

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2018-214

PATRICIA MILLER

APPELLANT

VS.

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

FINANCE AND ADMINISTRATION CABINET

APPELLEE

*** **

The Board, at its regular January 2020 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated December 4, 2019, Appellant's exceptions, Appellee's response to exceptions, and being duly advised,

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

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

SO ORDERED this 15th day of January, 2020.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Patrick McGee
Hon. Michele Henry
Ms. Stacy Perry

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This matter came on for evidentiary hearing on September 5, 2019, at 9:30 a.m., ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. John C. Ryan, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by KRS Chapter 18A.

The Appellant, Patricia Miller, was present and was represented by the Hon. Michele Henry. The Appellee, Finance and Administration Cabinet, was present and represented by the Hon. Patrick McGee.

This appeal was the subject of one pre-hearing conference, convened to define the issues, discuss the option of mediation, and to address any other matters appearing to require attention. At the conference, Appellant raised one additional/potential issue to be resolved in addition to those in her appeal form, namely whether the individual escorting her from the workplace possessed the authority to do so. Mediation was not pursued.

BACKGROUND

1. By letter of October 1, 2018, over the signature of Stacy N. Perry, Division Director, Finance and Administration Cabinet, Patricia G. Miller was dismissed from her position as Revenue Field Auditor IV in the Agency's Department of Revenue Louisville Taxpayer Service Center, effective the following day. As more fully outlined in the letter, a true copy of which is appended hereto and incorporated herein as **Recommended Order Attachment A**, the action was taken due to Ms. Miller's adamant refusal to be fingerprinted, which the Agency was insisting to be a requisite for her to continue in her position. As will be more fully demonstrated in the proof presented below, this action was the culmination of several weeks of communications between her and upper management on the subject.

2. Ms. Miller took timely appeal on October 23, 2018, under the categories of "Dismissal" and "Suspension," wherein she wrote:

I was terminated because I refused to provide my fingerprints for a background check with fingerprinting. The fingerprinting requirement contained in KRS §131.032 only requires fingerprinting for employees with access to federal tax information (as that term is defined in IRS Publication 1079) [sic], which I do not have. Because I am not covered by the statute, I should not have been terminated for refusing to do so.

3. A motion by the Agency for summary judgment dismissing the appeal having been overruled, evidentiary hearing was convened as scheduled, whereupon the Agency, under its assigned burden of proof, sought the testimony of **Appellant, Patricia Miller**, as upon cross-examination. She confirmed that, at the time of hearing, she was unemployed, having not publicly worked since her termination. She identified her signed Affidavit, which she presumably prepared to counter the Agency's Motion for Summary Judgment. The document briefly outlines her 13-year work history with the Agency's Department of Revenue (DOR), and asserts that she did not have access to or use federal tax information (FTI) throughout her tenure. It further recites that she obtained any needed tax information directly from the taxpayer being audited or from public records, which sources are not official FTI. To that end, the Affidavit concludes, she should not be subjected to the fingerprinting process for the reason that it only applies to those with direct access to FTI.

4. Appellant outlined her duties as Auditor with the Agency. She received assignments "from Frankfort," generated a file, and conducted research of the subject taxpayer. She then contacted and informed the taxpayer of the forthcoming audit and scheduled an appointment. She met with the taxpayer, developed and discussed her findings with him or her, and prepared a report for submission to her supervisor for review. Her assignments included income, corporate, sales, payroll, property, and severance taxes. If a taxpayer was found to be not completely forthcoming with the requisite information, she utilized what she characterized as a "trial balance" reading which, she asserted, ordinarily yielded a sufficiently accurate picture of the correct amounts sought. She never utilized the taxpayer's copy of the federal tax return, for which the trial balance method substituted.

5. Appellant recognized and identified a printed PowerPoint presentation utilized for training of DOR personnel focusing on, among other things, FTI requirements. She acknowledged that attendees were tested concerning its contents to affirm their understanding and retention thereof. She agreed that the training emphasized that noncompliance with the provisions of DOR policies or of Internal Revenue Service Publication 1075, "...may result in disciplinary action, up to and including termination of employment, fines and/or imprisonment." Directed to the stated definition in the presentation, i.e. that "FTI consists of any information that has come directly from the Internal Revenue Service," Appellant disputed its accuracy, asserting her interpretation, or definition, to be "federal tax information obtained directly from the IRS upon a need-to-know basis." Reviewing other portions of the PowerPoint, Appellant insisted that the provisions cited and/or emphasized applied only to those accessing FTI, from which she was always excluded.

6. The Agency introduced, and Appellant verified, a document which she signed on February 22, 2018, confirming the training, confidentiality requirements, and her awareness of the relevant provisions of the PowerPoint. She identified, and there was made a part of her testimony, the Job Class Specification for the Revenue Field Auditor IV position with its basic requirements and duties. She agreed that Auditor IV applicants and occupants are specifically subjected to background checks as may be defined and mandated by the Agency, recalling that at the time she assumed the position, the nature and extent of such checks differed from that currently in place. Pressed concerning her opinion as to the extent and nature of such background checks, she viewed that, while certain measures are necessary, fingerprinting of workers such as herself, as well as other field auditors, should not be required.

7. Turning to the matter of physical sight and sound barriers dealt with in the PowerPoint presentation, Appellant explained that the Jefferson County office of DOR utilized private cubicles for each auditor. She insisted that she was thereby segregated and shielded from any other worker who might access FTI, and that the workstations are sufficiently partitioned to prevent eavesdropping or inadvertent viewing of confidential information.

8. Appellant acknowledged the contents of a series of email transmissions and a local background investigation form that she executed on June 20, 2018. She agreed that the correspondence from upper management references the fingerprinting requirement in conformity with the IRS directive (Publication 1075) and sought to schedule their procurement on September 12, 2018. She noted that she registered her objection to the fingerprinting portion from the outset of its announcement. She informed management by email on September 5, 2018, "I plan to be in the office on the 12th, but as I stated before, I do not plan to be fingerprinted. I will not be part of a fingerprint database when I have not committed a crime." She also spoke with her supervisor during the interval, informing him that she considered her fingerprints to be "very personal" and "letting him know my concerns." Pressed by the Agency to expand thereon, she explained, "When you are giving your fingerprints, you are giving your fingerprints because you have committed a crime or done something wrong." She added that she was a faithful 13-year employee who "did a very good job" and "it bothered me to be forced to have to do this."

9. Appellant continued that, notwithstanding her personal objection, she recognized the necessity for fingerprinting as part of background checks in certain circumstances, wherein the specific position or occupation demands it. She volunteered that both of her sons are in sensitive occupations and both were required to and did supply their fingerprints. She conceded that in neither case was any criminal accusation involved.

10. Appellant continued that when confronted with the mandate, observing that the requirements were going forward, she approached upper management concerning other positions with DOR or, absent that, a possible transfer to the Commonwealth's Department of Transportation, where no fingerprinting was required. She was informed, in due course, that none of these options were available and that she must submit or risk termination.

11. Appellant recited the sequence of events involving her on the day that was assigned for her and others to be fingerprinted at the workplace. She recalled that Rebecca

Rodgers-Johnson, Disclosure and Security Officer from the DOR Commissioner's office, was present and informed her that she had no choice in the matter. Appellant reiterated her position in the presence of one or more other officials and was thereupon advised by Rodgers-Johnson that she would be required to leave the premises. Appellant, "very upset," questioned this for the reason that others not yet fingerprinted, due to scheduling or other reasons, were permitted to remain. She was escorted to her workstation to retrieve her purse and a small file cabinet containing personal material, which another worker wheeled to her car on a dolly.

12. Appellant identified, and the Agency introduced, a previous series of emails dating from December 11, 2017, between her and Security Officer Rodgers-Johnson purportedly seeking confidential FTI. She recalled that she was seeking a copy of a federal partnership tax document in order to complete an audit which had come to her after pending four years in the hands of a supervisor and concerning which time was about to expire. She explained that ordinarily federal tax schedules are attached to Kentucky returns and, even when they are not, she was generally able to retrieve and obtain the information needed from other sources. Having no time to do so in this instance due to the looming deadline, she communicated as indicated, signed and submitted a requisite form that she also identified as part of her testimony, seeking the FTI.

13. Directed again to the contents of her affidavit, Appellant acknowledged that she noted therein her understanding that certain other staff, supposedly similarly situated, were not required to submit to fingerprinting. Pressed by the Agency to identify them, she named one individual, believed to be a contract employee, who informed her on the day that she was escorted from the job that she, the coworker, was not required to undergo the process. Appellant insisted that others confirmed this as to this individual, acknowledging that she has never returned to the premises nor since met with the coworker.

14. Appellant having reserved her direct testimony pending conclusion of Agency proof, the Agency presented **Stacy Perry**, Director of Human Resources and an Appointing Authority. Serving in that position for nearly four years, her duties generally encompass oversight of all hiring and personnel actions, including disciplinary matters. She is familiar with the Agency background check requirements adopted in 2018, which she briefly outlined. She explained that the federal government implemented new standards for accessing federal tax information, whereupon DOR sought and obtained a statute, with a companion regulation which outlines requirements for implementing the guidelines. She noted that the process was a major undertaking for DOR, since it included all 140+ employees as well as new hires. It was emphasized that no exceptions were allowed – even mail handlers and "fringe" personnel not directly accessing FTI were, and are, required to comply.

15. The witness identified and introduced a September 5, 2018 email that ratifies the foregoing requirements and explains that no positions within the Agency are available to which Appellant might transfer wherein the fingerprinting mandate is waived. She recalled becoming aware of Appellant's objection to supplying her prints around the date of the email, when scheduling commenced to obtain them. She never discussed Appellant's concerns with her prior to her pre-termination meeting which was eventually conducted, nor did she ever allot her a "few

days” to think about the matter. Upon conferring with the Deputy Commissioner, and determining from the relevant statute and regulation that the fingerprinting requirement is mandatory throughout DOR, the witness concluded that a notice of intent to dismiss letter should be prepared and issued, which was accomplished on September 13, 2018, a copy of which she supplied with her testimony.

16. The witness continued that Appellant timely submitted a written request for a pre-termination hearing, which was conducted, and in which the parties and counsel participated. She recalled that Appellant asserted that she viewed that it was her right to refuse the fingerprinting and insisted that she did not access FTI in the performance of her auditor duties. Appellant had been placed upon administrative leave until that time and, the position of the Agency remaining unchanged, was issued a formal termination letter by the witness on October 1, 2018. She ratified that the Job Class Specification for the Auditor IV position provides for background checks as may be required or specified by the Agency.

17. Under cross-examination, Ms. Perry confirmed that both she and her supervisor are designated Appointing Authorities, noting that other than the Commissioner, no other Agency official is so designated or authorized to issue disciplinary actions. She acknowledged that Disclosure and Security Officer Rebecca Rodgers-Johnson is not an Appointing Authority. Pressed as to the reason a pre-termination hearing was conducted if Appellant’s termination was a forgone conclusion, she explained that Appellant requested the step and the possibility existed for further dialogue. She confirmed that in addition to reviewing the relevant statute and regulation, she also read a summary of the background check requirements outlined in the underlying IRS publication.

18. Appellant sought further clarification of certain portions of the Intent to Dismiss letter. The witness verified that background checks and their various components are deemed an essential function of the Auditor IV position and, although not necessarily set forth in the Job Class Specification, the requirements are blueprinted in a Position Description designed for the that position. She explained that from the perspective of the Agency, any auditor having access to the DOR computer system upon which FTI could be obtained is subject to all provisions of the background check requirements. She disavowed any flexibility surrounding a “need-to-know” approach within the auditing process and was unable to comment concerning whether, or under what conditions, FTI might be needed or sought. Pursuant to further inquiry, she commented and further explained upon specified portions of the dismissal letter. Among other aspects, she insisted that both the letter and intent of the mandated screening specify that DOR employees with access to or use of FTI must submit, pointing out that Appellant’s position of Auditor IV “...requires access and use of both FTI and confidential taxpayer information to perform the basic duties and functions of that position.”

19. Directed to Security Officer Rebecca Rodgers-Johnson’s role in Appellant’s removal from the workplace, the witness explained that she did not give Rodgers-Johnson any instructions for action in the event Appellant refused to leave, nor could she comment as to the source from which the approach which was utilized originated. She recalled learning subsequently that Appellant’s badge and keys were confiscated by Rodgers-Johnson.

20. The witness continued that, subsequent to the dismissal, she reviewed Appellant's access to FTI via the DOR computer system designed for that purpose. She did not undertake to verify whether Appellant ever actually accessed FTI, nor did she investigate whether she required it to perform her auditing duties. She acknowledged that she has not revisited the statute or the regulation to discern whether exceptions exist for staff who do not, or ever need to, access FTI and who could thereby seek waivers of portions of the background checks. She reiterated her understanding to be that all personnel employed by DOR must be, and have been, fingerprinted, including those under contract. She could not comment as to any outsourced services, such as janitorial or others not employed by DOR.

21. **Rebecca Rodgers-Johnson** has been the Disclosure and Security Officer for the Agency for four and one-half years. Answerable directly to the Deputy Commissioner, her primary duty is the maintenance and preservation of the security of all DOR confidential tax information. Supervising a staff of four, she depicted for the record examples of the processes that her office employ in the furtherance of its duties.

22. Turning to IRS Publication 1075, the witness recalled that it was most recently revised by the IRS effective September 2016, and it is deemed the "bible" governing proper access and dissemination of FTI. As Security Officer, she is inherently familiar with its contents. In the course of her testimony, she explained specific portions as they relate to the Commonwealth's requirements, including the design of the workplace, wherein a "two-barrier" arrangement must be in place to prevent unauthorized intrusion or eavesdropping. What constitutes FTI and what is deemed authorized/unauthorized access is described in detail therein. She disclosed that the IRS conducts a security audit of DOR every three years to confirm whether or not the Agency is in compliance. Any finding of non-compliance carries sanctions/penalties, including financial loss. In addition to background checks, the physical blueprints and areas occupied by those eligible to access FTI are critically reviewed.

23. The witness continued that the September 2016 version of the publication increased security requirements that must be implemented. Although a grace period was allowed, certain legal steps were required to properly comply. This led to creation of a statute, which she drafted and the legislature approved (KRS 131.032), and an attendant regulation (103 KAR 1:120) also prepared by her. Then came Procedure No. 6.2.9, which she likewise prepared. The first two provisions became effective and were activated in January 2018, and the Procedure was made effective in November 2018, which followed Appellant's dismissal.

24. The witness continued that since fingerprinting and other requirements were added and made applicable to all DOR personnel, including contractors and certain vendors, her office set about arranging for the process, which was ultimately performed onsite at the Louisville taxpayer center where Appellant was employed. She summarized the steps engaged in announcing and implementing the requirement and, in addition to introducing copies of the statute, regulation, and procedure, produced and identified one or more emails and other communications issued to staff commencing in January 2018 and ranging through mid-September 2018. All staff, including Appellant, were made aware of the requirement in the PowerPoint presentation as well.

25. The witness was on-hand to oversee the fingerprinting on September 12, 2018. All staff who were present, except Appellant, submitted notwithstanding some grumbling; those not present that day were eventually printed and the step was fully accomplished by the end of the month. She conferred with Appellant, who was steadfast in her position, whereupon she informed her that she would be required to escort her from the premises and cancel her access to all Agency records. Appellant complied without incident. By way of follow-up, the witness detailed the sequence to the Deputy Commissioner, her supervisor, and to Human Resources Director Perry later that day, via a lengthy email. She noted therein that Appellant asserted before leaving that she was of the understanding that she would be afforded "three to five days" to consider her options, that the Appointing Authority would be present to supervise the printing, and that the entire process was "sprung on her and she did not have time to think about providing her prints or not."

26. Continuing her discussion of the FTI system, the witness described the process required to access certain federal records, one program of which is called CARS. This includes completion of a form by the worker and approval of the relevant manager, which request this witness then submits to the IRS. She recalled that Appellant engaged this process upon at least one occasion, seeking a partnership return. She explained that the IRS and DOR exchange lists of filers residing or doing business in Kentucky which, in part, account for the notable level of control asserted by the federal system in exchange for sharing its information.

27. Directed to portions of Appellant's Affidavit made part of the record early on, the witness disputed the portions thereof that assert that Appellant neither had access to, nor had ever accessed FTI, pointing to the seeking of the partnership schedule. She insisted that an essential element of Appellant's auditor position is fulltime access, which would have commenced at the time she assumed the position, along with all other auditors similarly situated. She urged that whether or not Appellant regularly accessed FTI is irrelevant and, thus, the mandated background checks, including fingerprinting are.

28. Under cross-examination, the Security Officer ratified her familiarity with IRS Publication 1075, noting that the 2016 Edition was not entirely new but, rather, an upgrade. She confirmed that she is the Agency point-of-contact with the IRS, and all matters pertaining to background checks are managed through her office. Appellant quizzed her somewhat extensively concerning portions of both the publication and the PowerPoint presentation, pointing specifically to a "need-to-know" provision present in the two items. The witness acknowledged that any worker not needing FTI should not be furnished it nor have access to it. Consequently, anytime it is accessed unnecessarily, such activity is unauthorized and not every audit requires its use. However, she explained, the design of the CARS system, which is aged, affords blanket accessibility for agency auditors.

29. The witness confirmed that the fingerprinting is not DOR but IRS mandated and, under that requirement, no DOR position is excepted therefrom. Auditors, upon their hiring, are automatically provided a password, and thereby accessibility, upon certification for duty by the relevant manager. The CARS system contains both federal and Commonwealth tax information, and no control exists under which activity may be restricted to one or the other if the employee

possesses an appropriate password. Other FTI access is attained through use of a signed form approved by a branch manager, as outlined in the prior testimony.

30. Appellant discussed with the witness her role in matters of confidentiality, safe practices, use of passwords, and maintenance of records, including the tracking of those personnel accessing FTI. She acknowledged that information supplied by a taxpayer or derived from public records is not FTI and is deemed property of the Agency immediately upon receipt. She expanded that, notwithstanding the step(s) required to obtain specific FTI, under current procedure each auditor's password affords him or her blanket access to view the contents; only the obtaining of specific materials is case-by-case. Even so, she continued, any auditor seeking the information must justify the need. No surveillance other than that already mentioned is conducted concerning what is sought or who sought it, except that the witness maintains a handwritten log in her office. She reiterated that the security requirements apply to all workers who possess the ability to seek the information, regardless of whether or not it is ever sought. She confirmed that in light of the logs which she maintains, any and all access events seeking particular items are recorded for each auditor and maintained for at least seven years. She agreed that the records reflect only one such contact by Appellant. She ratified that Appellant has routinely attended the on-line PowerPoint training and passed the quiz concerning it.

31. The witness was again directed to the sequence and treatment of Appellant on September 12, 2018. She essentially ratified that recited by Appellant – Appellant had already made her concerns known through email, and the witness consulted with Agency legal counsel before attending the fingerprinting session. She met with Appellant, who was steadfast in her position, whereupon the witness, commensurate with advice, collected her badge and work laptop. The purpose in escorting her from the premises was specifically to separate her from further access to all confidential information, both federal and state. The witness noted that she possessed no authority to either dismiss Appellant or prevent her from performing any job duty that did not require commingling of confidential/non-confidential data. However, since no option was available that would assure appropriate separation of the duties, her departure was mandatory. She confirmed that, during the fingerprinting process, staff were conditionally permitted to continue performing their regular duties, pending submission of the prints to the Kentucky State Police and thereafter by KSP to the FBI for recording. She was unaware of any arrangement under which Appellant might be permitted to complete audits that were in progress without restoration of her FTI access, which is prohibited for the reason abundantly stated.

32. The Agency having completed its proof-in-chief, **Appellant, Patricia Miller**, presented testimony in her own behalf. She commenced with the Agency in July 2005 as a Revenue Program Officer and did, at that time, have access to FTI in order to perform the duties attendant thereto. She was upwardly mobile, due in great part to her accounting experience that she brought to the job. In due course, she attained the Revenue Field Auditor IV position, performing audits both in the field and in the office. Referrals came from the Revenue Collection Officer in Frankfort by way of distribution to her supervisor, who then assigned them to herself and other auditors. Appellant was comfortable with her caseload, which ordinarily averaged 14. Each file included basic vital information such as name, address, tax identification number, and any other information deemed pertinent to the particular case.

33. Neither Appellant nor any other auditor possessed a password to enable her or them to access the CARS system for the reason, she explained, no need existed for any of its information. Some information contained in the system, such as a federal tax identification number, was routinely supplied with the assignment to enable the reviewer to properly and correctly identify the subject taxpayer. Nothing therein was expressly “flagged” as FTI since the entire file was confidential. She insisted that she possessed no password or access to any FTI system whatsoever.

34. Directed to the prior testimony concerning an email exchange in early 2018 in which she sought specific FTI information through the office of Disclosure and Security Officer Rebecca Rodgers-Johnson, she acknowledged making the application, but denied ever receiving the information. She reiterated that ultimately she utilized alternate, non-confidential sources to collect the data and complete the pending audit.

35. Appellant expanded further upon the events surrounding her last day of DOR employment. She was stressed over being prevented from completing her existing assignments before ordered to leave, but she has never attempted to access any of the work since her departure. She disputed ever claiming that the fingerprinting requirement was a surprise or that it was “sprung” upon her, acknowledging that staff received several advance notifications. Throughout that timeframe, she recalled, she sought alternatives through channels, including transfer within the Agency or to the Transportation Cabinet, where she could continue employment without submitting to the fingerprinting. No one ever responded to the request. She explained that as the day approached, “I had made up my mind, I could not do it, because of violation of my rights as an individual, and I did not have access to FTI information.” She agreed that, if reinstated and found it necessary to access FTI, she would then submit to be fingerprinted. She confirmed that she does seek reinstatement to the position, which she enjoyed performing, with its interaction with taxpayers, for whom she felt some sympathy and empathy.

36. Under further, relatively brief cross-examination, Appellant agreed that her assertion that she never received the FTI document requested in early 2018 directly conflicts with that of Rodgers-Johnson, who insists that it was obtained and delivered. She expressed bafflement that her name appears upon one or another Agency register or list as holding ongoing access to FTI, suggesting the possibility that it is a carryover from her service as a Revenue Program Officer. She reiterated her disagreement with upper management, including the witnesses in this matter, concerning her ever having possessed access to any FTI system, regardless of whether or not it was ever utilized. The Agency, pointing to the Standard Procedure rules now in place (made effective in November 2018 following her departure) which mandate that all DOR personnel, without exception, must be fingerprinted, pressed Appellant as to her position should she be reinstated, whether or not she ever accesses FTI. She declined to comment concerning her intentions should such occur, citing unfamiliarity with the provisions of the procedure.

37. The sworn testimony being thereby concluded, Appellant sought opportunity to submit memorandum or brief concerning certain points asserted as newly presented in the

testimony. Scheduling thereof was assigned, submissions of memoranda were duly entered, and the matter stood for recommended order effective October 7, 2019.

38. KRS 18A.095(1) requires that “A classified employee with status shall not be dismissed, demoted, suspended, or otherwise penalized except for cause.”

39. 101 KAR 1:345 is the regulation relating to disciplinary actions. Section 1 thereof allows that “Appointing authorities may discipline employees for lack of good behavior or the unsatisfactory performance of duties.”

40. The Internal Revenue Service issued its latest revision of Publication 1075 effective September 30, 2016. Its basic title is Tax Information Security Guidelines for Federal, State and Local Agencies with “Safeguards for Protecting Federal Tax Returns and Return Information.” In its opening, the publication states:

Office of Safeguards Mission Statement

The Mission of the Office of Safeguards is to promote taxpayer confidence in the integrity of the tax system by ensuring the confidentiality of IRS information provided to federal, state, and local agencies. Safeguards verifies compliance with IRC 6103(p)(4) safeguard requirements through the identification and mitigation of any risk of loss, breach, or misuse of Federal Tax Information held by external government agencies. (Emphasis added.)

Section 4.2 of the publication deals extensively with the physical facility wherein those afforded access to IRS information are present. It prescribes a “two-barrier” requirement:

Minimum protection standards (MPS) establish a uniform method of physically protecting data and systems as well as non-electronic forms of FTI. This method contains minimum standards that will be applied on a case-by-case basis. Because local factors may require additional security measures, management must analyze local circumstances to determine location, container, and other physical security needs at individual facilities. MPS have been designed to provide management with a basic framework of minimum security requirements.

The objective of these standards is to prevent unauthorized access to FTI. MPS thus requires two barriers. Example barriers under the concept of MPS are outlined in the following table. Each topic represents one barrier and should be used as a starting point to identify two barriers of MPS to protect FTI.

The table cites four defined barriers not detailed here. The section continues that:

The MPS or “two barrier” rule applies to FTI, beginning at the FTI itself and *extending outward to individuals without a need-to-know*. MPS provides the capability to deter, delay, or detect surreptitious entry. Protected information must be containerized in areas where other than authorized employees may have access after-hours. (Emphasis added.)

Section 5.1.1 of the publication addresses added background investigation minimum requirements. That section requires state agencies, such as the Agency’s Department of Revenue to develop a written policy requiring that employees with access to federal tax information (FTI) must complete a background investigation approved by the IRS. Expressly added for any individual granted access to FTI is the requirement of FBI fingerprinting, according to the publication, “...to identify possible suitability issues.” The Publication goes on to assert that “this national agency check is the key to evaluating the history of a prospective candidate for access to FTI. It allows the Agency to check the applicant’s criminal history in all 50 states, not only current or known past residences.”

41. Commensurate with the federal mandate, the Agency implemented three measures:

A. Drafted KRS 131.032, adopted by the Kentucky Legislature, which mandates that:

1. Each employee of the Department of Revenue, including contract staff, with access to or use of federal tax information shall submit to a criminal background investigation by means of a fingerprint check by the Department of Kentucky State Police and the Federal Bureau of Investigation.
2. The Department of Revenue shall promulgate administrative regulations in accordance with KRS Chapter 13A to implement this section.

That measure became effective March 21, 2017.

B. Drafted and implemented through standard channels, 103 KAR 1:120. The regulation, by its terms, applies to existing staff and new hires. While clearly oriented to any personnel deemed to have access to FTI, the regulation also contains the following:

Section 3. Disqualification. The cabinet, department, or responsible agency shall not employ or offer employment to an individual with a disqualifying offense listed in Section 1 of this administrative regulation or whose background investigation reveals any factor that bears upon the fitness of

the individual to work in a position with access to FTI or confidential taxpayer information. *The department shall have the sole discretion to determine if a prospective or current employee of the department is suitable to work in a position with access to FTI or confidential taxpayer information to ensure its protection and security in accordance with KRS 131.190, IRS Publication 1075, and Finance and Administration Cabinet Standard Procedure 6.1.2 entitled "Confidentiality of State and Federal Information."* (Emphasis added.)

Section 4 of the regulation, while addressing the matter of new hires, provides that the Agency "may refuse to employ," among other reasons, any applicant who fails to submit their fingerprints as directed. The regulation deals somewhat extensively with disposition of the circumstance of any applicant or existing employee found who has committed a "disqualifying offense," none of which applies to Appellant.

- C. By date of November 19, 2018, the Agency enacted Procedure #6.2.9, Subject: Background Investigations. This procedure expressly applies to DOR and substantially parrots the contents of the regulation, but extends its coverage to provide that "*DOR employees and contractors requiring access to FTI, state tax information, or supporting systems, shall treat state tax information the same way as FTI. If FTI is commingled with state tax information, all commingled information shall be secured pursuant to IRS Publication 1075.*" (Emphasis added.)

The clear intent and purpose of the Procedure is to enhance the screening process for new hires, whom it assumes will either require, or be afforded access to, confidential information and, most notably, FTI.

FINDINGS OF FACT AND SUMMARY OF CONTENTIONS

1. At all times germane to this proceeding Appellant, Patricia Miller, was a classified employee with status, holding the position of Revenue Field Auditor IV in the Agency's Department of Revenue (DOR), where she served in various capacities for 13 years. No evidence is presented that she was previously disciplined during her tenure, nor is there any complaint relative to any aspect of her job performance anywhere in the proof.

2. DOR is the Commonwealth tax law administrator and works in tandem with the Internal Revenue Service (IRS), sharing information often, if not always, of a confidential nature. One important feature of the arrangement is that, in exchange for utilization of IRS

information catalogued in one or another of its systems, DOR is under a standing, mandatory requirement to perform background checks and to install similar safeguards to protect the privacy of taxpayers' records.

3. Commensurate with the foregoing, the IRS, by way of an official publication in September 2016, enhanced its background check standards, adding fingerprinting to its screening procedure for eligibility to access its records, known as federal tax information (FTI). This new feature, which DOR implemented during a two-year grace period at notable expense and effort, was finally completed for the most part near the end of September 2018. Important steps in the process were creation of a statutory provision, a companion regulation, and an outline of Agency procedures. The intent was, by all accounts, that all DOR personnel handling tax information, and most specifically FTI, must provide fingerprints, whether current or new hires.

4. Although complaints occurred within the ranks about the requirement, the preponderance of the proof is that all DOR personnel have complied with the exception of one individual, i.e. Appellant. While entirely agreeable to continuing to perform her auditor duties and submitting to all other elements of the background check, she balked at supplying her fingerprints from the outset of its announcement. Her stated basis, from her testimony, was "I had made up my mind, I could not do it, because of violation of my rights as an individual, and I did not have access to FTI information." Equating the taking or giving of fingerprints to an accusation of illegal behavior, Appellant nevertheless recognized the legitimacy of supplying them for security purposes where the job demands it, referencing members of her own family who have done so in their occupations.

5. Aside from her personal distaste of furnishing her fingerprints in a non-criminal arena, Appellant specifically grounds challenge of her dismissal upon the "having access to FTI" phrasing scattered throughout the provisions governing the matter. She asserts that she did not need, nor did she ever possess, access to the systems, nor was she supplied any password for the purpose. In support of her contention, she urges that the official definition of FTI should contain a "upon a need-to-know" provision. She also challenges the handling of her removal from the workplace and, in connection therewith, seeks ruling upon her status during the interval between removal (September 12, 2018) and her termination (October 2, 2018).

6. The Agency disputes certain factual assertions made by Appellant. These include whether she has ever utilized FTI and whether she held a password to access the federal system. In support of its perceived mandate, it points to the requirement now in place that all DOR personnel must comply with the fingerprinting requirement, without exception for any reason. It also contends that, in light of the extensive commingling of information between itself and IRS, combined with the so-called two barrier requirement, no feasible arrangement is available under which Appellant might be employed without complying, whether or not FTI is ever accessed by her.

7. The Hearing Officer finds the testimony of all witnesses, including that of Appellant, to be credible.

CONCLUSIONS OF LAW

1. Appellant presents a compelling, and no doubt sincere, argument in support of her individual rights concerning the providing and use of her fingerprints in a non-criminal arena. However, by her own admission, circumstances may dictate that these rights must be waived, or superseded as the case may be, in order to attain a particular objective. In this instance, her distaste therefor directly conflicts with the federal and state legal provisions now in place within the Department where she has been employed. The requirement, constituting a condition of employment, presents an admittedly stark choice – either comply, or seek arrangements elsewhere.

2. Appellant asserts her lack of any need to ever access the federal tax information systems, essentially relying upon the “having access to” and/or “need to know” language sprinkled throughout the relevant provisions. However, the clear intent of both the federal publication originating the current mandate, the statute, and regulation as well as Procedure No. 6.2.9, is that fingerprinting must be required of all personnel, whether or not actively accessing the confidential information or merely in the vicinity of those eligible to do so. The commingling of federal and state information would appear to render crafting of selective exceptions impractical, if not an impossibility, since the core duty of the auditing process require reviewing one aspect or another of the commingled data.

3. Determination of Appellant’s status, from the time of her removal through the date of her dismissal, was within the Agency’s discretion and deemed to be administrative leave. While this might constitute a form of penalization, just cause therefor is established given the circumstances in which it occurred. Similarly, the Agency official effecting the removal, who is charged with protection of confidential information and thereby afforded enforcement powers, acted properly and within her delegated authority both in determining Appellant’s status of non-compliance and accomplishing her removal from the presence of the confidential data.

4. The actions of the Agency surrounding its treatment of Appellant and her termination were neither excessive nor erroneous in light of the overall circumstances.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **PATRICIA MILLER V. FINANCE AND ADMINISTRATION CABINET (APPEAL NO. 2018-214)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with

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

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

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

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

ISSUED at the direction of **Hearing Officer John C. Ryan** this 4th day of December, 2019.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Patrick McGee
Hon. Michele Henry



Matthew G. Bevin
Governor

Commonwealth of Kentucky
Finance and Administration Cabinet

**OFFICE OF ADMINISTRATIVE SERVICES
DIVISION OF HUMAN RESOURCES**

702 Capital Avenue, Room 188
Frankfort, KY 40601
(502) 564-7233 / Fax (502) 564-2613

William M. Landrum III
Secretary

Stacy M. Perry
Division Director

October 1, 2018

Patricia G. Miller

Dear Ms. Miller,

PERNR:

Pursuant to KRS 18A.095, you are notified that you are dismissed from duty and pay from your position as Revenue Field Auditor IV within the Louisville Taxpayer Service Center, Region 2, Office of Field Operations, Department of Revenue ("Revenue"), effective October 2, 2018. Dismissal is authorized by 101 KAR 1:345, Section 1, lack of good behavior, and KRS 131.032 and 103 KAR 1:120, refusing to submit to a fingerprint-based criminal background investigation, as alleged in the Cabinet's September 13, 2018 correspondence (the "intent to dismiss" letter, or the "Letter"). Having considered all evidence presented on your behalf at a September 28, 2018 pre-termination hearing, I determine that the clear weight of evidence substantiates the Letter's charges and find as follows:

On September 12, 2018, at the Louisville Taxpayer Service Center, you refused to permit Rebecca Rodgers-Johnson, Revenue's Disclosure and Security Officer, to collect your fingerprints for purposes of conducting a criminal background investigation. Consistent with IRS Publication 1075, KRS 131.032 and 103 KAR 1:120 require Revenue employees with access or use of federal tax information ("FTI") or confidential taxpayer information shall submit to a fingerprint-based criminal background investigation. Your position, Revenue Field Auditor IV, requires access and use of both FTI and confidential taxpayer information to perform the basic duties and functions of that position. Revenue provided you with notice of the enactment of KRS 131.032 and promulgation of 103 KAR 1:120. Revenue further provided you with security and confidentiality training concerning IRS Publication 1075 and advance notice of Ms. Rodgers-Johnson's visit to your worksite (including the purpose of that visit). Nevertheless, you refused to consent to a fingerprint-based criminal background investigation required by law. Ms. Rodgers-Johnson advised you that by refusing to provide your fingerprints for the background investigation, she was required to terminate your access to FTI and confidential taxpayer information (including building, computer, and database access). Ms. Rodgers-Johnson ensured that you left the building and surrendered you badge and laptop computer.

103 KAR 1:120, Section 2 (3) provides: "The cabinet, department, or responsible agency **shall not employ** any person in a position for which job duties include access to FTI or confidential taxpayer information if the individual refuses to consent to a fingerprint-based state or national criminal background investigation." On September 12, 2018 and again on September 27, 2018, you refused to consent to a fingerprint-based criminal background investigation. Your job duties require access to FTI—information you are prohibited, by law from accessing without consenting to a fingerprint-based criminal background investigation. You can no longer perform the essential functions of a Revenue Field Auditor IV. Moreover, your continued and abject refusal to comply with a reasonable statutory directive constitutes a lack of good behavior.

Pursuant to KRS 18A.032, you will not be certified on future registers for employment within the Finance and Administration Cabinet, unless the Cabinet so requests.

In accordance with KRS 18A.095, you may appeal this action to the Personnel Board within sixty (60) days after receipt of this notice, excluding the date notification was received. Such appeals must be filed in writing using the attached appeal form and in the manner prescribed on the form.

Sincerely,



Stacy M. Perry, Appointing Authority
Finance & Administration Cabinet

Attachment: Appeal Form

CC: Thomas B. Stephens, Secretary, Personnel Cabinet
Dan Bork, Commissioner, Department of Revenue
Jane Becker, Deputy Commissioner, Department of Revenue
Brent King, Executive Director, Office of Field Operations
Charles Wilder, Revenue Field Operations Regional Manager, Region 2
William Duncan, Revenue District Manager, Louisville Taxpayer Service Center
Rebecca Rodgers-Johnson, Disclosure and Security Branch
Agency Personnel File