

COMMONWEALTH OF KENTUCKY
48TH JUDICIAL CIRCUIT
FRANKLIN CIRCUIT COURT - DIVISION II
CIVIL ACTION NO. 19-CI-00036

NICOLE LIBERTO

PLAINTIFF

vs.

COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF AGRICULTURE

DEFENDANT

DEPOSITION OF JOE BILBY

The deposition of JOE BILBY was taken on behalf of the Plaintiff before Hunter J. Beamer, Registered Professional Reporter and Notary Public in and for the State of Kentucky at Large, at the offices of the Kentucky Department of Agriculture, located at 105 Corporate Drive, Frankfort, Kentucky, on Wednesday, February 26, 2020, commencing at 10:52 a.m.

The deposition was taken pursuant to Notice for purposes of discovery, evidence, and for all other purposes allowed under the Kentucky Rules of Civil Procedure.

THE KLEINGARTNER GROUP, INC.
P.O. BOX 23978
Lexington, Kentucky 40523-3978
(859) 321-2701

APPEARANCES

COUNSEL FOR PLAINTIFF:

Robert L. Abell
LAW OFFICE OF ROBERT L. ABELL
120 North Upper Street
Lexington, Kentucky 40507

COUNSEL FOR DEFENDANT:

Heather L. Becker
Carmin G. Iaccarino
OFFICE OF THE ATTORNEY GENERAL
700 Capitol Avenue, Suite 118
Frankfort, Kentucky 40601

ALSO PRESENT:

Mark White

I N D E X

DEPONENT: JOE BILBY

EXAMINATION BY:	PAGE
Mr. Abell.	4
REPORTER'S CERTIFICATE.	40

EXHIBIT INDEX

NUMBER	DESCRIPTION	IDENTIFIED
EXHIBIT 1	Job Specification for Staff Attorney Mgr/Asst General Counsel Last Revision 5/16/08 (046-048)	12
EXHIBIT 2	Job Class Specification for Staff Attorney Mgr/Asst General Counsel Job Revised 2/16/19 (042-043)	12
EXHIBIT 3	Job Class Specification for Staff Attorney II Job Revised 2/16/19 (044-045)	12
EXHIBIT 4	6/22/18 Letter to Ms. Liberto from Mr. Rogers (004-8)	27
EXHIBIT 5	Annual Employee Performance Evaluation (183-185)	28
EXHIBIT 6	Annual Employee Performance Evaluation (186-191)	29
EXHIBIT 7	10/29/19 Letter to Office of General Counsel from Mr. Abell and Affidavit of Dr. Vincent DeGeare	31
EXHIBIT 8	2/4/20 Letter to Ms. Liberto from Mr. Rogers	34

1 correct?

2 A. I believe it's general counsel and executive
3 director of the Office of Legal Services.

4 Q. You've held that job since July 2016; is that
5 correct?

6 A. Yes, sir.

7 Q. And your education, you attended and got a
8 bachelor's degree from the University of Virginia.

9 A. Yes, sir.

10 Q. Graduated in 2003?

11 A. No, sir.

12 Q. 2007?

13 A. No, sir.

14 Q. When did you graduate from University of
15 Virginia?

16 A. 2001.

17 Q. You served a term in the United States Marine
18 Corps.

19 A. That's correct.

20 Q. I believe that was 2003 to 2007.

21 A. That's correct.

22 Q. Honorably discharged?

23 A. Yes.

24 Q. Attended law school at University of Kentucky.

25 A. Correct.

1 Q. When did you graduate from law school?

2 A. 2011.

3 Q. And did you become a member of the Kentucky
4 bar also in 2011?

5 A. I did.

6 Q. Are you a member of any other state bars?

7 A. No.

8 Q. You were employed for a period of time by the
9 law firm now known as Stoll Keenon & Ogden?

10 A. That's correct. Let me amend a previous
11 answer. I have been admitted to the Federal District
12 Court for the Southern District of Indiana. I don't
13 think that's what you're asking when you say state
14 bars, but I want to say it on the record anyway.

15 Q. All right. It wasn't, but thank you anyway.

16 A. Sure.

17 Q. Go back to my question, you were employed by a
18 law firm now known as Stoll Keenon & Ogden?

19 A. Yes, sir.

20 Q. When did you begin working there?

21 A. I began in 2011, I think it was the month of
22 September, though I'm not certain, and I stayed there
23 until the end of June 2016.

24 Q. And in terms of employment, did you basically
25 go directly from Stoll Keenon & Ogden to your position

1 with the Department of Agriculture?

2 A. Yes, sir.

3 Q. Have you tried any cases?

4 A. I have.

5 Q. How many?

6 A. As lead counsel, I did one here in the
7 Franklin Circuit Court last year; my client was the
8 Kentucky Labor Cabinet; plaintiff's name was Michael
9 Donta. I also as lead counsel tried a case one time in
10 small claims court in Jefferson County. And then I was
11 second chair or third chair in another four to six
12 cases. I'd have to walk through if you wanted to get
13 into that level of detail.

14 Q. You've taken a deposition before.

15 A. I have.

16 Q. What are your job duties? I'm going to -- can
17 I just refer to your job as "general counsel" just for
18 shorthand purposes and convenience?

19 A. That would be fine.

20 Q. All right. What are your job duties as
21 general counsel?

22 A. I provide advice and support to all the
23 members of the department who need legal advice for the
24 various things that they do in their jobs. Part of my
25 job is providing legal counsel to the Kentucky Board of

1 Veterinary Examiners, which this department does on a
2 contract basis. That's the professional licensing
3 board for veterinarians in Kentucky.

4 I spend about a third of my time working in
5 support of Kentucky's hemp program, which is heavy on
6 law and regulations, of necessity. And then I also
7 just play a lot of response to the different inquiries
8 that members of the department bring to me on a weekly
9 if not daily basis. And then of course I supervise
10 Nicole Liberto, who is the second in command within the
11 Office of Legal Services.

12 Q. Have you supervised Ms. Liberto the entire
13 time you've held the position as general counsel?

14 A. I don't believe so. I think in her first
15 year, maybe year and a half, Keith Rogers was her
16 first-line supervisor. I think if you look at her
17 performance evaluations from '16, there may have been a
18 time when a lady named Kim Delaney-Ellis functioned as
19 her supervisor, but I'm not sure of the timeline. At
20 some point I became her direct first-line supervisor.
21 My guess is that the performance evaluation documents
22 would make that clear.

23 Q. Who was Kim Delaney-Ellis?

24 A. She was, for a time, the HR director. She was
25 the predecessor of Mark White.

1 Q. Well, I also saw that -- well, you referred to
2 Keith Rogers. Keith Rogers, to whom you referred, is
3 the chief of staff for the Department of Agriculture,
4 correct?

5 A. Yes, sir.

6 Q. Is Mr. Rogers your immediate supervisor?

7 A. He is.

8 Q. I did see in at least one of Ms. Liberto's
9 evaluations that he had -- Mr. Rogers had done the
10 evaluation.

11 A. There was a time when he was her direct
12 supervisor.

13 Q. Okay. Have you since becoming general counsel
14 for the Department of Agriculture maintained any type
15 of outside or private practice?

16 A. Yes.

17 Q. And what's the nature of that?

18 A. I'm the sole member and owner of Bilby Law
19 PLLC, which is lawyering I do on a moonlighting basis.

20 Q. And what type of cases or matters do you get
21 involved with with Bilby Law LLC?

22 A. It's Bilby Law PLLC.

23 Q. I'm sorry.

24 A. My two main kind of lanes of the business, the
25 one is representing employers in employment law

1 matters, and the other is representing religious
2 organizations with different legal needs that they may
3 have.

4 Q. How does that coordinate with your
5 responsibilities as general counsel for the agriculture
6 department?

7 A. It's two separate matters. And I'm of course
8 bound to not take on matters for Bilby Law PLLC that
9 would create a conflict of interest with the
10 department.

11 Q. And I saw that Bilby Law PLLC had an address
12 of 222 Eastover Drive?

13 A. Yes, sir.

14 Q. Is that an office or a residence?

15 A. It's my residence. I have an office in the
16 basement.

17 Q. How active are you with Bilby Law PLLC?

18 A. Well, it varies. I would say, on average, I
19 spend five, maybe ten hours a week on it.

20 Q. You supervise Nicole Liberto. Could you
21 describe her job duties as you understand them?

22 A. They're set forth in her performance
23 evaluation. They include overseeing the department's
24 responses to open records requests as they come in;
25 notifying me about certain kinds of open records

1 requests, which are defined in her performance
2 evaluations. She's responsible for supervising Clint
3 Quarles, a staff attorney, and Michael Grant, who's not
4 an attorney but is housed within the Department of --
5 or in the Office of Legal Services.

6 She also is assigned various tasks from time
7 to time. Those would include performance -- I'm
8 sorry -- personnel board hearings, regulatory revision
9 assignments, and any other projects that may come
10 along. She's also expected to make herself available
11 to employees of the department who have requests about
12 any particular legal matter that may require the
13 assistance of the Office of Legal Services.

14 Q. Are you responsible for issuing any reprimands
15 or corrective employee action to Ms. Liberto?

16 A. She's my subordinate, so yes.

17 Q. Have you ever suggested to anyone that
18 Ms. Liberto should look into pursuing disability
19 retirement?

20 A. I believe I suggested that to you.

21 Q. Anybody else?

22 A. I don't think I've ever suggested it to her,
23 though I could be wrong. I can't recall suggesting it
24 to anyone else.

25 Q. Have you ever discussed with Mr. Rogers that

1 Ms. Liberto might -- a good solution for her might be
2 pursuing disability retirement?

3 A. Any communications that I would have had with
4 Mr. Rogers on that subject would be subject to the
5 attorney-client privilege.

6 MR. ABELL: I take it there's no advice
7 of counsel defense being asserted in this case?

8 MS. BECKER: Not at this time.

9 Q. Okay. You spoke once at an industrial hemp
10 seminar, correct?

11 A. It's been more than once.

12 Q. Some time ago three job descriptions were
13 produced to me, mark that 1, 2, and 3.

14 (EXHIBIT 1, EXHIBIT 2 AND EXHIBIT 3 MARKED)

15 Mr. Bilby, the prior counsel for the
16 Department of Agriculture produced to me I think it's
17 512 pages of documents some time ago. Did you ever
18 have any chance to look through them?

19 A. I did.

20 Q. All right. Among those documents, and you can
21 see they're stamped down in the lower-right-hand corner
22 and there's also handwriting on them, the numbers
23 differ for some reason. But anyway, looking at
24 Exhibits 1, 2 or 3 can you tell me which of them, if
25 any, is a job description applicable to Ms. Liberto's

1 position at present?

2 A. Well, the document you've labeled now as
3 Exhibit 3 is for staff attorney II. To my
4 understanding, that's not the position that she holds,
5 so I would rule that one out as having any bearing on
6 her job description. That leaves Exhibit 1 and Exhibit
7 2.

8 Looking at Exhibit 1, and turning to the third
9 page, it shows that this was a job established in 1982
10 and last revised on May 16th, 2008, so I would call
11 that some time ago, certainly before my time.

12 And then turning now to Exhibit Number 2, this
13 is a document titled, "Staff Attorney Manager/Assistant
14 General Counsel," which is what I understand her job
15 title to be. It was established in 1982 and last
16 revised on February 16th of 2019, so for that reason
17 alone I would say this one should be the one that's
18 most likely descriptive of her job.

19 Q. At present.

20 A. Yes, sir.

21 Q. All right. You referred -- do you know if,
22 prior to February 16, 2019, whether the job description
23 that's marked as Exhibit 1 was applicable to
24 Ms. Liberto's position?

25 A. I do not know.

1 Q. Turn to the second page of Exhibit Number 2.
2 It gives examples of duties, and some of these are
3 plainly not applicable such as preparing, trying and
4 arguing complex cases including capital cases, at least
5 to the extent that involves capital cases.

6 All right, but let's go through some of these
7 duties. First item is "Provides direct support to the
8 executive director, commissioner or general counsel in
9 the management and delivery of specialized legal
10 services." That's something that's part of
11 Ms. Liberto's duties, correct?

12 A. Yes.

13 Q. And has been since you've been general
14 counsel.

15 A. As I understand it, yes.

16 Q. "Manages and coordinates the work of
17 designated attorneys and non-attorney staff." You
18 referred earlier to her supervision of a staff attorney
19 and a non-attorney staff person, correct?

20 A. Uh-huh.

21 Q. Is handling complaints and grievances of
22 designated attorneys and non-attorney staff part of her
23 duties?

24 A. Yes, in the sense that she is responsible for
25 defending -- representing the department in matters

1 brought by KDA employees, which you could characterize
2 as complaints and grievances. She did one of those
3 last year and may have an opportunity to do one this
4 year.

5 Q. Are you talking about defending in personnel
6 board proceedings?

7 A. Yes, sir.

8 Q. Okay.

9 A. There's also such a thing as a grievance in
10 state government that is somehow different than a
11 personnel board complaint. In my mind, and this may be
12 incorrect, a grievance is not as serious of a complaint
13 as a personnel board appeal would be. I seem to recall
14 that she may have been involved in dealing with one of
15 these internal grievances, though I don't have any of
16 the details to support that.

17 And then at the most basic level, people come
18 to me all the time with things that I would
19 characterize as complaints and grievances and they want
20 a hearing from the attorney whether or not they're
21 right or they're wrong or what their rights are, so I
22 would imagine that if Nicole, you know, were approached
23 by such an employee, that she would also be responsible
24 for handling such a complaint or a grievance from a
25 non-attorney staff member of KDA.

1 Did I answer your question?

2 Q. An example of such a grievance might be, for
3 instance, what?

4 A. My supervisor telling me that I need to help
5 out with task X; that's never been a part of my job; do
6 I have to do it?

7 Q. Do you have any sense of how much work time
8 Ms. Liberto devotes to handling complaints and
9 grievances as you described them both with respect to
10 the personnel board and otherwise?

11 A. When there is a personnel board proceeding
12 that is coming up, I understand it to consume 100% of
13 her time or almost 100% of her time.

14 Q. How many personnel board matters have -- or
15 hearings have there been since you've been general
16 counsel?

17 A. There is the one that occurred in November and
18 December of last year. I can recall one shortly after
19 I came to the department that Ms. Liberto and I handled
20 together. I think that would be in early 2017, though
21 I'm not certain.

22 There have been others that have been filed
23 where we thought we were going to have to go in for a
24 hearing, but they were resolved shortly in one way or
25 another.

1 Q. All right, looking back at Exhibit 2,
2 "Performs specialized legal services relating to one or
3 more specific areas of the law," you referred to that
4 earlier, I believe, correct?

5 A. Yes.

6 Q. "Prepares, tries and argues complex cases
7 before state and federal courts and administrative
8 forums." You told us about a couple of personnel board
9 matters. Has Ms. Liberto since you've been general
10 counsel had responsibility for other -- whether in a
11 judicial forum or administrative forum -- other
12 litigation?

13 A. Not that I can think of. I am aware that she
14 has been trained as a hearing officer through the
15 training opportunities offered by the office -- I'm
16 sorry, the -- yeah, the Office of the Attorney General.
17 I don't know if she's ever been called upon to act as a
18 hearing officer during my time, but I know she's been
19 trained as one.

20 Q. The job description, Exhibit Number 2, is this
21 used -- if there were an opening for the position,
22 would this job description be used to advertise for it?

23 A. I don't know the answer to that.

24 Q. All right, going back to -- next item is
25 "Drafts and reviews proposed legislation... and

1 comments on proposed legislation." I believe you
2 referred to that earlier, correct?

3 A. It says legislation. I don't -- I'm not aware
4 of a time when Nicole has drafted or reviewed proposed
5 legislation to be introduced to the Legislature. She
6 has done similar work with regard to proposed
7 administrative regulations that were being drafted for
8 promulgation by the department. So I think that the
9 word "legislation" there is not as accurate as it could
10 be.

11 For instance, she's been tasked with doing an
12 overhaul of our motor fuels regulation, which has
13 turned into a project that has taken her almost two
14 years to complete, and that would be an administration
15 regulation that she was tasked with drafting.

16 Q. Does she have any responsibility for
17 coordinating legal work performed by contract
18 attorneys?

19 A. I lost track of where you were.

20 Q. Well, I skipped over a few because --

21 A. Oh, sorry.

22 Q. -- we've talked about them.

23 A. Oh, okay.

24 Q. You referred to them already.

25 A. Okay.

1 Q. But you go down a little bit, says, quote,
2 Coordinates legal work performed by contract attorneys.

3 A. In my time we have stopped using contract
4 attorneys, so she's not had an opportunity to do that
5 during my tenure as general counsel.

6 Q. Next is --

7 A. Let me qualify that. We still use one firm
8 for intellectual property work, but I handle
9 interaction with those attorneys; she does not.

10 Q. Okay. Next is "Approves settlement of legal
11 actions, consistent with agency procedures." To your
12 knowledge has Ms. Liberto ever had that type of
13 responsibility?

14 A. Not during my time here.

15 Q. Next is "Reviews and approves contracts,
16 official orders and other documents for form and
17 legality."

18 A. She does that sometimes.

19 Q. Next is "Represents the agency head and/or
20 advises agencies during meetings of various state
21 boards, commissions or similar entities." Does she
22 have that responsibility?

23 A. I can't recall an instance where she attended
24 a meeting of a state board, commission or similar
25 entity, but I can imagine there were times when

1 questions that arose within a state board or commission
2 or entity came to her for legal guidance. I know that
3 that happens with regard to her subordinate, Clint
4 Quarles. So in a sense, she supervises him and may
5 have substantive input in those efforts, though I don't
6 know any of the details.

7 Q. Next is "Reviews and makes recommendations on
8 agreements and other actions by an agency."

9 A. She does that.

10 Q. Next is "Drafts and reviews proposed
11 administrative regulations." I believe you referred to
12 that a few minutes ago with -- at least with respect to
13 motor fuels regulations.

14 A. That's correct, and she also oversees Clint's
15 efforts to do so with administrative regulations
16 touching on other matters.

17 Q. Next is "Prepares legal opinions"?

18 A. I can't recall a time when she's done that
19 while I've been here.

20 Q. Next is "Recommends policy and procedures to
21 conform with applicable laws and regulations."

22 A. I can't think of any specifics here, but I can
23 imagine a scenario where someone comes to her asking a
24 question about, "Can we do this or that in the program
25 that I run," and she would then need to consult with

1 the applicable laws and regulations and provide
2 guidance or an answer to that question, though I don't
3 know any of the specifics.

4 Q. And the last item would be, it seems, related
5 to what you just said, and it says, "Provides legal
6 advice to agency personnel."

7 A. Yes, sir.

8 Q. And you've mentioned several times that comes
9 up in a variety of contexts for Ms. Liberto and for
10 yourself as well, correct?

11 A. It does, indeed.

12 Q. One of her responsibilities is dealing with
13 open records requests.

14 A. That's correct.

15 Q. And reading through these materials, it could
16 be considered a significant part of her duties; is that
17 fair?

18 A. Think so.

19 Q. Walk me through a typical -- the department
20 receives an open records request in a typical case, and
21 I know there are atypical ones, but in a typical case
22 walk me through the process when it comes -- the
23 request is first received and then the response is
24 prepared and sent off.

25 A. I'll do my best to summarize, though I may

1 skip over a step or two.

2 The request usually comes in almost always in
3 writing. Sometimes it's on the one-page form that has
4 existed for longer than I've been here; sometimes it's
5 simply text in the form of an email or letter. Those
6 are -- no matter who receives it here in the
7 department, they should all be directed to Nicole's
8 attention.

9 In the email age they are often submitted by
10 whoever received it, sent to Nicole as an email or an
11 email attachment. She then is supposed to study it,
12 make an initial determination about whether or not KDA
13 is even likely to have documents that are responsive to
14 that request and/or whether or not there are exemptions
15 within Kentucky's Open Records Act that could be
16 applicable.

17 She then is responsible for figuring out who
18 is the person within KDA who is the keeper or custodian
19 of the documents that are responsive to this request.
20 She then shoots an email -- it's almost always email, I
21 believe -- to that KDA employee and requests
22 confirmation that documents exist and also an estimate
23 for how long it would take us to pull together the
24 records that are responsive to that request.

25 By law she's required within three days to

1 respond to the requesting party with an initial
2 assessment of whether or not the request has been
3 granted or denied or granted with qualifications. And
4 she also at that time is supposed to tell them an
5 estimate for how soon -- it's not even an estimate -- a
6 no-later-than date for when the documents will be
7 produced to the requesting party.

8 She's then responsible for staying in touch
9 with the KDA employee who is supposed to be pulling
10 those documents together and also staying in touch with
11 the requesting party to the extent they have questions
12 or a request for a status report on the department's
13 efforts to comply with the Open Records Act.

14 In addition, she's responsible for telling me
15 and our communications guy anytime she receives certain
16 kinds of open records requests which we've learned from
17 experience need to be flagged for my attention and for
18 Mr. Southard's.

19 Q. I think requests for media and lawyers were at
20 least two of the types that were supposed to be brought
21 to your attention, correct?

22 A. Correct.

23 Q. In terms of responding to the requesting
24 party, and what you have -- at least what I'm
25 understanding is Ms. Liberto has responsibility to

1 respond to the requesting party, and depending upon the
2 situation, "We don't have any of that"; "We have some
3 of it, but some of it's exempt"; or, "We're in the
4 process of fulfilling it completely, at least to the
5 extent we understand it," how is that response done?
6 Is that email or in writing, a letter, do you know?

7 A. I believe it's usually by email. I would
8 imagine that at an earlier stage in her career it was
9 done by letter, but increasingly we lean on email.

10 And I should also add that -- you're laying
11 out the various scenarios. I think there are times
12 when Nicole has to say to the requesting party, "Now
13 that my three days are up, your request is granted, but
14 I'm not even sure yet whether we have responsive
15 documents; we're working on it; I'll get back to you."

16 Q. I've gotten that response --

17 A. Have you?

18 Q. -- myself before from agencies. It's not
19 always easy to respond to open records requests.

20 A. That's true.

21 Q. All right. So at the end of this, does
22 Ms. Liberto have responsibility for physically
23 retrieving the documents?

24 A. Sometimes.

25 Q. How are they put together and delivered, if

1 there is a typical way that they're delivered to the
2 requesting party, on a DVD or a hardcopy?

3 A. Usually they are collected by whichever KDA
4 employee she has identified as the keeper of those
5 documents. Usually they are scanned and emailed to her
6 unless the documents are so voluminous that they cannot
7 be sent as an email attachment. I believe that she
8 also has a shared drive file where at least some KDA
9 employees can drop files in for her to retrieve
10 electronically. I'm not certain of that, though.

11 She then has the responsibility for printing
12 the documents out and inspecting them to identify
13 portions or pages that may need to be redacted and then
14 providing those redactions prior to production.
15 Sometimes we do physically produce the documents when
16 there's a big stack and it's most time and cost
17 effective to simply print them out and stick them in
18 the mail.

19 Q. Ms. Liberto has responsibility you said for
20 supervising two employees. One is a staff attorney.
21 What's that individual's name?

22 A. Clint Quarles.

23 Q. Could you summarize Mr. Quarles' duties?

24 A. I'm less familiar with his duties than I am
25 with Nicole's, but what I do know is that he is

1 responsible for many of the same tasks that she is; the
2 main difference being that he doesn't supervise any
3 staff attorneys and she supervises him.

4 Clint has responsibility for whatever duties
5 are assigned. Thinking back to the last year or so, he
6 has spent a lot of time spearheading regulatory
7 revision efforts for all the other regulations that are
8 promulgated by the state Board of Agriculture and the
9 Kentucky Department of Agriculture.

10 The reason we've been working so hard for the
11 last two years is because the General Assembly has
12 created a deadline for every agency to go through all
13 of its regs on the books and either update them or
14 identify them to be discarded as no longer necessary,
15 so-called "Red Tape Reduction Initiative." We spent a
16 lot of time on Red Tape Reduction Initiative. Clint
17 has done the lion's share of that work.

18 Q. Would it be fair for me to under-- conceiving
19 of Mr. Quarles' duties as generally similar to
20 Ms. Liberto's, absent the supervisory responsibilities?

21 A. Yes, although I would add the caveat that
22 there are certain subject matter areas that he just
23 knows a whole lot better than she does. And so my
24 understanding is that over the decade or more they've
25 worked together, they've reached an understanding that

1 when it comes to animal health issues or farming-
2 specific issues, Clint, being a farm kid, is the go-to
3 person on those issues and she handles the others.

4 Q. The other employee that Ms. Liberto supervises
5 his position is what?

6 A. I don't know what his position title is. His
7 name is Michael Grant.

8 Q. Do you know what Mr. Grant's job duties are?

9 A. I believe he assists her with whatever tasks
10 she may ask of him. I believe she has assigned him
11 with responsibility for keeping track of open records
12 requests as they come in and are completed and then
13 closed out. I think I saw at one point a tracker that
14 he had put together at her request. It's meant to keep
15 tabs on all these pending open records requests.

16 Beyond that, I'm not sure what he does. He is
17 a public notary, so from time to time he's called upon
18 to provide that service.

19 Q. Do you know how much time in a work week
20 Ms. Liberto devotes to supervising Mr. Quarles and
21 Mr. Grant?

22 A. I do not.

23 (EXHIBIT 4 MARKED)

24 Q. Mr. Bilby, I've marked as Exhibit Number 4 a
25 letter dated June 22, 2018. It is from Mr. Rogers to

1 Ms. Liberto. You've seen this before, I'm guessing?

2 A. I have.

3 Q. Did you have any role in drafting it?

4 A. I'm not going to answer any questions about
5 the legal services that I provide to the department.

6 Q. Turn to the third page. On the third page,
7 and this is KDA 006, it refers to performance
8 evaluation scores, beginning -- these are for
9 Ms. Liberto, beginning in 2003 and continuing to 2017.
10 Do you see those?

11 A. Yes, sir.

12 Q. Do you know what the source of those numbers
13 are?

14 A. I believe it was from her performance
15 evaluation documents.

16 Q. Okay. I had seen a document that indicated
17 that a overall evaluation score over 250 is a good
18 score. Is that correct?

19 A. There's a specific definition that's spelled
20 out in the document under your arm. If you'd like to
21 hand it to me, I can tell you what it is.

22 MR. ABELL: Let's mark this Exhibit 5.

23 (EXHIBIT 5 MARKED)

24 A. Would you like me to answer your question?

25 Q. Yes.

1 A. If you look at the document you've now marked
2 as Exhibit 5, on the first page there's a rating scale
3 of 1, 2, 3, 4, 5 on the right-hand column; a rating
4 that falls in the 3 tier is defined as "adequately
5 meets expectations." And I believe that if you were to
6 look at a completed performance plan set from 2019 or
7 some other year, one of the last pages would spell that
8 out explicitly.

9 (EXHIBIT 6 MARKED)

10 Q. All right. Exhibit 6, I think if you turn to
11 the last page, and it's KDA 191...

12 A. Yes.

13 Q. At the top.

14 A. Yes.

15 Q. I have the heading, "Overall Performance
16 Evaluation," and it has five boxes, and the middle box
17 says "good" and in parentheses says "250 to 349."

18 A. That's what it says.

19 Q. So my conclusion was that a score of 250 or
20 better -- a overall performance evaluation score of 250
21 or better was in the good employee category.

22 A. It's a score of 250 to 349, according to this
23 form, denotes good, yes.

24 Q. And turning back to Exhibit 4, the letter, I
25 concluded that the summary of Ms. Liberto's performance

1 evaluations indicated that she had always scored at the
2 level of a good employee or better. Is that fair?

3 A. Assuming, of course, that in these early years
4 the annual performance evaluation rubrics were the same
5 as the ones from the latter years, that would be
6 correct.

7 Q. Do you know whether any determination -- so
8 what you're saying is evaluations could have been
9 scored differently prior to your arrival in the
10 department, correct?

11 A. That's right.

12 Q. And, therefore, if we see, for instance, 453
13 for 2003, that may indicate a good employee; it may
14 not. You're not sure. Is that fair?

15 A. That's right.

16 Q. Do you know if any effort was made to
17 determine whether there was any scoring deviation in
18 these years?

19 A. Not that I'm aware of.

20 Q. Looking still at Exhibit Number 4, at the top
21 of -- it'd be the fourth page of this exhibit, in that
22 first paragraph, and I'll read the portion I'm
23 interested in. It says, quote, it is unlikely that you
24 could nevertheless perform your job duties adequately,
25 regardless of where you were physically located at the

1 time, end quote.

2 Do you know whether any -- well, physician was
3 consulted with respect to that conclusion?

4 A. I don't remember.

5 Q. Down at the bottom there's a footnote,
6 footnote 4, and it reads, quote, As I mentioned Monday,
7 there are no other employees within the Office of Legal
8 Services, the Office of Communications, or the Office
9 of Administrative Services who are permitted to work
10 from home, end quote.

11 Do you know whether there are any other
12 employees in any of those offices that have a heart
13 condition similar to Ms. Liberto's?

14 A. I'm not aware of any.

15 Q. We met and talked briefly in early January,
16 correct?

17 A. We did.

18 (EXHIBIT 7 MARKED)

19 Q. Mr. Bilby, Exhibit 7 is a document consisting
20 of a letter I sent to the former counsel for the
21 Department of Agriculture and an affidavit from
22 Dr. Vincent DeGeare. You've seen this before, I'm
23 sure. I know you have, because we've discussed it
24 before. Correct?

25 A. Yes.

1 Q. When did this first come to your attention?

2 A. It was on or after the letter was received by
3 Mr. Swansburg and Ms. Root.

4 Q. Would it be fair to conclude that would have
5 been in late October or early November?

6 A. I believe so.

7 Q. Did Dr. DeGeare's affidavit tell you anything
8 you didn't already know?

9 A. Yes.

10 Q. What was that?

11 A. Well, for one thing, it was quite a bit more
12 extensive than the previous letters that she had
13 provided from physicians, which I believe included
14 Dr. DeGeare, though I'm not certain of that.

15 Q. There was. There was a prior letter to
16 Dr. DeGeare; I believe it's referred to in that other
17 letter we were discussing --

18 A. I think so too, and I think I've seen letters
19 from other doctors that she --

20 Q. Dr. Miguel as well --

21 A. I can't remember the names.

22 Q. -- that I think it was from 2011.

23 A. That could be. I don't know their names.

24 Q. To your knowledge, was any -- did the
25 department make any effort from another physician or

1 other appropriate person to get some feedback regarding
2 what Dr. DeGeare was saying in this affidavit?

3 A. Can you ask the question a bit more precisely?

4 Q. Well, I had Dr. DeGeare review and prepare and
5 sign this, because the department's answer said, as I
6 read it, "We really don't know enough about her
7 condition to know whether or not it's a disability."
8 Okay? All right. Fair enough. So I wanted him to
9 explain the condition.

10 I'm not a cardiologist and you aren't either,
11 so you read this, you learn some things. I'm really
12 not in a position to know whether or not they make
13 sense or not. I'm guessing you're not either. So you
14 might consult with another physician or some other
15 authority that could tell you whether or not what
16 Dr. DeGeare is saying makes any sense. Do you know
17 whether that type of effort was undertaken?

18 A. Consultations with another physician?

19 Q. Yes.

20 A. I'm not aware of any.

21 Q. What to you was most significant about
22 Dr. DeGeare's affidavit?

23 A. I cannot remember what I thought was the most
24 significant portion or paragraph of his affidavit at
25 the time when I read it.

1 Q. You discussed it -- well, you don't want to
2 talk about that. Well, let me ask you anyway. You
3 discussed Dr. DeGeare's affidavit with Mr. Rogers?

4 A. I'm not going to answer any questions about my
5 discussions with Mr. Rogers.

6 Q. I thought that was your answer, but I needed
7 to ask anyway.

8 Was part of your responsibilities when my
9 letter and Dr. DeGeare's affidavit was received to
10 formulate the department's response?

11 A. I'm not going to answer any questions about
12 that.

13 (EXHIBIT 8 MARKED)

14 Q. Mr. Bilby, you've seen Exhibit 8 before,
15 correct?

16 A. Yes.

17 Q. You're going to decline to answer any question
18 regarding what role, if any, you had in drafting
19 Exhibit 8?

20 A. Correct.

21 Q. Looking at the first page, Hannah Blair Mann,
22 is she still an employee with the department's Office
23 of Consumer and Environmental Services?

24 A. Yes.

25 Q. Explain what Ms. Liberto and Ms. Blair did

1 working -- there's a reference -- if you know --
2 working together at a table in a conference room over
3 the past two years.

4 A. Well, Nicole has told me that she and Hannah
5 have met dozens of times, for hours at a time, to do a
6 complete rewrite of the administrative regulation that
7 oversees KDA's motor fuels program. This was an
8 assignment that I gave to her in April of 2018 and it
9 still isn't finished.

10 The two of them would sit down and talk
11 through the technical ins and outs of the industry and
12 KDA's regulatory role with regard to the industry in an
13 effort to craft an administrative regulation that an
14 ordinary member of the public can read and understand
15 and that also accurately reflects the motor fuels
16 program that we run here at KDA.

17 The reason that was necessary is that the
18 previous regulation had not been updated, I believe in
19 more than a decade, and there were large parts of how
20 we run our motor fuels program you would not have known
21 or understood from reading the existing regulation.

22 Q. So it's your understanding that Ms. Liberto
23 and Ms. Blair spent hundreds of hours over the course I
24 guess roughly over the last two years.

25 A. She's told me that.

1 Q. Do you have any sense of is hundreds 200 or
2 600 or do you know?

3 A. I think that what Nicole told me in a meeting
4 recently is that she believes they met approximately 60
5 times and that the average meeting was six hours in
6 length such that the total number of estimated hours on
7 Nicole's part would be 360 hours.

8 Q. Over the course of a couple of years.

9 A. Correct.

10 Q. Second page, under heading B, second paragraph
11 there, the concluding sentence reads, in part, quote,
12 we do not believe that your productivity on work-from-
13 home days is, or could be, commensurate to your
14 productivity on days when you are physically present in
15 your office, end quote. Correct?

16 A. That's what it says.

17 Q. Do you know when, if at all, Ms. Liberto had
18 been granted a reasonable accommodation by the
19 department to work from home?

20 A. I have seen documents in department files, I
21 believe which have been produced to you already, that
22 provide information about when the accommodation was
23 extended to her and under what circumstances. Those
24 events predate my time here.

25 Q. Do you know whether at any time the

1 accommodation included work from home?

2 A. I believe that it did.

3 Q. And that was prior to 2016?

4 A. Yes.

5 Q. Look at Exhibit 4, and we talked about this
6 earlier, on page 3 it referred to her performance
7 evaluation scores, and I'd understood, frankly, that
8 all the scores were in the good employee category. If
9 she prior to 2016 had a reasonable accommodation of
10 working at home, why were her performance evaluation
11 scores higher than they have been after 2016?

12 A. I don't know the answer to that.

13 Q. Does that indicate to you that she functioned
14 well and was very productive when having a reasonable
15 accommodation that permitted her to work at home?

16 A. No.

17 Q. Why not?

18 A. Well, I see a steady decline in the scores
19 that were given to her by whoever it was that was doing
20 her performance evaluation in 2007 and 2008 and 2009
21 and 2010 and 2011 and 2012 and 2013 and 2014 and 2015
22 and 2016 and 2017. And I would note, in fact, that in
23 2017 Nicole did have a work-from-home arrangement,
24 albeit of a different sort, so she was working from
25 home in calendar year 2017 when she received that

1 performance evaluation of 251.

2 Q. And was 2017 the first year that you were
3 responsible for her evaluation?

4 A. It was beginning in around early 2017 that I
5 became responsible for her evaluation.

6 Q. It's nevertheless true that at all times,
7 whatever accommodation has been afforded Ms. Liberto,
8 her performance evaluation scores put her in the good
9 employee category; isn't that correct?

10 A. According to the rubric that is written into
11 the state's performance evaluation system, that's
12 correct. I don't agree.

13 Q. Turning to the third page of Exhibit 8, first
14 paragraph, it concludes, last sentence, in part --
15 well, I'll just read the whole thing. Quote, We
16 believe that your sweating, shaking, fast heartbeat,
17 blurred vision, vertigo, and paresthesia symptoms, when
18 you are experiencing them, make it difficult" -- should
19 be -- "if not impossible for you to perform your job
20 tasks, regardless of whether you are physically present
21 in your office or at home at such times, end quote.

22 Do you know if any healthcare provider or
23 physician was consulted with respect to that statement?

24 A. I'm not aware of any.

25 MR. ABELL: Let's take a brief break.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

(OFF THE RECORD)

Q. Mr. Bilby, earlier you referred to a personnel board hearing that took place, I believe you said in November and December of 2019. What was the outcome of that?

A. We're still awaiting the outcome.

MR. ABELL: That's all the questions I have for you today. I will say that I understand you've invoked the attorney-client privilege. It is my understanding if I subsequently get testimony from Mr. White or Mr. Rogers -- they seem like the most likely candidates -- something to the effect of "on advice of counsel" or "based on advice of counsel," it may be necessary for us to reconvene, but with that said, that's all the questions I have for you today.

* * * * *

(DEPOSITION CONCLUDED AT 11:54 A.M.)

* * * * *

COMMONWEALTH OF KENTUCKY)
) ss.
 COUNTY OF FAYETTE)

I, HUNTER J. BEAMER, REGISTERED PROFESSIONAL REPORTER and NOTARY PUBLIC in and for the State of Kentucky at Large, do hereby certify that the facts as stated by me in the caption hereto are true; that the foregoing answers in response to the questions as indicated were made before me by the deponent hereinbefore named, after said deponent had first been duly placed under oath, and were thereafter reduced to computer-aided transcription by me and under my supervision, and that the same is a true and accurate transcript of the proceedings to the best of my ability.

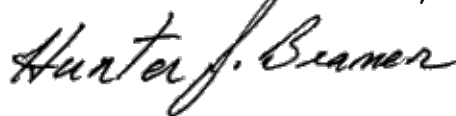
I further certify that I am not employed by, nor related by blood or marriage to any of the parties hereto, and that I have no interest in the outcome of the captioned case.

No party to this action nor counsel for said parties nor the deponent requested that the foregoing deposition be signed by the deponent.

My commission expires: January 26, 2024.

IN TESTIMONY WHEREOF, I have hereunto set my hand on this the 27th day of February, 2020.

THE KLEINGARTNER GROUP, INC.



HUNTER J. BEAMER (KYNP94)
 NOTARY PUBLIC, STATE AT LARGE