

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NOs. 2021-128 and 2022-003**

DANA SIMMONS

APPELLANT

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

PUBLIC PROTECTION CABINET

and

PERSONNEL CABINET

APPELLEES

* * * * *

The Board, at its regular March 2023 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated January 23, 2023, Appellant's Request for Oral Argument and Exceptions, Appellees' Joint Response to Exceptions, oral arguments, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be altered as follows:

A. **Delete** the Background paragraph 79 and substitute the following:

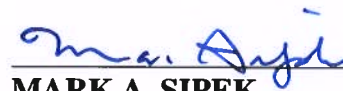
79. The Appellant's only witness was **Dana Simmons**.

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer, as Altered, are approved, adopted, and incorporated herein by reference as a part of this Order, and the Appellant's appeals are **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 16th day of March, 2023.

KENTUCKY PERSONNEL BOARD



**MARK A. SIPEK
SECRETARY**

A copy hereof this day mailed to:

Dana Simmons
Hon. Jennifer Wolsing
Hon. Jacob Walbourn
Hon. Catherine Stevens
Hon. Rosemary Holbrook (Personnel Cabinet)
Leslie Tindall

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
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DANA L. SIMMONS

APPELLANT

VS.

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

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These matters came on for an in-person evidentiary hearing on August 4 and 9, 2022, at 9:30 a.m. ET., at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before Hearing Officer Mark A. Sipek. The proceedings were recorded by audio/video equipment and were authorized by KRS Chapter 18A.

The Appellant, Dana Simmons, was present in and represented herself; it is worth noting, however, that she is an attorney licensed to practice law in the Commonwealth of Kentucky. The Appellee Public Protection Cabinet was present and represented by the Hon. Jennifer Wolsing and the Hon. Jacob Walbourn. Appearing for the Public Protection Cabinet as Agency representative was Office of Administrative Services Executive Director and Appointing Authority Brian Raley. The Appellee Personnel Cabinet was present and represented by the Hon. Catherine Stevens. Appearing on August 4, 2022, for the Personnel Cabinet as Agency representative was Department of Human Resources Administration Commissioner Mary Elizabeth Bailey.

Per the Interim Order entered on February 23, 2022, the issues to be determined at the evidentiary hearing were whether there was just cause for the following penalizations of the Appellant, and whether those penalizations were excessive or erroneous: 1) assigning the Appellant leave without pay if she did not wear a mask in common areas on days when she was scheduled to work at the office in person; 2) issuing the Appellant two separate suspensions for three (3) days and five (5) days, respectively; and 3) ultimately dismissing the Appellant from her position as a Staff Attorney II. The burden of proof was on the Appellee, Public Protection Cabinet (PPC), and was to be by a preponderance of the evidence. Additionally, the Appellant appealed a written reprimand. The issues regarding the written reprimand included whether a reprimand is appealable to the Personnel Board and, relatedly, whether the Appellant was penalized by that action. The burden of proof on the written reprimand issue was on the Appellant and was by a preponderance of the evidence.

Following the evidentiary hearing, the parties submitted Proposed Findings of Fact, Conclusions of Law, and Recommended Order.

BACKGROUND

[**HEARING OFFICER NOTE:** Below, the Hearing Officer is utilizing certain paragraphs from the Joint Proposed Findings of Fact, Conclusions of Law, and Recommended Order submitted by the Appellees. The Appellees included references to transcript pages. The Hearing Officer will include these references; however, the Hearing Officer would note that the official record of the hearing is the Board's evidentiary hearing video recording, which do not include such references, and the included references are merely used for the convenience of the parties.]

1. The Appellant filed Appeal No. 2021-128 with the Personnel Board on October 28, 2021, challenging the following:

- (a) September 30, 2021: Written reprimand for refusal to comply with the Personnel Cabinet's "Face Covering Policy" and refusal to adhere to a directive to comply with the Policy;
- (b) October 6, 2021: Three (3) - day suspension for lack of good behavior and unsatisfactory performance of duties (**attached to and incorporated herein as Recommended Order Attachment A**); and
- (c) October 27, 2021: Five (5) - day suspension for lack of good behavior and unsatisfactory performance of duties (**attached to and incorporated herein as Recommended Order Attachment B**).

2. The Appellant filed Appeal No. 2022-023 with the Personnel Board on January 15, 2022, challenging the following:

- (a) Involuntary assignment to leave without pay for scheduled in-office days when she chose not to wear a mask in common areas; and
- (b) December 16, 2021: Dismissal for lack of good behavior and unsatisfactory performance of duties (**attached to and incorporated herein as Recommended Order Attachment C**).

3. To open the evidentiary hearing, the first witness called by the Appellee Personnel Cabinet was **Mary Elizabeth Bailey**. Bailey is the Commissioner of the Department of Human Resources Administration in the Personnel Cabinet and has been so employed for ten

(10) years. Bailey has been in state government for a total of twenty-seven (27) years. (August 4, 2022; Transcript at 58.)

4. Bailey testified that, beginning in March 2020, the Personnel Cabinet began to require the majority of Executive Branch employees to work from home, when the COVID-19 pandemic first hit the Commonwealth and began spreading rapidly. (August 4, 2022; Transcript at 60-61.)

5. Bailey stated that the process of returning employees back to work in Executive Branch office buildings began in June 2021 when people began to get vaccinated, and the virus' prevalence began to decrease. (August 4, 2022; Transcript at 62-63.)

6. Bailey stated that the Commonwealth then started seeing new variants of COVID-19, including the Delta variant, in July 2021. The Delta variant was spreading very rapidly through the workforce. Accordingly, the Personnel Cabinet instituted a face covering policy for the employees who were working in Executive Branch office buildings. (August 4, 2022; Transcript at 63- 64.)

7. Bailey stated that Personnel Memo 21-11 constituted the "Face Covering Policy," effective July 29, 2021, for the Executive Branch workforce (**Recommended Order Attachment D, which is attached to and incorporated herein**, and Appellees' Joint Exhibit 1). Executive Branch employees were required to wear face coverings when they were in common areas of state office buildings, such as hallways. Employees could remove their face coverings when they could practice social distancing in their offices or cubicles. If necessary, employees could submit an accommodation request to their Cabinet's Human Resources office if they were unable to wear a face covering due to a medical condition. Personnel Memo 21-11 further stated that employees who did not comply with the "Face Covering Policy" may be removed from the building and subjected to corrective or disciplinary action. (August 4, 2022; Transcript at 66-69.)

8. Bailey stated that Personnel Memo 21-11 (hereinafter, the "Policy") was distributed to all Executive Branch employees. (August 4, 2022; Transcript at 71-73.) (Appellees' Joint Exhibit 2.)

9. Bailey stated that, effective February 28, 2022, the Personnel Cabinet advised employees that, effective March 1, 2022, the Executive Branch would transition to optional mask wearing for employees. This was because the number of COVID-19 positives had significantly declined. (August 4, 2022 Transcript at 75.) (Appellees' Joint Exhibit 3.) Accordingly, as a whole, the Policy was in effect from July 29, 2021, until March 1, 2022. (August 4, 2022; Transcript at 77.)

10. Bailey explained that the Policy was not promulgated as a regulation. The Policy had been implemented under KRS Chapter 18A, which states that the Secretary of the Personnel Cabinet has the authority to create personnel policies and inform state employees of those policies. Therefore, Bailey testified the Policy did not need to be promulgated as a regulation. She noted

that other health and safety policies, such as the tobacco policy and the dress code policy, are not promulgated as regulations. (August 4, 2022; Transcript at 77-78.)

11. When asked about specific authority, Bailey cited to KRS 18A.010, which states that the purpose of KRS Chapter 18A is to establish the principles and methods governing the welfare of its classified employees. She also cited to KRS 18A.025, which states that the Secretary of the Personnel Cabinet shall be responsible for employee communication about personnel issues. Finally, Bailey cited to KRS 18A.030, which states that the Secretary of the Personnel Cabinet had the duty to create programs for employee health and welfare. Bailey testified that establishing the Policy fell under this statutory authority. (August 4, 2022; Transcript at 79-83.)

12. Next, Bailey testified that Personnel Memo 21-14 established a COVID-19 Vaccine Initiative Program (hereinafter, the "Program"). The Program awarded employees one (1) day of annual leave upon submission of proof of vaccination against COVID-19. The Program was initially authorized by Executive Order and thereafter codified by the General Assembly. Bailey then differentiated the authority necessary to implement the Program and the Policy. She testified that the Program needed special authorization, by Executive Order or statute, because employee leave is set forth in existing regulation. In contrast, she testified that the Policy fell under the Personnel Cabinet Secretary's broad authority of creating policy and communications relevant to the welfare of employees. (August 4, 2022; Transcript at 86-92.)

13. Bailey testified that the majority of the Policy applied only to Executive Branch employees. A different part of the Policy was applicable to visitors to Executive Branch buildings and offices. (August 4, 2022; Transcript at 94-103.)

14. Bailey stated that she was not involved in any discussion about the impact of House Joint Resolution 1 on the Policy, because it was not required to be discussed. (August 4, 2022; Transcript at 104.)

15. Bailey stated that the Policy pertained to COVID-19. (August 4, 2022; Transcript at 255.)

16. Bailey testified that, while the Policy was in effect, an employee would have been insubordinate if they refused to enter any Executive Branch building rather than comply with the Policy; however, such an action would not violate the Policy itself. Similarly, an employee refusing to enter an Executive Branch building on a day they were scheduled to be in the office would constitute lack of good behavior and unsatisfactory performance of duties and not a violation of the Policy. (August 4, 2022; Transcript at 258-259, 260-261.)

17. The first witness called by the Appellee Public Protection Cabinet (PPC) was **Benjamin Adam Long**. Long was the Appellant's second-line supervisor and the previous General Counsel for the PPC. (August 4, 2022; Transcript at 111-116.)

18. Long testified that PPC employees engaged in a modified return to working at the office during June 2022. Instead of being required to work in the office five (5) days per week, PPC employees were given the option to work from home up to three (3) days per week. The Appellant took advantage of this option and worked at her workstation at PPC only on Wednesdays and Fridays. (August 4, 2022; Transcript at 116-117, 211-212.)

19. Long stated that people in PPC generally wore their masks in common areas of the building, including hallways and outside of their offices. No PPC employees, including the Appellant, were required to wear masks when working in their office or cubicle. (August 4, 2022; Transcript at 123-124.)

20. Long stated that the Appellant never submitted a request for an accommodation due to a medical condition or a religious objection that would preclude her wearing a mask. The Appellant never raised these topics with Long or her first-line supervisor, Benjamin Siegel. (August 4, 2022; Transcript at 124-125.)

21. Long stated that PPC learned that the Appellant was not following the Policy on September 22, 2021. On that date, the Deputy Commissioner of the Department of Housing, Buildings & Construction, Max Fuller, observed the Appellant in a common area without her mask. Fuller reminded her to wear a mask. The Appellant then emailed her first-line supervisor, Siegel, to advise that she does not wear face coverings. (Appellees' Joint Exhibit 6.) Siegel explained that the Policy only mandated face coverings in common areas. (August 4, 2022; Transcript at 125-128.)

22. Long stated that a cordial, respectful, and professional meeting took place two (2) days later, on September 24, 2021. The meeting included the Appellant, Long, and Jessica Van Sickel, PPC's Division Director for Human Resources. At the September 24 meeting, PPC had no intent to discipline the Appellant. Long's hope was that the Appellant would choose to comply with the Policy as a result of the meeting. Nonetheless, he told the Appellant that she could appeal PPC's implementation of the Policy if she so chose. (August 4, 2022; Transcript at 129-130, 144.)

23. Long stated that, during the September 24 meeting, he told the Appellant that he understood she was doing good work at PPC. A copy of the Policy was provided to the Appellant at the meeting. The Appellant was asked whether she had access to a mask. She stated that the issue was not a lack of access to a mask; instead, she simply chose not to wear face coverings. (August 4, 2022; Transcript at 129-130.)

24. Long stated that the Appellant proposed two (2) potential compromises during the meeting. First, she suggested that everyone who did not want to work with someone who was not wearing a mask could work from home. Second, she suggested that she should be allowed to work from home full-time. (August 4, 2022; Transcript at 131-132, 207-208.)

25. Long did not believe that either of the two (2) suggested compromises were feasible for practical reasons. Those reasons included the increased communication, teamwork, and efficiencies associated with in-office work. Additionally, it would not be fair to allow certain employees to be treated differently than others, merely because the Appellant chose not to comply with the Policy. (August 4, 2022; Transcript at 133-135.)

26. Long stated that the September 24, 2021 meeting was summarized in an email. This email stated that the Appellant could not use accrued leave for times when she was not in the office just because she refused to comply with the Policy. The email also clarified that failure to comply with the Policy could result in her removal from the building and/or corrective or disciplinary action. (August 4, 2022; Transcript at 136-139.) (Appellees' Joint Exhibit 7.)

27. Long stated that the Appellant then sent him an email at 5:27 p.m. on September 28, 2021. The Appellant was due to work in the office the next day, September 29, 2021. The Appellant's email indicated that she would show up at work, but she did not intend to follow the Policy. (August 4, 2022; Transcript at 139-142.) (Appellees' Joint Exhibit 8.)

28. Long stated that he responded to the Appellant on the evening of September 28, 2021. He reminded the Appellant that she could appeal the Policy if she chose. Long stated that the Appellant was not permitted to enter the office if she was not compliant with the Policy. Long also stated that, if the Appellant had arrived at work the next day and abided by the Policy, she would be allowed to work and would not be disciplined. (August 4, 2022; Transcript at 142-144, 213-215.)

29. Long stated that the Appellant came to work in the office on September 29, 2021. While in the office, however, she sent an email to Long, again stating that she chose not to wear a face covering. Long directed the Appellant to leave the building, and she complied. (August 4, 2022; Transcript at 146-147.) (Appellees' Joint Exhibit 9.)

30. Long stated that the Appellant received a written reprimand due to her failure to comply with the Policy on September 29, 2021, and her choice to leave work rather than comply. (August 4, 2022; Transcript at 147-148.) (Appellees' Joint Exhibit 10.)

31. Long stated that he agreed with the written reprimand because employees cannot pick and choose which requirements they will abide by. Long believed the Policy was reasonable and easy to comply with. Additionally, PPC had two (2) employees die due to COVID-19 during the pandemic. (August 4, 2022; Transcript at 149-152.)

32. Long stated that the Appellant's next day in the office would have been October 1, 2021. Long testified that, if the Appellant had arrived at work and complied with the Policy, she would have been allowed to work and would not have received any further disciplinary or corrective actions. (August 4, 2022; Transcript at 153-154.)

33. Long stated that, on October 1, 2021, the Appellant returned to the office. She stayed in the lobby and informed PPC that she was in the lobby and hoping to work that day, again without using a face covering. Brian Raley responded to Appellant's email. Raley reiterated the Policy and explained that any absence from work would lead to unapproved leave without pay, which could result in disciplinary action. The Appellant then left the office, rather than follow the Policy. The Appellant also stated that she would seek redress from the courts. (August 4, 2022; Transcript at 155-158, 216.) (Appellees' Joint Exhibit 9.)

34. Long stated that the Appellant did not perform any work on that day and was not given permission to take authorized leave. (August 4, 2022; Transcript at 158.)

35. Long stated that the Appellant was suspended for three (3) days because she did not come to work on the days that she was scheduled to be present and failed to comply with the Policy. Long agreed with the disciplinary action, because a verbal warning and written reprimand had not yet impacted the Appellant's behavior, and a suspension was the next step in progressive discipline. (August 4, 2022; Transcript at 159-160, 216-217, 250-251.) (Appellees' Joint Exhibit 11.)

36. Long stated that, if the Appellant had returned to work on her next scheduled day and had abided by the Policy, she would have been allowed to work in the building and would not have received any further disciplinary actions. (August 4, 2022; Transcript at 161.)

37. Long stated that he, Raley, and Van Sickel, participated in a telephone conference with the Appellant on October 11, 2021. The purpose of the call was to encourage the Appellant to comply with the Policy. There was also a discussion about the Personnel Cabinet's authority to issue the Policy. (August 4, 2022; Transcript at 163-164.)

38. Long stated that the Appellant used some approved annual leave in early October 2021. Her next day to work in the office was October 20, 2021. However, she did not present to her workstation, solely because she did not agree with the Policy. (August 4, 2022; Transcript at 164-165.)

39. Long stated that the Appellant was suspended for five (5) days, due to her failure to work on October 20, 2021, which was based on her refusal to comply with the Policy. (August 4, 2022; Transcript at 165-166, 218-219, 224-225.) (Appellees' Joint Exhibit 12.)

40. Long again stated that, if the Appellant had returned to work on her next scheduled day and had abided by the Policy, she would have been allowed to work in the building and would not have received any further disciplinary actions. (August 4, 2022; Transcript at 166, 168- 169.)

41. Long stated that the Appellant's next day to work in the office after her five (5) - day suspension was November 3, 2021. The Appellant asked for some time off on the morning of November 3, 2021, in order to attend a job interview. Her request to use leave time in the morning

was granted; however, the Appellant did not return to her workstation in the afternoon following the job interview. The Appellant's failure to work that afternoon was because she did not want to comply with the Policy. (August 4, 2022; Transcript at 169-171.)

42. The Appellant also did not present to her workstation on her next scheduled day in the office, which was November 5, 2021. Again, her reason was because she did not want to comply with the Policy. (August 4, 2022; Transcript at 171.)

43. Long stated that the Appellant's failure to appear at work on the afternoon of November 3, 2021 and on November 5, 2021, led to an Intent to Dismiss letter. (August 4, 2022; Transcript at 171.) (Appellees' Joint Exhibit 13.)

44. Long stated that the Appellant requested and received a pre-termination hearing. The Appellant, Raley, Van Sickel, and Long were present at the meeting. The pre-termination hearing was held remotely at the Appellant's request. The Appellant requested a remote hearing so that she would not have to comply with the Policy at an in-person hearing. At the pre-termination hearing, the Appellant did not request an accommodation for a health condition. She further stated that she would never comply with the Policy. (August 4, 2022; Transcript at 171-177.)

45. Long stated that there was an inaccurate regulatory citation in the Intent to Dismiss letter. The original Intent to Dismiss letter was rescinded and a second Intent to Dismiss letter was issued. (August 4, 2022; Transcript at 177-179.) (Appellees' Joint Exhibit 15 and 16.)

46. Long stated that the second Intent to Dismiss letter was still based on the Appellant's absences on the afternoon of November 3, 2021 and on November 5, 2021, but also included absences on November 10, 12, 17, and 19, 2021. The Appellant should have been working in the building on all five and one-half (5.5) of those days, but she did not come to work and coded her own time as "leave without pay." The Appellant did not have permission to use approved leave on these dates. Importantly, the second Intent to Dismiss letter was not based on the Appellant's request for leave on the morning of November 3, 2021. (August 4, 2022; Transcript at 179-181, 227-231.)

47. Long stated that the Appellant requested and received a second pre-termination hearing after the issuance of the second Intent to Dismiss. Again, the Appellant, Raley, Van Sickel, and Long were present, and the hearing was held remotely. At the pre-termination hearing, the Appellant did not request an accommodation for a health condition and simply stated that she chose not to cover her face. Once again, at the end of the pre-termination hearing, the Appellant stated that she would never comply with the Policy going forward. (August 4, 2022; Transcript at 181- 185.)

48. Long stated that PPC terminated the Appellant after the second pre- termination hearing. Her last day of employment with PPC was December 15, 2021. Long agreed with the

Appellant's dismissal, because PPC had gone through the progressive disciplinary steps and there was a continued refusal to comply with the Policy by the Appellant. (August 4, 2022; Transcript at 185-186.)

49. Long stated that the Appellant was dismissed because she failed to comply with the Policy and also had several instances of leave without pay. (August 4, 2022; Transcript at 233-234.)

50. Long stated that he believed the Policy was reasonable, because it only required him to wear a mask about forty-five (45) minutes per day when he worked at PPC. He also stated that he believed dismissal would be appropriate for any employee who repeatedly and intentionally refused to comply with the Policy. (August 4, 2022; Transcript at 191-192.)

51. Long stated that he did not have an understanding as to whether the Policy covered visitors as well as Executive Branch employees. (August 4, 2022; Transcript at 197-198.)

52. Long stated that Siegel did not want the Appellant to look for employment elsewhere, as it would be a great loss to the Department. Prior to the Appellant's violation of the Policy, the Appellant had incurred no disciplinary actions. (August 4, 2022; Transcript at 200.)

53. Long stated that, during the meeting on September 24, 2021, the Appellant asked about the authority for requiring her to wear a mask. He told her that the Personnel Cabinet had the ability to institute policies, such as the one at issue. He provided her with a copy of the Policy but did not provide her with a statutory citation at that time. Long stated that he believed he provided the Appellant with some statutory citations to KRS 18A during a later telephone conversation. (August 4, 2022; Transcript at 202-203.)

54. The second witness called by the Appellee PPC was **Brian Raley**. Raley is PPC's Executive Director of the Office of Administrative Services and the designated Appointing Authority. He has been Executive Director since Spring 2019. (August 4, 2022; Transcript at 265.)

55. Raley confirmed Long's testimony regarding the hybrid working schedule at PPC. The Appellant worked in the office only two (2) days per week. He also agreed that, when the Policy was in effect, employees were only required to wear masks in common areas or places where they could not socially distance. (August 4, 2022; Transcript at 267-268.)

56. Raley stated that PPC has approximately three hundred (300) employees in the Mayo Underwood Building. He was aware of only one (1) employee who consistently refused to comply with the Policy. Due to his position at the PPC, he would be aware if others had been non-compliant. (August 4, 2022; Transcript at 269-270.)

57. Raley stated that, when he learned that the Appellant refused to comply with the Policy, he wrote a letter to her in order to counsel her and help her become compliant with the

Policy. His goal was to convince the Appellant to become compliant with the Policy and also to warn her that non-compliance could lead to removal from the building, leave without pay, corrective action, and/or disciplinary action. He stated that the Appellant's refusal to wear a mask jeopardized other employees' health and safety. The Appellant was directed not to enter the building if she would not comply with the Policy. (August 4, 2022; Transcript at 270-272, 295.) (Appellees' Joint Exhibit 7.)

58. Raley stated that he had safety concerns if the Appellant refused to wear a mask in common areas of the building. COVID-19 is a communicable disease, and a face covering would provide protection from spreading this virus. Raley was aware of some employees who tested positive for COVID-19 and subsequently died as a result of their exposure. (August 4, 2022; Transcript at 272-274.)

59. Raley stated that, if the Appellant had come to the office on September 29, 2021, and remained in compliance with the Policy, she would have been allowed to work and would not have been issued any corrective or disciplinary action. (August 4, 2022; Transcript at 274.)

60. Raley stated that it was his decision to issue the written reprimand to the Appellant, due to her actions on September 29, 2021. He considered the Appellant's actions to be insubordinate. The reprimand was another step in progressive discipline in an effort to obtain compliance with the Policy. (August 4, 2022; Transcript at 275-277.)

61. Raley stated that if the Appellant had come to the office on her next scheduled workday and remained in compliance with the Policy, she would have been allowed to work and would not have been issued any further corrective or disciplinary action. (August 4, 2022; Transcript at 278.)

62. Raley stated that it was his decision to suspend the Appellant for three (3) days, due to her conduct on October 1, 2021. Raley stated that the Appellant never shared a medical or religious reason for her refusal to comply with the Policy. (August 4, 2022; Transcript at 279-280.) (Appellees' Joint Exhibit 11.)

63. Raley explained that the Appellant's refusal to follow the Policy constituted a lack of good behavior. The Appellant's refusal to show up for work because of her disagreement with the Policy was unsatisfactory performance of duties. The Appellant could not perform work effectively if she was not present to perform the work. The Appellant was also disciplined for unauthorized leave without pay because she refused to follow the Policy. In short, she was suspended for lack of good behavior, unsatisfactory work performance, and unauthorized leave. (August 4, 2022; Transcript at 280-281, 296, 298-299.)

64. Raley stated that, if the Appellant had come to the office after her three (3) - day suspension and remained in compliance with the Policy, she would have been allowed to work and would not have been issued any further corrective or disciplinary action. (August 4, 2022; Transcript at 281-282.)

65. Raley testified that he was included in a call with the Appellant to encourage her to return to the office, ensure that she understood the Policy, and confirm that PPC needed her to comply. During this call, the Appellant never stated that she had a medical or religious reason for refusing to wear a mask. (August 4, 2022; Transcript at 282-283.)

66. Raley stated that it was his decision to suspend the Appellant for five (5) days, effective October 27, 2021, due to her actions on October 20, 2021. Raley stated that the Appellant never shared a medical or religious reason for her refusal to comply with the Policy. (August 4, 2022; Transcript at 279-280.) (Appellees' Joint Exhibit 11.)

67. Raley stated that the Appellant's refusal to follow the Policy constituted lack of good behavior. The Appellant's refusal to show up for work because of her disagreement with the Policy was unsatisfactory performance of duties. In short, she was suspended for lack of good behavior, unsatisfactory work performance, and unauthorized leave. (August 4, 2022; Transcript at 283-284, 298-299.)

68. Raley stated that it was his decision to issue an Intent to Dismiss letter. This decision was based on the Appellant's failure to arrive at her workstation on the afternoon of November 3, 2021, and on November 5, 2021. He issued this letter because there was no evidence that the Appellant was changing course. She continued to refuse to show up at work and continued to state that she would not comply with the Policy. (August 4, 2022; Transcript at 285-286.) (Appellees' Joint Exhibit 13.)

69. Raley stated that he was present for the first pre-termination hearing, along with the Appellant, Long, and Van Sickel. The Appellant stated that she did not intend to comply with the Policy in the future. The Appellant never explained that her refusal to wear a mask was based on any protected class consideration, such as religion or a medical condition. (August 4, 2022; Transcript at 287-288.)

70. Raley rescinded the Intent to Dismiss letter because it had cited an incorrect regulation. (August 4, 2022; Transcript at 288-289.) (Appellees' Joint Exhibit 14.)

71. Raley stated that a revised Intent to Dismiss letter was issued. This letter was based on the Appellant's continued lack of compliance with the Policy, which caused her to not report to the office. This resulted in additional days of unauthorized leave. (August 4, 2022; Transcript at 289.) (Appellees' Joint Exhibit 15.)

72. Raley stated that he was present for the second pre-termination hearing, along with the Appellant, Long, and Van Sickel. The Appellant stated that she did not intend to comply with the Policy in the future. The Appellant never explained that her refusal to wear a mask was based on any protected class consideration, such as religion or a medical condition. (August 4, 2022; Transcript at 290-291.)

73. Raley stated that it was his decision to dismiss the Appellant. This decision was made due to a lack of good behavior and unsatisfactory performance of duties. The Appellant's lack of good behavior was non-compliance with the Policy and failure to report to work. (August 4, 2022; Transcript at 291-293.) (Appellee's' Joint Exhibit 18.)

74. Raley stated that the Policy is no longer in effect. However, he still agrees with the decision to dismiss the Appellant. Employees should not dictate what policies they will and will not comply with. Employees cannot take leave without pay because they do not want to comply with a policy. (August 4, 2022; Transcript at 293.)

75. Raley testified that, although the Appellant characterizes her situation as lose-lose, all she had to do was comply with the Policy and there would be a "win." (August 4, 2022; Transcript at 297.)

76. Raley stated that he did not have any understanding of House Joint Resolution 1 having an effect on the Policy. (August 4, 2022; Transcript at 303.)

77. Raley stated that the Policy did not bar employees from using accrued leave time. He also stated that the Appellant was instructed to code her time off as "unauthorized" when she was not in the building solely due to her refusal to comply with the Policy. (August 4, 2022; Transcript at 305-306.)

78. Raley stated that the Appellant's leave was unauthorized on dates when she was not in the building due solely to her refusal to comply with the Policy and because she did not have a valid reason to be off. The Appellant did not even call in and state that she was not working on many of the dates in question. (August 4, 2022; Transcript at 306-307.)

79. The Appellant's only witness was **Dana Lynette Simmons**.

80. The Appellant believed she began working for PPC on September 16, 2020, and had approximately eight (8) years of nonconsecutive employment with state government, including working in the legislative, judicial, and executive branches. (August 9, 2022; Transcript at 15-16.)

81. The Appellant stated that, on September 21, 2021, she had reported to work without wearing a face mask. She then attended a brief meeting with her first-line supervisor, Benjamin Siegel, and the Deputy Commissioner of the Department of Housing, Buildings & Construction, Max Fuller. The meeting was intended to give her a "pep talk" about an upcoming administrative hearing. (August 9, 2022; Transcript at 16-17.)

82. On September 21, 2021, when the Appellant was in a common area using a copy machine, Fuller asked the Appellant to put on a mask while she was in the common areas. The Appellant stated that she complied with that request, based on, at least in part, fear that by not complying, she might lose the administrative hearing. (August 9, 2022; Transcript at 17-18.)

83. The Appellant testified she later sent an email to her supervisor on September 22, 2021, explaining that she "chose not to comply" with the Policy. Her supervisor responded by providing a copy of the Policy and explaining that he hoped she would not leave her employment because of the Policy. (August 9, 2022; Transcript at 19-21.) (Appellees' Joint Exhibit 6.)

84. On her next day working in the office, September 24, 2022, the Appellant was asked to attend a meeting with Benjamin Long, General Counsel for PPC. Long was kind during the meeting informing her that she needed to comply with the Policy. In response, the Appellant informed Long she did not believe the Policy was lawful. (August 9, 2022; Transcript at 21-22.)

85. The Appellant testified that she learned someone in her department had complained about her declining to wear a mask, due to concern over an immune-compromised loved one. The Appellant stated that compromises were discussed, with her suggesting that either she or those with immune-compromised loved ones be permitted to work from home full time. (August 9, 2022; Transcript at 22-24.)

86. The Appellant testified that while she stated she did not believe the Policy to be lawful, Long disagreed, and they ultimately "agreed to disagree." (August 9, 2022; Transcript at 24-25.)

87. The Appellant stated she was aware that the expectation was that she would comply with the Policy moving forward. She was provided with a letter explaining the consequences of her continued non-compliance and an appeal form at the conclusion of the September 24, 2021 meeting. The Appellant was sent home at the conclusion of the meeting but was paid for the remainder of the day. (August 9, 2022; Transcript at 24-26.) (Appellees' Joint Exhibit 7.)

88. The Appellant stated that, at least as early as September 24, 2021, she was advised that any leave of absence due to her decision not to follow the Policy would be considered leave without pay, which may result in corrective or disciplinary action. (August 9, 2022; Transcript at 26, 76-77.)

89. The Appellant testified that she felt she "had a bit of a conundrum" because she was required to report to work, but also required to comply with the Policy. (August 9, 2022; Transcript at 26.)

90. She reported to work on September 29, 2021, as required but was not in compliance with the Policy. After informing Long of her noncompliance with the Policy, she was directed to leave the building. (August 9, 2022; Transcript at 27.)

91. The Appellant received a written reprimand for her conduct on September 29, 2021, via email from Raley on September 30, 2021. She informed Raley that she would seek redress from the courts, as she felt that they had "reached an impasse." (August 9, 2022; Transcript at 28.) (Appellees' Joint Exhibit 9-10.)

92. The Appellant testified that she arrived at her PPC workstation on October 1, 2021, as scheduled, but remained in the lobby because she was not complying with the Policy. She waited approximately twenty (20) minutes for a response to an email inquiring whether she could report to her desk before departing the building. She was notified via email that she could only report to her desk if she was in compliance with the Policy. (August 9, 2022; Transcript at 29-30.) (Appellees' Joint Exhibit 9.)

93. The Appellant testified she was ultimately instructed that, on days she did not report to work due to her noncompliance with the Policy, her timesheet should be completed as "Unauthorized Leave Without Pay." She notified Raley she would seek redress from the courts concerning this issue and would not be returning to the building as it would be "a waste of [her] time." (August 9, 2022; Transcript at 30-32.)

94. The Appellant was suspended for three (3) days on October 5, 2022, and again for five (5) days on October 27, 2022. (August 9, 2022; Transcript at 32-33.) (Appellees' Joint Exhibit 11-12.)

95. The Appellant's attempt to receive injunctive relief from the courts was unsuccessful. (August 9, 2022; Transcript at 33.)

96. The Appellant stated that she was issued an Intent to Dismiss letter on November 8, 2021. (August 9, 2022; Transcript at 36.) (Appellees' Joint Exhibit 13.)

97. She was provided with a pre-termination hearing via videoconference related to her Intent to Dismiss letter. (August 9, 2022; Transcript at 37.)

98. The Appellant testified that the prior Intent to Dismiss letter was rescinded and a revised Intent to Dismiss letter was issued on November 30, 2021. (August 9, 2022; Transcript at 39-40.) (Appellees' Joint Exhibit 15-16.)

99. She was provided with a pre-termination hearing in connection with the revised Intent to Dismiss letter. (August 9, 2022; Transcript at 40-41.)

100. The Appellant was terminated on December 16, 2021. (August 9, 2022; Transcript at 41.) (Appellees' Joint Exhibit 18.)

101. The Appellant stated that she had to wear a mask in common areas but not in her cubicle. On some days, she was required to wear a mask for as little as an hour per day while in the building for work. (August 9, 2022; Transcript at 68-70.)

102. The Appellant had no direct evidence that the written reprimand led to any entity's decision not to hire her anywhere else. (August 9, 2022; Transcript at 74-75.)

103. The Appellant stated that it would be a correct inference that she would never comply with the masking policy, even though her failure to comply would result in her missing a lot of work. (August 9, 2022; Transcript at 81-82, 85.)

104. She was permitted to use accrued leave for vacation and to attend an interview but was not permitted to use leave to avoid compliance with the face covering policy. (August 9, 2022; Transcript at 91-92.)

105. The Appellant stated she is not claiming there was selective enforcement of the face covering policy by PPC. (August 9, 2022; Transcript at 101, 138- 139.)

106. The Appellant stated that her refusal to comply with the face covering policy was not due to her religious beliefs or even akin to a religious belief. (August 9, 2022; Transcript at 109-110.)

107. The Appellant was not complaining that PPC had not told her quickly enough to allow her an opportunity to find new employment. (August 9, 2022; Transcript at 114-115.)

108. The Appellee PPC's first rebuttal witness was **Brian Raley**.

109. Raley stated that, had he been made aware of other employees not complying with the face covering policy, he would have taken action, beginning with counseling the employee. Employees who received counseling came into compliance with the face covering policy. The Appellant was the only employee who continually refused to comply with the policy. (August 9, 2022; Transcript at 149-151.)

110. Raley testified it was not conducive to a good work environment to allow employees to use accrued leave to avoid compliance with a policy they dislike, and that, in this situation, it would have caused an employee to miss forty percent (40%) of their working time. (August 9, 2022; Transcript at 153.)

111. Raley testified that PPC would have been burdened by allowing the Appellant to use leave time instead of complying with the face masking policy. (August 9, 2022; Transcript at 154.)

FINDINGS OF FACT

The material facts are largely not in dispute.

1. The Appellant, Dana Simmons, began employment as a Staff Attorney II with PPC in Frankfort, Kentucky on or about September 16, 2020.

2. The Appellant worked remotely for the first nine (9) months of her employment due to the COVID-19 pandemic.

3. The Appellant began working a hybrid schedule when staff began returning to the building at 500 Mero Street in Frankfort beginning in June 2021. The Appellant telecommuted and was only required to work in person at PPC on Wednesdays and Fridays, according to the testimony of the Appellant, Ben Long, and Appellees' Joint Exhibit 5.

4. Sometime during June 2021, largely in response to the Delta variant causing a spike in COVID-19 cases, hospitalizations, and deaths, employees were encouraged to wear a mask if they were not vaccinated.

5. The Appellant did not usually wear a mask while working in the building housing her PPC workstation.

6. On July 28, 2021, the Secretary of the Personnel Cabinet disseminated an email containing a memorandum by which she implemented the COVID-19 Face Covering Policy (the "Policy"), which governed Executive Branch employees and visitors to Executive Branch offices, buildings, and vehicles. Based on the undisputed testimony of the Appellant, Ben Long, and Brian Raley, PPC interpreted the Policy to require all employees to wear masks when entering the building housing PPC, in common areas, or when employees could not socially distance. Employees could choose whether to wear masks in their offices or cubicles.

7. As a result of her hybrid in-office schedule, the Appellant was only required to wear a mask two (2) days per week, and only when she was in common areas of the office. The Appellant testified that, on average, that meant that she had to wear a mask approximately two (2) hours per week or one (1) hour per day.

8. The General Assembly passed House Joint Resolution 1 and the Governor signed it into law effective September 7, 2021.

9. On September 21, 2021, the Deputy Commissioner of the Department of Housing, Building & Construction approached the Appellant and informed her that she needed to wear a face covering while in the common areas of the building.

10. The Appellant wore a face covering that day during her six (6) - hour long administrative hearing.

11. On September 22, 2021, the Appellant emailed her direct supervisor when she arrived to work and informed him about the Deputy Commissioner's comments. She informed her supervisor that she did not believe the Policy was enforceable and that she believed it was her choice to wear or not to wear a face covering and she chooses not to wear one. The Appellant's email further informed her supervisor that she would be happy to seek employment elsewhere, if

her choice not to wear a face covering was viewed as problematic. Finally, the Appellant inquired by what authority her government employer purported to require her to wear a face covering.

12. The Appellant's supervisor responded relatively quickly and informed the Appellant that her services were valued and discouraged her from leaving. He also provided her with a copy of the Policy.

13. On September 24, 2021, the Appellant attended a meeting with PPC General Counsel Ben Long and PPC Human Resources Division Director Jessica Van Sickel. After the meeting, Long followed up with an email. The Appellant was advised that she would no longer be permitted entry into any Executive Branch building or office, should she continue in her refusal to follow the Policy. The Appellant could not use accrued leave for times when she was not in the office because she refused to comply with the Policy. The email also clarified that failure to comply with the Policy could result in removal from the building and/or corrective or disciplinary action. The email also documented PPC's health and safety concerns about the Appellant's choice not to wear a mask. Appellees' Joint Exhibit 7 documents that meeting.

14. On September 28, 2021, the Appellant sent an email to Long and Van Sickel, that indicated she would arrive at the office the next day but would not wear a mask. Long responded later the same evening. He reminded the Appellant that she would not be permitted entry to the office while refusing to comply with the Policy. Those emails are documented as Appellees' Joint Exhibits 8 and 9.

15. On Wednesday, September 29, 2021, the Appellant arrived at her workstation at the Mayo Underwood building. Long asked if she was complying with the Policy. The Appellant responded, "As previously stated, I do not wear face coverings and do not believe that the face covering policy is enforceable." Long directed the Appellant to leave the building, which she did. Those emails are documented as Appellees' Joint Exhibit 9.

16. PPC determined that the Appellant was insubordinate, lacked good behavior, and failed to perform her duties satisfactorily when she arrived at the Mayo-Underwood building on September 29, 2021, but left the building rather than comply with the Policy.

17. On September 30, 2021, PPC issued the Appellant a written reprimand for her actions on September 29, 2021. The written reprimand is documented as Appellees' Joint Exhibit 10.

18. On Friday, October 1, 2021, the Appellant emailed from the lobby of the Mayo Underwood building. She requested to be allowed to proceed to her workstation. Human Resource Director Raley responded and advised that she was welcome to proceed to her workstation, but only if she intended to comply with the policy. He warned that an absence would constitute unapproved leave without pay and could result in disciplinary action. The Appellant stated that she had "left the building." Copies of those emails are documented at Appellees' Joint Exhibit 9.

19. The Appellant informed the Appellee PPC that she would not enter the building again and would be filing suit after she received the written reprimand.

20. PPC determined that the Appellant was insubordinate, lacked good behavior, and failed to perform her duties satisfactorily when she arrived at work on October 1, 2021, but left the building rather than comply with the Policy.

21. On Tuesday, October 5, 2021, PPC issued the Appellant a three (3) - day suspension for her actions on October 1, 2021. The Appellant was suspended from October 6 through October 8, 2021. She was directed to return to her PPC workstation on Wednesday, October 13, 2021. That suspension is documented in Appellees' Joint Exhibit 11.

22. On Monday, October 11, 2021, the Appellant, Long, and Raley had a telephone conference. During the call, Long and Raley encouraged the Appellant to return to the Mayo-Underwood building and comply with the Policy. She was also notified that her refusal to take these actions could result in further disciplinary action, including dismissal. That conversation is documented in Appellees' Joint Exhibit 12. (Exhibit 5 to suspension letter.)

23. On Tuesday, October 12, 2021, the Appellant received a follow-up email acknowledging that she had requested, and her first-line supervisor had approved, annual leave from October 13 through October 15, 2021. Therefore, she was expected to return to her PPC workstation on Wednesday, October 20, 2021. That approval is documented in Appellees' Joint Exhibit 12. (Exhibit 6 to suspension letter.)

24. On Wednesday, October 20, 2021, the Appellant did not arrive at her PPC workstation.

25. On Thursday, October 21, 2021, the Appellant told Siegel that she did not work on October 20, 2021, because she was "barred from the building" due to her choice "to not wear a face covering." That conversation is documented in Appellees' Joint Exhibit 12. (Exhibit 6 to suspension letter.)

26. PPC determined that the Appellant was insubordinate, lacked good behavior, and failed to perform her duties satisfactorily when she refused to report to work on October 20, 2021, because she did not want to comply with the Policy.

27. The Appellant filed suit in federal court on October 22, 2021.

28. On October 22, 2021, PPC issued the Appellant a five (5) - day suspension for her actions on October 20, 2021, effective October 27, 2022. The Appellant was suspended from Wednesday, October 27, 2021, through Tuesday, November 2, 2021. She was directed to return to her PPC workstation on Wednesday, November 3, 2021. That suspension is documented in Appellees' Joint Exhibit 12.

29. Also, on October 22, 2021, Siegel approved the Appellant taking a half (1/2) - day of leave on Wednesday, November 3, 2021, to attend a job interview. She was approved to take the morning off to attend an interview and was expected to return to her workstation "after the lunch hour." That approval is documented in Appellees' Exhibit 18. (Exhibit 1 to dismissal letter.)

30. The Appellant did not return to her PPC workstation the afternoon of Wednesday, November 3, 2021.

31. On November 4, 2021, the Appellant emailed Siegel and stated, "Because I am scheduled to work in the office on Wednesdays, I did not work before or after the interview [on November 3]." That email is documented in Appellees' Joint Exhibit 18. (Exhibit 2 to dismissal letter.)

32. The Appellant also did not work on Friday, November 5, 2021, although it was a day she was regularly scheduled to be in the office.

33. The Appellant confirmed, via text message, that she did not work that Friday. She stated in her text, "I am not permitted to enter the building on wednesdays or fridays [sic] due to my choice not to cover my face." That email is documented in Appellees' Exhibit 18. (Exhibit 3 to dismissal letter.)

34. PPC determined that the Appellant was insubordinate, lacked good behavior, and failed to perform her duties satisfactorily when she refused to report to work on the afternoon of November 3, 2021, and on November 5, 2021, because she did not want to comply with the Policy.

35. On November 8, 2021, PPC issued the Appellant an Intent to Dismiss letter regarding her conduct on November 3 and 5, 2021. That Intent to Dismiss letter is documented in Appellees' Joint Exhibit 13.

36. The Appellant requested a pre-termination hearing. That request is documented in Appellees' Joint Exhibit 14.

37. The Appellant attended a pre-termination hearing on Friday, November 19, 2021. Pursuant to the undisputed testimony of the Appellant, Ben Long, and Brian Raley, the Appellant confirmed or implied that she would not comply with the Policy in the future.

38. According to the undisputed testimony of Ben Long and Brian Raley, the Appellant then failed to arrive at her PPC workstation on the following required dates:

- (a) Wednesday, November 10, 2021;

- (b) Friday, November 12, 2021;
- (c) Wednesday, November 17, 2021; and
- (d) Friday, November 19, 2021.

39. The Appellant agreed that she quit coming to work at her PPC workstation after the September 30, 2021 email exchange.

40. PPC determined that the Appellant was insubordinate, lacked good behavior, and failed to perform her duties satisfactorily when she refused to report to work on the afternoon of November 3, 2021, and on November 5, 10, 12, 17, and 19, 2021, because she did not want to comply with the Policy.

41. For the Appellant's conduct on November 3, 5, 10, 12, 17, and 19, 2021, PPC issued an explanation of recission and a revised Intent to Dismiss letter. The explanatory letter and the revised Intent to Dismiss letter are documented in Appellees' Joint Exhibits 15 and 16, respectively.

42. The Appellant requested a pre-termination hearing as to the revised Intent to Dismiss letter. That request is documented in Appellees' Joint Exhibit 17.

43. The Appellant attended a second pre-termination hearing on Friday, December 10, 2021. According to the undisputed testimony of the Appellant, Long, and Raley, the Appellant again confirmed or implied that she would not comply with the Policy in the future.

44. On December 14, 2021, PPC issued a dismissal letter to the Appellant. That dismissal letter is documented in Appellees' Joint Exhibit 18. The Appellant was terminated effective December 16, 2021.

45. The Appellant timely filed her first appeal, No. 2021-128 with the Personnel Board on October 28, 2021, appealing the following:

- (a) September 30, 2021: Written reprimand for refusal to comply with the Personnel Cabinet's Face Covering Policy and refusal to adhere to a directive to comply with the Policy;
- (b) October 5, 2021: Three (3) - day suspension for lack of good behavior and unsatisfactory performance of duties; and
- (c) October 27, 2021: Five (5) - day suspension for lack of good behavior and unsatisfactory performance of duties.

46. The Appellant timely filed her second appeal, No. 2022-003 with the Personnel Board on January 15, 2022, appealing the following:

- (a) Assignment of leave without pay for dates during which she chose not to wear a mask in common areas when she was scheduled to work in the Public Protection Office; and
- (b) December 16, 2021: Dismissal for lack of good behavior and unsatisfactory performance of duties.

CONCLUSIONS OF LAW

1. The COVID-19 Face Covering Policy (the "Policy"), effective July 29, 2021, was lawfully issued under the authority granted to the Secretary of the Personnel Cabinet by the General Assembly pursuant to KRS Chapter 18A. The Policy was in effect from July 29, 2021, to March 1, 2022. As an employee of the Executive Branch during this period, the Appellant was obligated to comply with the Policy. The Appellant's argument that the Policy is illegal under Kentucky state law is invalid.

2. Pursuant to KRS Chapter 18A, the General Assembly established the Personnel Cabinet to administer the state personnel system to govern, among other things, the "welfare of its classified employees." KRS 18A.010(1). The Office of the Secretary of the Personnel Cabinet was established in KRS 18A.025(3)(a), in part, to "be responsible for communication with state employees about personnel and other relevant issues." The General Assembly established the Secretary of the Personnel Cabinet to be the "executive and administrative head of the Cabinet to supervise and control all ... work of the cabinet." KRS 18A.030(1). The General Assembly has directed the Secretary, with the aid of her staff, to "prepare ... programs for employee ... safety, ... health, ... and welfare . . . and exercise leadership in the development of effective personnel administration within the several departments of the Commonwealth . . ." KRS 18A.030(2)(i). It is these powers and directives granted by the General Assembly in KRS Chapter 18A that gave the Secretary of the Personnel Cabinet the authority to issue the Policy.

3. During the pandemic, the Governor executed many Executive Orders pursuant to the emergency powers granted to him by KRS Chapter 39A. The General Assembly then enacted various measures in 2021 to limit and/or curtail the Governor's emergency powers under KRS Chapter 39A. The Kentucky Supreme Court addressed many of these measures in *Cameron v. Beshear*, 628 S.W.3d 61 (Ky. 2021).

4. At no time did the actions of the Governor, General Assembly, or the Kentucky Supreme Court regarding the Governor's authority pursuant to KRS Chapter 39A limit the powers of the Secretary of the Personnel Cabinet granted by KRS Chapter 18A, including the power to issue the Policy applicable to Executive Branch employees.

- (a) The Appellant argued the Policy was rescinded by House Joint Resolution 1. The Appellant argued as follows:

The General Assembly passed, and the Governor signed into law, House Joint Resolution 1 on the first day of the special session. **House Joint Resolution 1 ended “All SARS-COV-2 related executive orders issued by the Governor and all executive actions and administrative orders, administrative regulations, or other administrative actions not specifically extended by this Resolution” and rendered them of no further force or effect as of September 7, 2021,** and identified which of the previous Executive Orders would be adopted and extended by the Resolution. The General Assembly declined to give the Governor the authority to issue a general mask mandate and did not adopt his Orders which previously set forth mask mandates.
(emphasis in original.)

- (b) The Appellant continued:

The scope of the Resolution was not limited to Executive actions rendered pursuant to KRS Chapter 39A, but rather to “ALL” Sars-Cov-2 related executive actions. Additionally, the fact that the Gubernatorial Proclamation which called the General Assembly into the September 2021 special session specifically requested that the General Assembly “Set forth the criteria pursuant to which the Governor may exercise authority to require facial coverings in indoor settings during the State of Emergency,” and the General Assembly declined to set forth any criteria authorizing the Governor to do so coupled with the other 2021 legislation of the General Assembly firmly establishes that a unilateral mask mandate of the Executive Branch, such as the COVID-19 Face Covering Policy at issue here, which lacks the consent of the General Assembly, is unequivocally illegal in the Commonwealth and therefore unenforceable.

- (c) The Hearing Officer is persuaded by the Appellees’ response to this argument, which reads as follows:

In an argument rejected by the United States District Court for the Eastern District of Kentucky, Ms. Simmons claims that the “Face Covering Policy was ended and rendered ‘of no further force or effect as of’ September 7, 2021 by the General Assembly’s enactment of House Joint Resolution 1.” Simmons Brief at 8. *See also* Appellees’ Joint Exhibit 19 (*Simmons v. Beshear*, No. 3:21-

CV-052, 2022 WL 1434644, at *6) (E.D. Ky. May 5, 2022) (Slip Op.) (copy attached as Exhibit A pursuant to CR 76.28) (currently on expedited appeal before the Sixth Circuit).

On September 4, 2021, following a landmark decision in *Cameron v. Beshear*, 628 S.W.3d 61 (Ky. 2021), Governor Andy Beshear issued a Proclamation calling a special legislative session. The Gubernatorial Proclamation directed the General Assembly to solely consider legislation regarding four subjects:

1. The extension of the State of Emergency due to COVID-19;
2. Approval of certain Executive, Cabinet, agency, and licensure board orders that would have expired and extend them until the State of Emergency expires;
3. The criteria by which the Governor may require facial coverings during the State of Emergency;
4. Extend some or all portions of Senate Bill 5 for the duration of the State of Emergency. Exhibit B, Sept. 4, 2021 Special Session Proclamation (available at <https://governor.ky.gov/attachments/20210904-Special-Session-Call.pdf>).

Thus, the September 2021 Special Session was focused entirely and exclusively on issues related to the COVID-19 State of Emergency. All laws coming from the Special Session had to be related to the COVID-19 State of Emergency – and no other matter. *See* Ky. Const. § 80 (“When [the Governor] shall convene the General Assembly it shall be by proclamation, stating the subjects to be considered, and no other shall be considered.”).

Although the Governor declared the COVID-19 State of Emergency by issuing his KRS Chapter 39A emergency powers, the Personnel Cabinet’s Face Covering Policy arose from a completely different source: KRS Chapter 18A. As set forth in detail in Appellees’ September 28, 2022 Joint Brief, the Face Covering Policy was authorized and implemented pursuant to KRS 18A.025, 18A.030, and 101 KAR 2:150. Those laws require the Personnel Cabinet Secretary to create programs and develop effective personnel administration for the safety, health, and welfare of state employees,

and to implement those programs and policies to ensure a safe workplace.

HJR 1 (now codified as KRS 39A.090) does not limit the Governor's powers under KRS Chapter 18A. Gov. Beshear's Proclamation limited the General Assembly's authority to act by focusing strictly on the State of Emergency declared under KRS Chapter 39A. Consequently, HJR 1 did nothing to limit or even alter the Governor's powers to control the Executive Branch and its employees under KRS Chapter 18A. HJR 1 did not impact the Face Covering Policy in any way.

- (d) Thus, the Hearing Officer rejects the Appellant's argument and adopts the Appellees' argument quoted above.

5. The Policy as applied to Executive Branch employees working in Executive Branch buildings was not required to be promulgated as a regulation under KRS Chapter 13A. The Hearing Officer adopts the Appellees' argument as a Conclusion of Law.

KRS Chapter 13A provides the framework for issuance of administrative regulations. Appellant argues the Face Covering Policy should have been promulgated by regulation, but she overlooks an exception to that requirement; the statutory definition of "Administrative Regulation" specifically excludes "Statements concerning only the internal management of an administrative body and not affecting private rights or procedures available to the public[.]" KRS 13A.010(2)(a). The face covering policy concerned only internal management of administrative agencies and buildings, in order to provide for the health, safety, and welfare of the Commonwealth's employees and to allow for the Executive Branch to continue providing critical government services during the pandemic.

Although Appellant has also attempted to argue that a portion of the Face Covering Policy – labeled "Visitors" – needed to be promulgated by administrative regulation, that argument carries absolutely no relevance to the instant case. Indeed, it is undisputed that Appellant was disciplined and dismissed from employment based on her conduct as an employee, not as a visitor. As such, that portion of the Policy cannot be used to shield her against the consequences of her refusal to comply in this instance.

Even if Appellant's argument were relevant, Appellant has no standing. Appellant raised a similar argument before the United States District Court for the Eastern District of Kentucky, which was rejected. Judge Bertelsman held that Appellant "does not have standing to contest...the policy requiring visitors to wear facemasks in Executive Branch buildings..." Furthermore,

the Policy's application to visitors did nothing to affect private rights or procedures available to the public. Instead, it was enacted, at least in part, to secure those rights, by ensuring that the Executive Branch could continue providing critical government services needed by the public throughout the course of the pandemic.

6. The Hearing Officer finds that Appellees' interpretation of the Policy was reasonable and warranted. The Policy was warranted to protect employees from transmitting COVID-19. The Policy was also reasonable and time-limited because it required the Appellant to wear a mask, on average, only one (1) hour per day, two (2) days per week.

7. The Appellee PPC has demonstrated by a preponderance of the evidence that it was justified in assigning the Appellant to leave without pay status on dates when the Appellant chose not to come to work solely because she did not want to comply with the Policy. The Appellant was aware that her absences on certain dates were approved, such as her vacation in early October 2021 and her half-day (1/2) job interview on the morning of November 3, 2021. However, she was also aware that absences solely due to her disagreement with the Policy were unapproved. (*See Appellees' Joint Exhibit 7.*) Executive Branch employees do not have the right to choose when they will attend work, based solely on whether they agree or disagree with any health and safety policy, much less the Policy in question, which is both reasonable and narrowly tailored to protect employees from communicable disease. Thus, the PPC's actions were neither excessive nor erroneous under the circumstances.

8. The Appellee PPC has demonstrated by a preponderance of the evidence that there was just cause to suspend the Appellant for three (3) days on October 5, 2021. The Appellant was aware that she was scheduled to work in the office on October 1, 2021. The Appellant was also aware that when she worked in the office, she had to comply with the Policy. The Appellant's choice to leave the building, rather than comply with the Policy, was insubordinate. It also demonstrated a lack of good behavior and poor work performance.

9. The Appellee PPC has demonstrated by a preponderance of the evidence that there was just cause to suspend the Appellant for five (5) days effective on October 27, 2021. The Appellant was aware that she was scheduled to work in the office on October 20, 2021. The Appellant was also aware that when she worked in the office, she had to comply with the Policy. The Appellant's choice to refuse to work, rather than comply with the Policy, was insubordinate. It also demonstrated a lack of good behavior and poor work performance.

10. The Appellee PPC has demonstrated by a preponderance of the evidence that there was just cause to dismiss the Appellant on December 16, 2021. The Appellant was aware that she was scheduled to work in the office on the afternoon of November 3, 2021, as well as November 5, 10, 12, 17, and 19, 2021. The Appellant was also aware that when she worked in the office, she had to comply with the Policy. The Appellant's choice to refuse to work, rather than comply with the Policy, was insubordinate. It also demonstrated a lack of good behavior and poor work performance.

11. The Appellant has not demonstrated that her written reprimand constituted a penalization that is appealable to the Personnel Board. The Appellant's theory that the written reprimand led employers to refuse to hire her is supported by nothing other than her own speculation. Furthermore, written reprimands are not penalizations, pursuant to *Pamela Perkins v. Cabinet for Health and Family Services*, Court of Appeal Case No. 2005-CA-2287-MR (Ky. App. 2007). The Appellant has attempted to distinguish *Perkins* from her case by arguing in her case that she was reprimanded for violating an illegal policy. This argument fails because the Policy was legal and enforceable.

12. The Hearing Officer agrees with the Appellant that the Sixth Circuit opinion affirming the dismissal of her Federal Court lawsuit challenging the Policy does not address whether the Policy violated established State law. Federal Court is not the forum for this argument. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 106 (1984). The Hearing Officer did not rely on the Sixth Circuit's opinion in the Appellant's case in reaching a decision in the instant Personnel Board appeals.

RECOMMENDED ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Personnel Board that the appeal of **DANA SIMMONS v. PUBLIC PROTECTION CABINET and PERSONNEL CABINET (APPEAL NOS. 2021-128 and 2022-003)** 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 23 day of January, 2023.

KENTUCKY PERSONNEL BOARD



**MARK A. SIPEK,
EXECUTIVE DIRECTOR**

A copy hereof this day e-mailed and mailed to:

Hon. Dana Simmons
Hon. Jennifer Wolsing
Hon. Jacob Walbourn
Hon. Catherine Stevens
Hon. Rosemary Holbrook (Personnel Cabinet)



PPC 0033

EXHIBIT

11

**PUBLIC PROTECTION CABINET
Office of the Secretary**

Andy Beshear
Governor

500 Mero Street 218 NC
Frankfort, KY 40601
Phone: 502-782-2736
Fax: 502-564-3969
<http://ppc.ky.gov>

Ray Perry
Secretary

October 5, 2021

Dana Simmons

Dear Ms. Simmons,

Pursuant to KRS 18A.095 you are notified that you are suspended from duty and pay for a period of 3 working days, effective beginning of business on October 6, 2021, through the close of business on October 8, 2021. The days you are scheduled to be off work during this time period are Wednesday-Friday. You are to return to work at your regularly scheduled time on October 11, 2021.

Pursuant to 101 KAR 1:345, Section 1, lack of good behavior and unsatisfactory performance of duties and 101 KAR 2:102 Section 10, absence without leave, you are being suspended from your position as Staff Attorney II, in the Housing Buildings, and Construction Legal Division, Office of Legal Services, Public Protection Cabinet, for your continued refusal to comply with Personnel Cabinet's Face Covering Policy which resulted in unapproved leave without pay. The below events detail your actions:

- On Thursday September 30, 2021, you were issued a written reprimand (exhibit 1) for your refusal to comply with Personnel Cabinet's Face Covering Policy (exhibit 2) that became effective July 29, 2021, and for your refusal to adhere to the directive given to you on September 24, 2021 (exhibit 3), that restricts your access to any Executive Branch building/office for choosing not to wear a face covering in accordance with the Personnel Cabinet's policy.
- On Friday October 1, 2021, at 8:08AM you emailed (exhibit 4) from the lobby of the Mayo-Underwood building which is an Executive Branch building and is the location of your official workstation stating, "I am here to work per my regular schedule. I have been advised that I am not permitted to work because I choose not to wear a face covering. I am requesting to work peacefully and productively as I always have please. I am in the lobby of the building, and will not enter until I hear back from you."

At 8:40AM Brian Raley responded, "[a]s required by Personnel Cabinet's Face Covering Policy, 'Employees must wear either a personal or employer-provided face covering while in an Executive Branch office' and 'Employees must wear a face covering when walking through common areas such as hallways.'" His email further stated that, "if you intend to comply with the policy, you are welcome to proceed to your workstation. If you intend to refuse to comply with the policy you must leave the building. Any absence today will be unapproved leave

without pay and may result in disciplinary action. As previously noted, you are only permitted to telework on Monday, Tuesday, and Thursday. A copy of the Face Covering Policy is attached."

You acknowledged in an email received by me at 10:52AM that you had "left the building" at 8:21AM.

To be clear, during your suspension (Wednesday, October 6 – Friday, October 8, 2021), you are not permitted to perform work for the Public Protection Cabinet.

As a reminder, your telecommuting agreement requires you to arrive at your primary workstation on Wednesday and Friday each week by 8am. You are not allowed to telecommute on Wednesday and Friday.

Please be advised that you are required to abide by the Executive Branch Face Covering Policy and return to your primary workstation on Wednesday, October 13, 2021. If you choose to not abide by the policy and/or not arrive at your primary workstation, those actions will result in additional unauthorized leave without pay and you may receive disciplinary action based on those actions.

For your information, the Kentucky Employee Assistance Program (KEAP) is a voluntary and confidential assessment and referral service for state employees. This service may help you with any personal problems that may be affecting your job performance. KEAP can be reached at (800) 445-5327 or (502) 564-5788.

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 is received. Such appeal must be filed in writing using the attached appeal form and in the manner prescribed on the form.

Sincerely,



/s/
Brian H Raley
Designated Appointing Authority

Attachment: Appeal Form

cc: Secretary, Personnel Cabinet
Personnel File



PPC 0050

EXHIBIT

12

**PUBLIC PROTECTION CABINET
Office of the Secretary****Ray Perry**
SecretaryAndy Beshear
Governor500 Mero Street 218 NC
Frankfort, KY 40601
Phone: 502-782-2736
Fax: 502-564-3969
<http://ppc.ky.gov>

October 22, 2021

Dana Simmons

Dear Ms. Simmons,

Pursuant to KRS 18A.095 you are notified that you are suspended from duty and pay for a period of 5 working days, effective beginning of business on Wednesday, October 27, 2021, through the close of business on Tuesday, November 2, 2021. You are to return to work at your regularly scheduled time on Wednesday, November 3, 2021.

Pursuant to 101 KAR 1:345, Section 1, lack of good behavior and unsatisfactory performance of duties and 101 KAR 2:102 Section 10, absence without leave, you are being suspended from your position as Staff Attorney II, in the Housing Buildings, and Construction Legal Division, Office of Legal Services, Public Protection Cabinet, for your continued refusal to comply with Personnel Cabinet's Face Covering Policy which resulted in unapproved leave without pay. The below events detail your actions:

- On Thursday, September 30, 2021, you were issued a written reprimand (exhibit 1) for your refusal to comply with Personnel Cabinet's Face Covering Policy (exhibit 2) that became effective July 29, 2021, and for your refusal to adhere to the directive given to you on September 24, 2021 (exhibit 3), that restricts your access to any Executive Branch building/office for choosing not to wear a face covering in accordance with the Personnel Cabinet's policy.
- On Tuesday, October 5, 2021 at 5:05 PM, you were notified by email of your 3-day suspension (exhibit 4) for a lack of good behavior, unsatisfactory performance of duties, and for your unauthorized absence without leave.
- On Monday, October 11, 2021, you were sent an email summarizing a phone call that occurred earlier that day. You, Ben Long, and I were the parties to that phone conversation. During that call, you were encouraged to "return to your primary workstation at the Mayo-Underwood building on Wednesday, October 13, and be in compliance with the face covering policy." You were also notified that "your refusal to take these actions may result in additional discipline, up to and including dismissal." (exhibit 5)
- On Tuesday, October 12, 2021, you were sent a follow-up email acknowledging that you had requested and that your supervisor had approved the use of annual leave from October 13, 2021 – October 15, 2021. The email

went on to state that, in light of this approved leave, you would not be expected to return to your primary workstation until Wednesday, October 20, 2021. (exhibit 6)

- On Wednesday, October 20, 2021, it was reported by your supervisor Ben Siegel, that you failed to arrive at your official workstation at the Mayo-Underwood building.
- On Thursday, October 21, 2021, during a phone call with Benjamin Siegel, you stated that you did not work on Wednesday, October 20, 2021 because you are "barred from the building" due to your choice "to not wear a face covering."

To be clear, during your suspension (Wednesday, October 27 – Tuesday, November 2, 2021), you are not permitted to perform work for the Public Protection Cabinet.

As a reminder, your telecommuting agreement requires you to arrive at your primary workstation on Wednesday and Friday each week by 8am. You are not allowed to telecommute on Wednesday and Friday.

Please be advised that you are required to abide by the Executive Branch Face Covering Policy and return to your primary workstation on Wednesday, November 3, 2021. If you choose to not abide by the policy and/or fail to arrive at your primary workstation, those actions will result in additional unauthorized leave without pay. Further, you may receive additional disciplinary action, up to and including termination, based on those actions.

For your information, the Kentucky Employee Assistance Program (KEAP) is a voluntary and confidential assessment and referral service for state employees. This service may help you with any personal problems that may be affecting your job performance. KEAP can be reached at (800) 445-5327 or (502) 564-5788.

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 is received. Such appeal must be filed in writing using the attached appeal form and in the manner prescribed on the form.

Sincerely,


/s/
Brian H Raley
Designated Appointing Authority

Attachment: Appeal Form

cc: Secretary, Personnel Cabinet
Personnel File



**PUBLIC PROTECTION CABINET
Office of the Secretary**

Andy Beshear
Governor

Ray Perry
Secretary

500 Mero Street 218 NC
Frankfort, KY 40601
Phone: 502-782-2736
Fax: 502-564-3969
<http://ppc.ky.gov>

December 14, 2021

Dana Simmons

Dear Ms. Simmons,

Having considered all statements made on your behalf during your pre-termination hearing held on December 10, 2021, I have determined that the clear weight of the evidence establishes that you committed the charges as outlined in my letter to you dated November 30, 2021.

Therefore, based on the authority of KRS 18A.095, you are hereby notified that you are officially dismissed from duty and pay effective December 16, 2021. Your last day with the Public Protection Cabinet will be December 15, 2021.

You are being dismissed from your position for violation of **101 KAR 1:345, Section 1** ("Appointing authorities may discipline employees for lack of good behavior or the unsatisfactory performance of duties."), **101 KAR 2:102 Section 10** ("**Unauthorized . . . absence shall . . . constitute grounds for disciplinary action.**"), based upon review of your employment record, and for the specific reasons outlined in my letter to you dated November 30, 2021. These reasons are again indicated as follows:

- On Tuesday, October 26, 2021, at 3:04 PM, you advised your supervisor, Benjamin Siegel, "I have an interview on the morning of Wednesday, November 3, 2021. Consequently, I will be off work that day [sic] I will work that morning until 9AM and return in the afternoon after the lunch hour if not sooner." Your supervisor approved this leave on Wednesday, October 27, 2021 at 5:09 PM. (Exhibit 1.)
- On Wednesday, November 3, 2021, you were previously approved for leave from 9:00 AM to "after the lunch hour if not sooner." Benjamin Siegel, your supervisor, informed me that you did not report to your primary workstation at 500 Mero Street, Frankfort, Kentucky from 8:00 AM to 9:00 AM and the portion of your day that you were scheduled to work "after the lunch hour." Attempts by your supervisor, Benjamin Siegel, to contact you by means of a phone call and by text message went unanswered. On Thursday, November 4, 2021, you emailed Mr. Siegel, "Because I am scheduled to work in the office on Wednesdays, I did not work before or after the interview." (Exhibit 2.) This confirms your unauthorized absence without leave for part of the day on Wednesday, November 3, 2021 due to your continued refusal to comply with Personnel Cabinet's Face Covering Policy.
- On Friday, November 5, 2021, your supervisor, Benjamin Siegel, did not hear from you all day, and you did not report to your primary workstation again. Attempts by your supervisor to contact you by means of a phone call

and by text message went unanswered. On Monday, November 8, 2021, you confirmed via text message with Mr. Siegel that you did not work on Friday, resulting in another unauthorized absence without leave. Specifically, you stated, "I am not permitted to enter the building on [W]ednesdays or [F]ridays due to my choice not to cover my face." (Exhibit 3.)

- When entering your time in the KHRIS self-time entry application you entered LNPU (Unauthorized Leave without Pay) for the following dates:
 - Wednesday, November 10, 2021,
 - Friday, November 12, 2021,
 - Wednesday, November 17, 2021, and
 - Friday, November 19, 2021.

Your time entries confirm (Exhibit 4) that you did not arrive to your primary workstation as required on those dates. Benjamin Siegel confirmed that he did not hear from you on those dates with the exception of one email on Friday, November 19, 2021, which you forwarded to him from somewhere outside the office.

- On Monday, November 8, 2021, you were issued an intent to dismiss letter. (Exhibit 5.) On Friday, November 19, 2021, you attended a pretermination hearing which occurred using Microsoft Teams. Brian Raley, Designated Appointing Authority, Jessica Van Sickel, Human Resources Director, and Ben Long, General Counsel for the Public Protection Cabinet were also in attendance. At that hearing, you confirmed that you would not comply with the face covering policy in the future.
- On Tuesday, November 30, 2021, you were issued an amended intent to dismiss letter. (Exhibit 6.) On Friday, December 10, 2021, you attended a pretermination hearing which occurred using Microsoft Teams. Brian Raley, Designated Appointing Authority, Jessica Van Sickel, Human Resources Director, and Ben Long, General Counsel for the Public Protection Cabinet were also in attendance. At that hearing, you confirmed that you would not comply with the face covering policy in the future.

Your employment record shows that you had previously received corrective and disciplinary action for your refusal to follow the Face Covering Policy, which resulted in unauthorized leave without pay:


- On Thursday, September 30, 2021, you were issued a written reprimand (Exhibit 7) for your refusal to comply with Personnel Cabinet's Face Covering Policy (Exhibit 8) that became effective July 29, 2021, and for your refusal to adhere to the directive given to you on September 24, 2021 (Exhibit 9), which restricts your access to any Executive Branch building/office when you do not wear a face covering in accordance with the Personnel Cabinet's policy.
- On Tuesday, October 5, 2021, at 5:05 PM, you were notified by email of your 3-day suspension (Exhibit 10) for a lack of good behavior, unsatisfactory performance of duties, and for your unauthorized absence without leave.
- On Friday, October 22, 2021 at 12:03 PM, you were notified by email of your 5-day suspension (Exhibit 11) for a lack of good behavior, unsatisfactory performance of duties, and for your unauthorized absence without leave. Within the suspension letter, you were instructed that "your telecommuting agreement requires you to arrive at your primary workstation on Wednesday and Friday each week by 8am" and that, "[y]ou are not allowed to telecommute on Wednesday and Friday." The letter also advised that "you are required to abide by the Executive Branch Face Covering Policy and return to your primary workstation on Wednesday, November 3, 2021." The letter further stated that "[i]f you choose not to abide by the policy and/or fail to arrive at your primary workstation, those actions will result in additional unauthorized leave without pay. Further, you may receive additional disciplinary action, up to and including termination, based on those actions."

The repeated choices you have made by disregarding directives and refusing to follow policy have resulted in your dismissal for a cause for lack of good behavior, unsatisfactory performance of duties, and unauthorized absence without leave.

Pursuant to KRS 18A.032, you will not be certified on future registers for employment within the Public Protection Cabinet unless the Public Protection 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 is received. Such appeal must be filed in writing using the attached appeal form and in the manner prescribed on the form.

Sincerely,



Brian Raley
Designated Appointing Authority
Public Protection Cabinet

Attachment: Appeal Form


cc: Secretary, Personnel Cabinet
Personnel File

ANDY BESHEAR
GOVERNORGERINA D. WHETHERS
SECRETARY501 HIGH STREET, 3RD FLOOR
FRANKFORT, KENTUCKY 40601
PHONE: (502) 564-7571
FAX (502) 564-1823
HTTPS://PERSONNEL.KY.GOV

MEMORANDUM

PERSONNEL MEMO 21-11

To: Cabinet Secretaries
Constitutional Officers
Agency Heads
Human Resource (HR) Administrators

From: Gerina D. Whethers, Secretary 

Date: July 28, 2021

Re: COVID-19 Face Covering Policy, Effective July 29, 2021

As part of the continuing COVID-19 "Healthy at Work" initiative, the Commonwealth of Kentucky remains committed to limiting the spread of COVID-19 and ensuring the health and safety of our state employees. Accordingly, employees, regardless of vaccination status, will be required to wear a face covering when present in Executive Branch buildings/offices and in state vehicles, where another employee is present. This policy will be continually monitored, re-evaluated, and revised, if necessary.

Purpose:

This policy will serve to protect employees and visitors from any individual who has become infected with coronavirus but does not yet demonstrate symptoms of the illness. This measure also allows us to continue providing critical government services by protecting our workforce.

This policy applies to employees categorized as "low exposure risk" employees by the Occupational Safety and Health Administration (OSHA). Low exposure risk employees are defined by OSHA as employees whose jobs do not require contact with people known to be, or suspected of being, infected with the virus that causes COVID-19 nor require frequent close contact with (i.e., within six feet of) the general public. To the extent that agencies have medium, high, or very high exposure risk jobs at issue and do not already have OSHA compliant mask policies in place, please consult with your agency legal staff to determine the applicability of any additional policy provisions.

Agencies:

Upon request, agencies will provide no more than two (2) cloth face coverings to employees and contractors. However, employees are permitted to wear their own cloth face coverings. Face coverings must cover both mouth and nose. The Kentucky Division of Emergency Management will be responsible for providing face coverings to agencies. Face coverings can be ordered at <https://tinyurl.com/kygovtpperequest>.

Employees:

- Employees must wear either a personal or employer-provided face covering while in an Executive

Branch office or state vehicle with other passengers.

- All personnel should wear a face covering when walking through common areas such as hallways.
- Employees who can safely practice social distancing in their office or work location may remove their face covering.
- All employees and visitors must wear a face covering when attending face-to-face meetings or trainings.
- Face coverings will be required to be worn during an employee's scheduled work hours while performing job duties on or off the work premises. In the event that the face covering becomes visibly soiled, saturated, or damaged while working, a new face covering must be obtained.
- Ideally, personal and employer-provided cloth face coverings should be washed each day after use. It is important that a fabric face covering is completely dry before wearing it, as its ability to capture particles is diminished when wet.
- Employees may submit accommodation requests to the agency Human Resources (HR) office for consideration if the employee is unable to wear a face covering because of an underlying medical condition.

Visitors: Visitors will be required to wear a face covering when entering Executive Branch buildings/offices. If a visitor chooses not to wear a face covering, they will not be permitted to enter the building/office. If a visitor does not have a face covering upon arrival, an agency may provide a face covering to the individual.

Employees who do not comply with this policy may be removed from Executive Branch buildings/offices and may be subject to corrective or disciplinary action.

Any questions related to this policy should be directed to Mary Elizabeth Bailey, Commissioner, Personnel Cabinet, Department of Human Resources Administration at MaryE.Bailey@ky.gov.