

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-022**

CARMEN W. KENT

APPELLANT

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

**JUSTICE AND PUBLIC SAFETY CABINET
DEPARTMENT OF PUBLIC ADVOCACY
ED MONAHAN, APPOINTING AUTHORITY**

APPELLEE

*** **

The Board at its regular November 2015 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated September 29, 2015; 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 **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 24th day of November, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. B. Scott West
Carmen W. Kent

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-022**

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**V. FINDINGS OF FACT, CONCLUSION OF LAW,
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**DEPARTMENT OF PUBLIC ADVOCACY,
ED MONAHAN, APPOINTING AUTHORITY**

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** ** *

This matter came on for an evidentiary hearing on July 21, 2015, at 10:00 AM, at the office of the Personnel Board, 28 Fountain Place, Frankfort, Kentucky before the Hon. Darren L. Embry, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Carmen W. Kent, was present at the evidentiary hearing and was not represented by legal counsel. The Appellee, Department of Public Advocacy, was present and represented by the Hon. B. Scott West. The Hon. Glenda Edwards was present on behalf of the Appellee as agency representative.

This matter involves whether Appellant's two-day suspension for breaches of confidentiality, lack of good performance, and unprofessional workplace behavior was excessive or erroneous. The parties provided several documents in support of their positions, which were admitted into the record as exhibits.

The burden of proof was placed upon Appellee to establish just cause for Appellant's two-day suspension, and to show that the penalty was neither excessive nor erroneous.

BACKGROUND

1. The Appellant, Carmen W. Kent, is employed by the Appellee, Department of Public Advocacy (DPA), as an Administrative Specialist III. The DPA is a public defender agency with numerous trial offices which employ attorneys and other staff. Appellant works in the DPA's Boone County, Kentucky, office.

2. On February 4, 2005, Appellant signed an affirmation confirming her understanding of the DPA's confidentiality policy. (Appellee's Exhibit 3). The policy indicates that all information relating to the representation of a client, no matter the source, is confidential.

3. On December 10, 2014, the Appellee issued a formal notice to Appellant that she would be suspended from duty and pay for a period of two working days, and that she would be required to take classes on anti-harassment awareness and employee accountability. The notice to Appellant indicated the suspension was issued due to an alleged breach of confidentiality and several incidents of unprofessional conduct and harassment in the workplace.

4. Appellant filed a timely appeal on February 9, 2015. Appellant denied that she committed a breach of confidentiality, and further denied that her conduct in the workplace had been unprofessional. In her appeal, Appellant made several allegations against other personnel in the DPA. These are not matters that will be addressed in this action.

5. **Kendra McCardle** was called as the first witness in the Appellee's case-in-chief. She is employed as a Staff Attorney in the Boone County trial office. Ms. McCardle works in the same office as the Appellant.

6. Ms. McCardle testified regarding the alleged incident where Appellant allegedly breached the DPA's confidentiality procedures. In October 2014, Appellant approached Ms. McCardle and asked about what had happened in court that day in the case of one of her clients. Ms. McCardle first assumed Appellant had asked for this information because the Appellant had answered a call from a client. Although Ms. McCardle could not remember the exact specifics of the conversation with Appellant, she then became concerned Appellant had asked for this information on behalf of the complaining witness. Ms. McCardle then informed Appellant that if the complaining witness were on the phone, the witness would instead need to call the child support office to get any information on the case.

7. During her conversation with Ms. McCardle, Appellant informed Ms. McCardle that no one had called the office asking for information regarding her client. Appellant reportedly informed Ms. McCardle that she had wanted to know more about the case because the complaining witness was a personal friend. Shortly after this conversation, Ms. McCardle was informed that Appellant had been overheard having a phone conversation with the complaining witness about Ms. McCardle's client.

8. After this incident, Ms. McCardle created a memo describing the event, which she sent to her supervisor, Steve Florian. The Appellee introduced this memo as Appellee's Exhibit 1.

9. The Appellee called its next witness, **Andrea Jones**. Ms. Jones is an Investigator in the Boone County's DPA office. On or about October 14, 2014, Ms. Jones witnessed a confrontation between the trial office employees which involved Appellant. The Appellant began accusing employees of the trial office of showing up at a restaurant to spy on her. The confrontation escalated to yelling. Ms. Jones reported this incident to her supervisor, Mr. Florian, and asked him to intervene.

10. Ms. Jones then testified regarding a separate incident of harassment involving Appellant. In approximately August 2014, Ms. Jones arrived at work and approached the door of the Boone County DPA Office. At this time, Appellant reportedly pulled into the parking lot in

the space closest to the door. Appellant then blew her car horn and made a gesture with her middle finger in the direction of Ms. Jones. Ms. Jones subsequently shook her head and continued into the office. When the Appellant entered the office and walked past Ms. Jones' desk, she allegedly looked at Ms. Jones and stated, "I don't care. It was worth it." Ms. Jones reported this incident to Mr. Florian. She did not consider this gesture to be "in good fun."

11. Ms. Jones indicated that in the Boone County Office, employees would sometimes make gestures with their middle fingers at each other in jest.

12. The Appellee introduced Appellee's Exhibit 2, which consisted of the letter sent to Appellant notifying her of her suspension.

13. The **Appellant, Carmen W. Kent**, was next to testify. She testified regarding her duties as an Administrative Specialist III. Appellant's duties include maintaining confidentiality on DPA cases. The Appellant signed an affirmation of this confidentiality policy on February 4, 2005. The Appellee introduced the confidentiality policy signed by Appellant as Appellee's Exhibit 3. The form states that a lawyer or staff member shall not disclose information concerning the representation of a client without the consent of the client.

14. The Appellant testified regarding the alleged breach of confidentiality incident. She indicated that on the day of the incident, she had spoken on the phone with the victim in one of Ms. McCardle's child support cases. The victim is an acquaintance of the Appellant, but Appellant had referred to the victim as her friend. On the telephone, the victim asked Appellant about a form the client had reportedly been asking her to sign. Appellant was unfamiliar with the form in question, and went to another attorney in the office, Keith Morgan, to inquire about it. The Appellant testified she went to Mr. Morgan as opposed to the attorney on the case, Ms. McCardle, to avoid any potential appearance of impropriety.

15. Mr. Morgan informed Appellant that the form in question was likely a waiver of arrearages, and it would be the victim's choice whether to sign the form or not. The Appellant indicated that Mr. Morgan then brought her into speak with Ms. McCardle. During this conversation, Appellant reportedly repeated several times that the victim had indicated Ms. McCardle's client was a "piece of shit."

16. After the conversation, Appellant telephoned the victim in the DPA's case and told her what she had learned about the form. During the conversation, the victim asked whether Appellant would sign the form. Appellant reportedly told the victim that in her position as an employee of the Boone Trial Office, she should say that it would be the victim's choice whether to sign the form. The Appellant indicated that the victim again asked her what she would do. The Appellant told the victim if it were up to her personally, she would not sign the form. Appellant does not believe this action constitutes a violation of her duty of confidentiality, as the information she gave was merely about a blank form, not any specifics of the case. The Appellant knew that if the victim did not sign the form, Ms. McCardle's client would have to pay the owed support.

17. The Appellant then testified regarding certain emails sent from her work account. In emails Appellant sent to a friend working as a secretary in the Boone County Court, the Appellant stated that there were a few attorneys in her office that she would “like to shoot actually, with Rhonda [Lause, a Boone County Staff Attorney] at the top.” Appellant also sent an email to the secretary stating that she would like to “choke” Rhonda Lause.

18. Appellant denied that she had ever behaved unprofessionally when answering phone calls at her office. She further denied that she committed a breach of confidentiality.

19. The Appellee called its next witness, **Steve Florian**. Mr. Florian is the Directing Attorney for the Boone County Public Defender’s Office. The Directing Attorney is responsible for the day-to-day functioning of the public defender’s office.

20. Mr. Florian testified regarding the alleged breach of confidentiality committed by the Appellant. In October 2014, Ms. McCardle entered Mr. Florian’s office and expressed concern that Appellant had been asking her about a flagrant nonsupport case, and might have been providing information on the case to a friend. After the conversation, Mr. Florian went to the copy room to work on an unrelated matter. At that time, Mr. Florian overheard the Appellant speaking to someone on the phone about Ms. McCardle’s case. Mr. Florian entered the office and asked with whom Appellant was speaking. At that time, Appellant admitted that she had been speaking to her friend, the victim in Ms. McCardle’s case. Mr. Florian then proceeded to have a discussion about the seriousness of confidentiality and how Appellant had violated the DPA’s policy by providing information about a case to an adverse party. The Appellant denied that she had committed a breach.

21. Mr. Florian testified that it is a breach of confidentiality for a DPA employee to advise a victim about a form related to a pending case, even if the form is blank. He explained that doing so is adverse to the client’s interest, and could be considered an illegal practice of law. Mr. Florian also expressed concern that he had overheard Appellant advise the victim to file criminal charges for harassment against the DPA’s client.

22. Mr. Florian then testified regarding the incident in which the Appellant made a gesture with her middle finger in the direction of Ms. Jones. According to Mr. Florian, he was not aware that employees commonly used such gestures toward one another in the office.

23. Mr. Florian then addressed the statements made in Appellant’s email. He explained that expressing a desire to “choke” or “shoot” fellow employees qualifies as unprofessional conduct. He characterized the statements made by the Appellant as very severe and threatening.

24. Mr. Florian indicated that in his time working with the Appellant, he had previously encountered problems with Appellant acting unprofessionally. Despite these past incidents of unprofessional behavior, Mr. Florian indicated the only basis for Appellant’s suspension was those charges listed in her formal notification. Mr. Florian indicated, however, that he should have addressed Appellant’s behavior years before.

25. Mr. Florian testified regarding his understanding of progressive discipline. He indicated that he had used progressive discipline with the Appellant over the past two years regarding previous incidents, however, the breach of confidentiality required more serious intervention.

26. Mr. Florian has continued to work with the Appellant following her suspension. As of the date of the hearing, Mr. Florian could not say that he believed Appellant understood the importance of confidentiality.

27. The Appellee called its next witness, **Glenda Edwards**. Ms. Edwards is the Trial Division Director for the DPA. In her position she oversees the 33 Kentucky DPA offices, and handles personnel matters that require more serious intervention. When learning of the incidents that are the subject of this action, Ms. Edwards recommended that the Appellant receive discipline for an alleged breach of confidentiality and unprofessional behavior. She made this recommendation based on her conversations with Mr. Florian and the Appellant. Ms. Edwards recommended a two-day suspension and that Appellant take classes to refresh her on the importance of confidentiality and anti-harassment.

28. In considering Appellant's discipline, Ms. Edwards weighed the possibility of issuing a reprimand rather than a suspension. She chose the suspension as the appropriate discipline due to the nature of Appellant's breach. Ms. Edwards considers giving information about the representation of a client one of the most serious offenses a DPA employee can commit. Ms. Edwards further stated that had she known at the time about the harm caused to the DPA's client as a result of the information provided by Appellant, she would have recommended more severe measures.

29. Ms. Edwards stated that it is unacceptable for a DPA employee to advise a victim in a case to take an action that would be detrimental to a DPA client. DPA employees should not discuss information about clients on the phone with anyone that they do not have authority to discuss the representation with. Ms. Edwards indicated that even if the individual seeking information could get the information requested from an agency outside of the DPA, it would still be a breach of confidentiality for an employee to provide that information.

FINDINGS OF FACT

1. The Appellant, Carmen W. Kent, appeals from a two-day suspension rendered due to incidents of unprofessional behavior and a breach of confidentiality Appellant committed in October 2014.

2. On February 4, 2005, the Appellant signed a form attesting to her understanding of the DPA's policy on confidentiality. The form lists several Kentucky Rules of Professional Conduct. The Appellant affirmed that she understood these rules, and understood that all information she received regarding any case while in her employ at the DPA was considered confidential and protected.

3. The Appellant learned about the arrearages form in a client's case by asking attorneys in her office. Appellant then provided this information to a victim in the client's case. Appellant maintains she provided this information and her advice to the victim in her capacity as a friend, and denies that the information she provided was confidential. Despite this, the information Appellant provided to the victim was information she received regarding a case while in her employ at the DPA. As such, the Appellant's actions constitute a breach of the DPA's confidentiality policy.

4. The record sufficiently establishes that Appellant made middle finger gestures to co-workers in the workplace, and sent emails in which she expressed a desire to commit physical violence against co-workers. These actions constitute unprofessional behavior.

5. The Appellee has established, by a preponderance of the evidence, that the two-day suspension of Appellant was neither excessive nor erroneous. The record shows Appellant committed a serious offense by speaking to the victim in a case about the representation of a DPA client. The Appellant provided the victim with information that caused harm to the client's case. Furthermore, the record shows by a preponderance of the evidence that Appellant acted unprofessionally on numerous occasions. In light of the serious degree of the Appellant's actions, a two-day suspension with mandatory classes to improve behavior is appropriate.

CONCLUSION OF LAW

The Appellee has demonstrated, by a preponderance of the evidence, that the decision to suspend Appellant for two days was neither excessive nor erroneous.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **CARMEN W. KENT V. DEPARTMENT OF PUBLIC ADVOCACY** (Appeal No. 2015-022) 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 part 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 Darren L. Embry** this 29th day of September, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. B. Scott West
Ms. Carmen W. Kent