

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2017-228

**JEFFREY DUERSON**

**APPELLANT**

**VS.**

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

**JUSTICE AND PUBLIC SAFETY CABINET,  
DEPARTMENT OF CRIMINAL JUSTICE TRAINING**

**APPELLEE**

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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, Appellant's Exceptions, Appellee's Response to Appellant's Exceptions, 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 13<sup>th</sup> day of February, 2019.

**KENTUCKY PERSONNEL BOARD**

  
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**MARK A. SIPEK, SECRETARY**

A copy hereof this day sent to:

Hon. Scotty McFarlan  
Hon. Edward E. Dove  
Mr. Kevin Rader

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**JEFFREY DUERSON**

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**APPELLEE**

\* \* \* \* \*

This matter came on for an evidentiary hearing on September 25, 2018, at 9:30 a.m., ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Roland P. Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Jeffrey Duerson, was present and represented by the Hon. Edward E. Dove. The Appellee, Justice and Public Safety Cabinet, Department of Criminal Justice Training, was present and represented by the Hon. Oran S. McFarlan III, accompanied by Paralegal, Ms. Deanna Smith. Also present as Agency representative was Mr. Mark Filburn.

Two issues were presented for consideration:

1. Whether or not there was just cause for the dismissal of the Appellant from his position as Administrative Specialist III, effective October 23, 2017, and whether that penalty was excessive or erroneous. The burden of proof was on the Appellee to prove its case by a preponderance of the evidence.
2. Appellant presented a claim of disability discrimination. The burden of proof was on the Appellant to prove his case by a preponderance of the evidence.

The rule separating witnesses was invoked and employed throughout the course of the hearing. Appellant's counsel withdrew his motion to allow telephonic testimony. The Appellee presented its opening statement.

**BACKGROUND**

1. The first witness called by the Appellee was **Garl Lovings**. Mr. Lovings is employed by the Department of Criminal Justice Training (DOCJT), as a Facilities Section Supervisor in the Administrative Division. He has held this position for the past seven (7) months. His prior position was Maintenance Superintendent I, which he held for 13 years. His workstation is in Richmond, Kentucky.

2. Mr. Lovings has known the Appellant from work for the past 13 years. He testified Appellant's character was impeccable as far as he knew.

3. Mr. Lovings had injured his right knee and lower back, had compressed back disks, and underwent two surgeries. He suffers very painful conditions. He has had a stimulator implanted to suppress pain. He had taken prescription medications for a while, including Tramadol, which prescription was later changed to Hydrocodone. He kept some of the Hydrocodone pills at work, to take as needed. He stored the pills in a locked desk drawer in his office. His supervisor was aware of this. Employees were required to keep private items locked away. Mr. Lovings kept the keys to his desk on a key ring he carried with him.

4. On the morning of Monday, July 10, 2017, he came into the office and saw a pill lying on the floor near his desk. He retrieved it and compared it with the pills in his prescription bottle. He saw the number on the pill matched the number on pills in his prescription bottle. He wanted to make sure he was not the one who had dropped that pill. He put additional pills in the bottle and locked the bottle in his desk cabinet. When he returned to the office the following Sunday, he checked the prescription bottle and noted there were two pills left. At that point, he knew someone had taken his medication.

5. He identified Appellee's Exhibit 1 as a timeline he kept in a notebook after he realized someone had taken his pills. The portion marked as page 1 shows that on July 14, 2017, he placed eight (8) pills in his prescription bottle, and the one pill from the floor was placed on the shelf of the desk cabinet next to the bottle. At 10:00 a.m. that Sunday, July 16, 2017, he saw six (6) pills were missing from the prescription bottle, and one pill remained on the shelf. On July 17, 2017, he notified his supervisor, Art Pascal.

6. Page 2 indicates that on July 17, 2017, Mr. Pascal told him to set up a camera to attempt to catch the person taking the pills. Mr. Lovings used an application on his cell phone that turned his phone into a surveillance camera. The application would notify him on another cell phone when the camera activated. On July 18, 2017, he placed the camera phone face up on his desk. He then placed 11 pills in the prescription bottle and locked it in the upper right cabinet of his desk.

7. Two weeks passed before he got a "hit" on his cell phone on a Saturday indicating his office cell phone camera had activated. He turned on his own cell phone in the presence of his wife and saw Mr. Duerson trying to get into the overhead cabinet at work. He shut off the phone and telephoned his supervisor, Mr. Pascal. Pascal advised he would call his own supervisor, Kerrie Dehorty. That same day, Mr. Lovings received a telephone call from Kerrie Dehorty.

8. On Sunday morning, July 30, 2017, Lovings received another notification of activation of the camera. When he viewed it, he saw Mr. Duerson attempting to open the cabinet on the right, stop, then open the cabinet on the left. Nothing was taken from the left cabinet. He then saw Duerson put gloves on his fingertips and reopen the right cabinet. Duerson reached in and retrieved the prescription bottle.

9. Mr. Lovings called Art Pascal. The Deputy Commissioner later contacted Lovings and they spoke at length. Lovings was told it was his option whether to involve the local police. He decided not to secure police involvement, but to wait. Everyone would meet in the office the following Monday morning.

10. On Monday morning, Lovings spoke briefly with Mr. Pascal before going to the Commissioner's office with Kerrie Dehorty. There, they met with the Commissioner, Deputy Commissioner, James "Oakie" Greer, Assistant Director Rader, and legal counsel. They discussed the events at length. The group then counseled together out of the presence of Mr. Lovings. Lovings was told they intended to get the police involved.

11. About an hour later, a police detective interviewed Mr. Lovings.

12. Three (3) or four (4) employees, including Duerson, had similar knee problems and pain. They had had general conversations about their pain.

13. **Joey Barnes** was the next witness. He is employed by DOCJT in Richmond, Kentucky, as an Investigator Manager in the Compliance Section. He has held this position for the past year, but has been employed in that office the past six (6) years. He is familiar with the subject incident. At the time of the incident, he was an Investigator III, assigned to investigate alleged employee misconduct. The Kentucky State Police had conducted a criminal investigation, and Mr. Barnes conducted the administrative investigation.

14. Mr. Barnes interviewed witnesses, searched physical areas for evidence, reviewed video evidence, compiled information, and generated a case report. He identified Appellee's Exhibit 2 as his August 22, 2017 Case Report. He concluded Garl Lovings had been a victim of theft of his prescription pain medication, taken from his locked overhead cabinet bin in the

office. Mr. Duerson had accessed the bin with keys on several occasions and took that medication. Barnes had no doubt it was Mr. Duerson who took the pills.

15. He turned in his report to his supervisor, James Vanhook, the Compliance Commander. Mr. Vanhook reviewed the report and sent it to Frank Kubala, Staff Assistant for Commissioner Filburn. The report eventually went to the Commissioner.

16. Mr. Barnes has known Mr. Duerson for quite a long time. "Jeff is a good fellow." He was very surprised to learn Duerson was the suspect. However, because Barnes knew Duerson, he had no doubt it was Duerson on the videos. Mr. Duerson worked in the Supply Section, located across the hall from the Facilities Section.

17. **Kevin Rader**, who, for the past six months has been employed by DOCJT as Director of the Administrative Division, offered his testimony. He previously had been the Assistant Director. He was in Appellant's chain-of-command, although not his direct supervisor. He was familiar with the incident. Kerrie Dehorty, Branch Manager, contacted him on a Saturday in July 2017. She told him an employee, Garl Lovings, had some prescription medications taken from his secured desk. Video evidence showed an individual who was identified as Mr. Duerson. Rader then contacted the Deputy Commissioner, John McGuire.

18. The following Monday morning, Rader met in the Commissioner's office with other administrators. The matter was referred to the Kentucky State Police. At that time, there had been no discussion of referring Appellant to the Kentucky Employee Assistance Program (KEAP) or another rehabilitation program. When the police detective arrived, he met briefly with Rader, the Commissioner, Counsel Deaidra Douglas, the Deputy Commissioner, and perhaps Division Director Oakie Greer. Rader was then asked to get Mr. Duerson.

19. Rader brought Duerson to the detective and then left their presence. Later, the detective returned to the Commissioner's office and told the assembled group that Mr. Duerson admitted he had taken the pills. The detective stated he would bring Mr. Duerson into the office, then take him to be placed under arrest. When Duerson was brought to the office, he said he was sick and had a problem; he had gone through \$13,000 and his wife took away his ability to spend money. Rader had no clue Duerson had a substance abuse problem prior to that meeting. Duerson had never reported this to supervisors at work.

20. Rader reviewed the investigative report of Mr. Barnes. It was an accurate depiction of what had happened. On September 8, 2017, he issued a Memorandum addressed to Commissioner Filburn, requesting disciplinary action. (Appellee's Exhibit 3). The request was based on allegations of violation by Duerson of DOCJT Policy and Procedure 2002-007 (Employee Standards of Conduct), Section III(C); and, 101 KAR 1:345, Section 1 – General

Provisions (Lack of Good Behavior or the Unsatisfactory Performance of Duties). He also stated therein, "Mr. Duerson failed to conduct himself in accordance with the standards contained in agency policy. Based on these facts, I request that Mr. Duerson receive discipline for the actions documented in this memo and the administrative investigation."

21. He identified Appellee's Exhibit 4 as DOCJT Policy and Procedure 2002-007, (Employee Standards of Conduct). Appellant had violated Section III(C), which states: "Employees shall conduct themselves in a manner that reflects professionalism and service, encourages respect and cooperation, and reflects favorably on the Department of Criminal Justice Training." Mr. Rader was the one who made the decision to request disciplinary action. However, he did not have authority to decide the extent or nature of such discipline. To his knowledge, Duerson was terminated because he stole prescription medication from another employee on state property. He was not terminated because he was a "drug addict" or sought addiction treatment.

22. The parties stipulated the Hearing Officer could take judicial notice of the state regulation, 803 KAR 25:280, Section III. The Hearing Officer took such judicial notice pursuant to KRS Chapter 13B.

23. Mr. Rader was first aware of Duerson's drug issues when he had learned on Monday the facts of the situation; that Mr. Duerson made an admission of guilt and his drug problems. If he had had prior reasonable suspicion of a drug issue, Rader would have reported it to a supervisor. However, Appellant committed theft from another employee on state property. Had Appellant come to Rader or others in management prior to the incident, they could have immediately taken steps to help him. Mr. Duerson had no prior disciplinary history.

24. **Mark Filburn**, employed by the Kentucky League of Cities as Senior Law Enforcement Liaison since May 2018, was the next witness. His prior employment from 2016 to May 2018 was as Commissioner of the DOCJT. In that position as Appointing Authority, he had the ability to issue discipline and make hiring and firing decisions.

25. On July 31, 2017, staff explained to him there was a personnel issue. It was alleged Mr. Duerson had stolen prescription drugs from another employee's locked office area on state property. Filburn made the decision to call in law enforcement, based on his own previous employment experience in police departments. It was important to secure an independent investigation as well as transparency for the Department.

26. When the detective arrived, Filburn and others briefed him on the allegations. The detective conducted his investigation. After speaking to Duerson, the detective told the

Commissioner that Appellant admitted to the allegations and was going to be charged with a crime.

27. The Commissioner decided to place Appellant on paid leave until a final decision regarding discipline could be made. He identified Appellee's Exhibit 5 as the July 31, 2017 letter he authored which placed Appellant, pursuant to 101 KAR 2:102, Section 9, on special leave with pay for a period not to exceed 60 working days, effective July 31, 2017, pending further investigation of the allegations of misconduct. That letter also advised the Appellant, "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 problem that may be affecting your job performance. KEAP can be reached at (800) 445-5327 or (502) 564-5788." Mr. Filburn further testified, "Jeff is a good person, a good man." They were concerned about his drug problem and wanted to make sure KEAP was made available to him.

28. Mr. Filburn then requested an administrative investigation be conducted by Joey Barnes, an investigator with the Compliance Section. Filburn reviewed Mr. Barnes' report and got input from his staff. After receiving all the information, he concluded the event did occur and discipline should be issued. When he considered the level of discipline, he examined the following questions: (1) Did the event occur? The investigation and Appellant's admission showed that the event did occur and the allegations were factual. It was an offense against another employee on DOCJT property. There was no dispute about the facts. (2) Was it a violation of policy? Yes, it did violate policies. (3) What kind of employee was Mr. Duerson? He concluded "...a good person. Was a good employee...good attitude...always did a good job." (4) What discipline is appropriate? Mr. Filburn and the Department believed in following a plan of progressive discipline unless the alleged act was of a level that required a severe, immediate penalty. In this case, he believed the act to be severe enough to merit termination.

29. He identified Appellee's Exhibit 6 as the October 2, 2017 letter he had authored notifying Appellant of the Intent to Dismiss him from his position of Administrative Specialist III. Attached to the letter was a form for Appellant to complete if he wanted to request a pre-termination hearing. The exhibit shows that on October 11, 2017, Mr. Duerson requested a pre-termination hearing.

30. A pre-termination hearing was held on October 16, 2017. Appellant was given the opportunity to explain his position and why he should be retained in employment. Following the pre-termination hearing, Mr. Filburn decided termination was indeed proper, and issued an October 23, 2017 letter notifying Appellant of his dismissal (Appellee's Exhibit 7). The termination from duty and pay was effective October 23, 2017, based on alleged violations of 101 KAR 1:345, Section 1; DOCJT Policy and Procedure 2002-007; DOCJT Policy and

Procedure 2002-002; 41 USC 81 §8103; KRS 18A.043; 803 KAR 25:280; Commonwealth of Kentucky Employee Handbook, page 100; and Commonwealth of Kentucky Department of Personnel Memo 14-21 (Drug Free Workplace).

31. He identified Appellee's Exhibit 8 as a printout of 101 KAR 1:345, Disciplinary Actions. Appellant was disciplined for violation of Section 1.

32. He identified Appellee's Exhibit 9 as DOCJT Policy and Procedure 2002-002, (Expectation of Privacy). Mr. Duerson was also disciplined under Section II Policy, Violating Another Employee's Limited Expectation of Privacy.

33. He identified Appellee's Exhibit 10 as a Section of the Commonwealth of Kentucky Employee Handbook, revised September 30, 2016. Appellant had also been disciplined for violation of the Drug Free Workplace policy, bullet points 1 and 4, (page 100).

34. He identified Appellee's Exhibit 11 as the October 17, 2014 Personnel Memo 14-21, Drug Free Workplace. Appellant had also been disciplined for violation of this Policy, Sections A and D.

35. He felt the dismissal was appropriate under all the circumstances. Appellant was not dismissed because he had drug abuse issues or because he would seek treatment. Appellant did not seek treatment prior to the incident. Filburn had no knowledge prior to the incident that Appellant had a drug problem. Appellant had not asked for help for his condition.

36. The incident was a complete shock to Filburn and other people who knew Mr. Duerson. Filburn took the criminal allegations very seriously and had asked for an independent investigation. The criminal matter had to be investigated, as well as the separate administrative violations.

37. Appellee's presentation on the issue of termination was closed. Appellant presented a Motion for Directed Verdict. The motion was **OVERRULED**. Appellant stated he would put on his case of disability discrimination, as well as rebuttal to the termination issue in his presentation.

38. At the request of the Appellant, the termination issue was reopened to allow the Appellant to ask Mr. Filburn an additional question. Mr. Filburn testified he had received numerous letters and emails from employees and outside individuals supporting the Appellant, prior to his having made the decision to terminate.



39. Appellant waived his opening statement. The first witness was **Kristi Hicks**. Since May 2014, Ms. Hicks has been employed by DOCJT as Administrative Supervisor in the Supply Section. She had supervised Appellant since that date and performed his evaluations. Duerson always received "Good" or "Excellent" evaluations. He had also received an award for professionalism, based on his excellent relationships with vendors. He did an excellent job as the fleet manager and took on increased responsibility with administrative tasks.

40. She provided a letter of support (Appellant's Exhibit 1) for the Appellant, in response to a request either by the Appellant or his wife. She had no problem providing this letter. She was surprised Appellant was terminated, because he was a good employee and Hicks had no knowledge of his having had any prior discipline. Mr. Duerson had never requested a KEAP referral or accommodation for drug addiction.

41. The next witness was **Eric Garner**. For the past four (4) years Mr. Garner has been employed by DOCJT as Administrative Section Supervisor over the Technical Services Section. He had been Appellant's immediate supervisor from 2007 through 2014. He believed Mr. Duerson was one of his best employees with whom he had no problems. He respected him very much.

42. Mr. Duerson had been awarded Administrative Staff Person of the Year.

43. Appellant never told Garner that he had problem with or was addicted to pain killers.

44. Mr. Garner was interviewed by Joey Barnes regarding the incident.

45. He identified Appellant's Exhibit 2 as an email (letter) of support for the Appellant. He respected Appellant, who is a fine person. He did not want to see Duerson lose his job. Garner had no suspicion Appellant had a drug addiction, nor was he aware of any drug addiction until he spoke to the Appellant after the termination. In his role as supervisor, he had never received from Appellant a request for a KEAP referral or accommodation for drug addiction.

46. The next witness was the **Appellant, Jeffrey Duerson**. His last employment had been at DOCJT in the Supply Section as Administrative Specialist II, where he maintained the Agency fleet. Prior to his termination, he was reclassified to Administrative Specialist III. He maintained over 100 vehicles in the fleet and kept fleet maintenance logs. Up until the time of his termination, he had had no prior discipline and always received excellent evaluations. In 2016, he was named Administrative Staff Person of the Year.

47. In 2012, his right knee had been “scoped;” he had a left knee replacement in 2013; subsequent toe surgery; in late October or November 2015, he had shoulder surgery. He had been on Tramadol for pain. From February through July 2017, he was taken off Tramadol and for a period, prescribed Hydrocodone.

48. He realized he had a problem after he had spent \$13,000 in 2016 buying pills for the pain in his shoulder. He knew Garl Lovings had pain issues and was taking pain pills. Lovings had told him about a pain management doctor.

49. He never told his chain of command that he was having trouble with pain pills or had an addiction. He started seeing a counselor in Lexington about two years ago. Then he attended counseling in Richmond with the same group, where he has been the past year. He knew he had pain medication trouble. It did not affect his ability to do his work.

50. After he had been placed on special leave, he contacted KEAP on August 1, 2017. The person he spoke to recommended some things for him to consider. He told that person he had already made contact with a doctor who would administer a plan for him. He would continue counseling and attend Celebrate Recovery meetings. He identified Appellant’s Exhibit 3 as a September 24, 2018 letter he secured from his current counselor, Carrie Koontz, LCSW, LCADC.

51. On a Monday morning, Mr. Rader approached Appellant and introduced a Kentucky State Police Detective. The detective took Appellant upstairs to Mr. Filburn’s office, then out to the detective’s car. The detective read him the allegations and told him he had been seen on camera getting into a locked area of Mr. Loving’s office, taking pills. Appellant responded to the detective, “I’m glad it is over.” He had been caught. He did it. “I needed it to end.”

52. He was taken to the Madison County Detention Center. While there, a letter was delivered to him (identified as Appellee’s Exhibit 5) placing him on special leave. He requested a meeting with the Commissioner.

53. In a meeting with the Commissioner, Deputy Commissioner McGuire, Deaidra Douglas, and Oakie Greer, Appellant admitted to the allegations. He told the Commissioner he had a problem with Hydrocodone. Appellant subsequently received a termination letter and filed this appeal.

54. Appellant admitted he stole prescription medication from a locked overhead cabinet. He agreed he was terminated for stealing. He also kept his substance abuse issues from coworkers. He did not know about the availability of KEAP until after the incident. At no time

had he ever requested accommodations at work for drug abuse problems. He acknowledged having violated policy by taking the medications.

55. Appellant closed his case. Appellee presented a single witness in rebuttal.

56. Appellee's rebuttal witness was **Tina Moss**. Since December 1, 2017, Ms. Moss has been employed by the DOCJT as a Human Resources Branch Manager over the Physical Management Branch. She oversees daily personnel operations and is the custodian of DOCJT employee files. She also has access to such employees' medical files. For the prior 30 years, she had been employed as the Human Resources Director for the Kentucky Justice and Public Safety Cabinet.

57. She identified KEAP as a voluntary program that can be requested by an employee or an employee may be referred to same by a supervisor.

58. She identified Appellee's Exhibit 5 as the letter that placed Appellant on special leave with pay. She acknowledged that that letter contained language advising Appellant of the availability of the KEAP program. By having included the language, the Agency satisfied its obligation to provide notice to the Appellant of the program's availability. It is up to the employee to reach out. If the employee does reach out and participate in KEAP, the administrators, supervisors, and human resource department are not notified of same, as it is confidential.

59. There is no record in Appellant's files of having made any request for accommodations due to drug problems. Likewise, there is no record of any request for a KEAP referral.

60. Appellant was not terminated for being a drug addict, having substance abuse issues, or seeking addiction treatment. The Agency acted appropriately in effecting his termination based on the severity of the offense of theft.

61. There is a policy under Complaint Investigations that requires an individual, knowledgeable of a criminal matter, to contact the appropriate law enforcement agency. That is what the Commissioner did in this case.

62. She acknowledged the Agency receives federal funding and is subject to 29 USC 2094, Rehabilitation Act, § 504. She agreed that section protects individuals with disabilities from discrimination, and that drug addiction can be a disability.

63. The Agency, however, does not conduct drug testing. They do comply with the state regulations on a drug-free workplace. If a supervisor has a “reasonable suspicion” of an employee having a drug problem, such reasonable suspicion could be triggered by noticing the employee exhibiting a change in behavior. In that instance, a KEAP referral would be appropriate.

64. Stealing property on state property is as serious an offense as one can commit. To Ms. Moss’s knowledge, there was no prior indication of Appellant having a drug addiction. It is up to the employee to reach out to KEAP when placed on leave.

65. Testimony was concluded. The parties reserved presentation of closing arguments for their respective briefs. A briefing schedule was set by separate Interim Order. Both parties timely filed their respective written closing arguments. Appellee timely filed its Response to Appellant’s Closing Argument. Appellant did not file a response.

#### **FINDINGS OF FACT**

1. Jeffrey Duerson, the Appellant, at the date of his termination from employment on October 23, 2017, was a classified employee with status. He was employed by the Kentucky Justice and Public Safety Cabinet, Department of Criminal Justice Training (DOCJT), in Richmond, Kentucky, as an Administrative Specialist III.

2. In 2017, Garl Lovings was employed by the Cabinet in Richmond, Kentucky, as a Maintenance Superintendent I. His office was located across the hall from Appellant’s office. With the knowledge of his supervisor, Mr. Lovings kept a prescription bottle of Hydrocodone locked in his office desk. He took this medication on occasion due to painful physical conditions.

3. Appellant and Lovings had engaged in conversations about their respective physical ailments and medications that each took. Appellant was aware Lovings kept Hydrocodone locked in his desk.

4. On the morning of July 10, 2017, Lovings noticed a pill on the floor near his desk. He compared the pill with those in his prescription bottle and found the number on the pills matched. He then placed eight (8) pills in the prescription bottle and locked the bottle in his desk cabinet.

5. The following Sunday, July 16, 2017, Lovings entered his office and checked his prescription bottle. Six pills were missing.

6. On July 18, 2017, Lovings set up his cell phone as a surveillance camera, and placed it face up on his office desk before he left work. He placed 11 pills in the prescription bottle and locked the bottle in his desk cabinet.

7. Two weeks later on a Saturday, his second cell phone notified him that the surveillance camera had been activated. When he viewed the transmission, he saw Jeffrey Duerson trying to get into his locked office overhead cabinet.

8. On Sunday, July 30, 2017, Lovings' camera activated again. He viewed the transmission and saw Appellant opening his locked cabinet. He also saw Appellant place gloves over his fingertips and reach into the cabinet to retrieve the prescription bottle.

9. On Monday morning, July 31, 2017, Lovings met with the Commissioner, the Deputy Commissioner, Kerrie Dehorty, James "Oakie" Greer, Assistant Director Rader, and the General Counsel. Commissioner Mark Filburn then notified the Kentucky State Police.

10. The State Police Detective arrived, was briefed on the matter, and began an investigation. After the Detective spoke with Appellant that same day, he advised the Commissioner that Duerson had admitted to the allegations. The Detective indicated Appellant would be charged with a crime. Appellant was then taken to the Madison County Detention Center.

11. Commissioner Filburn initiated an administrative investigation. He placed Appellant on special leave with pay, effective July 31, 2017, pending the investigation (Appellee's Exhibit 5). The letter also informed Appellant of the availability of the Kentucky Employee Assistance Program (KEAP). The investigation was assigned to Joey Barnes, an investigator with the Compliance Section.

12. Appellant contacted KEAP on August 1, 2017. He advised the KEAP contact person he had already made contact with a doctor who would administer a plan for him and that he would continue counseling and attend Celebrate Recovery meetings. He participated in counseling with Carrie Koontz, LCSW, LCADC (Appellant's Exhibit 3).

13. Joey Barnes interviewed witnesses, searched physical areas for evidence, reviewed video evidence, compiled information and, thereafter, on August 22, 2017, compiled a case report (Appellee's Exhibit 2). He concluded Garl Lovings had been a victim of theft of his prescription pain medication, taken from his locked office cabinet. Mr. Duerson had accessed the cabinet with keys on several occasions.

14. Commissioner Filburn examined the case report, received input from his staff, and concluded discipline should be issued. He considered four questions: (1) Did the event occur? The investigation and Appellant's admission showed him the event did occur and the allegations were factual; an offense had been committed against another employee on state property. (2) Was it a violation of policy? He concluded it did violate policies. (3) What kind of employee was Mr. Duerson? He concluded Duerson was a good employee with a good attitude who always performed well. (4) What discipline is appropriate? Commissioner Filburn and the Department believed in following a plan of progressive discipline, unless the alleged act was of a level that required a severe, immediate penalty. He concluded in this case that Duerson's act was severe enough to merit termination.

15. On October 2, 2017, the Commissioner issued a letter notifying Appellant of his intent to dismiss Appellant from employment (Appellee's Exhibit 6). Mr. Duerson requested a pre-termination hearing.

16. A pre-termination hearing was held October 16, 2017. After meeting with and listening to the Appellant, Commissioner Filburn was not dissuaded from his previous decision. On October 23, 2017, he issued a letter notifying Appellant he had been terminated from employment, effective October 23, 2017, based on allegations of violations of 101 KAR 1:345, Section 1; DOCJT Policy and Procedure 2002-007; DOCJT Policy and Procedure 2002-002; 41 USC 81 §8103; KRS 18A.043; 803 KAR 25:280; Commonwealth of Kentucky Employee Handbook, page 100; and Commonwealth of Kentucky Department of Personnel Memo 14-21 (Drug Free Workplace). (Appellee's Exhibit 7).

17. The following policies were in full force and effect during the entire time of the events described herein above:

- DOCJT Policy and Procedure 2002-007 (Appellee's Exhibit 4);
- DOCJT Policy and Procedure 2002-002 (Appellee's Exhibit 9);
- Commonwealth of Kentucky Employee Handbook, Revised September 30, 2016, issued by the Personnel Cabinet, Department of Human Resource Administration (Appellee's Exhibit 10);
- Personnel Cabinet, Personnel Memo 14-21, issued October 17, 2014 (Appellee's Exhibit 11).

18. Duerson had been attending regular counseling sessions with Carrie L. Koontz, LCSW, LCADC, to address his substance abuse issues since August 2017. This was first publicized by Ms. Koontz's letter of September 24, 2018. (Appellant's Exhibit 3).

19. Appellant timely filed an appeal of his dismissal with the Kentucky Personnel Board.

### CONCLUSIONS OF LAW

#### Appellant's Claim of Disability Discrimination

1. In Kentucky, any person is afforded a right of action against his or her employer due to discrimination based on disability, pursuant to KRS 344.040. Any state employee who believes he has been discriminated against may appeal to the Personnel Board. KRS 18A.095(15)(a). The Appellant, Jeffrey Duerson, has lodged such a claim in this proceeding.

2. The burden of proof was on the Appellant to prove, by a preponderance of the evidence, he had been discriminated against due to his disability. Appellant alleges the Appellee's decision to terminate his employment was based on Appellant's conduct that was a manifestation of his disability and, therefore, discriminatory. He alleges he is a "qualified individual with a disability" due to pain he suffers from two failed knee suppressors, RDS, and Complex Regional Pain Syndrome, and that he became addicted to prescription pain medication (Appellant's closing argument, page 1).

3. In order to determine whether one has met the burden of proof pertaining to a claim of disability under the Kentucky Civil Rights Act, that Act may be interpreted not only by decisions rendered in the state courts of Kentucky, but by federal decisions which have interpreted nearly identical provisions contained in the federal Americans With Disabilities Act.<sup>1</sup> *Jefferson County v. Zaring*, 91 S.W.3d 583 (Ky. 2002); *Smith v. Leggett Wire Co.*, et al., 220 Fed.3d 752 (6th Cir., 2000).

4. In support of his argument, Appellant has cited:

- 29 USC 794, Section 504, known as the "Rehabilitation Act";
- 34 CFR 104.3; and
- 803 KAR 25:280(3, 5).

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<sup>1</sup> Signed into law by the late President George H. W. Bush.

5. Claims brought under the Rehabilitation Act are reviewed under the same requirements as the Americans With Disabilities Act of 1990. *Doe v. Salvation Army NUS*, 531 Fed.3d 355, 357 (6th Cir., 2008). The elements of a cause of action under Section 504 are:

- The Plaintiff is a “[disabled] person” under the Act;
- The Plaintiff is “otherwise qualified” for participation in the program;
- The Plaintiff is being excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program solely by reason of his [disability]; and
- The relevant program or activity is receiving federal financial assistance. *Doherty v. Southern College of Optometry*, 862 Fed.2d 570, 572 (6th Cir., 1998).

6. Appellant must first show he has a disability. *Adkins v. Excel Mining, LLC*, 214 Fed. Sup.3d 617, 622 (E.D. Ky. 2008). “Disability” is defined as (a) a physical or mental impairment that substantially limits one (1) or more of major life activities of the individual; (b) a record of such an impairment; or (c) being regarded as having such an impairment. 42 U.S.C., Section 12102(2), KRS 344.010(4)(a-c), *Toyota Motor Manufacturing, Kentucky, Inc. v. Ella Williams*, 534 U.S. 184, 122 Sup. Ct. 681, 151 L.Ed.2d 615 (2002).

7. An individual must prove to have a physical or mental impairment that substantially limits one or more major life activities. 42 U.S.C., Section 12102(2)(A). The Supreme Court cited the Rehabilitation Act regulations issued by the Department of Health, Education, and Welfare, unchanged in the current regulations issued by the Department of Health and Human Services, which defined “physical impairment” as:

- (a) any physiological disorder or condition...affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito/urinary; hemic and lymphatic; skin; and endocrine; or
- (b) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. 45 CFR, Section 84.3(j)(2)(i) (2001).



The United States Supreme Court stated this would not include impairments that interfere in only a minor way with the performance of a major life activity. The impairment must be one that considerably, or to a large degree, interferes with, prevents, or limits the individual from engaging in a major life activity. Furthermore, “an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives. The impairment’s impact must also be permanent or long term. See 29 CFR, Sections 1630.2(j)(2)(ii)(iii) (2001).” *Toyota Motor Manufacturing, Kentucky, Inc. v. Ella Williams*, 534 U.S. 184, 122 Sup. Ct. 681 at 691 (2002).

8. “Major life activity” is defined as those activities that are of central importance to daily life. The United States Supreme Court cited the HEW Rehabilitation Act regulations, which provided the list of specific examples. 45 CFR, Section 84.3(j)(2)(ii) (2001) lists major life activities to mean “...functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”

9. There was nothing that prevented Appellant from obtaining “Good” to “Excellent” job performance evaluations all throughout his employment career (see supportive letter of Kristi L. Hicks [Appellant’s Exhibit 1]; testimony of Eric A. Garner and supportive letter of Eric A. Garner [Appellant’s Exhibit 2]). He was not limited from engaging in a major life activity or restricted from doing activities of central importance to most people’s daily lives. Furthermore, until the time of the incident, there was no record Appellant had any impairment or had been regarded as having an impairment.

10. Appellant was “otherwise qualified” to perform his job duties. Other than the incidents with which he was charged, there was no evidence Appellant was not performing the essential duties of his position.

11. Appellant was terminated from employment and, thus, suffered an adverse employment action. However, an employee’s illegal acts in connection with a drug addiction, does not protect one from appropriate disciplinary action by the employer.

12. Employers may hold an employee who engages in the illegal use of drugs to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use of such employee. 42 U.S.C., Section 12114(c)(4). The employer may also enforce compliance with policies that prohibit employees from engaging in criminal conduct.

13. In this instance, the Appellant was not discharged from employment “solely by reason of his handicap,” drug addiction, or illegal possession of prescription drugs. Rather, he

was terminated for theft of a fellow employee's prescription drugs on state property. Such an individual is not within the protection of the Rehabilitation Act. *Taub v. Frank*, 957 F.2d 8, 11 (1st Cir., 1992). The reasons for termination were clearly set out in the October 23, 2017 termination letter (Appellee's Exhibit 7), when Appellant was advised he was being dismissed for violation of 101 KAR 1:345, Section 1 (unsatisfactory performance); DOCJT Policy and Procedure 2002-007 (Employee Standards of Conduct); DOCJT Policy and Procedure 2002-002 (Expectation of Privacy – Section II and Section III); 41 U.S.C., Chapter 81, Section 8103; KRS 18A.043; 803 KAR 25:280; the Commonwealth of Kentucky Employee Handbook, page 100; and Commonwealth of Kentucky Department of Personnel Memo, 14-21 (Drug-Free Workplace).

14. Appellee, as an agency, had at the time been receiving federal financial assistance. This was acknowledged through the testimony of Tina Moss, Human Resources Branch Manager of the Physical Management Branch of DOCJT. She also acknowledged the agency is subject to 29 U.S.C. 2094, the Rehabilitation Act, Section 504.

15. Appellant claimed that once the agency had a "reasonable suspicion" of having a drug problem, the agency was required to institute drug testing pursuant to 803 KAR 25:280. A thorough examination of this regulation shows it sets out the process by which Kentucky employers ("corporation, partnership, sole proprietorship, or other business entity doing business in Kentucky, which is required to comply with the provisions of KRS Chapter 342 or voluntarily covers excluded employees pursuant to KRS 342.660" 803 KAR 25.280, Section 1(8)), may qualify to become certified as a "drug free workplace." When an employer meets all the minimum application requirements set out in this regulation, including certain procedures and programs, the Office of Workers Claims may certify the employer as a "Drug Free Workplace." Employees under this regulation, as defined by KRS 342.640(3) include employees of any agency of the Commonwealth. 803 KAR 25:280, Section 1(6).

16. 803 KAR 25:280 sets no requirement on the Appellee in this situation to have first performed drug testing on the Appellant prior to termination. The regulation pertains solely to the manner by which an employer, including a state agency, may qualify to receive certification as a "Drug Free Workplace." That same regulation also appears to place no limitation on the employer's ability to enforce employer policies or apply disciplinary measures for an employee's violation of prohibitions pertaining to a drug free policy work zone. 803 KAR 25:280, Section 5(1)(c); (2)(e).

17. Appellant has failed to prove by a preponderance of the evidence that he was the subject of or suffered any disability discrimination.

**Termination of the Appellant**

18. A classified employee with status shall not be dismissed, demoted, suspended, or otherwise penalized except for cause. KRS 18A.095(1). Appointing authorities may discipline employees for lack of good behavior or the unsatisfactory performance of duties. 101 KAR 1:345, Section 1. At the time of his termination from employment, Appellant, Jeffrey Duerson, was a classified employee with status.

19. Appellant, as an employee by the Kentucky Justice and Safety Cabinet, Department of Criminal Justice Training, was subject to its DOCJT Policy and Procedure 2002-007 (Appellee's Exhibit 4), DOCJT Policy and Procedure 2002-002 (Appellee's Exhibit 9), Commonwealth of Kentucky Employee Handbook, revised September 30, 2016, issued by the Personnel Cabinet, Department of Human Resource Administration (Appellee's Exhibit 10), and Personnel Cabinet, Personnel Memo 14-21, issued October 17, 2014 (Appellee's Exhibit 11). These policies were in full force and effect at all times during the events described herein.

20. In Section II, of DOCJT Policy and Procedure 2002-007, it states:

It is the policy of the Department of Criminal Justice Training that employees shall conduct themselves at all times in accordance with the standards contained in this and other agency policies and those of the Executive Branch.

21. Section III, Procedure, B. Prohibited Behaviors, states:

1. Employees shall not engage in any conduct prohibited by the Commonwealth of Kentucky Employees Handbook or by any applicable statute, regulation or policy.

22. C. Expected Behaviors:

Employees shall conduct themselves in a manner that reflects professionalism and service, encourages respect and cooperation and reflects favorably on the Department of Criminal Justice Training. (Appellee's Exhibit 4).

23. DOCJT Policy and Procedure 2002-002 states:

II. Policy – It shall be the policy of the Department of Criminal Justice Training that employees shall have a limited expectation of

privacy in the use of equipment and facilities owned or used by the Department of Criminal Justice Training. Employees shall not possess or conceal contraband in these areas or use department property to engage in illegal, dangerous, offensive, or inappropriate activities...

- III. Procedure – A. Definition – Contraband means illegal, dangerous, offensive, or inappropriate items, including, but not limited to... prescription drugs for which the employee does not have a prescription...
  
- III. Procedure – E. Disciplinary Action – Any violation of this policy may result in disciplinary action up to and including dismissal. Additionally, appropriate authorities may be notified if an employee engages in illegal activities or uses Department of Criminal Justice Training property for any illegal purposes. (Appellee's Exhibit 9).

24. The Commonwealth of Kentucky Employee Handbook, Revised September 30, 2016, at page 100 states, in part:

The unlawful...possession or use of any controlled substance is strictly prohibited in the workplace and any employee found to be in violation will be subject to disciplinary action by the Appointing Authority for misconduct which may include sanctions up to and including dismissal from state service, in accordance with State law. ...Employees found to be in violation of drug-free workplace requirements may face disciplinary action up to and including dismissal... (Appellee's Exhibit 10).

25. The Commonwealth of Kentucky Personnel Cabinet, Personnel Memo 14-21, restates and incorporates the Drug-Free Workplace Policy previously cited in the Commonwealth of Kentucky Employee Handbook (Appellee's Exhibits 10 and 11).

26. Garl Lovings testified that upon discovery of one of his prescription medication pills being on the floor near his desk, he set about methods to attempt to discover whether another person was taking that medication from his locked desk and overhead bin. He then documented with a timeline his record of events (Appellee's Exhibit 1). He also produced videotape evidence to his superiors.

27. Testimony from Mr. Joey Barnes, Investigator III, Compliance Section, included his procedures and conclusions in conducting the investigation into these incidents. (Appellee's Exhibit 2). He concluded Garl Lovings had been a victim of theft of his prescription pain medication, taken from his locked office bin in the office; that Mr. Duerson had accessed the bin with keys on several occasions and took that medication. Mr. Barnes had no doubt it was Mr. Duerson who took the pills.

28. Kevin Rader, who had been an Assistant Director at DOCJT, testified he was present during a meeting in the Commissioner's office. During part of that meeting, Mr. Duerson admitted to Mr. Rader and others in their presence, that he had taken the prescription medications from Mr. Lovings' desk.

29. Mr. Duerson testified he was aware Garl Lovings had pain issues and was taking pain pills. He related that when the Kentucky State Police Detective read him the allegations, he, Duerson, responded, "I'm glad it is over...I needed it to end." He testified he had been caught and that he did it. His testimony included an admission that he stole prescription medication from a locked overhead cabinet and he had been terminated for stealing. He also testified he had kept his substance abuse issues from his coworkers and, at no time had he ever requested accommodations at work for drug abuse problems. He further acknowledged he had violated policy by taking the medications belonging to a coworker.

30. Mark Filburn, who at that time was the Commissioner of DOCJT, testified how he went through a step-by-step and detailed process of considering whether to issue discipline, as well as the level of appropriate discipline. His testimony indicates a thoughtful and careful consideration of those issues based on the facts that were presented to him.

31. Appellee has proven by a preponderance of the evidence that there was just cause to dismiss Appellant from his position as Administrative Specialist III, effective October 23, 2017, based on allegations of lack of good behavior, and actions that violated the aforesaid policies and procedures. Appellee has also proven by a preponderance of the evidence that such penalty was neither excessive nor erroneous.

**RECOMMENDED ORDER**

The Hearing Officer recommends to the Personnel Board that the appeal of **JEFFREY DUERSON V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CRIMINAL JUSTICE TRAINING (APPEAL NO. 2017-228)** 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 Roland P. Merkel** this 8<sup>th</sup> day of January, 2019.

**KENTUCKY PERSONNEL BOARD**

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

A copy hereof this day mailed to:

Hon. Oran S. McFarlan  
Hon. Edward E. Dove