



**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2016-164**

**JASON TACKETT**

**APPELLANT**

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

**CABINET FOR HEALTH AND FAMILY SERVICES**

**APPELLEE**

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This matter was scheduled for evidentiary hearing on January 25, 2017. Before the evidentiary hearing, however, the parties submitted a Joint Motion to Continue Hearing, Agreed Briefing Schedule, Agreed Stipulations, and Joint Exhibits on or about December 21, 2016.

The Appellant, Jason Tackett, is not represented by counsel. The Agency/Appellee, Cabinet for Health and Family Services, is represented by the Hon. Blake Vogt.

This matter is before Hearing Officer Stafford Easterling for a ruling on the parties' dueling Motions for Summary Judgment. At issue is the Appellant's claims of penalization as to being placed on desk duty for eleven (11) working days in April 2016.

The Cabinet for Health and Family Services' Motion for Summary Judgment argues that this appeal should be dismissed because the Personnel Board cannot fashion a remedy that would make the Appellant whole. The Appellant argues that he was penalized in accordance with KRS 18A and seeks a ruling that would "relieve the Appellant (and other potential employees) from any future application of unwarranted penalizations." This matter now stands submitted to the Hearing Officer for a ruling on the parties' Motions for Summary Judgment.

**BACKGROUND**

1. During the pendency of this appeal, Appellant, Jason Tackett, was a classified employee with status within the Transportation Cabinet.

2. The Appellant was employed as a Family Services Office Supervisor ("FSOS") in the Protection and Permanency Division in the Northeast Region of the Cabinet for Health and Family Services' ("CHFS"), Department for Community Based Services (DCBS), located in Rowan County.

3. The Appellant's duties and responsibilities include, but are not limited to, supervising employees who investigate allegations of abuse, neglect, and maltreatment and having direct involvement with such investigations.

4. As noted by the Agreed Stipulations, in the interest of public trust, when an allegation is made against a CHFS employee, it may be necessary for CHFS to alter the job responsibilities of that employee for a period of time while the allegation is investigated. This altering of job duties is commonly referred to as "desk duty." Placing an employee on desk duty is provided for in CHFS Standard Operating Procedure ("SOP") 2.15.8.

5. For Protection and Permanency ("P&P") employees like the Appellant, assignment to desk duty entails the removal of all job responsibilities that involve direct or indirect involvement with current Protection and Permanency cases or investigations.

6. Direct and indirect involvement with current P&P cases represent a significant portion of the job descriptions and responsibilities of P&P employees like the Appellant.

7. As of the submission of the dueling Motions for Summary Judgment, the Appellant has been the subject of two separate allegations which named him as an alleged perpetrator. The first occurred in May 2015 and the second in April 2016. In both cases, the Appellant was assigned to desk duty while the allegations were investigated. However, the April 2016 placement on desk duty is the only incident at issue in this appeal.

8. On April 8, 2016, DCBS received a phone call that alleged the Appellant was a perpetrator. The caller alleged that the Appellant was allowing his children to be left alone in the care of the Appellant's ex-wife who was alleged to have been arrested for an alcohol related offense within the previous two or three weeks. The caller making the allegations expressed concern that the children were left alone in the care of the ex-wife who, it was alleged, drinks all the time. In October 2015, there were previous concerns of alcohol use on the part of the Appellant's ex-wife that led to a substantiation of neglect on the ex-wife. DCBS maintained an on-going case against the ex-wife. On-going DCBS involvement encompassed the time of the incident at issue. It was known by DCBS personnel that the Appellant's ex-wife had entered an in-patient treatment center and, to the best of DCBS' knowledge, had been compliant with treatment since December 2015. At the time of the incident at issue, the Appellant's ex-wife had begun receiving supervised contact with their children at the treatment center.

9. Upon learning of the allegations, Service Region Administrator ("SRA") Shannon Hall contacted DCBS Director of Service Regions Lesa Dennis for further direction.

10. Ms. Dennis instructed that the Appellant was to be assigned to desk duty pending an initial investigation as to the credibility of the allegations and instructed a neighboring service region to complete the investigation.

11. On April 8, 2016, the Appellant was informed that allegations were received by DCBS naming him as an alleged perpetrator of child maltreatment. On that same date, the Appellant was assigned to desk duty and the DCBS investigation began. DCBS did not consider assignment to desk duty a penalization and did not provide a Personnel Board Appeal Form to the Appellant.

12. At the conclusion of the investigation, DCBS did not substantiate concerns of possible maltreatment and expressed no concern to the Appellant about possible maltreatment.

13. After being informed of the investigation's findings, the Appellant made requests for written notification for the cause of the decision. DCBS did not respond to the Appellant's requests.

14. On April 15, 2016, the Appellant filed an official grievance regarding the decision to assign him to desk duty based solely on DCBS receiving allegations of mistreatment.

15. On April 25, 2016, CHFS completed a review of the Appellant's case in accordance with Standard Operating Procedure 2.15.8. The Appellant's assignment to desk duty was lifted and the Appellant was allowed to return to his normal job duties.

16. The Appellant filed the instant appeal on July 28, 2016.

17. It is undisputed that the Appellant suffered no loss or reduction of pay during his 11-day assignment to desk duty. However, the Appellant chose to use some of his accumulated leave during that time period in the interest of personal privacy.

18. The parties agree that the central issue in this appeal is whether the Appellant was assigned to desk duty with just cause. The Agency submits that receiving allegations such as those asserted against the Appellant provided just cause to assign the Appellant to desk duty pending investigation. The Appellant submits that just cause is established by the progress of the investigation; that is, just cause is established only when the initial investigation necessitates a subsequent law enforcement investigation or circumstances found by investigative staff lead them to believe there might be a possible substantiated finding of child maltreatment.

19. Upon receipt of an allegation against an employee, if the alleged incident occurred in the same region where the employee's workstation is located, CHFS SOP 2.15.8 provides, in pertinent part, that the SRA or designee shall:

A. Consult[] with the Director of Service Regions or designee regarding:

- i. The assignment of the investigation;
- ii. Investigations involving supervisors or other regional office staff so that the investigation may be assigned to an adjoining region;
- iii. Whether it is necessary for the employee to be assigned to alternate duties until the completion of the investigation, the Director of Service Regions consults with the Commissioner, Office of Human Resource Management, . . . and Office of Legal Services regarding this decision. If the employee is given alternate duties:
  - a. The decision is reviewed by the SRA or designee and Director of Service Regions every ten (10) working days until the completion of the investigation; and

- b. The decision to return the employee to regular duty is reviewed by the Director of Service Regions in consult with Office of Legal Services, the Commissioner and Office of Human Resource Management;

B. Ensures the investigation is assigned:

- i. In another county within the region, but not in the same county in which the employee is currently working or lives;
- ii. To a staff person without knowledge of the employee being investigated;
- iii. To an experienced staff person;
- iv. To ensure that support and technical assistance are readily available[.]

20. KRS 18A.005(24) provides:

‘Penalization’ means demotion, dismissal, suspension, fines, and other disciplinary actions; involuntary transfers; salary adjustments; any action that increases or diminishes the level, rank, discretion, or responsibility of an employee without proper cause or authority, including a reclassification or reallocation to a lower grade or rate of pay; and the abridgment or denial of other rights granted to state employees.

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

22. KRS 18A.095(8)(d) provides:

A classified employee with status who is demoted, suspended, or otherwise penalized shall be notified in writing [] . . . [t]hat he or she has the right to appeal to the board within sixty (60) days, excluding the day that he or she received notification of the personnel action.

23. KRS 18A.095(29) provides:

Notwithstanding any other prescribed limitation of action, an employee that has been penalized, but has not received a written

notice of his or her right to appeal as provided in this section, shall file his or her appeal with the Personnel Board within one (1) year from the date of the penalization or from the date that the employee reasonably should have known of the penalization.

### **FINDINGS OF FACT**

Because 1) the parties submitted agreed stipulations and exhibits and 2) the statements set out in the Background section above were quoted and/or paraphrased from those agreed stipulations and exhibits, the Hearing Officer hereby adopts and incorporates the statements set out in the Background section as the Findings of Fact in the instant appeal as if they were fully set out herein.

### **CONCLUSIONS OF LAW**

1. The Hearing Officer finds the instant appeal was timely filed. Although the Agency argues the Appellant failed to file his appeal within 60 days after being placed on desk duty, it is undisputed that the Agency did not inform the Appellant, in writing, of his right of appeal in accordance with KRS 18A.095(8)(d). Therefore, the one-year statute of limitations established by KRS 18A.095(29) applies and, because the Appellant filed his appeal within one year of being placed on desk duty, the instant appeal was filed in a timely manner.

2. When an allegation of misconduct is made against an employee, CHFS has a Standard Operating Procedure in place that balances the public interest in the integrity of its public servants against the rights afforded to merit employees by KRS Chapter 18A. CHFS's policy empowers the SRA and the Director of Service Regions, in consultation with the Office of Legal Services, the Commissioner and the Office of Human Resource Management, with the obligation to ensure a fair, impartial investigation of allegations against an employee and affords those officials with some discretion as to how to conduct that investigation.

3. SOP 2.15.8 specifically authorizes the SRA to assign alternate duties to an employee under investigation. The Appellant argues that the act of assigning an employee to alternate duties, especially when such assignment is based on nothing more than a mere allegation of misconduct, is a penalization. The Agency argues that an employee has not been penalized unless accompanied by a permanent change in duties.

4. The Hearing Officer finds that the Appellant has articulated a penalization as defined by KRS 18A.005(24). This is because being placed on desk duty, even temporarily, is an action that diminishes the discretion or responsibility afforded to the Appellant. Ordinarily, such a finding would necessitate an evidentiary hearing on the subsequent question of whether the Agency had "proper cause" to take such an action. Here, however, because the key facts of

the case are largely undisputed, the proper cause analysis has been reduced to a question of law. Accordingly, the Hearing Officer will make a proper cause determination given the stipulated facts and exhibits.

5. The Hearing Officer finds that what constitutes “proper cause” in any given situation is directly proportional to the extent of the penalization; stated differently, the more significant the penalization, the higher the “proper cause” threshold.

6. Here, given the facts of the instant appeal, the Hearing Officer finds that the Appellant’s temporary 11-day assignment to alternate duties in accordance with SOP 2.15.8, with no loss or reduction of pay, is a *de minimus* penalization. Additionally, the Hearing Officer notes that being placed on desk duty is a lesser penalization than being placed on investigative leave.

7. Due to the minimal nature of the challenged penalization, the Hearing Officer finds the Agency has to meet a minimal “proper cause” threshold.

8. Similar to the Board’s decision in Cathy Meeks v. Cabinet for Health and Family Services, 2005 WL 6154538 at 19 (KY PB), given the facts of the instant appeal and the *de minimus* penalization implicated in an employee being placed on desk duty, the Hearing Officer finds that a mere allegation of misconduct satisfies the threshold “cause” criterion set out in KRS 18A.095(1).

9. The actions of the Agency in placing the Appellant on desk duty as it investigated the allegations against him were taken with proper cause and were neither erroneous nor excessive to the overall circumstances.

### **RECOMMENDED ORDER**

The Hearing Officer recommends to the Personnel Board that the appeal of **JASON TACKETT V. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2016-164)** be **DISMISSED**.

### **NOTICE OF EXCEPTION AND APPEAL RIGHTS**

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

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

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

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

**ISSUED** at the direction of **Hearing Officer Stafford Easterling** this 7<sup>th</sup> day of August, 2017.

**KENTUCKY PERSONNEL BOARD**

  
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**MARK A. SIPEK**  
**EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:

Hon. Blake Vogt  
Jason Tackett