

FULL BOARD OF THE MISSISSIPPI EMPLOYEE APPEALS BOARD

KIMSEY WHIPPS

FILED

APPELLANT

VS.

DEC 03 2014

NO. 14-027

MISSISSIPPI DIVISION OF MEDICAID

EMPLOYEE APPEALS BOARD

APPELLEE

ORDER OF MEAB BOARD, EN BANC

Appellant, Kimsey Whipps (“Whipps”) filed an appeal to the Mississippi Employee Appeals Board (“EAB), *en banc*, appealing the Order entered by Hearing Officer Ingrid D. Williams on September 29, 2014, affirming her termination from employment with the Mississippi Division of Medicaid (“MDOM”). The EAB, *en banc*, having reviewed the record in this matter, affirms the decision of Hearing Officer Williams. The reasons for the MEAB, *en banc*, opinion are set forth below:

FACTS

Whipps was employed as an Accountant/Auditor IV with the MDOM. On June 20, 2014, Whipps was terminated for a Group Two, No. One Offense of, "insubordination, including, but not limited to ... failure or refusal to follow supervisor's instruction, perform assigned work, or otherwise comply with applicable established written policy." Specifically, Whipps was cited with the above Offense after agency internet access reports revealed she was performing duties and accessing websites, Taxslayer.com and IRS.com, associated with her outside job as a tax preparer during working hours. While employees of MDOM are permitted to engage in paid outside employment, they may do so only after authorization from the supervising Bureau/Office Director, clearance from the Legal Unit, and final approval from the Deputy Administrator. Such employment may not interfere with the employee’s duties, nor may the employee use MDOM equipment or supplies. All outside employment must be conducted on personal time.

Whipps was also charged with a Group Three, No. Six Offense of "falsification of records, such as, but not limited to, vouchers, reports, time records, leave records, employment applications or other official state documents." Specifically, Whipps was cited for allegedly recreating "a state document and record that is officially generated from the Mississippi Department of Finance and Administration on a monthly basis notifying each state employee of the direct deposit of their earnings, taxes, deductions, net pay, and leave usage." It is alleged she used said documents for tax preparation purposes.

Whipps was also charged with a Group Three, No. 12 Offense of "unauthorized use or misuse of State Property or records." The results of an MDOM internet activity report for the period of December 20, 2013 to March 5, 2014, revealed that Whipps accessed the websites, Taxslayer.com and IRS.com, sites commonly used by tax preparers, a total of 209 times during working hours. Each of these websites is non-work related sites.

Whipps was also charged with a Group Three, No. 14 Offense of "an act or acts of conduct occurring on or off the job which are plainly related to job performance and are of such nature that to continue the employee in the assigned position could constitute negligence in regard to the agency's duties to the public or to other state employees." Whipps allegedly faxed a document to the IRS on a MDOM fax machine on behalf of someone else; Recreating state employee paycheck stubs with inaccurate information on them; possessing a tax document summary in her name with an incorrect wage amounts listed; and possessing a "doctored" bank statement.

Whipps was also charged with the Group Three, No. 19 Offense of "willful violation of MSPB (Mississippi State Personnel Board) policies and procedures, including, but not limited to refusing to cooperate and/or giving a false statement in an investigation of possible violation of MSPB policies and procedures." Specifically, MDOM alleged that Whipps gave false statements in a March 28, 2014, investigative interview with MDOM Human Resources investigators.

Whipps appealed her termination to the EAB and a hearing was held on August 26, 2014, in Jackson, Mississippi. Hearing Officer Williams found as follows:

Whipps was able to meet her burden of proof with regard to the Group Three, No. Six Offense of "falsification of records, such as, but not limited to, vouchers, reports, time records, leave records, employment applications or other official state documents," and the Group Three, No. 14 Offense of "an act or acts of conduct occurring on or off the job which are plainly related to job performance and are of such nature that to continue the employee in the assigned position could constitute negligence in regard to the agency's duties to the public or to the other state employees." There is no definition of the term falsification in the Mississippi State Employee Handbook or in Mississippi Law. Thus, we must look to the list of examples in the description of the Group Three, No. Six Offense: vouchers, reports, time records, leave records and employment applications. The enumerated documents all imply intent to defraud. There is no doubt that MDOM found recreated pay stubs and other documents on Whipps computer, but there is no evidence that Whipps did or attempted to do anything with these documents. MDOM failed to show that Whipps attempted to use the recreated documents or deceive anyone with the documents. In sum, there was no evidence of intent to defraud. The mere fact that Whipps recreated the documents simply does not amount to falsification. The other item cited under this charge, faxing a letter to the Internal Revenue Service on behalf of a friend, does not rise to the level of a Group Three, No. 14 Offense.

With regard to the Group Two, No. One Offense of insubordination there was sufficient evidence to support MDOM's conclusion that Whipps had committed this offense. Whipps acknowledged that she did not inform MDOM that she was involved in outside employment. Failure to inform MDOM that she was engaged in outside employment was insubordinate in that she failed to comply with established written policy.

Furthermore, there was evidence to support the charge with regard to the Group Three, No. 12 Offense of unauthorized use or misuse of state property or records. There was ample evidence to support MDOM's finding that Whipps was preparing tax returns for pay at work including the presence of tax returns in her office, the number of times that Whipps accessed Tax Slayer, and the receipt of funds from persons who said she prepared their taxes.

Finally, there was sufficient evidence to support the Group Three, No. 19 Offense of giving a false statement in an investigation of possible violation of MSPB policies and procedures. After listening to the recording of the March 28, 2014, interview the undersigned Hearing Officer concludes that Whipps made the false statements enumerated in the notice of termination.

OPINION

MEAB Rule 18 A. provides that "The purpose of the hearing is to ascertain the truth."
MEAB Rule 20. B. states that "[a]n appealing party shall have the burden of proving that the reasons stated in the notice of the agency's final decision are not true or are not sufficient grounds for the action taken. There is no requirement that the agency support their decision to terminate an employee with "substantial evidence." The burden is on the employee to show that reasons for the agency's decision are not true or are not sufficient grounds for the action taken.

Having reviewed the testimony and evidence, the EAB, *en banc*, finds that there is sufficient evidence that Whipps committed the above Offenses, and hereby adopts and affirms Hearing Officer Williams' Findings and Opinion. The decision of the Hearing Officer is hereby Affirmed.

SO ORDERED this the 2nd day of December, 2014.

MISSISSIPPI EMPLOYEE APPEALS BOARD FULL BOARD

BY: _____


B. RAY THERRELL, II
Hearing Officer