CERTIFICATION OF PERSONNEL BOARD RECORDS

I certify that the attached is a true and correct copy of the Findings of Fact, Conclusions of Law, Recommended Order and Final Order in the case of **ODA BARNES VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2012-060)** as the same appears of record in the office of the Kentucky Personnel Board.

Witness my hand this 17th day of April, 2013.

MARK A. SIPEK, SECRETARY
KENTUCKY PERSONNEL BOARD

Copy to Secretary, Personnel Cabinet

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2012-060

ODA BARNES — APPELLANT

VS.

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

CABINET FOR HEALTH AND FAMILY SERVICES,
J. P. HAMM, APPOINTING AUTHORITY — APPELLEE

** ** ** ** **

The Board at its regular April 2013 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated February 5, 2013, Appellant's exceptions, Appellee's response to Appellant's exceptions, oral arguments, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be altered as follows:

A. At the end of Finding of Fact paragraph 12, **insert** the following as paragraph 13, and **renumber** the remaining paragraphs, so that paragraph 13 will become 14, paragraph 14 will become 15, etc. :

> 13. The Board finds that Appellant did not commit any misconduct as a result of her meeting with Mr. Linville continuing past 1:30 p.m. The Board finds persuasive that the Appellee coded that time between 1:30 and 2:00 p.m. as work time. The Board further agrees with the Hearing Officer there is nothing devious or untoward about Appellant's request as to whether she could use FMLA time, or what type of leave time could be used for the 1:30 to 2:00 p.m. period, and certainly her conduct did not merit punishment.

B. **Delete** Conclusion of Law 5 and substitute the following:

5. The Board concludes Appellant did not intend to improperly use FMLA time, but had been searching for available alternatives. The Board concludes that Appellant, even being late from lunch from her meeting with Linville, did not commit any misconduct which would be punishable by suspension, especially in light of the Appellee deciding the proper way to code Appellant's time from 1:30 to 2:00 p.m. would be as work time because she was, for at least part of that time, meeting with Mr. Linville to discuss work issues.

C. **Delete** the last sentence in Conclusion of Law 6:

However, Appellant did violate Policy 2.1, Employee Conduct, Subparagraph II – Employee Conduct Guidelines 5, by failing to take her meal and break period as scheduled.

D. **Delete** the Recommended Order.

IT IS ORDERED that the appeal of ODA BARNES VS. CABINET FOR HEALTH AND FAMILY SERVICES (Appeal No. 2012-060) be **SUSTAINED.** In addition, the Appellee is **ORDERED** to have the letter of suspension expunged from the Appellant's personnel file, to reimburse the Appellant for any leave time she used attending the hearing and any pre-hearing conferences at the Board, and to otherwise make the Appellant whole. **KRS 18A.105, KRS 18A.095(25) and 200 KAR 12:030.**

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

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

SO ORDERED this 17th day of April, 2013.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK, SECRETARY

A copy hereof this day mailed to:

Hon. Paul F. Fauri
Hon. Michael Board
J.P. Hamm

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2012-060

ODA BARNES **APPELLANT**

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

CABINET FOR HEALTH AND FAMILY SERVICES
JOHN P. HAMM, APPOINTING AUTHORITY **APPELLEE**

* * * * *

This appeal came on for an evidentiary hearing on October 1, 2012, at 9:30 a.m. ET, at 28 Fountain Place, Frankfort, KY, before the Hon. Roland Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment as authorized by KRS Chapter 18A.

Appellant Oda Barnes was present and represented by the Hon. Paul F. Fauri. Appellee Cabinet for Health and Family Services was present and represented by the Hon. Michael Board.

Ms. Barnes has appealed the disciplinary action of a 3-day suspension. Appellee is required to prove, by a preponderance of the evidence, that the 3-day suspension of Appellant from her position as an Office Support Assistant III was taken with just cause and was neither excessive nor erroneous.

The rule separating witnesses was invoked and employed throughout the course of the proceedings.

Mr. Board advised that the Cabinet was no longer pursuing the first charge set out in the March 1, 2012 suspension letter.[1] The Cabinet would continue to pursue the second and third charges set out in that letter.

Mr. Stephen Sutherland, who had been subpoenaed by the Cabinet, was called into the hearing room. Mr. Board advised that this witness could be released, as his testimony pertained solely to the first charge in the suspension letter. The Hearing Officer released Mr. Sutherland from the hearing.

[1] Unsatisfactory performance of duties: incident of February 3, 2012.

BACKGROUND

1. The first witness called by the Appellee was **Christina Stewart**, who, for the past five years, has served as Administrative Branch Manager in the Office of Vital Statistics. She supervises 75 employees, including the Appellant and she is Appellant's third-line supervisor.

2. On February 17, 2012, Appellant sent an e-mail to Ms. Stewart asking permission to change her lunch hour to 12:30 p.m. to 1:30 p.m. Stewart granted the request. Just before 2:00 p.m. that day, Stewart received another e-mail from Appellant. Barnes advised she had been late returning from lunch and requested one of her 10 minute breaks be applied toward that time. Stewart advised Barnes she could not connect break time to lunch time in that manner. Barnes then asked whether she could use Family Medical Leave (FML) time from 1:30 to 4:30 p.m. Stewart told Barnes that as she had returned late from lunch, FML time would not be approved for 1:30 to 2:00 p.m. FML time would be approved for 2:00 to 4:30. Stewart also told Appellant she would contact the Office of Human Resource Management (OHRM) to determine how to code the time from 1:30 to 2:00 p.m.

3. Appellant had not previously advised Stewart where she had been during the lunch hour. In her communication with OHRM, Stewart learned that during the 1:30 – 2:00 p.m. timeframe, Appellant had met with Galen Linville of OHRM. She was advised that time could be coded as "work time." She also concluded FML was not appropriate when meeting with someone in the office.

4. Stewart identified Appellant's Exhibit 1 as the February 13, 2012 Notice of Request for Major Disciplinary Action, a copy of which she had delivered to Appellant that same day.

5. She identified Appellant's Exhibit 2 as the February 10, 2012 memorandum from John D. Royalty, Certification Section Supervisor, to Jay Klein, acting Division Director and appointing authority of OHRM, pertaining to the major disciplinary action.

6. She identified Appellant's Exhibit 3 as her own notes pertaining to meetings she had with Appellant in early February 2012.

7. Upon inquiry from the Hearing Officer as to what it was Appellant did wrong that necessitated discipline, Stewart responded Barnes had made an improper request for FML leave time for the period of 1:30 – 2:00 p.m. Furthermore, she had not notified anyone she would not be returning at 1:30 p.m. The 1:30 – 2:00 p.m. period was coded as work time after Stewart had approved the 2:00 – 4:30 FML time, and Appellant was paid for that first half hour.

8. The next witness was **Galen Linville**. Mr. Linville has been employed with the Cabinet since May 2007, and for the past year has served as Employee Relations Branch, HR Administrator. He described his duties, which included investigation and drafting of disciplinary actions.

9. In February 2012, Oda Barnes contacted Linville and requested a meeting to discuss certain personnel matters. The meeting began at approximately 11:30 a.m. and lasted one to one and one-half hours. After the meeting, he received e-mails from a supervisor who inquired how to code a certain time period for Appellant.

10. He identified Appellant's Exhibit 4 as a series of e-mails generated on March 1, 2012. The suspension letter was to be delivered to Appellant on March 1. John Royalty had requested the letter be changed to cite unauthorized leave for the entire day, rather than just one hour. The suspension letter cited Appellant for one hour. Mr. Klein had responded to Royalty by stating the one hour of unauthorized time (as cited in the letter) would be fine.

11. Linville drafted the March 1 suspension letter and sent it to Mr. Klein for his review and approval. It was Mr. Klein's office that made the recommendation of a 3-day suspension. Recommending the type and degree of disciplinary action was not within Linville's authority.

12. He identified Appellant's Exhibit 7 as his February 21, 2012 response to the question of whether Appellant's presence on work property—after she had received leave approval—was proper. Linville testified there was no policy violation.

13. Mr. **John Royalty**, who has been employed the past three years by the Office of Vital Statistics (OVS), was the next witness. Since August 2009, he has been the Administrative Certification Section Supervisor, and is Appellant's second-line supervisor.

14. The OVS has a call-in procedure for all of its employees. An employee who realizes he/she will be late or unavailable to report to work, is required to telephone the office between 8:00 a.m. and 8:15 a.m., or within 15 minutes of that employees' start time. The employee must speak to their immediate supervisor. If the supervisor is unavailable, the employee must speak to her next-line supervisor. An employee may leave a voicemail message, but thereafter must repeatedly call the office until a "live" person is contacted. The OVS business day begins at 8:00 a.m., which was also Barnes' start-time. She was aware of the branch-wide policy call-in procedure. All new employees sign that policy upon hire. They are also periodically reminded of the policy through e-mails.

15. Barnes' first-line supervisor had been off work several days due to medical leave. Appellant telephoned the office and her call was transferred to Royalty. Royalty had been at his desk earlier that morning (from 8:00 to 8:15) awaiting any telephone calls, as the first-line supervisor was absent. Barnes had been the only employee absent in his section at 8:00 a.m. When Royalty had returned from an 8:15 a.m. interview, he was advised by his branch manager that sometime after 9:00 a.m. Barnes had phoned the office. Barnes had spoken to a supervisor in another section and stated she had over-slept and would not be coming in that day.

16. In the past, Royalty had participated in coaching sessions with the Appellant. She had been issued two Performance Improvement Plans (PIP), as well as a verbal warning, written warning, and had several counseling meetings. He identified Appellee's Exhibit 1 as the

February 2, 2012 written reprimand he had issued to Barnes. This reprimand was issued due to Appellant's inability to get along with coworkers.

17. He identified Appellee's Exhibit 2 as the PIP for the review period 7-15 to 10-15, 2011. This PIP pertained to time and attendance issues, as well as the call-in procedure. He identified Appellee's Exhibit 3 as the PIP he issued to Appellant for the review period 1-1 to 3-31-12.

18. During his supervision of Barnes, he had been aware she had ADA accommodations.[2] She had also been provided accommodations for her conditions of panic attacks and irritable bowel syndrome (IBS). Appellant also had approved FMLA status that was "unscheduled."

19. With regard to the February 24, 2012 incident, Royalty testified, "[I]f you call in and say 'I'm not coming in today because basically I overdosed myself,' that's not acceptable." "I overslept because I took a new prescription sleeping pill is different than, 'my doctor prescribed me to take one or two pills, and I took more than that last night because I couldn't sleep."

20. Following a review of Appellant's Exhibit 6 (a series of e-mails generated February 24, 2012), Royalty stated his issue with Barnes was she had not followed policy or indicated her time was for FMLA; therefore, it was unapproved sick leave unless there was additional information she could provide. The information she provided had been "[I] was overdosed on sleeping pills." Royalty believed she had "overdosed" based on his conclusion of never having heard of any doctor prescribing more than one sleeping pill at a time to a patient.

21. **Howard J. Klein** was the next witness. For the past 11½ years, Mr. Klein has been employed as the appointing authority and acting Division Director in the OHRM for the Cabinet for Health and Family Services. His office deals with grievances, disciplinary matters, open records requests, training, and investigations dealing with discrimination and sexual harassment. As the appointing authority, he reviews final drafts of all disciplinary actions. If he agrees with such action, he approves same by his signature.

22. He identified Appellee's Exhibit 4 as the March 1, 2012 letter notifying Barnes of her 3-day suspension.[3]

23. Individual discipline is progressive in nature unless one's act is so egregious that employment of a more extreme step is required. The suspension for Barnes was the next step in the process following the previous corrective actions of a verbal warning and written reprimand.

24. Klein identified the following exhibits:

- Appellee's Exhibit 5 – CHFS Policy 2.1 (Employee Conduct);
- Appellee's Exhibit 6 – CHFS Policy 5.2 (Annual Leave);

[2] Americans with Disabilities Act
[3] Appellee's Exhibit 4 is **sealed** in the record due to its inclusion of confidential information.

- Appellee's Exhibit 7 – CHFS Policy 5.8 (Family and Medical Leave);
- CHFS Policy 5.13 (Sick Leave);
- Appellee's Exhibit 9 – Copy of Administrative Regulation 101 KAR 2:095 (Classified Service Administrative Regulations); and
- Appellee's Exhibit 10 – Copy of Administrative Regulation 101 KAR 2:102 (Classified Leave Administrative Regulations)

25. In his prior evaluation of the charges against Barnes, he determined that with reference to Charge 2 (lack of good behavior), Appellant had tried to use FMLA for purposes of a meeting. "[S]he was caught." This constituted dishonesty and a falsification of a timesheet. This act violated Policy 2.1 (Employee Conduct), and constituted failure to exhibit good behavior and honesty. FMLA time is to be used when one is actually sick.

26. In his evaluation of Charge 3 (lack of good behavior on February 24, 2012), he had determined Appellant failed to follow the call-in procedure. Use of annual or sick leave requires an advance request be made via telephone. Barnes had violated Policy 5.2 (Annual Leave) and Policy 5.13 (Sick Leave), and failed to exhibit good behavior.

27. It was Galen Linville who had written the charges and recommended the amount of discipline. Klein felt (at that time) the 3-day suspension was appropriate. As Appellant had a previous written reprimand on time and attendance issues, the next appropriate step in discipline would be a suspension. Deleting the first charge, as outlined in the suspension letter, the second charge being an "attempted fraudulent element" would alone suffice for a 2-day suspension.

28. He identified Appellant's Exhibit 8 as the Notice of Eligibility and Rights and Responsibilities (Family and Medical Leave Act) approved for the Appellant for 2012.[4] He identified Appellant's Exhibit 9 as the January 4, 2012 response he authored to the Appellant's request for accommodations.[5]

29. A person cannot use FMLA time as a shield or defense for their failure to follow the agency call-in policy. When an employee calls in, he/she must at that time state if the leave is for FMLA, unless it is an obvious situation. The use of FMLA leave does not override the agency's call-in procedure. Had Appellant called in on time, she would have been granted the entire day as approved FMLA leave. Klein recently found out that the 6.5 hours of FMLA leave used by Appellant that day had not been coded properly and had not been deducted from her FMLA balance.

30. The Cabinet rested its case. Appellant presented a Motion for Directed Verdict, and that motion was **OVERRULED**.

31. **Appellant Oda Barnes** offered her testimony. She gave her employment history. It was in 2009 that she began working at the front desk at OVS. She currently works in the certification area for death certificates. In her 2009 Annual Employee Performance Evaluation

[4] Appellant's Exhibit 8 is **sealed** in the record.
[5] Appellant's Exhibit 9 is **sealed** in the record.

received a rating of "Highly Effective." Her Annual Employee Performance Evaluations for 2010 and 2011 each reflected an overall rating of "Good."

32. On February 17, 2012, Barnes had asked to meet with Mr. Linville during the lunch hour. He advised he could not meet with her until 12:30 p.m. Barnes changed her lunchtime to 12:30 to 1:30, and hoped the meeting would be completed in that hour. She telephoned Christina Stewart and told her she was going to meet with Linville to discuss a past disciplinary action. She also requested a change in her lunch hour. Stewart approved that change, after she required Appellant to make that request via e-mail. Barnes e-mailed the request and never mentioned FMLA.

33. The meeting with Linville ran late, and the Appellant returned to work about "ten till" 2:00 p.m. She e-mailed Stewart to let her know she returned 20 minutes late. The meeting had upset Barnes and made her very nervous. When she e-mailed Stewart, she requested FMLA time from 1:30 p.m. until the end of the day. Stewart advised she could not approve FMLA leave from 1:30 to 2:00 p.m., but would approve it for the remainder of the day. Stewart said she would find out how to code the time from 1:30 to 2:00 p.m.

34. With reference to her communication (as shown in Appellant's Exhibit 6), Barnes stated that due to her panic attacks, she had trouble sleeping. Her doctor then gave her a low-dose sleeping pill, and told her to try one pill. If one pill did not work, she could take two; if two did not work, she could take no more than three. This was a new prescription. The doctor wanted to determine what dosage would work for her. Upon that determination, the doctor would then write the next prescription for the adjusted dosage.

35. On the night of February 23, 2012, Barnes took the sleeping pills. She was aware of the OVS call-in policy. The next morning, she awoke at approximately 9:00 a.m. As soon as she woke up, she called her office. She did not realize Ms. Freeman was out of the office on medical leave. Barnes could not get in touch with Mr. Royalty. She then asked for Christina Stewart. Her phone call went to voicemail. Thereafter, she asked to speak to any available supervisor. She was connected to Kristie Hellman and told her she had overslept and would not be able to come in that day.

36. Later that same afternoon, she checked her e-mail. She saw Mr. Royalty had sent her an e-mail at approximately 10:30 a.m. (Appellant's Exhibit 6.) Mr. Royalty had been well aware of Appellant's medical situation.

37. She acknowledged that having called in around 9:00 a.m. was beyond the time required by OVS policy. She also acknowledged the purpose of FMLA leave was to allow her time off when she is ill, and it is not to be used for an office meeting.

38. Appellant's case was closed. The parties presented their respective closing arguments, and a briefing schedule was established by separate Order.

FINDINGS OF FACT

1. Oda Barnes is a classified employee with status. She is employed as an Office Support Assistant III with the Cabinet for Health and Family Services, Office of Vital Statistics.

2. On February 17, 2012, Appellant requested her lunch hour be changed to 12:30 to 1:30 p.m. Such request was approved by Christina Stewart, Administrative Branch Manager in the Office of Vital Statistics (OVS). During that lunch hour, Appellant met with Galen Linville, Employee Relations Branch, Human Resources Administrator, to discuss a previous disciplinary action. The meeting ran late and just prior to 2:00 p.m., Barnes sent an e-mail to Ms. Stewart advising she returned late from lunch. In the e-mail, Barnes requested a 10-minute break period be applied at the end of her lunch hour. Stewart denied that request.

3. Barnes then asked if she could use Family Medical Leave (FML) time from 1:30 to 4:30 p.m. Stewart denied FML time from 1:30 to 2:00 p.m., but approved it for 2:00 p.m. to 4:30 p.m. Stewart did not know how to code Barnes' time from 1:30 to 2:00 p.m. Stewart contacted OHRM and learned the time period of 1:30 to 2:00 p.m. should be coded as "work time."

4. An employee of OVS is required to notify the office when she will be late or unavailable for work. An employee must telephone the office before 8:15 a.m. or within 15 minutes of that employee's start time. Appellant's start time was 8:00 a.m.

5. On February 24, 2012, Barnes telephoned the office after 9:00 a.m. to advise she had overslept and would not be at work that day. She did not advise anyone whether her time off should be attributed to FML. Her doctor had prescribed a sleep aid for a condition covered under her FML. The doctor directed Appellant take incremental doses until the most effective dose was found: one, or two, but no more than three pills in one night. With the uncertainty of the effectiveness of the prescription and dosage, it was not reasonably foreseeable prior to that night that Appellant would oversleep the next morning. The possibility of oversleeping after ingesting the prescriptive sleep aid did become reasonably foreseeable to Appellant only after she awoke on February 24, 2012.

6. A previous written reprimand had been issued to Appellant on February 2, 2012, for her inability to get along with coworkers. (Appellee's Exhibit 1.) Barnes had been counseled on time and attendance issues, as well as the office call in procedure, including having received a PIP for the period July 15 through October 10, 2011. (Appellee's Exhibit 2.)

7. Appellant had Americans with Disabilities Act (ADA) accommodations, as well as "unscheduled" FMLA status, which were in effect during the time of the alleged incidents. (Appellant's Exhibits 8 and 9.)

8. Barnes was issued "unapproved sick leave" for her February 24, 2012 absence.

9. The Cabinet employs a progressive disciplinary scheme. Barnes had previously been issued a verbal warning (August 15, 2011) and a written reprimand (Appellee's Exhibit 1 – February 2, 2012.)

10. The following Cabinet policies were in full force and effect during the time the alleged incidents occurred:

- CHFS Policy 2.1 (Employee Conduct); Appellee's Exhibit 5; and
- CHFS Policy 5.2 (Annual Leave); Appellee's Exhibit 6
- CHFS Policy 5.8 (Family and Medical Leave); Appellee's Exhibit 7;
- CHFS Policy 5.13 (Sick Leave); Appellee's Exhibit 8;

11. Barnes was not "caught," as alleged by Howard J. Klein, trying to dishonestly use FMLA for the purposes of attending a meeting with Mr. Linville—quite the opposite. When Barnes learned her meeting had lasted longer than expected, she e-mailed Ms. Stewart and requested one of her 10-minute breaks be appended to her lunch hour. When she was told this could not be done, she asked if another alternative would be possible: use of FMLA.

12. The Cabinet, in approving FMLA time for 2:00 to 4:30 p.m., viewed Appellant's request proper for that time period. At the time of Appellant's request, Christina Stewart did not know how to properly code the 1:30 to 2:00 p.m. time slot, only that FMLA time could not be used for this 1/2 hour period. There was nothing devious or untoward about Appellant's request.

13. On March 1, 2012, the Cabinet issued Barnes a 3-day suspension (March 6, 7, and 8, 2012); [Appellee's Exhibit 4.] This suspension was based on three separate charges:

(a) Unsatisfactory performance of duties – citing a February 3, 2012 incident;

(b) Lack of Good Behavior – citing the February 17, 2012 incident; and

(c) Lack of Good Behavior – citing the February 24, 2012 incident.

14. At the start of the evidentiary hearing, the Cabinet withdrew the first charge. Howard J. Klein, as appointing authority, testified that after deletion of the first charge, a 2-day suspension would have been warranted on the remaining charges.

CONCLUSIONS OF LAW

1. 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 for the unsatisfactory performance of duties. 101 KAR 1:345, Section 1. A suspension shall not exceed thirty days. 101 KAR 1:345, Section 4(1).

2. The Cabinet issued Barnes a 3-day suspension by letter of March 1, 2012 (Appellee's Exhibit 4). That suspension was based on three separate charges pertaining to

incidents occurring on February 3, 17, and 24, 2012. At the start of the evidentiary hearing, the Cabinet withdrew the charge pertaining to February 3, 2012. Per the testimony of Howard Jay Klein, Appointing Authority, that the 3-day suspension was based upon all three incidents, and that as the first charge was deleted, a 2-day suspension was warranted, it is concluded that under the current circumstances, the 3-day suspension was excessive.

3. It appears from the evidence, particularly from the testimony of Christina Stewart, Appellant's supervisor, that discipline was requested for the February 17, 2012 incident due to Appellant's alleged improper request for FMLA leave time for the period of 1:30 to 2:00 p.m.; and that Appellant failed to notify anyone she would not be returning to work at 1:30 p.m.

4. Just before 2:00 p.m. that day, Stewart received an e-mail from Appellant advising she had been late returning from lunch. It was at that time that Barnes requested use of one of her 10-minute breaks to be applied against being late. Barnes did not intend to make an improper request for FMLA leave time. It was only after Barnes was advised she could not tack on break time to lunch time, that she searched for another alternative and inquired whether FMLA time could be approved from 1:30 to 4:30 p.m. Her FMLA request was approved for the period of 2:00 to 4:30 p.m., but denied for the 1:30 to 2:00 p.m. period. Ms. Stewart testified she was not certain at that time how to code Appellant's time from 1:30 to 2:00 p.m., and had to consult with the OHRM.

5. The Hearing Officer concludes Barnes did not intend to improperly use FMLA time, but had been searching for available alternatives. The only fault in her behavior for that incident was returning late from her lunch meeting, which the evidence shows was less than thirty (30) minutes.

6. The March 1, 2012 suspension letter cited the February 17, 2012 incident as a violation of CHFS Personnel Procedures 2.1, Employee Conduct, and 5.8, Family and Medical Leave, and Lack of Good Behavior. (Appellee's Exhibit 4). The Hearing Officer concludes there was no violation of Policy 5.8, Family and Medical Leave for this particular incident. However, Appellant did violate Policy 2.1, Employee Conduct, Subparagraph II – Employee Conduct Guidelines 5, by failing to take her meal and break period as scheduled.

7. The third incident for which Appellant was cited, occurred on February 24, 2012. Appellant, by her own testimony, overslept that morning as a result of having taken at least three (3) prescriptive sleeping pills the night before. An employee is required to telephone the office between 8:00 a.m. and 8:15 a.m., or within 15 minutes of that employee's start time when she realizes she will be late or unavailable to report to work. The Appellant's work day begins at 8:00 a.m. It was sometime after 9:00 a.m. that Barnes had telephoned the office, spoken to a supervisor, and advised she had overslept and would not be coming in that day.

8. Appellant had been provided accommodation for her conditions of panic attacks and irritable bowel syndrome. She also had approved FMLA status. It was due to her panic attacks that Appellant had trouble sleeping. Her doctor then gave her a low dose sleeping pill, which he advised her to ingest in incremental dosages up to three (3) pills, to help her sleep. During that night, it would not have been reasonably foreseeable for Appellant to have

determined that she would require FMLA leave the next day. The contention of the Cabinet that she should have called during that night and left a telephone message with the employer, is absurd.

9. The notification requirements for FMLA leave are set forth in 29 CFR 825.302, Employee Notice Requirements for Foreseeable FMLA, and 20 CFR 825.303, Employee Notice Requirements for Unforeseeable FMLA leave. Both regulations make specific references to providing notice as soon as practicable. The definition of "practicable" is set forth in 29 CFR 825.302(b) as follows: ". . .in all cases, however, the determination of when an employee could practicably provide notice must take into account the individual facts and circumstances."

10. Furthermore,

> "when the need for leave is not foreseeable, an employee must comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. . ." 29 CFR 825.303(c).

11. The Appellant's circumstances on the evening preceding February 24, 2012, were unusual and resulted in a situation the following day which was not reasonably foreseeable. The evidence indicated Barnes took reasonable action in calling the employer immediately upon awakening to notify she would not be in to work that day. Her sleep problems were directly related to her stress, which condition was part of her eligibility under FMLA. On the evening of February 23, 2012, up to the time she awoke the next morning, the matter of oversleeping due to the dosage of sleeping pill recommended by her physician, was not reasonably foreseeable to the Appellant. However, since she did oversleep from a 3-pill dosage, then after February 24, 2012, any like dosage of the prescriptive sleep aid would indeed result in an oversleeping event which would be reasonably foreseeable to the Appellant.

RECOMMENDED ORDER

The Hearing Officer hereby recommends to the Personnel Board that the appeal of Oda Barnes vs. Cabinet for Health and Family Services,(Appeal No. 2012-060), be **SUSTAINED IN PART** as follows: The imposition of a 3-day suspension was based on three separate charges, occurring on February 3, 17 and 24, 2012. The agency, having withdrawn the charges pertaining to February 3, 2012, and there being a failure of a preponderance of the evidence to show that under the FMLA status accorded to Appellant, she violated any policy for the incident of February 24, 2012, the imposition of a 3-day suspension was excessive. The agency did, however, by a preponderance of the evidence show Appellant failed to properly notify her employer in advance for the incident of February 17, 2012, and so the imposition of disciplinary action for this single event is warranted. The evidence does not show that Appellant attempted to deceive the agency or otherwise improperly utilize FMLA time. Therefore, it is **RECOMMENDED** that the 3-day suspension be reduced to a 1-day suspension.

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.

SO ISSUED at the direction of **Hearing Officer Roland Merkel** this 5th day of February, 2013.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Michael Board
Hon. Paul Fauri