

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2016-093

KELLY JONES

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 December 2016 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated November 7, 2016, 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:

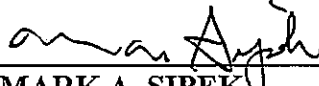
A. **Delete** all references to "paramour" in Background and Findings of Fact, and substitute "boyfriend."

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer, as Altered, be and they hereby are, approved, adopted and incorporated herein by reference as a part of this Order, and Appellant's appeal is **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 15th day of December, 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
SECRETARY

A copy hereof this day mailed to:

Hon. Kathleen Hines
Ms. Kelly Jones
Mr. Jay Klein

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2016-093**

KELLY JONES

APPELLANT

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

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

** ** *

This matter came on for an evidentiary hearing on September 16, 2016, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Roland P. Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Kelly Jones, was present and was not represented by legal counsel. The Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Kathleen Hines. Also present as Agency representative was Ms. Crystal Siler.

The first issue under consideration was the five-day suspension of the Appellant from her position as a Family Support Specialist II with the Department for Community Based Services, South Central Region, for the period of April 11 through April 15, 2016, based on allegations of lack of good behavior. The burden of proof was on the Appellee to show, by a preponderance of the evidence, the disciplinary action was taken with just cause and was neither excessive nor erroneous.

The second issue was Appellant's claims of retaliation and/or harassment. The burden of proof was on the Appellant to support those allegations by a preponderance of the evidence.

The rule separating witnesses was invoked and employed throughout the course of the hearing. Both parties waived presentation of opening statements.

BACKGROUND

1. The first witness for the Appellee was **Crystal Siler**. For the past three years, Ms. Siler has been employed by the Cabinet for Health and Family Services as a Personnel Associate. Her duties include dealing with personnel issues, hiring, discipline, Family Medical Leave and attendance, in the Division of Protection and Permanency, and in Family Support.

2. Ms. Siler is the point person between the regional office and the Office for Human Resource Management (OHRM) in matters of discipline. She was involved in this

disciplinary matter. The issue was brought to her attention through a letter she received in the mail that alleged Ms. Jones had used her position as a Family Support Worker for personal benefit, for her boyfriend, and had used state equipment to do so. She identified Appellee's Exhibit 1 as the letter and the documents she received from an anonymous source.

3. The first page of Appellee's Exhibit 1 shows the envelope in which the documents arrived. Page 2 is a typed summary pertaining to the allegations. The remainder of the exhibit shows a benefit history printout, copy of a fax cover sheet Ms. Jones used on Commonwealth Office letterhead directed to Tennessee Unemployment Special Services requesting information for her boyfriend; and a separate letter. The document contains wage information obtained from Commonwealth Program 48, for Appellant's personal use and was not related to an open case with Family Support or the office. Program 48 is a program that Family Support workers use to access and verify client income.

4. Once Ms. Siler received these documents, she consulted Jeff North, SRAA over the Rockcastle County Family Support Office, and Jennifer Warren, SRAA. Together they verified, through Appellant's personnel file, that the individual identified in the documents, Jay Shearer, had a personal relationship with Appellant, as he had been listed as Appellant's emergency contact. The individual was in the system, but did not have a case with Family Support.

5. They then consulted Shawn Estep and Jay Klein of OHRM for guidance on how to proceed. They made inquiry whether Appellant had used her office title to obtain personal information for personal use. They verified Appellant had access to Program 48 for such personal information on Mr. Shearer. OHRM then requested submission of a Request for Major Disciplinary Action.

6. Ms. Siler identified Appellee's Exhibit 2 as the February 25, 2016 Request for Major Disciplinary Action sent from Jeff North to Jay Klein. A request had also been made to the Commonwealth Office of Technology (COT) to determine whether Appellant had accessed Program 48 using Mr. Shearer's social security number. She identified Appellee's Exhibit 3 as the response from the Commonwealth Office of Technology, showing on the top right line that Appellant, under her user ID had accessed Program 48 to search for information pertaining to Mr. Shearer. Appellant had used state equipment to access these records.

7. Employees sign, on an annual basis, a confidentiality agreement agreeing not to access information for personal use or share such information without a business reason. Policy also prohibits a Family Support Specialist from providing services directly to a family member or close acquaintance. Under such circumstances, the employee is required to refer the client to the next-line supervisor.

8. Prior to submission of the Request for Major Disciplinary Action, Ms. Siler met with the Appellant and gave her a copy. Thereafter, Ms. Jones submitted a written response.

9. Once OHRM received and reviewed the Request for Major Disciplinary Action, it decided a five-day suspension would be appropriate. They issued the March 31, 2016 Five (5) Day Suspension letter (Appellee's Exhibit 4). The letter was delivered to Ms. Jones by Siler, Ben Miller and Don Tackett.

10. Appellant acknowledged she had sent the fax contained in Appellee's Exhibit 1, that Richard Shearer had asked her to look up the information, and he gave her permission to assist him for his own employment purposes. Appellant regretted having used office equipment. She did not deny she had assisted Mr. Shearer with the matter. Mr. Shearer had also submitted an explanatory letter with the same information.

11. At the time of the incident, Mr. Shearer was not a client. Such a request would have resulted in referring Shearer directly to Tennessee to obtain the information on his own. Appellant would not have performed this service for Shearer as a part of her own duties. Shearer had been searching for his own wage information from employment in Tennessee. Ms. Siler testified that the last two pages of Appellee's Exhibit 1 show that Appellant used official stationary improperly, as it was not used in the course of her duties.

12. Ms. Siler testified there was, indeed, a delay between the time of receipt of the anonymous information (August 13, 2015) to the date of Request for Major Disciplinary Action (February 2016). In August 2015, there was a restructuring of the Division of Family Support, which changed the entirety of management. This transition took six months, through January 2016. The restructuring resulted in a processing delay for the current matter.

13. The five-day suspension letter alleged Appellant had misused her official capacity to inappropriately access records; she obtained information outside the scope of her job duties; and she misused Commonwealth resources to obtain information for her paramour. Ms. Siler recalled three prior incidents involving other employees who had violated confidentiality which resulted in issuance of five-day suspensions.

14. The next witness was **Benjamin Miller**, who, since May 2015, has been employed by the Cabinet for Health and Family Services as Service Region Administrator Associate (SRAA). Mr. Miller met with Appellant to explain that a Request for Major Disciplinary Action was being sent forward. He explained the allegations to Ms. Jones and listened to what she had to say. Once the five-day suspension letter was issued, he and Ms. Siler delivered the letter to the Appellant.

15. He identified Appellee's Exhibit 5 as the Acknowledgement of Request for Major Disciplinary Action, which he and Appellant signed on February 23, 2016.

16. He identified Appellee's Exhibit 6 as:

- MS 0015, Ethics Policy For Family Support Employees;
- CHFS Personnel Procedures Handbook, Section 2.10, Privacy and Security of Protected Health, Confidential and Sensitive Information;
- MD 0020, General Case Processing.

These are the policies cited in the suspension letter alleged to have been violated by the Appellant.

17. On August 13, 2015, a letter was received alleging Appellant had used her job title to obtain information for a non-client through Program 48 wage records, and that she had sent a fax on official Commonwealth stationery to Tennessee authorities requesting the information. A Cabinet employee may enter the Kentucky Information Management System (KYIMS) system by signing on with their individual ID number. Once access to the system is made, that individual has access to a series of different programs, including Program 48, by mere use of a client's social security number.

18. Access for employees is limited by policy to work-related inquiries, because there is so much information available through the use of someone's social security number. One may only use a program if working on a case.

19. He identified Appellee's Exhibit 7 as the Cabinet for Health and Family Services, Employee Privacy and Security of Protected Health, Confidential and Sensitive Information Agreement signed by Appellant each year of her employment.

20. What the Appellant did would have been a part of her duties if a bonafide client had made application for benefits. Mr. Shearer was not a client at the time. An employee is not allowed to work a case for someone who is a close relative or acquaintance.

21. The next witness was **Howard J. Klein**. For the past 15 years, Mr. Klein has been employed by the Cabinet for Health and Family Services as Division Director for the Division of Employee Management in the Office of Human Resource Management (OHRM).

22. A department will submit a Request for Major Disciplinary Action directly to Mr. Klein, along with witness statements, supporting documents and copies of policies alleged to have been violated. Mr. Klein assigns the matter to one of the branches within his division. That branch puts together the initial draft of a disciplinary letter.

23. Prior cases are examined to determine an appropriate level of discipline. If the matter is at a disciplinary level of suspension, it is returned directly to Mr. Klein (discipline at the level of an Intent to Dismiss will first go to Legal Services). When Mr. Klein approves the level of discipline, he sends it to his Appointing Authority for approval: either to Alan Sisk or Tresa Straw.

24. In this matter, Mr. Klein agreed with the five-day suspension. It was consistent with what they have done in other cases in the past in Family Support or involving a Social Worker who went into the computer system and looked up information they were not supposed to access. Employees are supposed to be looking at information only for cases on which they are working. These systems also allow one to link into other systems. A five-day suspension was issued in this case because it involved more than one incident: (1) inappropriately looking up

information, that is, looking into Program 48 for information for her boyfriend; and (2) using her position and the Commonwealth letterhead to request and receive information, which Jones then passed on to her paramour.

25. He identified Appellee's Exhibit 4 as the disciplinary letter he reviewed before it was delivered to Appellant. He cited the policies therein as having been violated by Appellant. Mr. Klein testified that even without the prior written reprimand, which had been issued 13 years ago, a five-day suspension was appropriate. When a close acquaintance makes a request such as this, one is required to notify their supervisor so the client can be assigned to another worker.

26. Mr. Klein testified Appellant had violated policies in the following manner:

- MS 0015 Ethics Policy For Family Support Employees:
 - Appellant failed to adhere to standards of ethics, confidentiality and security agreements by having accessed the system;
 - She provided obtained information to her paramour and, therefore, was not prudent in the disclosure or use of information;
 - She used confidential information for personal gain by having provided it to assist her boyfriend;
 - She used State resources, time, facilities, equipment and her own position by having utilized the computer system, Commonwealth letterhead and faxing documents to the Tennessee authorities;
 - She failed to document her professional work by failing to report the contact from her paramour, who made a request for information. Family Support employees are required to keep a record of contacts. She also failed to be truthful in that she sent a request to the Tennessee authorities, falsely representing that she had authority to make that request.
- MD 0020 General Case Processing:
 - Appellant violated Sections B and C by having failed to document the contact from her paramour and the inquiry he made;
 - She violated Section D by providing services to someone who was a close acquaintance. Furthermore, she failed to advise supervisory staff that a close acquaintance had made this inquiry.

27. The Appellee rested its case.

28. The sole witness for the Appellant was the **Appellant, Kelly Jones**. Although Ms. Jones had made allegations of harassment and retaliation, she testified that such acts were not the result of anyone who offered their testimony today. Those allegations pertained to previous supervisors or coworkers.

29. She has been a Family Support Specialist II in the Cabinet for Health and Family Services, Office of Family Support, since December 16, 2001. She admitted her error was bad judgment, but disagreed with the level of discipline, stating a five-day suspension was not warranted. She requested a lesser penalization be issued. She testified she admitted to her actions, to the events which happened over two and a half years ago. At that time, she did not think about her having used the Commonwealth letterhead. She just pulled up Microsoft Word and there it was; it was a "bad mistake."

30. When Appellant spoke to Ben Miller about the incident, she stated she was honest with him, and told him everything she could remember. "I admit I did do a bad judgment" and she was sorry. At no time had she denied to anyone that she faxed the request to Tennessee. She was aware of the confidentiality policies she had signed on an annual basis.

31. Appellant rested her case. Appellee presented a closing argument. Appellant waived presentation of a closing argument. The matter stood submitted to the Hearing Officer for a recommended order.

FINDINGS OF FACT

1. Kelly Jones, the Appellant, is a classified employee with status. From December 16, 2001, to the current date, she has been employed as a Family Support Specialist II by the Cabinet for Health and Family Services, Department for Community Based Services, with a workstation in London, Kentucky.

2. In August 2015, Crystal Siler, Personnel Associate with the Cabinet for Health and Family Services, received an anonymous letter and packet by mail at her office in London, Kentucky (Appellee's Exhibit 1). Those documents made the following allegations against Appellant:

- Documents used to obtain benefit information for a personal reason using job title (boyfriend's info);
- Documents for personal use were printed from state equipment during non-working hours;
- Use of Facebook during working hours.

The packet also contained a benefit history printout, copy of a fax cover sheet on Commonwealth stationary dated November 15, 2013, and an accompanying separate letter on Commonwealth stationary of even date.

3. Ms. Siler verified from Appellant's personnel file that the third party identified in the anonymous packet, Jay (Richard) Shearer, had been listed as a personal contact for Appellant. That individual did not have a case pending with Family Support in Kentucky, nor was he a client.

4. As part of her job duties, Ms. Jones had computer access to Program 48: a program that allows access to information to verify an individual's income.

5. It was confirmed Ms. Jones accessed Program 48 using state equipment, while on state time, to obtain income information from authorities in Tennessee pertaining to Jay Shearer.

6. During the course of the investigation, Ms. Jones admitted she sent the fax contained in Appellee's Exhibit 1. At the evidentiary hearing, she testified she admitted her error was bad judgment, however, she disagreed with the level of discipline she received. She was aware of the confidentiality policies she had signed on an annual basis (Appellee's Exhibit 7).

7. On February 5, 2016, a Request for Major Disciplinary Action against Appellant was made by Jeff North, SRAA (Appellee's Exhibit 2) and sent to Jay Klein, Director of the Division of Employee Management. In reviewing the Request for Major Disciplinary Action, the documents that accompanied same and the recommended five-day suspension, Mr. Klein concluded Appellant, by her acts, had violated the following policies in the following manner:

- MS 0015 Ethics Policy For Family Support Employees:
 - Appellant failed to adhere to standards of ethics, confidentiality and security agreements by having accessed the system;
 - She provided obtained information to her paramour, therefore was not prudent in the disclosure or use of information;
 - She used confidential information for personal gain by having provided it to assist her boyfriend;
 - She used State resources, time, facilities, equipment and her own position by having utilized the computer system, Commonwealth letterhead and by faxing documents to the Tennessee authorities;
 - She failed to document her professional work by failing to report the contact from her paramour, who made a request for information. Family Support employees are required to keep a record of contacts. She also failed to be truthful in that she sent a request to the Tennessee authorities, representing that she had authority to make that request.

- MD 0020 General Case Processing:
 - Appellant violated Sections B and C by having failed to document the contact from her paramour and the inquiry he made;
 - She violated Section D by providing services to someone who was a close acquaintance. Furthermore, she failed to advise supervisory staff that a close acquaintance had made this inquiry.

He agreed such acts, when compared to similar prior cases involving other employees, warranted a five-day suspension.

8. The following policies were in full force and effect at the time of the acts of the Appellant, as well as on the date of issuance of the five-day suspension:

- The Cabinet for Health and Family Services Personnel Procedure Handbook, Section 2.10 Privacy and Security of Protected Health, Confidential and Sensitive Information;
- DCBS Division of Family Support Manual, Volume I, General Administration, MS 0015, Ethics Policy for Family Support Employees;
- DCBS Division of Family Support Manual, Volume I, General Administration, MD 0020, General Case Processing (Appellee's Exhibit 6).

9. On March 31, 2016, Tresa Straw, the Appointing Authority, issued a letter notifying Appellant she had been suspended from duty and pay for five working days, April 11 through April 15, 2016, based on lack of good behavior (Appellee's Exhibit 4).

10. Ms. Jones timely filed her appeal of the disciplinary action with the Kentucky Personnel Board.

11. Appellant did not present any evidence or testimony to support her allegations of retaliation and/or harassment. She testified such allegations were not the result of anyone who offered testimony at the evidentiary hearing, but instead pertain to previous supervisors or coworkers.

CONCLUSIONS OF LAW

1. A classified employee with status shall not be suspended except for cause. KRS 18A.095(1). Appointing Authorities may discipline employees for lack of good behavior or the

unsatisfactory performance of duties. 101 KAR 1:345, Section 1. A suspension shall not exceed 30 days. 101 KAR 1:345, Section 4(1).

2. Appellee issued Kelly Jones a five-day suspension by letter of March 31, 2016 (Appellee's Exhibit 4). That suspension was based on an allegation of lack of good behavior, citing 101 KAR 1:345, Section 1.

3. The evidence shows that Ms. Jones, while on state time, used state resources to assist a close personal friend of hers who was not a client of Appellee. She also improperly accessed Commonwealth Program 48 for such purpose; contacted authorities in Tennessee to falsely report she had authority to act in this matter; and failed to report to her superiors the contact made by Jay Shearer. All of such acts support the allegations that Appellant violated the Cabinet for Health and Family Services Personnel Procedure Handbook, Section 2.10, Privacy and Security of Protected Health, Confidential and Sensitive Information; DCBS Division of Family Support Manual, Volume I, General Administration, MS 0015, Ethics Policy for Family Support Employees; DCBS Division of Family Support Manual, Volume I, General Administration, MD 0020, General Case Processing (Appellee's Exhibits 6 and 7).

4. Appellee has shown by a preponderance of the evidence that there was just cause for disciplinary action against the Appellant, and has also shown by a preponderance of the evidence that the disciplinary action taken, that is, a five-day suspension, was neither excessive nor erroneous.

5. Appellant has failed to prove by a preponderance of the evidence that she was subject to claims of retaliation and/or harassment.

RECOMMENDED ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Kentucky Personnel Board that the appeal of **KELLY JONES V. CABINET FOR HEALTH AND FAMILY SERVICES, (APPEAL NO. 2016-093)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

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

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

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

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

ISSUED at the direction of **Hearing Officer Roland P. Merkel** this 7th day of November, 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Kathleen Hines
Ms. Kelly Jones