COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2017-007

DAVID WILBERS **APPELLANT**

VS.

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

OFFICE OF THE ATTORNEY GENERAL **APPELLEE**

*** *** *** *** ***

The Board, at its regular January 2018 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated December 7, 2017, Appellant's Exceptions, Appellee's Response, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer 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 18th day of January, 2018.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Samuel Flynn
Hon. Stephen D. Wolnitzek
Ms. Lynn Gillis

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OFFICE OF ATTORNEY GENERAL **APPELLEE**

** ** ** ** **

This matter came on for an evidentiary hearing on July 10 and 11, 2017, at 9:30 a.m., EST, at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Colleen Beach, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, David Wilbers, was present and was represented by the Hon. Stephen Wolnitzek. The Appellee, Office of the Attorney General, was present and represented by the Hon. Samuel Flynn.

BACKGROUND

Day One

1. The Appellant was terminated by letter dated January 6, 2017, for lack of good behavior and unsatisfactory performance of duties. A copy of this letter is attached and incorporated by reference as **Recommended Order Attachment A**.

2. The Appellee had the burden of proof, by a preponderance of the evidence, to show that the dismissal action herein was neither excessive nor erroneous, and was appropriate under all the surrounding circumstances.

3. By agreement of the parties, Appellant called the following two witnesses out of order.

4. **Janette Wilson** is the Chief Deputy for Franklin Circuit Court. Through Wilson's testimony, the Grand Jury transcript of the case, *Commonwealth of Kentucky v. Elizabeth Elaine Royse*, 10-CR-144, was introduced into the record as Appellant's Exhibit 1.

5. **Cortney Shewmaker** is the Circuit Court Clerk in Boyle County. Through Shewmaker's testimony, the Grand Jury transcript of the case *Commonwealth of Kentucky v. Edward Donzell Parker*, 16-CR-58, was introduced into the record as Appellant's Exhibit 2.

6. Appellee called its first witness. **Michelle Rudovich** is the Executive Director of the Office of the Attorney General's Office of Medicaid Fraud and Abuse. Her unit investigates complaints of patient abuse, neglect, and exploitation, as well as Medicaid provider fraud cases.

7. Rudovich began her employment with the Attorney General's office in January 2011 as an Assistant Attorney General. She was appointed Assistant Director/Litigation Manager six months later. In the Fall of 2016, she was promoted to Executive Director.

8. Prior her to her employment at the Attorney General's office, she was an Assistant Commonwealth Attorney in Louisville and prosecuted felony cases.

9. Rudovich explained the process by which her office prosecutes a case. Once an initial complaint is received and the decision is made to open it, a team, consisting of an attorney, investigator and nurse or other support personnel, is appointed. After the investigation of the case is completed, it is determined whether to prosecute the case, to pursue it as a civil case, or to close the case. If a case is brought to the grand jury, Rudovich stated that usually only the investigator testifies.

10. Rudovich addressed the *Edward Parker* case. She stated that Appellant was the lead investigator in that case; Jesse Robbins was the lead attorney, and Jessica Williamson acted as second chair. Appellant testified to the Boyle County Grand Jury in this case on February 18, 2016.

11. Rudovich was asked if she was aware of any issues with Appellant's work performance prior to his involvement in the *Parker* case. She answered that a case Appellant had testified in previously, *Commonwealth v. Elizabeth Royse*, had resulted in an order of dismissal for prosecutorial misconduct. In that case, Franklin Circuit Judge Thomas Wingate found that Appellant made "certain false and/or misleading statements to the Grand Jury." (Joint Exhibit 5). After the Franklin Circuit Court issued its order on January 19, 2012, her office appealed the decision to the Kentucky Court of Appeals, which affirmed the lower court's decision on September 27, 2013. Her office then filed a motion for discretionary review, which was denied by the Kentucky Supreme Court.

12. Rudovich stated that the *Royse* order affected Appellant as an Investigator because "any time that there's a witness who has a finding of... false or misleading statements or any kind of credibility issues, that's always a concern. If that person testifies, that can be raised on cross-examination." Rudovich added: "And our cases hinge generally – our provider fraud cases hinge on someone's credibility and whether they have made misleading statements or lied about the benefits that they provided to receive Medicaid payments. And so having a witness who has – who could be construed as having credibility issues is potentially damaging to our cases." (*Wilbers v. OAG*, Transcript, p. 36).

13. Sometime in 2012, after the *Royse* case was final, the Director at the time, Robin Bender, made the decision to remove Appellant from investigative work to assume more of a "background" type of role for the office. After Bender was promoted, the new Director, Mike Brooks, made the decision to place Appellant back in investigative duties. After Brooks left, in December of 2015, Mike Wright became Director and Wright decided to place Appellant more in the role of outreach and background work.

14. Rudovich first learned of the allegations against Appellant in the *Parker* case when Parker filed a Motion to Dismiss Due to Prosecutorial Misconduct on August 1, 2016. The motion alleged that Appellant made the following false and misleading statements to the Grand Jury: first, that Parker, a Behavior Analyst, started his practice in 2007 when, in fact, he did not start it until 2011; second, that Appellant testified that Parker, as an employee of Bluegrass Oakwood, Inc., was not permitted to perform outside employment when, in fact, he had received permission to conduct a private practice. The motion also alleged that Appellant's contact with Parker in the Boyle County jail was improper, as Appellant knew Parker was represented by counsel, and that Jesse Robbins had improperly failed to turn the *Royse* case over to Parker's attorney in discovery. (Appellant Exhibit 2).

15. After the Motion to Dismiss was filed, Rudovich removed Jesse Robbins, Jessica Williamson, and Appellant from the case. She substituted herself as counsel of record and entered into an Agreed Order of Dismissal with Parker's counsel, with the agreement that Parker would pay back the remaining portion of his restitution.

16. Rudovich and Wright also contacted Administrative Services and informed them of Parker's Motion to Dismiss. They met with Holly McCoy-Johnson, Director of Administrative Services, and Gordon Slone, an Attorney for the Attorney General, on August 11, 2016, to discuss the matter. Specifically, the group discussed concerns regarding the issues raised in the motion and whether disciplinary action for Robbins and Appellant was warranted.

17. After this meeting, McCoy-Johnson decided to pursue a fact-finding mission. Rudovich supplied her with Appellant's "Chronology Notes" regarding the *Parker* case. **[Hearing Officer Note**: "Chronology Notes" are entries about actions or events that have occurred in a case which are entered into "JustWare," an electronic case management system.]

18. The result of McCoy-Johnson's investigation was Appellant's dismissal. Rudovich was not personally involved in the decision to dismiss Appellant.

19. On cross-examination, Rudovich stated that it was her understanding that Jesse Robbins received a written reprimand for his part in the *Parker* case. Robbins had failed to alert Parker's counsel of possibly exculpatory evidence, specifically, the *Royse* decision which found that Appellant had made false or misleading statements in his grand jury testimony.

20. Rudovich later asked Robbins why he did not disclose the *Royse* case. He responded that he had found case law that held that such evidence does not need to be turned

over to opposing counsel until the attorney determines his final witness list. Rudovich responded that she chose not to operate that way, and she would have preferred that Robbins had turned over the *Royse* orders earlier in the *Parker* case. (Transcript, pp.128-9).

21. Rudovich agreed that an attorney in a case being presented to a grand jury should know the facts of a case and should try to correct a witness who misspeaks. However, in the *Parker* case, Rudovich believed that Robbins may not have heard Appellant's statement that Parker had been employed since 2007. She testified that after listening to the recording of the testimony in that case, Rudovich noticed that someone coughed when [Appellant] said "2007," and she was not sure if Robbins heard the answer.

22. As for Appellant's contact with Parker in the Boyle County jail, Rudovich stated that "[W]henever someone, a defendant, is in custody and there's any kind of a statement from that defendant, that defendant should be Mirandized." (*Wilbers v. OAG*, Transcript, p. 72). Rudovich added that because Investigators in her office work so closely with attorneys they are held to the same professional rules. Under those rules, "any contact with a represented party is a decision that would be made by the office if it should happen." (Transcript, p. 77).

23. In Rudovich's opinion, when Parker began to discuss the Medicaid fraud charges against him, instead of saying "Got ya," Appellant should have read him his Miranda rights before he discussed anything further. "When you're doing a custodial interrogation or a custodial statement and the defendant says – when it appears that they may speak to the crime, which is the Medicaid Fraud, and they're in custody, then that defendant should be Mirandized because we can't project what's about to come out of someone's mouth." (sic)(Transcript, pp. 94-95).

24. Rudovich also noted that Appellant stated he spoke to Parker because he looked out of his element. "He was just basically going in to be friendly. But that doesn't really make a lot of sense to me," Rudovich testified. (Transcript, pp. 79-80). Rudovich added that even if Appellant really did go to the jail solely to get a booking photograph, she did not understand why he turned on the tape recorder and went to a separate room. "It's not as if it's a conversation that's happening while he's standing there in booking and [Appellant] just goes up to him and starts talking to him. I mean, it sounds like it's more that Doctor Parker is put in a room and then a recorder is turned on." (Transcript, p. 81).

25. Rudovich also noted that if Appellant's sole reason for going to the jail was to obtain a booking photograph, he could have obtained it through fax or email, which her office routinely does. (Transcript, p. 120).

26. According to Rudovich, the problem with Appellant's conversation with Parker was two-prong. First, there was the fact that Parker was not Mirandized before the conversation began; second, Appellant violated ethical guidelines that investigators in her office should not speak to represented defendants without the authorization of a supervisor. (Transcript, pp. 96 and 118).

27. Rudovich was asked if she was aware of the *Lyon* case. She stated that she became aware of it when defense counsel in a *Royse* case hearing asked Appellant on cross-examination if there were any prior allegations against him of prosecutorial misconduct. At the time, Rudovich was unaware what this line of questioning referred to. Later, Rudovich asked Appellant what defense counsel was alluding to. Appellant denied having knowledge of any such allegations. After Parker filed the Motion to Dismiss, she read a newspaper article that referenced the *Lyon* case, which alleged that Appellant improperly recommended the name of an attorney to the victim's family member.

28. Rudovich acknowledged that there was no explicit finding of improper action by the Logan Circuit Court's order in the *Lyon* case. The order states in relevant part:

> "...although the evidence concerning the investigator providing the name of a plaintiff's attorney to the family of the alleged victim might cause one to reasonably inquire as to whether there was a financial motive, these actions are also consistent with the absence of improper motive." (Joint Exhibit 7).

29. Rudovich added: "I think what most impressed me is when I went back and asked [Appellant] if he knew what the allegations were, if there were ever allegations made, he told me, 'No'..." (Transcript, p. 101).

30. Rudovich stated that investigators are expected to know the facts of the case before they appear before a grand jury, including times and dates. Her expectation that an investigator would be truthful and accurate in his statements before a grand jury was even stronger for Appellant due to the prior finding in the *Royse* case of his having made a false or misleading statement. (Transcript, p. 108).

31. Rudovich was asked if attorneys should know the answers to the questions they are asking the investigators during a grand jury proceeding. She answered, "You would assume the attorney should, but the attorney also relies heavily on the investigator's knowledge in answering the questions properly and accurately...the investigator is the one who is sworn to tell the truth." (Transcript, pp. 126-127).

32. **Jesse Robbins** is a Staff Attorney III in the Office of the Attorney General, where he has worked since 2007. He is currently employed in the Criminal Appeals Division, which he joined in early Fall, 2016. Prior to that, he was employed in the Medicaid Fraud Division.

33. Robbins was asked to address the role of the investigator in a Medicaid fraud case. Robbins stated that prior to taking a case to the grand jury, the investigator leads the case; he directs whom to question and determines the investigative steps to take. If legal questions arise, the investigator consults with the attorney assigned to the case.

34. When asked how he prepared investigators for their grand jury testimony, Robbins answered, "Our investigators are experienced law enforcement... they're experienced

with grand juries... I would give them a prepared list of questions most of the time...I would ask them to review it, and then at some point I would come back to them and say, 'Is there anything we need to talk about or discuss?' And then that's pretty much it for them, and I would tell them 'Review your evidence.' And I tried, during the grand jury, to stick to my questions." (Transcript, pp. 160-161).

35. Robbins addressed the *Edward Parker* case. Robbins was the Prosecuting Attorney in that case, and Appellant was the Investigator who testified to the grand jury. Robbins stated that he "prepped" Appellant beforehand, and provided Appellant with a copy of the questions he planned to ask.

36. Robbins did not become aware of the problems with the case until Parker filed his Motion to Dismiss. The one "glaring" error in [Appellant's] testimony, Robbins stated, was Appellant's assertion regarding Parker's experience with Medicaid. When queried about when Parker became a Medicaid provider, "[Appellant] answered something like 2003 or 2004, 2005, and in reality he hadn't started the experience with Medicaid and Medicaid billing until later, after he graduated." (Transcript, p.163). Robbins characterized the other allegations raised in Parker's Motion to Dismiss as "inconsistencies...not glaring mistakes." (Transcript, p. 16). [**Hearing Officer Note**: Robbins later corrected his testimony to reflect that Appellant had testified at the grand jury that Parker started his business in 2007.]

37. Robbins described how Appellant had "inappropriate conduct" with Parker: "The day Parker turned himself in and was driving to the jail, we had sent [Appellant]—because at that point our office had determined that it was okay to talk to Parker because he wasn't represented in a criminal action. So [Appellant] prepared to go to the jail. He was going to get a booking photo, and we said, 'It's okay to talk to Parker.' Literally, as [Appellant] was driving there, I got a call from Noel Caldwell who told me that he now—that they had been officially retained by Mr. Parker." Robbins then called Appellant and said, "He (Parker) is represented by counsel, so you don't need to talk to him." To the best of Robbins' knowledge, Appellant was on his way to the Boyle County jail when the phone call was made. (Transcript, pp. 165-166.)

38. After Parker filed the Motion to Dismiss, the Attorney General's office entered into an Agreed Dismissal with Prejudice. Michelle Rudovich also took Robbins' place in the case as Attorney of Record.

39. Robbins testified that he met with Holly McCoy-Johnson on her "fact-finding mission." He told her that he had informed Appellant that Parker was represented by counsel as Appellant was traveling to the jail.

40. Robbins also looked at his personal cell phone records so that he could tell McCoy-Johnson exactly when he contacted Appellant as he travelled to the Boyle County jail.

41. On cross-examination, Robbins was asked why he did not correct Appellant's testimony regarding when Parker began his practice, if it was indeed such a "glaring error." Robbins answered: "I just didn't catch it." (Transcript, p. 170).

42. Robbins testified that after he told Appellant not to speak to Parker, they both agreed he could proceed to the jail to obtain a booking photograph.

43. Robbins received a written reprimand for his conduct in the *Parker* case, specifically for his failure to disclose to defense counsel that [Appellant] had had a previous case in Franklin Circuit Court that was dismissed due to Appellant's grand jury testimony. (Specifically, the *Royse* case) (Transcript, p. 180). Robbins later voluntarily transferred to the Criminal Appeals Division of the Attorney General's office.

44. **Keith Howard** is an Investigative Supervisor with the Medical Fraud and Abuse unit for the Attorney General's office. He began his career with the Attorney General's office in 2005 as an Investigator and was promoted to supervisor in 2013. Prior to his employment with the state, he worked for 25 years in the Lexington Police Department.

45. Howard was Appellant's co-worker when Appellant joined the Attorney General's office in 2008. He became Appellant's supervisor upon Howard's promotion in 2013.

46. Howard addressed Appellant's contact with Parker at the Boyle County jail. He affirmed that Appellant knew Parker was represented by counsel. Appellant told Howard that he had been contacted about Parker's representation by someone in the office, a female. Howard and the Investigator Manager, Joe Williams, spoke to all the female employees in the office. No female employee recalled contacting Appellant to inform him that Parker had representation.

47. Howard was aware that the ethical policy, which provides that attorneys should not have contact with represented individuals, also applies to the investigators in his office. "If that had been me, I would not have communicated with Mr. Parker," Howard stated. (Transcript, p. 198).

48. Howard was asked if he was aware of any prior issues with Appellant's job performance. He responded that due to the *Royse* case, Appellant was "Giglio impaired." The issue in question in the *Royse* case, in Howard's opinion, was Appellant's "credibility." (Transcript, p. 199).

49. Howard stated that he agreed law enforcement personnel must adhere to a higher standard of truthfulness and integrity. "We hold an office that instills public trust," he stated. (Transcript, p. 203).

50. When questioned if Appellant could continue on as an effective investigator, Howard answered: "With the Giglio impairment, I'm not sure." (Transcript, p. 204).

51. On cross-examination, Howard was asked if there were "lots of law enforcement officers with Giglio impairments." Howard answered that he knew of only one other officer similarly impaired. (Transcript, p. 205).

52. As Appellant's supervisor, Howard agreed that he had never had any problems with Appellant's work performance. "[He] did his job," Howard stated. (Transcript, p. 209).

53. Howard was asked to review the transcript of Appellant's conversation with Parker at the Boyle County jail and address whether Appellant had really asked questions of Parker. Howard noted, "When you don't see question marks, that doesn't mean you should allow a defendant or someone that's been indicted to allow them to talk..." (sic) (Transcript, p. 214).

54. **Holly McCoy-Johnson** is Executive Director of Administrative Services for the Office of the Attorney General. She has held the position since January 4, 2016. She is one of two designated appointing authorities for the Attorney General's office. McCoy-Johnson is responsible for signing off on all personnel actions for approximately 205 employees. McCoy-Johnson was previously employed as Executive Director of General Administration and Program Support (GAPS) Shared Services for the Energy and Environment, Public Protection and Labor Cabinets. She has also worked at the Alcohol Beverage Commission. She estimated she had handled "hundreds" of disciplinary actions during her 25-year tenure in state government.

55. McCoy-Johnson stated she first learned of the allegations against Appellant when she met with Mike Wright and Michelle Rudovich of the Medicaid Fraud Unit on August 11, 2016. They informed her they had concerns regarding the actions of Appellant and Jesse Robbins in regard to the *Parker* case. This inquiry sparked the beginning of her "fact-finding process" into Appellant's alleged misconduct.

56. Because McCoy-Johnson is not an attorney, she enlisted the assistance of another attorney in her office, Gordon Slone, who also attended the August 11, 2016 meeting.

57. On September 30, 2016, McCoy-Johnson and Slone arranged to meet with Appellant. The purpose of this interview was to get some initial information regarding the allegations Parker made in his Motion to Dismiss. McCoy-Johnson also met with Jesse Robbins and Keith Howard.

58. During the fact-finding process, McCoy-Johnson also reviewed the following: OAG policy and procedure; the Medicaid Fraud and Abuse Handbook; the computerized case chronology of the *Parker* case; Parker's Motion to Dismiss for Prosecutorial Misconduct; and the transcript of Appellant's conversation with Parker at the Boyle County jail; Appellant's personnel file; the Position Description/Job Class Specification for the Investigator III position; the *Royse* and *Lyon* orders; the cell phone records of both the Appellant and Jessie Robbins, and the Attorney General's office landline records. Through an Open Records Request, she acquired a copy of the Boyle County jail sign–in sheet for February 26, 2016.

59. McCoy-Johnson met with Appellant again on December 16, 2016. At the end of her fact-finding process, she determined that the appropriate discipline for Appellant was dismissal. Jesse Robbins was given a written reprimand.

60. An Intent to Dismiss letter was delivered to Appellant on December 28, 2016. At Appellant's request, a pre-termination hearing was held on January 5, 2017. Appellant had counsel present. At this hearing, Appellant had "ample opportunity during the pre-termination hearing to address those inconsistent statements in his statements, and he did not," McCoy-

Johnson stated. According to McCoy-Johnson, Appellant did not dispute the allegations in the dismissal letter, but he did ask for a more lenient consequence. (Transcript, pp. 243-4).

61. Appellant received a copy of the final dismissal letter on January 6, 2017. The ultimate reason for his dismissal, according to McCoy-Johnson, was his lack of truthfulness. "He is an investigator. He is a law enforcement officer. We are the Office of the Attorney General, and we are the chief law enforcement agency in the state. We have a policy that states that employees are expected to conduct themselves with integrity, to represent the office ethically, and to not bring any disrepute on the office...So in addition to that...being a law enforcement officer...I feel that they have to be held to a higher standard of...public trust and truthfulness." (Transcript, p. 246).

62. McCoy-Johnson testified that the first conflicting statement Appellant made to her was regarding the phone call he received on the way to the Boyle County jail, notifying him that Parker had retained counsel. First, he informed McCoy-Johnson that "one of the girls in the office" had called him. But Jessie Robbins told McCoy-Johnson that he had called Appellant; Robbins produced his cell phone records which documented that he had called Appellant sometime around 1:30 p.m., and Appellant had called him sometime around 3:00 p.m.

63. In her December 2016 meeting with Appellant, McCoy-Johnson testified that he told her very specifically where he had been when the call was received; specifically, that he was on a bypass, which made him miss his turn.

64. McCoy-Johnson concluded that Appellant had told her multiple versions of the circumstances surrounding this call and Robbins offered another.

65. The second false statement Appellant allegedly made to McCoy-Johnson was his assertion to her that once he found out Parker was represented by counsel, he continued on his journey there solely for a booking photograph. But on the sign-in sheet for the Boyle County jail, Appellant listed "Interview" under the category "Purpose of Visit." (Joint Exhibit 14).

66. McCoy-Johnson also took issue with Appellant's statement to her that when he entered the jail, he observed Parker "looking freaked out" and asked Parker if he wanted to talk, then took him to a room and turned on the recorder. In McCoy-Johnson's opinion, the recording of their interview indicated that when the interview began, it was the first time the two men had seen each other. "It is extremely obvious, if you listen to the recorded interview, that this was an initial interview, that there was no introduction that occurred out front before they were brought into this room. This was the first time these two men came toe to toe with each other and saw each other in this jail."

67. McCoy-Johnson added that Parker was booked between 1:47 p.m. and 1:58 p.m., but Appellant didn't arrive in Boyle County until 2:47 p.m. McCoy-Johnson opined that if Parker was booked at 2:00 p.m., it seemed unlikely he would still be in the booking area when Appellant arrived. (Transcript, p. 254).

68. In McCoy-Johnson's opinion, Appellant should have stopped Parker when he said "And, you know, it's got –hindsight being 20/20, I've got a few I-was-dumb moments in it, but for the most part there was nothing malicious." Instead, Appellant said to Parker: "Got you." Parker then went on: "Some mistakes were made. I'm not a bad guy. I got in this to help people, enjoyed having the company. I enjoy employing people and helping people out."

69. According to McCoy-Johnson, Robbins told her that when Appellant called him after the meeting, Appellant told Robbins that Parker made the statement that he had made mistakes. Appellant documented that comment in JustWare when he returned to the office. "So obviously [Appellant] thought that that was an important statement," McCoy-Johnson stated. (Transcript, p. 257).

70. McCoy-Johnson determined that Appellant went to the jail with the intent to interview Parker.

71. McCoy-Johnson testified that while Appellant's misstatements to her alone were enough to terminate him, she also considered Appellant's conduct in the *Royse* and *Lyon* cases: "So while the other actions were enough, the thing about the past work history that I can't ignore and that was true is…it's out there. He has a decision against him in terms of Judge Wingate stating that he made false or misleading testimony in the *Royse* case…We have areas with the *Lyon* case where there was allegations that were out there that were left at least that I think question his credibility there." (Transcript, pp. 259-60).

72. McCoy-Johnson noted that Appellant's actions in the *Parker* case again questioned his credibility. As a law enforcement officer, Appellant was expected to testify. McCoy-Johnson stated that her office cannot have an investigator that she does not have "100 percent confidence in what they're telling you is absolutely the truth without any concern about there being some issue with it." (Transcript, p. 262).

73. As for why Robbins only got a written reprimand, McCoy-Johnson stated that "He was truthful and forthcoming in my interaction with him." McCoy-Johnson also considered Robbins' reason for not disclosing the *Royse* decision to Parker's counsel, "while misguided, did make some sense…" (Transcript, p. 265).

74. McCoy-Johnson was asked if a less severe disciplinary action could have been meted out to Appellant. She replied, "He would have to be an Investigator. I would have to rely on him to be truthful and honest and accurate. I didn't have confidence in him." McCoy-Johnson added that even if Appellant was demoted to Investigator II or Investigator I, he would still be in a law enforcement role. Consequently, she felt that dismissal was the proper disciplinary action.

75. On cross-examination, McCoy-Johnson was asked to address the interview she held with Appellant on September 30, 2016. McCoy-Johnson acknowledged that Appellant raised the issue of his rights under KRS 15.520 (also known as the Police Officer's Bill of Rights). She told him that his employment was solely covered under KRS Chapter 18A and 101 KAR, and that KRS 15.520 was not applicable. It was her understanding that while Appellant

did receive KLEFPF funds while employed as an investigator for the AG's office, KRS 15.520 applies only to local law enforcement personnel, and seems to address "areas where there is no administrative process in place." (Transcript, p. 271).[1]

76. McCoy-Johnson admitted that Appellant was given no prior notice of the September 30, 2016 meeting. As for whether she told him his failure to cooperate would lead to a charge of insubordination, McCoy-Johnson answered, "We have a little sheet that we read that pretty much says you're expected to be telling the truth and cooperate." (Transcript, p. 271). She added, "I feel like the truth is the truth and you don't need to prepare to tell the truth." (Transcript, p. 274).

77. McCoy-Johnson stated that Appellant's failure to remember where he received the phone call, or who had called him, was not the relevant issue: She considered the varying statements he made to her regarding the details of the phone call to be proof that he was not being truthful with her. McCoy-Johnson also took issue with the detail he provided in his inconsistencies which, in her opinion, is different from an answer of "I don't remember." In McCoy-Johnson's opinion, Appellant could not return to his prior position with credibility.

78. McCoy-Johnson acknowledged that Appellant had received no disciplinary action after the *Royse* case. As for finding anything in the *Lyon* opinion that specifically stated that Appellant did something wrong, McCoy-Johnson stated, "He did not get fired for these allegations...but these things are going to follow him throughout his entire life." (Transcript, p. 283).

79. McCoy-Johnson acknowledged that there was nothing "negative" in Appellant's personnel file.

Day Two

80. **John Michael Brown** is the Deputy Attorney General, a responsibility he assumed on March 28, 2016. His duties include serving as the Attorney General when Mr. Beshear is not present. Brown is also in charge of the operations of the Attorney General's office and is an Appointing Authority. Prior to his employment at the AG's office, Brown has been employed as the Secretary of the Justice and Public Safety Cabinet, a First Assistant County Attorney, and a District Court Judge. Brown has also taught Constitutional Law and Criminal Procedure at the University of Louisville's School of Law.

81. Brown stated that he may have met the Appellant, but he had very little, if any, personal experience with him. Brown was aware of the *Edward Parker* case, but did not know the details. He did recall that the course of action taken, dismissal of the case, was due to "potential problems involving presentation of testimony on Brady or Giglio issues." (Transcript, p. 332).

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[1] "KLEFPF" is an acronym for "Kentucky Law Enforcement Foundation Program Funds".

82. Brown described a Giglio impairment: "...in the Giglio situation...the Commonwealth or the State, depending on what jurisdiction you're in, must reveal to defense counsel any situation that might lead to – in this case not necessarily exculpatory, but evidence of impeachment against the integrity of a presenting officer...So the fact that there had been a judicial finding of a misstatement to a grand jury by Judge Wingate, then sets the stage that in any situation that the investigator was going to testify again that fact would be brought up and that officer would be subject to potential impeachment on his truthfulness in any other case." (Transcript, pp. 334-5).

83. Brown stated that during the course of McCoy-Johnson's fact-finding review process, she would periodically update him, but denied that he advised her on what course of action to take.

84. Brown next addressed the "Police Officer's Bill of Rights," KRS 15.520, which is a statute that acts as a "procedural guideline that protects local police officers in situations of discipline...it lays out a very specific criteria that the public is aware of and the officer is aware of, that if there is a charge or complaint brought against that officer, that officer has certain rights and procedures that will be followed." Brown stated that it does not apply to state executive branch investigators, which includes Appellant. (Transcript, p. 338.)

85. Brown noted that the statute states that it specifically applies only to local governments that receive KLEFPF funds. Brown explained that "KLEFPF" refers to Kentucky Law Enforcement Foundation Program Funds, which were created to enhance the professionalism of duly qualified, employed officers who are in good standing. However, the KLEFPF funding statute does not extend coverage to state Executive Branch Investigators. Complicating this issue is the fact that "the last budget bill passed by the General Assembly and signed by the Governor that will carry through this biennial awarded that stipend to other state officers, other state investigators, ABC, for example, Attorney General's, Fish and Wildlife, again some 300 people." (Transcript p. 340).

86. In Brown's opinion, the funding statute does not extend the due process coverage of the Police Officer's Bill of Rights to state Executive Branch Investigators. Brown noted that the statute involving the Police Officer's Bill of Rights was not amended to include that group of officers who were awarded stipends under the budget bill.

87. As for the decision to terminate Appellant, Holly McCoy-Johnson presented her recommendation of dismissal to Brown, and he concurred. In Brown's opinion, the false and misleading statements he made to McCoy-Johnson were enough to terminate, which was a separate issue from the Giglio impairment. In Brown's opinion, the *Royse* case had a practical effect on what his office could involve Appellant in: "...[I]f we do present him to testify in a case, the Giglio is going to require that we inform defense of this prior order and that will make him subject to impeachment and call his credibility into question before a jury." (Transcript, p. 342).

88. On cross-examination, Brown read for the record the definition of "officer" according to the KRS 15.520 (1)(h):

> Officer means a person employed as a full-time peace officer by a unit of government that receives funds under KRS 15.410 to 15.510 who has completed any officially established initial probationary period of employment lasting no longer than twelve months not including, unless otherwise specified by the employing agency, any time the officer was employed and completing the basic training required by KRS 15.404." Brown acknowledged that the definition does not specify that the officer must work for a "local government.

89. Brown affirmed that Appellant had received KLEFPF funds since the last biennial budget.

90. On re-direct examination, Brown read for the record KRS 15.520, Section 2:

> In order to establish a minimum system of professional conduct of officers of local units of government of this Commonwealth, the following standards are stated as the intention of the General Assembly to deal fairly and set administrative due process rights in certain disciplinary matters concerning those officer of any employing unit of government that participates in the [KLEFPF] administered pursuant to KRS 15.430, and, at the same time, to provide a means for redress by the citizens of the Commonwealth for wrongs allegedly done to them by officers covered by this section.

Brown also read for the record the definition of "local government" pursuant to KRS 15.420:

> Local unit of government' means any city or county, combination of cities and counties, state or public university, or county sheriff's office of the Commonwealth.

91. Brown affirmed that the Attorney General's office is not a local unit of government, and that Attorney General Investigators are KRS Chapter 18A merit employees.

92. On re-cross examination, Brown agreed that KRS 15.520(1)(h) and the section of that statute defining "Officer" appears to be conflicting.

93. At the end of Brown's testimony, the Appellee rested its case.

94. **Isabelle Sherer** retired from the Attorney General's office in July 2015, after working in the Office of Medicaid Fraud and Abuse as a Nurse Consultant (and later as a

Healthcare Data Administrator) for 16 years. Her duties there included assisting staff in understanding medical data and records and issues related to the Medicaid program.

95. Sherer stated that the investigative process in the office was "collaborative." She estimated that she worked with Appellant on dozens of cases. She described his work product as very thorough and, in her estimation, Appellant was "one of the best." She added that she found Appellant's character to be impeccable. (Transcript, p. 371).

96. The **Appellant, David Wilbers**, testified on his own behalf. He began his employment with the Attorney General's office, Medicaid Fraud and Abuse Division, in January 2007, as an Investigator II. Sometime after the *Lyon's* case, Appellant stated that he was promoted to an Investigator III. He testified that his job duties did not change at this time, but he did receive a salary increase. After the *Royse* decision came down, Appellant was put in a different role: he began doing background research related to investigations, and created files of internet and database searches. When Michael Brooks became the Executive Director, Appellant was allowed to return to investigations, but was admonished to record every contact that he had related to his investigations. Appellant explained that Brooks had been "an FBI lawyer in the Cincinnati Division and dealt specifically with Giglio agents. He told me that my situation was not good, but it was something that could be overcome..." (Transcript, p. 379).

97. When Mike Wright became Executive Director, Appellant was placed in an outreach officer role for a new Division called "Senior Advocacy." In his new role, Appellant made community presentations on healthcare fraud. Appellant was working in this capacity when he was terminated.

98. Appellant testified that prior to his dismissal, he had never been disciplined. His personnel file was introduced into the record as Joint Exhibit 1.

99. When Holly McCoy-Johnson first contacted Appellant to meet with him, he had asked her why she wanted to speak with him. He stated that he had to "inquire about ten times...It was pretty vague about what we were going to discuss." (Transcript, p. 384).

100. Present at their first meeting was Appellant, McCoy-Johnson, and Gordon Slone. Appellant testified that he tried to invoke his KRS 15.525 rights at that time "They said I didn't have rights under KRS 15.520, that I was a KRS Chapter 18A employee, and that I had more protection under 18A than 15.520."

101. Appellant suggested they delay the meeting until there was a reasonable discussion as to what statute was pertinent. McCoy-Johnson refused. "I was informed that if I didn't participate or answer questions that I would be terminated for insubordination," He stated. (Transcript, p. 385).

102. Appellant described the allegations against Edward Parker, a Behavior Analyst who had been charged with Medicaid fraud. Parker enlisted college students to perform client services for him which he billed to Medicaid as if he had performed them. When that practice

was questioned, he falsified documents. He also billed for completing evaluations of children he had never met.

103. Appellant addressed the statement that he gave to the *Parker* grand jury that Parker had been a psychologist since 2007, when in fact, he did not begin his practice until 2011. Appellant explained, "The curriculum for a behavior analyst has them, from graduate school, learning treatments and how to code them. So the '07 theoretically could have been – was correct from my point of view because he had been in contact with how to do it." (sic) (Transcript, p. 388). Robbins later explained to Appellant that the question "was more directed to his business, and I just misinterpreted the question…" (Transcript, p. 388).

104. As for the second misstatement he allegedly made to the *Parker* grand jury (that Parker was not allowed under his employment contract to "do outside work"), Appellant explained, "I said 'As an employee of Oakwood, he could not perform his private business dealings while at Oakwood on Oakwood time.'" Appellant affirmed that that statement was indeed accurate. (Transcript, p. 391).

105. Appellant explained the circumstances regarding his contact with Parker in the Boyle County jail. At the time Parker was indicted by the Boyle County Grand Jury, Parker's whereabouts were unknown. Appellant noted that Parker had had numerous attorneys, for a variety of different legal issues. Parker's family was located in Indiana. Before a warrant was served on him, however, his wife indicated that he would turn himself in, which he did on February 26, 2016.

106. As soon as the Boyle County jail alerted Appellant that Parker had turned himself in, Appellant informed Jesse Robbins and Keith Howard that he was going to Danville to interview Parker. He also "grabbed a Miranda form" on his way out. Howard reminded him to get a mugshot for the press release. (Transcript, p. 394).

107. During the 35-mile trip from Frankfort to Danville, Appellant received many phone calls. He affirmed that one of the calls had been regarding Parker's legal representation. As for why he told McCoy-Johnson the caller had been a female, Appellant explained: "…I had been talking to my daughter, I talked to two acquaintances that had called and my wife, and so I just – I remembered that I had been in conversations with females." (Transcript, p. 398).

108. Once Appellant arrived at the Boyle County jail, he passed into the "inner jail," where the intake desk was. He told the deputy jailer on duty that he was there to get a booking photograph of Parker. The jailer responded: "Who? Him?" and pointed to a man a few paces off. Appellant recognized the man as Parker. According to Appellant, Parker looked like he was in shock. Appellant walked over to him and introduced himself. When he asked if Parker was okay, Parker responded "No." (Transcript, p. 402).

109. Appellant then asked Parker if he wanted to talk, to which Parker responded "yes," by shaking his head affirmatively. Appellant then said to the jailer: "This guy wants to…talk to me. Is there a place we can go?" The jailer directed Appellant down the hallway.

Appellant took Parker to a room with a desk and two chairs. (Transcript, p. 402). At this point in time, Appellant turned on his digital recorder.

110. A copy of the transcript of this conversation was introduced into the record as Joint Exhibit 13.

111. Appellant was asked why he introduced himself on the recorded conversation if they had already talked at the booking desk. Appellant answered that he did it to identify the voices on the recording.

112. Appellant described Parker's demeanor as "mild hysteria...this was not a good situation." (Transcript, p. 404). Appellant testified: "I got to the Boyle County jail, and they were preparing for a shift change. There were trustees running around doing stuff, and I thought that it would be in the best interest of Doctor Parker and for the Attorney General's office that somebody go and assess him, calm him, and make sure that he knows that this isn't the worst thing that can happen. I had no intent on soliciting any evidential information from him, and I didn't." (Transcript, p. 404).

113. According to Appellant, he received a phone call at 1:28 p.m. informing him that Parker was now being represented by counsel; Parker was booked at 1:47 p.m. The shift change at the jail occurred at 2:00 p.m.; Appellant signed the jail's sign-in sheet at 2:27 p.m., on his way out of the jail after he had spoken to Parker.

114. Appellant characterized their conversation as an effort to calm Parker down and assess him, adding, "I mean, I did have a motive, that I wanted him to come in and talk to us. I'm not going to deny that." (Transcript, p. 405). Appellant described their conversation as Appellant doing most of the talking, and then, as Parker got more comfortable, Parker became more talkative. "And at the point where he starts talking related to the situation, I'm afraid he's going to say something, and I stop him and I leave." (Transcript, p. 406).

115. Appellant stated that he assumed Parker "had no idea what was going on," and his conversation with Parker was an attempt "to keep him informed. That's—you know, knowledge sometimes is one of those calming things, to know that this wasn't something he was going to be there for months." (Transcript, pp. 408-9).

116. As for why he did not read Parker his "Miranda rights," Appellant stated, "I was not questioning him for evidentiary statements related to the case." (Transcript, p. 409). Appellant testified that he cut Parker off when he thought Parker "was going down a path where he was going to start revealing information..." (Transcript, p. 411).

117. Appellant disagreed with McCoy-Johnson's characterization of his conversation with Parker as an "interrogation." He described his meeting with Parker as a "humanitarian effort." (Transcript, p. 411).

118. Appellant stated that after Parker filed the Motion to Dismiss, he discussed the matter with Jesse Robbins. Robbins noted that Appellant had "misspoke" relating to the date Parker began his employment. Robbins assured Appellant he would contest the motion. When asked why he had not corrected Appellant's testimony regarding the date, Robbins answered that he had missed it.

119. Appellant was asked to address the circumstances surrounding the *Lyon* case. Appellant explained that Melissa Lyon was a Certified Nursing Assistant ("CNA") who violated a patient care plan and nursing home policy by doing a "one person lift" of an elderly patient. During the lift, the patient suffered a spiral fracture of her leg. After seeing the injury, Lyon enlisted another aide to help her conceal the injury. (Transcript, p. 416).

120. Appellant admitted that he did give the victim's daughter the name of an attorney, but denied that he got paid for the referral.

121. Following the *Lyon* case, Appellant stated he got a positive evaluation, and was also promoted. As far as he knows, he was not the subject of any kind of investigation regarding his role in the case.

122. As for the *Royse* case, Franklin Circuit Judge Wingate found that Appellant made a false or misleading statements. Appellant testified to the grand jury that Royse had been employed for "several months" when she had actually been employed for 10 weeks. After Appellant gave his testimony, the prosecuting attorney did not attempt to correct his answer.

123. Appellant was not disciplined for his conduct in the *Royse* case, which was entered in 2013, and stated that he received an "Outstanding" evaluation in 2014. (Transcript, p. 420).

124. On cross examination, Appellant affirmed that he was employed in a state Executive Branch law enforcement position under the KRS Chapter 18A merit system, but stated that he believed he was also an employee covered by KRS 15.520 as well. As for his "promotion" after the *Lyon* case, Appellant acknowledged that according to a Position Action Notification, he was actually reclassified into the Investigator III positon on March 3, 2011. (Joint Exhibit 1).

125. Appellant affirmed that neither the *Lyon* nor *Royse* orders have been overturned, and both are still in effect. [**Hearing Officer Note**: The Logan Circuit Judge in the *Lyon* case dismissed the case without prejudice.]

126. Appellant stated that it was "not a firm rule" that investigators were not to meet or contact represented parties without their counsel. He added, "...I say that because every director and every manager had a different opinion of it. When I was first hired on, that was a firm and designated order, but as different directors came in, had different thoughts, it was loosened a little bit." (Transcript, p. 430).

127. Appellant acknowledged that when he was contacted by Parker on June 9, 2014, he specifically told Parker he could not meet with him because Parker was represented at that time. Appellant acknowledged that his refusal to meet with Parker was due to ethical concerns outlined in the Office of Attorney General's policies and procedures. (Transcript, p. 433).

128. When questioned why he felt it was necessary to speak with Parker, Appellant stated, "Would it reflect worse on the Attorney General's Office that I identified somebody in a crisis and didn't do anything and he committed suicide?" (Transcript, p. 435).

129. Appellant admitted that he never told Holly McCoy-Johnson in his interviews with her that he was concerned that Parker may have serious health issues, or was in need of a medical examiner. (Transcript, p. 442).

130. Appellant acknowledged that he did not admit to McCoy-Johnson until his second interview with her, on December 28, 2015, that he knew he was not to interview Parker at the Boyle County jail:

> Q. You later admitted to Ms. McCoy-Johnson in your second interview that you were not to interview Dr. Parker; isn't that right?
>
> A. That was information that came to me after our first discussion.
>
> Q. That you were not to interview Doctor Parker. You didn't know beforehand?
>
> A. Jesse Robbins informed me that he told me not to because he was represented. So that was – I didn't recall him saying –
>
> Q. Okay. So you're telling me now that when Jesse Robbins called you and told you that Mr. Parker was represented by counsel, he also instructed you not to meet with Mr. Parker?
>
> A. He said, "There's no need to talk to him." (Transcript, p. 443).

131. Appellant admitted that his statement at the September 30, 2016 meeting with McCoy-Johnson concerning where he was when he received the phone call informing him that Parker was represented, "could be" inaccurate. At the September meeting he said he was pulling into the jail; at at the December 16, 2016 interview he stated that he received the call while on the bypass in Danville. (Transcript, pp. 444-445).

132. As for why he wrote "Interview" on the sign-in sheet at the Boyle County jail, Appellant explained that because he had spoken to Parker it would "have been more inappropriate" for him to write "photo." (Transcript, p. 448).

133. On re-cross examination, Appellant was asked to address why he told McCoy-Johnson at the September 30, 2016 meeting that he spoke to Parker to "build rapport," but he testified at the evidentiary hearing that he spoke to him because he was seriously concerned about his health. Appellant answered that both answers were correct. (Transcript, p. 463).

134. At the end of his testimony, Appellant rested his case.

135. Appellee called **Gordon Slone** on rebuttal. Slone is an attorney employed by the Office of the Attorney General. He described his job duties as "90% writing open record and open meeting decisions. About 10% or even less of my job has to do with personnel-related issues assisting Holly McCoy-Johnson or her staff..." (Transcript, p. 465).

136. Slone stated that he was made aware of the *Parker* case on August 10 or 11, 2016, when he accompanied Holly McCoy-Johnson to a meeting with Michael Wright and Michelle Rudovich. They had questions relating to the possible personnel issues raised by employee conduct in the *Parker* case. The most important issue raised by Parker's Motion to Dismiss, in Slone's opinion, was that Appellant had misspoke during his grand jury testimony specifically, that he said Parker had been in business since 2007, when, in fact, the correct date was 2011. This testimony, in Slone's estimation, "misled" the grand jury. The second issue in the *Parker* case was Appellant's testimony regarding Parker's work outside of Oakwood, but Slone didn't "know the facts enough" to speak to the details. (Transcript, p. 468).

137. Slone was also aware of the allegation made in Parker's Motion to Dismiss that Appellant had improper contact with Parker at the Boyle County jail.

138. Slone was asked to describe the fact-finding review he conducted with Holly McCoy-Johnson. First, they received information from Wright and Rudovich concerning Appellant's past work history, specifically, the facts surrounding the *Royse* case. Next, Slone and McCoy-Johnson interviewed the following staff members: the Appellant, Jesse Robbins, Keith Howard and Joe Williams. They also gathered a number of documents, including phone records and records from the Boyle County Detention Center.

139. Slone acknowledged that he read a standard statement to Appellant before their first interview which is typically read at the outset or end of every personnel interview. The statement directs employees to answer truthfully and accurately.

140. Slone read into the record a portion of the transcript of the interview Slone and McCoy-Johnson conducted with Appellant on December 16, 2016:

> The purpose of this interview is fact-finding. We will be soliciting information from you concerning your work as an investigator with the Office of the Attorney General. The appointing authority, Holly McCoy-Johnson, is directing you to participate in this interview. Answer honestly and completely, and it's your duty to do so. This is a civil matter. There are no 4th or 5th Amendment rights implicated in this interview. You do

> not have a right to have an attorney present during the interview. Failure to answer truthfully or fully will be considered insubordination and may result in corrective or disciplinary action, up to and including dismissal. (Transcript, p. 475).

Slone read the same statement to Appellant at their first interview on September 30, 2016.

> Slone testified that at the September 30, 2016 interview with Appellant, Appellant told them that he had gone to the Boyle County jail with the intention of "building rapport" with Parker. Slone stated that Appellant had not mentioned at either interview that Appellant had any serious concerns about Parker's health. (Transcript, p. 476).

141. On cross-examination, Slone acknowledged that he told Appellant he had no rights under KRS 15.520. "But," Slone added, "We were very respectful of his rights under KRS 18A."

142. Slone was asked why Appellant's failure to remember the details of the February 26, 2016 phone call (informing him Parker was represented) mattered. Slone answered, "It matters a lot. [Appellant's] an investigator for the Office of the Attorney General. He is expected to testify before grand juries. He is expected to testify in matters that can lead to the imprisonment or loss of fortunes of people. It matters a lot that he's got to remember the details of his investigations and his actions." (Transcript, p. 481).

143. 101 KAR 1:345, Section 1 states:

> **Section 1. General Provision.**
>
> Appointing authorities may discipline employees for lack of good behavior or the unsatisfactory performance of duties.

144. KRS 18A.095(1) states:

> (1) A classified employee with status shall not be dismissed, demoted, suspended, or otherwise penalized except for cause.

145. Office of Attorney General Procedure Number 2.13, "Public Integrity & Professionalism," states in relevant part:

> I. **PURPOSE**
>
> As the chief law enforcement agency in the state, it is imperative that the Office of the Attorney General require the highest standards of public integrity from its employees to promote the interests of the public.

The mission of the Office includes preventing and prosecuting child abuse, protecting our seniors from scams and abuse, better addressing Kentucky's drug epidemic, and seeking justice for victims of rape. Integrity is indispensable to our mission. Employees are expected to act with honesty and adhere to the highest standards of moral and ethical values and principles through professional behavior, as well as personal behavior that may reflect upon the Office.

II. **STATEMENT**

This policy establishes the foundation, criteria and expectations regarding personal conduct as a representative of the Office of the Attorney General. Employees of the OAG are required to self-disclose violations of law or any legal orders representing a conflict with the mission of the Office of Attorney General, and to represent the Office with professionalism and decorum when wearing any item of clothing, security ID badge, or carrying anything that has the seal of the Office of the Attorney General that identifies an employee as a representative of the Office of the Attorney General, regardless of whether they are on or off duty.

III. **PROFESSIONAL CONDUCT**

Employees shall conduct themselves at all times, both on and off duty, in such a manner as to reflect favorably on the Office of Attorney General. Unprofessional conduct shall include any conduct that brings the OAG into disrepute or reflects poorly upon a member of the OAG, or impairs the operation or efficiency of the OAG or the employee.

FINDINGS OF FACT

1. Appellant began his employment with the Office of the Attorney General in January 2007, as an Investigator II. On March 1, 2011, his position was reclassified to Investigator III.

2. Appellant was informed of his dismissal by letter under the signature of Holly McCoy-Johnson on January 6, 2017. He timely filed this appeal on January 12, 2017.

3. Appellant, in his capacity as investigator, was assigned to the case of *Commonwealth of Kentucky v. Melissa Leann Lyon.* The defendant, Melissa Lyon, appealed her indictment which resulted in a trial by jury on September 16, 2010. Lyon alleged that the case had been brought against her as the result of "misconduct on behalf of an investigator employed

by the Office of the Attorney General," namely, Appellant. Lyon alleged that Appellant delivered to the daughter of the alleged victim the name and phone number of a plaintiff's attorney. Lyon further asserted that Appellant was "biased and that this act may have indicated an improper financial connection." (Joint Exhibit 7).

4. An Order Declaring Mistrial and Dismissing the Case Without Prejudice was entered on September 17, 2010, by Logan Circuit Court Judge Tyler Gill, who dismissed the case without prejudice in order "to allow the Commonwealth Attorney to freshly evaluate whether the case merits indictment." The Judge also found that "although the evidence concerning the investigator providing the names of a plaintiff's attorney to the family of the alleged victim might cause one to reasonably inquire as to whether there was a financial motive, those actions are also consistent with the absence of an improper motive." (Joint Exhibit 7).

5. Appellant was not disciplined for his conduct in the *Lyon* case.

6. On June 30, 2010, Appellant, in his capacity as Investigator, testified to the grand jury in the case of *Commonwealth v. Elizabeth Elaine Royse*, which resulted in her indictment. This case involved the alleged actions of Royse, a Licensed Practical Nurse (LPN), toward a patient at a nursing home, Golden Living Center.

7. Royse filed a Motion to Dismiss Indictment Due to Prosecutorial Misconduct after which Franklin Circuit Court Judge Thomas Wingate dismissed the indictment, finding that Appellant "made certain false and/or misleading statements to the Grand Jury in order to obtain the indictment in the case." Judge Wingate noted that Appellant had testified that Royse had worked at Golden Living for "several months," when she had only been employed there "eight weeks." (Joint Exhibit 5.)

8. Judge Wingate also took issue with Appellant's testimony that Royse had failed to notify her superiors about the patient's declining condition, when "in fact, Defendant proved that she contacted her superiors several times…she further demonstrated that she possessed no position of authority at Golden Living during her short employment there." (Joint Exhibit 5).

9. Judge Wingate further noted that the "crux" of the Commonwealth's case, as evidenced by Appellant's testimony, was that Royse had failed to properly follow through on lab orders for the patient in question. "Yet, Defendant proved at the hearing with this court that she made several notations for labs to be taken, but those notations were not followed through with by her day-shift co-workers." (Joint Exhibit 5).

10. In its unpublished decision, rendered September 27, 2013, the Kentucky Court of Appeals affirmed the decision of the trial court. This court agreed with Royse's argument that "…the prosecutor, through [Appellant], misled the jury and took simple mistakes and misunderstandings between Royse and her co-workers and made it appear to be conduct constituting a felony charge." (Joint Exhibit 6).

11. The Office of the Attorney General's Office of Medicaid Fraud and Abuse appealed this decision, but the Kentucky Supreme Court denied discretionary review.

12. While no disciplinary action was taken against Appellant for his conduct in the *Royse* case, it did affect his job duties. What was developed at the evidentiary hearing was that the Office of Medicaid Fraud and Abuse had a number of different Executive Directors during Appellant's tenure there, and each director reacted to Appellant's conduct differently. Specifically, Robin Bender decided to remove Appellant from investigations some time in 2012, after the *Royse* case was final. The next director, Mike Brooks, placed Appellant back in investigative duties, with the instruction to record all his interviews. The proceeding director, Mike Wright, put Appellant in an "outreach" role.

13. The *Royse* case also resulted in a "Giglio impairment" for Appellant, which would subject him to potential impeachment on his truthfulness in future cases.

14. On February 18, 2016, the Boyle County Grand Jury returned a three-count indictment against Edward Parker, charging him with what is commonly referred to as Medicaid Fraud. The case was presented to the Grand Jury by Assistant Attorney General Jesse Robbins. Appellant, as the Investigator assigned to the case, was the only witness to testify.

15. The day Parker turned himself in, February 26, 2016, Appellant traveled to the Boyle County jail to interview him. On his way there, Robbins called Appellant to inform him that Parker was now represented by counsel, and told Appellant that he did not need to speak to Parker. The men agreed that Appellant would procure a "mugshot" of Parker for a press release. (Transcript, pp. 165-166).

16. Appellant testified that when he arrived at the jail, Parker happened to still be in the booking area. According to Appellant's testimony, Parker looked "like he was in shock" and as if he were experiencing "mild hysteria." In an attempt to "calm him down and assess him," Appellant asked Parker if he would like to talk. The jailer pointed them in the direction of a private room. Parker turned on his microphone and their conversation was recorded. Appellant testified that when Parker started "talking related to the situation," he ended their discussion and left the jail. (Transcript, p. 406).

17. On August 1, 2016, Parker filed a Motion to Dismiss Indictment Due To Prosecutorial Misconduct. In the Motion, Parker alleged that Appellant made false and misleading statements to the grand jury, and that Appellant had inappropriate contact with Parker at the Boyle County jail.

18. After the Motion to Dismiss was received, Michelle Rudovich, then Assistant Director/Litigation Manager, and Mike Wright, then Executive Director, contacted Holly McCoy-Johnson in Administrative Services to discuss the claims Parker made in his motion against Appellant and Robbins. Rudovich also removed Appellant and Robbins from the case. She became attorney of record and entered into an Agreed Order of Dismissal.

19. McCoy-Johnson, with the assistance of Gordon Slone, another attorney in the Attorney General's office, began a fact-finding investigation and met with Appellant twice-- on September 30, 2016 and December 16, 2016. Appellant asked to assert his KRS 15.520 rights, which he was denied. According to McCoy-Johnson and Slone, Appellant's employment was covered solely under KRS 18A and 101 KAR.

20. The Hearing Officer finds that Appellant made material misstatements to the *Parker* grand jury. Specifically, when questioned by Jesse Robbins, the Attorney General's prosecuting attorney, "How did he [Parker] get paid through Medicaid?", Appellant answered, "Well, the way the system was when he started his business back in 2007 was he could not be a direct provider. So he would have to subcontract with a provider that for the client for him to receive the money. So the money kind of flowed backwards toward him." (Boyle County Grand Jury Testimony, Re: Ed Parker, Appellant's Exhibit 2). In truth, Parker did not begin his business as a Behavioral Analyst until 2011. At the evidentiary hearing, Appellant stated that he considered his grand jury testimony "theoretically" correct because Appellant was actually in graduate school in 2007, and part of the school curriculum was "learning treatments and how to code them." (Transcript, p. 388). Based on the plain language of Appellant's testimony ("[Parker] started his business back in 2007"), the Hearing Officer rejects Appellant's explanation of this misstatement, and finds it to be a weak effort to excuse incorrect testimony.

21. Appellant made a second misstatement to the Boyle County Grand Jury in regard to Parker's employment outside Oakwood when he stated: "Well he as an employee of Oakwood; so, his contract said he could not do any outside business at CAKY—I'm sorry, at Oakwood." (Boyle County Grand Jury Testimony, Re: Ed Parker, Appellant's Exhibit 2). In fact, Oakwood had approved Parker's application for private practice as supplemental employment. (Appellant's Exhibit 2). At the evidentiary hearing, Appellant defended this statement: "I said 'As an employee of Oakwood, he could not perform his private business dealings while at Oakwood on Oakwood time.'" (Transcript p. 388). As the above passage from the grand jury testimony indicates, Appellant did not make that clarification, and the Hearing Officer agrees with Parker's assertion that Appellant's statement "implied that [Parker] was violating company policy and had zero authority to even conduct a private practice outside his employment at Bluegrass Oakwood." (Parker's Motion to Dismiss for Prosecutorial Misconduct, Appellant's Exhibit 2).

22. The Hearing Officer rejects Appellant's defense that he spoke to Parker at the Boyle County jail as a "humanitarian effort," and as a way to calm down a man he was concerned may be in shock or even possibly suicidal. (Transcript, pp. 411, 435). This is particularly true in light of the fact that Appellant told McCoy-Johnson and Slone in the December 16, 2016 interview that he spoke to Parker primarily to build rapport in the hopes that Parker would come in later to negotiate a plea deal. (Joint Exhibit 3). It should also be noted that in the Hearing Officer's opinion, the tenor of Parker's voice in the recorded interview between Appellant and Parker at the Boyle County jail, is completely normal and his language is matter of fact. (Joint Exhibit 13). There is no indication in this recording that Parker was suffering anything approaching "mild hysteria." (Transcript, p. 404). Appellant's explanation at

the evidentiary hearing that he spoke to Parker because he was afraid for his mental health is self-serving and contrived.

23. The Hearing Officer rejects Appellant's assertion that he ran into Parker in the booking area, asked him if he wanted to talk, took Parker to a private room, then turned on his digital recorder and identified himself and Parker for the record. (Transcript, p. 402). In the recorded interview, Appellant first states, "I don't know if you remember me, I'm Reed Wilbers." Parker then answers, "I do remember you." (Joint Exhibit 13). In the Hearing Officer's opinion, this recording documents the two men seeing each other for the first time that day. The Hearing Officer finds Appellant's testimony at the evidentiary regarding this meeting to be untruthful.

24. The Hearing Officer finds the testimony of Michelle Rudovich credible as to the ethical requirements for interviewing an unrepresented defendant and that Appellant's conversation with Parker in the Boyle County jail was inconsistent with those requirements and inappropriate for an investigator in the Attorney General's office.

25. The Hearing Officer finds that Appellant made multiple conflicting statements to Holly McCoy-Johnson regarding the details of the phone call he received on his way to the Boyle County jail regarding the news that Parker had just obtained legal counsel. In McCoy-Johnson's opinion, these statements demonstrated a "failure to be truthful." (Transcript, p. 246).

26. The Hearing Officer finds Appellant's excuses and defenses for his actions and misstatements reflect an inability to accept responsibility for his mistakes. His conduct also demonstrates a lack of good judgment necessary to perform his duties as an Investigator of the Attorney General's office.

27. The Hearing Officer finds Appellant's effectiveness as an Investigator was impaired by the "Giglio" effect of the *Royse* case. According to McCoy-Johnson, there is no investigator position available in the Office of Medicaid Fraud and Abuse that does not involve testifying before a grand jury. While McCoy-Johnson testified that she did not base her decision to dismiss Appellant on the *Royse* or *Lyon* cases, she affirmed that she could not ignore them, and, in her opinion, both cases call into question Appellant's credibility.

28. The Hearing Officer finds that Appellant's inappropriate actions constitute just cause for his dismissal and his dismissal was neither excessive nor erroneous as established by all the surrounding circumstances, including the fact that Appellant's role as an Investigator for the Attorney General's office, which requires testifying before grand jury panels, requires the highest standard of public integrity, professionalism, and truthfulness. Appellant's conduct is in violation of the Public Integrity and Professionalism policy of the Office of the Attorney General. (OAG Policy 2.13, Joint Exhibit 9).

29. Appellant contends that he is covered by the due process provisions of KRS 15.520 which provide for a "minimum system of professional conduct for officers of local units of government" that participate in the Kentucky Law Enforcement Foundation Program Fund

(KLEFPF). KLEFPF is governed by the provisions of KRS 15.410 to 15.510, and defines "local unit of government" as "any city or county, combination of cities and counties, state or public university, or county sheriff's office of the Commonwealth." The definition does not include Executive Branch constitutional offices, such as the Office of the Attorney General.

30. KLEFPF defines "police officer" as a "full-time member of a lawfully organized police department of county, urban-county or city government, a sheriff or full-time deputy sheriff, including any providing court security or appointed under KRS 70.030, or a state or public university..." The definition clearly states that it does not include "any other peace officer not specifically authorized in KRS 14.410 to KRS 15.510." (KRS 15.420(2)). The Hearing Officer finds that an Investigator for the Attorney General's office is not a "police officer" under the KLEFPF definition.

31. Based on the plain language of the statutes above, The Hearing Officer finds that Appellant, as a state Executive Branch employee, is covered under the protections of KRS 18A, and that he is not entitled to the administrative due process protections of KRS 15.520.

CONCLUSIONS OF LAW

1. The Hearing Officer concludes as a matter of law that Appellant's conduct in the *Parker* case and during the fact-finding investigation as charged in the dismissal letter constitutes lack of good behavior and unsatisfactory performance of duties pursuant to 101 KAR 1:345 and is worthy of discipline.

2. The Hearing Officer concludes as a matter of law that the decision to dismiss the Appellant was supported by just cause and was neither excessive nor erroneous. KRS 18A.095(1) and (22)(c). The surrounding circumstances in this appeal, including Appellant's self-serving excuses for his misstatements and behavior, all support the finding of just cause.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **DAVID WILBERS V. OFFICE OF THE ATTORNEY GENERAL, (APPEAL NO. 2017-007)** 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 Colleen Beach** this 7th day of December, 2017.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Samuel Flynn
Hon. Stephen Wolnitzek

COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

ANDY BESHEAR
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITOL AVENUE
FRANKFORT, KENTUCKY 40601
(502) 696-5300
FAX: (502) 564-2894

SENT BY CERTIFIED AND REGULAR MAIL AND DELIVERED BY HAND

January 6, 2017

Perur

Mr. David Reed Wilbers

Dear Mr. Wilbers:

Having considered all statements made on your behalf during your pre-termination hearing held on January 5, 2017, I have determined that your dismissal is appropriate as outlined in my letter to you dated December 28, 2016.

Therefore, based on the authority of KRS 18A.095, and in accordance with 101 KAR 1:345, Section 1, you are notified that you are dismissed from duty and pay effective January 10, 2017 for the specific reasons set forth as follows:

Lack of Good Behavior and Unsatisfactory Performance of Duties

Job Duties: As an Investigator III with the Office of Medicaid Fraud & Abuse Control ("MFCU"), Investigations Branch since January 1, 2008, your duties include conducting professional level investigations of allegations of healthcare fraud committed against the Kentucky Medicaid Program and coordinating and investigating allegations of patient abuse, caretaker neglect, and the financial exploitation of vulnerable adults by Kentucky Medicaid Program providers and their employees. You may be called upon to testify before Grand Juries and in the prosecution of criminal matters. You are vested by law with full police powers, holding a special position of public trust and are mandated to maintain the high level of integrity and truthfulness expected of an employee in the Office of the Attorney General. Under OAG

Policy 2.13 Public Integrity and Professionalism, you have failed to meet these standards of integrity and truthfulness as set forth below:

Recommended Order
Attachment A

EXHIBIT
tabbies 4

Parker Case

You were assigned the investigation of Edward Donzell Parker, a Licensed Behavior Analyst, regarding alleged Medicaid Fraud and you testified as the only prosecution witness before the Boyle County Grand Jury on February 18, 2016. The Grand Jury returned a three-count felony indictment against Dr. Parker. *Commonwealth v. Edward Donzell Parker*, Case No. 16-CR-0058, Boyle Circuit Court. Attorneys for Dr. Parker filed a motion to dismiss in which they alleged that you made false and misleading statements to the Grand Jury that resulted in prejudice to Dr. Parker. Specifically, the motion alleged that you testified that Dr. Parker started his business, Bluegrass Autism Services, in 2007, when in fact he did not start his business until 2011 and that you testified that Dr. Parker could not do any business outside of his employment at Bluegrass Oakwood, even though the prosecution was in possession of Dr. Parker's personnel file indicating he had approval. After that motion to dismiss was filed, the Office of the Attorney General moved to dismiss the case with prejudice and an Agreed Order dismissing the case was accepted by Judge Darren W. Peckler, Boyle Circuit Court, on September 26, 2016.

Fact Finding Review of Parker Case

The dismissal of the Dr. Parker case called for a fact-finding review of your role in this matter. As part of that review, Assistant Attorney General Gordon Slone and I interviewed you on September 30, 2016, at the OAG Capitol offices, regarding your interaction with Dr. Parker. You stated that you went to the Boyle County Detention Center ("Detention Center" or "jail"), Danville, Kentucky, on February 26, 2016, upon learning that Dr. Parker had turned himself in, to interview him. You stated that when you left the Frankfort office, you believed that Dr. Parker was unrepresented by counsel. You stated that when you pulled into the drive of the jail, you received a telephone call from the office on your work phone informing you that Dr. Parker was represented by counsel. You stated that, once you learned that Dr. Parker was represented, you decided to only get a booking photo of him from the jail.

You stated that you were allowed into the jail's intake area and, when you walked in, Dr. Parker was standing there next to the desk. You told me that "the guy's definitely out of his element. He's on the verge of freaking." You then asked Dr. Parker if he remembered who you were and he agreed that he did, and that you next asked him if he was "up for talking a little bit." According to you, Dr. Parker agreed. You then got your recorder out, turned it on and were directed to go to an interview room by a jailer who was working the intake. You spoke with Dr. Parker and recorded it. You later put the recording of that conversation into JustWare, the investigative and litigation management tool for cases in the MFCU, with the description "Parker interview."

Regarding your grand jury testimony that Dr. Parker had started his business in 2007, rather than 2011, the actual year that he went into business, you stated: "I misspoke, plain and simple. I knew that he had entered graduate school at that time."

In a follow up interview with me and Mr. Slone on December 16, 2016, you said that you knew that you could not interview Dr. Parker regarding the investigation since he had representation, unless Dr. Parker waived his Miranda rights.

Determinations Regarding Your Statements

After a review of my interviews with you, other witnesses, records obtained from the Boyle County Jail, and the interview you conducted with Dr. Parker at the jail, I have identified several inconsistencies in the statements you have made to me that cause me to believe you have made false or misleading statements to me.

First, in your September 30, 2016, interview, you stated that you received the phone call from the office, about Dr. Parker being represented, on your work cell phone when you pulled into the drive of the jail, and that the call was from a female. However, in your recorded interview with Dr. Parker, you told a jail staff member that you had received the call about Dr. Parker being represented when you were in Harrodsburg. Furthermore, in an interview with Staff Attorney III Jesse Robbins, on October 6, 2016, he stated that he called you to inform you that Dr. Parker was represented by counsel. Mr. Robbins has provided his personal cell phone records showing that he called you on your personal cell phone, rather than your work cell phone, at 1:28 p.m. on February 26, 2016. Your version of that phone call is also contradicted by the records of your state issued work cell phone which show that you did not receive any calls on that phone that afternoon. By the December 16, 2016 interview, you claimed that you got the call about Dr. Parker being represented while on the bypass at the overpass in Danville, that the call made you miss your turn, that you got lost and had to first stop at a fire station, before crossing the road, to a store at the mall to ask for directions to the jail. I find your multiple versions of events not to be credible.

Second, in contradiction to your September 30, 2016, representation to me that, after receiving the phone call about Dr. Parker being represented, the purpose of your visit to the jail on February 26, 2016, was only to get a booking photograph, a review of the jail sign-in sheet, under "Reason for Visit," you wrote: "Interview." You also told me that you asked for the photo before you started talking with Dr. Parker, but your recording of the Dr. Parker interview reflects that you asked for the photo when you were ending your interview with Dr. Parker. It is my determination that, despite knowing that Dr. Parker was represented by counsel and your December 16th admission that you could not interview him about the case, you interviewed Dr. Parker anyway.

Third, in your September 30, 2016, interview, you stated that you saw Dr. Parker standing by the desk in the intake area and that you introduced yourself before going into a room where you then turned on your audio recorder. In contrast to your statements to me, the audio recording of your interview with Dr. Parker reflects that you recorded the initial introduction rather than first introducing yourself and then asking if Dr. Parker wanted to talk.

The audio recording of the Parker interview is inconsistent with your statement to me on how you came in contact with Dr. Parker. My conclusion is that you intended to interview Dr. Parker when you entered the jail despite telling me on December 16, 2016, that you knew that you could not interview Dr. Parker regarding the investigation since he had representation, unless he "waived his rights."

Fourth, during the September 30th and December 16th interviews, you stated that you spoke to Dr. Parker to try to help him "feel better," to help "build rapport" and explain the process to him. You stated on December 16, 2016, that had Dr. Parker made incriminating statements, you would have stopped him. However, the February 26, 2016 Wilbers/Dr. Parker interview shows that you did not stop him when Dr. Parker was making statements that could be seen as incriminating:

Dr. PARKER: So, you know, I definitely have a story to tell.
DAVID REED WILBERS:· Okay.
Dr. PARKER· And, you know, it's got a -- and with hindsight being 20/20, it's got a few -- I was dumb-- moments in it, but for the most part, there was -- there was nothing malicious --
WILBERS: Got ya.
Dr. PARKER:· -- in terms of – of - of Medicaid fraud.
WILBERS: Got ya.
Dr. PARKER:· Yeah.· Some mistakes were made, but I'm not a bad guy.· I'm in this to help people.· I enjoyed having the company. I enjoyed employing people and helping people out -- helping, shaping the -- the behavioral analytic skills of the people that I employed, and I've got several people who worked under me who went off and have gotten their certifications and, you know, they're off doing their thing now.· So I'm no -- I
I -- I don't believe I'm a criminal.· I've made mistakes and as soon as those mistakes were identified, those funds were -- were -- were paid back, so
WILBERS: I think I --

Your statements and actions are consistent with an investigator interrogating a defendant.

Finally, you have been an investigator with the OAG for eight years and in law enforcement since 1985, according to your personnel file. However, during the December 16, 2016, interview, when I asked you to explain the reason that you could not interview Dr. Parker upon learning that he had counsel you replied with vague answers before finally stating "I think it's a constitutional right, I'm not sure." You also stated that "there's no black and white in this."

Prior Relevant Work History:

In a criminal prosecution, *Commonwealth of Kentucky vs. Royse*, 2013 WL 5436523 (Ky. App. Unpub. 2013) Franklin Circuit Court, 10-CR-00144, Judge Thomas Wingate determined that you had made "false and/or misleading statements to the Grand Jury in order to obtain the indictment..." In his order of January 19, 2012, dismissing that case, Judge Wingate specifically cited your statement that the defendant in that case had worked at the Golden Living Center "for several months," when in fact the defendant had only been employed for eight weeks.

In another case, *Commonwealth v. Lyon*, 09-CR-00240, Judge Tyler L. Gill, Logan Circuit Court, in declaring a mistrial and dismissing the case, recounted that the defendant's

attorney alleged misconduct on your part because you had delivered the name and phone number of a plaintiff's attorney to the daughter of the alleged victim. The Court's order of dismissal, entered September 17, 2010, stated: "That plaintiff's attorney ultimately filed a civil action on behalf of the alleged victim. The upshot of the Defendant's allegation was that the investigator was biased and that this act may have indicated an improper financial connection between the plaintiff's counsel in the civil action and the investigator – and therefore an improper motive on behalf of the investigator to obtain a criminal conviction. The Court determined that if an improper financial motive existed, this fact could theoretically be relevant if it were also shown that the investigator could have manipulated evidence or testimony to the detriment of the Defendant."

In light of your false and/or misleading testimony in the *Royse* case, and the court's finding of improper action in the *Lyon* case, your statement to me that you merely "misspoke" during your Grand Jury testimony when you falsely stated that Dr. Parker started his business in 2007, is not credible. An Investigator III with your experience, and having caused the dismissal of two prior criminal cases, knew, or should have known, that misstatements of any kind would jeopardize the important public service of the Office of the Attorney General.

Your false and/or inaccurate testimony before the *Parker and Royse* grand juries, your wrongful action in the *Lyon* case, and your false statements to me reflect a lack of good behavior and unsatisfactory performance of duties. The Office of the Attorney General, Policy/Procedure Number 2.13, July 11, 2016, states that "Integrity is indispensable to our mission. Employees are expected to act with honesty and adhere to the highest standards of moral and ethical values and principles through professional behavior, as well as personal behavior that may reflect upon the Office." You signed receipt of this policy on July 19, 2016.

Your false statements to me reflect a failure to act with the integrity required of an employee of the Office of the Attorney General. As you may be required to testify before grand juries and courts, your demonstrated failures to be truthful show that you cannot perform the minimum requirements of your job duties. An investigator who has repeatedly demonstrated a lack of attention to detail and misrepresentation of information cannot be effective nor entrusted to represent the Office of the Attorney General and the Commonwealth. Pursuant to 101 KAR 1:345 Section 1, you have clearly engaged in unsatisfactory performance of your duties and lack of good behavior, as detailed above.

You were issued a letter on December 28, 2016, notifying you of my intent to dismiss you from employment. At your request, a pre-termination hearing was conducted on January 5, 2017, in the Conference Room of the Office of the Attorney General, Capitol Building, 700 Capitol Avenue, Frankfort, Kentucky. I conducted the pre-termination meeting with you in the presence of your attorney, Hon. Stephen D. Wolnitzek, and Assistant Attorney General Gordon Slone.

During the pre-termination hearing, you made statements regarding your service to the Office of the Attorney General and questioning whether there was some option other than dismissal. Your attorney also made statements questioning the reason for your dismissal.

I have considered the statements you and your attorney made during your Pre-Termination Hearing but those statements have not persuaded me to alter my determinations as set forth above or my decision to dismiss you from employment.

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

Pursuant to KRS 18A.032, you will not be certified on future registers for employment within the Office of the Attorney General.

In accordance with KRS 18A.095, you may appeal this action to the Personnel Board within sixty (60) days after receipt of this notice, excluding the date notification is received. Such appeal must be filed in writing using the attached appeal form and in the manner prescribed on the form.

Sincerely,

Holly McCoy-Johnson

Holly McCoy-Johnson
Designated Appointing Authority

Attachment: Personnel Board Appeal Form

cc: Secretary, Personnel Cabinet
Personnel file

Revised 12-15-94 KENTUCKY PERSONNEL BOARD FORM #18

APPEAL FORM

ALL APPEALS TO THE PERSONNEL BOARD MUST BE ON THIS FORM

This appeal to the Kentucky Personnel Board is hereby filed pursuant to the provisions of KRS Chapter 18A. The following information is provided as required by law.

For Official Use Only

NAME: _____
(LAST) (FIRST (MIDDLE) (MAIDEN) (SOC. SEC. NO.)

HOME ADDRESS: _____
(STREET) (CITY) (STATE) (ZIP CODE)

WORK STATION ADDRESS: _____
(STREET) (CITY) (STATE) (ZIP CODE)

HOME PHONE NO: _____ WORK STATION PHONE NO: _____

CABINET OR AGENCY: _____

NAME OF APPOINTING AUTHORITY: _____

REPRESENTED BY ATTORNEY: ☐ NO ☐ YES

ATTORNEY'S NAME, ADDRESS AND PHONE NO: _____

I AM A:
☐ Classified employee ☐ Unclassified employee
☐ Applicant for employment ☐ Eligible on register

I AM APPEALING THE FOLLOWING ACTIONS: (Check appropriate box or boxes)

☐ DISMISSAL
☐ DISCIPLINARY FINE
☐ EMPLOYEE EVALUATION
☐ APPLICANT REJECTION
☐ REMOVAL FROM REGISTER
☐ DEMOTION
☐ INVOLUNTARY TRANSFER
☐ REALLOCATION
☐ DENIED, ABRIDGED OR IMPEDED RIGHT TO INSPECT OR COPY RECORDS
☐ SUSPENSION
☐ LAYOFF
☐ RECLASSIFICATION
☐ DISCRIMINATION Circle those that apply [race, color, religion, ethnic origin, sex, disability, political, age (over 40)]
☐ OTHER PENALIZATION (Specify):

CLASSIFIED, ELIGIBLE OR APPLICANT, PREPARE THIS SECTION

The following is a short, plain, and concise statement of the facts which relate to the action I am appealing:

UNCLASSIFIED EMPLOYEE, PREPARE THIS SECTION

The following is a short, plain, and concise statement of reason or cause given for dismissal or other penalization:

DATE OF RECEIPT OF NOTICE OF APPEALED ACTION: (Attach a copy of any written notice which you received relating to this Appeal.) _____

_____
SIGNATURE DATE

_____
ATTORNEY'S SIGNATURE (if any) DATE

For Official Use Only

THIS FORM IS TO BE MAILED OR DELIVERED TO:

KENTUCKY PERSONNEL BOARD
28 FOUNTAIN PLACE
FRANKFORT, KENTUCKY 40601