

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2018-059

BRIANNA BROWN

APPELLANT

VS.

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

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

*** **

The Board, at its regular February 2019 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated January 8, 2019, 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 13th day of February, 2019.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Jennifer Wolsing
Hon. Jeremy S. Aldridge
Mr. Jay Klein

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2018-059

BRIANNA BROWN

APPELLANT

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

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

** **

This matter came on for evidentiary hearing commencing on August 1, 2018 and resuming on November 5, 2018, at 9:30 a.m., ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. John C. Ryan, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by KRS Chapter 18A.

Appellant, Brianna Brown, was present and was represented by the Hon. Jeremy Aldridge. The Agency/Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Jennifer Wolsing.

This matter was the subject of at least two (2) pre-hearing conferences at which the issues were defined and other pending matters requiring attention dealt with. Although Appellant was not opposed to mediation, the Agency signaled that it had no interest therein.

BACKGROUND

1. By letter of March 2, 2018, over the signature of J. Alan Sisk, designated Appointing Authority, Cabinet for Health and Family Services (Cabinet), Office of Human Resource Management, Brianna Brown received notice of her termination from her position of Social Service Worker I in the Department for Community Based Services (DCBS), Salt River Trail Service Region, effective the following day. The letter, a true copy of which is attached hereto as "**Recommended Order Attachment A**," pointed out that the employee was at the time serving an initial probationary period, and thus afforded no right of appeal from the action other than "...you may file a claim of discrimination with the Kentucky Personnel Board if you believe the action was based on unlawful discrimination." As will be evident, the letter further alerted the recipient that any claim must be filed within 30 days and in writing.

2. By appeal form officially received on March 29, 2018, Ms. Brown took issue with the action under "Dismissal," "Employee Evaluation," and "Discrimination – Race/Color/Religion/Political," and further wrote:

I feel I was terminated as a result of discrimination and harassment.

3. Upon convening the evidentiary hearing **Appellant, Brianna Brown**, offered her own testimony. She commenced with the Cabinet on July 1, 2017, having previously served as an Intern. Briefly discussing the process of her termination, she recalled that she was called into the office of her second-line supervisor to be informed that her services were no longer needed. Her probationary period of nine months was to have ended on or about April 1, 2018. Her employment ended, therefore, approximately 27 days before the end of probation.

4. Appellant's supervisor during her term was Jasmine Thornton, DCBS Family Services Office Supervisor. Appellant felt belittled and harassed by the supervisor at various points in her tenure, and at one or more undisclosed points complained of the treatment to upper management. She urged that these complaints may have resulted in her being seen as a "troublemaker," possibly contributing to her early termination. The perceived slights took the form of comments to her by Thornton which she felt to be as snide or inappropriate, such as inquiring of her whether she had ever used Passport, later explained to be a form of government-provided healthcare. She recalled that the supervisor had laughed while making this inquiry, as if posing it in a sarcastic manner. Upon at least one occasion, in a referral involving a domestic violence situation, an email from an attorney came to her. Appellant, being new in the position, forwarded the email to the supervisor seeking her input, whereupon the response was "Show me the policy where you're not to follow my directions." Although the supervisor, following a conference among herself, the supervisor, and the second-line supervisor, later apologized for this comment, Appellant had felt "humiliated and stupid," and worried that she did something wrong by merely asking for help.

5. Turning to the matter of her political affiliation, Appellant recalled that while returning from an investigation the subject of politics was broached; she became uncomfortable therewith and just "sat back" during which the supervisor stated, "Oh God no, you're a Democrat...that's disgusting, I bet you voted for Hillary."

6. Appellant also felt that her religious beliefs were demeaned or, at least, discussed. She recited a circumstance in which she was waiting with other social workers in a conference room at the Hardin County, Kentucky, courthouse to attend a court hearing. While there the manager (Thornton) made one or more comments about her being a Christian and laughed or chuckled about it. Upon another occasion, she was working in her assigned office with Christian music playing in the background, whereupon the manager came by and stated, "Ugh, what is this, church music?"

7. Although she was never formally written-up for any infractions, Appellant perceived that she was treated differently than others similarly situated and some notations may have been made concerning her shortcomings without any discussion with her. She viewed that she was required to submit more extensive documentation of her travel, visits, and other events than her coworkers. However, to her knowledge, no complaints concerning her performance or behavior were received from anyone outside of the agency, such as from county attorneys, judges, or clients.

8. Under cross-examination, Appellant recited her understanding of Passport to be a form of government-provided health insurance or care. Further explaining her concern with the supervisor having broached the subject, Appellant, who is biracial, submitted that, in her view, a perception exists that African-Americans are too poor or impoverished to afford the coverage and instead opt for welfare. She consequently felt that the manager was belittling her in inquiring if she was familiar therewith.

9. Pressed concerning other interactions with the supervisor, Appellant conceded that she no longer possesses the email referenced in her prior testimony, adding that the response to her inquiry concerning it made her feel that the manager was attempting to make her job more difficult. She viewed that others making similar inquiries received the information which they needed without sarcasm or negative comments. She acknowledged that no other persons were present in the vehicle when the manager referenced her political views, nor did others overhear any discussion of her religion or music preferences.

10. The Agency pressed Appellant relative to one or another conference with second-line supervisor Melissa Farmer. Further addressing the practice of written comments or review of her performance which she touched upon in her prior testimony, Appellant urged that Farmer confirmed that the comments, presumably entered by Supervisor Thornton, should have been presented to Appellant at the time of entry and that Farmer was unaware that this did not occur until so informed by Appellant. These related to certain overtime incurred allegedly without permission, issues of training, and a failure to complete one or another training course upon a timely basis. Also addressed was allegedly late Disposition Court Reports; Appellant insisted this aspect was and is a chronic and universal problem among nearly all social workers.

11. The Agency quizzed Appellant concerning her awareness of and implementation of one or more work plans, presumably designed by Supervisor Thornton to aid her work performance. Appellant acknowledged that although such plans were routinely supplied, the suggested blueprint could not always be complied with due to the workload and mix of duties occurring simultaneously, thereby necessitating reallocation of priorities. She defended any asserted failure to have complied with any particular plan, citing the constant press of new casework coming in and the urgent nature of some aspects thereof.

12. Under brief redirect and further cross-examination, Appellant conceded that the previously-referenced Disposition Court Reports assigned to her were often not timely but reiterated that nearly all of the workers encountered this problem. She pointed out that the caseloads are quite heavy, notably exceeding a comfortable or recommended workload of which the courts were aware and understood, and concerning which tardiness she received no complaints. Appellant was unable to comment concerning any comparison of her own performance to that of others also in initial probationary status.

13. **Justin Wade Cave** is a Social Worker with the Agency, assigned to Marion County, Kentucky at the time of hearing. He previously served in Hardin County under several supervisors, the last of whom was Family Services Office Supervisor Thornton. His term with Thornton consisted of approximately one year and ended on August 1, 2017. He was assigned to the same team as Appellant.

14. This witness did not overhear or observe any negative communications between Appellant and Supervisor Thornton, nor did he witness any inappropriate treatment. Appellant did complain to him, recalled to be upon an almost daily basis, that she felt uncomfortable with the manager and perceived her environment to be unpleasant.

15. The witness asserted that his own disposition of court reports were ordinarily timely. He recalled that Thornton implemented a work plan process near the end of July 2017, just prior to his departure. He described the nature thereof for the record, noting that he was not always able to complete all of the plan requirements due to the volume of referrals at the time, which he estimated to be two or more each day.

16. Under brief cross-examination, Cave acknowledged that he was occasionally late with his case reports, but not often. He expressly denied ever hearing or personally observing any of the comments attributed to Thornton by Appellant concerning her religion, political views, race, or other characteristics, either personal or job related.

17. **Priscilla Zuniga** has been a Social Services Worker for approximately three (3) years, currently assigned to Hardin County, Kentucky. She worked alongside Appellant upon nearly a daily basis. Although not assigned to Thornton, she was in a position to observe the interaction between the supervisor and Appellant.

18. The witness recalled one or more instances of what she deemed to be inappropriate comments directed to Appellant. Upon one specific occasion, in the presence of several workers awaiting court hearings in a Hardin County conference room, the supervisor was heard to say to Appellant, "I bet you use ChristianMingle.com." She perceived this to have been volunteered in a condescending tone. Upon another occasion, during which Appellant was preparing a referral after interviewing a nine- or ten-year-old child and an adult involved, a bruise was observed on the child's arm. In addressing the matter, the supervisor was seen "talking down" to Appellant, utilizing condescending language, and frequently interrupting her. She recalled that others were present and at least two of them commented upon Thornton's negative demeanor. She also alluded to an issue surrounding certain overtime which Appellant incurred, initially cited as improper but ultimately deemed to have been previously approved. In summary, this witness viewed, or at least perceived, that the supervisor's treatment of Appellant, as compared to other team personnel, was "extremely harsh." The Agency conducted no cross-examination of this witness.

19. **Angela Ball** served, at the time of hearing, as a Victims' Advocate with Silverleaf Services, a sexual trauma recovery center which operates a rape crisis center in Hardin County, Kentucky. Her prior position was with the Agency as a member of the team headed by Jasmine Thornton, which job she assumed in May 2017 and departed from in November 2017.

20. This witness was regularly in the presence of the supervisor and Appellant and observed the supervisor's demeanor toward her, which she intimated to be condescending. She cited, as an example, one occasion upon which Thornton advised Appellant, "I'm up here, you're down (here)." This remark signaled to the witness that, in addition to the supervisory/worker

arrangement, the manager was being more personal in her treatment of Appellant. She perceived the treatment of Appellant to be uneven and that she was being targeted for criticism. For example, she recalled upon one or more instances wherein Appellant would ask advice concerning policy or procedure; Thornton's reaction thereto signaled an impression that she perceived, incorrectly in the view of this witness, that Appellant was challenging the particular policy, although merely seeking advice.

21. The witness related that she was also criticized by the supervisor. She had encountered issues with dealing with her workload and, in addressing the concerns, the manager advised her that if she could not "keep up" then perhaps she was in the wrong position, since work in Hardin County is fast paced with high volume. It was the impression of the witness that the manager's focus as to that aspect had more to do with upholding her own reputation, and was concerned as to how the performance of her team reflected upon her. She acknowledged receiving one verbal reprimand during her brief time with the team. The Agency had no cross-examination of this witness.

22. Appellant offered the testimony of **Krista Deibler**, a Social Worker employed by the Agency in Hardin County who commenced her probationary service on August 18, 2017. She is not supervised by Ms. Thornton, except under an "on-call" arrangement.

23. This witness discussed having overheard a conversation between Appellant and the supervisor which was over a speakerphone earlier in 2018. Details were that the witness and Appellant were executing an Emergency Custody Order (ECO) to remove a child from a home around 10:30 p.m. Appellant called Thornton for guidance, having already commenced preparation of the requisite documentation. In the course thereof, in the view of the witness, the supervisor was curt and critical, advising at one point, essentially, "You need to listen to me, do what I say, I'm your boss." The witness stepped out of earshot at that point for the reason that the discourse made her uncomfortable, demonstrated a lack of respect, and did not constitute a worthy response to the inquiry.

24. The witness acknowledged that she has been late with her reports, noting that tardiness is a chronic problem among most or all of the workers. Although routinely present for requisite appearances and awaiting her turn at court, the witness heard no derogatory comments from the court or other court personnel concerning Appellant's work product or performance. Under very brief cross-examination, she had no knowledge concerning whether Appellant was authorized to prepare or execute Emergency Custody Orders.

25. Appellant having completed her proof-in-chief upon the first day of testimony, commencing with the second day, the Agency offered the testimony of **Jasmine Thornton**, Family Services Office Supervisor (FSOS) now assigned to Breckinridge County. At the time Appellant was serving her probation, the witness was her supervisor in Hardin County. She has been with the Commonwealth for 6.5 years, including two years as a manager. She depicted the primary duties of her position to be the supervision of Social Service Workers and Clinicians, while providing guidance and direction for those personnel; she also controls case assignments.

26. The witness recalled that Appellant came to her to begin a mandatory nine-month probation, ultimately not completed. She reviewed and presented a three-month probation evaluation, which she performs for all workers in that status, made up for Appellant on November 6, 2017. She also supplied and filed a time log chart, which was allowed over Appellant's objection. She explained that the 90-day evaluation revealed certain concerns with Appellant's performance, including a failure to complete specified training depicted to be important at this stage of the probation. The training is a prerequisite to complete the probation and, until accomplished, the trainee was not authorized to accept or investigate sexual abuse cases, a critical activity. When approached about not having completed the training, Appellant had reacted that she would accomplish it before the end of her probation. The witness pointed out that this was unacceptable, since she was already two months delinquent. She noted other concerns were raised in the evaluation as well.

27. The witness continued that she encountered issues with Appellant's use of overtime, offering a representative timesheet as an example thereof. She explained that Appellant's use of overtime without prior approval was problematic in that management was unaware of her whereabouts. Further, no noteworthy results from this practice was ever received. When quizzed about it, Appellant became argumentative and appeared to disregard the supervisor's suggestions or input. She recalled numerous discussions with Appellant concerning her overtime usage throughout her probation.

28. The witness produced and discussed a work plan that she prepared for Appellant outlining requisite tasks to be completed for the particular week, designed to "keep her on track and get her caseload in compliance." However, Appellant failed to fully comply therewith. Additional plans were designed, specifically for September 5, September 18, and September 25, 2017, undertaking to aid Appellant in completing her assigned work; these likewise were ineffective in accomplishing the purpose as were two more such plans for October, copies of which were offered in the course of her testimony.

29. The witness continued that an unusual quantity of work plans for Appellant were generated due to her chronic inability to remain current upon her assignments, a critical aspect. She explained that in the service requirements under scrutiny, welfare of children is involved. Failure to timely perform the service and complete the documentation places them at risk, because no noteworthy assessment of their needs and placement can be accomplished without current and accurate information. However, she continued, throughout this term, i.e. October/November/December 2017, her conferences with Appellant found her to be "very argumentative" demonstrating an apparent refusal to follow directions. Further, the witness viewed that Appellant was overanxious to remove children from their family, but reluctant to assess other relatives for placement with them, although seen as the best practice, rather than sending them to foster care. Discussions with Appellant often brought a negative reaction, along with effort to defend or justify that which she desired to do.

30. The witness pointed out that Appellant performed certain functions well, including supplying excellent documentation and writing skills for work actually completed. She also was professional with her peers and others in the community.

31. Appellant's six-month probation evaluation was completed on January 19, 2018. In making it part of her testimony, the supervisor pointed out that as of that time Appellant still had not completed the previously-discussed, required training. She insisted that she had had no time to take care of it and again promised that it would be accomplished by the end of probation. There were also problems observed in completing requisite home visits and their reports, with assigned cases remaining outstanding and incomplete. Appellant reacted that shortage of time prohibited her from performing this work as scheduled.

32. The witness continued that Appellant remained chronically in arrears with her casework and the requisite reports. These were routinely due each Friday, whereas Appellant produced hers on the Monday or Tuesday thereafter. The supervisor prepared a seven-month probation evaluation, a rare but necessary step due to certain now-urgent issues with her performance. The oft-discussed training remained uncompleted for the reason, recalled by the witness, that she failed to appear despite being scheduled. The manager continued to prepare additional weekly work plans in an effort to coach Appellant toward better use of her workday and scheduling. However, these steps were only partially successful. She presented one or more items of material in the course of her testimony which were utilized to aid Appellant in accomplishing her assignments. During her presentation, she supplied and discussed a series of emails identifying a variety of issues with Appellant's work product, including a complaint from a family with whom she was working. Much of what was assigned was tardy or incomplete. Express deadlines were set but missed. As somewhat of a last resort, she drew up a daily itinerary for Appellant in an effort to guide her, a first in her time as manager. Nonetheless, Appellant accrued an extraordinary 29 past due reports, which the witness documented in her testimony.

33. In summary, at six months into the probationary term, in the view of the witness, Appellant was not progressing satisfactorily toward the skills necessary to perform the tasks assigned her. She continued to experience the same deficiencies encountered at the outset, namely a tendency to accrue unapproved overtime, produce chronically tardy work product, and demonstrate a general failure to comply with management's instructions. At meetings to discuss the concerns, she would often react angrily, become flustered and upset, and threaten to perform the work "off the clock" despite admonitions not to do so. Further, she never attended the obligatory training session.

34. This witness did not instigate nor recommend whether Appellant should be terminated. However, she did prepare the previously-referenced seven-month probationary evaluation, wherein she supplied a synopsis of a sub-par performance. Directed to the allegations raised in the prior testimony, she expressly denied that she ever criticized or remarked concerning Appellant's religion, political affiliation, or social status, nor was she familiar with Appellant's tastes in music. She did recall discussing the chain of command with her, explaining the levels of management and where Appellant ranked within the structure.

35. Under cross-examination, Thornton was unable to estimate the number of new probational referrals assigned to her while at Hardin County during any particular month. She noted that no other member of her team during her service there was ever chronically behind in

getting in reports, notwithstanding Appellant's assertions to the contrary. She explained that probationary evaluations are ordinarily prepared at the three-month, six-month, and final nine-month points of service. Thus, that made up for Appellant in her seventh month was extraordinary and was generated, she reiterated, due to the "extreme circumstances" being encountered. She urged that neither that process nor her critiques of Appellant's work along the way was ever intended to be condescending.

36. Appellant's counsel pressed the witness concerning the purpose and substance of the various meetings referenced in her prior testimony. She explained that these were for the most part routine, usually involving her supervisor and herself, and sometimes Appellant as well when the need presented itself. She urged that little or no connection existed between any meeting and the perceived necessity to prepare the seven-month evaluation. Similarly, the work plans were generated due to concerns that Appellant was not timely performing her assigned tasks, and the intent was to aid her in budgeting her work day as efficiently as possible through a blueprinting of priorities.

37. Counsel quizzed the witness at some length concerning the use of overtime. The witness further explained the established policy therefor and Appellant's perceived abuse thereof. She emphasized that overtime may be utilized as needed, but must be pre-approved and the purpose supported. Most importantly, she reiterated, management must be aware of the whereabouts of the worker at all times for reasons of safety, whereas Appellant tended to incur the time without approval. In at least one instance, she spent several overtime hours working with another worker upon a case which was not hers, while being behind with her own assignments. In that regard, in one or more time periods she claimed 35 to 50 hours of overtime, viewed as excessive, with a portion thereof being without prior approval.

38. Directed to the issue of required training, the witness reiterated that Appellant's procrastination thereof was problematic; she disputed any assertion that it was accomplished, noting that she may have registered for it, but it was never completed. As a corollary, Appellant did not commence with a full caseload, although eligible therefor; a handful of files assigned her were, in fact, already past due when turned over to her.

39. The witness acknowledged that no serious complaints from the court, attorneys, or clients, other than "a couple" were received concerning Appellant's attitude or workups. She reiterated that that which she did actually complete and turn in was well done and thorough. Similarly, her demeanor toward those outside the Agency with whom it deals was courteous and pleasant. She recalled that Appellant was among the "three or four" minority workers assigned to her, not all of whom were probationary.

40. **Melissa Farmer** is a Service Region Clinical Associate, with two years' experience in that position and 14 years total experience with Agency. She rose through the ranks to attain her current position. She oversees the Salt River Trail Region, consisting of 17 counties. Her duties include overall supervision of most of the Adult Protective Service Units in the region, oversight of a program for high-risk investigations which includes several subparts, and occasional oversight of investigative supervisors with management consultations as needed.

In that role, she supervises three supervisors in Hardin County. Consequently, FSOS Thornton came under her management for approximately three months, commencing in January 2018 and ending when Thornton departed for another county.

41. Appellant was a member of Thornton's team when the witness acquired oversight of her. She recalled that rather promptly a meeting was convened, on February 2, 2018, with the two of them, during which the witness took notes and which she made part of her testimony. Some comments were positive, while there were also concerns, primarily of a communication nature. She recalled that Brown was insisting that Thornton was behaving in a condescending manner toward her and treating her in what Appellant perceived to be an unnecessarily superior/underling manner. Appellant also alluded to a comment wherein she was directed to "stay in your lane," which she saw as derogatory.

42. The witness continued that another employee under Thornton, who is Caucasian, also made the same comment. She recalled that the two employees appeared to be unable to explain what the manager was really telling them, whereas she (Thornton) merely viewed that they had differing opinions about what needed to be done and the method to accomplish it. She noted that the "I'm up here, you're down there" assertion to which Appellant had alluded was simply an expression concerning the chain of command rather than any criticism.

43. The witness recalled that a considerable portion of the February 2, 2018 meeting was consumed with a discussion of the various concerns already discussed in some detail by the prior witness, namely an inordinate need for work plans, chronic past due reports, overtime problems, and an on-going failure to complete critical training so that Appellant could be assigned the category of cases impacted thereby. Appellant had asserted that the supervisor "took a stab at" her faith, which developed to be a Facebook exchange; the witness recalled suggesting to her that she should carefully consider who to "friend" on Facebook. Appellant made no mention of any references to her politics or her religion by the supervisor to this witness. She met with Thornton alone following the meeting, wherein communication and supervisory style was discussed. The supervisor was receptive to any suggestions to improve or how best to aid and support her staff in the performance of their duties and they agreed to remain in contact relative to the on-going concerns.

44. A follow-up meeting with Thornton and Brown occurred on February 26, 2018, at which the witness again made contemporaneous notes which she made part of her testimony. This meeting consumed approximately 45 minutes and essentially consisted of an update of Appellant's progress and/or remedial needs. Appellant reported that she perceived she was doing well, whereas Thornton expressed, to the contrary, that no improvement in her performance was being reflected and the same issues were on-going, such as improper use of overtime, failure to sign in and out as to her whereabouts, and an extraordinary amount of supervision being required in order to maintain her performance at a productive level. The witness observed no bullying of Appellant or of any other employee by the supervisor, aside from pushing them as needed to timely complete their work.

45. The witness explained that the possibility of Appellant's separation from the service was an on-going consideration throughout the 90-day timeframe of her oversight of Thornton. She noted that the seven-month probationary evaluation which Thornton supplied added to and supported the possibility, since it evidenced that the sub-par performance and behavior were chronic and apparently not likely to improve. She identified and introduced a March 1, 2018 email issued by her own superior, a Service Region Administrator Associate, directed to Jay H. Klein as Appointing Authority, suggesting the termination. Appended to that transmission was a number of attachments detailing much of the grounds already developed in the testimony. This was then supported by a more formal letter from management to Mr. Klein confirming the recommendation, together with supporting documentation, copies of which are already of record herein.

46. Under cross-examination, counsel for Appellant inquired of Farmer concerning one or more other conferences which she conducted with Appellant. She confirmed that Appellant advised her, following the February 2, 2018 meeting, that she anticipated retaliation from the supervisor. She briefly discussed the seven-month probationary evaluation which Thornton prepared, noting that such evaluations for each quarter are routine, whereas that at seven months was not.

47. The witness recalled that during her time there, Hardin County was understaffed as to Social Workers while simultaneously enduring a heavy caseload. She noted that a caseload of 25 to 40 files assigned to each worker is deemed "heavy" and, during her tenure there, the average was 35 active cases per worker. On the other hand, she added, the volume of investigative cases was 10 to 15 assignments, which she deemed "very low." She was unaware of any other probationary personnel being terminated during her oversight of the county.

48. Under brief redirect questioning, the witness defined on-going cases as those wherein abuse or neglect has been substantiated and/or dependency established so that a family is determined to be in need. She expanded upon the nature of the investigative aspects, pointing out that Appellant was an investigative caseworker.

49. **Howard Jay Klein** is, for purposes of this proceeding, the designated Appointing Authority, a position which he holds in addition to other titles which he recited for the record. He has 17 years' experience with the Agency and includes among his duties matters of discipline. He introduced an email of March 1, 2018, from Marjorie Shular, directed to him requesting the separation of Appellant. The transmission included a series of materials already made part of the record, such as Interim Probationary Evaluations, work plans, and other materials. He further identified a memorandum directed to him of the same date by Ms. Shular confirming the request. Finally, he confirmed and introduced the actual separation letter.

50. The witness explained that it was he who orchestrated the protocol to finalize the decision to separate Appellant. More specifically, he explained, he reviewed the sizeable packet submitted in support of the request, agreed with it, and referred it to the then-designated Appointing Authority who thereupon signed off upon the actual letter.

51. Under brief cross-examination, the witness expanded upon the separation process, recalling that to that point he has presided over 25 to 30 separations during the calendar year 2018. He recalled no rejections of separation requests, pointing out that by the time such request reaches him, it is quite well documented and ordinarily nothing further is required. He added that further supportive information may always be requested, not seen as necessary in this instance.

52. The Agency having concluded its proof-in-chief, **Appellant** offered brief rebuttal. Addressing the matter of signing-in and out when going into the field for an investigation, she asserted that at no time during her probationary service was she trained concerning this, and was unaware that she should have been doing it. She recalled that it was ultimately brought to her attention quite late in her probation, sometime in February 2018. Addressing an incomplete investigation attributed to her in the prior testimony, she insisted that the failure to finish the file arose from difficulty in scheduling with the family involved due to their working hours and daycare arrangements. This necessitated, she urged, undertaking to contact them only in the evenings, which she was not always able to accomplish.

53. Again addressing the matter of training asserted as missed, Appellant insisted that she did in fact complete the pre-requisite for the training but, upon her arrival for the training itself, the record of her completion was inexplicably missing and the instructor would not permit her to attend. Again addressing her relationship with those with whom she worked, she recalled no complaints from any judges, prosecuting attorneys, court officials, or coworkers.

54. Under very brief further cross-examination, Appellant was pressed to admit that she only completed the pre-requisite to the mandatory training course on the same morning that she was to attend the training itself. She demurred thereto, insisting she could not recall. Quizzed further as to whether she was aware that the subject training was required to be completed no later than December, 2017, Appellant insisted that she had no knowledge thereof. The sworn testimony was thereupon completed and the matter stood submitted for recommended order.

55. KRS 18A.111(1) provides in part: "An employee may be separated from his position, reduced in class or rank, or replaced on the eligible list during this initial probationary period and shall not have a right to appeal, except as provided by KRS 18A.095."

56. KRS 18A.095(12) requires that "Any classified employee may appeal to the Board an action alleged to be based on discrimination due to race, color, religion, national origin, sex, disability or age...". A further provision of the statute, at (14)(a) allows that "any employee, applicant for employment, or eligible on a register, who believes that he had been discriminated against may appeal to the Board."

FINDINGS OF FACT

1. Brianna Brown came to work for the Commonwealth in its Cabinet for Health and Family Services on July 1, 2017. After an internship, she commenced her nine months' probationary service as a Social Service Worker I assigned to Hardin County, Kentucky. Her duties focused upon investigations pertaining to the welfare of children, on a team headed by Family Services Office Supervisor Jasmine Thornton. Thornton held two years' experience as manager out of a total of 6.5 years with the Agency.

2. By management's account, concerns surrounding Brown's performance commenced early in her service, generating notice thereof as early as three months into it. It was at that juncture that certain formal sexual abuse training is ordinarily required, concerning which attendance she procrastinated, asserting in due course that she would fulfill it before the end of her probation. Failure to attain this training prohibited Appellant from receiving assignment of any investigations in that category and, thus, she was ineligible for such assignments throughout the term of her probation. She presents no valid basis for her failure to comply.

3. Management depicts an on-going scenario wherein Appellant required excessive hands-on attention to enable her to perform her assignments in a reasonably timely manner but concerning which she remained chronically in arrears. Further, despite regular verbal suggestions and aids, together with quarterly evaluations and eventually weekly work plans, both her supervisor and the second-line supervisor came to the conclusion that, if Appellant attained merit status, this critical deficiency would likely not be cured.

4. Management observed other concerns with Appellant's performance that only expanded their doubts of her fitness for the position. In some instances she apparently ignored the supervisor's advice, tended to accrue unapproved overtime working in the field with her whereabouts unknown (a safety issue), and upon occasion engaged in field work outside of her own assignments, despite being notably in arrears thereon.

5. Although never having done so before, the supervisor felt the need to prepare and submit an extra probationary evaluation at the seven-month level. This was to alert both Appellant and upper management of what she perceived to be pressing concerns relative to the performance of a probationary employee whom she viewed should be much further along in mandatory training and in compliance with established policy. While on the one hand, Appellant displayed good documentation and writing skills and was professional in her interactions with the community partners and peers, such as courts and prosecutors, she was responding negatively to management, reacting argumentatively while ignoring instruction and/or advice.

6. Appellant, a probationary worker in merit status, brings this appeal under allegations of discrimination and harassment, consisting primarily of asserted comments of a derogatory nature by her supervisor variously concerning her religion, politics, and/or possibly her race. This is expressly denied by the manager, and neither that about which Appellant testifies nor that presented by other witnesses provide sufficient substance to support whether

such comments did occur, nor are they of sufficient weight to demonstrate that any such remarks factored into her failure to complete probation.

7. The Hearing Officer finds the testimony of all witnesses to be credible, although that of Appellant as a basis for her termination is insufficiently substantiated.

CONCLUSIONS OF LAW

1. KRS 18A.111(1) specifies that no right of appeal is available to a probationary employee. Consequently, any individual seeking a remedy, such as restoration of employment after failing probation, must bring the action under KRS 18A.095(12) and prove that legal discrimination occurred. This must be accomplished by way of “a preponderance of the evidence.” The agency needs only to establish that no bias was present.

2. In the immediate instance, the agency has not only countered Appellant’s allegations, but also supplied abundant evidence to support the actions taken. It has clearly established that she was not a good “fit” for the position to which she aspired. Further contradicting Appellant’s claims is the fact that it would have actually been in the best interests of both parties if Appellant had done well and succeeded in the service, in light of the chronic shortage of talented personnel. The position was Appellant’s to win, rather than any arrangement to cause her to fail and be rid of her.

3. Appellant has not met the burden of proof to establish that her failure to complete probation was due to discrimination toward her by management.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **BRIANNA BROWN V. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2018-059)** 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 John C. Ryan** this 8th day of January, 2019.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Jennifer Wolsing
Hon. Jeremy Aldridge



RECEIVED

MAR 29 2018

Personnel Board

CABINET FOR HEALTH AND FAMILY SERVICES

Matthew G. Bevin
Governor

OFFICE OF HUMAN
RESOURCE MANAGEMENT
275 E. Main Street, 5CD
Frankfort, KY 40621
(502) 564-7770
Fax: (502) 564-3129
www.chfs.ky.gov

Scott W. Brinkman
Acting Secretary

March 2, 2018

Brianna Brown

PERNR:

Re: Separation

Dear Ms. Brown:

Pursuant to KRS 18A.111, you are advised that you will be terminated from your position as a Social Service Worker I, in the Department for Community Based Services (DCBS), Salt River Trail Service Region, effective March 3, 2018. Your last working day will be March 2, 2018. You shall not be certified on future registers for employment within DCBS unless DCBS so requests.

As an employee serving an initial probationary period as provided by KRS 18A.111, you do not have the right to appeal this action to the Kentucky Personnel Board. However, KRS 18A.095 provides that you may file a claim of discrimination with the Kentucky Personnel Board if you believe the action was based on unlawful discrimination. In accordance with KRS 18A.095, any claim of discrimination must be filed within thirty (30) days, excluding the date notification is sent. Such appeal must be filed in writing using the attached appeal form and in the manner prescribed on the form.

Sincerely,

J. Alan Sisk
Designated Appointing Authority

JAS:jc

Attachment: Appeal Form

cc: Secretary Thomas B. Stephens, Personnel Cabinet
Executive Director Mark Sipek, Personnel Board
Commissioner Adria Johnson, Department for Community Based Services
Service Region Administrator Nelson Knight, Salt River Trail Service Region
Cabinet Personnel File



**CABINET FOR HEALTH AND FAMILY SERVICES
OFFICE OF HUMAN RESOURCE MANAGEMENT**


Matthew G. Bevin
Governor

275 East Main Street, 5C-D
Frankfort, Kentucky 40621
(502)564-7770
Fax: (502)564-3129
www.chfs.ky.gov

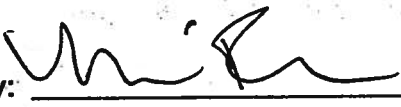
Scott W. Brinkman
Acting Secretary

Acknowledgement of Receipt

This is to acknowledge receipt of a letter dated, **March 2, 2018** and addressed to **Brianna Brown** from the Cabinet for Health and Family Services, advising of a **separation**.

Employee Signature: 

Date: 3/2/18

Delivered by: 

Date: 3/2/18

Witness Signature: _____
(Required if the Employee Refuses to Sign)

Date: _____