

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2018-014

LORI SCHOLL

APPELLANT

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

**TOURISM, ARTS AND HERITAGE CABINET,
DEPARTMENT OF PARKS**

APPELLEE

*** **

The Board, at its regular October 2023 meeting, having considered the record, including the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer dated August 28, 2023, and being duly advised,

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

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

SO ORDERED this 17th day of October, 2023.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

Copies hereof this day sent to:

Hon. D. Wes Sullenger
Hon. Evan Jones
Hon. Rosemary Holbrook (Personnel Cabinet)
Shawn Estep

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This matter last came on for an evidentiary hearing on January 12, 2022, at 9:30 a.m. EDT, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Stafford Easterling, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Lori Scholl, was present and represented by the Hon. Wes Sullenger. The Agency/Appellee, Tourism, Arts and Heritage Cabinet, Department of Parks, was present and represented by the Hon. Evan Jones.

At issue during the evidentiary hearing was the Agency's termination of the Appellant and whether such termination was taken with just cause and was either excessive or erroneous. Importantly, however, given the impact of previous rulings, including those regarding the Appellant's misdemeanor conviction in circuit court for the events underlying the Appellant's termination, the Agency had the burden of proof on establishing the propriety of the termination, but, as a practical matter, as a result of the constructive burden-shifting analysis set out in the December 6, 2019 Interim Order, after a *de minimus* showing from the Agency explaining why they chose to fire the Appellant, the Appellant had the burden of convincing the Personnel Board that her guilty plea warranted imposition of discipline lesser than dismissal.

BACKGROUND/ FINDINGS OF FACT

1. Following discussion of burdens of proof and the agreed admission of certain documents, the parties briefly presented opening statements. The Agency then called **Laurie Spaulding** as its first witness. Spaulding began by setting out her credentials, including her twenty-eight (28) years of service in state government human resources (HR), ultimately serving as Director of Human Resources for the Tourism, Arts and Heritage Cabinet, Department of Parks (Parks) from 2006 until her retirement in 2017.

2. Spaulding explained that she got involved in this matter after receiving a constituent tipline complaint for employees to make complaints. The complaint came from an employee who worked in the dining room of the Kentucky Dam Village State Park and alleged that the Appellant and her sister, Denise Gore, who was the dining room supervisor, engaged in timecard fraud, unfair treatment of other employees, and the theft of another employee's cellphone. Spaulding also was made aware that the tipline complainant decided to quit and, during their exit interview, alleged that the Appellant and her sister intimidated them in an attempt to prevent disclosure of the allegations. Upon being made aware of the allegations, Spaulding placed Gore and the Appellant on administrative leave. She then went on to discuss the both the Agency investigation of the allegations and the concurrent criminal investigation focusing on the allegations of theft.

3. Spaulding then addressed a conversation she had with the Appellant and Gore about a potential criminal conviction's impact on her employment with Parks. Spaulding testified that she told the Appellant that the criminal matter was a separate matter and that she was only able to address the administrative allegations against her. Spaulding specifically denied telling the Appellant that any potential criminal conviction would have no impact on her job. She also addressed a similar conversation she had with the Appellant's sister, Gore, where she said she was only looking into the administrative allegations and not the criminal theft allegations. She again denies telling either Gore or the Appellant that any potential criminal conviction was not work related and would not impact their employment with Parks. On cross-examination, Spaulding acknowledged that neither the call with the Appellant nor the call with Gore were recorded.

4. Spaulding then reviewed the letter placing the Appellant on investigative leave and acknowledged that neither theft of a phone nor pending criminal charges were the basis of placement on leave. She also acknowledged that the Appellant has denied the allegations against her and that she is unaware of the Appellant ever being affirmatively told that a criminal conviction could be used against her. She went on to testify that the allegations against the Appellant could be broken into roughly three (3) groups - 1) intimidation of a coworker, 2) theft and fraud claims, and 3) the criminal matter. Spaulding clarified the boundaries between the administrative theft and fraud claims and the criminal matter indicating that the criminal matter was based on the theft of a coworker's cellphone that was valued at ~\$800, while the administrative theft and fraud charges focused on time theft, improperly dividing/pooling tips, and theft of cash through various dining room cashier schemes, including the "wagon wheel." She testified that her only involvement in the cellphone theft allegations was through the intimidation of coworkers component as the intimidation allegedly centered around persuading the witness coworkers to stop participating in the investigation and prosecution of the criminal cellphone theft charges. She also testified that she considered the Appellant's criminal conviction to be work-related misconduct because all of the events underlying the criminal conviction occurred at work.

5. The Agency then called **Shawn Estep**, Assistant Director of Human Resources, as its next witness. Estep began by setting out his experience, including over twenty-seven (27) years of state government experience, primarily in human resources. He is an Appointing Authority for Parks and the author and issuer of the termination letter underlying this appeal. Estep began his testimony by setting out the timeline of events in detail, starting with the constituent tipline

complaint and ending with the decision to terminate the Appellant and her sister. He addressed the investigation and termination letter at length and addressed the relevant Agency policies applicable to all of the allegations against the Appellant. He then went on to explain why he deemed the allegations against the Appellant substantiated, including the Appellant's guilty plea to the attendant misdemeanor, which triggered the Appellant's termination, pursuant to KRS 18A.032(1)(j) as the Agency deemed the Appellant's misdemeanor conviction to be work related upon consultation with the Personnel Cabinet's Office of Legal Services. Estep also explained why the substantiated allegations against the Appellant justified her termination, given progressive discipline principles, the nature of the charges against her, and the Appellant's specific work history with Parks, including her evaluations and clear disciplinary history.

6. The Appellant, **Lori Scholl**, called herself as the primary witness in her defense. She began by laying out her work history with Parks, including discussion of her evaluations, serving as a server at the Kentucky Dam Village's dining room for sixteen (16) years full-time in addition to several years as a seasonal server. She then addressed the circumstances around her guilty plea on the theft charges of her coworker's phone. The Appellant described a meeting in July of 2017 with Laurie Spaulding and Shawn Estep where they placed her on investigative leave and discussed the allegations against her. She said that Spaulding told her that "the cellphone thing" was "a non-work issue" that had nothing to do with why she was being placed on leave and that she was not supposed to talk about the criminal matter at the workplace while out on leave. She then told her criminal attorney (who was not the same legal counsel representing her during this evidentiary hearing) that HR said the cellphone issue was non-work related. As trial on the misdemeanor approached, the prosecutor offered the Appellant a diversion. She had to pled guilty to the charges, she would enter a six (6) – month diversion program, and the conviction would be dropped if she successfully completed the diversion program. The Appellant again stated that Spaulding told her it was a non-work issue and decided to plead guilty to the charges against her and enter the diversion program. The Appellant was then terminated for reasons including her misdemeanor theft charges of her coworker's cellphone. The Appellant then testified to her frustrations with Spaulding, her reliance on the statement that the cellphone issue was a "non-work issue," and the way her termination was handled by HR.

7. On cross-examination, the Appellant unsuccessfully tried to remedy some of the inconsistencies between her testimony, the evidence of record, and some of her prior statements, including statements made in her Appeal Form, her answers to Agency interrogatories, and her guilty plea to the misdemeanor charges against her. She acknowledged that Spaulding's statement was accurate when she said that the cellphone allegations and the criminal charges were not why she was placed on investigative leave in July 2017, but asserts that HR owed her an affirmative duty to warn her that a criminal conviction may be used against her and that her wholesale reliance on the phrase "non-work issue" operating as a complete wall between her criminal conviction and her employment with Parks was reasonable. She also pointed out that the termination letter ultimately issued to her focused exclusively on the misdemeanor conviction and did not address any of the other allegations that originally prompted her placement on investigative leave.

8. The Appellant then called **Denise Gore**, the Appellant's sister and former supervisor. Gore testified about a meeting she had with Spaulding and Estep where she was placed on investigative leave. She said that Spaulding told her that "the cellphone issue" was a "non-work issue" and was not why she was being placed on leave. On cross-examination, Gore acknowledged that she was terminated from Parks for misconduct and discussed some of the details of that misconduct. She also addressed her own dismissed Personnel Board appeal of that termination and subsequent Franklin Circuit Court appeal of the Board's Final Order. Relevant to this appeal, amongst other misconduct discussed at length, Gore was found to have conspired with the Appellant in covering up the Appellant's unlawful removal of a coworker's cellphone. Gore testified that she was charged with the same misdemeanor theft charge that the Appellant faced, but her charges were dropped when the Appellant pled guilty to possession of the coworker's cellphone.

9. Review of the testimony and evidence of record makes clear that the Appellant's defense to her termination wholly hinges on her assertion that she only pled guilty to the misdemeanor theft charges because Spaulding previously told her, in a meeting placing the Appellant on investigative leave, that the criminal proceedings were a "non-work issue." Upon consideration, the Hearing Officer specifically rejects the Appellant's outsized reliance on Spaulding's purported statement, when placing the Appellant on investigative leave, that the "cellphone thing" was "non-work issue." First, the evidence of record, including both credible testimony and the investigative leave letter itself, is clear that the Appellant was not placed on investigative leave due to the then-pending criminal proceedings, so, even assuming Spaulding made the statement using the specific wording alleged by the Appellant, such a statement would be accurate at the time it was made. The Appellant then appears to have taken an accurate statement of limited applicability and interpreted that statement to create an impermeable barrier totally separating the pending criminal proceedings from her continued employment with Parks. To the extent that the Appellant relied on Spaulding's statement that the criminal proceedings were a "non-work issue" to subsequently plead guilty to those criminal proceedings, the Hearing Officer finds that such reliance on Spaulding's statement is wholly unreasonable and is supported by neither law nor common sense. Spaulding's statement clearly did not preclude the Agency from considering the Appellant's guilty plea to misdemeanor theft charges and the Hearing Officer completely rejects the Appellant's defense that she was entitled to rely on a single statement made by a HR professional to negate the impact of her guilty plea.

10. After review of the evidence of record, including the Board's prior judicial notice of the Appellant's guilty plea and misdemeanor theft conviction, the Hearing Officer finds the facts underlying the Appellant's misdemeanor theft conviction clearly establish that the misdemeanor was job-related. The Appellant is a Parks employee who stole from another Parks employee, while on Parks premises and on the clock working for Parks. While it is possible that the absence of any one of those factors may lead to a finding that a misdemeanor is not job-related, here, consideration of every possible potential factor applicable herein leads to a finding that the misdemeanor to which the Appellant pled guilty was clearly job-related.

RELEVANT LAW

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

2. KRS 18A.032(1) provides, in full:

(1) Except as provided by the provisions of this chapter, the secretary [of the Personnel Cabinet] may refuse to examine an applicant; or, after examination, may disqualify an applicant, remove his name from a register, refuse to certify any eligible on a register, or may consult with the appointing authority in taking steps to remove such person already appointed if: ...

(a) It is found that he does not meet any one (1) of the preliminary requirements established for the examination for the class of position;

(b) He is unable to perform the duties of the class;

(c) He has made a false statement of material fact in his application;

(d) He has used or attempted to use political pressure or bribery to secure an advantage in the examination;

(e) He has directly or indirectly obtained information regarding the examination to which, as an applicant, he was not entitled;

(f) He has failed to submit his application correctly or within the prescribed time limits;

(g) He has taken part in the compilation, administration, or correction of the examination for which he is an applicant;

(h) He has previously been dismissed from a position in the state service for cause or has resigned while charges for dismissal for cause of which he had knowledge were pending;

(i) He has been convicted of a felony within the preceding five (5) years and his civil rights have not been restored or he has not been pardoned by the Governor;

(j) He has been convicted of a job related misdemeanor, except that convictions for violations of traffic regulations shall not constitute grounds for disqualification; or

(k) He has otherwise willfully violated the provisions of this chapter.

CONCLUSIONS OF LAW

1. Primarily at issue in this evidentiary hearing was the Appellant's dismissal for the KRS 18A.032(1)(j) violation of having "been convicted of a job related misdemeanor" was taken with just cause and is neither excessive nor erroneous. The Agency carried the burden of proof on the disciplinary action.

2. Prior to the evidentiary hearing, the Agency attempted to meet their burden of proof as to just cause by relying on the Appellant's guilty plea and misdemeanor theft conviction. As stated in the Hearing Officer's June 6, 2019 Interim Order, the Agency correctly articulates the general proposition that a "guilty plea is a judicial admission and precludes Scholl from now saying that it is not the way it actually happened." The Personnel Board can and must take notice of the guilty plea and the Appellant is collaterally estopped from relitigating the facts underlying the guilty plea. Because the Personnel Board has taken judicial notice of the Appellant's guilty plea, if the Agency can establish that the misdemeanor was job-related, then the Agency will have established that there is just cause to discipline the Appellant. However, the Agency still had the burden of establishing that the dismissal of the Appellant was neither excessive nor erroneous.

3. The Hearing Officer further incorporates the standard set out in the June 6, 2019 Interim Order, which provides:

Here, the Agency properly relies on the fact of the Appellant's misdemeanor conviction to establish that there was just cause to discipline the Appellant. The Agency would have the burden of establishing that the misdemeanor was job-related. Stated differently, the Agency would have to establish that there was a "nexus" between the Appellant's conduct or performance and the work of the Agency. See Doe v. Department of Justice, 565 F.3d 1375, 7379 (Fed. Cir. 2009). For some offenses, the Board may consider the nexus between the misdemeanor and the work of the Agency to be self-evident. Offenses that take place in the workplace, like the misdemeanor at issue herein, likely will have a connection to that workplace and, thus, the work of the Agency. Yet, it is also clear that an Agency may be able to establish a nexus with off-duty behavior as well as on-duty behavior. Although not binding on the Board, the Hearing Officer is persuaded by a decision arising out of the U.S. Merit Systems Protection Board (MSPB), Scheffler v. Department of the Army, 117 M.S.P.R. 499, ¶ 10 (2012), *aff'd*, 522 F. App'x 913 (Fed. Cir. 2013). In Scheffler, the MSPB recognized

three methods by which the Agency may meet its burden of establishing a nexus linking an employee's misconduct with the work of the Agency: (1) a rebuttable presumption of a nexus may arise in certain egregious circumstances; (2) the agency may show, by a preponderance of the evidence, that the misconduct at issue has adversely affected the employee's or co-workers' job performance or the agency's trust and confidence in the employee's job performance; and (3) the agency may show, by a preponderance of the evidence, that the misconduct interfered with or adversely affected the agency's mission.

If the Agency is able to establish by a preponderance of evidence that there is a nexus between the misconduct and the work of the Agency, in a case where the Board takes judicial notice of a guilty plea in a criminal matter, the Agency is entitled to a strong rebuttable presumption that the guilty plea establishes just cause for a disciplinary action. The constructive burden of proof would then shift to the Appellant to establish that the misconduct underlying the misdemeanor conviction did not happen, was unreliable, or offer some other reason as to why the fact-finder should not rely upon the misdemeanor conviction. If the Appellant is unable to effectively undermine the misdemeanor conviction, which is a very high bar, the burden would then shift to the Agency to establish that the discipline imposed for the misdemeanor conviction, here, dismissal, was neither excessive nor erroneous. Upon the Agency's explanation of the discipline imposed, the constructive burden would then shift to the Appellant to explain why the discipline imposed was excessive or erroneous.

3. As noted above, the evidence of record clearly establishes that there is a nexus between the Appellant's misconduct and the work of the Agency. The Appellant has been given an opportunity to establish that the misconduct underlying the misdemeanor conviction did not happen, was unreliable, or offer some other reason as to why the factfinder should not rely upon the misdemeanor conviction and she has entirely failed to do so. The Hearing Officer specifically finds that the misdemeanor theft charges to which the Appellant pled guilty were job-related. As a result, the Agency has established by a preponderance of evidence that there was just cause to discipline the Appellant. Further, the Agency has also demonstrated by a preponderance of the evidence that the Appellant's termination was neither erroneous nor excessive.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **LORI SCHOLL V. TOURISM, ARTS & HERITAGE CABINET, DEPARTMENT OF PARKS (APPEAL NO. 2018-014)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

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

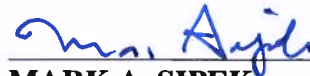
Any document filed with the Personnel Board shall be served on the opposing party.

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 Mark A. Sipek** this 28 day of August, 2023.

KENTUCKY PERSONNEL BOARD



**MARK A. SIPEK,
EXECUTIVE DIRECTOR**

A copy hereof this day emailed and mailed to:

Hon. Wes Sullenger
Hon. Evan Jones
Hon. Rosemary Holbrook (Personnel Cabinet)