

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2016-099

JACLYN SIMMONS

APPELLANT

VS.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

** ** * * *

This matter came on for an evidentiary hearing on October 17, 2016, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Stephen T. McMurtry, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellant, Jaclyn Simmons, was present and was represented by the Hon. Brandy Eden. Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Mona Womack.

BACKGROUND

1. On March 25, 2016, the Cabinet for Health and Family Services *ex rel* the Office of Human Resource Management, suspended Simmons for 15 working days for lack of good behavior, pursuant to 101 KAR 1:345; 101 KAR 2:095, Section 9; workplace violence, and related Cabinet Policy provisions. (See attached March 25, 2016 suspension letter to Jaclyn Simmons from Tresa Straw, Appointing Authority attached hereto as **RECOMMENDED ORDER ATTACHMENT A**). This letter rescinded a February 11, 2016 letter notifying Simmons of the Cabinet's intention to terminate her employment as a Social Service Worker I.

2. Simmons filed a timely appeal with the Personnel Board on May 16, 2016, stating:

A co-worker made a false statement that I threatened 3 people. No-one else reports to have heard me say this and there is no proof that it occurred. It is her word against mine and I did not make those statements. I have evidence to show that I was not even speaking with her when she says I was. I have evidence to show that she lied at least

2-5 times in her statement. Originally I was sent a letter with intent to dismiss, after a pre-termination hearing I was allowed to keep my same position, but was suspended for 3 weeks. I am requesting to appeal this suspension. (Sic)

3. 101 KAR 2:095, Section 9, states in pertinent part:

(1) Workplace violence shall be prohibited and shall include.

...

(b) A threatening statement, harassment, or behavior that gives a state employee or member of the general public reasonable cause to believe that his health or safety is at risk.

...

(2) Examples of prohibited violence shall include:

(a) Threats of harm....

4. **Gretchen Marshall**, Assistant Director, Division of Protection and Permanency of the Department of Community Based Services for the Cabinet, testified she listened to a recording of a call-in to the Division reporting an alleged incident of medical neglect by Kenny Richmond of his daughter, also the daughter of the Appellant. The caller said that Kenny Richmond did not take appropriate action to obtain medical care for his daughter's injured arm. The arm was determined to have been fractured. Marshall explained that the report did not meet the Division's criteria to begin an investigation of medical neglect.

5. **Melissa McIntosh**, Office Support Assistant, Division of Protection and Permanency in Robertson and Fleming Counties, testified that late morning on February 10, 2016, Simmons came into her office visibly upset asking for Katie. McIntosh said she hugged Simmons, and told her Katie would not be back for a while and that she understood. To which Simmons replied, "No you don't." McIntosh said Simmons calmed down a bit and then said, "She was going to get her gun and shoot fucking Kenny, his fucking girlfriend, and Jason Tackett". Tackett was the supervisor in the Rowan County office who made the decision not to investigate the report of alleged medical neglect by Kenny Richmond. She said Simmons left the building stating she was going home. McIntosh testified further that her supervisor, Eric Martin, came by shortly thereafter, and she told him what had happened. McIntosh provided Eric Martin a written statement. In this statement, McIntosh said Jaelyn further stated, "If the Cabinet was going to let her child die, she didn't care if all the kids died too." In the statement she also wrote,

“She told me she was taking off the two days and putting in her resignation on Monday.” McIntosh said she did not think Simmons would carry out her threats and had never intended for Simmons to get into trouble.

6. On cross-examination McIntosh said she was not jealous over the friendship between Jaclyn and Katie, she had been suspended along with the entire office staff for three days in 2014, she did not seek out Eric Martin to report the threat she attributed to Simmons, and Simmons’ voice and crying were “raised some” when she made the threats. She testified there were other Social Workers present in their respective offices and no supervisor had asked her to report on Simmons.

7. **Jay Klein**, Division Director of Employee Management, Office of Human Resource Management, testified that he pursued the disciplinary action against Jaclyn Simmons. This involved preparing the notification of intent to dismiss and the amended disciplinary action of 15 days suspension, assuring proportionality of disciplinary action within the Cabinet and presenting the recommended action to the Appointing Authority, Tresa Straw, for her signature and approval. He explained that Simmons’ threat occurred at a time of heightened fear of violence throughout the country which influenced the initial decision to seek her dismissal. He said that initial decision changed when he viewed the DVD of the Circuit Court proceedings for an Emergency Protective Order. He and others who viewed the DVD proceedings concluded that Simmons would not have carried out her threat. But, he still found the behavior inappropriate. Given her previous three-day suspension in August 2014, for very inappropriate workplace language, he recommended, and Tresa Straw concurred, that the discipline should be a 15-day suspension.

8. **Jaclyn Simmons** testified that there had been a long history of abuse by her ex-husband against her daughter. When the Cabinet refused to investigate her ex-husband for child abuse, she became very upset and tearful to the extent that she wanted the day off. McIntosh saw her crying, gave her a hug and asked her to stay and talk. She told McIntosh her daughter was hurt and the Cabinet was no help. She left saying “See you Monday.”

9. Simmons denied emphatically making the threatening statement for which she was suspended. She said McIntosh “liked drama like a middle schooler.” She said had she made the threat McIntosh related, others in the surrounding offices would have heard.

10. **Joshua Deakins**, Simmons’ fiancé and father of one of her children, testified that he received phone calls from Simmons during her drive home on February 10, 2016. He said she was upset and he tried to calm her. When she arrived home she seemed “more relaxed, and calm.”

11. **Eric Martin**, Supervisor, Cabinet for Health and Family Services for Flemingsburg and Robertson Counties, testified that Simmons was a good worker. The morning of February 10, 2016, he had talked to Simmons about her daughter's injury and her efforts to get the Cabinet to investigate abuse by the child's father. He said Simmons was upset and crying. He said, "You can hear everything through the walls." He left the office for a meeting and returned after lunch when McIntosh told him about Simmons' threat. Martin passed the information to his supervisor, Sharon Kiser, and had McIntosh make a written statement of what Simmons had told him. Martin said he made no determination of McIntosh's creditability. He regarded the allegation as serious and immediately passed it on to his supervisor. Martin said when he became Office Supervisor, the previous supervisor, Angie Estep, reviewed with him "office dynamics." She told him that McIntosh liked to pass along rumors. Martin also testified that McIntosh had passed a rumor about a sexual relationship in the office that he knew was not true. He said that "weighed into my thoughts as to whether McIntosh's statement about Simmons was true."

12. On cross-examination, Martin said he had never disciplined McIntosh for "spreading rumors" and had not told his supervisor, Sharon Kiser, that he had concerns about her credibility.

13. **Lauren Tackett**, a Social Worker for the Cabinet in the same office in which McIntosh worked, testified that "not long ago" McIntosh told her about a coworker, Katie Thompson, having an affair with a client. McIntosh warned that if she told anyone she would not kill her, but she would do something. McIntosh told Tackett that someone told her about the affair. Later she admitted to Tackett that she had made up the rumor.

14. The Cabinet produced certified records from the Fleming County District Court Clerk of a criminal prosecution of Jaclyn Simmons for Terroristic Threatening, 3rd degree, initiated by complaints from Jason Tackett and Kenny Richmond. These records indicated that by agreement between the attorney for the Commonwealth and Jaclyn Simmons, negotiated by her attorney, the District Court Judge diverted the charges on condition that Jaclyn Simmons-Richmond have no unlawful contact with Kenneth Richmond or Emily Texas and that Simmons complete an anger management assessment and any necessary treatment, if recommended.

FINDINGS OF FACT

The Hearing Officer makes the following findings by a preponderance of the evidence:

1. The offices in which Simmons, McIntosh and Martin worked had thin walls. Other fellow employees who worked close by could easily hear conversations through them.

That fact does not help Simmons or the Cabinet, as no other employee came forward to affirm or discredit Simmons' or McIntosh's testimony.

2. Although Eric Martin had concerns about McIntosh's credibility because she was wont to spread rumors, he did not express these concerns when Simmons faced prosecution for terroristic threatening and disciplinary action by the Cabinet. His concerns were minimal.

3. McIntosh related to Eric Martin specific information about Simmons' threat that she likely would not have known had Simmons not told her. For example, Jason Tackett was the Cabinet employee who denied an investigation into Simmons' claim of child abuse. Simmons blamed Kenny Richmond's girlfriend, Emily Texas, in part for the failure to obtain medical care for her daughter. McIntosh knew Simmons was considering resignation from her position in the Department. Either Martin or Simmons told her. But Simmons, in her testimony, did not state she told McIntosh she was considering resignation. Simmons testified she left McIntosh saying "See you Monday."

4. Simmons was not averse to using vulgar language and had a penchant for hyperbole as evidenced by a prior disciplinary action against her.

5. Jason Tackett and Kenny Richmond had enough fear of and belief in Simmons' threat to swear criminal complaints against Simmons.

6. Although taking diversion is not an admission of guilt, Simmons agreed to anger management evaluation and completion of any recommended therapy.

7. The testimony of Marshall, McIntosh, Klein, Deakins, Martin and Tackett is true.

CONCLUSIONS OF LAW

1. By a preponderance of the evidence the Cabinet proved that Jaclyn Simmons made a threatening statement on February 10, 2016, that gave Jason Tackett, a state employee, and Kenny Richmond, a member of the general public, reasonable cause to believe their safety was at risk in violation of 101 KAR 2:095, Section 9. That statement constituted lack of good behavior in violation of 101 KAR 1:345, Section 1.

2. The Cabinet's disciplinary action of suspending Jaclyn Simmons for 15 working days was neither excessive nor erroneous in view of all the surrounding circumstances.

RECOMMENDED ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Kentucky Personnel Board that the appeal of **JACLYN SIMMONS VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2016-099)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13.B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal, a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

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 Stephen T. McMurtry** this 22nd day of December, 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Mona Womack
Ms. Jaclyn Simmons

Received

MAR 28 2016

Personnel Board



CABINET FOR HEALTH AND FAMILY SERVICES

Matthew G. Bevin
Governor

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Vickie Yates Brown Glisson
Secretary

March 25, 2016

Jaclyn Simmons

PERNF

Re: Recission of Intent to Dismiss, Return from Administrative Leave, and Issuance of Fifteen (15) Day Suspension

Dear Ms. Simmons:

In a letter dated February 11, 2016, you were notified of my intent to dismiss you from your position as a Social Service Worker I with the Department of Community Based Services (DCBS), Northeastern Service Region. After taking into consideration your statements and your attorney's statements during your pre-termination hearing on March 7, 2016, and upon further investigation, I have decided to rescind the intent to dismiss letter.

Further, in an accompanying letter dated February 11, 2016, you were placed on Administrative Leave. As this letter serves as the final determination of the appointing authority, you are hereby notified that your Administrative Leave is concluded effective March 26, 2016.

Instead, based on the authority of KRS 18A.095 and 101 KAR 1:345, you are hereby notified that you are officially suspended from duty and pay for a period of fifteen (15) working days. The effective dates of your suspension are March 28, 2016; March 29, 2016; March 30, 2016; March 31, 2016; April 1, 2016; April 4, 2016; April 5, 2016; April 6, 2016; April 7, 2016; April 8, 2016; April 11, 2016; April 12, 2016; April 13, 2016; April 14, 2016; and April 18, 2016. Of note, you are to report to work or you may use your annual or compensatory leave for Friday, April 15, 2016.

In accordance with 101 KAR 1:345, Section 1, you are being suspended from your position as a Social Service Worker I with the Department for Community Based Services, Northeastern Service Region for the following specific reasons:

Lack of Good Behavior. As reported by Acting Service Region Administrator Shannon Hall, you engaged in behavior incompatible with your position as a Social Service Worker I,

when you made a threat of violence towards a DCBS Northeastern Service Region supervisor.

101 KAR 2:095, Section 9, Workplace Violence Policy, specifically states the following:

- (1) Workplace violence shall be prohibited and shall include: (a) The attempted, threatened, or actual conduct of a person who endangers or is likely to endanger the health and safety of state employees or the general public; or (b) A threatening statement, harassment, or behavior but gives a state employee or member of the general public reasonable cause to believe that his health or safety is at risk. (2) Examples of prohibited violence shall include: (a) Threats of harm...

The Cabinet for Health and Family Services' (CHFS) Personnel Procedure 2.1, Employee Conduct, (I), *Purpose*, specifically states the following:

CHFS expects its employees to maintain a high standard of conduct and professional behavior, including outside of work, to maintain the public's confidence in the integrity of its government and public servants. (See Guide to the Executive Branch Code of Ethics.) Actions in violation of this duty as a public servant may lead to corrective or disciplinary action, up to and including dismissal.

CHFS also expects a respectful and professional work environment, free from any form of harassment and violence. Violation of policies and procedures, unsatisfactory performance of duties, and /or failure to exhibit good behavior may lead to corrective or disciplinary action, up to and including dismissal.

The CHFS' Personnel Procedure 2.1, Employee Conduct, (II), *Employee Conduct Guidelines*, specifically states the following:

As examples of such guidelines, including but not limited to, employees shall:

Not commit or threaten to commit acts of violence.

The CHFS' Personnel Procedure 2.12, Workplace Violence, (I), *Purpose*, specifically states the following:

CHFS is committed to providing a work environment free from violence, threats of violence, stalking, harassment, intimidation, and other disruptive behavior. Such activity is strictly prohibited and will be addressed immediately.

The CHFS' Personnel Procedure 2.12, Workplace Violence, (III), *Definitions*, defines Act of Violence as:

The attempted, threatened, or actual conduct of a person that endangers or is likely to endanger the health and/or safety of another individual.

The CHFS' Personnel Procedure 2.12, Workplace Violence, (III), Definitions, defines Threat of Violence as:

A threatening statement, harassment, or behavior which gives an individual reasonable cause to believe his/her health or safety is at risk.

Specifically, on the morning of February 10, 2016, you entered the workstation of your coworker, Office Support Assistant II Melissa McIntosh in the Fleming County DCBS Protection and Permanency Office. According to Ms. McIntosh, you were visibly upset about your daughter and crying "really hard." Ms. McIntosh stated that she hugged you and asked you what she could do for you. You said that you wished that Katie [referring to your coworker Social Service Worker I Katie Thompson] was there. Ms. McIntosh told you that Katie said she would not be back for a while and whatever you needed Katie to do, that she could do for you, and that she understood. You replied, "No, you don't." Ms. McIntosh asked you to please calm down and sit down for a few minutes, and you did, but you were still very upset. You informed Ms. McIntosh that you "were just going to get your gun" and "shoot fucking Kenny [your ex-husband] and his fucking girlfriend", and that while you were at it, you were "going to shoot Jason Tackett [Mr. Tackett is the on-call supervisor for the Rowan County DCBS centralized intake unit]." Ms. McIntosh stated to you that you should not "talk like that" and you replied that you did not care, because if the Cabinet was going to let your child die, you didn't care if all the kids died too. You then informed Ms. McIntosh that you were taking leave the next two days [Thursday, February 11, 2016 and Friday, February 12, 2016] and putting in your resignation on Monday [February 15, 2016].

Your actions violate 101 KAR 2:095, Section 9, Workplace Violence Policy; CHFS' Personnel Procedures 2.12, Workplace Violence & 2.1, Employee Conduct & DCBS' Standard of Practice (SOP) 1.1, Ethical Practice. Further, your actions constitute lack of good behavior for which you may be disciplined pursuant to 101 KAR 1:345, Section 1.

You previously received the following action(s):

<u>DATE</u>	<u>ACTION</u>	<u>REASON</u>
August 4, 2014	Three - Day Suspension	Lack of Good Behavior

Further incidents in violation of policy may lead to further and more severe disciplinary action, up to and including dismissal.

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 1-800-445-5327 or (502) 564-5788.

Jaelyn Simmons
March 25, 2016
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As you are an employee with status, you may appeal this action to the Personnel Board within sixty (60) days after receipt of this notice, excluding the day of receipt. To appeal, you must complete the attached form and direct it to the address indicated on the form. Copies of KRS 18A.095 and 101 KAR 1:365 concerning appeal and hearing procedures are enclosed.

Sincerely,



Tresa Straw
Appointing Authority

TS:ste

Attachments

cc: Thomas Stephens, Personnel Cabinet Secretary
Executive Director Mark Sipek, Personnel Board
Commissioner Adria Johnson, Department for Community Based Services
Acting Service Region Administrator Shannon Hall, Northeastern Service Region
Cabinet Personnel File