

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2017-014

THERESA ANDERSON

APPELLANT

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

ENERGY AND ENVIRONMENT CABINET

APPELLEE

*** **

The Board, at its regular May 2018 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated March 13, 2018, Appellant's Exceptions and Request for Oral Argument, Appellee's Response to Exceptions, Oral Arguments, and being duly advised,

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

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this 14th day of May, 2018.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Erritt Griggs
Hon. Edward E. Dove
Mr. David Dooley

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**FINDINGS OF FACT, CONCLUSIONS OF LAW
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This matter came on for an evidentiary hearing on December 14, 2017, at 9:30 a.m., ET, at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Roland P. Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by KRS Chapter 18A.

The Appellant, Theresa Anderson, was present and represented by the Hon. Edward E. Dove. The Appellee, Energy and Environment Cabinet, was present and represented by the Hon. Leesa Moorman. Also present was Agency representative, Ms. Sherry Butler.

The issues were: (1) whether the 20-day suspension of the Appellant from her position as Environmental Scientist III with the Energy and Environment Cabinet (EEC), Department for Environmental Protection (DEP), Underground Storage Tank Branch, spanning November and December 2016, based on allegations of lack of good behavior and falsifying time, was taken with just cause and whether such penalty was excessive or erroneous. The burden of proof was on the Appellee to establish its case by a preponderance of the evidence; (2) Appellant's claim of retaliation, after having filed a grievance on July 6, 2016. The burden of proof was on the Appellant to establish her claim by a preponderance of the evidence.

The parties agreed to stipulate to admission of the following exhibits: Joint Exhibit 1, the November 21, 2016 letter of suspension issued by the Energy and Environment Cabinet, to the Appellant; Joint Exhibit 2, Kentucky Personnel Cabinet Position Description for the position held by Theresa L. Anderson, as Environmental Scientist III; and Joint Exhibit 3, Department for Environmental Protection, Time and Attendance, Policy per 401.1, effective August 1, 2014. Appellant reserved the right to cross-examine appropriate witnesses pertaining to each of those exhibits. The parties also agreed to stipulate that in Joint Exhibit 1, the specifically-dated charges against the Appellant, beginning on page 3 and continuing through page 11, and set off by bullet points, were accurate recitations of the charges against the Appellant. Appellant reserved the right to offer her own testimony pertaining to the charges, as well as the right to cross-examine Sherry Butler on the methodology she used in drafting these charges.

Counsel for the Appellant tendered two subpoenas served on witnesses, which subpoenas were made a part of the administrative record. Mr. Dove also advised he had previously subpoenaed Christopher Hall and asked that Mr. Hall be released from the subpoena at this time. Counsel for the Appellee had no objection. The Hearing Officer ruled that Christopher Hall **WOULD BE RELEASED** from the subpoena.

The parties waived presentation of opening statements. The rule separating witnesses was invoked and employed throughout the course of the proceeding.

BACKGROUND

1. The first witness for the Appellee was **Ahad Chowdhury**. Mr. Chowdhury has been employed for the past 28 years with the Department of Environmental Protection, the last five years as a supervisor in the Underground Storage Tank (UST) Branch. As supervisor, he has been the Appellant's first-line supervisor and supervises five other employees. Their section is in charge of implementing corrective action. They investigate and clean-up releases that occur on underground storage tanks. Appellant is a project manager and technical reviewer. As supervisor, Mr. Chowdhury reviews and approves Appellant's timesheets. He is familiar with the Time and Attendance Policy. Employees are required to sign a sign-in sheet when they report to work. On occasion, he has sent his employees emails pertaining to time and attendance issues.

2. He identified Appellee's Exhibit 1 as the August 21, 2015 email he had received from John Maddy, Manager of the Program Planning Branch. Chowdhury forwarded that email to all his employees. It was a reminder that employees were to report to work on time and adhere to Department policy regarding signing in. Failure to do so could result in disciplinary action. Appellant's work hours were 9:00 a.m. to 5:00 p.m.

3. He identified Appellee's Exhibit 2 as the August 24, 2015 email sent from timekeeper, Lola Lyle, which Mr. Chowdhury forwarded to his employees. That email set out the policy pertaining to signing in and out.

4. He identified Appellee's Exhibit 3 as the April 11, 2016 email from Brad Highley, which Chowdhury forwarded to Edward Winner. This email emphasized the importance of time management.

5. Chowdhury had performed Appellant's evaluations during the time of his supervision. He identified Appellee's Exhibit 4 as Appellant's Annual Employee Performance Evaluation for the 2015 calendar year. In the rating pertaining to punctuality, he gave her a 3, "Adequately Met Expectations." Her overall performance rating was "Highly Effective."

6. During 2016, the workstation for the UST Branch at the 200 Fair Oaks Building in Frankfort, Kentucky. They moved to a new building on Sower Boulevard in June 2016. Meetings were held to advise employees how to prepare for the move. All Chowdhury's employees were required to attend a specifically set meeting. Chowdhury went to the meeting and noted Appellant was not present. He believed then that she did not attend. An option had been offered for employees who missed this meeting to attend a later meeting.

7. He asked Appellant if she attended the first meeting, and if not, would she be attending the second meeting. Appellant stated she would take the training at a later date. Chowdhury showed her the sign-in sheet and told her she was not at the first meeting or at her desk. She had signed in to work at the same time all that week, but he had not seen her during those times. He told her that he could place her on a Performance Improvement Plan (PIP) for time and attendance irregularities. She stormed out of the conversation and went to Ed Winner, the Branch Manager. Appellant did not give Chowdhury a chance to explain anything. Chowdhury did not put Appellant on a PIP, nor did he request any disciplinary action.

8. Appellant is an Environmental Scientist III, performing technical evaluations of clean-up projects and remediation. In January 2016, Appellant was in the process of reviewing a report. The report needed to move forward, as there was not much to it. Appellant had prolonged that process. Chowdhury told her it could be moved forward. Appellant became accusatory, telling Chowdhury he was not following the regulations. The witness admitted that, during that conversation, he used bad judgment, but both he and Appellant had moved forward from that incident. He would not do that again. Following the meeting, Appellant talked to Ed Winner about the incident. Chowdhury did not take any action against the Appellant. He stated she had been loud and he himself had been accusatory. He told her she committed a waste of time and taxpayer money. He also told her this was the worst review he had seen, and she was the worst reviewer.

9. All the employees worked in cubicles. Both he and the Appellant were loud during that conversation. There was nothing personal about the discussion. Chowdhury apologized to her later. He had not been directed by anyone to apologize.

10. Employees sign in daily and have to fill out a timesheet every other week. Chowdhury reviews all timesheets and, when he approves them, sends them on to the timekeeper. Prior to July 2016, he never disapproved any of Appellant's timesheets. As a supervisor, he is not required to check the employee badge scan-in times. He is required to check the sign-in sheets and compare them to what the employee reports. He acknowledged he was aware Appellant had filed a grievance against him in July 2016.

11. With regard to Joint Exhibit 1, at the top of page 2, the Hearing Officer read to the witness the following statement: "On June 7, 2016, your supervisor, Ahad Chowdhury – Geologist Supervisor Registered, brought forth to his manager, Edward Winner, Environmental Control Manager, that he had concerns regarding your punctuality and time reporting." Mr.

Chowdhury testified he did not go to Ed Winner or report this. At that time, Mr. Winner was an Environmental Control Manager and Chowdhury's immediate supervisor. Winner was Appellant's second-line supervisor.

12. In May 2016, he performed Appellant's Interim Evaluation (Appellee's Exhibit 5). Nowhere did he mention Appellant was a bad reviewer. He did note that she needed improvement with punctuality. He and Appellant currently work fine together; she has had no time and attendance problems after the Section moved to the new building location.

13. For the past year, **Edward Winner** has been employed as Assistant Director of the Division of Waste Management. Previously, he had been the manager of the Underground Storage Tank Branch, where he served for four and a half years. He had concerns during that time about Appellant's time and attendance. He had walked past her cubicle in the morning in the old building and noticed she was not there. He mentioned this to Mr. Chowdhury and to "watch out" for Appellant on time and attendance; that if he saw anything to let Winner know the details.

14. He was first made aware Appellant and Mr. Chowdhury had a discussion regarding her attendance at a relocation training, when Appellant came to see him in June 2016. She said Chowdhury had been questioning her attendance. She also related a January discussion she had with her supervisor. She felt she could not work with him and wanted a change of sections. Winner told her he would check her time and attendance and, if it "lines up" with what Appellant told him, he would look into finding another section for her to work in. She agreed.

15. Winner requested and examined Appellant's door scans for the previous month. He saw there were "significant discrepancies between the door scans and her sign-in sheet." He then requested and examined the door scan records for additional prior months. He also asked for Appellant's computer log-in records for the same time period. Employees are not required to immediately log on to their computer when they arrive at work. All the requested documents had come to him from Nina Hockensmith in Human Resources.

16. Every employee has their own unique ID badge. When the employee comes in the door, there is a sensor. The employee scans the badge and the door unlocks. In the old building, an employee would scan at the stairwell or elevator and again at the entry door for the area where their Branch is located. All employees are required to scan as they come in. "Piggybacking" is frowned upon. Multiple notices went out to employees on that subject.

17. When he saw the amount of time that was missing, he had no choice but to send the information on to Human Resources. He only sent information forward that showed there was a discrepancy of more than 20 minutes. He was familiar with the Department's Time and Attendance Policy. With regard to Joint Exhibit 3, the policy requires an employee to sign in when they arrive and out when they leave the building; there are consequences for falsifying documents, which consequences may include disciplinary action.

18. He identified Appellee's Exhibit 6 as the July 29, 2010 email from Tammy Hurst, which stated, "All double glass doors leading into the office areas in the 200 Fair Oaks building are now locked 24/7. You will have to use your ID badge to obtain entry. Please let your division contact know if your ID is not working properly and they will let me know so I can take care of it. A reminder to all staff to NOT let other staff in to any of our buildings even if you know them. All staff, including temps, have an ID badge that will allow them access to our buildings." This same directive was in effect during 2016.

19. Subsequently, the witness was asked to meet with Nina Hockensmith. Ms. Hockensmith asked if Winner believed a 20-day suspension was appropriate. He believed it was, because it was consistent with discipline given to Chris Hall, who had also been in Winner's branch, for similar incidents. Mr. Hall had a prior disciplinary history.

20. In his July 12, 2016 meeting with the Appellant, Ms. Anderson strongly stated that her time was correct. She then brought up the January incident with her supervisor. After that meeting, she filed a grievance against Mr. Chowdhury. He reviewed the document, and because "the data was overwhelming," and as she had earlier agreed the unrelated January incident had already been resolved, he signed the grievance indicating he did not agree with her allegations. He testified he had directed Mr. Chowdhury to apologize to the Appellant, a few days after the January incident.

21. With reference to Joint Exhibit 3, Appellee, through counsel, stipulated that there is nothing in official policy to indicate that a door scan is an official document; it is not a payroll document. Although not stipulated, counsel further stated that pay is assigned based on the sign-in/sign-out sheets, which are an official payroll document, and the supervisor uses the KRONOS timesheet in conjunction with the sign-in sheets to review and approve time.

22. Mr. Winner testified an employee is charged with being honest about their sign-in sheet and accurately reporting the data on the KRONOS system. He had also looked at the KRONOS information when he made his prior comparisons of Appellant's time discrepancies.

23. When Winner first became the manager at the UST Branch, Appellant used a walker a very short period of time. For two years, she never used her walker. After he turned Appellant's attendance data in, Ms. Anderson began using her walker fulltime. Once he turned over the data to Human Resources, it was Human Resources that conducted further investigation.

24. **Sherry Butler** was the next witness. Since November 1, 2016, she has been employed by the Kentucky Labor Cabinet as Deputy Executive Director in the Office of Administrative Services. Previously, she worked as a Staff Assistant in the General Administration Program Support (GAPS), which program was abolished November 1, 2016. GAPS provided administrative support to EEC at the time of the events in this appeal. Ms. Butler was responsible for conducting disciplinary action reviews.

25. She conducted the investigation of possible time and attendance violations by Theresa Anderson. She reviewed Appellant's training records and testified Appellee's Exhibit 8 is an acknowledgement signed by Appellant on September 25, 2014, admitting she received and it was her responsibility to read and understand certain time and attendance policy documents.

26. Each year the Personnel Cabinet presents time reporting training online. She identified Appellee's Exhibit 9 as the documents pertaining to that training, acknowledged by Theresa Anderson on March 31, 2015.

27. Appellant's workday at that time started at 9:00 a.m. Butler believed Appellant had Family Medical Leave prior to the time in question, but not during the timeframe containing the alleged violations of the time and attendance policy. Butler, as ADA Coordinator, also determined that Appellant had no reasonable ADA accommodations extended during that same time. She reviewed Appellant's medical file and saw there was no request for Family Medical Leave during that time, nor any accommodations on file. Section 6, Employee Time Reporting, of the Cabinet's training, set out that an employee must accurately report time worked and leave used, and that falsification of records is a violation of state laws and subject to discipline.

28. It was at the end of July or beginning of August 2016 that she was contacted by Nina Hockensmith, the Department's Human Resource Administrator. A preliminary review had identified concerns about Appellant's time and attendance and a review was requested. Butler was sent an Excel spreadsheet, upon which had been compiled data pertaining to Appellant's time, as well as documents showing her sign-in sheets, badge door scans, computer log-in activity reports, and possibly KRONOS reports.

29. She identified Appellee's Exhibit 10 as the spreadsheet that had been provided to her. She testified the handwritten notes were later added by the Appellant.

30. She identified Appellee's Exhibit 11 as Appellant's sign-in/sign-out sheets sent to her by the Agency.

31. She identified Appellee's Exhibit 12 as Appellant's KRONOS reports for the time period of January 1, 2016 through June 15, 2016.

32. She identified Appellee's Exhibit 13 as the KRONOS printout that is viewed by a supervisor for Ms. Anderson, for the period of January 4, 2016 through January 31, 2016.

33. Over the course of a couple of weeks, she examined all the information provided to her. She verified the accuracy of the entries, and whether such data appeared on the spreadsheets. She met with Cabinet management and Human Resource staff to get a clarification of their concerns and a better understanding of the issues reflected in the documents provided to her.

34. Anytime employee misconduct is an issue, Ms. Butler gives the employee a chance to respond. She and Nina Hockensmith first met with Appellant about August 19, 2016. They primarily reviewed the spreadsheet, which Appellant had previously seen. Appellant identified the expectation of punctuality. They focused on reasons Appellant may have had for the discrepancies in the time. Due to the numerous dates, they gave Appellant additional information and the spreadsheet so she could compare it with her calendar and provide explanations at a later date.

35. At this initial meeting, Appellant stated she was aware she had to use the sign-in sheet upon her arrival. She stated she used either the clock outside the secretary's office as you walk in the door or the clock in the visitor's area to record her time. She also said that on an almost daily basis she would not use her badge and the receptionist would "buzz her in" however, this was contradictory to the fact that her door scan information existed. Appellant stated her understanding was that the badge was to be used "after hours" and you just needed to have the badge with you at all times. After considering all the information and Appellant's statements, Butler believed at that time that Appellant was not being honest as to her understanding of punctuality expectations.

36. Also during that first meeting, Appellant drew a sketch to explain how she moved about within the building in her general area; how she entered and moved about for various breaks. What Appellant explained created more confusion. When she utilized restrooms, they were not located outside her area and did not coincide with the use of door scans that led outside the area. At the conclusion of the meeting, what Butler heard had not changed her belief that there were concerns about time and attendance. Appellant was given more time to gather information. Butler requested Hockensmith to provide her an official schematic of that floor to show identification of the entrances Appellant stated she used and to compare same with the door scan logs.

37. Appellant followed-up by sending Butler an email with additional documents. She identified Appellee's Exhibit 14 as that email and responsive notes. The majority of the explanation contained therein was Appellant had gone and used the bathroom or taken a break. Having compared the schematic with Appellant's explanations, Butler concluded Appellant's explanations did not match up with the records. It was decided a second meeting would be held with Appellant. There were still discrepancies in the explanations. Door scans for a bathroom were not outside the lobby door scan. None of Appellant's explanations matched up.

38. She identified Appellee's Exhibit 16 as the Facilities and Support Services Doors list provided to her by Nina Hockensmith with attached schematic of the second floor.

39. Appellant originally claimed she did not use her badge to gain access into the building, and that the receptionist would let her in every day. That was not consistent with the door scan information or Appellant's drawing of how she moved about in the building. On page

2 of Appellee's Exhibit 16, the door scan for the lobby entrance on the second floor is identified as P5D2. Most of Appellant's entrance scans picked up on the second floor.

40. The second meeting Butler and Hockensmith had with Appellant occurred at the beginning of September. The witness identified Appellee's Exhibit 15 as a Transaction Log showing which doors Appellant used when she utilized her badge in door scans. During this second meeting, Appellant got upset and had no explanation other than she would use the bathroom and scan the doors during that time.

41. Appellant admitted she routinely ran late. Butler then reviewed Appellant's personnel record and noted several supervisors made note of Appellant's punctuality issues.

42. Subsequent to the second meeting, Ms. Butler put together a summary of the discrepancies shown and made a recommendation for discipline. This was sent to DEP management and Cabinet leadership.

43. In her review of Joint Exhibit 1 for the date of January 8, 2016, Butler noted the sign-in sheet reflected Appellant's signing in at 8:30 a.m. Her badge scan was at 9:02 a.m., constituting a 28-minute difference.¹ The scan was at the second floor lobby entrance. The KRONOS timesheets signed by Appellant claimed she worked 4.75 compensatory-earned hours and 7.5 hours that day. She had been overcompensated 0.50 hours. Ms. Butler used the same methodology for comparisons throughout, which resulted in the bullet-pointed charges listed in the letter.

44. For the period of January 4, 2016 through June 4, 2016, Appellant reported to work a total of 86 days. During that time, 56 days had inaccurate reporting. Of those, two days reported 7.5 hours worked when she did not work. She was falsely compensated for 50.5 hours: 30.25 regular hours and 20.25 compensatory-earned hours.

45. Butler recommended a 20-day suspension, as it was consistent with the discipline issued within the Cabinet for a similar offense. Christopher Hall, employed in the UST Branch, had been issued a similar suspension for similar infractions. Both Ed Winner and the Appointing Authority agreed with a 20-day suspension of Appellant.

46. In the 200 Fair Oaks building, the door to the first floor lobby is open and does not require a badge scan. A first floor scan is required only if one is attempting to access the work area. If one works on other floors, they take the elevator. The second floor lobby is the first secured door Appellant would scan into the building to access her work area.

47. None of the subject timesheets had ever been disapproved by Mr. Chowdhury. There is no specific training or policy that requires an employee use the door badge scan for

¹ The record reflects a 32-minute difference.

timekeeping purposes. However, it does not exclude use of that data as a tool to assist in assessing time and attendance issues.

48. The badge scan document is not a payroll document. It is an additional reference tool. Each employee is assigned a distinct ID badge. This data has been consistently used in the past when allegations of time inconsistencies had arisen. Other data is used for other incidents. For example, if a matter involved use of a state car, reference is made to the GPS reports. If a matter involves use of state funds, credit card reports are examined.

49. In the KRONOS timekeeping system, each employee sets their own user name and password. They log into their account and record their time. The supervisor has access to this screen to review and approve the time, once he compares it to the employee's sign-in sheet. The supervisor is not required to check door scans or speak to other employees in the normal course of reviewing time for payroll purposes. It is the responsibility of the employee to accurately record the time they have worked.

50. She identified Joint Exhibit 4 as the schematic drawn by the Appellant to show her travels on the second floor at various internal door scan locations.

51. For the period of January through June 2016, Ms. Butler was not aware of the existence of any problems existing with door scanners at the 200 Fair Oaks building. Tiffany Yeast, the designated Appointing Authority, issued the suspension letter. It was Butler who authored the letter, which was reviewed and approved by Ms. Yeast. The discretion for issuance of discipline, as well as the amount of discipline, lies at the Cabinet level and not with Appellant's first-line supervisor.

52. Appellee rested its case. Appellant presented her case.

53. The first witness for the Appellant was **Melinda Buffin**. Ms. Buffin is employed by EEC, UST Branch, as an Environmental Scientist III. She knows Appellant, as well as Ahad Chowdhury. Mr. Chowdhury is the one who approves the Appellant's draft reports and then sends them on to Buffin for further review and transmission. Ms. Buffin works for the Claims and Payments Department.

54. A few years back, while she was working at her desk, a good distance from the Appellant's desk, Ms. Buffin heard loud voices. Mr. Chowdhury did not agree with the way Appellant had reviewed a site. He said she was difficult to work with. The volume and tone of his voice were inappropriate. This was the only time Buffin heard Chowdhury raise his voice to Appellant. She had never heard him raise his voice to anyone else.

55. **Alvin Campbell**, who, since 2007, has been employed in the UST Branch as an Environmental Scientist III, was the next witness. He has known Appellant for about 10 years and performs the same duties as she. He has worked with her on several sites. They also

regularly bounce ideas off each other. He believes she is just as capable as he in performing the job.

56. He has observed communication issues between Appellant and Mr. Chowdhury. They have difficulty understanding each other. He, himself, has had some issues with Chowdhury trying to get him to understand what he is saying and vice versa. He has seen him get “a little frustrated” because he was not able to get his point across. “He gets a little riled-up from that.” On one occasion, he heard Chowdhury raise his voice toward the Appellant. It was “not a very good conversation.” He degraded her, told her she was a “horrible reviewer,” and she did not know what she was doing. He scolded her, telling her that she did not know how to do her job, and he no longer had faith in her or trusted her to do her job. Campbell disagreed with Chowdhury’s assessment of Appellant. Chowdhury’s action was inappropriate and the witness spoke to him about it. He also spoke to Ed Winner.

57. Mr. Chowdhury admitted he was wrong and he had been upset at the time. He wanted to apologize directly to the Appellant. He telephoned the witness later that day after work, and asked for Appellant’s phone number to apologize. Although Campbell did not give it to him, he called the Appellant himself and Appellant told him not to give out her number. Although Appellant was not scheduled for work the next day, she came to work just to be there for Chowdhury’s apology.

58. **Lori Terry**, who, since July 1, 2017, has been employed as an Environmental Control Manager with the UST Branch, Division of Waste Management, offered her testimony. She has been employed in UST since 1988, and has held positions as Supervisor, Branch Manager, and Environmental Scientist IV. She is the immediate supervisor to Ahad Chowdhury.

59. Ms. Terry is familiar with the Time and Attendance Policy. Time entries are made by an employee, which are reviewed and approved by the supervisor. The supervisor matches entries made by the employee with the sign-in sheet. The document then goes on to the timekeeper. She personally believed the employee has the most responsibility to make sure the timesheet is entirely correct and that all time and attendance policy is followed. The supervisor just approves what the employee entered. They are not equally responsible. Supervisors verify employee KRONOS entries with the employees’ sign-in/sign-out sheets.

60. The next witness was the **Appellant, Theresa Anderson**. For the past 12 years, she has been employed by the Energy and Environment Cabinet, UST Branch, as an Environmental Scientist III. She gave a description of her duties. For the past two years, Ahad Chowdhury has been her immediate supervisor. Chowdhury has been in the UST Branch for five years. When she first met her supervisor, she had initial concerns, as he would make inappropriate comments, such as: “You have not read a report” or “You do not know what you are talking about.” He had also made a point that Appellant was not a geologist, just a reviewer.

61. On December 29, 2015, she approached Chowdhury to discuss a review of a site that had three parts to it: two releases and one closure. She had been given the closure for review. She typically did site investigation and did not do closures. She told Chowdhury she was not familiar with the regulations regarding closure and that there were two releases and groundwater issues. He told her to close it and that the closure was "clean." Because the releases had not been addressed, she feared the issuance of a closure would result in the release issues getting "lost in the mix." Chowdhury told her she did not know what she was talking about, was the worst reviewer in the branch, and everyone knew it. He kept repeating this for 15 to 20 minutes.

62. Ed Winner was on vacation that day, so Appellant went to the Assistant Director's office to file a complaint. The Assistant Director was also absent that day. She made an appointment with the secretary and came in the next day to speak with Jon Maybriar. She related to him what had been said between her and Chowdhury, how it was very inappropriate, and was heard by everyone in the office. Maybriar arranged a meeting for January 8, 2016, for the Appellant, Mr. Chowdhury, Ed Winner and himself.

63. When Appellant approached Maybriar on January 8th for the meeting, he told her it had been canceled. He related that Chowdhury had felt sorry for what he did and would not do it again. They did not feel there was a need to proceed. He asked her to keep him informed if Chowdhury started behaving like he had in the past.

64. Subsequent to January 8, 2016, Appellant went to Maybriar on at least two occasions to advise that although Chowdhury was no longer yelling at her, his demeanor towards her was "still very toxic and was not very nice."

65. With regard to the incident of January 8, 2016, noted in Joint Exhibit 1, she testified this was the same day as the proposed meeting. She came in early, specifically for the meeting, and went to Maybriar's office about 9:00 a.m. They spoke for about two hours. She does not know why the letter says she scanned in at 9:02 a.m., and she cannot remember that.

66. She met with Nina Hockensmith to ask if there were any safeguards against Chowdhury taking retaliatory action. Hockensmith said they would have to first look to make sure Appellant was not the culprit for the situation.

67. On June 7, 2016, the first relocation meeting/training was scheduled for the UST Branch employees. Appellant missed that meeting. Later that day, she spoke with Chowdhury and told him she had missed the meeting and would either talk with someone to get up to speed or attend another meeting. The following week she attended the make-up meeting. He accused her of being "no call, no show" that day. She immediately went to Ed Winner's office. That is when the time and attendance became an issue. She told Winner she had badge scanned-in on the day of the second meeting. That is what raised the issue of her attendance, but she had been there on both days.

68. On July 6, 2016, she filed a grievance against Chowdhury for the June 7, 2016 incident. Thereafter, she filed a separate grievance against Mr. Winner. She was later pulled into a meeting and told this was all a time and attendance issue. Hockensmith had rolled both grievances into a single grievance.

71. She identified Appellant's Exhibit 1 as the July 6, 2016 grievance she filed against Chowdhury for his having accused her of not being present on two separate days. He had also threatened to put her on a PIP.

72. She identified Appellant's Exhibit 2 as the July 14, 2016 grievance she had filed against Winner.

73. In June 2016, after they had moved to the new building, Ed Winner called the Appellant in and told her that her door scans did not match her sign-in sheets. She told him she was present at work. He advised the matter would have to be investigated further.

74. She believed employees were just required to keep ID badges on their person. The only time the badge was needed was when an employee came in from the field after hours, or if the doors were locked and there was no one around to let them in. In the mornings, there are always people rushing to get to work who hold the door open for you. At the Fair Oaks building, it was easier to "buzz in" on the buzzer than it was to use the door scan.

75. Ms. Anderson has been using her walker as an accommodation for three years. In 2010, she was diagnosed with cancer. She had another cancer scare in 2011. She became very weak and fell, which resulted in knee replacement surgery. She can walk short distances without the walker, but cannot walk long distances without aid.

76. At the Fair Oaks building, upon arrival, people usually hold the door open for you on the first floor. When you arrive at the second floor, there are people in the lobby who hold that door open as well. If no one holds the door open, she would "buzz in." She then signed in, usually around 9:00 a.m. and got all of her "busy work" out of the way. She would then take a bathroom break after about an hour. At times she would return to her car to bring in the remainder of items she was unable to carry on her first trip.

77. She admitted that she used her badge to scan in on the dates reported in the suspension letter. The majority of mornings she would sign in and put her stuff down. Her badge scan did not necessarily show the time she first arrived. The badge scans merely reflected her first use of the badge that day.

78. Appellant participated in a meeting with Nina Hockensmith and Sherry Butler. They handed her a door scan document and asked why the scans did not match her sign-ins. She told them she could not remember six months' worth of time, but that she could say what was

most probable. A majority of times she got “buzzed in.” She advised them she would look through her calendar to make a “best guess” as to why there were discrepancies.

79. In August she went through her calendar, schedules, emails and any document that had a time code on it. She provided all these documents, along with an explanation, to Hockensmith and Butler. During the second meeting, she explained that a later scan was most likely a bathroom break. If a badge scan was around 2:14 p.m., that probably meant she was coming back from lunch. Butler told her that her story did not match up and Appellant got furious. She did not falsify her timesheet. She could not explain why the door scans did not match the timesheets. Mr. Chowdhury never told her that he had any problems with her timesheets.

80. It was late November 2016 when Mr. Winner advised Appellant she was suspended 20 days for falsifying timesheets and that her hours would be modified accordingly. She lost one annual day, one sick day, one adverse weather day, approximately \$5,000 in adjusted time overpaid, as well as a loss of pay for 20 days. She returned to work at the end of December.

81. Her Second Interim Review in May was scored very low. She disagreed with that. She protested the final evaluation done the following January. Mr. Chowdhury had to change the final scores three times.

82. Appellant believes she was suspended because she had filed a grievance against Ed Winner. Mr. Chowdhury would have been happy to let it go. Winner, however, got mad and changed her grievance to a time and attendance issue, which was retaliatory.

83. She identified Appellee’s Exhibit 17 as the August 8, 2016 grievance response she received in reply to her July 6 grievance. It had been concluded at that level.

84. Ms. Anderson had no contact with Sherry Butler prior to time and attendance having become an issue. She has no knowledge why Butler would retaliate against her, other than that she “had my suspicions.” She believed Butler followed the “purview” of Nina Hockensmith. When Appellant had spoken to Hockensmith about the January incident with Mr. Chowdhury, Hockensmith had been very unwilling to help her or advise her how to obtain security from “being railroaded by upper management because I was filing a grievance or was concerned of issues with my supervisor.”

85. Appellant testified she has never been counseled about her punctuality. When asked by the Hearing Officer if she ever discussed this issue with supervisors during Interim Reviews, she said they told her it could be better, but that did not constitute counseling. When asked if she had discussions with supervisors during the Interim Reviews about punctuality, she answered, “No, I did not.”

86. She identified Appellee's Exhibit 19 as her Annual Employee Performance Evaluation for 2007, performed by supervisor Amy Siewert. During the April 23, 2007 First Interim Review, it was noted on punctuality that Appellant "needs improvement, but adheres to policy." Appellant denied that this was discussed.

87. She identified Appellee's Exhibit 20 as her Annual Employee Performance Evaluation for 2008, also performed by supervisor Amy Siewert. The August 11, 2008 Second Interim Review notes that for attendance and punctuality, Appellant "Needs improvement. Theresa is tardy on several occasions. Adverse weather wiped out the majority of her leave balance, so be careful with attendance and punctuality. This is impacting review numbers." Appellant wrote a response at the bottom of the page that although she had been tardy on several occasions, her review numbers have not been impacted. That her review numbers were a result of difficulties with sickness and although her leave balances were low, she had no control over inclement weather or the distance she had to drive to work.

88. She identified Appellee's Exhibit 21 as her Annual Employee Performance Evaluation for 2014, conducted by Kerry Willoughby and separately by Ed Winner. Attendance was noted as generally good and she was admonished to focus on consistency when it came to punctuality.

89. She identified Appellee's Exhibit 22 as her Annual Employee Performance Evaluation for 2011, performed by Dawn Baase. The First Interim Review of April 20, 2011, noted that while she utilized leave time in an appropriate manner and requested approval of all compensatory time, she consistently forgot to sign in or sign out upon arrival or departure, per Division policy. The August 30, 2011 Second Interim Review reflected that while she was often tardy to work, she worked late to make up for the tardiness.

90. Appellant testified that Mr. Willoughby, Ms. Siewert, and Ms. Baase all addressed punctuality issues with her during interim reviews.

91. Appellant closed her case-in-chief. Appellee offered one rebuttal witness.

92. **Sherry Butler** was recalled to the stand. In the generation of KRONOS timesheets, only the holidays are "populated" or entered automatically on the documents. It is the employee who enters the remainder of the times worked for that week. Regarding the May 2, 2016 KRONOS entries, it was Appellant who entered her time on that document and the document shows such entries made by her at 3:44 p.m.

93. No further witnesses were called by either party. The parties reserved presentation of closing arguments for their respective briefs. A briefing schedule was set by separate Interim Order.

FINDINGS OF FACT

1. Theresa Anderson, the Appellant, is a classified employee with status. At the time of her 20-day suspension (beginning November 22, 2016), she was employed by the Energy and Environment Cabinet, Department for Environmental Protection (DEP), Underground Storage Tank (UST) Branch, as an Environmental Scientist III, with a workstation in Frankfort, Kentucky. Her first-line supervisor was Ahad Chowdhury; her second-line supervisor was Edward Winner (previously the Manager of the UST Branch). Her work hours were 9:00 a.m. to 5:00 p.m., Monday through Friday.

2. The Department for Environmental Protection had in effect at that time, a Time and Attendance Policy: PER-401.1 (Joint Exhibit 3). That policy stated each office had a sign-in and sign-out sheet, which required every employee to:

- Sign in upon reporting to work;
- Sign in and out for lunch (at the discretion of your Division Director);
- Sign in and out for all leave time used throughout the work day;
- Sign out at the end of the scheduled workday.

The same policy advised employees the sign in and sign out sheets are considered “official documents used for auditing purposes. Falsification of state payroll documents, by either the employee or the supervisor, is a criminal act and can result in not only disciplinary action, but also criminal charges due to public funding sources.” Various email communications reinforcing the requirements of the Time and Attendance Policy were sent to employees (Appellee’s Exhibits 1, 2, 3, and 6).

3. Appellant acknowledged, through a signed document, that she received, and it was her responsibility to read and understand, the DEP Time and Attendance Policy (Appellee’s Exhibit 8). She also acknowledged, in writing, she had completed the Accurate Time Reporting course on March 31, 2015 (Appellee’s Exhibit 9).

4. Each employee, including Appellant, is given their own individual, unique identification badge. Various work areas in the 200 Fair Oaks building, where Appellant worked, were locked. To gain entry, an employee was required to scan their ID badge to unlock the door and gain entry. When an employee scanned the badge, the date, time and specific location of the scan, as well as the ID of the employee was recorded in a databank. All employees are required to scan their ID badge to gain entry to their locked work area. The practice of “piggybacking” or gaining entry via the use of another employee’s ID badge is prohibited (although it appeared from testimony such practice occurred with some regularity).

5. In January 2016, Mr. Chowdhury and Ms. Anderson had engaged in a heated discussion, overheard by several other employees working in nearby cubicles. Chowdhury

accused Anderson of poor performance of a report review, as well as problems with her time and attendance. Chowdhury later acknowledged he was wrong and apologized to the Appellant.

6. The UST Branch was scheduled to relocate from the 200 Fair Oaks building sometime in mid- to late 2016. On June 7, 2016, Appellant missed a meeting scheduled for these branch employees. The meeting was instruction on the relocation process.

7. Later that day, she told Chowdhury she missed the meeting, but would attend a make-up meeting scheduled for the following week. Chowdhury told her, "You are no call, no show." Appellant denied this and immediately went to Ed Winner's office.

8. Appellant told Winner that Chowdhury had questioned her attendance, they had a verbal altercation back in January, and she could no longer work with Chowdhury. She requested a change of sections. Winner told her he would check her time and attendance records and, if it "lines up" with what she stated, he would look into finding another section for her.

9. Winner requested and received from Nina Hockensmith, Human Resources, the record of Appellant's door scans for the previous month. He found "significant discrepancies" between her door scans and the time she reported on her sign-in sheet. He then requested and examined door scan records for additional prior months. He also examined the KRONOS time information input by the Appellant.

10. Winner made note of the instances when there were discrepancies of more than 20 minutes between the time of Appellant's door scan and what she registered on the sign-in sheets. Those records showed several instances of Appellant's sign in to have been a time earlier than the door scan. He sent this information on to the Office of Human Resource Management (OHRM).

11. The parties stipulated: (a) there is nothing in the Department's Time and Attendance Policy (Joint Exhibit 3) to indicate a door scan is an official document. A door scan record is not a payroll record; (b) pay is assigned to an employee based on an employee's sign-in sheets. The sign in sheets are official payroll documents; (c) supervisors examine an employee's KRONOS timesheet in conjunction with the sign-in sheet, when reviewing and approving a timesheet submission.

12. However, there is no prohibition excluding the use of door scan records as a tool to assist in assessing time and attendance issues, similar to using the GPS reports from a state vehicle to investigate issues involving use of a state car, or credit card reports to investigate issues pertaining to use of state funds (Testimony of Sherry Butler, previous Staff Assistant in GAPS).

13. Employees, including Appellant, are required to fill out a timesheet every other week. The employee timesheet is delivered to the first-line supervisor for review and approval.

In the review, the supervisor compares the timesheet with the office sign-in sheet. The supervisor is not required to review the record of ID badge scans. Once the timesheet is approved, it is sent on to the timekeeper.

14. Nina Hockensmith, the Department's Human Resource Administrator, contacted Sherry Butler, Staff Assistant at GAPS, in July or August of 2016. Together they conducted an investigation. Butler specifically examined Appellant's training records, medical file, and data pertaining to her time records, including the sign-in sheets, badge door scans, computer login activity, and KRONOS reports (Appellee's Exhibits 10, 11, 12, and 13). She and Hockensmith interviewed Appellant in mid-August 2016. Due to the large number of incidents alleged to constitute time and attendance problems, they gave Appellant additional time to respond to their inquiry.

15. Appellant provided Butler with additional information (Appellee's Exhibit 14). After examination of all documents and taking into consideration Appellant's responses, Butler concluded Appellant's explanations did not match up with the records. A second interview of Appellant was conducted in September 2016.

16. At the second interview, Appellant admitted she routinely ran late. Several of Appellant's supervisors had made note in her personnel records of Appellant's punctuality issues. Following this meeting, Butler sent a summary and recommendation for disciplinary action to DEP management and Cabinet leadership.

17. After having reviewed the records, Butler concluded that for the period of January 4, 2016 through June 4, 2016, Appellant reported to work a total of 86 days. Of those days, 56 days had inaccurate reporting – two days showed 7.5 hours worked when Appellant had not worked; Appellant was falsely compensated 50.5 hours – 30.25 regular hours and 20.25 compensatory-earned hours. Based on past discipline issued to another employee for a similar infraction, she recommended the issuance of a 20-day suspension. This recommendation was agreed to by Ed Winner and by the Appointing Authority.

18. On November 21, 2016, Tiffany N. Yeast, designated Appointing Authority for the Energy and Environment Cabinet, issued a 20-day suspension to Appellant, from beginning of business November 22, 2016, through close of business December 22, 2016 (Joint Exhibit 1). Appellant was suspended based on allegations of lack of good behavior and falsifying time between January 4, 2016, and June 15, 2016, thus constituting misconduct. The suspension letter cited more than 60 separate incidents. Appellant had admitted in testimony that she used her ID badge to scan in on the dates reported in the suspension letter.

19. At all times during the events described herein, the Department for Environmental Protection's Time and Attendance Policy (PER-401.1) was in full force and effect.

20. On July 6, 2016, Appellant filed a grievance against her supervisor, Ahad Chowdhury, for a June 7, 2016 incident (Appellant's Exhibit 1). Subsequently, she filed a separate grievance on July 14, 2016, against Ed Winner (Appellant's Exhibit 2). Appellant believed both grievances had been "rolled" into a single grievance, and the grievance had been changed to a time and attendance issue.

21. In response to Appellant's two grievances, Lynn Keeling Gillis, Assistant Director and designated Appointing Authority for EEC, transmitted a letter to Appellant on August 18, 2016 (Appellee's Exhibit 17). She responded to Appellant's concerns pertaining to a threat of placement on a PIP, as well as an alleged hostile work environment. The letter concluded "This response concludes the grievance process. The grievance is not appealable to a higher level." This final response to the grievances determined that there was insufficient evidence supporting Appellant's allegations.

22. Appellant timely filed her appeal of the 20-day suspension with the Kentucky Personnel Board, which appeal contained her allegation of retaliation.

CONCLUSIONS OF LAW

1. The issues in this case are: (1) whether the 20-day suspension of the Appellant from her position as Environmental Scientist III with the Energy and Environment Cabinet, Department for Environmental Protection, Underground Storage Tank Branch, was taken with just cause and whether such was excessive or erroneous; and (2) whether Appellant was the victim of retaliation. The burden of proof was on the Appellee to support its issuance of the 20-day suspension by a preponderance of the evidence. The burden of proof was on the Appellant to establish by a preponderance of the evidence her claim of retaliation. KRS 13B.090(7).

2. "Preponderance of Evidence" means: "...evidence which as a whole, shows that the facts sought to be proved is more probable than not. With respect to burden of proof in civil actions, means greater weight of evidence, or evidence which is more credible and convincing to the mind." Black's Law Dictionary, 5th ed., page 1064. The ultimate burden of persuasion in all administrative hearings is met by a preponderance of evidence in the record. Failure to meet the burden of proof is grounds for a recommended order from the hearing officer. KRS 13B.090(7).

3. A classified employee with status shall not be suspended except for cause. KRS 18A.095(1). Appointing Authorities may discipline employees for lack of good behavior and for the unsatisfactory performance of duties. 101 KAR 1:345, Section 1. A suspension shall not exceed 30 days. 101 KAR 1:345, Section 4(1).

4. Appellant, Theresa Anderson, was issued a 20-day suspension from her employment position by letter of November 21, 2016 (Joint Exhibit 1). That suspension was

based on an allegation of lack of good behavior and falsifying time (101 KAR 1:345, Section 1); Department of Environmental Protection Time and Attendance Policy (PER-401.1).

5. Appellant claims she was the victim of retaliation, having been suspended from employment as the result of having filed a grievance against her supervisor, Ahad Chowdhury, and a separate grievance against her second-line supervisor, Edward Winner (Appellant's Exhibits 1 and 2).

6. An act of retaliation may properly be considered as a "penalization." A classified employee with status shall not be otherwise penalized, except for cause. KRS 18A.095(1). A "penalization" includes "...any action that diminishes the level, rank, discretion, or responsibility of an employee without proper cause." It also includes "the abridgement or denial of other rights granted to state employees." KRS 18A.005(24).

7. Appellant testified, and it is documented in the grievance she filed on July 6, 2016 (Appellant's Exhibit 1), that she and her supervisor, Ahad Chowdhury, engaged in a spirited discussion on June 7, 2016, about time and attendance issues and Chowdhury's threat to put her on a Performance Improvement Plan (PIP) as a result of time and attendance problems. In her grievance, Appellant alleged, "I believe that my supervisor's behavior is his way of retaliation for having to apologize to me for yelling at me in the hallway in January 2016 in front of my coworkers that I was a 'terrible reviewer and everyone knows.'"

8. When Appellant brought the June 7, 2016 incident to the attention of Edward Winner, she brought up Chowdhury's allegations of problems regarding her time and attendance. She and Winner discussed a possible change of departments. Winner told Appellant that if what she had reported about her compliance with time and attendance requirements was accurate, he would see what department she could be transferred to. Winner thereafter examined time and attendance records to determine whether Appellant's statements had been accurate.

9. Winner found "significant discrepancies between the door scans and her sign-in sheet." He concentrated on those incidents where the time discrepancy was more than 20 minutes, and thereafter sent that information to Human Resources.

10. Believing Winner had turned the tables on her by concentrating on her time and attendance, Appellant filed a grievance against Winner on July 14, 2016 (Appellant's Exhibit 2).

11. Nina Hockensmith, the Department's Human Resource Administrator, contacted Sherry Butler at GAPS in July/August 2016 to advise a preliminary review had been conducted of Appellant's time and attendance behavior, which raised concerns about such behavior. Ms. Butler was responsible for conducting disciplinary action reviews, and so began her own investigation. She properly examined all relevant records, interviewed Appellant on two occasions, and had given her time between the two interviews to gather additional information to respond to the allegations.

12. After careful consideration, Butler concluded Appellant's explanations did not reconcile with what was shown in the records she had examined. Butler drafted a summary of the discrepancies and independently made a recommendation for discipline. Her conclusion included more than 60 separate incidents of time discrepancies, and for the period of January 4, 2016 through June 4, 2016, 56 of 86 workdays had inaccurate reporting of time worked; Appellant had been "falsely compensated" for 50.5 hours – 30.25 regular hours and 20.25 compensatory-earned hours.

13. Butler also gave consideration to the proper length of a suspension. She identified another employee in the same branch who had previously been suspended 20 days for similar infractions. Butler, therefore, recommended a 20-day suspension, which recommendation was approved by Tiffany N. Yeast, the designated Appointing Authority.

14. Edward Winner properly relayed his concerns about Appellant's time and attendance behavior to his own Human Resource Department. Human Resources, in turn, properly referred the matter to GAPS, where employee disciplinary matters are independently investigated and processed further, should discipline be determined appropriate.

15. The ultimate decision whether to issue discipline and the amount of such discipline, was made by the Appointing Authority. That decision was based on the independent investigation and recommendation of Sherry Butler of GAPS. There has been a lack of a preponderance of evidence to show that the suspension of 20 days was a retaliatory act of either Sherry Butler or Tiffany Yeast.

16. The Appellee has proven by a preponderance of the evidence that there was just cause for disciplinary action against the Appellant, and has also shown by a preponderance of the evidence that the disciplinary action taken, that is, a 20-day suspension, was neither excessive nor erroneous.

17. Appellant has failed to prove by a preponderance of the evidence that she was the victim of retaliation.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **THERESA ANDERSON V. ENERGY AND ENVIRONMENT CABINET, (APPEAL NO. 2017-014)** be **DISMISSED**.

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 exceptions that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

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 Roland P. Merkel** this 13th day of March, 2018.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Leesa Moorman
Hon. Edward Dove