

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-316

JOHNNY L. WARE

APPELLANT

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

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

*** **

The Board at its regular April 2016 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order on Remand of the Hearing Officer dated February 23, 2016, and being duly advised,

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

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 20th day of April, 2016.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Rebecca Wooldridge
Mr. Johnny L. Ware
Mr. Jay Klein

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This matter came on for an evidentiary hearing on remand from the Personnel Board on November 23, 2015, before the Hon. E. Patrick Moores at the offices of the Kentucky Personnel Board, Frankfort, Kentucky. The remand was ordered by the Board after it was revealed that a portion of the evidence presented at the initial evidentiary hearing failed to be recorded. The remand was ordered to re-examine the portion of the testimony that was not recorded. The proceedings were recorded by audio-video equipment pursuant to the authority found at KRS Chapter 18A.

The Appellant, Johnny L. Ware, was present and was not represented by legal counsel, although he had been advised of his right to legal counsel in this proceeding. The Appellee, the Cabinet for Health and Family Services, was represented by the Hon. Rebecca Wooldridge, of the Cabinet's Office of Legal Services.

I. STATEMENT OF THE CASE

1. **Johnny Ware** appeals the Cabinet's decision of November 6, 2014, in which he was issued a five-day disciplinary suspension from duty and pay under an allegation of Unsatisfactory Performance of Duties for his failure to appropriately supervise a subordinate employee. Mr. Ware was employed as a Family Services Office Supervisor (FSOS) with the Department for Community Based Services, Salt River Trail Region. In a 19-page letter setting out the allegations against Mr. Ware, signed by Howard J. Klein, the Appointing Authority, Mr. Ware was charged with numerous counts in which he "seriously failed to ensure a subordinate competently completely and thoroughly documented required casework in client records." The letter goes on to document over the 19 pages fourteen matters in which the subordinate employee under Mr. Ware's supervision had failed to properly document the records of the client cases under her care. As a result of this failure to properly supervise the subordinate employee and direct compliance with the Department's Standards of Practice (SOP), he was assessed a five-day suspension with loss of pay.

2. Mr. Ware timely filed an appeal with the Kentucky Personnel Board on December 4, 2014, in which he alleged that the employee he supervised had not been truthful with him and had lied to him about her cases and work done. He appealed the suspension seeking to have the matter expunged from his record, and to receive the back pay he would be due.

3. A pre-hearing conference was held before the Kentucky Personnel Board on January 26, 2015, during which Hearing Officer Boyce A. Crocker explained the procedures of the Personnel Board for an evidentiary hearing, and advised the Appellant concerning the burden of proof, the procedure to introduce documents as exhibits, obtaining witness testimony and giving notice of any witnesses and exhibits. The matter was initially presented for an evidentiary hearing held before the Board on April 20 and 21, 2015. The issue presented was whether the disciplinary decision by the Cabinet was taken with just cause and that the penalty imposed was neither excessive nor erroneous.

4. The evidentiary hearing began on April 20, 2015. The Appellee had the burden of proof, which is by a preponderance of the evidence. At the conclusion of the presentation of the Appellee's evidence, the Appellant disclosed that he had three witnesses he wanted to call to testify on his behalf. Mr. Ware failed to disclose these witnesses prior to the hearing, as directed by the Order from the pre-hearing conference, and the Appellee made appropriate objections. The Appellee and its counsel acknowledged that the Appellant's witnesses were employed at the Salt River Trail office and were known to them. Other than not having the opportunity to prepare for their testimony, the Appellee was unable to provide a reason they would be prejudiced if a recess in the hearing was provided to give them an opportunity to interview the witnesses, who were present, and prepare for their cross-examination of the witnesses the next day. Accordingly, the Hearing Officer adjourned the evidentiary hearing at 3:00 p.m., and allowed the Appellee's counsel to interview said witnesses and prepare to cross-exam them the next day, and the hearing was recessed to 9:30 a.m. on April 21, 2015.

5. The hearing resumed the next day, April 21, 2015 with the Appellant presenting witness testimony on his behalf. After the Appellee's brief rebuttal presentation, the parties gave their closing arguments, following which the hearing closed and the matter was submitted for findings of fact and conclusions of law.

6. Following the initial evidentiary hearing, the Hearing Officer found that the evidence was overwhelming that the caseworker abused her position of trust to the detriment of the client children, placing them at risk, and that Ware was frustrated in his efforts to take corrective action with the caseworker, from imposing several PIP's on her, to almost daily supervision and directions to her about her work, to providing coworkers to assist her. The evidence further established that despite Ware's numerous requests to his supervisor for

guidance on the action to take against the caseworker he did receive any help from the higher levels of supervisors. The evidence did not show any help Ware received from higher authority to guide him as to additional actions available to him to provide him to ability to obtain the assurances demanded by the Cabinet that the caseworker was actually doing the field work assigned. Nor was there any evidence presented of quality control systems in place by the Cabinet to verify the field work of the caseworker other than filling out forms for their files that were susceptible to falsification.

7. Accordingly, after the initial evidentiary hearing, the Hearing Officer found that the Cabinet failed to meet its burden of proof that it had just cause for the disciplinary action against Ware for his failure to properly supervise the caseworker, and recommended that an Order be entered sustaining the appeal and dismissing the disciplinary action taken against him and restoring his full benefits.

8. The Cabinet objected to the Recommended Order, claiming that the recording of the hearing was missing a key portion of the testimony, alleging such evidence was therefore not properly considered by the Hearing Officer. Although the Hearing Officer responded that he relied on his notes from the testimony, the Board remanded this matter for a hearing on that portion not recorded, and that the matter be submitted for reconsideration. The rehearing heard testimony from only two witnesses, Mr. Ware and Nelson Knight. Following said rehearing and applying due consideration to the testimony from both hearings, the weight of the evidence and the credibility of all the witnesses, the Hearing Officer revises the previous Findings of Fact and Conclusions of Law as follows.

II. SUMMARY OF WITNESS TESTIMONY

1. The first witness for the Cabinet was **Tony Helm**, the Family Service's Regional Associate Administrator. He testified that he initiated his investigation on the matter of the caseworker's failure to perform her duties working with the children assigned to her oversight after he received three phone calls from foster home parents that visits of the children were not being made by their caseworker (the individual shall be unnamed and referred to hereinafter as the "caseworker.") Helm said that he discussed the situation with the caseworker's supervisor, Johnny Ware, and began to review the files, finding numerous violations of home visits being not documented. After he did an audit of the worker's cases and Ware's handling of the caseworker, he consulted with the Regional Manager, Nelson Knight, who instructed him to start the process for a major disciplinary action.

2. Helm testified that he began a centralized intake process for the disciplinary action, forwarding the matter to an investigating person, to investigate the matter and place any collection of information and all documentation accumulated into a file and recorded into the computer. Once the information was documented from the contacts with home visits, court, therapists and counselors, and the investigator determined the process was completed, the file was forwarded to a supervisor.

3. Helm testified that the role performed by Ware as Family Services Office Supervisor is to maintain close review of the care of the child under their supervision and any risks to the child's safety. This is performed by reviewing the documentation of the caseworker's contacts filed in the computer electronic record and in the child's case file. This was the only means available to prove that the care of a child was being performed, and gain insight as to the progress in the care. Helm testified that the Department is dealing with vulnerable children, and that the importance of the documentation of the contacts in the files is gone over and over in the supervisors meetings.

4. Helm said the investigation of one particular case revealed 14 documentation violations of supervision by Ware. The 14 violations were documented in a letter dated November 6, 2014, giving Ware notice of his suspension without pay. Helm testified that he prepared the letter describing the violations, which was ultimately signed by Howard J. Klein, the Appointing Authority for the Cabinet's Office of Human Resources Management.

5. Some of the violations in the documentation were that the caseworker documented only six of the 41 visits she was supposed to make with one particular family during the period of August 2013 to May 2014, and these failures by the caseworker should have been revealed by Ware in his reviews of her case files. Helm's audit also indicated that no mental health assessment of the family had been documented by the caseworker, to determine if the child was receiving proper supervision or at risk of further abuse.

6. Helm testified that a supervisor should never allow a child's case file to be closed unless the file is fully documented, as the supervisor is the last available check and balance to make sure the work required for the child is actually done. The position of the Department is that **"if an action is not documented in the file, it did not happen."** [Emphasis added.]

7. Another case involved a child that was assigned to the caseworker on January 20, 2012, but the initial visit was not documented until April 30, indicating three months went by with no visits by the caseworker to the child under care. The documentation of the meeting with the child's parents lacked signatures establishing that they actually received the care plan. Furthermore, the case plans that are required to be reviewed and upgraded every six months were

not substantiated. The documentation also revealed delays in services to the family. There was no documentation of what was done with the family. Helm testified that had Ware been reviewing the caseworker and the files he would have known that the caseworker was not completing the visits, and that he should have verbally directed the caseworker as to what should have been done, that the appropriate contacts were being done and following up with disciplinary action.

8. Another charge against Ware's lack of proper supervision involved two children placed in a private care facility. Helm testified that if a child is unable to be placed in an available foster care home, then a private care facility is utilized. On May 9, 2014, a complaint was received that the children assigned to a private facility on November 12, 2013, had not been visited by the caseworker. When asked about the situation, Ware responded that the caseworker lied to him stating that she had visited the child and documented her visits in the file. A report from the Director of the private facility gave notice to the agency that the caseworker had falsified her records.

9. Helm stated that there were 14 cases in which Ware did not do a thorough review of the case files to determine if the issues concerning the risk to the child had been resolved. Helm testified that in none of the closed files he audited was he able to locate any closing checklists. However, he acknowledged that it was not a form that was consistently used within the Department. Helm also testified that the Director of Facilities reported that she had given Ware notice that the caseworker was falsifying her records, but that he never responded to her.

10. Helm said that if Ware had been diligent in his supervision, some of these issues involving the caseworker's failure to do her work and falsifying her files would have been discovered earlier. However, Ware questioned Helm's argument concerning the audit of the caseworker's files, as the caseworker maintains custody of the files, which are only monitored on an annual basis. Helm responded by expressing his opinion that Ware did not conference his cases with a proper care initiative with the caseworker, nor did he properly monitor her work on a monthly basis.

11. Helm acknowledged that Ware came to him and expressed his concerns of the caseworker's not properly working her files. Helm said he talked to Ware a couple of times about her work, and that he could not hold Ware accountable for her lying and falsifying documents. Ware had 5-6 other caseworkers under his supervision and the caseworkers maintained control of their case files, and these files were not brought to their monthly consult meeting with their supervisor. Ware also would not see the signatures on documents in the electronic copy of the file. Thus, it would be necessary for the supervisor to personally audit the case file in order to determine that everything was being properly performed with the children

under their care. Helm testified that where he found Ware failing to perform his duty as supervisor was his closing 14 files without doing due diligence and completing a thorough review of the case files to ensure that the family received all the services they were supposed to receive and that the risk to the child had been mitigated.

12. **Nelson Knight** is the Family Service's Regional Administrator, and supervises the region's managers, including Ware. He testified that Helm's presentation to him demonstrated some pervasive problems with the caseworker, and he instructed Helm to do an audit on her, following which they began to work on a disciplinary action against her with intent to dismiss her. Knight testified that after consideration of the actions of the caseworker, they then began to review the actions of her supervisor, Appellant Johnny Ware, in his handling his supervisory responsibilities of the caseworker. Based on a pattern of incomplete files and missing documentation from the files of the caseworker Ware was supposed to supervise, Knight testified that it became evident to him that the caseworker's files were closed without properly documenting the work done.

13. Knight testified that the Service has a Standard Operating Procedure on supervisor responsibilities and ethical responsibilities. The ethical practices standards requires the supervisor and caseworker to be diligent in the performance of their duties and responsibilities, that they are to thoroughly familiarize themselves with the background of the case involved, and promote the welfare of those to whom they have been assigned professional responsibilities. Among the supervisor's standard responsibilities are to meet monthly with each worker to discuss and strategize case specific issues for each child, and ensure that the staff completes all identified tasks or actions as discussed and documented on the corresponding case consultation forms. Additionally, the supervisor has the task to assess the completion of the identified tasks or actions at the consultation meetings.

14. Knight testified that his review of the situation was that the caseworker and Ware demonstrated a lack of diligence, and that Ware failed to perform his essential task of familiarizing himself with the file. Knight said that as a Family Services agency, it did not provide quality supervision of the approved services to be performed and which was not delivered. Further, the service provided lacked truthfulness. Knight testified that they did not discipline Ware for the falsifications made by the caseworker. Their decision to discipline Ware was because one of the most important duties of a supervisor, such as Ware, was to make sure the services were being provided by reviewing and making sure the appropriate documentation of the work performed was placed in the file, fulfilling the agency's policy "if an action is not documented in the file, it did not happen." Knight said they learned way after the fact that Ware had not confirmed that all the home visits and services required for the children under her oversight were made by a caseworker. He said that any supervisory approval of such a pervasive

pattern of falsification, causes them to believe that the supervisor is saying to the families that the Department of Family Services had done everything required with the children under their care. This they believe was a breakdown in his supervisory responsibilities and placed potential liability exposure of the Department for Community Based Services. Knight testified that it was determined that the situation was so pervasive that it called for a major disciplinary action against the caseworker, and against Ware for failing to properly review the case files. A request for a Major Disciplinary Action was submitted to Human Resources.

15. In the hearing on remand, Knight acknowledged that Ware was correct that supervisors have to rely on the honesty of the caseworkers. He added that the role of the supervisor is so important, as the supervisor is the final check on all the services required to be provided by the caseworker. Knight testified that Ware's disciplinary action was based on the fact that many of the caseworker's files were closed without the required paperwork, which also lacked documentation of the home visits. The lack of complete files was also reflected in the electronic files. Furthermore, the Department has a protocol that all phone calls be returned within 48 hours, which the record showed the caseworker failed to do. Knight testified that had Ware done a proper review of the files of the caseworker in question, he would have recognized that she was not making the required home visits.

16. **Howard J. Klein** is the appointing authority for the Cabinet for Health and Family Services' Office of Human Resource Management. His duties include overseeing the branch that determines disciplinary action of state personnel. He testified that as they were working on the disciplinary action to take against the caseworker involved in this matter, they began to notice some culpability on the part of her supervisor, Appellant Johnny Ware. He testified that he agreed with the disciplinary determination made at the regional level that was reviewed by the legal and EEO branches, and he felt the disciplinary action taken was analogous to other supervisor suspensions for similar violations, under the authority of 101 KAR 1:345. He said the discipline is determined on a case-by-case basis, as no two cases are alike, and that the discipline given to Ware was a balancing of situations involving less volume with more egregious offenses, and situations of more volume with less egregious offenses.

17. The Appellant, **Johnny L. Ware**, initially testified that there were many problems with the caseworker involved and that he conducted extra consults with her, audited her cases, reviewed case plans, and requested several Performance Improvement Plans (PIP) for her. He even gave her a verbal warning. He testified that the 14 cases cited by the Department in his suspension letter were a small amount of the over 300 cases assigned. He said he had nine caseworkers to supervise and that he thought he did adequate supervision of her. He said he tried to work with difficult employees and give them extra training, and that he spent a lot of extra time working with the caseworker in issue.

18. Ware testified that during their consult meetings she would show him documentation of her work, which he expected to make it to the file, but apparently did not. However, most of the documents she allegedly completed were subsequently found in her office. Ware testified that he really did not know how bad things were with this worker, as he did not get any calls of complaints, although he knew she was struggling with her work. Ware testified that he believed he did everything he knew how to do supervising her, and that she always appeared to meet her statistics and numbers on the cases. He testified that he believed that the cases were properly closed because the courts closed them. He alleged that he got no direction or recommendations from his supervisor when he discussed this caseworker's work problems, and he believes that his supervisors failed him in providing assistance and guidelines in his supervision.

19. On remand, Ware described the caseworker as a "difficult employee" that required him to give her special attention. He testified that he would meet weekly with each caseworker under his supervision and discuss the issues they were facing and what needed to be done. He described how he had to spend an enormous amount of time working with the caseworker, requiring her to bring a note pad to their meetings to take notes. Ware testified that he did what he was trained to do meeting his responsibilities in supervising her. He reiterated that he asked Mr. Helm for assistance on what he could do to improve the caseworker's work performance, but that Helm gave him very little information or guidance as to what he should do to have her improve her performance.

20. Ware also testified on remand that if the caseworker told him she had the documentation, he had to accept her word, as he had to have some trust in his workers. He also said that many of the files lacking completed documentation involved military clients who had left their area, although he did acknowledge that with more than 300 cases to review he may not have completely audited all of them that were closed, relying on the caseworker's statements that the files were completed.

21. **Janet Mobley** works with Ware as a secretary for the regional office and does case filings and preparation. Mobley said she told the caseworker that whenever she had the documentation completed she would prepare the files for her. She said that the caseworker involved had a lot of files in her office and often had more than one "dummy file" or folder of documents on the same case. She said that on several occasions she would find the documents misfiled in the wrong file folder. She also testified that to her knowledge Ware was unaware of the problems the caseworker had with organizing her files. Mobley stated that she did find a lot of unfiled documentation and court orders in her office after she left the Department, but she wasn't sure which case files they went to. Mobley testified that if there were any missing

documents, she would not know about it, and that when she filed her documents she did pay attention to the case or child involved.

22. Mobley testified that the caseworker always seemed to be doing two or three things at once. She would start on something and get interrupted and that she had difficulty with her organization. She testified that several other workers believed that Ware was always very demanding on the caseworker, particularly when she was on a PIP, as he was always insisting that she get things done. He would instruct her to complete a task and the next day she still would not have it done.

23. **Carolyn Compton** joined Ware's team on April 1, 2012, and was assigned to the caseworker at issue as an "ongoing worker" assigned to do investigations and monitor the services provided to the child. It was her job to help the caseworker with home visits of families, help complete the documents, and assist in closing files. She said she worked very closely with the caseworker on a daily basis and often offered to assist the caseworker in organizing the files. She testified that when Ware consulted with them on cases, he would always provide them a list of things to do, and that he was always very thorough in mentoring the staff.

24. Compton testified that the caseworker had to often bring her files to the consult meetings and that Ware would go through the files with her. She said he had to constantly stay on her and that he monitored a number of the files of her cases. Compton said that one of the important concerns reviewed in the meetings was obtaining the signatures of the family members from the home visits and discussions of the case plans, certifying that they attended the meeting and discussed the plan. Compton testified that Ware was always very hard on this caseworker.

25. Compton said she had no knowledge of any missing documents and was not aware that the caseworker falsified her records, until she was told that the caseworker was going to Owensboro for a home visit and she later learned was not done. She also learned of an occasion when the caseworker did not make a home visit. Compton said she did talk to the caseworker about not doing her work assignments.

26. **Clem McStoots** works in the Hardin County office of Child Services as an ongoing Social Worker and Clinician, where she worked under the supervision of Ware and worked with the caseworker in issue. She testified that she was asked to help the caseworker write up her investigations, and that the caseworker asked for assistance a number of times in preparing her reports and paperwork documenting her investigations, stating she did not know how to do the reports despite having done them numerous times.

27. McStoots testified that Ware mentored the team monthly, but that he spent additional time with the caseworker involved in the controversy of this matter, as she was not organized. When asked about the caseworker's truthfulness, McStoots smirked and laughed under her breath, and stated she was not always truthful, particularly about personal matters involving her family. She said that towards the end of the caseworker's involvement with the department she was generally known within the department as not being truthful.

28. McStoots said that Ware was very thorough when he conferenced cases with the staff. She further stated that it would be possible for Ware to not know that the caseworker's home visits and investigations were not done, as he would generally be relying on what he was told. She said that they observed Ware staying intent in consulting with the caseworker on her case load and that towards the end they could see the reasons why he was so hard on her. She testified that towards the end of the caseworker's tenure with the Agency they began to be aware that the investigations and documentation were not being done.

29. McStoots testified that they began to see that the caseworker was not doing her work, despite Ware spending more time with her. She said the caseworker falsified information in her documentation as to the work she was supposed to be doing. She testified that she never had a conversation with the caseworker about her untruthfulness, stating that was not her role as a team member. She also said that Ware had her on a number of PIPs, and was always talking to her about not doing her job.

30. In rebuttal, **Tony Helm** testified that he had retained 13 of the 14 files that the audit showed were missing documentation, and that he has not found any of the documentation cited as missing in the November 6 report. He acknowledged that Ware spoke with him several times asking for guidance on what he should do with the caseworker. He stated that he told Ware that she had to be accountable for her work, but admitted he did not provide Ware any guidance about disciplinary actions to take other than recommending he put her on PIP orders.

31. Helm said he did not see any improvement in the caseworker's performance, and that he was not aware of the extent of her lack of production until he did the audits. After the audits were completed, Helm wrote up the report that was incorporated in Klein's letter dated November 6, which he sent to the Office of Human Resources Management. He said he made no recommendations of disciplinary actions. He further acknowledged that he never warned Ware that he was subject to disciplinary action in the performance of his supervisory duties with the caseworker nor did he recommend that Ware be placed on a Performance Improvement Plan or written reprimand.

III. FINDINGS OF FACT

1. The Appellant, Johnny L. Ware, is employed as a Family Services Office Supervisor (FSOS) with the Department for Community Based Services, Salt River Trail Region. His duties required him to supervise nine social workers who oversaw cases involving young children at risk and in need of specialized care and supervision assigned to the Department.

2. Ware's supervisor, Tony Helm, became aware of a problem with a caseworker failing to properly perform her duties of overseeing the care being given to children assigned to her, when he received three phone calls from foster homes that the caseworker working out of their regional office had not made visits with the child under their care.

3. Helm discussed the developing problem with Ware and personally began to investigate and audit the files of the caseworker. He immediately found numerous violations of home visits not being conducted by the caseworker. As the investigation progressed with more findings of violations and failures to properly document the files, Helms discussed the matter with his supervisor, Nelson Knight, the regional manager, who instructed him to start the process for a Major Disciplinary Action.

4. A critical function of the Department's caseworkers is the documentation of the file of the work they do in their service for the children. As Helm said, "if it isn't documented in the file, it didn't happen." He added that a case should never be closed unless the file was fully documented and signatures obtained from the family having custody.

5. Helm testified that his audit of the caseworker's files disclosed fourteen cases that were not properly documented, which should have been discovered by Ware if he had been properly performing his supervisory duties. As a result of this ongoing pattern of violations and falsification of the Department's records, and Ware's apparent failure to be aware of this, a decision was made to also initiate a disciplinary investigation against him. The result of the inquiry into the pervasive violations and falsifications by the caseworker, and Helm's belief of Ware's failure to appropriately supervise the caseworker, and a further review of his prior disciplinary history revealing a recent previous verbal warning for unsatisfactory performance of his duties, a determination was made that he should be suspended from duty and pay for a period of five days.

6. Appellant Ware was determined by the Cabinet to have not properly supervised a subordinate caseworker who was the subject of an audit by Ware's regional supervisor, Tony Helm, which produced 14 violations of the Department of Community Based Service's Standards of Practice. The audit was brought about by inquiries received by the Department concerning the caseworker's failure to keep appointments or make home visits to the children whose care was under her oversight responsibility. The audit produced a large number of violations of the Department's policies in her failures to not only visit the children but falsifying the documentation as to the tasks and actions she claimed she was performing on the children under her care. These failures and falsified documents were reported in a 19-page letter and memoranda prepared by Mr. Helm dated November 6, 2014, that was included in the notice to Ware from the Appointing Authority informing him of the disciplinary action being taken by the Cabinet against him.

7. The Department of Community Based Services is charged by the Commonwealth of Kentucky and its citizens to maintain close supervision over the care given to children placed under its supervision by the courts and other governmental agencies. The caseworkers are to adequately protect their vulnerability from risks to the safety and welfare of the child. Such responsibilities made it necessary that the Department adequately document the care given the child, both electronically on the Department's computer records, and in each child's individual case file. To repeat the testimony of Helm "if it isn't documented in the file, it didn't happen." This documentation of actions taken in the care of the child is the Department's key supervisory function in allowing insight into the child's progress under their care, and thus is critically important in determining that the care of the child was being performed.

8. It is factually established that the caseworker in this matter made numerous serious failures to perform her work and falsified the records of the Department concerning the care provided the children under her supervisory care. The caseworker was employed by the Cabinet and the people of the Commonwealth of Kentucky to provide special care and services to the children appointed to her supervision. Her conduct in failing to perform her duties and falsifying her documentation posted in the files warranted her dismissal and clearly subjected the children to risk and exposed the Department to potential liability.

9. Even though Helm had received requests from Ware for help and guidance with his supervision issues with the caseworker, the record shows he provided none. It was only after Helm obtained several phone calls about the caseworker's not performing her job duties, that Helm began to look deeper into the matter, and began to personally conduct audits on her case files. However, when it previously became widely known to Helm of the disorganization and problems the caseworker had in performing her work duties, and Ware asked Helm for guidance, there was no evidence presented that Helm recommended Ware conduct a complete audit of her

case files. The record is void of any guidance given Ware to direct him in dealing with an employee that was not doing her job and lying to her supervisor. Furthermore, there was no evidence where Helm asked Ware to assist him in the audits that he undertook or that he consulted with Ware.

10. There was significant evidence documented by Helm about the misconduct of the caseworker in her job performance in 14 of the files he manually audited. Helm wrote an extensive report of the deceptions of the caseworker, and cited all the Standard Operating Procedures he believed were violated. However, no specific evidence was presented as to what supervisory actions Ware failed to perform in his role of directing the caseworker, other than failing to require the filing of case documentation while he was supervising her and other caseworkers for which he was responsible. It took an in-depth hands-on audit of her actual case files to ascertain the deceit she had conducted on her employer and falsification of the file records and breach of her duty to the children and persons having custody of the child.

11. The Hearing Officer heard extensive evidence in the initial evidentiary hearing and in the hearing on remand of the standard operating policies of the Department and the reasonable justification for said policies. However, the Hearing Officer also heard evidence from the caseworkers and secretary working under the supervision of Mr. Ware as to the extensive amount of additional time Ware spent working individually with the caseworker, and that he was always "very hard on her," constantly insisting that she do her work and complete the documentation of the children she was supervising, and that he had placed her under several Performance Improvement Plans (PIP). The employees under his supervision testified as to their opinions that he was being very hard on the case worker, and they described the thoroughness of their meetings and his monitoring of the files of their cases in the meetings.

12. It appears from the evidence that the review of the files was done electronically, as an actual audit of the individual file was only done annually or on the closing of the case. Even the employees assigned to help the caseworker were unable to detect that the caseworker was not properly doing her work or documenting the files. One employee, Carolyn Compton, testified that she was assigned to the caseworker to help monitor the investigations and services provided to each child, but that she had no knowledge of any missing documentation or falsification of records until towards the end of the caseworker's employment. Even upon learning such information, the co-worker acknowledged she did report any of her information. Another employee, Clem McStoots, was an experienced Clinician that worked with the caseworker and helped write up her reports. She testified that Ware was constantly complaining to the caseworker about her work performance and testified that it was possible that Ware would not be aware of her failing to make the home visits, as he would have to rely on what she told

him. She testified that it was only at the end of the caseworker's tenure that she became aware of the caseworker's untruthfulness.

13. The Hearing Officer heard no significant testimony to support by a preponderance of the evidence the accusations in the terms set forth in the letter concerning the failures of Ware in bringing to accountability the conduct of the caseworker who lied about what she was doing, and falsified the documents. Her deceit rose to the extent that even her coworkers did not know of her wrongdoing, and certainly failed to show any knowledge as her acts pertained to the supervisory role of Ware.

IV. CONCLUSIONS OF LAW

1. KRS 18A.095 provides that a classified employee of the state, with status, may not be dismissed, demoted suspended, or penalized except for cause. 101 KAR 1:345 provides the Cabinet's Appointing Authority with the power to discipline employees for lack of good behavior or unsatisfactory performance of their duties. In a unpublished opinion, Court of Appeals Judge Acree wrote:

101 KAR 1:345(1) contemplates all employees' duties to fulfill their jobs, not just those imposed on the employee by statutory mandate. The statute is a general provision which gives appointing authorities means by which to address bad behavior or the unsatisfactory performance of all duties.

Alvey v. Kentucky Personnel Board, No. 2007-CA-002108-MR (Sept. 12, 2008)

2. Helm and the reviewing members of the Cabinet considered that Ware's failure to ensure that the caseworker properly completed the documentation as to the actions taken on the children in her custody constituted a serious failure of proper supervision of the caseworker by Ware in the performance of his duties. In essence, he failed to adhere to the policy "if it isn't documented in the file, it didn't happen."

3. The audit by Helm produced 14 such violations, which were extensively documented in the report contained in the Notice dated November 6, 2014, from the Appointing Authority to Mr. Ware. Had the audit been more extensive it is probable many more such violations would have been found. That problem concerning the caseworker's job violations has been resolved in another matter and is not the subject of this inquiry.

4. The troublesome issue presented here is the questioned failure of Mr. Ware in his supervision of the caseworker and whether the Cabinet's disciplinary action against him was appropriately made with just cause or whether the penalty was arbitrary. After sitting through two days of hearing evidence, plus a third day rehearing some of the testimony on the matter on remand, the Hearing Officer failed to hear sufficient specific evidence of how Ware failed to properly supervise the caseworker that warranted such disciplinary action. His testimony and that of the workers under his supervision was that they thought the paper work was being done, as a couple of the coworkers assisted her in completing the paper work.

5. The problem is that the record establishes Ware asked his supervisor, Helm, for guidance on handling the problem he was having with the case worker, and received no help from someone who was in a position to know the process and should have given some assistance to Ware. Helm acknowledged that Ware came to him with concerns about the caseworker not properly working her case files, yet no evidence was given by Helm as to any recommendations or guidance he gave to Ware about how to handle the situation of the caseworker's poor work performance, other than to put her on a PIP. There is no evidence that it was recommended to Ware that he conduct an in-depth audit of her case files, which Helm subsequently conducted on his own after receiving three phone calls complaining about her lack of action.

6. Moreover, the preponderance of the evidence on the record establishes there were no supervisory quality control systems or tools Ware had available to him to verify the work in the field being done by the caseworker other than documentation filled out by the caseworker and trusting the caseworker to be truthful in his reports. There was no evidence of quality control systems of an employee's field work that was available other than the documentation provided by the caseworker to the computer electronic file and an annual audit of the child's actual case file. Apparently, the department depended solely on the documentation submitted by the caseworker, because "if it isn't documented in the file, it didn't happen." The unfortunate result of this lack of quality control systems to verify the work in the field, other than documentation that can be falsified, leaves the workers to believe their fieldwork were not inquired into. The presentation was virtually "no news is good news" and "be sure to fill out the forms." If such other systems were available to the worker's supervisor, there was no presentation of such in the evidence. The Cabinet's entire focus was on the documentation, and the evidence shows that Ware was doing all he was trained to do, and was repeatedly giving management attention to the caseworker, without any help from his higher authorities which he requested.

7. Ware had available the use of PIP's and constantly complaining to the caseworker and directing her to get her work done and provide her with help from her coworkers to comply with her required job performance, yet there apparently were no systems in place to check that the caseworker in the field was actually doing her job, such as random checks on visits reported as having been made or other safeguards. The supervisor was virtually at the mercy of the truthfulness of the caseworker, which honor system has failed the Cabinet miserably.

8. The preponderance of the evidence further shows that Ware asked his supervisor, Helm, for guidance on methods or systems available to improve the caseworker's performance. Yet, the record shows that after Helm received three phone calls from the field that the caseworker was meeting with the children under her control that he sprang into action. He personally undertook an audit of the caseworker's files and was able to prepare a 19-page report of the caseworker's deceit to her employer and falsification of records. However, there is a lack of a clear explanation of what Ware specifically did wrong in his supervisory handling of the caseworker. A litany of SOPs are listed, but not one specific violation was pinned to Ware.

9. One cannot but wonder how far up the chain a field supervisor has to ask for guidance on handling disciplinary matters of a problem worker before he can feel confident that his own actions will not bring down disciplinary action on himself. Ware certainly got no response to his requests for help, and the Hearing Officer fails to find from the preponderance of the evidence any wrongdoing that provides just cause he should be punished for what happened.

10. The directed disciplinary action taken against Ware fails to establish how the method of supervising individual caseworker's actual job performance and trustworthiness in completing the file documentation has actually been remotely improved by the disciplinary penalty imposed on Ware. The problem presented by the preponderance of the evidence is that Ware was aware he had a problem with the job performance of the caseworker, that he requested help from his supervisor who failed to diligently respond and provided none, and there is no showing as to what the five-day suspension and loss of pay provides in improving the oversight responsibilities of the supervisor where there are clearly no quality controls systems in place to oversee the field work done by the caseworker other than the filling out documentation. One has to ask, what did they do to improve the situation involving the oversight of the care and welfare of the children entrusted by the people of the Commonwealth to their care?

11. It is the Hearing Officer's finding and conclusion that the action taken by the appointing authority was arbitrary and without just cause and that it was erroneous in view of all the surrounding circumstances. The burden is on the employer to show by a preponderance of the evidence that the disciplinary measure applied was taken for reasonable cause, and was neither arbitrary nor capricious.

12. Section 2 of our Constitution ensures that citizens of this Commonwealth shall not be subjected to arbitrary state action. *Smith v. O'Dea*, 939 S.W.2d 353, 357 (Ky. App. 1997); Ky. Const. § 2.[6] "With respect to adjudications, whether judicial or administrative, this guarantee is generally understood as a due process provision whereby Kentucky citizens may be assured of fundamentally fair and unbiased procedures." *Id.*; *Kentucky Milk Marketing and Antimonopoly Com'n v. Kroger Co.*, 691 S.W.2d 893, 899 (Ky. 1985).

13. The Hearing Officer is led to believe that the responses to the personnel problem caused the Cabinet to come down hard and hold someone responsible, but in the process they lost sight of the problems they were facing, which is significant. It has been held that the primary purpose of disciplinary procedure in an administrative personnel matter is to protect the public being served. *Hickey v. N.D. Dept. of Health*, 536 N.W. 2d 370 (N.D. 1995). The evidence was overwhelming that the caseworker abused her position to the detriment of the client children and the people of the Commonwealth who entrusted her with the duty to provide diligent care of the children, placing them at risk. The evidence also presented that Ware was frustrated in his efforts to take corrective action with the caseworker, from imposing several PIPs on her, to almost daily supervision and directions to her about her work, to providing coworkers to assist her. The evidence does not show any help he received from higher authority to guide him as to additional actions available to him to provide him to ability to obtain assurances demanded by the Cabinet that the caseworker in the field was actually doing the work assigned. There was no evidence that it was recommended to Ware to conduct a complete audit of her files.

14. The evidence of the disciplinary action taken by the Cabinet shows an act of making someone responsible for what the caseworker did, in a manner that appears to involve some amount of piling on being used to cover the shortcomings of the Department's failure to have a process in place that provides adequate assurance that all the caseworkers working in the field are actually performing the work they are assigned. Actual case file audits are shown to occur only on an annual basis, leaving the field supervisor to resort to an electronic file and the caseworker's word that the work is being done. Imposing PIPs and assigning scarce workers to assist a caseworker having problems does not provide adequate remedies to the situation confronting the Department, nor does the imposition of a penalty on the supervisor result in any positive corrective measures to resolve these issues in the future. The evidence showed that the Cabinet has no quality control system in place to check the field performances of their employees other than the all-important focus on the documentation filled out by the worker, which is woefully susceptible to falsification, as this case illustrates.

15. After weighing all the evidence from the initial hearing and the hearing on remand, taking into account the credibility of the witnesses and giving due consideration to the applicable law, the Hearing Officer concludes that the preponderance of the evidence shows that the action taken against Ware was arbitrary and capricious in that it was done in an apparent whimsical manner, implying either a lack of understanding of or disregard for the surrounding facts.

16. The Hearing Officer concludes that the decision of the Cabinet be reversed and that Appellant Ware be restored to all rights and pay.

V. RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **JOHNNY L. WARE VS. CABINET FOR HEALTH AND FAMILY SERVICES, (APPEAL NO. 2014-316)** be **SUSTAINED** and the five-day suspension against the Appellant be set aside and expunged from his file. The Appellant shall be restored all pay, benefits and made whole with respect to the restoration of the five working days. Further, the Appellee shall reimburse the Appellant for any leave time he used attending the hearing and any pre-hearing conferences. [KRS 18A.105, KRS 18A.095(25), and 200 KAR 12:030.]

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 E. Patrick Moores**, this 23rd day of February, 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Rebecca Wooldridge
Johnny L. Ware