

**KENTUCKY PERSONNEL BOARD
MINUTES OF SEPTEMBER 9, 2016**

1. The regular monthly meeting of the Kentucky Personnel Board was called to order by Vice Chairman Larry Gillis on September 9, 2016, at approximately 9:30 a.m., 28 Fountain Place, Frankfort, Kentucky.

Board Personnel Present:

Brian J. Crall, Chairman
Larry B. Gillis, Vice Chairman
David B. Stevens, Member
D. Brian Richmond, Member
Mark O. Haines, Member
Beverly H. Griffith, Member
Mark A. Sipek, Executive Director and Secretary
Cynthia Perkins, Administrative Section Supervisor
Gwendolyn McDonald, Administrative Specialist

2. **READING OF THE MINUTES OF REGULAR MEETING HELD AUGUST 12, 2016**

The minutes of the last Board meeting had been previously circulated among the members. Chair Gillis asked for additions or corrections. Mr. Crall moved to approve the minutes, as submitted. Dr. Stevens seconded and the motion carried 4-0. The Board members signed the minutes.

(Vice Chair Gillis does not vote, unless noted.)

[Mr. Richmond arrived at 9:50.]

3. **EXECUTIVE DIRECTOR'S REPORT**

Mr. Sipek advised that 76 new appeals were filed in August 2016 and 23 Final Orders went out. The total number of active appeals for the month was 385. On another note, there were 24 evidentiary hearings scheduled in August; however, only 4 were actually held due to appeals being rescheduled, settled, withdrawn or converted to pre-hearings.

Mr. Sipek stated that in the appeal of *Cabinet for Health and Family Services v. Debra Vahle*, 2016-SC-000080-D [2014-CA-001561] the Kentucky Supreme Court denied discretionary review, but ordered the opinion not to be published. The Court of Appeals agreed with the Board's decision, which reaffirms that the Board has final say on disciplinary penalties.

Mr. Sipek stated that he and Ms. Perkins attended the Performance Matters Refresher Training for evaluators on September 8, 2016. This refresher training was presented by Stan Riley, Personnel Program Consultant with the Department of Human Resources Administration. Mr. Sipek stated that new information was provided since the last time he had attended training.

Mr. Sipek stated he had the opportunity to discuss issues and cases with twelve new mediators at the mediation training on August 30, 2016.

Staff has continued to make progress on the website which is now up-to-date, except backlog on cases decided by the Board.

Mr. Sipek wanted to thank Ms. Amanda Cloyd publicly for her two plus years' service on the Board and her significant contributions to the Board. In addition, applicants have until the end of the day to apply for the vacant position, to be discussed at the end of the Agenda.

At the conclusion of Mr. Sipek's report, Chair Gillis called for the Personnel Cabinet's report.

4. PERSONNEL CABINET'S REPORT

Secretary Thomas Stephens and Commissioner Jenny Goins, Department of Employee Insurance, were present for the Personnel Cabinet's report. Sharon Burton, Deputy Executive Director of Legal Services, and Matt Hall, Deputy Commissioner, Department of Employee Insurance, were also available.

Commissioner Goins stated that the Department of Employee Insurance regulates the Kentucky Employees Health Plan and Kentucky Group Life Insurance Plan. Both plans are self-insured. There are 46 people in the department; with 6 new members from life insurance. There are 178,000 plan holders; 260,000 including dependents. There are 7,500 cross-reference family members. 32,000 people have waived coverage.

Commissioner Goins stated that Anthem is the Medical Third-Party Administrator; CVS is the Pharmacy Benefits Manager; Wage Works is the FSA/HRA Administrator; Humana Vitality (Go365) is the wellness administrator, and Vitals SmartShopper is the Transparency Vendor. Those completing the Living Well Promise will not have a premium increase; however, for those who have not completed the Living Well Promise they will be charged a \$40 monthly fee, but will still have access to all plans. Frankfort has four Living Well health on-site clinics.

Included in the Kentucky Employees' Health Plan (KEHP) is the Diabetes Value Benefit. The Diabetes Value Benefit helps manage the cost of medications and supplies with diabetic members paying reduced co-pays or no co-pay, with zero cost for supplies, for their maintenance.

LiveHealth On-line medical service is available to plan holders. About 10,000 people have registered, with 4,000 actually using it. This program allows immediate access to a doctor 24/7, which is especially helpful to families with small children.

The Department is working with Anthem to have on-line licensed psychologists and therapists. Plan holders will not have immediate access; however, a psychologist or therapist will get back with the plan holder within 24 hours of the request. This plan will be covered 100%.

Commissioner Stephens thanked Mr. Sipek for attending and speaking at the Kentucky Employee Mediation Program (KEMP). Mr. Stephens stated the Cabinet had not had training for a number of years and twelve new mediators completed training, including him.

Governor Bevin advocated criminal justice reform which passed the Legislature, specifically for expungement of Class D, non-violent, low level drug crimes. On September 20, 2016, the Department of Public Advocacy will present a one-hour CLE at the Personnel Cabinet open to anyone at no cost. An ad will run in the Bar Journal.

Mr. Crall asked about the relationship between KEMP and the Personnel Board. Secretary Stephens stated that the Personnel Board usually directs mediation to the Cabinet during the pre-hearing conference. Mr. Sipek stated that if both parties express an interest in mediation at the pre-hearing conference, the Board will order it. Sometimes the agency will need to discuss it with their appointing authority first, before committing to mediation. Mediation is free to the parties and is sometimes easier to schedule than a hearing. Secretary Stephens suggested that the appeal forms be modified to add a box to consent to mediation. Dr. Stevens asked if there was any consideration in making mediation mandatory. Secretary Stephens stated that only in formal conversations; there would have to be a change in the program to accommodate that. The Cabinet has considered arbitration which is used in other states; however, there are a lot of hurdles.

5. ORAL ARGUMENTS

A. Donald Breeding v. Transportation Cabinet

Present for oral arguments were the Appellant, Donald Breeding, and counsel for Appellee, the Hon. William Fogle. After presenting oral arguments, the parties answered questions from the Board.

B. John Coffey v. Tourism, Arts and Heritage Cabinet/Fish and Wildlife

Present for oral arguments were counsel for Appellant, the Hon. Paul Fauri, and counsel for Appellee, the Hon. David Wicker. After presenting oral arguments, the parties answered questions from the Board.

C. **Melena Lamb v. Cabinet for Health and Family Services**

Present for oral arguments were counsel for Appellant, the Hon. Amelia Zachary, and counsel for Appellee, the Hon. Blake Vogt. After presenting oral arguments, the parties answered questions from the Board.

D. **Michael G. Brown v. Education and Workforce Development Cabinet**

Present for oral arguments were counsel for Appellant, the Hon. Robert Rowland, and counsel for Appellee, the Hon. Tess Russell and the Hon. Patrick Shirley. Counsel for Appellant requested to move oral arguments to the next Board meeting. Counsel for Appellee had no objection. (**Moved to October Board.**)

6. **CLOSED SESSION**

Dr. Stevens moved that the Board go into Executive Session for the purposes of discussing complaints, proposed or pending litigation, and deliberations regarding individual adjudications. Mr. Crall seconded. Chair Gillis stated that the motion had been made and seconded for the Personnel Board to retire into closed Executive Session, passed by a majority vote of the members present, with enough members present to form a quorum. Pursuant to KRS 61.810(1) (c), (f), and (j), the Kentucky Open Meetings Act, the Board will now retire into closed Executive Session. Specific justification under the Kentucky Open Meetings Act for this action are as follows, because there will be discussion of proposed or pending litigation against or on behalf of the Board; and deliberations regarding individual adjudication. The motion carried 5-0. (11:05 a.m.)

Dr. Stevens moved to return to open session. Mr. Crall seconded and the motion carried 5-0. (11:40 a.m.)

7. **CASES TO BE DECIDED**

The Board reviewed the following cases. At that time, the Board considered the record including the Hearing Officers' findings of fact, conclusions of law and recommendations, any exceptions and responses which had been filed, and oral arguments, where applicable.

A. **Donald Breeding v. Transportation Cabinet (2015-253)**

Mr. Crall, having noted Appellant's exceptions, Appellee's response to Appellant's exceptions, and oral arguments, moved to accept the recommended order dismissing the appeal. Mr. Haines seconded and the motion carried 5-0.

B. John Coffey v. Fish and Wildlife (2015-179)

Mr. Crall, having noted Appellant's exceptions, Appellee's exceptions, Appellee's response to Appellant's exceptions, Appellant's response to Appellee's exceptions and oral arguments, moved to accept the recommended order dismissing the appeal. Ms. Griffith seconded and the motion carried 5-0.

C. Melena Lamb v. Cabinet for Health and Family Services (2015-262)

Mr. Crall, having noted Appellant's exceptions, Appellee's response to Appellant's exceptions, and oral arguments, moved to accept the recommended order dismissing the appeal. Mr. Richmond seconded and the motion carried 5-0.

D. Michael G. Brown v. Education and Workforce Development Cabinet (2014-111) Moved to October Board

E. Michael L. Blackburn v. Education and Workforce Development Cabinet (2015-279) Deferred from August

Mr. Crall, having noted Appellee's exceptions, Appellant's response and oral arguments, moved to accept the Final Order altering the recommended order, as attached to the minutes, dismissing the appeal. Mr. Haines seconded and the motion carried 5-0.

F. Gillian Fell v. Department of Parks (2015-254) Deferred from August

Mr. Crall, having noted Appellee's exceptions and Appellant's response, moved to accept the Final Order altering the recommended order, as attached to the minutes, dismissing the appeal. Dr. Stevens seconded and the motion carried 5-0.

G. Junior Mondie v. Cabinet for Health and Family Services (2015-305)

Ms. Griffith, having noted Appellee's exceptions, moved to accept the recommended order dismissing the appeal. Mr. Haines seconded and the motion carried 5-0.

H. Kimberly Mudd v. Cabinet for Health and Family Services (2015-189)

Dr. Stevens, having noted Appellee's exceptions, moved to defer this matter to the next Board meeting. Mr. Crall seconded and the motion carried 5-0.

I. **Clayton Brooks v. Transportation Cabinet (2016-048)**

Dr. Stevens moved to accept the recommended order dismissing the appeal. Ms. Griffith seconded and the motion carried 5-0.

J. **Monique Rodriguez v. Cabinet for Health and Family Services (2016-042)**

Mr. Crall moved to accept the recommended order dismissing the appeal. Dr. Stevens seconded and the motion carried 5-0.

Show Cause Orders – No Response Filed – Appeals Dismissed

Dr. Stevens moved to find that the Appellants had not responded to the show cause orders and that the recommended orders be accepted *en bloc* dismissing the appeals for failure to timely prosecute the appeals. Ms. Griffith seconded and the motion carried 5-0.

K. Brian Blair v. Department of Corrections (2016-070)

L. Craig Mitchell v. Finance and Administration Cabinet (2015-183)

M. Delton Wright v. Cabinet for Health and Family Services (2016-105)

8. **WITHDRAWALS**

Dr. Stevens moved to accept the following withdrawal of appeals *en bloc* and to dismiss the appeals. Ms. Griffith seconded and the motion carried 5-0.

A. Lee Karsner v. Department of Corrections (2015-293)

B. Alicia Lewis v. Cabinet for Health and Family Services (2016-087)

C. Paul McDonald v. Department of Corrections and Personnel Cabinet (2016-157)

D. David Tate v. Department of Corrections (2015-277)

E. Elizabeth Vetter v. Cabinet for Health and Family Services (2016-151)

F. Robert Tapp v. Department of Corrections (2016-094)

9. **SETTLEMENTS**

Mr. Haines moved to issue settlement orders and to sustain the appeals *en bloc* to the extent set forth in the settlements as submitted by the parties. Dr. Stevens seconded and the motion carried 5-0.

A. Lemuel Watts, Jr. v. Transportation Cabinet (2016-073)

B. Lisa Gaw v. Board of Nursing (2016-082)

10. **OTHER**

A. **Election of Officers**

Mr. Gillis moved to elect Mr. Crall as Chairman. Mr. Haines seconded and the motion carried 6-0 (with Mr. Gillis voting).

Mr. Crall moved to re-elect Mr. Gillis as Vice Chairman. Ms. Griffith seconded and the motion carried 5-0, with Mr. Gillis abstaining.

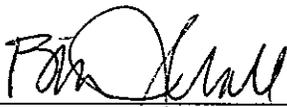
B. **Personnel Board Vacancy**

Chair Gillis stated that after Ms. Cloyd's resignation, the Board, governed by statute, needs to fill the position until the term expires. Secretary Stephens issued a memo to all classified employees for them to apply. Chair Gillis stated today is the cut-off date to apply. So far, 27 employees have applied. Chair Gillis stated that the last time a merit position was filled, a committee was formed to review the applications and select candidates to be interviewed. Mr. Haines asked if that was followed this time, would the other Board members have any input. Chair Gillis stated that if the Board members want to review the applications and submit recommendations, it could be done any way they wanted to. Ms. Griffith stated they could submit their recommendations by email. Chair Gillis stated there are no criteria for selecting the merit employee member to fill an unexpired term.

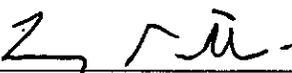
Mr. Sipek stated that Secretary Stephens' memo stated the cut-off for applying was close of business, the statute states ten days with no cut-off time; therefore, he would suggest keeping it open until midnight. Mr. Sipek further stated that unlike the past, if a committee is selected, Open Meeting procedures would apply, and wanted the members to be aware of that. Mr. Crall stated he would work with Chair Gillis as a committee. Chair Gillis suggested contacting Mr. Crall to advise him of their selections.

As to the General Counsel's position, Mr. Sipek stated that he is awaiting approval from Mr. Steve Pitt, in the Governor's office.

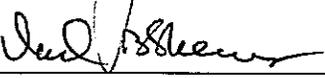
There being no further business, Mr. Haines moved to adjourn. Dr. Stevens seconded and the motion carried 5-0. (12:00 p.m.)



Brian J. Crall, Chairman



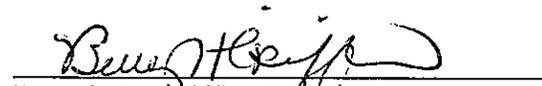
Larry Gillis, Vice Chairman



David B. Stevens, Member

D. Brian Richmond, Member


Mark O. Haines, Member


Beverly H. Griffith, Member

Jim Recktenwald on June 1, 2015, when she came back to the facility to pick up her things. (Testimony of the Appellant, Jim Recktenwald, Rick Duty, Kimberly Tucker, Priscilla McCowan, Beth Steinle and Appellee's Exhibits 1 and 2.)

8. During the course of the investigation, the Appellant was interviewed by Kimberly Tucker and Carmen Maxson on June 12, 2015. During this interview, Appellant admitted he slapped "LS" and "ET" on the bottom. He could not explain why he did this and admitted that his actions were inappropriate. (Testimony of Kimberly Tucker and Appellee's Exhibit 5.)

9. Appellant was interviewed again on September 16, 2015, in Frankfort by Ms. Tucker and Ms. McCowan. At that time, Appellant denied slapping students on the bottom at any time, and stated that he tapped "ET" and "LS" on the side of their legs, not their bottoms, while trying to get them out of the office in the Recreation Department. Appellant testified that he tapped the side of students' legs during his testimony at this hearing. (Testimony of Appellant, Kimberly Tucker and Appellee's Exhibit 5.)

10. The Board finds that Appellant's initial admission of slapping students "ET" and "LS" on their bottoms credible. Appellant's explanation that he was nervous when confronted with an investigation where his job was in jeopardy and thus, testified inaccurately about inappropriate actions is simply not believable. The Board finds that Appellant's later denials of slapping these students on the bottom to be self-serving and contrived, once Appellant realized the trouble he was in regarding these allegations.

11. Based on the testimony at the hearing, the Personnel Board finds Appellant engaged in the following misconduct with students:

- a. Appellant lifted "JG" up like a sack of potatoes, acting like he was going to throw her in the pool. (Testimony of Appellant, Kimberly Tucker and Appellee's Exhibit 5.)
- b. Appellant pulled his sweaty shirt over "JG's" head at a basketball game, claiming he was just goofing around. (Testimony of Appellant, Kimberly Tucker and Appellee's Exhibits 5 and 7.)
- c. Appellant slapped "LS" on the bottom. (Testimony of Kimberly Tucker, Rick Duty and Appellee's Exhibit 5.)
- d. Appellant slapped "ET" on the bottom. (Testimony of "ET," Kimberly Tucker and Appellee's Exhibit 5.)
- e. Appellant allowed "ET" to put her legs on his legs while showing movies. (Testimony of "ET," Kimberly Tucker, Greg Standifer, Rick Duty and Appellee's Exhibit 7.)
- f. Appellant hugged students or allowed students to hug him before bed, including student "ET." (Testimony of Kimberly Tucker, Greg Standifer and Appellee's Exhibit 7.)
- g. Appellant picked up student "LS" and put her over his shoulder. (Testimony of Greg Standifer and "LS.")
- h. Appellant allowed "LS" to put her legs over his lap. (Testimony of Rick Duty.)

- i. Appellant wrestled with "LS" in the office, as if one of them was trying to get something from the other. (Testimony of Rick Duty.)
- j. Appellant tickled student "ET." (Testimony of Rick Duty.)

12. The Board rejects Appellant's defense that he was goofing around and this is just the way he interacted with students in the Recreation Department in order to develop a better rapport with them. Regardless of his motivation, Appellant's conducts were inappropriate in any workplace, and certainly inappropriate at the Carl D. Perkins Center when dealing with the vulnerable students he was with. Appellant's conduct was disruptive to the workplace, disruptive and disturbing to the students and contrary to the mission of the Carl D. Perkins Center.

13. Appellant's inappropriate actions constitute just cause for his dismissal and his dismissal was neither excessive nor erroneous as established by all of the surrounding circumstances. The Board finds staff witnesses Greg Standifer and Rick Duty credible in their descriptions of Appellant's misconduct. The Board specifically finds Kimberly Tucker's testimony credible, especially her description of Appellant's admissions during her two interviews with him. The Board finds "ET's" testimony credible describing Appellant's misconduct. The Board finds "LS's" denials of Appellant's misconduct not credible, as she appeared as a very intimidated and frightened witness. The Board further finds "LS" less than credible in her testimony in that she denies the Appellant slapped her on the bottom when the Appellant admitted this conduct in his first interview with Kimberly Tucker.

14. The Board also finds that during the course of his employment, Appellant underwent training involving sexual harassment and proper staff relations

with students. Such training was a part of the Code of Professional Ethics for Rehabilitation Counselors, which included such topics as “Relationship Boundaries with Students and Supervisees,” “Sexual Intimacies with Clients” and “Non-Professional Relationships with Clients.” The Appellant was also on notice not to engage in these behaviors through the guidelines stated in “Staff Relations with Consumers.” (Appellee’s Exhibit 11.)

B. Delete Conclusions of Law and substitute the following:

1. The Board concludes that based on the Findings of Fact, the Agency carried its burden of proof to establish just cause for the dismissal of the Appellant, and his dismissal was neither excessive nor erroneous based on all of the surrounding circumstances. KRS 18A.095(1) and (2)(c).

2. The Board concludes that the Hearing Officer properly excluded evidence the Agency tried to introduce, which was not included in the charges of dismissal in this case. KRS 18A.095(7)(b) and *Cleveland Board of Education v. Loudermill*, 470 US 532 (1985). Allowing the Agency to proceed against the Appellant based on uncharged conduct would have been a fundamental violation of due process, which requires that Appellant be provided with notice and an opportunity to be heard. Notice of the charges against the Appellant after his dismissal would deprive him of both aspects of due process and violate KRS 18A.095(2) through (6).

3. The allegations against the Appellant that were contained in his dismissal letter (Appellee’s Exhibit 12) which were not proven at the evidentiary hearing played no part in the Board’s consideration of this appeal. KRS 13B.090(7).

C. Delete the Recommended Order, and substitute the following:

IT IS HEREBY ORDERED that the appeal of **MICHAEL L. BLACKBURN V. EDUCATION AND WORKFORCE DEVELOPMENT CABINET (APPEAL NO. 2015-279)** is **DISMISSED**.

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer, as Altered, be, and they hereby are, approved, adopted and incorporated herein by reference as a part of this Order and the Appellant's appeal is **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 September, 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
SECRETARY

A copy hereof this day mailed to:

Hon. Patrick B. Shirley
Hon. Tess Russell
Hon. Paul Fauri

3. The Board also finds credible Mr. Bailey's testimony that he witnessed the Appellant giving an incorrect tour in July 2015. On July 23, 2015, Mr. Bailey established the Appellant gave a tour and left out information pertaining to the duel. Mr. Bailey spoke with the Appellant on two occasions regarding this. On one occasion she forgot the information, on another, she stated that she did not see a point in providing the information. The Board finds this second meeting as evidence of the Appellant's insubordination regarding instructions from Mr. Bailey on how to conduct the tour.

4. The Board finds, based on the misconduct proven by the evidence at the hearing, the Appellee has established proper cause for the four-day suspension of the Appellant and this penalty was neither excessive nor erroneous. The Board bases this finding not only on the testimony regarding the Appellant's misconduct, but also on the undisputed evidence of the Appellant's disciplinary history.

B. **Delete** the Conclusion of Law and substitute the following:

The Board concludes the Appellee proved Appellant committed misconduct pursuant to 101 KAR 1:345, and her misconduct constitutes just cause for a four-day suspension without pay. In addition, the Board finds this penalty is neither excessive nor erroneous. [KRS 18A.095(1) and (22)(c).]

C. **Delete** the Recommended Order and substitute the following:

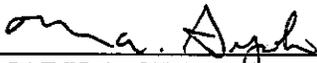
IT IS HEREBY ORDERED that the appeal of **GILLIAN FELL V. TOURISM, ARTS AND HERITAGE CABINET, DEPARTMENT OF PARKS (APPEAL NO. 2015-254)** is **DISMISSED**.

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

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this 13th day of September, 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day mailed to:

Hon. William T. Hutchins
Hon. Jean W. Bird