

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2022-139**

RACHEL JENKINS

APPELLANT

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

EDUCATION AND LABOR CABINET

APPELLEE

*** **

The Board, at its regular May 2024 meeting, having considered the record, including the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer dated April 11, 2024, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer are approved, adopted, and incorporated herein by reference as a part of this Order, and the Appellant's appeal is therefore **DISMISSED**.

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

SO ORDERED this 17th day of May, 2024.

KENTUCKY PERSONNEL BOARD



GORDON A. ROWE, JR., SECRETARY

Copies hereof this day emailed and mailed to:

Hon. Ned Pillersdorf
Hon. Matthew Lynch
Hon. Rosemary Holbrook (Personnel Cabinet)
Leslie Tindall

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**V. FINDINGS OF FACT, CONCLUSIONS OF LAW,
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This matter came on for an evidentiary hearing on April 3, 2024, at 9:30 a.m., ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A. This evidentiary hearing was conducted by video conferencing using Amazon Chime.

The Appellant, Rachel Jenkins, was present and was represented by the Hon. Ned Pillersdorf. The Appellee, Education and Labor Cabinet, was present and was represented by the Hon. Matthew Lynch. Also present was Agency representative and appointing authority Leslie Tindall and the Hon. Bernadette Leveridge.

BACKGROUND

1. The Appellant filed her appeal with the Personnel Board on September 28, 2022, from her dismissal. Counsel for the Appellee requested a More Definite Statement of the Appellant's appeal. The parties agreed to exchange discovery, file dispositive motions, and schedule a video evidentiary hearing.

2. The Appellant filed a More Definite Statement on March 6, 2023, which reads as follows:

Rachel Jenkins states that she was discharged from employment on September 2, 2022, at which time she was employed as an Unemployment Hearing Officer. Rachel Jenkins states she was terminated as a result of her accessing her husband's pending unemployment claim in April of 2021.

The reason Rachel Jenkins accessed her husband's unemployment claim was due to the fact that during that timeframe there was great confusion and

uncertainty as to numerous claims being made in the midst of the COVID epidemic. During that timeframe, the Unemployment office was besieged with numerous claims and there were constant complaints as to why unemployment benefits were not being distributed in a prompt manner. Rachel Jenkins states that her judgment at that time was to look at her husband's case to gain better information as to what was going on. She subsequently accessed the Unemployment letter in September of 2021, her husband's unemployment status, to once again learn what type of issues were arising with unemployment claims. Once again, during this timeframe, there was great uncertainty as to why unemployment claims were not being processed in a timely manner or related to the ongoing COVID epidemic. Her husband consented to her reviewing his information.

Rachel Jenkins, on August 17, 2022, on behalf of her husband, did directly contact the Executive Director of Unemployment Insurance, Buddy Hoskinson, as to what she received as to unfair treatment of her husband's claim. Approximately two weeks later, she learned of the adverse action, and Ms. Jenkins believes that this was in retaliation for the emails she sent two weeks earlier in that her alleged violations had occurred more than one year and a half earlier.

3. The Hearing Officer denied the Appellee's Motion for Partial Summary Judgment in an Interim Order issued on January 11, 2024.

4. Issues for the evidentiary hearing:

- a) Whether or not there was just cause for the dismissal of the Appellant and whether that penalty was excessive or erroneous.
- b) The Appellant's allegation that she had been retaliated against.

5. Witnesses:

a. Appellee:

- 1. The Appellant, Rachel Jenkins.
- 2. Rebecca Rogers Johnson, Executive Director of Policy and Administration.
- 3. Leslie Tindall, Deputy Executive Director of Administrative Services and Appointing Authority.

b. Appellant:

The Appellant did not call any witnesses and presented her case through cross-examination of the Appellee's witnesses.

6. Exhibits:

a. Appellee:

1. Personnel Action Request and Personnel Action Notification for Appellant showing Resign to Reappoint from Workforce Development Specialist II to Unemployment Insurance Appeals Referee I effective August 16, 2021.
2. Labor Cabinet Conflict of Interest Policy effective April 20, 2021, and Appellant's Acknowledgement of receipt of Multiple Labor Cabinet's Policies signed electronically on April 20, 2021.
3. Appellant's Response to Appellee's First Set of Requests for Admissions.
4. Notice of Dismissal for cause to the Appellant from Education and Labor Cabinet (ELC) Appointing Authority, Leslie Tindall, dated September 2, 2022.
5. Memorandum from ELC Executive Director, Rebecca Rogers Johnson, to ELC Division Director, Kimberly Tucker, regarding "Employee Misconduct- Rachel Jenkins" dated August 26, 2022.
6. Selected pages from "Report of the Statewide Single Audit of the Commonwealth of Kentucky, Volume II, For the Year Ended June 30, 2020" issued by Mike Harmon, Auditor of Public Accounts, on April 21, 2021.
7. Initial Determination from the United States Department of Labor, Employment and Training Administration for the Commonwealth of Kentucky for the period July 1, 2019 to June 30, 2020, issued on July 20, 2021.
8. PowerPoint presentation slides from Office of Unemployment Insurance Security Awareness Training presented by Rebecca Rogers Johnson.

9. Office of Unemployment Insurance Security Awareness Training Quiz.
10. List of attendees at training session in the Appellee's Exhibit 8 showing the Appellant's attendance on April 12, 2021.
11. Complete log of access to Appellant's husband's Unemployment Insurance claim.

7. At the conclusion of the presentation of evidence, counsel for both parties presented closing arguments.

FINDINGS OF FACT

1. The Appellant was a Workforce Development Specialist II with the Appellee from 2011 to August 2021. In this position, she was a classified employee with status. (Testimony of the Appellant and **Appellee's Exhibit 1**).

2. On August 16, 2021, she "Resigned to Reappoint" as an Unemployment Insurance Appeals Referee I. In her new position, she was a Federally Funded Time Limited (FFTL) employee. As such, she was an unclassified employee. (Testimony of the Appellant and **Appellee's Exhibit 1**).

3. During the COVID-19 Pandemic, the Appellee was overwhelmed with unemployment claims. The Appellant was aware of complaints and even had people showing up at her home with questions about their claims. (Testimony of the Appellant).

4. The Appellant accessed unemployment claims filed by her husband and son. The Appellant testified she had permission from both her husband and son. She stated she wanted to see if checks had been issued for her family members and the "public at large." (Testimony of the Appellant).

5. The Appellant's Unemployment Insurance Program is subject to oversight by the Auditor of Public Accounts as well as the United States Department of Labor, the Internal Revenue Service, and the Social Security Administration. In 2021, the Appellee received a report from the Auditor highlighting "Material Weaknesses Relating to Internal Controls and/or Noncompliance." One specific finding was the "Office of Unemployment Insurance Employees Were Able to Access and Change Their Own Claims in the Kentucky Information Management System." The United States Department of Labor raised the same concerns in its Initial Determination. (Testimony of Rebecca Rogers Johnson (Rogers Johnson) and **Appellee's Exhibits 6 and 7**).

6. The Appellee issued a new Conflict of Interest Policy on April 20, 2021. All employees were required to attend training and complete a quiz on the new policy. The Appellant

completed these tasks on April 12, 2021. The policy included the following language: "No employee shall access or obtain copies of their own information or that of any family member or close friends." Employees were warned that violations of the policy may result in disciplinary action up to and including dismissal. (Testimony of Rogers Johnson and **Appellee's Exhibit 2**).

7. The Appellant accessed both her husband and son's unemployment claims on numerous occasions before she attended the Conflict of Interest Training and before the new policy went into effect. The Appellant admitted that the April 12, 2021 Conflict of Interest Training informed participants that the Office of Unemployment Insurance System should never be used to access unemployment accounts pertaining to family members. She also took and passed the quiz that reinforced that employees should not access accounts belonging to family members. Nonetheless, the Appellant accessed her husband's unemployment insurance claims on April 18, 2021, and April 19, 2021, within a week after attending the training. She also accessed her husband's claim five (5) more times after she was appointed as an Unemployment Insurance Appeals Referee I. (Testimony of the Appellant, Rogers Johnson, and **Appellee's Exhibits 3, 4, 5, 10, and 11**).

8. The Appellant's actions in accessing her family members unemployment claims, constituted a Lack of Good Behavior and violated the Appellee's Conflict of Interest Policy. The Hearing Officer finds there was just cause for disciplinary action against the Appellant. (Testimony of the Appellant, Rogers Johnson, Leslie Tindall (Tindall) and **Appellee's Exhibits 2, 3, 4, 5, 8, 9, and 11**).

9. The Appellant contended she should have been suspended instead of dismissed. She emphasized that other employees worked on their coworkers' claims and faced no discipline. Counsel for the Appellant argued that her punishment should be mitigated because she had her family members permission to access their accounts and there was no evidence she changed anything when she accessed the accounts. The Appellee's witnesses successfully refuted these claims. Rogers Johnson and Tindall pointed out the Appellee considered dismissal the appropriate penalty for employees who had been trained on the Conflict of Interest Policy and who inappropriately accessed files after the policy became effective. Rogers Johnson stated that permission might impact confidentiality but does not in any way mitigate against the damage to the integrity of the Unemployment Insurance System. Rogers Johnson and Tindall testified credibly that accessing family members claims, even without changing anything, is a sufficiently egregious violation of policy to justify dismissal. The Hearing Officer finds that there was just cause for dismissal of the Appellant and that the penalty is neither excessive or erroneous. (Testimony of Appellant, Rogers Johnson, Tindall, and **Appellee's Exhibits 4, 5, 6, 7, and 11**).

10. The Appellant did not introduce any testimony of retaliation. There was no evidence the Appellant contacted the Executive Director alleging unfair treatment of her husband's claim as the Appellant alleged in her More Definite Statement.

CONCLUSIONS OF LAW

1. The Appellant, an unclassified employee, was dismissed for cause. As a result, she had a right to appeal her dismissal and the Appellee was correctly assigned the burden of proof. KRS 18A.095(9), KRS 13B.090(7) and *Martin v Corrections Cabinet*, 822 S.W.2d 858, (Ky. 1991).
2. The Appellee carried its burden of proof to establish a lack of good behavior by the Appellant and a violation of the Conflict of Interest Policy. KRS 13B.090(7) and 101 KAR 3:050.
3. The Appellee carried its burden of proof that there was just cause for the Appellant's dismissal and the penalty was neither excessive or erroneous. KRS 13B.090(7) and KRS 18A.095(7) and (22).
4. The Appellant failed to carry her burden of proof that her dismissal was the result of retaliation. KRS 13.090(7) and KRS 18A.095(9) and (14).
5. Because all the events underlying this Appeal occurred before the effective date of Senate Bill 153, all references to KRS Chapter 18A are to the sections in effect at the time of the events associated with this Appeal.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **RACHEL JENKINS V EDUCATION AND LABOR CABINET (APPEAL NO. 2022-139)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

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

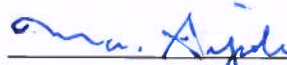
The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

The parties are strongly encouraged to send any exceptions and/or requests for oral argument by email to: PersonnelBoard@ky.gov

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.

SO ORDERED at the direction of the Hearing Officer this 11 day of April, 2024.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day emailed and mailed to:

Hon. Ned Pillersdorf
Hon. Matthew Lynch
Hon. Rosemary Holbrook (Personnel Cabinet)