a risk factor, such would not constitute a violation of any policy.

45. Appellant engaged in inappropriate and false use of this particular form. Once she filled it out and delivered it to the grandmother, she made it appear it was official. She misused her position and misused an official form.

46. Had she written this agreement on a blank piece of paper, which was then signed by both parties, there would have been no violations. Violations exist because she used the Cabinet's form and it looks like it was issued by the Cabinet. However, the witness acknowledged the form does not show on its face that it is associated with the Commonwealth of Kentucky or any of its agencies.

47. The next witness was **Howard J. Klein**. Mr. Klein is employed by the Cabinet for Health and Family Services, Office of Human Resource Management, and for the past thirteen years has been the Appointing Authority. He is also the Division Director of the Division of Employee Management. Disciplinary matters are included among his duties. He receives disciplinary requests, and assigns same to the appropriate branch. That branch then prepares a disciplinary letter. Mr. Klein reviews the final product and if he agrees with the document, signs it. He then described the general process of review before he signs.

48. Initially, he agreed with the intent to dismiss. The Appellant asked for a pre-termination hearing. As a result of the hearing, it was decided to apply only one element of the charges and reduce the discipline to a demotion. He decided on demotion, "Because of the deception she basically perpetrated upon the family, by using an official Cabinet document . . . still very inappropriate."

49. He testified that all verbiage contained in the intent to dismiss letter pertaining to the charge of the misuse of the Prevention Plan, was unchanged in the demotion letter. In making his decision he took into account what the DCBS wanted, the fact pattern, Appellant's position, and the elimination of the other charge. He decided on the demotion. "I agreed with the Department that thought this was a very egregious, just flat out wrong . . .A social worker should never do something like this . . . The level of inappropriateness that, they felt, and I agreed, that she needed to be out of the business of being a social worker. She would still have a job, just not be a social worker."

50. Mr. Klein testified that Appellant's use of an official document was ". . . to basically trick some citizens into thinking this has the weight of the Cabinet and the Department behind it. That if you don't do this, you're in big trouble." He did not speak to any outside citizens about the matter and when asked by Appellant's counsel for facts pertaining to his allegations that others had been tricked, Mr. Klein testified, "I don't know if they were or not, but it really doesn't matter. It's the act that, of her intentionally, to try and trick someone, that's why (she) was demoted. Whether you're successful or not doesn't matter . . . she tried to trick them, I don't know whether she actually succeeded."

51. The Hearing Officer inquired what facts Mr. Klein had to back up the allegation that Appellant engaged in a deception. Mr. Klein held up Appellee's Exhibit 1 and testified, "This is proof." When asked to elaborate, he stated, "She knowingly and unprofessionally used her position for personal reasons by inappropriately completing an official form for an individual, even though the individual did not have an open case, was not on her caseload, and would never been assigned to her due to a close, personal relationship."

52. He was asked how he knew that this particular document was presented as a Prevention Plan. He testified, "It says Prevention Plan. She's a social worker. She signs it as a social worker . . . She tried to make it look like it was official to hand it to this grandmother to use." Mr. Klein was asked what tells the general public, unfamiliar with the Cabinet, that this document is an official document of the Cabinet. He replied, "Well, you have to take in all the elements. It says Prevention Plan, she signed as a social worker, they know she's a social worker and works for the Cabinet."

53. Mr. Klein was asked again about his prior testimony about there having been a "deception perpetrated upon the family." He now testified that there was an "attempted" deception in that she tried to deceive. He was asked whether the grandmother was one of the individuals deceived by this document. He said he did not know. He was asked if the biological parents were deceived. He testified they would be, but he did not know if they saw the document. He continued that whether or not they saw the document was "irrelevant." "It's the attempt, the purpose behind her mental state when she used this. Whether it worked or not, was irrelevant."

54. Appellant's counsel asked Mr. Klein how he ascertained the Appellant's state of mind. He said it was because she specifically used this form. "You don't just pick this up by accident and use it, for what she used it for. It was a purposeful act to pick this up and use it." When asked if he had any facts, whether the form was used by the grandmother to advise the parents there would be no unsupervised contact, he testified, "I don't know how it was used and as I said . . .it doesn't matter how it was used. The fact that it was given to her for that use." He continued, "It was used, to be used to deceive. Why would it be created? Why would you even need it? Why not just verbally say, 'Don't let the kid go with those two?' Why do you need to write it down?"

55. "It's obvious this was used because just verbally telling someone, she wanted the weight of the Cabinet behind this to attempt to deceive these people."

56. The Hearing Officer inquired of Mr. Klein regarding the statement he made on p. 2 of the December 17, 2013 demotion letter (Appellee's Exhibit 5). In the second paragraph of the first violation, it was stated in part, ". . . you gave Client *1 the incorrect impression that you were acting in your official capacity as a Cabinet social service worker; thereby using your position for personal reasons. . ." He was asked what facts he had to make such a statement. He stated that by Appellant's position and the grandmother knowing her position, the use of that document constituted a violation. When the Hearing Officer inquired, "You don't know what impression Client *1 had?" Mr. Klein testified, "Correct." Then when further asked whether his statement in the letter was false, Mr. Klein testified, "It might be right."

57. The statement in the letter also alleged that Appellant's acts interfered with her objectivity. The Hearing Officer inquired how it interfered with her objectivity. Mr. Klein testified she should not have been involved in this case in the first place. "Objectively, she should have gone to a supervisor and say, 'Here is what's happening, I can't handle this, and we need to open a case.' If she had so much concern about what is going on, maybe she should have reported it."

58. Mr. Klein did not know whether a case had ever been opened on this child. "It really doesn't matter. This case is about what she did. When she filled this out (Appellee's Exhibit 1) and handed it to someone, that is the bad act. Everything after that is irrelevant."

59. He stated he did not know that Appellant performed this act on state time. The Hearing Officer asked why, then, he would put that allegation in the letter. Mr. Klein then testified, "I think we do know." After reviewing the letter he stated, "I don't remember what time it was."

60. There were no further witnesses for the Appellee. The Appellant called no witnesses. Each of the parties presented closing arguments.

FINDINGS OF FACT

1. Kimberly Dickerson, Appellant, was at the time of issuance of the subject disciplinary action, employed by the Cabinet for Health and Family Services as a Social Service Clinician I. She conducted investigations for the Division of Protection and Permanency. Appellant is a classified employee with status and possesses a Master's Degree in Social Work (MSW).

2. In 2013 Appellant and her husband had legal custody of "R.W.," a minor, who was the husband's great great nephew. "R.W." had been having regular visits with "L.R.," the maternal grandmother. Through agreement with the Appellant, whenever "R.W." visited with his biological parents, those visits were supervised by "L.R."

3. Appellant had a twenty-year history with "R.W.s" family and was aware of the on-going drug issues in the home of the biological parents. She did not want "R.W." to ever be alone with the parents.

4. Appellant and her husband entered an agreement with "L.R." that all contact between "R.W." and the child's biological parents, would be supervised. The biological parents then began to pressure "L.R." to have unsupervised visits. "L.R." communicated this to Appellant and Appellant agreed to provide "L.R." a written statement setting out their agreement so "L.R." could show this to the biological parents.

5. In June 2013, "L.R." arrived at the Appellant's house three hours earlier than previously arranged, to pick up "R.W." Appellant was at work while her husband was home. Appellant's husband then asked "L.R." to stop at the Elliott County office on her way out, to meet with Appellant.

6. Appellant took a Prevention Plan form and wrote down the parties' prior agreement. She met with "L.R." in the Elliott County office where they both voluntarily and without duress signed their agreement. (Appellee's Exhibit 1.) Each of them retained a copy. There is nothing on the face of the document to indicate any connection with any agency of Kentucky State Government, or that it is in anyway an official form or document of the Commonwealth.

7. The Prevention Plan form is a DCBS form used during negotiations with families. When a Prevention Plan is issued, it is written on a Prevention Plan form and sets out steps a family will take to keep children safe at home. When parties sign the document it signifies the agreement to abide by its terms to assure the child's safety. If the Prevention Plan is not followed, DCBS may employ more progressive steps, including placement of a child outside the home, or court involvement. If there has not been a case opened with the family, there is no reason to issue a Prevention Plan. There had been no open case involving "R.W." or the child's family.

The Standard of Practice directs that a Social Worker may not, under any circumstances, issue a Prevention Plan for their own family member.

8. After having received a copy of the written agreement, "L.R." never mentioned the document again until the investigation. The document was never made a part of any Cabinet records.

9. Legal custody of "R.W." was voluntarily transferred from Appellant to "L.R." on August 22, 2013.

10. A complaint had been made to the Office of the Ombudsman.[1] The complaint was referred to the Office of Inspector General (OIG). During the OIG investigation, the Prevention Plan form came to light, resulting in a referral to Appellee's investigators. The investigation by the Cabinet was conducted by Shannon Hall, Personnel SRAA for the Northeast Service Region. He interviewed Appellant and "L.R." It was "L.R." who provided him a copy of Appellee's Exhibit 1.

11. When he completed his investigation, Hall submitted a written report[2]. He concluded Appellant's use of the Prevention Plan form was a conflict between her professional and personal goals; she had personal reasons for entering into this agreement with "L.R." He concluded that Appellant had violated SOP 1.1, SOP 1.8, and the Personnel Procedures Handbook, Section 2.1. (Appellee's Exhibits 2, 3 and 4.) All policies were in full force and effect during this time.

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[1] That complaint was not in any way related to the subject Prevention Plan form.
[2] That report was not presented to the Hearing Officer or made an exhibit in this proceeding.

12. There is no violation of any policy if a Social Worker writes notes on a Prevention Plan form, and the notes have nothing to do with domestic violence or a case involving a child, or the identity of a risk factor. Likewise, had Appellant written this agreement on a blank piece of paper, which she and "L.R." thereafter signed, no policy would have been violated. (Testimony of Jenny Young, Human Resources Administrator, OHRM, CHFS.)

13. A request for Major Disciplinary Action (MDA) was made. Howard J. Klein, the Appointing Authority agreed with the decision to issue an intent to dismiss letter. Appellant requested and participated in a pre-termination hearing.

14. Klein decided to apply only one element of the previous charge and reduced the discipline to a demotion. He based his decision on his belief that Appellant had engaged in a "deception she basically perpetrated upon the family, by using an official Cabinet document . . .I agreed, that she needed to be out of the business of being a Social Worker. She would still have a job, just not be a Social Worker."

15. Mr. Klein had no knowledge whether or not others were tricked or deceived by this document or whether the biological parents had ever seen the document. He later revised his testimony to say Appellant had "tried to deceive" others.

16. Mr. Klein issued the December 17, 2013 letter notifying Appellant the intent to dismiss had been rescinded, but that she was demoted from Social Service Clinician I, at pay grade 14, to Family Support Specialist I, pay grade 10, effective January 1, 2014; and that her monthly salary would be reduced from $3,248.08 to $2,706.74. The demotion was based on an allegation of lack of good behavior by Appellant having used her position for personal reasons when she ". . . inappropriately completed an official Cabinet form for an individual, even though the individual did not have an open case, was not on your caseload, and would have never been assigned to your caseload due to your close, personal relationship;" that she had given Client #1[3] the incorrect impression that she was acting in her official capacity as a Cabinet Social Service Worker. (Appellee's Exhibit 5.)

17. When he wrote the letter, Mr. Klein did not know what impression Client #1 had. When asked by the Hearing Officer whether his statement in the letter then, might be false, Klein answered, "It might be right."

18. The letter also alleged Appellant had ultimately used ". . . state time and resources for a personal matter and not Cabinet business," and were ". . . an unethical use of your position, state time and resources." Mr. Klein did not know whether Appellant performed this act on state time.

[3] "Client #1" as identified in the letter is one and the same person as "L.R." the grandmother.

19. The Cabinet employs progressive discipline.

20. During her years of employment with the Cabinet Appellant had previously received, in January 2013, a written reprimand. Her evaluations throughout the course of her professional career, with the exception of one, were all rated "Highly Exceeds."[4]

CONCLUSIONS OF LAW

1. The issue in this case is whether there was just cause for the disciplinary action taken against the Appellant, and whether it was excessive or erroneous. The Appellant, Kimberly Dickerson, was demoted from Social Services Clinician (pay grade 14) to Family Support Specialist I (pay grade 10) with a 20 percent decrease in pay. The burden of proof was on the Appellee to prove its case by a preponderance of the evidence.

2. Kimberly Dickerson was a classified employee with status. A classified employee with status may not be demoted or otherwise penalized except for cause. KRS 18A.095(1).

3. A "penalization" includes, but is not limited to, demotion and any action that diminishes the level, rank, discretion, or responsibility of an employee without proper cause; and the abridgement or denial of other rights granted to state employees. KRS 18A.005(24).

4. "Preponderance of evidence" means: '. . . evidence which, as a whole, shows that the facts sought to be proved is more probable than not. With respect to burden of proof in civil actions, means greater weight of evidence, or evidence which is more credible and convincing to the mind." Black's Law Dictionary, 5th Ed., p. 1064. The ultimate burden of persuasion in all administrative hearings is met by a preponderance of evidence in the record. Failure to meet the burden of proof is grounds for a recommended order from the Hearing Officer. KRS 13B.090(7).

5. In the December 17, 2013 letter from Howard J. Klein, Appointing Authority, he cited violations of DCBS Standard of Practice (SOP) 1.8, Prevention Planning, and DCBS SOP 1.1, Ethical Practice, and Cabinet for Health and Family Services, Personnel Procedure 2.1, Employee Conduct, as the basis for Appellant's demotion.[5]

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[4] This information came from the testimony of Ms. Dickerson. There is no mention in the December 17, 2013 disciplinary letter of Appellant's prior disciplinary history.

[5] Such policies were admitted as Appellee's Exhibits 3, 2, and 4 respectively.

6. Appellee cited alleged violation of SOP 1.8 which states:

The SSW:

1. Utilizes the Prevention Plan when safety concerns are identified during an investigation or FINSA and;

   A. When the SSW believes the child(ren)'s safety may be compromised and the child remains in the home/setting;

   B. When the child(ren) has been temporarily placed with a relative or other person chosen by the parent/caretaker due to risk or safety issues; or

   C. A FINSA indicates a family needs services or an investigation substantiates abuse or neglect.

. . .

"Utilizes the Prevention Plan" means issuing a Prevention Plan as a Social Service Worker. Mere use of the form without intent to issue or appear to issue a Prevention Plan is quite different.

7. There was no investigation or FINSA. There was no case involving "R.W." Appellant and her husband were "R.W.s" legal custodians. There was a lack of preponderance of the evidence to show that Appellant's mere use of a form, without anything more, constituted an intent to represent the document as an officially issued Cabinet Prevention Plan.

- Appellant and the maternal grandmother entered an oral contract concerning supervised visitation for "R.W.," well in advance of Appellant's use of the form. The Cabinet was not a party to this contract, nor should it have been.
- Appellant was aware at that time of a twenty-year history of "R.W.'s" parents which included drug abuse. She and the grandmother voluntarily, freely, and without duress, entered into their oral agreement.
- The oral agreement was reduced to writing after the grandmother told Appellant the biological parents had been pressuring her to have unsupervised visits with "R.W.," trying to convince her that "Kim won't care." Appellant did care and agreed to provide the grandmother a written memorialization of their existing oral contract.

- The Appellant and grandmother were aware there was no Cabinet involvement or open case pertaining to "R.W." Likewise, there was no domestic violence involved here.
- One day in June 2013 the grandmother arrived three hours earlier than expected to pick up "R.W." Appellant's husband asked the grandmother to go and meet Appellant at her work to pick up some paperwork. Appellant took a Prevention Plan form and wrote down the contents of the parties' prior oral contract. She signed it as did the grandmother when they met at the Elliott County office. Each party retained a copy.
- Nowhere on the face of the Prevention Plan form does it indicate it is in any way connected with or issued by the Commonwealth of Kentucky or any of its agencies.
- If one uses the Prevention Plan form just to write a note, as one might on a piece of paper, and the note has nothing to do with domestic violence or the case of a child, or the identity of a risk factor, there is no violation of policy. [Testimony of Jenny Young, Human Resources Administrator, OHRM, Cabinet for Health and Family services.]
- There is no evidence that the grandmother thereafter showed the document to anyone, prior to the Cabinet's investigation
- There is conflicting evidence from the Cabinet whether Appellant misused state time or was charged for such alleged misuse.[6] While Appellant should not have used state resources, vis-à-vis, a form generated for Cabinet use, the Appellee has failed to show by a preponderance of the evidence that Appellant had any intent to issue a Prevention Plan. There was also no evidence to show that Appellant gave the grandmother any explanation of potential consequences, or that any progressive steps would be instituted, if the grandmother did not comply with their agreement. Therefore, there was no a violation of SOP 1.8.

8. Appellee cited alleged violations of SOP 1.1, Ethical Practice, in particular sections related to DCBS employees, items 5, 6, 7 and 8; Protection and Permanency Professionals, items 12, 15, 16 and 17. The Hearing Officer will also discuss DCBS employees, Item 13.

[6] On p.2 of the December 17, 2013 demotion letter signed by Howard J. Klein (Appellee's Exhibit 5) it states in part, ". . .and was ultimately using state time and resources for a personal matter and not Cabinet business." Jenny Young testified Appellant had not been cited for misuse of state time . . .It could not be determined how much time was involved when Appellant met with the grandmother in the Elliott County office; that the Cabinet does not dock an employee if a matter took less than fifteen minutes. Mr. Klein appeared more unsure, having first testified he did not know if the matter occurred on state time, then stating, "I think we do know," and shortly thereafter, "I don't remember what time it was."

Item 5: "Avoid participation in any activity they know to be illegal or improper activity; In the performance of their duties;"

There has been no allegation or evidence that Appellant engaged in any activity that was illegal. The allegations of "improper" activity were set out in Mr. Klein's testimony:

- "because of the deception she basically perpetrated upon the family, by using an official Cabinet document . . ."
- "I agreed that she needed to be put out of the business of being a Social Worker."
- ". . .to basically trick some citizens into thinking this has the weight of the Cabinet and the Department behind it." Mr. Klein, however, testified that he did not know if any citizens had been so tricked.
- That Appellant had ". . . used her position for personal reasons by inappropriately completing an official form for an individual, even though that individual did not have an open case, was not on her caseload, and would never have been assigned to her due to a close, personal relationship."
- That Appellant had "attempted" a deception upon the family. Mr. Klein, however, did not know whether the grandmother used the document or if the biological parents had ever seen the document.
- That such "attempt" was the act of writing down the agreement on the Prevention Plan form, because "Why not just verbally say 'Don't let the kid go with those two.' Why do you need to write it down?"

The evidence showed there had been no Cabinet involvement with "R.W." The placement of the child in the legal custody of Appellant and her husband was done privately, presumably through the courts, without involvement or participation by the Cabinet. Thousands of parents and relatives raise children without the Cabinet's involvement in such a manner.

Appellant showed good sense and reason for the welfare and best interests of "R.W." when she was steadfast in permitting only supervised visits by the biological parents. Despite Mr. Klein's assertion that such agreement need not have been placed in writing, Appellant made clear in her testimony that the grandmother felt pressured by the biological parents. Item 5 was not violated.

Item 6: "Are continually aware of the public trust they hold and their obligation to maintain a high standard of competence and dignity in the performance of their duties."

Appellant, concerned about the wellbeing of "R.W.," took into account his best interest when she reasoned his behavioral problems might subside when allowed to visit with his biological parents and older sibling. Aware, however, of the personal problems of the biological

parents, she insisted such visits be supervised by the grandmother.

Furthermore, Appellant acted either in a personal manner or in the performance of her duties. The Cabinet cannot have it both ways. The evidence shows that Appellant, before, during and after, acted in a personal manner, not in the performance of her duties. Item 6, therefore, was not violated.

> **Item 7**: "Do not enter into any activity which may be in conflict with the interest of the citizens of Kentucky."

The Cabinet failed to prove by a preponderance of the evidence that anything Appellant did was an "activity which may be in conflict with the interests of the citizens of Kentucky."

Item 8: "Refrain from entering into any activity which may prejudice (or give the appearance of such) their ability to objectively perform their duties and responsibilities."

The Cabinet failed to prove by a preponderance of the evidence that anything Appellant did could ". . . prejudice (or give the appearance of such) their ability to objectively perform their duties and responsibilities." Her use of the Prevention Plan form to write out her agreement with the grandmother was something she did in her capacity as "R.W.'s" legal custodian. There had been no involvement at all by the Cabinet and there was no case. There was no need for a case in this situation as Appellant and the grandmother reasonably resolved a private matter that required no state intervention on any level. Appellant's duties and responsibilities as a Social Worker were not required here, and her acts on a personal level were not shown to prejudice her professional objectivity in any manner.

> **Item 12:** "Avoid any conduct that would lead a reasonable person to conclude that the social service professional might be biased or motivated by personal or private interests in the performance of duties"

There had been neither an open case involving "R.W." nor any involvement in his life on the part of the Cabinet. The evidence did not show there had been any potential danger to the child's safety that might have required Appellant to notify or involve the Cabinet. Appellant and her husband, quite reasonably, in their private capacities as the child's legal custodians, allowed the child to begin to reintegrate and interact with his biological parents, but only under conditions that such visits be supervised by the grandmother. Supervised visits had been established well before the grandmother requested the parties' oral agreement be placed in writing. There is no evidence the grandmother requested anything in an "official" capacity, or anything other than a written memorialization of the prior agreement.

At no time did Appellant act in the performance of her duties as a Cabinet social worker, nor was she required to so act in this instance. The "reasonable person" here, the grandmother, had knowledge of Appellant's and her husband's private capacity as the child's legal custodians, as well as the substance of the private agreement into which they had previously entered.

Item 13: "Do not use state resources, including time, facilities, equipment, supplies or uniforms for private benefit or advantage."

The evidence does show Appellant used state resources, that is, the Prevention Plan ***form***, which is a "supply" item, for her private benefit. There was conflicting testimony and evidence, and therefore insufficient proof to show whether Appellant utilized state time for her own benefit.

Items 15, 16 and 17:

These items refer specifically to the avoidance of a conflict of interest between a Social Worker's professional duties and responsibilities and that individual's personal gain or private interest. As stated above, Appellant was not acting or purporting to act in her professional position as a Cabinet Social Worker when she and the grandmother signed the written agreement, despite her having written the initials "MSW" next to her signature.[7]

She acted in her private, individual capacity. The grandmother also had a history with the family, and certainly had knowledge of Appellant being the legal custodian of "R.W." When the grandmother signed the form, the parties had previously entered into an oral agreement containing the same terms and substance. It is unclear from the hearsay testimony pertaining to the grandmother's alleged statements made during the investigation, whether when she referred to the document as being "the law" she meant the law as their contractual agreement or Appellant's position as a Social Worker. Without anything more, the Hearing Officer will not speculate on her perception.

9. Appellee cited alleged violations of the Cabinet for Health and Family Services Personnel Procedure 2.1, Employee Conduct. Testimony provided by Appellee's witnesses indicated there were allegations of violation of: **II. Employee Conduct Guidelines, Lack of Good Behavior**, paragraph 1, and **Ethics**, paragraph 10. The Hearing Officer finds the evidence insufficient to support an allegation that Appellant falsified, forged, or inappropriately altered any official documents. However, Appellant did use state government property, a blank form, for personal benefit.

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[7] "MSW" denotes Appellant holds the degree of Masters in Social Work. She will still hold that degree, and designation, whether she is employed as a Social Worker or is demoted, and remains entitled to so designate her education in that manner. Such designation is tantamount to one using "Ph.D." behind their name or "Dr." in front of their name, without representing themselves to be a physician.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **KIMBERLY DICKERSON VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2014-027)** be:

1. **SUSTAINED to the following extent**: That the demotion of the Appellant to Family Support Specialist I, Pay Grade 10, be reversed, vacated, and held for naught; that Appellant immediately be restored to her former position of Social Service Clinician I, Pay Grade 14, retroactive to January 1, 2014, with full reinstatement of her duties and restoration of all salary and benefits;

2. As Appellant has been found to have used state resources, that is, a blank form provided by the Cabinet, for her private benefit, and in view of the testimony of the next progressive step in discipline following a written reprimand, that the discipline issued to Appellant be a two-day suspension from duty and pay; AND

3. The Appellee is ordered to reimburse Appellant for any leave time she used IN attending the evidentiary hearing and any pre-hearing conferences at the 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 Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

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

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

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

ISSUED at the direction of **Hearing Officer Roland P. Merkel** this 6th day of November, 2014.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Rebecca Wooldridge
Hon. Rebecca Graham