

CERTIFICATION OF PERSONNEL BOARD RECORDS

I certify that attached hereto is a true and correct copy of the Findings of Fact, Conclusions of Law and Recommended Order and Final Order in the case of **KEVIN ADAMS V. EDUCATION AND LABOR CABINET** (formerly known as **Education and Workforce Development Cabinet**) (**APPEAL NO. 2018-066**) as the same appears of record in the office of the Kentucky Personnel Board.

Witness my hand this 14th day of February, 2023.



MARK A. SIPER, SECRETARY
KENTUCKY PERSONNEL BOARD

Copy to Secretary, Personnel Cabinet

Performance Evaluation as the Appellant's second-line supervisor. On that same day, Beth Steinle, who served as an Appointing Authority for the Agency, issued to the Appellant a letter entitled "Involuntary Transfer." Unbeknownst to the Appellant, the development, drafting, and issuance of this letter had been the topic of discussions over a period of time with Beyea, Pallasch, and the Human Resources Department. Beyea had prepared an earlier draft of the letter and sent it in to HR for finalization and issuance. Members of the group involved in finalizing the "Involuntary Transfer" letter acknowledged that they then engaged in speculative discussions about whether or not the Appellant would accept the transfer. (Testimony of Beyea and Pallasch). The final version of the letter issued to the Appellant, which differed from the initial draft prepared by Beyea, states as follows:

Dear Mr. Adams:

Effective beginning of business, April 12, 2018, your workstation will change from your home workstation in Jeremiah, Kentucky in Letcher County to the Hazard Career Center at 412 Roy Campbell Dr., Hazard, Kentucky in Perry County.

You will be involuntarily transferred from your current position of Resource Management Analyst III to a position of the same title, Resource Management Analyst III, with no change in pay.

The basis of which you have been selected for the involuntary transfer is that the Monitoring and Accountability Branch was recently moved by reorganization from the Office of Employment and Training (OET) into the Division of Fiscal and Budget Integrity directly under the Department of Workplace Investment. The purpose of this move in part was to more efficiently provide monitoring and reporting functions across the three workforce offices within the department, which include (OET), Office For the Blind (OFB) and Office of Vocational Rehabilitation (OVR). As part of the monitoring reporting team, it is essential that you have direct and effective partner agencies and to be able to more efficiently access and analyze data. Moving your workstation from a home workstation to the Hazard Career Center will accomplish this as it is a comprehensive Career Center. Therefore a change in your workstation will better meet the needs of DWI.

(Emphasis added) (Appellee's Exhibit 2).

12. The Appellant sought and received treatment by a psychiatrist for severe anxiety and depression. (Testimony of the Appellant).

C. **Delete** Factual Background paragraph 16 and substitute the following:

16. The Appellant submitted to the Appellee a request for Family and Medical Leave (FMLA) along with documentation from his treating psychiatrist. (Testimony of the Appellant).

D. **Delete** Factual Background paragraph 18 and substitute the following:

18. The Appellant's request for FMLA was initially denied. (Testimony of the Appellant).

E. **Delete** Factual Background paragraphs 20 and 21 and substitute the following:

20. On April 20, 2018, at 8:06 a.m., Sabrena Hockensmith, Benefits Coordinator for the Appellee, forwarded to Appointing Authority, Beth Steinle, the Appellant's email within which the Appellant had accused the Agency of making him accept work conditions that aggravated his medical conditions and made his work intolerable. (Appellant's Exhibit 1).

21. The Appellee later reversed its initial determination as to FMLA and approved the Appellant for Intermittent Family Medical Leave. (Testimony of Tucker).

F. **Delete** Factual Background paragraph 25 and substitute the following:

25. After the Appellant's last day working for the Appellee, his case remained pending before the Personnel Board over the next two and one-half (2.5) years until an evidentiary hearing was held in September 2020.

G. **Delete** “Summary Of The Evidence In Light Of The Questions On Remand” paragraph 28 and substitute the following:

28. Beyea testified that the Appellant’s role was to pull data from the internet. The Appellant had specifically told him that, on one occasion, he (the Appellant) suffered from “the shakes” in the parking lot and was unable to walk into the Whitesburg Office. The Appellant also informed him that his work was stressful. Beyea was aware that the Appellant was authorized to work from home for several years prior to the involuntary transfer letter. He was also aware that, when he became the Appellant’s supervisor several years ago, the Appellant was already working from his home workstation. He testified that the Appellant has received good performance evaluations.

H. **Delete** “Summary Of the Evidence In Light Of The Questions On Remand” paragraph 43 and substitute the following:

43. The Appellant, **Kevin Adams**, then testified on his own behalf. He began his employment with the Commonwealth in 2008 and, at the time he received the involuntary transfer letter in March 2018, had been working from his home workstation for more than five (5) years because of his bipolar and anxiety issues. He testified that, after a previous mental breakdown, he worked with his psychiatrist and supervisor and was permitted to work from a home workstation. He testified that the Appellee had provided him a cell phone and a laptop. He also had his own cell phone through a different provider in addition to a fax machine. He stated that he had an office in Whitesburg about ten (10) miles from his home where he would go four (4) or five (5) times per month, after hours, to make copies for training sessions he conducted.

I. **Delete** “Summary Of The Evidence In Light Of The Questions On Remand” paragraph 46 and substitute the following:

46. The Appellant submitted his letter of resignation and then, once he sought additional treatment from his psychiatrist, he decided to rescind it. He testified that, when he initially submitted his resignation letter, he felt his options were either to resign or kill himself.

J. **Delete** “Determination As To Whether Or Not This Action Was An Involuntary Transfer Or A Work County Change” paragraph 53 and substitute the following:

53. A transfer, by law, requires the movement *from one position to another*. In this case, the Appellant was moved from Position ID 30022601 to Position ID 31070681. Therefore, this personnel action constitutes a transfer. The Board rejects the reasoning of the Hearing Officer that, because this was a newly established position, this action does not constitute a transfer. Also, the Board finds that the letter’s references to the Appellant’s workstation changing do not prevent this action from meeting the definition of transfer found in KRS Chapter 18A.005(38).

K. **Delete** “Determination As To Whether Or Not This Action Was An Involuntary Transfer Or A Work County Change” paragraphs 54 and 55.

L. **Renumber** “Determination As To Whether Or Not The Appellant Made A Claim Of Constructive Discharge And If So Was The Claim Proven” paragraph 56 to 54.

M. **Delete** “Determination As To Whether Or Not The Appellant Made A Claim Of Constructive Discharge And If So Was This Proven” paragraph 57 and substitute the following:

55. In this case, the Appellant has a history of suffering from anxiety and depression in addition to a diagnosis of bipolar disorder. As a result of his conditions, the Appellant was permitted to have a home workstation where he performed his job duties successfully and received great performance evaluations for more than five (5) years. Then, in March 2018, only days after issuing him another outstanding Annual Employee

Performance Evaluation, the Appellee issued the Appellant a letter transferring him to the Hazard Comprehensive Career Center, forty (40) miles from his home workstation, in a different county to work alongside a number of other people and requiring that he communicate with them in-person. Given that mandate, the Appellant filed an appeal with the Personnel Board, sought treatment from his psychiatrist, requested FMLA, and ultimately resigned.

N. **Renumber** “Determination As To Whether Or Not The Appellant Made A Claim Of Constructive Discharge And If So Was This Proven” paragraph 58 to 56 and paragraph 59 to 57.

O. **Delete** “Determination As To Whether Or Not The Appellant Made A Claim Of Constructive Discharge And If So Was This Proven” paragraph 60 and substitute the following:

58. The Board rejects the Hearing Officer’s finding that John Pallasch knew of the Appellant’s diagnosis. Pallasch testified he was involved in discussions about whether or not the Appellant would accept the involuntary transfer.

P. **Renumber** “Determination As To Whether Or Not The Appellant Made A Claim Of Constructive Discharge And If So Was This Proven” paragraph 61 to 59 and paragraph 62 to 60.

Q. **Delete** “Determination As To Whether Or Not The Appellant Made A Claim Of Constructive Discharge And If So Was This Proven” paragraphs 63, 64, and 65 and substitute the following:

61. The Board finds the Appellant credible when he testified that, when he appeared at the Hazard Comprehensive Career Center on or near his first day of work following the transfer, no one could tell him where his workstation was within the office. The Appellant not only testified to this but sent an email regarding this fact shortly after it occurred. There was no response to the email that refuted his claim or outlined where his workstation was located. Likewise, there was no testimony to refute this.

62. The Board finds that the Appellee failed to establish just cause for the involuntary transfer of the Appellant. It was well known that the Appellant prepared reports that were based almost exclusively on information he obtained from the internet. The record clearly demonstrates that, prior to the transfer, the Appellant was performing his job duties at an outstanding level. Importantly, the justification for the move was purportedly so that the Appellant could have “direct communication” with Workforce agencies and partner agencies at the Hazard Comprehensive Career Center. However, for the Appellant to continue performing those job duties at an outstanding level, Beyea acknowledged that the Appellant would only require direct communication if he had questions based on the data he had received from the internet. The Appellee provided no information about the importance or frequency of questions that the Appellant might have. In contrast, the Appellant testified that he would have no need for information from any of the staff working at the Hazard Comprehensive Career Center. Any information he would need to complete his reports would come from individuals who worked for the Cabinet in Frankfort or who worked for the federal government in Washington, D.C. The Appellee failed to present credible evidence that a change in the Appellant’s workstation would better meet the needs of the Department of Workforce Investment.

63. Although the Board finds the Appellee did not establish just cause for his involuntary transfer, nonetheless, the Appellant had other options instead of resignation. He certainly did not need to resign on April 11, 2018, the day before the effective date of his transfer. This is clear from the Appellant’s own testimony that he went to his new workstation on April 12, 2018. Even if it took phone calls or emails to his superiors over the course of a few hours or days, or the use of the Agency’s internal grievance processes over the course of several months, the Appellant could have exerted more effort to determine whether the involuntary transfer was tolerable, regardless of whether that transfer was based on just cause. The Appellant could have requested an accommodation if he could not comply with the involuntary transfer because of a disability. The Appellee may have changed or modified the personnel action if the Appellant had made a disability claim prior to submitting his resignation. Finally, the fact that the Appellant attempted to

rescind his resignation demonstrates the conditions were not so intolerable that he was compelled to resign.

R. **Delete** Findings of Fact paragraphs 3, 4, and 5 and substitute the following:

3. The Appellant suffered from bipolar disorder, severe anxiety, and depression; after a mental breakdown in approximately 2013, the Appellant was under the treatment of a psychiatrist for at least five (5) years prior to his involuntary transfer. The Appellant's home was his official workstation. (Testimony of the Appellant.)

4. The Appellee provided the Appellant with a cell phone and laptop computer; the Appellant had a fax machine and his own personal cell phone to facilitate his ability to work and communicate in the course of his work. The Board finds that the Appellant was available by phone or email when he worked from home. In order to carry out his job duties, the Appellant independently obtained most of his information from the internet, and any additional information he would need to complete his reports would come from individuals who either worked for the Cabinet in Frankfort or for the federal government in Washington, D.C. (Testimony of the Appellant.)

5. In November 2017, the Appellee worked with the Governor's Office in proposing a reorganization plan to abolish certain departments and create new ones. The Executive Order was issued and, on that same date, the Appellant and forty (40) other individuals were moved "on paper" to their newly-created organizational units. The November 2017 Executive Order required that all employee moved remain in the same job class and work county. (Appellee's Exhibit 1 and Testimony of Tucker.)

S. **Delete** Finding of Facts paragraphs 8, 9, and 10 and substitute the following:

8. The Appellant was the only individual whom the Appellee selected to move a second time related to the Executive Order. Officials with the Appellee had discussions

about the proposed personnel action, including whether or not the Appellant would accept the involuntary transfer. (Testimony of Tucker and Pallasch.)

9. In early 2018, Jim Beyea met with the Appellant to provide his 2017 Annual Employee Performance Evaluation, within which he scored the Appellant as “Outstanding” and noted no deficiencies, areas of concern, or need for improvement in the performance of his job duties. Beyea and the Appellant then signed the performance evaluation and forwarded it to John Pallasch for his review and signature. (Appellee’s Exhibit 5.)

10. A few days later, John Pallasch signed and dated the Appellant’s 2017 “Outstanding” Annual Employee Performance Evaluation. Then, on that very same date, with their multiple internal discussions completed and a final draft of their letter prepared, the Department of Human Resources issued the Appellant a letter entitled “Involuntary Transfer,” outlining that the Appellant was being moved out-of-county to the Hazard Comprehensive Career Center. (Appellant’s Exhibit 5.)

T. **Delete** Findings of Fact paragraph 13 and substitute the following:

13. The Board rejects the Hearing Officer’s Findings of Fact paragraph 13. Although there is evidence that the Appellant sought treatment and suffered a shaking incident in the parking lot that rendered him unable to enter the Whitesburg Office, there is no evidence that these events occurred immediately after his receipt of the involuntary transfer letter. (Testimony of Beyea and the Appellant.)

U. **Delete**, Findings of Fact paragraph 15 and substitute the following:

15. On or around April 12, 2018, the Appellant reported to his new workstation in Hazard and was unable to locate any office set aside for him, nor was anyone in the office able to advise him of where he was to work in the building. The Appellant left the

Hazard worksite and sought treatment with his psychiatrist. (Testimony of the Appellant, Appellant's Exhibit 1.)

V. **Delete** Findings of Fact paragraph 17 and substitute the following:

17. The PAN issued to the Appellant denotes that there was movement from one position to another and that the personnel action constitutes a "transfer," pursuant to the definition of that term set out in KRS 18A.005(38). (Personnel Board Exhibit 1.)

W. **Delete** Findings of Fact paragraphs 18, 19, 20, 21, 22, and 23 and substitute the following:

18. The Appellant was never asked if he would agree to voluntarily transfer from his home workstation to the Hazard Comprehensive Career Center. Usually, employees are asked if they will voluntarily transfer before an involuntary transfer takes place. (Testimony of Tucker and the Appellant.)

19. The Appellee failed to carry its burden of proof to establish just cause for the Appellant's involuntary transfer. In its transfer letter, the Appellee provided the following justification for the personnel action:

As a part of the monitoring reporting team, it is essential that you have direct and effective communication with all these workforce agencies, as well as our partner agencies and to be able to more efficiently access and analyze data. Moving your workstation from a homework station to the Hazard Career Center will accomplish this as it is a Comprehensive Career Center. Therefore, a change in your workstation will better meet the needs of DWI.

The Board finds, however, that the Appellant's work consisted of preparing reports based on data he obtained from the internet. The Board finds the Appellant's testimony credible that he did not have any problems with obtaining the data necessary to perform his job duties while at his home workstation. In addition, the evidence demonstrates the Appellant's work did not involve face-to-face contact with any other Agency staff that

worked at the Hazard Comprehensive Career Center. In other words, the Appellee failed to prove that changing the Appellant's workstation to the Hazard Comprehensive Career Center would better meet the needs of DWI.

20. Although there was not just cause for the involuntary transfer, the Board finds the Appellant's resignation was voluntary. The Appellant had options available to him other than to resign, including attempting to try working at his new workstation while filing an Agency grievance challenging the involuntary transfer. He could have taken sick leave, if necessary. He also could have tried to convince his superiors that he could work more effectively from home. He could have requested a hybrid work schedule. He could have made a disability claim if a medical condition prevented him from complying with the involuntary transfer. Finally, he could have accepted the transfer while pursuing his Board appeal.

21. As a whole, as to the material questions of fact underlying this appeal, the Board finds the Appellant's testimony credible and the Appellee's witnesses less than credible. As a result, the Appellee failed to carry its burden of proof that there was just cause for the Appellant's involuntary transfer. The Board specifically finds that moving the Appellant to the Hazard Comprehensive Career Center would not increase the Appellant's ability to "efficiently provide monitoring and reporting functions across the three workforce offices within the department." The Board further finds that the evidence does not demonstrate that the Appellant must be transferred to "have direct and effective communication with all" Workforce and partner agencies.

22. Nonetheless, the Appellant failed to carry his burden of proof that the involuntary transfer created conditions of employment that were so intolerable that a reasonable person would feel compelled to resign. The Board makes this finding in part because the Appellant resigned without even trying to work from his new workstation. While a forty (40) -mile commute is difficult, it is not so onerous that a reasonable person would resign without even an attempt to comply. Further, the Appellant's attempt to

rescind his resignation is additional evidence the Appellant did not find the conditions so onerous that he had to resign as he specifically requested to return to those conditions.

23. Although the Appellee could not establish just cause for the involuntary transfer, the Board does not find the Appellee was trying to force the Appellant to resign.

X. **Delete** Conclusions of Law paragraphs 1, 2, and 3 and substitute the following:

1. As stated in the Findings of Fact, the Appellant was moved from one position to another position of “the same grade having the same salary ranges, the same level of responsibility with the classified service, and the same salary received immediately prior to transfer.” This action constituted a transfer. KRS 18A.005(38). Because he did not request the transfer, the Appellant’s involuntary transfer constituted a penalization. KRS 18A.005(24). As a result, the Appellee had the burden of proof to establish just cause for the involuntary transfer of the Appellant. KRS 18A.095(1) and KRS 13B.090(7).

2. The Board concludes the Appellee, Education and Labor Cabinet (formerly known as the Education and Workforce Development Cabinet), failed to meet its burden of proof to show there was just cause for the involuntary transfer of the Appellant. KRS 18A.095(1).

3. The Board also concludes the Appellee did not create work conditions so intolerable for the Appellant that his resignation was compelled. The Board concludes the Appellant’s resignation was not a reasonable response to the involuntary transfer, even if that transfer was issued without just cause. Thus, the Board concludes the Appellant has not met his burden of proof that he was subjected to a constructive discharge. See Brooks v. Lexington-Fayette Urban County Housing Authority, 132 S.W.3d 790 (Ky. 2004) and Commonwealth, Tourism Cabinet v. Stosberg, 948 S.W.2d 425 (Ky. App. 1997).

The Appellant’s case is easily distinguished from the Stosberg case where the Appellant sought a position in Louisville and was transferred to Natural Bridge State Resort Park, if for no

other reason than the significantly different mileage involved in reaching the workstation to which those two Appellants were transferred.

4. Because the Appellant's resignation was voluntary, the Board cannot grant him any relief. KRS 18A.095(22).

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

IT IS HEREBY ORDERED that the appeal of **KEVIN ADAMS V. EDUCATION AND LABOR CABINET (FORMERLY KNOWN AS) EDUCATION AND WORKFORCE DEVELOPMENT CABINET ON REMAND (APPEAL NO. 2019-152)**, be **SUSTAINED to the extent** that the Appellant's involuntary transfer was taken without just cause, however, his voluntary resignation prevents the Board from granting him any relief. KRS 18A.095(22).

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer, as altered, are approved, adopted, and incorporated herein by reference as a part of this Order and that the Appellant's appeal is **SUSTAINED to the extent** herein.

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 14th day of February, 2023.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Matthew Lynch

Hon. Andrew Bryson

Hon. Daniel Dotson

Leslie Tindall

Hon. Rosemary Holbrook (Personnel Cabinet)

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2018-066**

KEVIN ADAMS

APPELLANT

**V. FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER ON REMAND**

**EDUCATION AND LABOR CABINET (formerly known as)
EDUCATION AND WORKFORCE DEVELOPMENT CABINET**

APPELLEE

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

This matter comes before Hearing Officer Brenda D. Allen upon a Remand Order issued by the Personnel Board on September 16, 2021. Through the remand, the Personnel Board posed several questions and sought additional evidence. The Hearing Officer held a post hearing conference and, in keeping with the Remand Order, asked the Appellee to ensure that all Personnel Action Notifications (PAN) forms were in the record. Also, in accordance with the post hearing order, the Appellee submitted a Supplemental Motion to Dismiss, and the Appellant filed a response thereto.

In analyzing the evidence and responding to the Board's questions, the Hearing Officer finds it important to detail the timeline of events and the exact wording the parties used at various stages of this matter. Accordingly, a detailed background, procedural history, and analysis are warranted. Emphasis will be added by underline in various quoted text because those passages are particularly relevant to the questions before the Hearing Officer on Remand.¹

The Questions on Remand follow and for those questions for which the parties have provided a response prior to the Hearing Officer's review and analysis of the evidence on Remand, the answer is provided here at the onset.

**ISSUE 1: WAS THE ACTION TAKEN AGAINST THE APPELLANT
RELATED TO THE REORGANIZATION? IF SO, PROVIDE THE TIMING
OF THE ACTION.**

The Appellee asserts in all pleadings to date, even in those pleadings submitted after the case was remanded, that the involuntary transfer of the Appellant was related to the reorganization. However, the testimony of one of the Appellee's own witnesses, Kimberly Tucker, Assistant Director of Human Resources, refutes that assertion. She testified that the action taken against the Appellant was carried out by Beth Steinle prior to her retirement, and that the involuntary transfer

¹ The Hearing Officer will refer to the March 2018 letter of Involuntary Transfer as the Involuntary Transfer Letter or refer to the action as the Appellee involuntarily transferred the Appellant. Those words are used to identify the letter or the act taken and are not intended to be used as a legal or factual conclusion to the issue before the Hearing Officer.

was not related to the Governor's Executive Order. The timing and analysis of the evidence will be discussed in greater detail below.

ISSUE 2: A DETERMINATION AS TO WHETHER OR NOT THIS ACTION WAS AN INVOLUNTARY TRANSFER OR A WORK COUNTY CHANGE.

Issue to be addressed in detail below.

ISSUE 3: HAVE ALL PERSONNEL ACTION NOTIFICATIONS BEEN PLACED INTO EVIDENCE?

No. Prior to the Order on Remand, no Personnel Action Notification forms (PANs) had been entered into the record by either party. Upon Order of the Hearing Officer, the Appellee provided fourteen (14) PANs spanning from the Appellant's appointment to the position in February 2008 to the Appellant's separation on April 26, 2018. The Hearing Officer entered those PANs into the Record as Personnel Board 1, collectively.

ISSUE 4: A DETERMINATION AS TO WHETHER OR NOT THE APPELLANT MADE A DISABILITY DISCRIMINATION CLAIM AND, IF SO, WAS THIS CLAIM PROVEN?

No, the Appellant, through counsel, acknowledged in a pre-hearing conference on Remand that he did not make a disability discrimination claim.

ISSUE 5: A DETERMINATION AS TO WHETHER OR NOT THE APPELLANT MADE A CLAIM OF CONSTRUCTIVE DISCHARGE AND, IF SO, WAS THIS CLAIM PROVEN?

Yes, the Appellant has made a claim of constructive discharge. While the issue of a constructive discharge was not outlined by the Hearing Officer at the onset of the hearing, the parties were on notice that it was an issue in this case and both parties practiced their case accordingly. A review of the record reveals that, at the time the Appellant filed his appeal with the Personnel Board on April 6, 2018, he was still employed with the Appellee, and he submitted his letter of resignation five (5) days later on April 11, 2018. Accordingly, constructive discharge was not listed on the appeal form filed prior to Appellant's separation from the Appellee's employ. However, the issue of a constructive discharge was raised in discovery and during a pre-hearing conference to the degree that the Appellee responded to that claim in its Motion to Dismiss filed November 16, 2018. In arguing that the Appellant's case should be dismissed because he had failed to state a claim upon which relief could be granted, the Appellee acknowledged that Appellant made allegations that he was pressured to resign, but the Appellee argued that the Appellant had put forth no evidence to support that allegation.

As it pertains to how the constructive discharge claim was addressed at the hearing, despite the fact that the Hearing Officer did not list constructive discharge as an issue, based upon the prepared "lead in" provided to her by Personnel Board staff at the onset of the hearing, the

Appellant's questioning of each witness during the course of the hearing was consistent with the elements of a constructive discharge claim, and two (2) pages of Appellant's Exhibit 1 entered into the record allege that the Appellee "involuntarily transferred" the Appellant in order to force his resignation in light of his bipolar, anxiety, and depression diagnoses. In response to the questioning and evidence relative to this issue, the Appellee argued in its Closing Statement and Supplemental Motion to Dismiss (on Remand) that the Appellant had failed to meet his burden to prove constructive discharge. Accordingly, the parties were on notice of this as an issue. The issue of whether the Appellant has met his burden is outlined in detail near the conclusion of this document.

PROCEDURAL BACKGROUND

1. The Appellant's April 6, 2018 Personnel Board appeal form denoted that he was appealing both a demotion and an involuntary transfer. (See Appellee's Exhibit 7).

2. The parties engaged in pre-hearing conferences and discovery and the Appellee filed a Motion to Dismiss, which was converted to a Motion for Summary Judgment due to the inclusion of information outside of the pleadings. The Appellant did not file a response. The Hearing Officer assigned at that time issued Findings of Fact and Conclusions of Law and ruled that genuine issues of material fact existed, which included, but were not limited to, 1) whether the Appellant sought an accommodation under the ADA and 2) whether the initial denial of his request for an accommodation was a penalization. The Hearing Officer ruled that the involuntary transfer was a penalization by definition and the Appellant warranted a hearing. Finally, the Hearing Officer ruled that the facts as alleged did not constitute a demotion under KRS 18A and, thus, the Personnel Board lacked jurisdiction to entertain the purported demotion. (Interim Order entered April 23, 2019.)

3. This matter was assigned to the undersigned Hearing Officer and the evidentiary hearing commenced on September 20, 2020. The issue at the evidentiary hearing was the Appellee's involuntary transfer of the Appellant and whether there was just cause for that personnel action. After the hearing, the parties filed written closings. The Hearing Officer ultimately submitted Findings of Fact, Conclusions of Law and a Recommended Order that detailed that the involuntary transfer of the Appellant served the overarching governmental purpose of operational efficiencies that came about by the Executive Order issued by Governor Bevin in November 2017, months before the Cabinet issued to the Appellant the letter entitled Involuntary Transfer.

4. Exceptions were filed and the Board ultimately remanded the matter back to the Hearing Officer with several questions and seeking additional evidence.

FACTUAL BACKGROUND

5. The Appellant, Kevin Adams, began working for the Commonwealth in 2008 and, at all times relevant to this matter, served in the position of Resource Management Analyst III in the Education and Workforce Development Cabinet¹. (Testimony of Adams, Personnel Board Exhibit 1.)

6. The Appellant was diagnosed with severe anxiety and bipolar disorder and, after a mental breakdown, and with the involvement of the Appellant's psychiatrist and supervisor, the Appellee made a reasonable accommodation and established the Appellant's workstation as his home in Jeremiah, Kentucky, in Letcher County, where he worked for more than five (5) years. (See Stipulations of the Parties, testimony of Adams, Appellee's Exhibit 2).

7. To facilitate his work from his home duty station, the Appellee provided the Appellant with a state-issued cell phone and laptop. The Appellant also had a fax machine and his own personal cell phone on a different carrier than his work cell phone. The Appellant had a key to the Appellee's office in Whitesburg where he would occasionally go four (4) or five (5) times a month, after hours, in order to make copies for training sessions that he facilitated. (Testimony of Adams).

8. On November 16, 2017, then-Governor Matthew Bevin issued an Executive Order that reorganized the Appellee Education and Workforce Development Cabinet as permitted under KRS 12.028. Among other changes, the Executive Order abolished the Quality Assurance Branch in the Office of Employment and Training in which the Appellant was employed and created a new Division of Fiscal and Budget Integrity and a Monitoring and Accountability Branch within it, to which the Appellant was moved. The Executive Order provided:

All records, files, equipment and funds shall be transferred to the newly created Division of Fiscal and Budget Integrity within the Department of Workforce Investment.

The Executive Order was accompanied by a Summary of the Plan, which provided:

Personnel and Fiscal Impacts

All employees and positions currently in the organizational units being abolished will be moved to the newly created or existing organizational units in their same job classifications and work counties.

(See Appellant's Exhibits 6 and 7). A PAN was issued to the Appellant and placed in his file on November 16, 2017, citing the Executive Order as the basis for his transfer. The Appellant experienced no change in workstation or job duties as a result of the reorganization.

9. On March 1, 2018, the Appellant met with his supervisor, James Beyea, and received his Annual Employee Performance Evaluation for 2017, within which Mr. Beyea provided Appellant a score of 459 and rated his performance as "Outstanding." (See Appellant's Exhibit 8, testimony of Adams).

10. Mr. Beyea scored the Appellant with either a four (4) - "Exceeds Expectations" - or five (5) - "Greatly Exceeds Expectations" - in all categories except "Career Development," for which his supervisor rated him a three (3) - "Adequately Meets Expectations." There were no deficiencies or areas for concern and no negative comments noted nor scores of any kind relating to the

Appellant's work and, specifically, no negative comments regarding an inability to reach him or technology outages affecting his work from home. The Appellant and his supervisor signed the 2017 Annual Employee Performance Evaluation and dated it on March 1, 2018, with the Appellant denoting that he agreed with the scoring. (Appellant's Exhibit 8). The Appellant has consistently received evaluations denoting he was performing "Outstanding" or "Highly Effective" for several years. (Testimony of Beyea and Adams).

11. On March 8, 2018, John Pallasch, who served as the Executive Director of Office of Employment Training (OET), signed the Appellant's 2017 Annual Employee Performance Evaluation as Appellant's second-line supervisor. On that same day, Beth Steinle, who served as the Appointing Authority for the Appellee, issued to the Appellant a letter entitled "Involuntary Transfer." Unbeknownst to the Appellant, the development and issuance of this letter had been the topic of multiple discussions over a period of several weeks' time with Beyea, Pallasch, and the Human Resources department. Beyea had prepared an earlier draft of the letter and the parties had discussions regarding how the Appellant might react to its issuance. (Testimony of Beyea and Pallasch). The final version of the letter issued to the Appellant, which differed from the initial draft prepared by Beyea, states as follows:

Dear Mr. Adams:

Effective beginning of business, April 12, 2018, your workstation will change from your home workstation in Jeremiah, Kentucky in Letcher County to the Hazard Career Center at 412 Roy Campbell Dr., Hazard, Kentucky in Perry County.

You will be involuntarily transferred from your current position of Resource Management Analyst III to a position of the same title, Resource Management Analyst III with no change in pay.

The basis on which you have been selected for the involuntary transfer is that the Monitoring and Accountability Branch was recently moved by reorganization from the Office of Employment and Training (OET) into the Division of Fiscal and Budget Integrity directly under the Department of Workforce Investment. The purpose of this move in part was to more efficiently provide monitoring and reporting functions across the three workforce offices within the department, which include (OET), Office For the Blind (OFB) and Office of Vocational Rehabilitation (OVR). As part of the monitoring reporting team, it is essential that you have direct and effective communication with all these workforce agencies, as well as our partner agencies and to be able to more efficiently access and analyze data. Moving your workstation from a home workstation to the Hazard Career Center will accomplish this as it is a comprehensive Career Center. Therefore a change in your workstation will better meet the needs of DWI.

(Emphasis Added) (Appellee's Exhibit 2).

12. On March 31, 2018, the Appellant sought and received treatment by a psychiatrist for severe anxiety and depression. (Appellee's Exhibit 4).

13. On April 6, 2018, the Appellant filed an appeal with the Personnel Board, citing that he was appealing an involuntary transfer and a demotion. The Appellant contended there was no just cause for his involuntary transfer or demotion, and that he had received outstanding performance evaluations for several years. (See Appeal Form of Record).

14. On April 11, 2018, one (1) day before he was to report to his new out-of-county duty station, which was approximately forty (40) miles from his home workstation, the Appellant submitted a letter of resignation, providing two (2) weeks' notice, with his last day being April 25, 2018. (See Stipulations as to the distance; Appellee's Exhibit 3)

15. On or about April 12, 2018, the Appellant's first date assigned to his new duty station in Hazard, Kentucky, the Appellant appeared at the Hazard office and checked with the receptionist and several other people to determine where his assigned workstation was located. After no one was able to advise him of where he should be, even after one (1) employee made a call to leadership inquiring, the Appellant left and then immediately sought treatment with his psychiatrist. (Testimony of Adams; Appellant's Exhibit 1).

16. On April 16, 2018, the Appellant submitted to the Appellee a request for Family and Medical Leave (FMLA) with documentation from his treating psychiatrist, which outlined that he had diagnosed the Appellant with depression and "severe anxiety especially in crowds," that he was subject to episodic flare ups, and that it was medically necessary to be absent from work during flareups. (Appellee's Exhibit 4).

17. On April 17, 2018, approximately eight (8) days prior to the Appellant's last day of employment, Jim Beyea sent the Appellant an email entitled "State Equipment," which detailed:

Kevin, I understand you handed in your laptop and cell phone yesterday. I need the 4-digit code to the iPhone and the username and password to the laptop.

18. On April 18, 2018, Sabrena Hockensmith, Benefits Coordinator for the Appellee, mailed the Appellant a letter denying his request for FMLA to the Appellant's home address. (Appellee's Exhibit 5).

19. On Friday, April 20, 2018, at 2:43 a.m., the Appellant sent an email with the subject "State Equipment and Reasonable Accommodation" to his supervisor, Jim Beyea, with copies to Benefits Coordinator Sabrena Hockensmith, which provided in its entirety:

I done (sic) as you requested regarding my laptop and cell phone last week. You sent me an e-mail requesting me to bring both my laptop and cell phone to Hazard on Monday and leave them for COT. Please do not insinuate I've absolved my responsibilities; I'm only following your orders. You never

informed me of exactly where my office was located within the Hazard building, and staff there additionally had no idea.

As far as you (sic) other e-mail requesting PIN, username and password, the pin for the phone is not needed as I reset the phone. The user/password on the laptop should not be needed by state IT and I'm highly reluctant and frankly shocked that you'd even ask for that information as you know that is the same credentials needed to enter my e-mail. Why would you ask for that? Are you wanting to read my emails? I'm sure if you could, you would have already shut my e-mail down already. My access to EKOS was shut down, and passwords to WRIS was changed, yet, you still expect me to do my job duties. I've not absconded my work duties, but you intentionally hampered my ability to complete any task.

This whole transfer is a ramification of non-work related issues. I have received either highly effective or outstanding on past annual evaluations, from you and the two other supervisors I've had while working for OET. I have done nothing negative regarding work that I've been informed. Non work social interactions should not impact work relations. My only negative work issues have been of late, and are a direct result of management decisions imparted upon me without regard to my medical conditions. There is no basis for these decisions other than punishments for issues completely unrelated to work performance.

The ADA requires employers to give reasonable accommodations for covered disabilities. Both anxiety disorder and bipolar disorder are covered. I am also sure that Jim Beyea knows this as well as other higher in the chain that I suffer from these two conditions. However, instead of trying to accommodate, I have been forced to accept conditions that aggravate my condition and even make work intolerable.

I have worked in a home-based environment for over five years while at KY OET. During this time, I have received either "Highly Effective" or "Outstanding" annual performance evaluations. I submitted a letter of resignation due to hostilities exhibited by my supervisor that was not connected to my work performance. Reasonable accommodations would have prevented my departure. I am again asking for reasonable accommodations before I escalate.

Kevin Adams

(Emphasis Added) (Appellant's Exhibit I (Collective)).

20. On April 20, 2018, at 8:06 a.m., Ms. Hockensmith forwarded to Appointing Authority Beth Steidle the Appellant's email within which the Appellant had accused the Appellee of

transferring him in order to force his resignation and threatening to escalate his entitlement to reasonable accommodations for his disability. (Appellant's Exhibit 1)

21. By letter dated that day to the Appellant, Ms. Hockensmith mailed a second letter to the Appellant's home address, reversing their previous position and granting entitlement to leave under the FMLA. It provided:

Upon further review, we have determined that approval of Intermittent family medical leave for treatments and appointments, periodic flare ups is appropriate per certification of health care provided statement. The statement does not indicate a continuous period of leave is necessary.

22. On Monday April 23, 2018, at 10:03 a.m., the Appellant wrote to Jim Beyea, with a cc to Sabrena Hockensmith:

Hello: I am withdrawing my letter of resignation. The decision to resign was made under duress. Additionally, the current status of Kentucky's submission clearly shows that I am needed.

Accordingly I will need access restored to systems required to do my duties, including, but not limited to EKOS, WRIS, WIPS, AJLA, EDRVS. Access to these systems has been revoked prior to my resignation date rendering me unable to complete necessary job duties.

Kevin Adams

(Emphasis Added) (Appellant's Exhibit 1 (Collective)).

23. Later that day, at 4:40 p.m., Beth Steinle, Appointing Authority, responded to the Appellant's April 20 emailed request for a reasonable accommodation, which had been forwarded to her by Sabrena Hockensmith several days earlier. Steinle wrote:

Kevin, the accommodation process is not an option at this point, given that you made the request after tendering your resignation and within days of the effective date of said resignation. This is despite the fact that you were approved that you were provided 30 days prior notice of the change of workstation to the Hazard local office which was to be effective April 16th 2018. The resignation was received, accepted and submitted for processing by your supervisor Jim on April 11th 2018 to be effective close of business on April 25th 2018. Agency leadership has declined your offer to rescind your resignation. In addition, you are directed at the request of agency leadership to immediately cease and desist accessing and making changes to the WIA closeout report. In addition to the security concerns caused by you accessing this report from your personal computer, it is counterproductive to the efforts of other employees who are attempting to complete this work.

(Emphasis Added) (Appellant's Exhibit 1 (Collective)).

24. The Appellant's last day of employment with the Appellee was April 25, 2018, as his request to rescind his letter of resignation was denied and his resignation became effective. (Appellee's Exhibit 1; testimony of Appellant; Personnel Board 1).

25. After the Appellant's last day working for the Appellee, his case remained pending before the Personnel Board case over the next two and a half (2.5) years until a hearing in September 2020.

SUMMARY OF THE EVIDENCE IN LIGHT OF THE QUESTIONS ON REMAND

26. Through pleadings over the years of this case, the Appellee has consistently contended that the personnel action they effectuated upon the Appellant was an involuntary transfer that took place *because of* Governor Bevin's Executive Order 2017-0799 and the resulting need to have the Appellant communicate directly and effectively with partner agencies through his physical presence in the Comprehensive Center.

27. **James Beyea**, the Appellant's first-line supervisor, testified that he became aware of the letter entitled "Involuntary Transfer" a few weeks before it was carried out and that he was involved in discussions with Human Resources and the witnesses' own supervisor, John Pallasch, regarding the Appellant's move. He testified that he had prepared an initial draft letter and that it was changed significantly by his supervisor before being issued.

28. He testified that the Appellant's role was to pull data from the internet. He was aware of the Appellant's mental health issues and that the Appellee had authorized the Appellant to work from home for several years prior to the involuntary transfer letter. He was also aware that, when he became the Appellant's supervisor several years ago, the Appellant was already working from his home workstation. He testified that the Appellant has received good performance evaluations.

29. The witness testified that, after the Executive Order was issued, several employees were moved "on paper" to the new organizational structure and that there were steps to continue to structure operations at the Comprehensive Centers.

30. Beyea testified that the involuntary transfer of the Appellant out of county was necessary for "direct and effective communication" which, in his opinion, meant in-person communication that would occur because they could go into one another's cubicles to talk during the day. He stated that there were difficulties reaching the Appellant by phone and email and this would likewise be resolved by his move to the Hazard Comprehensive Center.

31. Beyea testified that, after the involuntary transfer letter was issued to the Appellant, he had a discussion with the Appellant during which the Appellant told him of how stressful the situation was and mentioned to him that he was unable to go into the Appellee's Whitesburg office on a particular day because he had experienced shaking while he was in the parking lot.

32. He testified that, after receiving the Appellant's letter of resignation, he forwarded it to Human Resources and that, when the Appellant attempted to rescind the resignation a few days later, the Appellee had not taken any steps to replace the Appellant.

33. The next witness was **John Pallasch**, the former Executive Director of the OET at both the time of the reorganization and at the time the involuntary transfer letter was issued to the Appellant. He testified that he had multiple discussions with Human Resources and across the Cabinet regarding the decision to move the Appellant from his home workstation in Whitesburg to the Hazard Comprehensive Center, including discussions of potential outcomes that might result and how the Appellant might respond.

34. He testified that Comprehensive Centers were created, that there was a need for a "presence" in them, and that the Appellant's unique skillset and his role of pulling data warranted that he be moved. Pallasch stated that there were connectivity issues with large data sets that the Appellant would need to pull from the internet and that difficulties reaching the Appellant were sources of great frustration for the Appellant's supervisor, James Beyea. He noted that the Appellant worked non-traditional hours; the witness did not believe it was his role to require the Appellant to work traditional hours, but that it was important that he be available to the folks in Frankfort by phone during regular business hours.

35. Pallasch testified that he was unaware of the internet service providers or internet speeds that were present and available at the Appellant's workstation at home or in the Hazard Comprehensive Center to which they had elected to move the Appellant.

36. The witness testified that the Appellee had the authority to move the Appellant, either through the Executive Order or through their own general business reasons and, without the PAN in front of him, he was unable to recall which instance was used here. He said the reorganization developed because of the need for direct communication in the Comprehensive Centers, but the inability of the witness's special assistant, Rachel, and the Appellant's supervisor, Jim Beyea, to reach the Appellant during business hours was also a key reason for the involuntary transfer.

37. The witness stated that he was not aware of the Appellant's mental health issues; he was aware that the Appellant had worked from home but did not know if home was the Appellant's official workstation. He testified that he did not know if the Appellant was transferred as a result of the Executive Order, but believed it was because of the inability to communicate with him. When questioned regarding whether a resignation was a reasonable response to the involuntary transfer approximately forty (40) miles from the Appellant's home workstation, the witness stated that it depended on the situation.

38. The next witness to testify on the Appellee's behalf was **Kimberly Tucker**, Assistant Director of Human Resources. Tucker began by testifying that Beth Steinle, who has now retired, issued the letter entitled "Involuntary Transfer" to the Appellant and that, in accordance with the regulations, all that was necessary for the transfer was a "reasonable basis."

39. She stated that the Executive Order signed in November 2017 by then-Governor Bevin moved forty-one (41) individuals “on paper” to the newly-created Branch and that it was just a simple reorganization. She testified that, in March 2018, the Appellant was the only person who was selected and involuntarily transferred because of his unique skill set and the importance of his work. She testified that, “*his position was transferred to the comprehensive center*” and then, a moment later after being asked the next question, she backtracked and asked to correct her prior statement and then said,

A new position was created in the Comprehensive Center and Kevin was transferred from his old position to this newly created one to allow him to communicate with the business partners housed there. (Emphasis Added).

40. When questioned regarding the issue of a constructive discharge, Tucker testified that the Appellant’s resignation was not a reasonable response to the transfer because, after filing his appeal, he could have waited two (2) or three (3) years and things may have changed so he could be working from home, just as everyone was now (as a result of COVID).

41. Tucker testified that the Appellant was not transferred as a result of the November 2017 Executive Order, but that he was transferred later on when the department looked at his duties. She testified that he had a unique set of skills that made it important for him to be in Hazard. She also testified that, when he sought to rescind his resignation, no steps had been taken to replace him.

42. **The Appellee rested.**

43. The Appellant, **Kevin Adams**, then testified on his own behalf. He began his employment with the State in 2008 and, at the time he received the involuntary transfer letter in March 2018, had been working from his home workstation for more than five (5) years because of his bipolar and anxiety issues. He testified that, after a previous mental breakdown, he worked with his psychiatrist and supervisor and was permitted to work from a home workstation. He testified that the Appellee had provided him a cell phone and a laptop. He also had his own cell phone through a different provider as well as a fax machine. He stated that he had an office in Whitesburg about six (6) miles from his home where he would go four (4) or five (5) times per month, after hours, to make copies for trainings and he routinely had meetings via zoom with the Louisville staff without issue.

44. Since his role was only to pull and compile data and prepare reports, the Appellant testified that he had no idea about what topics that he was to communicate with the people at the Hazard office. He stated that the timing of the reports he compiled required that he work eighty (80) hours after the data was released to him, and that he would continue to work with the data during a relatively short window and re-submit it multiple times to the U.S. Department of Labor until it was error-free. His internet provided sufficient upload and download speeds and he had no problems with downloading or submitting the data sets.

45. He stated he communicated more with his counterparts across the country than with his agency in Frankfort and there were never any discussions with him or in his evaluations about an inability to reach him, or with connectivity or communication issues. He testified that his house was next to an AT&T cell tower and his work cell phone would not work in the Hazard office to which they had transferred him.

46. He submitted his letter of resignation and then, once he sought additional treatment from his psychiatrist, he decided to rescind it. He testified that he felt his options were either to resign or kill himself, because his condition would not allow him to work in the Comprehensive Center and to have to commute forty (40) miles each way from his home.

ANALYSIS OF UNRESOLVED ISSUES

ISSUE 1: WAS THE ACTION TAKEN AGAINST THE APPELLANT RELATED TO THE REORGANIZATION? IF SO, PROVIDE THE TIMING OF THE ACTION.

47. The evidence on this issue is conflicting. The Appellee's own witness, Kimberly Tucker, Assistant Director of Human Resources, testified that the Appellee's "involuntary transfer" of the Appellant was not related to the reorganization. Instead, she testified that it was an independent act, specific to the Appellant and his job duties. She testified that he was the only person moved a second time after the initial forty-one (41) people were moved "on paper" because of the reorganization. Despite this testimony, in post hearing pleadings and in pleadings throughout the entirety of this proceeding spanning over several years, the Appellee has contended that the involuntary transfer is, in fact, related to the Governor's reorganization. Most recently, in its Supplemental Motion to Dismiss, in explaining the timing of the transfer as the Personnel Board requested, the Appellee argued that the transfer was related to the reorganization, but that it simply took several months to effectuate. However, the Hearing Officer notes that the PANs issued by Human Resources to the Appellant clearly show this is false. A PAN issued on November 17, 2017, effectuates the Executive Order and reorganization and transfers the Appellant into the Monitoring and Accountability Branch that the Governor had just created through Executive Order at the request of the Appellee. Then, in March 2018, four (4) months later, a subsequent PAN reveals that the Appellee moved the Appellant a second time to the out-of-county workstation, an action which spawned this appeal.

48. However, arguments of the parties are not evidence of record, and a careful examination of the evidence is warranted. Thus, the Hearing Officer turns to Appellee's Exhibit 2, the March 2018 "Involuntary Transfer" letter issued to Appellant, which provided, in relevant part:

The basis on which you have been selected for the involuntary transfer is that the Monitoring and Accountability Branch was recently moved by reorganization from the Office of Employment Training (OET) into the Division of Fiscal and Budget Integrity directly under the Department of Workforce Investment.

(Emphasis Added) (See Appellee's Exhibit 2).

49. The Hearing Officer would note that this statement, too, is false. A review of the PANs issued to the Appellant in conjunction with the November 2017 Executive Order itself is instructive. Prior to the reorganization, the PANs issued to the Appellant - going back as far as 2014 - show that the Appellant was in the Quality Assurance Branch. The Monitoring and Accountably Branch did not exist prior to the Executive Order of November 2017, but instead that Executive Order created it, abolished the Quality Assurance Branch the Appellant was in, and moved the Appellant to this newly-created Branch with restrictions on what could happen to him as a result of this move.

50. It is important to the Hearing Officer's consideration that the Appellee Education and Workforce Development Cabinet *proposed* the new organizational structure and *worked with* the Governor's Office in bringing it to fruition under the framework of the reorganization statute outlined in KRS 12.050. So, this was not an edict handed down by the Governor without the Appellee's involvement. The Executive Order provided:

I *The Division of Fiscal and Budget Integrity is hereby created* and shall be headed by a division director appointed by the Secretary of the Education and Workforce Development Cabinet pursuant to KRS 12.050 who shall report to the commissioner of the Department of Workforce Investment.

The Summary of the Plan that accompanied then provided:

The Cabinet proposes to abolish one (1) division and five (5) branches in the OET, one (1) branch in the Office for Vocational Rehabilitation, and one (1) branch in the Division of Administrative Services, Office of Budget and Administration in the Office of the Secretary.

The following organizational units shall be abolished in the Office of Employment and Training:

- Division of Grant Management and Support
- Grant Management Branch within the Division of Grant Management and Support
- Operational Support Branch within the Division of Grant Management and Support
- Program Support Branch within the Division of Grant Management and Support
- Systems Management Branch within the Division of workforce and Employment Services
- *Quality Assurance Branch within the Division of Workforce and Employment Services*

The following organizational units *will be established* in the Department of Workforce Investment:

- Division of Fiscal and Budget Integrity
- Grants Budget Branch within the Division of Fiscal and Budget Integrity
- Fiscal Support Branch within the Division of Fiscal and Budget Integrity
- *Monitoring and Accountability Branch within the Division of Fiscal and Budget Integrity*

All employees and positions currently in the organizational units being abolished will be moved to the newly created or existing organizational units in their same job classifications and work counties. (Emphasis Added).

51. So, whether the inaccurate statements within the transfer letter were mere oversight or were carefully drafted so as not to alert the Appellant that he was entitled to remain in his same job classification and work county, pursuant to the Executive Order, is of little consequence. The Appellee issued the letter with the words it contained, and the Hearing Officer finds and concludes that, as outlined in the letter in the record, the transfer was related to the reorganization. With that being established, the Hearing Officer finds that the Appellee had no authority to violate the express directive of the Summary of the Plan, which was incorporated into the November 2017 Executive Order and specifically provided that all employees and positions will be moved to the new units in their same job classifications and work counties, even if they did so several weeks or months after the initial move. In other words, nothing permitted the Appellee a “second bite at the [involuntary transfer] apple.”

ISSUE 2: DETERMINATION AS TO WHETHER OR NOT THIS ACTION WAS AN INVOLUNTARY TRANSFER OR A WORK COUNTY CHANGE.

52. The definitions and precise parameters of “transfers” and “work stations” are important to the Hearing Officer’s consideration of this issue. Pursuant to KRS 18A.005(38):

Transfer: A movement of an employee from one (1) position to another of the same grade having the same salary ranges, the same level or responsibility within the classified service, and the same salary received immediately prior to the transfer.

A review of the PAN that effectuated this move provides as follows:

Dear Kevin Adams:

Upon the recommendation of your appointing authority on April 12, 2018, the Personnel Cabinet processed the following action(s) in KHRIS:

Start Date
April 12, 2018

Z8 Position Number Change – Interna- 01 TWI Invol.

FROM	TO
Job ID: 20001510	Job ID: 20001510
Job Title: Resource Management Analyst III	Job Title: Resource Management Analyst III
Pos ID: 30022601	Pos ID: 31070681
Salary 3,403.18	Salary 3,403.18
Org ID: 10201276	Org ID: 10201276
Org Unit: Monitoring and Accountability Branch	Org Unit: Monitoring and Accountability Branch
Pay Grade 15	Pay Grade 15
Work County: 067	Work County: 097

(See Personnel Exhibit Board 1 (Collective))

53. A transfer, by law, requires the movement *from one position to another*. In this case, there was no vacant position already in existence at the Hazard Comprehensive Center to which the Appellee moved the Appellant. This is consistent with the testimony of all the parties and the evidence of record. Instead, the PAN reveals that the Appellant remained in his position, and the Personnel Cabinet merely changed his position number as is evidenced by the words “Position Number Change.” As such, and while it is quite clear that it was not their intent, the Appellee did not effectuate an involuntary transfer of the Appellant, and this was, in actuality, a workstation change governed by 101 KAR 2:095(2) and (3). This is consistent with the fact that nothing changed relative to the Appellant’s work other than the work county: His supervisor, duties, and pay all remained the same, and all of the Appellee’s witnesses testified that they wanted the Appellant physically present, out-of-county, in Hazard. The Appellee’s key witnesses’ own words prior to and during the evidentiary hearing present no doubt to the Hearing Officer that this was indeed an improperly processed out of county workstation change. For example, the letter entitled “Involuntary Transfer” provided in relevant part:

Effective beginning of business, April 12, 2018, your workstation will change from your home workstation in Jeremiah, Kentucky, in Letcher County to the Hazard Career Center at 412 Roy Campbell Dr., Hazard, Kentucky, in Perry County.

...

Moving your workstation from a home workstation to the Hazard Career Center will accomplish this as it is a comprehensive Career Center. Therefore, a change in your workstation will better meet the needs of DWI.

(See Appellee's Exhibit 2). Further, in an April 2018 email to the Appellant, the Appellee's Appointing Authority Beth Steinle also wrote:

Kevin, the accommodation process is not an option at this point, given that you made the request after tendering your resignation and within days of the effective date of said resignation. This is despite the fact that you were provided 30 days prior notice of the change of workstation to the Hazard local office which was to be effective April 16, 2018.

(See April 20 2018 email from Beth Steinle to the Appellant; Appellant's Exhibit 1 (collective)).

54. Finally, in her testimony, Assistant Director of HR Kimberly Tucker even testified that this was the case, then made a point to change her testimony when, in the opinion of the Hearing Officer, Tucker realized the significance of her statement in light of the issue before the Hearing Officer. Upon questioning by the Appellant's counsel, Tucker specifically stated that, with regard the Appellant's movement, "his position was transferred to the Comprehensive Center." Then, several seconds later, she asked to correct her prior statement and said,

A new position was created in the Comprehensive Center and that Kevin was transferred from his old position to this newly created one to allow him to communicate with the business partners housed there.

(See Testimony of Kimberly Tucker).

However, the evidence of record refutes Tucker's latter statement. The PANs show quite clearly that her first statement was accurate. His position was transferred to a different work county, and the change of the position number was a means by which the Appellee attempted to make their efforts fit the narrative they created.

55. Thus, given the Hearing Officer's determination that the Appellee did not effectuate an involuntary transfer of the Appellant and, instead, attempted an out of county work station change, a determination must be made if the Appellant's work station change was made within the confines of the regulations.

101 KAR 2:095, Section 4, provides the following with regard to workstations:

Section 4. Official Work Station, Alternate Work Station, and Temporary Assignment.

- (1) Each employee shall be assigned an official work station and may be assigned one (1) or more additional alternate work stations by the appointing authority.
- (2) *An official work station or alternate work station may be changed to better meet the needs of the agency.*
- (3) *An employee may be temporarily assigned to a different official work station or alternate work station in a different county. The assignment shall be to the same job classification.*
 - (a) *If an employee is temporarily assigned to a different official work station or alternate work station in a different county, the assignment shall not last more than sixty (60) calendar days.*
 - (b) Temporary assignment may be renewed with prior approval of the Secretary of Personnel.
 - (c) A temporarily reassigned employee shall be reimbursed for travel expenses in accordance with 200 KAR 2:006, and the appointing authority shall notify the employee in writing prior to the effective date of the action.
- (4) An appointing authority may assign an employee to work in a different site within the county of employment within the same job classification.

(See 101 KAR 2:095).

Thus, by applying the clear provisions of 101 KAR 2:095(2) and (3) to the fact pattern underlying this appeal, the Hearing Officer finds that the “Involuntary Transfer” letter issued by the Appellee actually effectuated a workstation change out-of-county. By doing so, the Appellee was limited to a temporary change of the Appellant’s workstation out-of-county only for a maximum of sixty (60) days and they were required to reimburse him for travel expenses.

ISSUE 5: A DETERMINATION AS TO WHETHER OR NOT THE APPELLANT MADE A CLAIM OF CONSTRUCTIVE DISCHARGE AND, IF SO, WAS THIS CLAIM PROVEN?

56. As outlined in greater detail previously, the claim of constructive discharge was made by the Appellant; now it remains to be resolved whether or not it was proven. The elements of constructive discharge are as follows: whether, based upon objective criteria, the conditions created by the employer's actions are so intolerable that a reasonable person would feel compelled to resign. (See Darnell v Campbell County Fiscal Court, 731 F Supp 1309 (E.D. Ky 1990)).

57. In this case, the Appellant has a medically documented history of suffering from anxiety and depression, which was exacerbated by crowds and his bipolar disorder. His conditions were so severe that the Appellee had provided a reasonable accommodation for the Appellant by assigning him to a home workstation where he performed successfully and received great performance evaluations for more than five (5) years. Then, in March 2018, only days after providing him another outstanding yearly performance evaluation, the Appellee issued a letter transferring him to the Hazard Comprehensive Center, forty (40) miles from his home workstation in a different county, to work alongside a number of other people, and requiring that he directly communicate with them in-person, in direct violation of the reasonable accommodation they were required to afford him. The Appellant filed an appeal with the Personnel Board, sought treatment from his psychiatrist, requested FMLA (which was later denied and then 'after that' approved), and resigned.

58. The Appellee asserts that the November 2017 Executive Order suddenly created this imperative need for the Appellant to be physically present in the Hazard Comprehensive Center to communicate in-person with the people in the office. They contended this was the only means of "direct and effective" communication that could exist. This, despite the fact that his position, by all accounts, consisted of pulling large data sets from the internet, working with the data, scrubbing it of data entry errors, and continuing to upload it under a relatively short but labor-intensive timeframe, to a federal labor website until it was error free. His interaction with others in his Cabinet was relatively limited and, contrary to the Appellee's claims at the hearing, had worked incredibly well for years as is evidenced by his evaluations, which the Appellee agrees, were consistently good.

59. The Appellee also asserts after-the-fact that the Appellant was often unreachable and that his technology at his home was spotty, leaving him without the ability to perform his work adequately. Despite these claimed deficiencies and mere days before issuing the letter moving him to Hazard, the Appellee's first-line supervisor rated him as "Outstanding" on his 2017 Annual Employee Performance Evaluation and not one single negative comment was cited. His second-line supervisor, John Pallasch, signed off on that evaluation signifying his agreement with the glowing assessment of the Appellant's performance on the very same day the Appointing Authority issued him the letter of "Involuntary Transfer." Absent from the record was any email, note, or testimony that anyone had discussed these now-claimed deficiencies with the Appellant at any time.

60. John Pallasch testified he had no knowledge of the Appellant's diagnoses or that he had been provided reasonable accommodations. Pallasch testified that he was only aware that the Appellant worked from home but did not know why or whether that was his official workstation. The Hearing Officer does not find Pallasch credible on this issue in light of 1) his position as the Appellant's second-line supervisor, and 2) the multiple conversations Pallasch testified that he had with Human Resources about the Appellant, their plan to move the Appellant to the Comprehensive Center, and their discussions about how the Appellant might respond to the out-of-county move.

61. There is no credible evidence that the nature of the Appellant's work, the November 2017 Executive Order, or any technology, communication, or availability deficiencies warranted the Appellant's move to the Hazard Comprehensive Center. The Appellee's witnesses relayed that the Appellant's skill set was unique, and that he was critically important to the agency's mission such that it was imperative that he be stationed at the Hazard Comprehensive Center. Yet, when the Appellant attempted to rescind his resignation letter only days after tendering it, the Appellee flatly refused to allow him to do so, despite having taken no steps to replace him.

62. The Hearing Officer finds all three of the Appellee's witnesses, James Beyca, John Pallasch, and Kim Tucker, lack credibility. Their testimony and the carefully-crafted though fatally-flawed letter of transfer simply do not hold up when tested with the evidence of their own conflicting testimony, the Executive Order, the PANs, the Appellant's 2017 Annual Employee Performance Evaluation, the emails between the parties, and the Appellant's testimony.

63. The Hearing Officer finds the Appellant credible when he testified that, when he appeared at the Hazard Comprehensive Center on or near his first day of work following the transfer, no one could tell him where his workstation was within the office. The Appellant not only testified to this but sent an email regarding this fact shortly after it occurred. There was no response in the email that refuted his claim or outlined where his workstation was located. Likewise, there was no testimony to refute this. This leads the Hearing Officer to believe that there indeed was no workstation created for the Appellant in the Hazard office because they surmised that, with his psychological maladies, the removal of his reasonable accommodation, and forcing him to relocate to an office to communicate with people in-person, he would resign.

64. All of the evidence lends support for the Hearing Officer's conclusion that the Appellee's stated purpose for moving the Appellant was mere pretext and the Appellee intended to constructively discharge the Appellant.

65. The Hearing Officer is persuaded that a reasonably objective person, similarly situated (with the Appellant's disabilities), whose reasonable accommodation in place for years was so egregiously and abruptly removed, and who would be required to travel forty (40) miles each way

to another county to work in an office with others in a Comprehensive Center, would feel compelled to resign.

FINDINGS OF FACT

1. The Appellant, Kevin Adams, was a classified employee serving as a Resource Management Analyst III in the Education and Workforce Development Cabinet. (Appellant's Appeal form; Testimony of Kevin Adams).

2. The Appellant's role was to work with large data sets that he obtained through the internet, to work to clean the data, and resubmit it to the U.S. Department of Labor during a very short but time-intensive window each month. (Testimony of Adams).

3. The Appellant suffered from bipolar disorder, severe anxiety, and depression, exacerbated by crowds and, after a mental breakdown in approximately 2013, he worked with his psychiatrist and supervisor to create reasonable accommodations with the Appellee, which included the parties agreeing to make the Appellant's home his official workstation. (Testimony of Adams; Testimony of James Beyea; Appellee's Exhibit 2; Appellant's Exhibit 4).

4. The Appellee provided the Appellant with a cell phone and laptop computer; the Appellant had a fax machine and his own personal cell phone to facilitate his ability to work and communicate in the course of his work. (Testimony of Adams).

5. In November 2017, the Appellee worked with the Governor's Office in proposing a reorganization plan to abolish certain departments and create new ones. The Executive Order was issued, and, on that same date, the Appellant and forty (40) other individuals were moved "on paper" to their newly created organizational units. The November 2017 Executive Order required that all employees moved remain in the same job class and work county. (Appellant's Exhibit 6 and 7, Testimony of Kimberly Tucker).

6. A PAN was issued effectuating this movement of the Appellant. (Personnel Board Exhibit 1).

7. In the weeks after effectuating the November 2017 Executive Order, the Appellant's first-line supervisor, Jim Beyea, along with the Appellant's second-line supervisor, Executive Director John Pallasch, began certain discussions with the Human Resources Department about moving the Appellant from his home workstation out-of-county to the Hazard Comprehensive Center. (Testimony of John Pallasch, Testimony of Beyea).

8. The Appellant was the only individual the Appellee selected to move a second time related to the Executive Order and they had multiple discussions about the proposed movement, including speculation as to how the Appellant might respond. (Testimony of Tucker, Testimony of Pallasch)

9. In early March 2018, Jim Beyea met with the Appellant to provide his 2017 Annual Employee Performance Evaluation, within which he scored the Appellant “Outstanding” and noted no deficiencies, areas of concern, or need for improvement. Beyea and the Appellant signed the evaluation and forwarded it to John Pallasch for his review and signature. (Appellant’s Exhibit 8).

10. A few days later, John Pallasch signed and dated the Appellant’s 2017 “Outstanding” Annual Employee Performance Evaluation and, on that same date, with his multiple discussions with Human Resources completed and a final draft prepared, the Department of Human Resources issued the Appellant a letter entitled “Involuntary Transfer,” outlining that the Appellant was being moved out-of-county to the Hazard Comprehensive Center. (Appellant’s Exhibit 8, Appellee’s Exhibit 2, Testimony of Pallasch, Testimony of Beyea).

11. The “Involuntary Transfer” letter cited the November 2017 Executive Order and the resulting need for the Appellant to engage in direct and effective communication and improved access to data as justifications for the movement. (Appellee’s Exhibit 2)

12. A PAN was issued to the Appellant outlining that the Appellant was being moved from county 067 to 097, and the PAN also listed the words “Position Change Number- Interna TWI Invol.” (Personnel Board Exhibit 1).

13. After receiving the letter, the Appellant sought psychological treatment and also suffered shaking in the parking lot that rendered him unable to enter the Whitesburg office on a particular date. (Testimony of Beyea, Testimony of Adams, Appellant’s Exhibit 4).

14. On April 11, 2018, the day prior to his scheduled report date to the Hazard Comprehensive Center, the Appellant submitted a letter of resignation, believing his only options were to resign or commit suicide. (Appellee’s Exhibit 3, Testimony of Adams).

15. On or around April 12, 2018, the Appellant reported to his new duty station in Hazard and was unable to locate any workstation set aside for him, nor was anyone in the office able to advise him of where he was to work in the building. He left. (Testimony of Adams, Appellant’s Exhibit 1).

16. KRS 18A.005(38) - Transfer: A movement of an employee from one (1) position to another of the same grade having the same salary ranges, the same level or responsibility within the classified service, and the same salary received immediately prior to the transfer.

17. The PAN issued to the Appellant denotes that there was not movement from one position to another, but instead that there was a Position Number Change. Even if this is technically the means whereby the Cabinet effectuates a transfer, the overwhelming evidence of record clearly demonstrates that the stated desire of the Appellee was to move the Appellant out of Letcher County to Perry County to work at the Hazard Comprehensive Center. (Personnel Board Exhibit 1, Testimony of Beyea, Pallasch, Tucker).

18. 101 KAR 2:095, Section 4 provides:

Official Work Station, Alternate Work Station, and Temporary Assignment.

- (1) Each employee shall be assigned an official work station and may be assigned one (1) or more additional alternate work stations by the appointing authority.
- (2) *An official work station or alternate work station may be changed to better meet the needs of the agency.*
- (3) *An employee may be temporarily assigned to a different official work station or alternate work station in a different county. The assignment shall be to the same job classification.*
 - (a) *If an employee is temporarily assigned to a different official work station or alternate work station in a different county, the assignment shall not last more than sixty (60) calendar days.*
 - (b) Temporary assignment may be renewed with prior approval of the Secretary of Personnel.
 - (c) A temporarily reassigned employee shall be reimbursed for travel expenses in accordance with 200 KAR 2:006, and the appointing authority shall notify the employee in writing prior to the effective date of the action. (Emphasis Added).

19. The Hearing Officer finds that the Appellee's March 2018 "Involuntary Transfer" letter actually effectuated a workstation change out-of-county, which was limited to a maximum of sixty (60) days' in duration in accordance with the above regulation, and subject to the reasonable accommodations that the Appellant had been entitled to for years relative to his work for the Appellee.

20. KRS 18A.005(24) provides:

Penalization' means demotion, dismissal, suspension, fines and other disciplinary actions; involuntary transfers; salary adjustments; any action that increases or diminishes the level, rank, discretion, or responsibility of an employee without proper cause or authority, including a reclassification or reallocation to a lower grade or rate of pay; and the abridgement or denial of other rights granted to state employees.

21. KRS 18A.095(1) provides:

A classified employee with status shall not be dismissed, demoted, suspended, or otherwise penalized except for cause.

22. The Hearing Officer finds that the March 2018 “Involuntary Transfer” letter issued to the Appellant was a penalization in that the Appellant was abridged or denied the other rights granted state employees pursuant to 101 KAR 2:095, Section 4, and pursuant to the Executive Order issued November 2017 that required that the employees moved pursuant to the Executive Order remain in their same job class and work county.

23. The Hearing Officer finds that given 1) the Appellant’s well-documented diagnoses, 2) the Appellee’s unjustified removal of reasonable accommodations that had been afforded to the Appellant for more than five (5) years, and 3) the Appellee’s improper handling of moving the Appellant’s workstation out-of-county to the Hazard office, the Appellee created a situation so intolerable a reasonable person would feel compelled to resign.

CONCLUSIONS OF LAW

1. The Hearing Officer concludes that the Appellee, Education and Workforce Development Cabinet, has failed to meet its burden of proof to show that there was just cause for the March 2018 letter entitled “Involuntary Transfer” issued to the Appellant, moving his workstation out-of-county from his home in Letcher County to the Hazard Comprehensive Center in Perry County, Kentucky.

2. The Hearing Officer concludes that what the Appellee actually effectuated with the March 2018 “Involuntary Transfer” letter was a workstation change out-of-county, without 1) the adequate notice, 2) the sixty (60) day maximum or 3) the sixty (60) days of expense reimbursement required by 101 KAR 2:095, Section 4.

3. The Hearing Officer concludes that the Appellant has met his burden to prove a constructive discharge effectuated by Appellee as a result of the March 2018 “Involuntary Transfer” letter issued to the Appellant moving his workstation out-of-county from his home in Letcher County to the Hazard Comprehensive Center in Perry County, Kentucky.

RECOMMENDED ORDER

The Hearing Officer recommends that the Personnel Board vacate the Hearing Officers’ previous Recommended Order and replace it with this one, recommending that that the case of **KEVIN ADAMS VS. EDUCATION AND LABOR CABINET (formerly known as) EDUCATION AND WORKFORCE DEVELOPMENT CABINET (APPEAL NO. 2018-066) ON REMAND BE SUSTAINED** and that the Appellant Kevin Adams be reinstated to his position with back pay and all entitlements due him, including the reinstatement of his reasonable accommodations in accordance with the laws governing them, and be otherwise made whole. **KRS 18A.105 and 200 KAR 12:030.**

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.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 exception that are filed by the other party within fifteen (15) 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 the 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).

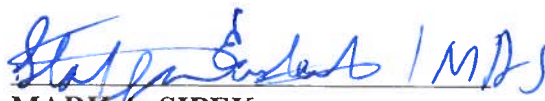
Any document filed with the Personnel Board shall be served on the opposing party.

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 Brenda D. Allen** this 4 day of October, 2022.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy this day emailed and mailed to:

Hon. Daniel F. Dotson
Hon. Matthew P. Lynch
Hon. Andrew T. Bryson
Hon. Rosemary Holbrook (Personnel Cabinet)

¹ In 2022, the Education and Workforce Development Cabinet was reorganized along with the Labor Cabinet into the Education and Labor Cabinet. All matters relevant to this appeal occurred prior to the reorganization, so the Appellee shall be referred to as the Education and Workforce Development Cabinet. Moreover, the 2017 reorganization underlying this appeal is not related to the subsequent creation of the Education and Labor Cabinet.

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2018-066

KEVIN A. ADAMS

APPELLANT

V.

FINDINGS OF FACT, CONCLUSION OF LAW
AND RECOMMENDED ORDER

EDUCATION AND WORKFORCE DEVELOPMENT CABINET

APPELLEE

This matter came on for evidentiary hearing on September 11, 2020, at 9:30 a.m. at the office of the Kentucky Personnel Board, 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Brenda D. Allen, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by KRS Chapter 18A. By agreement of the parties under KRS Chapter 13B, the evidentiary hearing was conducted by video teleconference using Amazon Chime video teleconferencing software.

The Appellant, Kevin A. Adams, was present and was represented by the Hon. Daniel Dotson, both of whom were together, and appearing via Amazon Chime. The Appellee was present and was represented by the Hon. Linda Keeton, appearing via Amazon Chime. Also present was Agency representative, Kimberly Tucker, Assistant Director of the Education and Workforce Development Cabinet, Department of Human Resources, who appeared by Amazon Chime.

The Appellant **MOVED** to invoke the rule of separation of witnesses to include text messages, emails, and phone calls. The Motion was **SUSTAINED**, without objection. At issue in the evidentiary hearing is the Appellee's involuntary transfer of the Appellant and whether there was just cause. The Appellee has the burden of proof by a preponderance of evidence.

BACKGROUND

1. The Appellant, Kevin Adams, served in the position of Resource Management Analyst III in the Monitoring and Accountability Branch of the Education and Workforce Development Cabinet.

2. By letter dated March 8, 2018, the Appellant was notified he was being involuntarily transferred from his current workstation at his home in Jeremiah, Letcher County, Kentucky, to a new workstation at the Hazard Career Center in Hazard, Perry County, KY. According to the letter, his title and salary remained unchanged.

3. The letter outlined that the basis for the Involuntary Transfer was that, pursuant to a recent reorganization into the Fiscal and Integrity Branch, the Monitoring and Accountability Branch was moved. The Appellant's transfer would more efficiently provide monitoring and reporting functions across the three workforce offices in the department as well as with partner agencies as a part of the Comprehensive Career Center. Finally, the letter cited more effective communication with all workforce agencies, including their ability to access and analyze data and improve network connectivity issues.

4. The Appellant filed his appeal on April 6, 2018, citing that he was appealing a demotion and an involuntary transfer.

5. As a result of a dispositive motion filed thereafter, the Hearing Officer, by Interim Orders, ruled that no demotion took place and, thus, the Personnel Board was without jurisdiction to hear that issue.

6. An evidentiary hearing was subsequently scheduled for September 11, 2020, with the only issue being the Involuntary Transfer of the Appellant and whether there was just cause.

7. On the day of the evidentiary hearing, the first witness to testify on behalf of the Appellee was **James Beyea** who serves as the Compliance Manager for the Department of Workforce Investment. After being sworn, Mr. Beyea testified that he was Mr. Adams' first line supervisor.

8. He testified he became aware of an Executive Order signed by the Governor Bevin that reorganized the Cabinet and moved Monitoring and Accountability to the department level.

9. He testified that his role was to carry out the reorganization with regard to the Monitoring and Reporting Branch.

10. The witness identified **Appellee's Exhibit 1**, Executive Order 2017-0799 signed by Governor Bevin, which was entered into the record without objection. The witness testified that the purpose of the Appellant's transfer to the new duty station was have him work closely with partner agencies, several of which were housed in the Comprehensive Career Center in Hazard. The witness testified that Hazard was the closest Comprehensive Career Center to the Appellant's duty station.

11. Mr. Beyea identified **Appellee's Exhibits 2, 3, and 4** and he testified briefly regarding them. They were entered into the record without objection.

12. The witness testified that the Appellant's role was to pull data from the internet and answer questions regarding that data for those partner agencies in the Comprehensive Career Center. He stated the reasoning for the involuntary transfer was outlined in the letter of involuntary transfer provided to the Appellant (**Appellee's Exhibit 2**). Specifically, the transfer occurred because of the need for direct and effective communication with staff within the Cabinet as well

as the business partner agencies assigned to the Comprehensive Career Center, such as Adult Education, the Office of the Blind, and Office of Vocational Rehabilitation.

13. The witness stated that, in the past, there had been occasional problems communicating with the Appellant by phone or email and there had been power outages. This reorganization would improve accessibility and efficient communication between the Appellant and others.

14. Mr. Beyea testified that this involuntary transfer was not effectuated to penalize the Appellant, but rather to align human capital with business needs. He stated that the reorganization placed Vocational Rehabilitation, the Office of the Blind, and the Office of Employment Training within the same department as core partners with Monitoring and Accountability.

15. The witness acknowledged that, prior to his involuntary transfer, the Appellant's home workstation in Jeremiah, Kentucky, was in Letcher County, and that the Cabinet had an office in Whitesburg, which was also in Letcher County. He admitted that this new duty station was further away from the Cabinet's Whitesburg office.

16. The next witness to testify was **John Pallasch** who, after being sworn, testified telephonically that he now works for the U.S. Department of Labor, but was formerly with the Education and Workforce Development Cabinet as the Executive Director for the Office of Employment Training (OET).

17. The witness testified that one of his duties was to implement the Executive Order that reorganized the Cabinet and to bring workforce programs, such as Vocational Rehab, the Office of the Blind, and the Office of Employment Training together to create a seamless workforce system in one physical location. He testified that it consolidated functions for budget and monitoring, and improved efficiency, performance, and accountability.

18. Mr. Pallasch testified that the decision to send the Appellant to the Hazard Comprehensive Career Center was based, in part, upon the partner agencies located at the Hazard Center, which were not all present at the Whitesburg Office, where the Appellant also had an office.

19. The witness testified that, as a part of the Workforce Investment Opportunity Act, local workforce boards need to comply with their obligation to provide "comprehensive" career centers. As a part of that, core partners must have a "presence" in a comprehensive career center and that this requirement was taken into consideration in assigning the Appellant to Hazard's Comprehensive Career Center.

20. The witness reviewed the involuntary transfer letter, Appellee's Exhibit 2. He was questioned on cross-examination as to whether the involuntary transfer letter violates the provision of the Executive Order that provides "All employees and positions currently in the organization units being abolished will be moved to the newly created or existing organizational units in their same job classifications and work counties."

21. The witness testified that the letter does not violate the Executive Order, since the Executive Order was not listed in the transfer letter as the authority for the transfer. He testified that Cabinets have the ability to effectuate direct reassignments at any time either by executive orders or general rules.

22. He stated that, in this case, a general rule was used to effectuate the transfer and the basis was to promote organizational efficiency in the monitoring and reporting functions resulting from the reorganization several months earlier. He testified that, at times, there had been issues with phone and internet connectivity when reaching the Appellant at his home workstation.

23. The next witness to testify after being administered the oath was **Kimberly Tucker**, who serves as the Assistant Director of Human Resources in the Education and Workforce Development Cabinet. She testified that one of her duties is to carry out involuntary transfers.

24. Ms. Tucker testified that there were two reorganizations that took place, with the first being completed in February 2017 by administrative order. She stated that it decreased the number of personnel in the office and that 233 positions were affected, with 95 or 96 people outplaced.

25. She testified the second reorganization took place in November 2017, and that the purpose of this one was to continue streamlining the Offices of Monitoring and Accountability and eliminate overlap and repetition of duties.

26. Ms. Tucker stated that no employees were outplaced, but 37 employees were affected. She stated that they needed to have all monitoring centrally located, and this resulted in the Appellant being centrally located by transfer to the Hazard office.

27. Ms. Tucker stated that, for an involuntary transfer, which is considered a penalization under the regulation, they must establish a reasonable business need, which they outlined in the letter of transfer to the Appellant, Appellee's Exhibit 2, specifically, in the last three sentences, and that, in doing so, the Cabinet met the requirements of 101 KAR 1:335, Section 4.

28. On cross-examination, Ms. Tucker rejected the notion that the legal standards applicable to 101 KAR 1:335 was "excessive and erroneous." She testified that they simply needed "just cause" to support the decision to involuntarily transfer the Appellant.

29. She testified the Appellant was not transferred by authority of the Executive Order. She stated he was the only person involuntarily transferred in March 2018 and that his job skills were fairly unique, he was needed at the Comprehensive Career Center, and there had been issues with the ability to reach him at his home workstation.

30. She stated the transfer was not a penalization and that having Mr. Adams present at the Hazard Office supported impromptu meetings and question and answer sessions that were occurring.

31. The Appellee rested.

32. The **Appellant, Kevin Adams** was duly sworn and testified as the only witness for his case-in-chief.

33. He stated that he began working for the State in 2008. He stated he had a mental breakdown, bipolar disorder, and severe anxiety and began working from home. He stated that he had no issues with connectivity or an inability to reach him. He had a state-issued cell phone, a fax machine, and a personal cell phone with another carrier.

34. He testified that his main duty was to pull data from the internet and generate reports. Based upon that, he had no idea what he was to speak with people at the Hazard office about. He stated he went to the Whitesburg office 4-5 times per month and had a key to that office where there were two staff assigned from Vocational Rehab.

35. The Appellant identified and testified regarding **Appellant's Exhibit 1**, a collective exhibit, in addition to **Appellant's Exhibits 2, 3, 4, and 5**, all of which were entered without objection. The Appellant identified **Appellant's Exhibit 6** and testified regarding it. It was entered over the **OBJECTION** of the Appellee, with the Hearing Officer ruling she would give it the weight it was due. (Note: The Hearing Officer advised that she had not been provided any of Appellant's Exhibits prior to the hearing and had requested them by email during the hearing. She advised they were being admitted into the record and that they would be obtained for the record and the Hearing Officer's consideration post hearing.)

36. The Appellant rested.

37. The Hearing Officer, by Post Hearing Order, ordered the parties to provide written closings, agreed-upon stipulations and Appellant's Exhibits. All were provided.

38. The Hearing Officer considered the entire administrative record.

FINDINGS OF FACT

1. The Appellant, Kevin Adams was a classified employee serving as a Resource Management Analyst III in the Education and Workforce Investment Cabinet. (Appellant's Appeal form, Appellant's testimony.)

2. By letter of March 8, 2018, the Appellant was advised that he was being involuntarily transferred from his home workstation in Jeremiah (Letcher County), Kentucky, to Hazard, Perry County, Kentucky. (Appellee's Exhibit 2, testimony of Beyea.)

3. On April 6, 2018, the Appellant appealed the involuntary transfer alleging there was no just cause for his involuntary transfer. He cited his outstanding evaluations, the lack of network issues with his location, and that specific offices with whom he was to coordinate at his

new worksite were not located there. (Appellant's Appeal Form.) (Note the allegation of a demotion contained in the original appeal form was disposed of by Interim Order of the Hearing Officer after a dispositive motion, as outlined on the Background, page 2.)

4. KRS 18A.005(24) provides:

'Penalization' means demotion, dismissal, suspension, fines and other disciplinary actions; involuntary transfers; salary adjustments; any action that increases or diminishes the level, rank, discretion, or responsibility of an employee without proper cause or authority, including a reclassification or reallocation to a lower grade or rate of pay; and the abridgement or denial of other rights granted to state employees.

5. KRS 18A.095(1) provides:

A classified employee with status shall not be dismissed, demoted, suspended, or otherwise penalized except for cause.

6. 101 KAR 1:345, Section 4(2), provides, as it relates to transfers of employees:

- a. A transfer shall be on a voluntary or involuntary basis.
- b. An appointing authority shall establish a reasonable basis for selecting an employee for involuntary transfer.

7. As outlined in the letter of transfer, the basis for Appellee's involuntary transfer of the Appellant was:

[T]he Monitoring and Accountability Branch was recently moved by reorganization from the Office of Employment and Training (OET) into the Division of Fiscal and Budget Integrity (DFBI) directly under the Department of Workforce Investment . . . The purpose of this move, in part, was to more efficiently provide monitoring and reporting functions across the three workforce offices within the Department. . . . It is essential that you have direct and effective communication with all of these workforce agencies, as well as our partner agencies to more efficiently access and analyze data . . . Moving your workstation from a home workstation to the Hazard Career Center will accomplish this as it is a comprehensive career center. Therefore, a change in your workstation will better meet the needs of DWI. An additional consideration is that the Hazard career center will

provide a more reliable technology network than what is currently available at your home workstation. (Appellee's Exhibit 2.)

8. The Hearing Officer finds that the involuntary transfer of the Appellant aligned with the overarching purpose for which Governor Bevin effectuated the reorganization of the Cabinet the year prior, which was to "improve efficiency and transparency in the areas of fiscal, grants, and budget management functions by consolidating and centralizing these functions." (Appellee's Exhibit 1, Testimony of Tucker.)

9. The Hearing Officer also finds that this transfer supported the Workforce Investment Act's requirement for a presence of related workforce entities in a single comprehensive career center. In light of the Appellant's role in data collection and analysis, the Hearing Officer is persuaded that it is prudent to have Appellant in the same location as the other partner agencies and is further persuaded that improved communication would result through physical presence and improved network connectivity. (Testimony of Pallasch and Tucker.)

10. The Hearing Officer is not persuaded by the Appellant's contention that a transfer to the office in Whitesburg would have met the Appellee's legitimate business need for a comprehensive career center, efficiency, and improved communication.

CONCLUSION OF LAW

The Hearing Officer concludes that the Appellee, Education and Workforce Development Cabinet, has met its burden of proof to show that there was just cause for Kevin Adams' involuntary transfer to Perry County, Kentucky.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the case of **KEVIN ADAMS VS. EDUCATION AND WORKFORCE DEVELOPMENT CABINET (APPEAL NO. 2018-066)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen 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 exception 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 the 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).

Any document filed with the Personnel Board shall be served on the opposing party.

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 Brenda D. Allen** this 11th day of January, 2021.

KENTUCKY PERSONNEL BOARD



Mark A. Sipek
Executive Director

A copy this day mailed to:

Hon. Daniel Dotson
Hon. Linda Keeton