COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-111

MICHAEL G. BROWN **APPELLANT**

VS.

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

EDUCATION AND WORKFORCE DEVELOPMENT CABINET **APPELLEE**

*** *** *** *** ***

The Board, at its regular October 2016 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated July 25, 2016, Appellant's Exceptions, Appellant's Request for Oral Argument, Appellee's Response to Exceptions, oral arguments, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer 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 3rd day of November, 2016.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Patrick B. Shirley
Hon. Tess Russell
Hon. Robert Rowland

COMMONWEALTH OF KENTUCKY
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EDUCATION AND WORKFORCE DEVELOPMENT CABINET **APPELLEE**

** ** ** ** **

This matter came on for an evidentiary hearing on January 29, 2016, and again on April 13, 2016, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Kim Price, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Michael G. Brown, was present and was represented by the Hon. Robert Rowland. The Appellee, Education and Workforce Development Cabinet, was present and represented by the Hon. Patrick Shirley, also present for Appellee was the Hon. Tess Russell.

The parties were afforded the opportunity to file written closing briefs and did so on May 31, 2016.

BACKGROUND

1. The Appellant was employed as a Human Services Program Compliance Analyst in the office of Employment and Training in the Quality Control Branch. By letter dated April 17, 2014, he was suspended for three days without pay for the following reasons:

> Pursuant to 101 KAR 1:345, Section 1 (unsatisfactory performance), 101 KAR 2:095, Section 2 (attendance and hours of work), and 101 KAR 2:102, Section 10 (absence without leave), you are being suspended from your position as Human Services Program Compliance Analysist in the Office of Employment and Training, for the following reason:
>
> You were absent without proper authorization or notice on April 10, 2014 when you did not report to work until approximately 9:30 am instead of your scheduled time of 8:00 am and did not follow office call-in procedures and report the reason for your absence to your supervisor,

> Toby Thompson. You are reminded that you are required to follow call in procedures even if your absence is due to a condition for which you have been approved for Family and Medical Leave.
>
> You told your supervisor that you emailed to report you would be late on April 10; however, there is no evidence that you did so.
>
> Your absence without proper authorization and failure to call in properly are in violation of office call-in procedures issued to you October 2, 2013, 101 KAR 2:095, constitutes absence without leave according to 101 KAR 2:102 Section 10 and unsatisfactory performance according 101 KAR 1:345 Section 1.
>
> Previous efforts to correct your adherence to time and attendance procedures include: a verbal reprimand issued on December 13, 2013, for failing to follow call in procedures; a Written Reprimand issued on December 27, 2013 for absence without leave (tardiness) and failure to follow call in procedures; and, a one day suspension dated January 24, 2014 for absence without leave (tardiness) and failure to follow call in procedures. (sic)

2. Appellant filed a timely appeal on May 21, 2014, alleging "Other Penalization," specifically "rights under FMLA," suspension and discrimination without any area specified. His appeal stated:

> Michael G. Brown's suspension was without cause. Mr. Brown gave proper notice of absence on April 10, 2014. Mr. Brown's absence on April 10, 2014 did not constitute absence without leave. Mr. Brown's absence on April 10, 2014, did not constitute unsatisfactory performance. 'Office call-in procedures' were not issued or implemented in accordance with regulations and/or statutes. Mr. Brown's suspension, including the facts and circumstances leading to the same, constitute an interference, restraint and/or denial of Mr. Brown's rights under the Family and Medical Leave Act. Mr. Brown has been working in a hostile and discriminatory work environment. Mr. Brown's suspension was the result of a continuing pattern of repeated discrimination in the face of his known disabilities. (sic)

3. Appellant's immediate supervisor at the time of his suspension was Toby Thompson. His second line supervisor, Branch Manager of Quality Control, was **Becky Akin**.

4. Ms. Akin testified she came to her position in approximately November 2012. When she took over there was zero discipline in the branch. She asked the supervisor at the time to track leave balances and keep up with tardies and absences. However, that supervisor left her position because she was not doing the monitoring requested by Akin. Soon after a new supervisor, Toby Thompson, was hired, they created a uniform policy on attendance. Said policy was introduced as Appellee's Exhibit 1, and was sent from Toby Thompson by email to Appellant and all other employees within their branch. Said policy stated:

> Going forward, if you are going to be absent from your workstation, please report that absence to your supervisor before 8:20am. You can call or email but it must be sent to the supervisors state issued email address or one our state phone numbers. Everyone is already very good about reporting absences by 8:20am but, for the sake of consistency I wanted to send out an email. Becky requested I send it to those who report to her directly as well." (sic)

Akin testified that this was sent not targeting any particular employee and was uniformly enforced.

5. Appellant received a verbal reprimand on December 13, 2013, for failing to adhere to the reporting policy for an absence or tardy that occurred on December 10, 2013.

6. Appellee's Exhibit 2 was a written reprimand that Appellant received on December 27, 2013, due to his failure to report to his assigned work station by 8:00 a.m. on December 20, 2013, and his failure to notify his supervisor that he would be late until after 10:00 a.m. on that day. He stated that the reason he failed to follow policy was that he had mistakenly thought it was Saturday. Appellant did show up later in the day for work on December 20, 2013, and forwarded an email to Thompson and Akin apologizing, and stating that he had the best sleep he had in weeks and thought it was a Saturday morning.

7. Appellant was next given a one-day suspension by letter introduced as Appellee's Exhibit 4 due to a January 15, 2014 tardiness, at which time he did not call his supervisor, Toby Thompson, until 8:45 a.m., and signed in to work at 9:05 a.m., again in violation of the office call-in procedure.

8. According to Akin, the problems continued and there was another incident on January 29, 2014, but no action was taken at that time.

9. Akin testified there is a workload with extensive deadlines, and that this particular group is good about picking up the slack for each other, but still it was important for employees to be there timely. She admitted she has not had any training for FMLA as that is handled through Human Resources. She was aware that Appellant had been on FMLA for years, and had

previously supervised other employees who had FMLA. Appellant is the only person under her supervision who is on intermittent FMLA. Appellant's intermittent leave was for one day leave per week. Akin acknowledged that she had discussed with Randy Groves the use of FMLA and other leave that Appellant was using. Questions were directed at determining whether leave could be granted for FMLA or as Leave With No Pay Unauthorized (LNPU) or Leave With No Pay Authorized (LNPA).

10. After this series of emails, Appellant's doctor sent a statement of a blanket intermittent FMLA, which was approved. On March 7, 2014, an email was sent from Sabrina Hockensmith indicating that Appellant had been approved for three to five days per week intermittent FMLA. This was allowed to go back retroactively to the prior pay period.

11. Appellant introduced email strings from August 12, 2013, and April 21, 2014, wherein Akin and Thompson had discussed leave time of Appellant. In one response after being told Appellant had gone to have his blood pressure checked, Akin had responded "Ha! I'm not getting near a blood pressure monitor." She explained that this was not in any way making fun of Appellant. Akin was also questioned about a March 6, 2014 email when she stated, "With Mike, there can't be enough written documentation," and that she hoped he would exhaust his FMLA. By this she meant that when he was out of leave, he would be able to be in the office to work.

12. **Toby Thompson** testified that he became Appellant's manager and the supervisor in the Quality Control Branch in July 2013. There was an ongoing issue of absences not being properly called in and a lot of turnover had happened within the branch so a written call-in policy was developed to move forward. He stated that it was necessary to know where employees were in order to manage his branch. The policy permitted email or phone call-ins. It was not created to target any individual and helped him to manage his branch. Thompson testified that Appellant had problems complying with time and attendance the first few months he was there. He verified that Appellant had another absence where he did not follow call-in procedure on November 13, 2013, but he had not taken any discipline with regard to that because Appellant had cited a pounding chest as the reason he was late in emailing his absence.

13. With regard to the incident at bar, Thompson testified that he and Akin prepared Appellee's Exhibit 7, a letter to the Appointing Authority laying out the background of the case and Human Resources actually decided on what discipline to impose. Thompson was not aware of the reason Appellant had called in on April 10, 2014, but did recall he had previously called in complaining of his chest hurting. It was his understanding that the policy for call-ins must be followed even if FMLA has been awarded. He also acknowledged that he had stated in an email that he thought state law provided a call-in time to be a "reasonable time."

14. **Beth Steinle,** Division Director for Human Resources, testified that the three-day suspension letter was appropriate because there had been progressive disciplinary action

repeatedly concerning the same problem. She stated that FMLA allowed intermittent leave for a situation of an employee with a chronic or recurring condition or a condition that needed periodic treatment. The request for FMLA approval is made for six month increments so that it can be determined how things changed over time. An individual who receives intermittent FMLA leave does not necessarily know when the need will arise. However, they still must notify their supervisor that they are taking FMLA leave. She further testified that call-in times could be established by each agency so long as it did not violate any specific regulations. Their specific regulation for leave requires reasonable notice and the policies can be implemented by each agency to address the needs within their own agency, depending on time sensitivity of each office.

15. **Sabrina Hockensmith** testified that she works in the Office of the Secretary and handles benefits including FMLA and sick leave. She verified that Appellant is entitled to intermittent FMLA. On January 28, 2014, Appellant was approved for three to five days per week of intermittent FMLA leave, effective March 19, 2014.

16. **Anna Clark,** in Office of Employee Training, Quality Control, for two years testified on behalf of Appellant. However, she acknowledged she never heard Akin discuss Appellant negatively and had never seen an issue between them. She stated she had never heard Akin raise her voice directly at Appellant. She also verified that she had worked in the Appeals Branch with Akin as her supervisor prior to the two of them coming to the Quality Control Branch, and at the previous branch, there had been a call-in procedure for 8:00 a.m. call-ins. Akin further verified that on April 10, 2014, Appellant had called in at 9:30 a.m. and was at the COT office. He indicated that he had sent the email that did not go through, but never produced any proof of any attempt at email. Also at that time, he did not give any indication that his failure to call in was medically related.

17. **Appellant** testified that he began work with the state at the Office of Employment Training in July 2002, and has been in the same job position the entire time. He stated he enjoyed his job, but hated going to work because he felt he was discriminated against. He felt that ever since he had filed for FMLA, Akin had given him hell. He stated that she had screamed at him one time in his cubical. He stated that he made clear on April 10, 2014, that he was calling in because of sleeping and chest problems. From his perspective, Appellant had been Branch Manager for a year and the call-in notice provision was not incorporated until after he went on FMLA. He described being treated like a child at work, and thought that Akin hated him and was trying to get him fired.

18. Appellant contended that he sent an email on the morning of April 10, 2014, stating that he would be late. He had probably copied and pasted it from prior emails. He could not locate this email. He acknowledged he could not prove this email was ever sent, as he could not find it in his sent files or draft email files. He alleged that his chest was killing him on that morning, and that largely it was due to work-related stress, panic attacks and high blood

pressure. He felt that Thompson was great to work with and was just stuck in the middle in this situation.

19. Appellant acknowledged that the December 2013 verbal warning for not calling in was not medically related, and felt the written reprimand was medically related because he had overslept. The January 2014 call-in was medically related because he could not get to sleep until 5:00 a.m. that morning.

20. Appellant stated he did not request from Akin any accommodation for a different call-in procedure due to his medical needs because he felt that she hated him.

21. Appellant also acknowledged that he could not say other employees had failed to comply with the call-in policy without being disciplined. He felt that the medical issues that he had which prevented him from calling-in in accordance with the policy were insomnia, work-related stress, taking sleep medications, ADHD, Bi-polar, panic attacks, and three blood pressure medications. This medication often confused him and caused him to sleep so soundly that his alarm clock would sometimes not wake him up. He acknowledged he could have called-in during the night when he was having difficulty sleeping, but stated that even on sleepless nights he intends to go in the next morning.

22. **Stuart Hamling**, Staff Assistant to the Chief Information Officer, does IT for the Appellee. He testified that someone who had access to the email for the Appellee would have to go through a two-step process if they were to have typed an email and made an error in sending it. Because if you wanted to cancel, it would ask you if you were sure, requiring the second step.

23. **Dr. Peter Ko,** Appellant's Physician who prepared his FMLA paperwork, testified that Appellant had been his patient for nearly six years. During this testimony, Dr. Ko did not have Appellant's medical records in front of him, but assumed that Appellant's condition had worsened in symptoms is the reason that FMLA needed to be extended intermittently. He was aware that it was a chronic, on-going condition. He recalled that Appellant had reported stress at work and was also receiving psychiatric treatment. Dr. Ko testified that he had given Appellant a medication for insomnia. This medication had been changed from Remeron to Trazodone, and he believed that Appellant had also been on Ambien, but again he did not have his medical records in front of him to verify that. Dr. Ko testified that Remeron is an antidepressant and does have sedating effects, and is often used for chronic insomnia. Most individuals can function with it, but some individuals do have over-sedation. A medical record dated March 6, 2014, introduced as Appellant's Exhibit 14, verified that Appellant was given a 30 mg. dosage of Remeron at that time. Remeron can also have a build-up effect. Medical records in December 2014 referred to vivid dreams and the medicines can also cause confusion and memory loss, as well as grogginess and concentration difficulties, which could possibly have been a cause for someone thinking they sent an email, as well as possible that a person could not wake up to an alarm.

24. Dr. Ko testified that the FMLA had been based on an injury that Appellant incurred during work at an Atlanta hotel, and that his insomnia went back for years. He could not state that insomnia was the reason he had given for the FMLA for which Appellant was approved. He also acknowledged, pursuant to Appellant's request, he had provided a note for work in December 2014 because Appellant had asked for an explanation of why he was oversleeping, and he had written a note concerning chronic insomnia.

25. Dr. Ko testified that he felt Appellant was compliant with his medications, but had no reason to dispute Physician Assistant Virginia Morris' statement in June 2008 that Appellant had elevated blood pressure and was not taking his blood pressure medication.

PERTINENT LAW

The law is pertinent to deciding the issues in the case at bar.

1. 101 KAR 1:345, Section 1, states:

> Appointing authorities may discipline employees for lack of good behavior or the unsatisfactory performance of duties.

2. 101 KAR 2:095, Section 2 (5), states:

> 5. An employee shall give reasonable notice in advance of absence from a work station.

3. 101 KAR 2:102, Section 10, states, in pertinent part:

> (1) An employee who is absent from duty without prior approval shall report the reason for the absence to the supervisor immediately.
>
> (2) Unauthorized or unreported absence shall:
>
> > (a) Be considered absence without leave;
> >
> > (b) Be treated as leave without pay for an employee covered by the provisions of the Fair Labor Standards Act, 29 U.S.C. Chapter 8; and
> >
> > (c) Constitute grounds for disciplinary action.

4. 29 CFR §825.302 covers foreseeable FMLA leave defined as "...based on expected birth, placement for adoption or foster care, planned medical treatment for a serious health condition...or serious injury."

5. 29 CFR §825.303 covers unforeseeable FMLA leave. Section A states:

> When the approximate timing of the need for leave is not foreseeable, an employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case. It generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employer's usual and customary notice requirements applicable to such leave.

Section B states, in pertinent part:

> An employee shall provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request. Depending on the situation, such information may include that a condition renders the employee unable to perform the functions of the job;...whether the employee...is under the continuing care of a health care provider;...When an employee seeks leave due to a qualifying reason, for which the employer has previously provided the employee FMLA-protected leave, the employee must specifically reference either the qualifying reason for leave or the need for FMLA leave. Calling in 'sick' without providing more information will not be considered sufficient notice to trigger an employer's obligations under the Act.

Section C states, in pertinent part:

> When the need for leave is not foreseeable, an employee must comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances.

Examples of unusual circumstances include emergency medical treatment.

Section C further states:

> If an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied.

FINDINGS OF FACT

1. Appellant is employed as a Human Services Program Compliance Analyst in the Quality Control Branch, Division of Unemployment Insurance, and has been so employed since 2002.

2. In November 2012, Becky Akin became the Branch Manager for Appellant's branch. When she arrived there was an overall problem with discipline, especially tardiness and absences within the branch. At the time Akin began, she instructed Appellant's superviser to keep track of all employees' leave balances and keep up with their tardies and absences. That supervisor failed to do so, and eventually left employment with the branch, at which time Toby Thompson became the branch supervisor. Shortly after Toby Thompson's arrival as supervisor, a written policy requiring that employees call-in no later than 8:20 a.m. on any day they would not be working was implemented effective October 2, 2013.

3. Appellant enjoyed a good relationship with Toby Thompson, but felt that Becky Akin hated him and was trying to get rid of him. Appellant was originally approved for intermittent FMLA leave of one day. Later, in January 2014, Appellant's intermittent leave was changed from one day to three-to-five days per week, based on a chest injury he received on the job and work-related stress. No witness testimony, the testimony of Appellant or any record submitted into evidence showed that insomnia was ever a basis for the granting of FMLA to Appellant.

4. Thompson was also believed to be a credible individual, even by the Appellant. His testimony was clear that this policy for call-ins was enforced against all employees, and was not instituted in an attempt to single Appellant out.

5. Appellant was issued a verbal reprimand on December 13, 2013, for failing to comply with the call-in policy on December 10, 2013.

6. On December 27, 2013, Appellant received a written reprimand for failing to comply with the call-in procedures on December 20, 2013.

7. Appellant was given a one-day suspension for failing to comply with call-in procedure on January 16, 2014.

8. There had been another incident in which Appellant failed to call in in compliance with the call-in procedure, but he cited chest pains as the reason and no action was taken based on that representation.

9. Appellant did not call in to work on April 10, 2014, by 8:20 a.m. He claims to have attempted to send an email in, but no evidence of that attempt was ever shown. Due to the fact that it would take at least a two-step process to type an email and actually delete it or not send it so there would be no record of same, the Hearing Officer specifically finds that there was no attempt to send said email. Appellant arrived to work at 9:30 a.m. on the morning of April 10, 2014. He never cited an issue of chest pain on April 10, 2014, until the hearing in this case.

10. Appellant stated he had trouble complying with the 8:20 a.m. call-in procedure because of health reasons, but never asked for an accommodation to comply with the policy.

CONCLUSIONS OF LAW

1. Foreseeable FMLA leave is defined to be for planned medical treatment for injury or illness, and that is not the case in this matter thus said potion of the FMLA is inapplicable.

2. The Code of Federal Regulations (CFR) requires that when leave time under FMLA is not foreseeable, an employee must comply with the employer's usual and customary procedural requirements for requesting leave unless there are unusual circumstances. Unforeseeable leave is not fully defined in the FMLA regulations, but they do cite an example of unusual circumstances to be if an employee requires emergency medical treatment which would prevent him from calling in or being able to use a telephone or other device. The oversleeping and not calling in in this case is clearly unforeseeable. 29 CFR 825.303(a) further specifically recognizes that it generally should be practicable for the employee to provide notice of unforeseeable leave within the time prescribed by the employer's usual and customary notice requirements.

3. Appellant did not comply with the call-in procedure on April 10, 2014, as there is no credible proof of an alleged email being sent. Further, he did not receive any emergency medical treatment or cite any circumstance that would have made it impossible for him to have called in that day due to a medical condition. In fact, Appellant showed up at 9:30 a.m. and did work the remainder of the day.

4. The medical evidence by Dr. Ko never specifically stated that Appellant had an emergency situation, and only stated it was possible Appellant's medication could have caused him to oversleep and miss an alarm. This evidence is not conclusive proof that is what happened in this case on April 10, 2014, and further, Appellant's allegations of chest pain at the hearing are not given credibility as same was mentioned for the first time at the hearing. The fact that

Appellant came in to work and did not receive any medical treatment verified there was no medical emergency on this date.

5. 101 KAR 1:345, Section 1, allows discipline for unsatisfactory performance of duties. Not complying with call-in procedures in this case constitutes unsatisfactory performance of duties.

6. 101 KAR 2:095, Section 2, allows discipline for attendance and hours of work. Appellant's failure to comply with call-in procedures violates the Appellee's attendance policy.

7. 101 KAR 2:102, Section 10, allows discipline for absence without leave. Failing to timely call-in created absence without leave by Appellant.

8. The Appellant has been given numerous progressive disciplinary actions in relation to the same problem of not complying with the call-in provisions. Therefore, progressive discipline was followed in this case.

9. Although Appellant alleges discrimination, he has not provided any evidence to support that allegation, although he stated his own belief that Ms. Akin hates him. He admittedly trusts and likes Toby Thompson, who testified that this call-in procedure was not instituted with Appellant in mind and had been applied equally to all employees. Even a witness called by the Appellant, Anna Clark, testified that she had never heard Akin express any negative sentiments about Appellant, and has never heard her raise her voice to Appellant. Therefore, Appellant has not shown that he was discriminated against in any manner in this matter.

RECOMMENDED ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Kentucky Personnel Board that the appeal of **MICHAEL G. BROWN VS. EDUCATION AND WORKFORCE DEVELOPMENT CABINET (APPEAL NO. 2014-111)** be **DISMISSED.**

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13.B.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).

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, Kim Hunt Price,** this 25th day of July, 2016.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Patrick Shirley
Hon. Tess Russell
Hon. Robert Rowland