COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-281

CURTIS GODCHAUX **APPELLANT**

VS.

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

CABINET FOR HEALTH AND FAMILY SERVICES **APPELLEE**

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

The Board, at its regular June 2016 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated May 19, 2016, 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 17th day of June, 2016.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Lucas Roberts
Mr. Curtis Godchaux
Mr. Jay Klein

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-281

CURTIS GODCHAUX **APPELLANT**

VS. **FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER**

CABINET FOR HEALTH AND FAMILY SERVICES **APPELLEE**

** ** ** ** **

This matter came on for evidentiary hearing on March 14, 2016, at 9:35 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. John C. Ryan, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by KRS Chapter 18A.

Appellant, Curtis Godchaux, was present and was not represented by legal counsel. Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Lucas Roberts.

This matter was the subject of at least two pre-hearing conferences during early 2016. The Hearing Officer discerned from the presentations at that time that the parties were essentially out of contact with each other, that Appellant, as of February 17, 2016, had not yet returned to work, and that the parties should exchange and review relevant materials pertaining to his health status. The respective burdens of proof were also assessed and a previously assigned evidentiary hearing date was canceled and reset.

BACKGROUND

1. By letter of October 28, 2015, over the signature of Howard J. Klein, Appointing Authority, Curtis Godchaux, an unclassified employee, was placed upon directed sick-leave "...out of concern for you and your ability to safely perform your job duties." This letter, a true copy which is attached hereto as "**Recommended Order Attachment 1,**" does not further elaborate as to grounds for the placement and is open ended as to its term.

2. By timely appeal entered on November 6, 2015, under a designated category of "suspension," Mr. Godchaux took issue with the action and wrote "appealing action of directed sick-leave. Retaliation for grievances."

3. Upon convening the evidentiary hearing, the Agency was assigned the initial burden of proof and presented the testimony of **Howard J. Klein**, who serves as Division Director, Division of Employee Management, Human Resources Management, within the agency. He held appointing authority at the time Appellant was placed upon sick-leave. He depicted his duties as essentially all matters dealing with personnel including, but not limited to, discipline, ADA issues, open record requests, and imposition of directed sick-leave. He explained that directed sick-leave, per regulations empowers management to remove an employee from his state workplace if it views existence of a safety issue, either as to co-workers or the employee. The determination to take action may be based upon behavioral concerns including, but not limited to, threats of physical injury to himself or others, or apparent mental impairment. In such event, the employee is required to obtain written confirmation from a licensed medical provider that he is sufficiently healthy to return to work.

4. Directed to the circumstances of Appellant, the witness produced and quoted from one or more email texts which were established to have come from Appellant and sent to one or another co-worker. He recalled that the message initially went to an individual in the Agency Ombudsman's office, was then relayed to the Department for Income Support, and thereupon reached the office of this witness, all in the same day. He pointed to certain threatening and alarming language contained in the email, including a reference to a gun, which he and staff viewed as sufficient to justify removing Appellant from the workplace and directing him to obtain medical help and advice. He thereupon caused to be issued two letters, one directing the sick-leave and another for delivery to a healthcare provider of Appellant's choice. He noted that, in due course, Appellant did confer with a provider and produced sufficient evidence of stability from the provider that would enable him to return to work.

5. Under cross examination, the witness acknowledged that the text that triggered the sequence resulting in Appellant being removed from the workplace was not transmitted upon state-owned equipment but, rather, from and/or to Appellant's personal phone. He denied that access to and utilization of the information constituted an improper invasion of Appellant's privacy, since it was sent to a state office.

6. Appellant tendered a copy of a letter dated January 28, 2016, addressed to this witness over the signature of Deborah Goad, LMFT, MS, MA, confirming Appellant's attendance at specified counseling sessions. This letter essentially certified that in the view of Ms. Goad, Appellant was sufficiently remorseful and regretful of the

actions which gave management concern and he could safely return to work. Upon Appellant's request, the witness read this letter into the record. Appellant also produced a letter dated January 25, 2016, over the signature of Charles C. Johnson, D.O., of Commonwealth Family Physicians, which appears to address certain medical issues impacting Appellant. This letter recommended that Appellant be transferred to another department. The witness also read this letter into the record. Both documents were made part of the record over the objection of the Agency upon the basis that Appellant did not supply a witness or exhibit list in advance of the hearing.

7. The Agency having concluded its proof-in-chief, **Appellant, Curtis Godchaux** offered his own testimony. He confirmed he held the position of Family Support Specialist II for approximately 18 years prior to the current series of events. He also ratified that he was cleared by proper medical providers to return to work as evidenced by the materials previously supplied by date of January 25 and January 28, 2016, respectively. He urged that he has not yet returned to work and expressed lack of understanding as to the reason for this.

8. Under questioning by the Hearing Officer, Appellant expanded upon his circumstance, recalling that approximately three weeks prior to this hearing, he did receive written notice to report for work at a different office with a new supervisor to perform different duties than previously. He did as directed and, after three days on that job, the same management official who instructed him to return appeared at the location and ordered him to depart the premises. He did so and has not reported to work since then. (**Hearing Officer note:** at the request of the Hearing Officer seeking further explanation of this sequence, Appellant produced a copy of a "Notice of Intent to Dismiss" letter which, Appellant explained, was in the process of being appealed. The letter was viewed but not accepted as part of this appeal upon objection by the Agency.)

9. Appellant did not deny either the content or transmittal of the text. He urged that due to the fact that it was sent from his private cell phone and intended to be a personal expression of anger and frustration from "friend to friend," it should have never come under scrutiny by management nor acted upon. He seeks reinstatement of the leave he was forced to utilize and a purging of the text message from his record.

10. Shifting to his burden to demonstrate retaliation, Appellant urged the possibility of a form of discrimination or retaliation toward him which he felt at least partially accounted for his problems with management. He referenced one or more grievances which he previously filed and, which he surmised, angered the supervisors or others, leading to harassment of him. He recalled a particular event or sequence which occurred on or about September 1, 2015, which he felt originated the anger and frustration that he eventually expressed in the text to his friend. He insisted that a

conversation at the time between him and his supervisor, wherein she loudly and angrily berated him, was memorialized in a recording which the supervisor made, but to which he was denied access. Further, he urged, the workload assigned to him greatly exceeded that given to others similarly situated, leading to further deterioration in the relationship. Appellant tendered certain documents which he considered verified the claimed excess workload but, upon objection by the Agency thereto as to relevance and Appellant's failure to comply with the pre-hearing order, the materials were not allowed.

11. Under relatively brief cross examination, Appellant confirmed he transmitted the text under scrutiny to his friend in the office of the Ombudsman. He was unable to comment as to what her interpretation of the wording he used might have been. He ratified that the circumstance giving rise to the transmittal was his anger and frustration with the supervisor and her demeanor toward him. He expressed a desire to return to work, but viewed that he should be assigned to another manager in a different location with new duties. The sworn testimony was thereupon concluded and the matter stood submitted for recommended order.

12. KRS 18A.095(9) provides that "any unclassified employee who is dismissed, demoted, suspended, or otherwise penalized for cause may, within thirty (30) days after the dismissal, demotion, suspension, or other form of penalization, appeal to the board for a review thereof."

13. 101 KAR 3:015 is the regulation pertaining to leave for those members of the unclassified service. Section 2, thereof, relates to sick-leave and Subsection (2)(a) provides that "an appointing authority shall grant or may require the use of accrued sick leave with pay..." under specified circumstances. Sub-subsection 4 denotes one such circumstance to be wherein an employee "would jeopardize the health of himself or others at his work station because of a ... demonstration of behavior that might endanger himself or others."

14. 101 KAR 3:015, Section 2, Subsection 4(b) provides that "at the termination of sick leave with pay, the appointing authority shall return the employee to his former position." Further provisions of the regulation address the use of sick leave with and/or without pay; Appellant has not presented any challenge as to this aspect.

FINDINGS OF FACT

The Hearing Officer makes the following findings by a preponderance of the evidence:

1. At all times germane to this proceeding Appellant, Curtis Godchaux, was an unclassified employee in the Department for Income Support in the Office of Human Resource Management of the Cabinet for Health and Family Services, where he has so served in excess of 18 years. Around October 28, 2015, under professed stress and anger or frustration with his supervisor, he texted a friend in the Office of the Ombudsman of the Agency using his personal cell phone. The wording and tone of the text which, among other things, made reference to a gun, caused the friend sufficient concern for Appellant's mental state that she alerted management. Management conveyed the concern to the Human Resources Division, whereupon, he was promptly sent out upon directed sick leave under the relevant regulation. Appellant complied therewith.

2. Correspondence directing Appellant to leave the premises also contained separate instructions for the obtaining of treatment and certification thereof from a healthcare provider of his choice. Appellant consulted in due course with two certified providers. Each of these providers examined and/or counseled with him and, upon January 25 and January 28 respectively, certified that he was not suicidal nor homicidal, confirming his mental and physical fitness to return. Further, both providers suggested that he should be reassigned to another department and supervisor.

3. The proof tends to indicate, although without specificity, that Appellant did, in fact, return to work sometime in February 2016, reporting to another office with a new supervisor and an alternative set of duties. His testimony is that he was at that location for three days whereupon the same director who instructed him to return came to him and ordered him off the job. Appellant alludes to receiving what is depicted as a notice of intent to dismiss him. Consequently, his status at the time of evidentiary hearing in this matter appears to be a form of suspension of him pending disposition of a proposed dismissal.

4. The posture of Appellant is that he and his supervisor were at serious cross purposes, that management is resentful of his filing of grievances, and that his assigned workload, combined with a variety of other factors, caused him extreme frustration and anger. He expressed this to an individual whom he felt would keep it in confidence, only to learn that his unfortunate wording caused her sufficient concern that she alerted management that a potentially dangerous circumstance existed. He disputes that his intentions were ever sinister and points to the correspondence from his healthcare providers which certify his fitness to return.

5. The Hearing Officer finds the testimony of all witnesses and that of Appellant to be credible.

CONCLUSIONS OF LAW

1. In any circumstance coming to the attention of management in which the welfare of personnel is threatened, whether real or perceived, management has no choice and must exercise extreme caution for obvious reasons. The relevant portion(s) of 101 KAR 3:015 mandate this. Similarly, staff who become aware of potential risk have a duty, whether or not formalized in any regulation or statute, to report messages of a threatening tone, regardless of how received or from what source.

2. Although Appellant sincerely urges that his text to his friend was merely an expression of anger and frustration, neither the recipient nor management could have reasonably assumed the message to be harmless, particularly in light of its reference to a gun. Given that, together with the overall tone of the text, reaction of management directing him to seek medical help was not only reasonable but mandated.

3. Appellant's claim that his placement upon leave was a retaliatory measure initiated due to prior issues and grievances is misplaced. While there can be little doubt that his relationship with his supervisor and possibly others at his job was strained, and presumably this triggered his expression of frustration and anger, it was the immediate tone and content of his message, not the underlying reasons that gave rise to it, that caused his forced leave.

4. The action of placement of Appellant upon directed sick leave, pending production by him of appropriate certification from an acceptable healthcare provider of his fitness to return to work, was neither excessive nor erroneous in light of the overall circumstances.

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 **CURTIS GODCHAUX VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2015-281)** 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

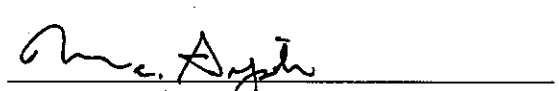
specifically excepted to. On appeal, a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

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 John C. Ryan** this 19th day of May, 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Lucas Roberts
Mr. Curtis J. Godchaux

CABINET FOR HEALTH AND FAMILY SERVICES
OFFICE OF HUMAN RESOURCE MANAGEMENT
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Steven L. Beshear
Governor

Audrey Tayse Haynes
Secretary

October 28, 2015

Curtis Godchaux

Re: Directed Sick Leave

Dear Mr. Godchaux:

Pursuant to 101 KAR 3:015, Section 2, this correspondence is to advise you that effective October 28, 2015 you shall be placed on sick leave. The Department for Income Support has provided information regarding your behavior. Based on this information, it is necessary to place you on leave.

Please understand that the reason you are being placed on directed sick leave is out of concern for you and your ability to safely perform your job duties. You are encouraged to contact the Kentucky Employee Assistance Program at 1-800-445-5327 or (502) 564-5788 if you wish assistance in seeking proper medical advice and treatment.

You shall continue on sick leave until you are fit to return to work and perform your assigned job duties. If needed, you may request to use accrued annual and compensatory leave in addition to your sick leave. As you may know, you may be able to take unpaid leave under the Family and Medical Leave Act and you should discuss with your supervisor the use of Family Medical Leave for 2015. Once you deplete your paid leave and Family Medical Leave, you will be placed on sick leave without pay.

As an unclassified employee and pursuant to KRS 18A.095(9), you may appeal this action to the Personnel Board within thirty (30) days of receipt of this notice.

Sincerely,

Howard J. Klein
Appointing Authority

Enclosure: Appeal form

CC: Personnel Cabinet Secretary
Executive Director Mark Sipek, Personnel Board
Steve Veno, Executive Director, Department for Income Support
Cabinet Personnel File

Recommended Order - Attachment # 1