

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 on Remand and Final Order in the case of **RHONDA KIPER VS. LABOR CABINET (APPEAL NO. 2018-005)** as the same appears of record in the office of the Kentucky Personnel Board.

Witness my hand this 22nd day of April, 2020.



MARK A. SIPEK, SECRETARY
KENTUCKY PERSONNEL BOARD

Copy to Secretary, Personnel Cabinet

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2018-005

RHONDA KIPER

APPELLANT

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

LABOR CABINET

APPELLEE

*** **

The Board, at its regular April 2020 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order on Remand of the Hearing Officer dated March 23, 2020, Appellee's exceptions and request for oral argument, Appellant's exceptions and request for oral argument, Appellant's response to exceptions, oral arguments, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order on Remand 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 **SUSTAINED**.

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 22nd day of April, 2020.

KENTUCKY PERSONNEL BOARD



MARK A. SIPER, SECRETARY

A copy hereof this day sent to:

Hon. Haley Kincer
Ms. Rhonda Kiper
Ms. Leslie Tindall

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2018-005

RHONDA L. KIPER

APPELLANT

VS.

RECOMMENDED ORDER ON REMAND

LABOR CABINET

APPELLEE

* * * * *

This matter was remanded to Hearing Officer Colleen Beach on October 14, 2019, by Order of the Personnel Board for the purpose of addressing whether the Board has jurisdiction to decide the issue of whether the person(s) who dismissed the Appellant have appointing authority, if the Board determines the age discrimination issue against the Appellant.

PROCEDURAL BACKGROUND

1. This appeal came on for an evidentiary hearing before Hearing Officer Colleen Beach on April 8 and 9, 2019. After post-hearing briefs and replies were filed, the Hearing Officer submitted her Recommended Order on August 2, 2019. The case was remanded to the Hearing Officer and a post-hearing conference on remand was held on November 26, 2019. The parties were ordered to submit briefs on this jurisdictional matter by January 14, 2020. By request of the Appellant, the briefing deadline was extended to January 21, 2020. Both parties timely submitted their briefs on this date.

2. In her Response to the Interim Order on Remand, Appellant calls our attention to Hearing Officer Stafford Easterling's Interim Order, entered January 28, 2019, in which he denied the Cabinet's Motion to Dismiss.

3. Appellant noted that, in the order, Easterling reasoned that the case of Martin v. Corrections Cabinet, 822 S.W.2d 858 (Ky. 1991) implicitly held that an unclassified employee can only be dismissed by a party having the authority to do so.

4. Appellant concluded her response by alleging that "[W]rongful termination is an act of discrimination if an agency violates company and/or public policies/law. The Appellant provided support to the Personnel Board and in the evidentiary hearings that Mr. Jones and Tiffany Yeast did not have the 'authority' to terminate her and that policies and statutes were violated." (Appellant's Response, p. 5.)

5. In its Post-Evidentiary Hearing Brief of Jurisdiction, Appellee contended that the Hearing Officer did not have jurisdiction to rule on the issue of whether or not the proper

avenues were followed in terminating the Appellant. Appellee asserts that Appellant's appeal rights to the Board are limited to matters involving discrimination only.

6. In support of this position, Appellee states, "Case law precedent and KRS 18A.095 does not grant the Board or the Hearing Officer authority to hear issues regarding potentially improper *procedures* taken to terminate an employee; the Board may only hear matters relating to the CAUSE or REASON for termination if the cause or reason for termination was illegal." (Appellee's Post-Evidentiary Hearing Brief, p. 5.) (Emphasis in the original.)

7. The Hearing Officer notes that Appellee asserts in its Post-Hearing Brief that "case law precedent" supports its position. While no specific cases (other than Martin) are mentioned or discussed in that brief, the Appellee states that it adopts and incorporates by reference all arguments the Cabinet set forth in its Closing Brief and Response to Appellant's Closing Argument. However, the jurisdictional matter currently before the Hearing Officer was not addressed in either of those two pleadings and, thus, no cases germane to the issue before us were discussed.

ANALYSIS

1. The threshold question before the Hearing Officer is whether the Personnel Board has jurisdiction to determine the issue of whether the person who signed an unclassified employee's dismissal letter had the appointing authority to do so if the Board first determines the employee's discrimination claim.

2. Because this analysis involves the interpretation of statutes, in part, our starting point should be the language of the statutes themselves.

a. KRS 18A.005(1) states, as follows:

'Appointing authority' means the agency head or any person whom he has authorized by law to designate to act on behalf of the agency with respect to employee appointments, position establishments, payroll documents, register requests, waiver requests, requests for certification, or other position actions. Such designation shall be in writing and signed by both the agency head and his designee. Prior to the exercise of appointing authority, such designation shall be filed with the secretary;

- b. KRS 18A.095(9) states, as follows:

Any unclassified employee who is dismissed, demoted, suspended, or otherwise penalized for cause may, within thirty (30) days after the dismissal, demotion, suspension, or other form of penalization, appeal to the board for review thereof.

- c. KRS 18A.095(12) states, as follows:

Any classified employee may appeal to the board an action alleged to be based on discrimination due to race, color, religion, national origin, sex, disability, or age forty (40) and above. Nothing in this section shall be construed to preclude any classified or unclassified employee from filing with the Kentucky Commission on Human Rights a complaint alleging discrimination on the basis of race, color, religion, national origin, sex, disability, or age in accordance with KRS Chapter 344.

- d. KRS 18A.095(14)(a) states, as follows:

Any employee, applicant for employment, or eligible on a register, who believes that he has been discriminated against, may appeal to the board.

3. While statutory construction is considered to be "...something less than an exact science, the rules serve an important function in helping courts determine legislative intent....all statutes are to be liberally construed with a view to promote their objects and carry out the intent of the legislature. KRS 446.080(1). It is a basic rule of construction that 'where there is an apparent conflict between statutes or sections thereof, it is the duty of the court to try to harmonize the interpretation of the law so as to give effect to both sections or statutes if possible.'" Commonwealth v. Halsell, 934 S.W.2d 552, 555 (Ky. 1996), quoting Ledford v. Faulkner, 661 S.W.2d 475, 476 (Ky. 1983). In the same vein, "it is well settled that two or more acts dealing with the same subject matter must be construed *in pari materia*, and any apparent conflict between them must be reconciled, if possible, so as to give effect to both." Galloway v. Fletcher, 241 S.W.3d 819, 823 (Ky. App. 2007), quoting Sumpter v. Burchett, 202 S.W.2d 735, 736 (Ky. 1947).

4. Looking at 18A.005(1) in conjunction with KRS 18A.095(9), (12), and (14), the statute must be read "as a whole, and with other parts of the law of the Commonwealth, to ensure

that our interpretation is logical in context.” (Pearce v. University of Louisville, 448 S.W.3d 746, 749 (Ky. 2014).

5. Significantly, the statutory text of KRS 18A.005(1) contains no explicit suggestion that the protection of this statute is only available to classified employees. Had that been the original intent of the statute, that qualifying language would have been very simple for the legislature to add, as it did throughout KRS 18A.095.¹

6. Further evidence that KRS 18A.005(1) was meant to apply to the unclassified employee can be found in the administrative regulations regarding unclassified employees. 101 KAR 3:050 states: “An employee appointed to a position subject to this administrative regulation shall serve at the will of the appointing authority and shall be subject to termination without prior notice or cause.” [101 KAR 3:050, Section 1(3)] (Emphasis added.) It is logical to assume, then, that the legislature intended that the person responsible for position actions regarding the unclassified employee would have the same designation and responsibilities as authorized in KRS 18A.005(1) as it contains the sole definition of “Appointing Authority” in KRS 18A.

7. In order to “harmonize” and “give effect” to all sections of KRS 18A, as case law discussed above instructs us to do, and to ensure a logical interpretation of the statute, the Hearing Officer finds that the Personnel Board has jurisdiction to decide whether the person who dismissed an unclassified employee has appointing authority to do so when the Board determines whether the employee was dismissed due to discrimination.

8. A review of Personnel Board appeals tangentially related to this matter supports this conclusion. The Hearing Officer first considers the case cited by Appellee in its Post-Hearing Brief on remand, Martin v. Corrections Cabinet, 822 S.W. 2d 858 (Ky. 1991).

9. Patricia Martin was the Warden of the Frankfort Career Development Center, which is a non-merit, unclassified position. She claimed she had been terminated from her position for her attempt to discipline a politically influential classified employee. She appealed her dismissal to the Personnel Board, claiming a right to a hearing pursuant to KRS 18A.095(9), which permits an unclassified employee dismissed “for cause” to file an appeal.

10. The Personnel Board dismissed Martin’s appeal, holding that she was not dismissed “for cause,” and that KRS 18A.095(14)(a) did not apply to political discrimination. The Franklin Circuit Court reversed the decision of the Personnel Board, but the Kentucky Court of Appeals overturned the Circuit Court’s decision and held that to give KRS 18A.095(14)(a) the

¹Numerous sections of KRS 18A.095 state explicitly the kind of employee the section applies to. For instance, the legislators used the following descriptions in the statute: the “classified employees with status” (1); “Any unclassified employees” (9); “Any employee” (14)(a); “Any applicant” (14)(b); and “Any state employee” (11).

broad interpretation sought by Martin would effectively eliminate the primary distinction between classified and unclassified employees.

11. The Kentucky Supreme Court rejected the Court of Appeal's conclusion that "the purpose of KRS Chapter 18 was to 'perpetuate the distinction between classified and unclassified employees.'" The Court reasoned that "the more appropriate rule of statutory construction in this case is the rule that the courts will consider the purpose which the statute is intended to accomplish, and the reason and spirit of the statute, and the mischief intended to be remedied."

12. The Kentucky Supreme Court ultimately found that an unclassified employee, if discharged for retaliation for enforcing legal prohibitions against political favoritism as contained in the merit law, had a right to appeal to the Personnel Board:

The purpose of the law would be seriously undermined by prohibiting appeals by unclassified or nonmerit supervisors who have alleged discharge and retaliation for enforcing or applying prohibition against political interference of any kind." (*Id.* at 861.)

13. The Hearing Officer finds that implicit in the Martin analysis is the understanding that the party dismissing the unclassified employee actually has the authority to effectuate the termination. To hold otherwise would seriously undermine the safeguards the Kentucky legislature has put in place regarding the process by which state employees can be dismissed pursuant to the definition of "Appointing Authority" in KRS 18A.005(1), and the relevant hiring statute pertaining to the employee's agency. (**Hearing Officer's Note:** In the Kiper appeal, the statute regarding the hiring duties of the Kentucky Workers Compensation Funding Commission's Board of Directors is KRS 344.1224.) This conclusion is consistent with previous decisions of the Personnel Board, specifically Tramontin v. Cabinet for Health and Family Services, and Deborah Pigman v. Health and Family Services.

14. In Kenneth Tramontin v. Cabinet and Health and Family Services, 2010 WL 677203 (KY PB 2008-166), the Hearing Officer found that Tramontin, a classified employee, was dismissed for just cause, and that the penalty of dismissal was neither excessive nor erroneous. However, the Hearing Officer ultimately concluded that Jay Klein (the Assistant Director of the Office of Human Resource Management for the Cabinet for Health and Family Services [CHFS] who signed the dismissal letter) was not a properly designated appointing authority. In recommending that Tramontin's appeal be sustained and that he be reinstated to his previous or similar position, the Hearing Officer noted: "*The Board has a long-standing practice of carefully reviewing allegations that the individual that signed a letter lacked the authority to take the action in question.*" (Emphasis added.) The Personnel Board sustained the Hearing Officer's Recommended Order.

15. In Debora Pigman v. Cabinet for Health and Family Services, 2010 WL 2547502 (KY PB 2009-243), Pigman, a classified employee, filed a motion to sustain her appeal before the Personnel Board on the grounds that the person who signed her dismissal letter (Jay Klein), lacked the authority to do so. The Board held that Pigman's dismissal was void because Klein had no authorization from the appointing authority (the CHFS Secretary) to take personnel actions.

16. A timely petition for review was filed by the Cabinet for Health and Family Services (CHFS) in the Franklin Circuit Court. The Circuit Court concluded that the Board was reasonable in its determination that KRS Chapter 18A is the applicable law and that Klein did not have the authority to sign Pigman's dismissal letter because he had not been formally delegated such authority by the Secretary on behalf of the Agency. CHFS appealed that order to the Kentucky Court of Appeals.

17. In affirming the decision of the Franklin Circuit Court, the Kentucky Court of Appeals agreed "with the Board and the lower court that the Secretary was clearly the appointing authority to act on behalf of the agency in light of Martin, KRS 18A.005(1), and KRS 194A.030....We believe that such a construction of KRS 18A.005(1) and KRS 194A.030 effectuates the intention of our legislature." (p. 18.) Pigman, 2013 WL 1003469 at *6.

18. Even though Tramontin and Pigman involved appeals made by classified employees, we must consider, as the Martin court instructs, "the purpose which the statute is intended to accomplish, and the reason and spirit of the statute and the mischief intended to be remedied." Martin at 861. The purpose of KRS 18A.005(1) is clearly to protect state employees from dismissal by an individual not properly designated as appointing authority.

19. Two previous Personnel Board appeals considered the very issue before us, and the Board (and in one case the Kentucky Court of Appeals) recognized that the Board had jurisdiction to determine whether the person who dismissed the unclassified employee had appointing authority.

20. In John Veitch v. Public Protection Cabinet, Kentucky Horse Racing Commission, 2013 WL 3967319 (KY PB 2011-263), the Personnel Board found that Veitch, an unclassified employee of the Kentucky Horse Racing Commission, failed to show that his termination was based on age discrimination. The Board also considered whether Robert Vance, Secretary of the Public Protection Cabinet, had the authority to dismiss Veitch. The Board concluded as a matter of law "that the Secretary of the Public Protection Cabinet, Robert Vance, had the authority conferred by KRS 18A.005(1) and KRS 12.270(3) and (4) to make the decision to instruct Holly McCoy-Johnson to draft a letter terminating employment of John Veitch as Chief State Steward." (*Id.* at p. 2.)

21. The Veitch Final Order was appealed to the Kentucky Court of Appeals from a Franklin Circuit Court decision. The Court of Appeals found that Veitch was a non-merit, unclassified employee and that the Public Protection Cabinet had the appointing authority to terminate him. Commonwealth of Kentucky v. Veitch, 2016 WL 3905614 (Ky. App. 2016)

22. In Sallie C. Bolton v. Finance and Administration Cabinet, 2017 WL 2851366 (KY PB 2016-097), the Hearing Officer concluded that Bolton, an unclassified employee employed as an Executive Secretary at the Commercial Mobile Radio Service (CMRS) Emergency Telecommunication Board, had failed to meet her burden of proof to show that she was the subject of unlawful discrimination based on political affiliation. The Hearing Officer also considered whether Troy Robinson, Executive Director of the Office of Administrative Services within the Finance and Administration Cabinet, had the legal authority to terminate Bolton. The Hearing Officer concluded that Robinson did have the authority to dismiss Bolton, and the Personnel Board sustained the Hearing Officer's Recommended Order.

23. In both Veitch and Bolton, the Personnel Board considered the question of whether the person dismissing the Appellants (both unclassified employees) had appointing authority. Implicit in the Board's analysis of both appeals was the belief that the Board had jurisdiction to so. Considering those cases in light of the principle found in both Tramontin and Pigman, that the Board has a long-standing practice of carefully reviewing allegations regarding the appointing authority of a person signing a dismissal letter, leads the Hearing Officer to conclude that the Personnel Board has jurisdiction to decide if the person dismissing an unclassified employee had the authority to do so after the Appellant's discrimination claim has been determined. This conclusion is bolstered by the holding of Martin that the court must consider the "reason and spirit" of a statute. Martin at 861. The purpose of KRS 18A.005(1) would be seriously undermined if the Board did not have jurisdiction to hear the claim of an unclassified employee that his dismissal was done by a person not having appointing authority when the employee has also filed a claim of discrimination pursuant to KRS 18A.095(12) and (14)(a).

CONCLUSIONS OF LAW

1. Based on the relevant statutes, case law, and prior decisions of the Personnel Board, as discussed above, the Hearing Officer concludes that the Personnel Board has jurisdiction to decide whether the person(s) who dismissed the Appellant had appointing authority, if the Board determines the age discrimination issue against the Appellant.

2. The Findings of Fact, Conclusions of Law and Recommended Order dated August 7, 2019, is incorporated and attached hereto as **Recommended Order Attachment A**.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **RHONDA KIPER V. LABOR CABINET (APPEAL NO. 2018-005)** be **SUSTAINED**, that Appellant be reinstated to her previous position of Insurance Compliance Auditor IV or a position of like pay and status, with back pay and benefits for the period of dismissal, and to otherwise make Appellant whole. (KRS 18A.105 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 Colleen Beach** this 23rd day of March, 2020.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:
Hon. Haley Kincer
Ms. Rhonda Kiper

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2018-005

RHONDA L. KIPER

APPELLANT

VS.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER

LABOR CABINET

APPELLEE

* * * * *

This matter came on for evidentiary hearing on April 8 and 9, 2019, at 9:30 a.m., ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Colleen Beach, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by KRS Chapter 18A.

The Appellant, Rhonda L. Kiper, was present at the evidentiary hearing and was not represented by legal counsel. The Appellee, Labor Cabinet, was present and represented by the Hon. Kate Bennett and the Hon. Tressa Root. Also present as agency representative was Anya Carnes, Executive Director, Office of Administrative Services, Labor Cabinet.

BACKGROUND

1. The Appellant, Rhonda L. Kiper, filed her appeal with the Personnel Board on January 19, 2018. On the Appeal Form, she detailed that she was an unclassified employee assigned to the Kentucky Workers' Compensation Funding Commission (hereinafter "KWCF"), and that she was terminated on December 21, 2017. She alleged that she had been subject to a wrongful termination, retaliation, age discrimination, and privacy violations.

2. By Interim Order dated February 28, 2019, it was established that the issues in the evidentiary hearing would include as follows:

- a. The question of whether KWCF had the legal authority to terminate the Appellant and whether they exercised that authority.
- b. The claim by Appellant that her dismissal was due to age discrimination.
- c. The Appellant's claim that she was retaliated against.
- d. The Appellant's claim that she was penalized by the way her personnel records were handled.

3. It was further established in this Interim Order that Appellant shall have the burden of proof on all issues except the questions regarding KWCF's legal authority to terminate the Appellant and whether they exercised that authority, which burden was assigned to the Appellee.

4. **General Reuben Jones** was called as the first witness for Appellee. Jones is the Executive of Director of KWCF, a position he has held for approximately three years. Prior to joining KWCF, Jones served for thirty years in the United States Army, in various human resource positions.

5. Jones stated that KWCF was established in 1987. The Commission is charged with managing funds collected through assessments of "premium players," that is, insurance companies who conduct business in the Commonwealth of Kentucky. Jones estimated that the current fund is close to \$400 million. The Commission manages, collects, and invests these funds, which are used to pay workers' compensation claims.

6. The Commission employs a number of auditors, who ensure that the insurance companies are paying the proper amount, and that the Commission's policies have been administered properly. Appellant was employed as an auditor for KWCF until she was terminated by Jones on December 21, 2017.

7. Jones referenced KRS 342.1224(5) as the legal basis for his authority to direct policy and take certain actions for the Commission. The statute reads:

The board of directors shall appoint an executive director to administer, manage, and direct the affairs and business of the commission, and other staff persons to carry out the affairs and business of the commission, subject in each instance to the policies, control, and directions of the board of directors. The board of directors shall fix the compensation of all such persons and shall pay such compensation out of the funds of the commission.

8. Jones testified that as Executive Director, he has the authority to hire and fire employees without prior Board approval. He stated that he has hired four people and merely "introduced" them to the Board after they had been offered positions. He added that if an action needs to be taken which he does not have the authority to effectuate, he takes that action to the Commission for their approval. As an example of such an action, Jones noted that he does not have the authority to finalize an audit.

9. Jones was asked to address why he terminated Appellant. He answered that her behavior had become "disruptive." Earlier he had directed Appellant to the Kentucky Employee Assistance Program ("KEAP") for assistance with "the emotional swings in her behavior."

10. Appellant's dismissal letter was written under the signature of General Jones, and Tiffany Yeast, Designated Appointing Authority, Kentucky Labor Cabinet, and was delivered to Appellant on December 21, 2017. The letter informed Appellant that the action was being taken "without cause." (Appellee's Exhibit 1).

11. Jones was asked to specify where his authority to terminate Appellant came from. He responded, "From Executive Session and the statute, and by clarification of the Board."

12. On cross-examination, several Board of Directors' minutes were introduced into the record as Appellant's Exhibit 1. These minutes documented that certain personnel actions had been presented to the Board and voted on for their approval.

13. Specifically, the minutes reference the following personnel actions from May 18, 2017, to January 24, 2018:

1. May 18, 2017: "#44. Ms. Caroline Baesler made the motion to promote Ms. Lisa Fernandez to Compliance Auditor IV...Motion carried."
2. June 21, 2017: "#27. Madam Chair Long asked for a motion to approve the hiring of an Insurance Compliance Auditor. Ms. Michelle Landers made the motion. Mr. Ted Luckett seconded the motion...Motion carried."
3. September 27, 2017: "# 29. Ms. Michelle Landers made a motion to hire Olivia Orreander as an Insurance Compliance Auditor III...Motion carried."
#30 Ms. Michelle Landers made a motion to hire Brandon Burdette as an Insurance Compliance Auditor I...Motion carried.
#31 Ms Michelle Landers made a motion to hire Stephanie Jones as an Administrative Services Officer....Motion carried."
4. November 15, 2017: "#27. Mr. Reuben Jones introduced new employee Branden Burdette to the Board.
#29. Ms. Stephanie Rich make a motion to grant authority to hire a Director, Audit and Collections....Motion carried."
5. January 24, 2018: "#34. Secretary Derrick Ramsey made a motion to hire an Insurance Compliance Auditor...Motion carried.
#35. Secretary Derrick Ramsey made a motion to hire an Audit Review Manager...Motion carried." (Appellant's Exhibit 1)

14. Jones was asked to address why the above minutes indicated that a Board member had motioned to execute a personnel action, which was subsequently voted on. Jones responded that a "clarification" of his authority to execute personnel actions without Board approval occurred at the January 24, 2018 Board meeting, after Appellant's termination. The discussion occurred during Executive Session and was not memorialized in the minutes. Jones testified that Executive Session discussions typically do not appear in the minutes.

15. As for whether KWCFC has a human resource department, Jones stated that the Commission does have "people that perform human resources duties, like Angela Calloway and Estee Jackson, who perform human resource-related functions."

16. Jones was asked to refer to the KEAP supervisory referral form he completed on August 15, 2016. (Appellant's Exhibit 2). Jones testified that he felt the referral was necessary due to Appellant's behavior.

17. When asked to describe this behavior, Jones stated, "When something did not go [Appellant's] way, [her] method was to just leave. [She] abandoned her post." Jones added, "When people were waiting for [her], [she] left abruptly." The KEAP referral was Jones' way of getting Appellant "to deal with her issues, rather than flight."

18. As for the "Work Performance Problems" referenced on the KEAP referral form, Jones had scored Appellant in the category of "Decline in Quality of Work" as a 4 out of 5 (5 being the most "severe"). Jones stated that score was based on an audit Appellant had been scheduled to work in Cincinnati that had to be rescheduled because she was not available. Jones concluded, "[Appellant] had unprogrammed absences. She put the mission at risk by keeping people waiting."

19. When asked if her audit completion rate was acceptable, Jones responded that her completion rate was irrelevant. "She also had training scheduled, of which she was a part, but she left without prior notice to her supervisors." When pressed to provide more specific information regarding these unscheduled departures, Jones stated that he was aware of three different occasions when they had occurred.

20. As for keeping the KEAP referral form confidential, Jones stated that the Labor Cabinet had asked for all documents relating to Appellant after her appeal with the Personnel Board was filed, and he forwarded the referral form to them at their request.

21. Jones was asked to address his refusal to grant a request for educational assistance made by some auditors, including Appellant. Jones explained that he wanted to first "take a deeper dive" into the matter, and that his decision was not a "flat out refusal." He noted that KWCFC staff does not perform audits using the same standards that the requested training discussed. He added that any educational assistance had to first be approved by the Labor

Cabinet. As for his decision to allow two other individuals to get educational assistance, Jones stated they were “two bright stars in the organization that had plenty of room for growth.”

22. On redirect examination, Jones stated that while Appellant was KWCFC’s best technical auditor, “the cost it took on the organization was tremendous and not acceptable.”

23. Jones was asked to address a grievance filed by a “junior” auditor, Tyler Paske. Jones stated that Paske approached him one day to complain that Appellant had exhibited inappropriate behavior toward him, and that two staff members, David Ritchie and Lisa Fernandez, had been witnesses to the event. Paske told Jones that he wanted to report what had happened because “he was afraid it would be his word against hers if they went out on an audit together.”

24. Jones advised Paske to make a written statement, which Paske did on December 19, 2017. In the statement, Paske states that Appellant had asked him if he had an audit file that had gone missing from the file room. Paske informed Appellant that he did have the file. Appellant then called Paske “a bad boy,” and repeated that phrase four times. Then Appellant “pointed at a ruler” and said to Paske, “I am going to have to spank you with that ruler...tell me where you want it.” (Appellee’s Exhibit 3).

25. Jones testified that prior to the incident with Paske, he had discussed Appellant with Tiffany Yeast, and had implemented the KEAP referral. “But when this came up, I felt it was appropriate to terminate.”

26. As for discriminating against Appellant because of her age, Jones denied that he would ever do that. “I am African American,” he stated, “I am very sensitive to that.” Jones added that he had no idea how old Appellant is.

27. Jones stated that he cannot make motions at KWCFC Board meetings because he is not a member of the Board.

28. When asked what specific concerns he had about Appellant’s behavior, he answered that on one occasion she was unavailable and an audit had to be rescheduled. On two other occasions, he was aware that she had left work abruptly. He overheard a staff member comment, “Rhonda is at it again.” Jones further recounted that Renee Haddix had reported to him that Appellant wrote a long letter to her in September 2017, complaining about her treatment in the office, including the lack of promotion and pay issues. (Appellant’s Exhibit 14).

29. By agreement of the parties, further cross-examination of General Jones was delayed so that a second witness of the Appellee, Judy Long, could be taken out of order.

30. **Judy Bartlett Long** is an Office Claims Manager with Health Smart. She has been a member of the KWCFC Board of Directors since 2002, and has been its Chair for the past ten years. She stated that the KWCFC Board is tasked with overseeing investments of the monies from insurance premium assessments for the purpose of funding the Special Fund. She clarified that an outside firm handles the actual investing of the funds.

31. Long testified that General Jones is in charge of the Commission's day-to-day activities. He also has authority to hire and fire staff members. Jones, as Executive Director, reports directly to the Board. The rest of the KWCFC staff reports to Jones.

32. When asked if the Board had ever fired anyone, Long responded that the Board had previously fired two Executive Directors—Winslow Hale and Bill Riggs.

33. Long was asked to address what is usually discussed during the Board's Executive Sessions. She responded that the agenda sets topics for Executive Session discussions, which are generally not reported in the minutes unless the Board "takes action."

34. Long testified that she could not recall a conversation during Executive Session as to whether the Executive Director had the ability to hire and fire without Board approval. She did recall that the issue had been discussed at Board meetings before, but could not remember which meeting specifically.

35. On cross-examination, Long was asked if she remembered Appellant's email to her requesting a meeting. Long did not recall that email, but did remember that Appellant sent correspondence to her after Appellant was terminated.

36. Long was asked to explain a motion in the September 24, 2015 Board meeting, under the category of "Personnel." The minutes state, "Caroline Baesler made a motion to allow the Executive Director to hire two individuals in the Auditor Level I position at the salaries of \$36,000. Bill Finn seconded. Motion carried." (Appellant's Exhibit 6). Long's response to these minutes was, "If we were told we needed to make a motion, we did." She added that she always had legal counsel sitting next to her, and it was her usual practice to ask him whether or not a motion was necessary.

37. At the end of Long's testimony, **General Reuben Jones** was re-called to the witness stand for further cross-examination by Appellant.

38. Jones was asked to describe the contents of the file given him by Judy Long regarding Appellant. He responded that there was a "long missive" in it by Appellant explaining what her job-related complaints were to Long.

39. When pressed to detail when the “clarification” of his authority with the Board occurred, Jones answered, “The Board minutes tell me it must have been after [Appellant’s] termination.”

40. Jones stated that he had sought to terminate Appellant as early as September or October 2017. He made this decision based on his observation “of a series of behavior toward Renee (Haddix) I thought was not appropriate.”

41. On redirect examination, Jones testified that Appellant was a non-merit employee. When asked again on why he had terminated Appellant, he answered, “Because of the act committed against Tyler Paske.”

42. At the request of Appellant, and by agreement of the parties, Appellant called her first witness, out of order. **Kendra Brewster** was employed as an Auditor I at KDWR from June 1, 2011, until November 27, 2013. Brewster stated that during this time, Appellant was her coworker. The two had travelled on business together as well.

43. At one point during her tenure at KDWR, Brewster’s supervisor, Renee Haddix, advised her to write a statement against Appellant. She did not recall the circumstances of the request, but recollected that another employee, Lisa Fernandez, may have prompted it.

44. Brewster described the office environment at KDWR as “clikey,” and Brewster often felt left out.

45. On cross-examination, the statement Brewster wrote was introduced into the record as Appellee’s Exhibit 4. It is a letter, dated November 4, 2011, and states, essentially, that Appellant told Brewster that “Lisa (Fernandez) needed to be careful because she would flip things on her by telling management that Lisa’s language and a few choice words that she used was offensive and makes her feel uncomfortable.” (sic) Brewster concluded the letter, “I am worried that this statement might cause me negative conflict or retaliation towards me in the office.” (sic) (Appellee’s Exhibit 4).

46. Appellee called its next witness. **Leslie Tindall** is the Director of the Division of Human Resources Management at the Labor Cabinet, where she is responsible for the general oversight of all personnel actions. She is also the custodian of record for the Labor Cabinet’s personnel files. Tindall stated that these files contain “any action that happens once an employee is hired.”

47. While the Personnel Cabinet holds the employee’s official files, agencies typically store their own unofficial file for easy access to certain information, Tindall stated. She noted that “active” files are kept for employees currently working for the Labor Cabinet. “Inactive” files are kept for employees no longer employed there and are kept for five years.

48. Through Tindall's testimony, the inactive file of a past KWCFE employee, Mindy Sexton, was introduced into the record as Appellee's Exhibit 6. This record includes Sexton's letter of termination, dated September 25, 2015, and is signed by Bill Riggs, then-Executive Director of KWCFE. The file also includes a second termination letter, dated October 9, 2015, and is signed by Lynn Keeling Gillis, Designated Appointing Authority of the Labor Cabinet. The letter from Gillis is notated "Corrected" at the top. The opening paragraph states, "This letter is to correct the letter issued to you September 28, 2015." While the signatories of the letter are different, and the date the termination is deemed effective varies by one day, the rest of the letter is the same as the one Riggs sent.

49. **Tiffany Yeast** is currently Executive Director, Office of Administrative Services for the Education and Workforce Development Cabinet, a position she has held since June 2018. Prior to that, she was the Executive Director of the Office of Administrative Services, Labor Cabinet, and was a Designated Appointing Authority.

50. Yeast testified that, in addition to General Jones, she also signed Appellant's termination letter. Yeast stated that as Appointing Authority for the Labor Cabinet, she had the authority to terminate KWCFE employees even though the Commission was "administratively attached to the Cabinet." She further stated that "when actions came up from the Commission, I never made sure there were Board minutes supporting the action...I was just checking to make sure the request was accurate."

51. Yeast attended two KWCFE Board meetings, but in only one did she discuss a personnel matter. She was summoned to the January 2018 meeting to discuss Appellant's dismissal.

52. On cross-examination, Yeast was asked to recall the conversation that occurred at the Board meeting at which Appellant's dismissal was discussed. Yeast answered, "We were re-confirming that at some point in time the Commission gave General Jones authority to make personnel decisions. It was delegated to Jones to make those decisions as to hiring and firing. They did not want to do it."

53. The second day of the evidentiary hearing was held on April 9, 2019. The Appellant called her next witness. **Angela Calloway** is currently a Fiscal Services Officer for the Workers Compensation Funding Commission. Prior to assuming that position, Calloway worked at KWCFE for nine years. While she was not an auditor, she was Appellant's coworker, and they "saw each other at the office every day."

54. Calloway testified that she was not aware that Appellant had been terminated, but added that she was "not surprised." Calloway recalled discussing with Appellant her wish for "more opportunity." Calloway stated that she had no issues with Appellant.

55. On cross-examination, Calloway affirmed that she was not in Appellant's chain-of-command, nor did she and Appellant work on projects together. Calloway worked first in an administrative position, before she transferred to a job she described as "more on the fiscal side."

56. On redirect, Calloway was asked to address educational assistance. Calloway stated that "through the years, we requested it, but we were told 'No.' Then it came through for two Commission employees."

57. **Olivia Orrender** is currently an Audit Review Manager. She worked at KWCFPC as an Auditor 1 from 2013 until 2015, when she left the Commission. She returned in 2017 as an Auditor III, and was promoted to Audit Review Manager in April 2018.

58. She denied that she was "recruited" by Renee Haddix when she came back to the Commission in 2017. When questioned if she did things with Haddix outside the office, Orrender responded, "I do recall one painting outing with all the females in the office."

59. Orrender denied that she knew she was going to be promoted to Audit Review Manager when she returned in 2017. She described her job duties upon her rehire as "just normal audits."

60. On cross-examination, Orrender testified that she did recall Appellant occasionally raising her voice, as well as slamming doors and leaving the office abruptly.

61. **Lisa Fernandez** is an Insurance Compliance Auditor IV at KWCFPC, where she has been employed for the past nine years. Fernandez was Appellant's coworker during Appellant's tenure at the Commission. When asked if Fernandez was aware of any issues with Appellant, she replied, "My office was in the back. No one ever talked to me." Fernandez agreed that she and Appellant remained friends for months after Appellant was terminated.

62. Fernandez was asked what happened in the office after Appellant left. She responded, "After [Appellant] left, they moved my office, changed people around, hired new people." Fernandez added that she "became the new Rhonda (Appellant)." When pressed what she meant by that, Fernandez explained, "I was excluded." She added that she and Appellant "were older than the new hires. Management doesn't talk to us." She further testified that "the younger people were told not to talk to us by Renee Haddix." Fernandez agreed that Appellant made a contribution to the office and sometimes had to perform other auditors' work. She affirmed that when she and Appellant had traveled for work together, Appellant acted in a professional manner.

63. Fernandez applied for the Audit Review Manager position, which was later awarded to Olivia Orrender.

64. Fernandez stated that she did not receive additional training. Haddix informed her that her request for educational assistance had been denied, and Haddix was “very rude and hateful” when delivering that information. However, General Jones approved the educational assistance for another auditor, Scott McKelway, and an administrator, Estee Jackson. In Fernandez’s estimation, Jones had an “outside friendship” with Ms. Jackson.

65. On cross-examination, Fernandez stated that she never filed a grievance against Renee Haddix. She testified that she could not complain to General Jones because “he was the one who got me jumped on.”

66. Fernandez was asked to recall the incident between Appellant and Tyler Paske. She stated that she did not recall it specifically, but remembered that Tyler was upset by it. In her opinion, the incident was merely the kind of joking that typically goes on in an office. “It was probably taken out of context.”

67. On redirect examination, Fernandez stated that she is “the only girl auditor,” and one of the oldest auditors.

68. Fernandez affirmed that Board Chair Judy Long told her and Appellant “many times” to reach out to her.

69. The Appellant, **Rhonda Kiper**, testified on her own behalf. She was hired by KWCF on July 1, 2002, as a Premium Auditor, and was promoted up the ranks to Insurance Compliance Auditor IV. She was employed by KWCF for almost sixteen years, until her termination on December 21, 2017.

70. After she was dismissed, Appellant wrote a memorandum to Board Chair Judy Long in which she discussed the past conditions of her employment. The memo, dated January 12, 2018, was introduced into the record as Appellant’s Exhibit 5. The document lists what Appellant described as “the actions that support my belief of wrongful termination.” The actions Appellant complained of can be summarized as follows:

- Appellant was denied four days’ holiday pay after her termination.
- Appellant believed the manner in which she was terminated to be an incorrect procedure. Citing both KRS 342.807(1) and KRS 342.1224(5), Appellant noted that “The direction of the board is given to determine the direction of all personnel issues during scheduled board meetings. The personnel action is recorded and posted in board meeting minutes. A copy of the minutes is submitted with each personnel action to Personnel to be processed accordingly and placed in Official Personnel File. My Official Personnel File includes a copy of meeting minutes with all title,

promotional or monetary board approved changes. The next board meeting was not scheduled until a date to be determined in January 2018.”

- Her termination was made 5 months prior to her attainment of career employee status.
- A meeting with her supervisor, Renee Haddix, and General Jones, occurred on December 15, 2017, a week prior to her dismissal, during which Appellant felt she was “being attacked.”
- She was denied promotion to the Field Audit Manager position, which, according to Appellant, was not filled. Instead, she and the Audit Review Manager were asked to assume additional duties. Appellant felt this was “discriminatory and retaliation act on part of management.” (sic)
- Jones informed Appellant that her contact with Board Chair Long was a break in the chain-of-command.
- The KEAP referral given to Appellant by Jones occurred on August 22, 2016, just days after Appellant had cancelled an audit in Fairfield, Ohio, due to the ill health of her mother. According to Appellant, Renee Haddix was aware of her situation and had encouraged Appellant to take time off and be with her mother.
- Appellant was told by both Jones and Haddix that the KEAP referral was confidential. However, a copy of it appeared in the personnel file sent to her by the Labor Cabinet pursuant to a discovery request.

71. Appellant concluded that she “had no animosity toward anyone at the Commission.” She wished primarily to be “afforded the opportunity to address any issues prior to termination to prove that [she] had been a loyal and committed employee, not without issues because everyone has them but given a chance to correct them.” (sic) (Appellant’s Exhibit 5).

72. Appellant next addressed her personnel files. She introduced into the record the Commission’s personnel file (Appellant’s Exhibit 8); the Labor Cabinet’s files (Appellant’s Exhibit 9); and the Personnel Cabinet’s file (Appellant’s Exhibit 10). Appellant stated that her KEAP referral was put in the Commission’s file. Appellant asserted that “KEAP is confidential by state and federal law, and should not be put in a personnel file, or taken as a reprimand.” She testified that she had asked several times to have it removed, but it never was.

73. Appellant next referred to her Personnel Cabinet file (Appellant’s Exhibit 10). She contended that the file showed that for every personnel action that took place regarding her employment, there were Board minutes attached, documenting Board approval of the action.

Specifically, on the following dates, a member of the Board of Directors motioned for a designated personnel action, which was voted on and approved:

- April 20, 2004: Appellant's reclassification from Premium Auditor to Senior Premium Auditor
- July 1, 2005: Appellant's reclassification from Senior Premium Auditor to Principal Premium Auditor
- December 21, 2007: Salary adjustments for various staff members, including Appellant
- January 2008: Salary adjustment for Appellant
- July 26, 2012: Resign to reappoint Appellant from Principal Premium Auditor to Insurance Compliance Auditor IV

74. Appellant concluded, "The only personnel action submitted without Board minutes documentation was my termination."

75. Through Appellant's testimony, an email sent to her by Labor Cabinet General Counsel, Michael G. Swansburg, Jr., on March 15, 2018, was entered into the record as Appellant's Exhibit 11. The unredacted portion of it reads:

"I apologize for the delay in sending an email communication to you....day after your termination) through January 24, 2018 (the date the KWCFB Board of Directors approved your separation)". (sic)

76. Appellant stated that Olivia Orrander was hired on December 1, 2017. In Appellant's opinion, management knew at that time that they were going to terminate Appellant's employment. "I wasn't a young 'super star,' like some of the others...Pretty much everyone was under thirty."

77. Appellant also felt that Haddix did not want to promote her. Appellant stated, "They wanted to replace me with Olivia Orrander." Appellant also alleged that one of the new hires was associates with Haddix's son.

78. On cross-examination, Appellant was asked when the alleged discrimination against her began. She answered that it began when they brought in young auditors, like David Ritchie. She also referenced Thomas Gregory, whom she knew was under 25 because he could not rent a car.

79. She also felt that Haddix and Jones had retaliated against her by not promoting her. She felt this retaliation was prompted by the fact that she had contacted Board Chair Long.

80. Appellant was asked if she had been harmed in any way by the KEAP referral being placed in her personnel file. She responded, "No, but I think it should be known."

81. Through Appellant's testimony, the page from a deposition in a Funding Commission hearing, in which Appellant testified that she was a non-merit employee, was entered into the record as Appellee's Exhibit 8.

82. At the end of Appellant's testimony, Appellant rested her case.

83. Appellee called its first rebuttal witness. **Michael Swansburg** is Deputy Secretary and General Counsel for the Labor Cabinet. He stated that he was given an attorney/client privilege waiver, and was authorized to discuss the Executive Session of the KWCFB Board of Directors' meeting on January 24, 2018.

84. Swansburg was asked to describe the circumstances leading up to the January meeting. He responded that in December of 2017, the decision was made by General Jones and Tiffany Yeast to terminate Appellant.

85. After being separated from her employment, Appellant wrote a memorandum "spelling out her concerns about her termination and the circumstances of her work." One of her concerns was her belief that only the Commission has the authority to make decisions regarding personnel.

86. After discussing the matter, the Board was given the choice to vote on, approve, or to "ratify" the decision by Jones and Yeast to terminate Appellant. The Board determined, however, that they didn't need to do any of those things. Their interpretation of KRS 342.1224(5) was that the Executive Director, who is authorized by statute to "oversee the affairs of the Commission," had the authority to make personnel decisions as well. Swansburg added that the Board felt there was also no need to "codify or memorialize" the decision to terminate Appellant, nor did the Board feel that they needed to officially vote on the matter. Swansburg concluded, "Jones had already used his lawful authority to terminate[Appellant]. Yeast had the authority to execute the termination as well."

87. On cross-examination, Swansburg stated that the "overall theme of the conversation" between the Board and General Jones was their statement to him that he is the Executive Director and the Board trusts his judgment.

88. Appellee called its next rebuttal witness. **Anya Carnes** is employed by the Labor Cabinet as Executive Director for the Office of Administrative Services, where she oversees all human resource matters. Carnes was asked to explain how personnel files are generally handled. She stated that the Personnel Cabinet keeps the official records of all personnel actions. The Commission keeps what she termed "the manager's record," that is, a working file of any pertinent notes regarding an employee, including discipline and performance issues. The Commission's files are not "the official file." It was the Commission's file that had Board minutes attached to various personnel actions, like salary increases, promotions, and hirings.

89. Appellee called its next rebuttal witness. **Tyler Paske** is a KWCFC Auditor II. He has been employed with the Commission for approximately two and a half years.

90. Paske was asked to recall an encounter he had with Appellant on December 19, 2017. Paske testified that he had been sitting in David Ritchie's office when Appellant entered and asked for a file that had been given to Paske, but not signed out. Appellant told Paske that he "was a bad boy," and that she "had a ruler and where did he want her to spank him." Paske stated that after the incident he "didn't think much of it." But other employees encouraged him to report the incident "or else they would."

91. Paske reported the incident to his immediate supervisor, Lisa King. King told him to report it to Jones, which he did. Jones told him to put his report in writing. (Appellee's Exhibit 3).

92. Paske stated that Jones told him, "It's up to you to determine how to take it. If something happened and you failed to report it, you are responsible, too." Paske added that he "was worried about words getting twisted against him."

93. On cross-examination, Paske admitted that Appellant referred to a ruler on a desk in Ritchie's office, but she never actually picked it up. He agreed that he and Appellant had driven to an audit together previously and that Appellant was not inappropriate during this trip.

94. Appellee called its last rebuttal witness. **Lisa King** is Director of Audit Collection at KWCFC. She has worked for the Commission for the past nineteen years.

95. King was asked if she had ever witnessed Appellant behaving in a disruptive way. She answered that "at various times [Appellant] would get upset with Renee Haddix, and yell or leave abruptly. If she was upset, she would just leave work. That happened on several occasions."

96. Appellant, **Rhonda Kiper**, testified on her own behalf on rebuttal. She testified that Paske's memorandum stated that she had "pointed the ruler" at him, but his testimony at the

evidentiary hearing was that she had not picked the ruler up. (**Hearing Officer Note:** Paske's memorandum states that "she had a ruler." Appellee's Exhibit 3).

FINDINGS OF FACT

1. The Appellant, Rhonda Kiper, was a non-merit, unclassified employee with the Kentucky Workers' Compensation Funding Commission (KWFC). She timely filed an appeal with the Personnel Board, alleging that she was improperly terminated from her position as an Auditor IV, that her dismissal was the result of age discrimination and retaliation, and that the inclusion of a Supervisory KEAP referral in her personnel files was a penalization.

2. Through her closing argument and in arguments throughout the proceeding, Appellant asserts that neither General Reuben Jones, KWFC Executive Director, nor Tiffany Yeast, designated Appointing Authority for the Labor Cabinet, had the authority to dismiss her.

3. KWFC was created as an agency of the Commonwealth for the public purpose of controlling, investing, and managing the funds collected pursuant to KRS 342.122, which establishes a special fund assessment upon workers' compensation premiums by insurance carriers writing workers compensation insurance in the Commonwealth. [KRS 342.1223(1)].

4. The Hearing Officer finds that the KWFC Board is an independent entity of state government attached to the Kentucky Labor Cabinet for administrative purposes only. [KRS 342.1223 (5)].

5. The Hearing Officer finds that KWFC is a statutorily created body with specifically designated powers and duties. Within the provisions of KRS 342.1223, the Commission "shall have all of the powers necessary or convenient to carry out and effectuate the purposes for which it was established, including, but not limited to, the power: (b) To elect, appoint, or hire officers, agents, *and employees*, and define their duties and fix their compensation within the limits of its budget approved by the General Assembly. Notwithstanding any provision of KRS Chapter 18A to the contrary, officers and employees of the funding commission may be exempted from the classified service." [KRS 342.1223(3)]. (Emphasis added).

6. Pursuant to the provisions of KRS 342. 1224 (5), the Board of Directors of the Commission "shall appoint an executive director to administer, manage, and direct the affairs and business of the commission, *and other staff persons* to carry out the affairs and business of the commission, subject in each instance to the policies, control, and direction of the board of directors. The Board of Directors shall fix the compensation of all such persons and shall pay such compensation out of the funds of the commission." (Emphasis added).

7. The Hearing Officer finds that only the KWCFB Board of Directors, through its authorizing statutes KRS 342.1223 and KRS 342.1224, has the legal authority to hire and dismiss its staff and to set their compensation.

8. The Hearing Officer finds that the KWCFB Board of Directors is the Appointing Authority for the Commission.

9. KRS 18A.005(1) defines an "Appointing Authority" as "The agency head or any person whom he has authorized by law to designate to act on behalf of the agency with respect to employee appointments, position establishments, payroll documents, register requests, waiver requests, requests for certification, or other position actions. Such designation shall be in writing and signed by both the agency head and his designee. Prior to the exercise of appointing authority, such designation shall be filed with the secretary."

10. According to the Appellee's closing argument and the testimony of Michael Swansberg, the KWCFB Board interpreted KRS 342.1224 to mean that General Jones had the inherent authority to dismiss Appellant without a formal designation by the Board of Directors. The Hearing Officer disagrees with this analysis. The plain language of KRS 18A.005(1) clearly lays out the process an Appointing Authority (the KWCFB Board of Directors) must follow to lawfully designate someone to act on its behalf in regard to employment actions: it must be done "in writing, and signed by both the agency head and his designee. Prior to the exercise of the appointing authority, such designation shall be filed with the secretary." [KRS 18A.005(1)]. Nothing presented at the evidentiary hearing showed that General Jones had been properly designated by the KWCFB Board of Directors to act on its behalf with respect to employment appointments or dismissals, or any personnel actions. In fact, Swansberg testified that the Board of Directors "felt it did not have to do anything" to lawfully designate Jones to effectuate personnel actions. The only action the Board took in this matter was to discuss Appellant's termination in Executive Session at the January 2018 Board meeting, which occurred approximately a month after Appellant was dismissed.

11. The Hearing Officer finds that General Reuben Jones was without legal authority to sign the dismissal letter as he had not been formally designated in writing by the Appointing Authority to act on behalf of the Commission.

12. According to the Appellee's closing brief, the Cabinet contends that even if Jones did not have the authority to sign Appellant's dismissal letter, Tiffany Yeast, the designated appointing authority for the Labor Cabinet, who also signed the dismissal letter, did have such authority. The Hearing Officer disagrees. Again, no evidence was introduced into the record that Yeast had been designated by the KWCFB Board of Directors to act on its behalf, according to the directives of KRS 18A.005(1). The Personnel Cabinet's Signature Authorization Form, signed by Secretary Derek Ramsey on November 1, 2017, authorized Yeast to sign personnel actions for the Labor Cabinet only.

13. The Hearing Officer finds that the use of “shall” in KRS 342.1224 is mandatory, and further bolsters the conclusion that the KWFC Board of Directors is given sole and exclusive authority over KWFC personnel. See Commonwealth v. Wright, 415 S.W.3d 606, 609 (Ky. 2013): “The term ‘shall’ is a word of command and must be given a compulsory meaning.”

14. The Hearing Officer finds that Tiffany Yeast was without authority to sign the dismissal letter as she had not been formally designated in writing by the Appointing Authority (KWFC Board of Directors) to act on behalf of the Commission.

15. The Appellee references the Personnel Board case of Sallie Bolton v. Finance and Administration Cabinet, Appeal No. 2016-097, to stand for the proposition that a Designated Appointing Authority of the Finance and Administration Cabinet and General Government Cabinet had the legal authority to terminate a non-merit employee of the CMRS Board. (Labor Cabinet’s closing brief). The Hearing Officer finds that the Bolton case is distinguishable from the facts of the present one. In Bolton, the CMRS Board Minutes did not reflect that they had approved to hire Sallie Bolton, and therefore, the Hearing Officer found that the CMRS Board did not “officially act to hire Appellant, fix her compensation or dismiss her.” (Sallie Bolton v. Finance and Administration Cabinet, Appeal No. 2016-097, p. 12). The Hearing Officer in Bolton also noted that “...a public agency speaks through its minutes. See County Board of Education v. Durham, 198 Ky. 732, 249 S.W. 1028 (1923). See also Board of Educ. v. Jones, Ky., 823 S.W.2d 457, 459 (1992).”

16. In the present case, the KWFC Board of Directors’ Minutes reflect that they routinely approved personnel actions. A review of the KWFC Board Minutes introduced into the record as Appellant’s Exhibit 1, show that from July 21, 2016, to February 2, 2018, the Board voted on at least seventeen different personnel actions, from hiring to promotion to salary increase. (The exhibit is not a complete record of all the Minutes from this timeframe). As for personnel actions regarding Appellant, the Minutes introduced into the record show that the Board voted on, approved, and documented the following actions in the Minutes: Appellant’s reclassifications on April 15, 2004 and July 1, 2005; Appellant’s salary adjustment on January 16, 2008; and Appellant’s promotion to the Auditor IV position on July 26, 2012 (Appellant’s Exhibit 10). [The Hearing Officer notes that the only documents entered into the record regarding the initial hire of Appellant were her cover letter and resume (Appellant’s Exhibit 8); her state application; a “Request for Personnel-Position Action” that documented her hire as a Premium Auditor; and an email from then-Executive Director, Jon E. Nielsen, informing Darla Sandlin that Appellant had recently been hired. (Appellant’s Exhibit 10.)]

17. The Hearing Officer finds that it has been the accepted business practice for many years that the KWFC Board of Directors votes on and approves personnel actions while the Labor Cabinet merely processes the actions once they have been decided. Illustrative of this finding is an email, dated 4/20/04, contained in Appellant’s personnel file identified as

Appellant's Exhibit 9. The email is from Darla Sandlin (Labor) to Elizabeth Hensley [Environmental and Public Protection Cabinet (EPPC), Department of Administrative Services (DAS)]. It reads in pertinent part:

Elizabeth—I have two personnel actions to process for Workers Comp Funding Commission, we have no jurisdiction over what KYWC personnel actions. (sic) All actions are voted on in board meetings and then we process accordingly using minutes as backups... (Appellant's Exhibit 9).

18. Finally, Appellee's contends that the October 9, 2015, dismissal letters of Mindy Sexton, Appellant's coworker, signed first by Bill Riggs, Executive Director, and then by Lynn Gillis, designated Appointing Authority of the Labor Cabinet, is proof that such a termination is valid. The Hearing Officer does not find this argument persuasive. Without evidence that Riggs or Gillis were authorized by the KWCFB Board of Directors to act on their behalf with regard to personnel actions, Sexton's dismissal is subject to the same scrutiny as Appellant's. In other words, a possibly invalid termination letter does not render a second, similar one, valid. The Hearing Officer finds that the facts of Mindy Sexton's dismissal have no probative value to this case.

I. APPELLANT'S CLAIM OF AGE DISCRIMINATION

19. KRS 18A.095(12) provides:

Any classified employee may appeal to the board an action alleged to be based on discrimination due to race, color, religion, national origin, sex, disability, or age forty (40) and above. Nothing in this section shall be construed to preclude any classified or unclassified employee from filing with the Kentucky Commission on Human Rights a complaint alleging discrimination on the basis of race, color, religion, national origin, sex, disability, or age in accordance with KRS Chapter 344.

20. However, KRS 18A.095(14) refers to claims of discrimination by any employee, including unclassified, and provides only, "Any employee, applicant for employment, or eligible on a register, who believes he has been discriminated against, may appeal to the board."

21. The Hearing Officer finds that KRS 18A.095(9) allows a right of appeal to the Personnel Board for an unclassified employee terminated for cause, but a termination not for cause may only be appealed to the Board upon the basis of discrimination as outlined in KRS 18A.095(14) above.

22. To prove age discrimination, the aggrieved party must either show direct evidence of a discriminatory animus or, absent that, must satisfy the burden shifting test of McDonnell Douglas Corp vs. Green, 422 U.S. 792 (1973). The Kentucky Supreme Court in Williams v. Walmart 184 S.W.3d 492 (Ky. 2005) reflects that the purpose of the McDonnell Douglas *prima facie* case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by. This burden-shifting approach allows the victim of discrimination to establish a case through inferential and circumstantial proof. The McDonnell Douglas framework requires that an aggrieved party to show: 1) that he was a member of a protected class, 2) that he suffered an adverse employment action, and 3) that another substantially younger employee received those benefits of employment. The employer must articulate some legitimate, non-discriminatory reason for its actions and then the employee must then be afforded a fair opportunity to demonstrate that the employer's stated reason for its actions was pretext.

23. The Hearing Officer finds that Appellant did not make a *prima facie* case of age discrimination. While her personnel records reflect that she is over the age of forty and, therefore, a member of a protected class, and while termination is unquestionably an adverse employment action, Appellant failed to show that a substantially younger employee received the benefits of her employment.

24. At the evidentiary hearing, Appellant made assertions that she was not "a young superstar" like some of the other auditors. In her estimation, most of the newly hired auditors were under 30. However, Appellant failed to establish definitively the actual age of any employee in the office. Her statement that a particular employee was under thirty is not sufficient to prove their actual age, or that they are "substantially younger." And while Appellant alleged that Olivia Orrender was hired to take her place in the office, she offered no corroborating evidence.

25. The Hearing Officer finds Appellant failed to sustain her burden of proof on her age discrimination claim.

II. APPELLANT'S CLAIM OF RETALIATION

26. In her written closing argument, Appellant alleges that her dismissal was discriminatory and based on retaliation. She alleges that she was retaliated against for a letter she wrote Renee Haddix in September 2017. (Written closing argument of Appellant, pp. 6, 7-8).

27. In order to show retaliation in the employment context, Appellant must show that: (1) she engaged in protected activity; (2) her employer knew she had engaged in protected activity; (3) thereafter, her employer took some employment action adverse to the employee; (4)

there was a causal connection between the protected activity and the adverse employment action. Smith v. City of Salem, 378 F.3d 566, 570 (6th Cir. 2004).

28. The Hearing Officer finds that even assuming *arguendo* that the first three prongs of the *prima facie* case of retaliation in the employment context were met, Appellant was unable to establish a causal connection between the letter she sent to Haddix and her dismissal. Although not required to, Appellee was able to articulate legitimate, non-retaliatory reasons for its decision, including Appellant's behavior in the work place, her attitude toward her supervisor, Renee Haddix, and her inappropriate conversation with a coworker, Tyler Paske.

29. The Hearing Officer finds that Appellant failed to satisfy her burden of proof on her retaliation claim.

III. APPELLANT'S CLAIM THAT THE PLACEMENT OF A KEAP REFERRAL FORM IN HER PERSONNEL FILE WAS A PENALIZATION

30. KRS 18A.095(9) authorizes an appeal to the Personnel Board by an unclassified employee who has been penalized for cause. Appellant's appeal of the KEAP referral form placement in her agency personnel file must be predicated upon a penalization. That term, in turn, is defined by KRS 18A.005(24).

31. Penalization includes a diminution in rank or level of an employee without proper cause, and further includes "the abridgement or denial of other rights granted to state employees." KRS 18A.005(24).

32. The Hearing Officer finds that Jones' placement of the KEAP referral form in an informal manager's file he kept did not "diminish the level, rank, discretion or responsibility of the employee." Nor did Appellant show that the action was an "abridgement or denial of other rights granted to state employees." In fact, the Hearing Officer notes when asked specifically at the evidentiary hearing if the KEAP referral placement in Jones' file had harmed in her any way, Appellant answered: "No, but it should be known."

33. The Hearing Officer finds that Appellant failed to sustain her burden of proof to show that she was penalized by the placement of a KEAP referral form in a manager's informal personnel file.

CONCLUSIONS OF LAW

1. Based on the Findings of Fact, the Hearing Officer concludes that the purported dismissal of Appellant, Rhonda Kiper, by General Jones and Tiffany Yeast did not meet the combined requirements of KRS 18A.005(1), KRS 342.1223(3) and (5), and KRS 342.1224(5),

and this dismissal is void *ab initio*. (See Bowling v. Natural Resources and Environmental Protection Cabinet, 891 S.W.2d 406, 409 (Ky. App. 1994).)

2. Based on the Findings of Fact, the Hearing Officer concludes that Appellant failed to sustain her burden of proof to show that she was the subject of unlawful discrimination based on her age (over 40).

3. Based on the Findings of Fact, the Hearing Officer concludes that Appellant failed to sustain her burden of proof to show that her dismissal was the result of retaliation.

referral form in her manager's personnel file.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **RHONDA KIPER V. LABOR CABINET (APPEAL NO. 2018-005)** be **SUSTAINED**, that Appellant be reinstated to her previous position of Insurance Compliance Auditor IV or a position of like pay and status, with back pay and benefits for the period of dismissal, and to otherwise make Appellant whole. (KRS 18A.105 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 Colleen Beach** this 2nd day of August, 2019.

KENTUCKY PERSONNEL BOARD

[Handwritten signature]

A copy hereof this day mailed to:

Hon. Kate Bennett
Hon. Tressa Root
Ms. Rhonda Kiper