

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2018-222

SHERRI BAPTISTE

APPELLANT

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

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

\*\*\* \*\*

The Board, at its regular June 2019 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated May 8, 2019, 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 19<sup>th</sup> day of June, 2019.

**KENTUCKY PERSONNEL BOARD**

  
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**MARK A. SIPEK, SECRETARY**

A copy hereof this day sent to:

Hon. Lucas Roberts  
Ms. Sherri Baptiste  
Mr. Jay Klein

**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2018-222**

**SHERRI BAPTISTE**

**APPELLANT**

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

**CABINET FOR HEALTH AND FAMILY SERVICES**

**APPELLEE**

\*\* \*\* \* \* \*

This matter came on for an evidentiary hearing on March 5, 2019, at 9:30 a.m., at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Colleen Beach, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Sherri Baptiste, was present at the evidentiary hearing and was not represented by legal counsel. The Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Lucas Roberts. Also present as Agency representative was Crissy Grubbs.

**BACKGROUND**

1. Appellant was employed as a Social Service Aide I in the Department for Community Based Services (DCBS), Southern Bluegrass Service Region. She was dismissed during her initial probationary period, by letter under the signature of Howard J. Klein, on October 24, 2018. Appellant filed a timely appeal of her dismissal on October 26, 2018, appealing her dismissal and removal from future registers for employment with DCBS. In her appeal she also alleged discrimination. In support of her appeal, she made the following statement:

On 10/23/18 I was informed that a major disciplinary action was being requested against me and I would we (sic) be given two working days to submit a written statement & documentation which supports my statement. I was informed that my statement & documentation would be placed alongside the request for major disciplinary action for review & consideration. On 10/24, 2018, 1 day later I was terminated & I was not given the 2 days to respond in writing. As a result, I am unemployed & also my name has been removed from the register blocking me from future opportunities.

I had spoke (sic) to Rachel Hodnett via telephone regarding speeding in state vehicle on 10/15/18 Rachel Hodnett and I communicated again through text. On 10/22/18 I spoke with Krystle Wirth in person and I was told "I do not worry about it." On 10/23/18 I was told "well you know what this is about" & informed of the major disciplinary action.

2. By Interim Order dated January 2, 2019, it was established that at issue in the evidentiary hearing would be whether or not Appellant's dismissal during probation was the result of disability discrimination. Appellant was assigned the burden of proof.

3. **Appellant, Sherri Baptiste**, testified on her own behalf. She stated that she was employed by DCBS from June 1, 2018, until October 24, 2018. Her primary duties as a Social Service Aide I were transporting children to and from visitation with their biological parents, and supervising these visits.

4. On October 12, 2018, Appellant arrived at the DCBS office in Lexington from her home in Berea. The night before she had experienced a "very unpleasant and severe reaction" to new medication prescribed to her by a physician. In the morning she felt better and decided to proceed to work. Unfortunately, on her way to pick up some children from a Berea daycare, her symptoms returned, and were "excruciating." Appellant went home quickly to address her physical symptoms, then proceeded to the day care. She transported the children to Lexington for supervised visitation, which she was tasked with monitoring. During the visit, Appellant suffered another bout of symptoms and asked a coworker to relieve her.

5. Appellant testified that she continued to experience symptoms on and off throughout the day.

6. On October 15, 2018, Appellant received a call from her second-line supervisor, Rachel Hodnett. Hodnett informed Appellant that she had received a report that Appellant had been driving at a high rate of speed in her assigned state vehicle on October 12, 2018. Appellant explained to Hodnett that she had not been feeling well that day. On October 21, 2018, Appellant stated that she spoke with Krystle Wirth, who assured her "Don't worry about it too much. There will probably be some kind of discipline."

7. On October 23, 2018, Wirth texted Appellant, directing her to come into her office. As soon as Appellant walked in, Wirth stated: "You know what this is about." Appellant was asked to sign an Acknowledgment of Major Disciplinary Action. (Appellant's Exhibit 4).

8. On October 24, 2018, Appellant attended a meeting with Wirth and Hodnett. Appellant was informed that she was being separated from her employment. That same day, Appellant contacted her physician, Dr. Mehul Ajay Suthar, and requested a letter from him to document that she was under his medical care and was experiencing side effects to some new medications. He responded by sending her a letter that stated the following:

Sherri Baptiste is currently under my medical care. She has been started on several new medications over the last few months which may result in changes in bowel function, abdominal pain, and nausea. As she has shared her concerns regarding these side effects affecting her work performance, medications have been adjusted.

If additional information is needed, it can be provided upon request.

(Appellant's Exhibit 1)

9. Appellant submitted this letter to her supervisors, Wirth and Hodnett, along with a written response, which was dated October 24, 2018, and introduced into the record as Appellant's Exhibit 3.

10. In her memorandum to Wirth, Appellant stated that she had really enjoyed her job, and that her driving on October 12, 2018, was "a reaction to the symptoms [her] body was having." She added "I wasn't thinking straight." According to Appellant, while she experienced symptoms intermittently all day, they were most extreme when she was travelling in the morning from the DCBS office to the Berea daycare.

11. On cross-examination, Appellant recounted the driving she did on October 12, 2018. She summarized that she first drove to Lexington from Berea to pick up her state car. Then she drove to Berea to pick up children from a daycare. She then drove the children to Lexington for visitation with their biological parents. After visitation, she drove the children back to Berea. From there, she travelled back to Lexington to finish out the workday and return the vehicle.

12. When asked if she let anyone in her office know of her medical condition prior to October 12, 2018, Appellant answered: "I am a private person. But some of my coworkers knew I was under a doctor's care."

13. Appellant agreed that she had never informed her supervisors of her medical condition, nor had she ever requested an accommodation. She also did not discuss with anyone the "protocol" of having an emergency on the road.

14. At the end of Appellant's testimony, she rested her case.

15. Appellee, Cabinet for Health and Family Services (CHFS), called its first witness. **Everett "Pete" McDonald** is Director of Fleet Management, which is under the administration of the Finance and Administration Cabinet.

16. McDonald stated that Fleet Management is responsible for the state motor pool which is available for anyone who works for the state. There are approximately 4,500 vehicles in the motor pool. Fleet Management is also responsible for maintenance of these vehicles.

17. McDonald testified that there are certain rules and procedures that state employees must follow to gain access to the vehicles and continue to be allowed to use them. There is a general Drivers' Guide, and agencies may implement their own rules as well. Drivers are expected to obey all traffic laws.

18. With the exception of police cars, all state vehicles have a GPS monitoring device. The GPS allows Fleet to monitor a vehicle's speed, its location, and its mileage.

19. McDonald stated that each vehicle's GPS has the ability to generate an "Over Speed Report" when the vehicle travels over 85 miles per hour. When this report is received by Fleet, the agency assigned that vehicle is also alerted. McDonald added that when a vehicle is shown to have travelled over 90 miles per hour, the report is sent directly to him.

20. McDonald recalled a report he received regarding the driving speeds for a vehicle assigned to Appellant on October 12, 2018. The GPS monitor in her car documented that Appellant was speeding, often at over 80 miles per hour. The "Vehicle Activity Report" for Appellant's assigned vehicle on October 12, 2018 was introduced into the record as Appellee's Exhibit 1.

21. McDonald testified that he often asks the agency what disciplinary action was taken after an employee is shown to have travelled over the speed limit in a state car. In his experience, disciplinary actions range from dismissal to withdrawing an employee's privilege to drive a state vehicle.

22. **Krystle Wirth** is currently employed as a Family Service Office Supervisor (FSOS) for the Cabinet. She works in Fayette County and was Appellant's direct supervisor.

23. Wirth described Appellant's job as a transport aide, "taking kids from foster care and transporting them to the office for visits with their biological parents, and supervision of that visit."

24. Wirth first became aware of Appellant's speeding in the state vehicle five days after it occurred, on October 17, 2018. She had been out on sick leave prior to that. She estimated that her office learned of the incident two days earlier. Wirth had been informed that her supervisor, Rachel Hodnett, had contacted Appellant regarding the speeding report on October 15, 2018.

25. Wirth testified that she had previously discussed with Appellant the "do's and don'ts" of driving a state vehicle. "I told [Appellant] that the car is not for personal use, and no speeding." Appellant was also forbidden from keeping the car overnight.

26. Wirth met with Appellant on October 23, 2018, when she signed an "Acknowledgement of Request for Major Disciplinary Action." (Appellant's Exhibit 4.) At that meeting, Appellant informed Wirth that she would be providing a written statement in response.

27. Wirth testified that the speeding incident of October 12, 2018, was the sole reason for Appellant's dismissal. She denied that the action was based on Appellant's physical health. When asked if she was aware of Appellant's claim of disability, Wirth responded, "Not on October 23<sup>rd</sup>. On October 24<sup>th</sup> we met with [Appellant] and she gave me a letter and doctor's note."

28. Wirth stated that she had documented the state vehicle assigned to Appellant and it matched the tag number of the vehicle cited in the vehicle activity report (Appellee's Exhibit 1).

29. Wirth noted specifically that the vehicle activity report showed that Appellant had been going 98 miles per hour at 10:10 a.m., at which time the foster care children had been passengers in the car.

30. As for what an employee should do if they are driving minors and become ill, Wirth stated that the proper protocol is to stop driving and call another employee to come pick the children up.

31. **Jay Klein** is employed by the Office of Human Resource Management with CHFS. He is a designated Appointing Authority. Klein testified that Fleet Management contacted the Office of Administrative and Technical Services ("OATS") in regard to the incident report which documented Appellant's high rate of driving speed on October 12, 2018. OATS in turn forwarded the report to Klein.

32. Klein stated that the decision was made to separate Appellant from employment during her initial probation because "[T]he report shows sixteen minutes of excessive speeding. She was not just going fast, she was sometimes breaking 100 miles per hour, which is extremely inappropriate."

33. At the end of Klein's testimony, the Cabinet rested its case.

34. KRS 18A.111 (1) provides in part:

Except when appointed to a job classification with an initial probationary period in excess of six (6) months, and except as provided in KRS 18A.005 and this section, an employee shall serve a six (6) months probationary period when he is initially appointed to the classified service. An employee may be separated from his position, reduced in class or rank, or replaced on the eligible list during this initial probationary period and shall not have a right to appeal, except as provided by KRS 18A.095. The employee may be placed on an eligible list but shall not be certified to the agency from which he was separated unless that agency so requests. Unless the appointing authority notifies the employee prior to the end of the initial probationary period that he is separated, the employee shall be

deemed to have served satisfactorily and shall acquire status in the classified service.

35. KRS 18A.095(12) requires that:

Any classified employee may appeal to the board an action alleged to be based on discrimination due to race, color, religion, national origin, sex, disability, or age forty (40) and above. Nothing in this section shall be construed to preclude any classified or unclassified employee from filing with the Kentucky Commission on Human Rights a complaint alleging discrimination on the basis of race, color, religion, national origin, sex, disability, or age in accordance with KRS Chapter 344.

36. A further provision of KRS 18A.095(14)(a) allows that:

Any employee, applicant for employment, or eligible on a register, who believes that he has been discriminated against, may appeal to the board.

#### **FINDINGS OF FACT**

1. Appellant began her employment as a Social Service Aide I for the Department of Community Based Services, Southern Bluegrass Region, on June 1, 2018. She was terminated from that position on October 24, 2018, while serving her initial probation. She filed a timely appeal from her termination on October 26, 2018.

2. Appellant's job at DCBS was primarily to transport children in foster care to their scheduled visitation with their parents. She also supervised these visits. This job included driving children housed in Berea to the Lexington DCBS office for the visits, and then back again.

3. On October 12, 2018, Appellant suffered what she described as an "unpleasant and severe reaction" to medication she was prescribed to take by her physician, Mehul Ajay Suthar, DO. According to a letter prepared by Dr. Suthar, the medications' possible side effects included "changes in bowel function, abdominal pain, and nausea." (Appellant's Exhibit 1.)

4. Fleet Management, who manages the state motor pool, generated a report through the GPS monitoring system installed in the vehicle assigned to Appellant. This report documented that on October 12, 2018, Appellant drove at a high rate of speed, specifically over 80 miles per hour (and travelling up to 103 miles per hour), at different times throughout the day. She was transporting foster children in the vehicle during some of this time. (Appellee's Exhibit 1.)

5. After the report was brought to Appellant's attention, she informed her supervisors, through a written response written on October 24, 2018, and a doctor's note submitted on the same day, that she had suffered an adverse reaction to medication. Prior to that, Appellant, by her own admission, had never alerted her supervisors to the fact that she suffered from a physical ailment of any kind. The only indication she had shared information regarding her health with staff in her office was her testimony that her "coworkers knew [she] was under a physician's care." (Testimony of Appellant.)

6. Appellant testified that the physical symptoms she suffered "off and on" throughout the day, necessitated her to occasionally drive at a high rate of speed. (Testimony of Appellant). While the Appellant did not explain specifically the correlation between her speeding and her physical symptoms, the Hearing Officer infers from Appellant's testimony and the October 24, 2018 note from Dr. Suthar (Appellant's Exhibit 1), that Appellant's symptoms caused her to urgently need to use restroom facilities while she was driving.

### CONCLUSIONS OF LAW

1. KRS 18A.111(1) specifies that no right of appeal is available to a probationary employee. Consequently, an individual seeking a remedy, such as restoration of employment, after failing probation, must bring the action under KRS 18A.095(12) and prove that discrimination occurred. This must be accomplished by "a preponderance of the evidence." The agency need only establish that no bias was present.

2. Under the Americans with Disabilities Act, a "disability" is defined as: "(A) Physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 USC § 12102(2). "Temporary non-chronic impairments of short duration with little or no long-term impact are usually not disabilities." *Heintzman v. Runyon*, 120 F3d 143 (8<sup>th</sup> Cir.).

3. Appellant failed to show that her stated discomfort, due to what she described as an adjustment in medication, was a permanent impairment. Appellant also failed to show that she had a record of an impairment or that she was regarded as having such an impairment. In fact, Appellant's first-line supervisor testified that she was not made aware of Appellant's physical condition until after the Request for Major Disciplinary Action had been delivered. The Hearing Officer concludes, therefore, that Appellant has failed to satisfy her burden of proof to show that she suffered from a disability.

4. Appellant has not met her burden of proof to establish that her failure to complete probation was due to disability discrimination toward her by Appellee.



**RECOMMENDED ORDER**

The Hearing Officer recommends to the Personnel Board that the appeal of **SHERRI BAPTISTE V. CABINET FOR HEALTH AND FAMILY SERVICES, (APPEAL NO. 2018-222)** 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 Colleen Beach** this 8<sup>th</sup> day of May, 2019.

**KENTUCKY PERSONNEL BOARD**

  
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**MARK A. SIPEK**  
**EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:

Hon. Lucas Roberts  
Ms. Sherry Baptiste