

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2012-241

JENNIFER WARFORD

APPELLANT

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

ENERGY AND ENVIRONMENT CABINET  
DR. LEN PETERS, APPOINTING AUTHORITY

APPELLEE

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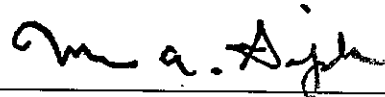
The Board at its regular June 2013 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated April 30, 2013, and being duly advised,

**IT IS HEREBY ORDERED** that the Findings of Fact, Conclusions of Law and Recommended Order 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 **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 19<sup>th</sup> day of June, 2013.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Gordon R. Slone  
Jennifer Warford  
Lynn Keeling

**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2012-241**

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**VS.**

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

**ENERGY AND ENVIRONMENT CABINET  
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**APPELLEE**

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This matter came on for an evidentiary hearing on February 27, 2013, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Boyce A. Crocker, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Jennifer Warford, was present and was not represented by legal counsel. Appearing with Ms. Warford at the table, but not participating, was her mother. The Appellee, Energy and Environment Cabinet, was present and represented by the Hon. Gordon Slone. Also present as Agency representative was Ms. Lynn Keeling.

This was an appeal from the dismissal of Ms. Warford from her position as Administrative Specialist II in the Energy and Environment Cabinet by letter dated October 17, 2012. Appellant filed a timely appeal with the Personnel Board on October 22, 2012.

**BACKGROUND**

1. During the relevant times, Appellant, Jennifer Warford, was a classified employee with status working as an Administrative Specialist II within the Division of Mine Permits within the Energy and Environment Cabinet.

2. As the burden of proof was on the Appellee, and due to this being a disciplinary action, the Appellee proceeded first in the presentation of evidence.

3. The Appellee called as its first witness **Katherine Wainscott**. Ms. Wainscott testified that she was employed as a Clinical Assistant at the Family Care of the Bluegrass (FCB) [which is a doctor's office]. Ms. Wainscott testified that she had worked at FCB in June and July of 2012 and that she knew Appellant both from Appellant having been a patient at FCB and also knew her through school. Ms. Wainscott stated that she handed the FMLA form(s) to Appellant

through the window at the offices of the FCB. She stated this occurred during a lunch break. (Ms. Wainscott testified this exchange occurred in June or July of 2012; Appellant later testified this occurred on or about July 9, 2012.) The witness testified regarding the "Certification of Health Care Provider" form that is part of Appellee's Exhibit 1. On p. 2 of the form, on the line "Probable Duration of Condition," the date is 7-16-12. Ms. Wainscott confirmed this was in fact the date on the document maintained at the FCB. Ms. Wainscott denied that Appellant asked her about this date or asked to have it changed, and as far as she knew "7-16-12" was what was on the form she handed to Appellant.

4. On what was admitted as Appellee's Exhibit 2, counsel for the Appellee directed Ms. Wainscott's attention again to p. 2 of the "Certification of Health Care Provider" form on the line titled "Probable Duration of Condition;" the witness testified the date on this form was "7-26-12" and that this appeared to have been altered. Ms. Wainscott denied making this alteration. She also stated that to the best of her knowledge no one at FCB made such alteration.

5. On p. 3 of the "Certification of Health Care Provider" form in Appellee's Exhibit 2 under the heading of "Amount of Leave Needed," is the line titled "If so, estimate the beginning and ending dates for the period of incapacity." The witness testified that the dates there were "6-15-12 through 7-26-12." Ms. Wainscott stated that the "7-26-12" date appeared to have been altered. Ms. Wainscott testified the form she handed to Appellant had a date of "7-16-12" on it and not "7-26-12." Ms. Wainscott denied anyone at FCB would have made such change.

6. Appellant had brief cross-examination of the witness and introduced over objection of Appellee what was marked as Appellant's Exhibit 1. Ms. Wainscott confirmed that was her handwriting on Appellant's Exhibit 1, which is an excuse slip from FCB. The document stated Appellant had been seen at FCB on 6-25-12 and was released to return to work on 6-28-12.

7. The next witness called by Appellee was **Elizabeth Smoot**. Ms. Smoot was properly sworn and testified as follows in summary form. Ms. Smoot was employed at the time of the hearing at FCB and was also there during June and July, 2012. Ms. Smoot reviewed Appellee's Exhibit 1. Ms. Smoot testified that she filled out p. 2 of the "Certification of Health Care Provider" form that is in Appellee's Exhibit 1 and that it was her handwriting. Ms. Smoot denied making the alteration on p. 2 of this form. [Hearing Officer's Note: This is the alteration at Part A "Medical Facts," "Probable Duration of Condition" where it states "7-26-12" and appears to have been altered.]

8. The witness testified she did make the strikethrough and wrote in different words in paragraph 4 of Appellee's Exhibit 1 and 2 on p. 2 of the form. Ms. Smoot identified what was admitted as Appellee's Exhibit 3, which is a letter from FCB, signed by the office manager to Appellant notifying her that she would no longer be a patient because she changed dates on an FMLA form the FCB had completed for her.

9. The next witness called by the Appellee in its case in chief was **Ms. Tonya Cohorn**. Ms. Cohorn was properly sworn and offered the following summarized testimony. Ms. Cohorn is employed by FCB and was during the times in question for this evidentiary hearing, June and July 2012. Ms. Cohorn is a Physician's Assistant. Ms. Cohorn reviewed Appellee's Exhibit 1 and stated it was her understanding that this document was filled out at FCB and given to Appellant. Ms. Cohorn confirmed that on p. 2 of the "Certification of Health Care Provider" form that the "Duration of Condition" line did in fact say 7-16-12 and this was filled out by staff of FCB.

10. Ms. Cohorn then reviewed Appellee's Exhibit 2 which contains the obviously altered date of "7-26-12" on p.2. Ms. Cohorn stated that when the altered date was brought to her attention she asked Katherine Wainscott and Elizabeth Smoot if they had made changes to this form, that is, altering the date, and they denied such. Ms. Cohorn also asked Dr. Farley, who reviews her work, and he stated that he had only signed the form.

11. On cross-examination, Appellant established that Ms. Cohorn did in fact sign the document admitted as Appellee's Exhibit 7, which was an "Excuse Slip" dated July 24, 2012, which released the Appellant to return to work on 8-1-12.

12. The next witness called by the Appellee was **Ms. Lynn Keeling**. Ms. Keeling was properly sworn and testified as follows in summary form.

13. Ms. Keeling was the Agency representative during this evidentiary hearing. Ms. Keeling stated that her current position is Division Director of Human Resources in General Administration and Program Support (GAPS) which performs personnel duties for the Energy and Environment Cabinet (EEC). She stated that she is also a designated appointing authority for the EEC. Ms. Keeling stated that at the time of the issues relevant in this hearing in June and July of 2012, she was the Assistant Division Director responsible for personnel actions. Ms. Keeling testified about Appellee's Exhibit 4 which is a Request for Disciplinary Action dated June 27, 2012, against the Appellant. Ms. Keeling stated the requested punishment would have been three days without pay. Ms. Keeling offered testimony about Appellee's Exhibit 5, which is a letter from Susan Smith to Ms. Warford. This letter advised Appellant to report to work immediately or otherwise to apply for FML and cited the Absence Without Leave regulation at 101 KAR 2:102.

14. Ms. Keeling also offered testimony as to Appellee's Exhibit 6, a letter from Susan Smith to Appellant dated July 19, 2012, regarding Appellant's absence from work and need for FMLA application or documentation. This letter gave Appellant a deadline to provide medical documentation of July 22, 2012. Ms. Keeling agreed after reviewing Appellee's Exhibit 8, that with the unaltered FML form, the dates of July 17 through July 23 (exclusive of the weekend) would not have been excused. Ms. Keeling agreed that based on Appellee's Exhibit 6, Susan Smith's letter to Appellant, that Appellant would have been excused for the dates of July 17, 18, 19 and 20 and 23 had the altered FML version been accepted.

15. Appellee called as its next witness, **Ms. Charlotte Kline**, who was Appellant's last supervisor prior to Appellant's dismissal. Ms. Kline stated that she is the section supervisor for the Records and Management Branch of the Division of Mine Permits. Ms. Kline testified as to Appellee's Exhibits 9 and 10; Exhibit 9 being a log Ms. Kline kept regarding Appellant's poor time and attendance during the time in question and Exhibit 10 being the memorandum regarding a verbal counseling.

16. The next witness called by Appellee was **Ms. Cristina Violet**. Ms. Violet is employed as an Investigator with the EEC Office of Inspector General (OIG). Ms. Violet confirmed she interviewed Elizabeth Smoot of FCB who stated she had put in a July 16, 2012 date on the Appellant's FML form. Ms. Violet testified that during the interview with Appellant, Appellant offered three different versions of how the date on the form was changed from 7-16-12 to 7-26-12. These versions are contained in the Final Report, part of Appellee's Exhibit 11.

17. The Appellee's last witness was **Ms. Holly McCoy-Johnson**. Ms. McCoy-Johnson is the Executive Director of GAPS and is also an appointing authority for EEC. Ms. McCoy Johnson was the appointing authority who took the action in issuing both the intent to dismiss letter and the dismissal letter for the Appellant in this case.

18. Ms. McCoy-Johnson confirmed that she believed the only person who would have benefited from altering the FML form from 7-16-12 to 7-26-12 would have been the Appellant, and that if it was GAPS personnel that changed the form it would have been initialed and struck through properly. Ms. McCoy-Johnson stated this is why she wanted OIG to investigate further.

19. Ms. McCoy-Johnson stated that after reviewing the OIG Report she believed Appellant had been untruthful about how the dates may have been altered. Through Ms. McCoy-Johnson's testimony, counsel introduced Appellee's Exhibits 12 and 13 which were the intent to dismiss and the dismissal letters for Appellant. At the pre-termination hearing, Ms. McCoy-Johnson stated the Appellant attended and did not present anything to her which made her doubt the OIG investigation into the date changes on the FML form.

20. Ms. McCoy-Johnson testified that she believed dismissal was appropriate in this case because falsification of a legal document, such as an FML form, is very serious and could even lead to criminal charges, though rarely; that such behavior undermines the trust an employer has in its employee; and that other FML falsifications have, in the past, resulted in dismissal. The witness did state, however, that there were no automatic decisions on such and that each case must be evaluated independently. Upon the conclusion of the testimony of Ms. McCoy-Johnson, Appellee rested.

21. The Appellant, **Jennifer Warford**, called herself as her only witness. Appellant was properly sworn and testified as follows in summary form. Appellant testified that on 6-15-12, Kay Thompson, apparently a supervisor, told her she had to go home because of a medical condition (rash) she had. Appellant stated she called Dr. Farley's office, but did not actually see the doctor until June 26, 2012. Appellant testified that after seeing Dr. Farley on June 26, 2012, at some point within the next two weeks, she saw Tonya Cohorn, Physician's Assistant at FCB,

who told Appellant she did not know what the rash was and referred her to a dermatologist whom Appellant saw on July 10, 2012. Appellant stated she had been released to work to return July 12, 2012, but that she had no telephone, her car had been repossessed, and that she was catching the bus to get back and forth<sup>1</sup>.

22. Appellant stated that she gained nothing from the alteration made to the FML form and had nothing to gain from doing so. She had been off work without pay since June 15, 2012. Extending being off work without pay would not have benefited her, as no one had donated any sick leave to her.

23. On cross-examination, counsel for Appellee questioned Appellant whether it was June 15 or June 14, 2012, that she was ordered to leave work and go to the doctor.

24. After cross-examination, Appellant stated it was not her writing and that she had not altered the date of 7-26-12 on the FML form in Appellee's Exhibit 2. Appellant went on to testify that on July 23, 2012, she had spoken with Melissa Wright, and told her that it appeared the "2" had been altered. Appellant asked Melissa Wright if "she needed to call the doctor's office to verify I(Appellant) had not changed it." Appellant states she was never contracted until August 1, 2013, when she was notified she would be on special leave.

25. Appellant testified that a blonde lady at FCB (whose name she did not know), had actually changed the date on the FML forms to 7-26-12. Appellant agreed that it was Katherine Wainscott who originally handed her the form with the original dates and that the following day Appellant had returned to FCB, and that is when the date was changed. Appellant stated she had told this to the OIG.

26. Upon conclusion of her testimony, Appellant had no other witnesses. [**Hearing Officer Note:** The Appellant had not filed a witness or exhibit list and thus was essentially limited to calling herself as a witness.]

27. Appellant waived closing argument. Appellee made closing argument.

### **FINDINGS OF FACT**

1. During the relevant times, Appellant, Jennifer Warford, was a classified employee with status working as an Administrative Specialist II within the Division of Mine Permits within the Energy and Environment Cabinet.

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<sup>1</sup>At this point of Appellant's testimony, the Hearing Officer was summoned to the Franklin Circuit Court to testify pursuant to a subpoena earlier served on a case unrelated to the Personnel Board. The parties took a lunch break at this time. The parties went back on the record with Appellant resuming her testimony at about 12:40 p.m., on February 27, 2013.

2. The Hearing Officer finds that the FML form turned in by Appellant on July 23, 2012, was altered on the second page of the "Certification of Health Care Provider" form accompanying the application, to read on date of return, "7-26-12" instead of "7-16-12."

3. The Hearing Officer finds credible the testimony of the three witnesses from the Family Care of the Bluegrass (FCB) [Katherine Wainscott, Elizabeth Smoot, and Tonya Cohorn] who testified that they did not alter the date from "7-16-12" to "7-26-12," nor were they aware of anyone else in the office that did.

4. The Hearing Officer finds that on July 23, 2012, Appellant did turn in the FML application with the attachments being the forms she had received from FCB which contained the altered dates. Appellant had signed this form, dated "7-23-12" when she turned it in. The dates Appellant had also apparently filled in on the application that stated "Anticipated duration of leave from 6-15-12 to 7-26-12. . ."

5. The Hearing officer is aware that Appellant denies altering the FML forms to read "7-26-12" instead of "7-16-12." The Hearing Officer does not find this testimony credible. Though Appellant argues that she would have gained no benefit by altering the dates since she was on Leave Without Pay from about June 15, 2012, onward, the Hearing Officer does not find it likely any other person would have altered the document. The only person who stood to gain anything from this document being altered was Appellant, because even if she was not getting paid, she was under direction to turn in the FML application, the documentation from a doctor excusing her from work under FML.

6. One other fact the Hearing Officer will discuss that he finds persuasive in this matter is that the dates altered, "7-16-12" to "7-26-12," are important because Appellant did not turn in the FML application until July 23, 2012. The Hearing Officer cannot know Appellant's state of mind at the time, but does know that when she turned in the FML application on July 23, 2012, the unaltered date would not have covered the entire time she was off work from June 15 onward, but the altered date, if accepted, would have.

7. The Hearing Officer, having found Appellant's testimony not credible as to the alteration of the dates on the FML forms, does find the action taken by the Appellee was justified.

### **CONCLUSIONS OF LAW**

1. The Hearing Officer concludes as a matter of law that the Appellee met its burden of proof demonstrating that Appellant committed misconduct pursuant to 101 KAR 1:345. The Hearing Officer did not find the Appellant's testimony to be credible, but did find the Appellee's witnesses to be credible as to the alteration of dates.

2. The Hearing Officer concludes that the action of dismissing the Appellant was neither excessive nor erroneous and was taken with just cause.

**RECOMMENDED ORDER**

The Hearing Officer recommends to the Personnel Board that the appeal of **JENNIFER WARFORD VS. ENERGY AND ENVIRONMENT CABINET (APPEAL NO. 2012-241)** 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.

**SO ORDERED** at the direction of **Hearing Officer Boyce A. Crocker** this 30<sup>th</sup> day of April, 2013.

**KENTUCKY PERSONNEL BOARD**

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

A copy hereof this day mailed to:

Hon. Gordon Slone  
Jennifer Warford  
Lynn Keeling