COMMONWEALTH OF KENTUCKY PERSONNEL BOARD APPEAL NO. 2012-069

ADAM DUNCAN APPELLANT

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

JUSTICE AND PUBLIC SAFETY CABINET DEPARTMENT OF CORRECTIONS J. MICHAEL BROWN, APPOINTING AUTHORITY

APPELLEE

** ** ** **

The Board at its regular March 2013 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated January 24, 2013, having considered Appellant's exceptions, Appellee's response and being duly advised,

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

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

SO ORDERED this _____ day of March, 2013.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Amber Arnett Hon. Michael Boylan Stephanie Appel

VS.

COMMONWEALTH OF KENTUCKY PERSONNEL BOARD APPEAL NO. 2012-069

ADAM DUNCAN APPELLANT

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

JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS, J. MICHAEL BROWN, APPOINTING AUTHORITY

APPELLEE

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This matter came on for an evidentiary hearing on September 27, 2012, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Geoffrey Greenawalt, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Adam Duncan, was present at the evidentiary hearing and was represented by the Hon. Michael L. Boylan. The Appellee Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Amber Arnett.

The issue at the evidentiary hearing was the Appellant's having been placed on agency-directed sick leave and any claims of discrimination based upon disability raised by the Appellant. The burden of proof was upon the Appellee to demonstrate the placement of the Appellant on agency-directed sick leave was in compliance with the applicable regulations and statutes. The Appellant was to bear the burden of proof on any claims of discrimination based upon his disability. The burden of proof on all issues was to be by a preponderance of the evidence.

BACKGROUND

- 1. The Appellant, Adam Duncan, timely filed his appeal with the Personnel Board on March 22, 2012, appealing from his placement on agency-directed medical leave and discrimination based upon his disability.
- 2. The first person to testify was **Amy Ganschow**, who has been with the Kentucky State Reformatory for 11+ years and is currently serving as a Personnel Administrator. In addition to her general duties involving human resource matters, Ms. Ganschow's duties include requesting new employment positions, facilitating employee appointments and handling

disciplinary actions. Ms. Ganschow is also responsible for creating and maintaining employee personnel files.

- 3. Appellee's Exhibit 1 was introduced into the record and is a copy of Kentucky State Reformatory Policy No. KSR 03-00-01, regarding employee leave regulations. Ms. Ganschow pointed to Sections 1-G, H, and I and stated this policy was given to all new employees during their orientation, which takes place during their first week on the job. This particular policy indicates that employees may be required to work overtime on a scheduled or unscheduled basis and that such overtime shall be mandatory if it is in the best interest of the institution.
- 4. Appellee's Exhibit 2 was introduced into the record and is the Appellant's written portion of the interview for his current position of Correctional Officer. This document is dated April 4, 2008, and was signed by the Appellant. Specific reference to Paragraph 6 was made, where the Appellant indicated that being required to work overtime was not a problem for him.
- 5. Appellee's Exhibit 3 was introduced into the record and is a copy of a time clock memo issued to all security staff and signed off on by the Appellant on June 1, 2008. Again, this document indicates that overtime must be scheduled and approved by an immediate supervisor to meet the needs of the institution and that said overtime shall be mandatory.
- 6. Appellee's Exhibit 4 was introduced into the record and is a copy of all the Appellant's time cards. From the entirety of this list, on the front page of Appellee's Exhibit 4, Ms. Ganschow condensed and set forth the specific dates in which the Appellant was required to work overtime.
- 7. Appellee's Exhibit 5 was introduced into the record and is a copy of the fitness for duty assessment given to the Appellant's physician to fill out. This form lists the essential requirements and duties of a Correctional Officer, including that mandatory overtime as required. As shown on this assessment, the Appellant's physician recommended that the Appellant be given a gap of 10 to 12 hours between shifts due to his chronic problems. This document is dated February 23, 2012. According to Ms. Ganschow, this document is forwarded to the Warden who decides whether or not an accommodation to the employee can be made. This document is kept in Ms. Ganschow's office in the employee's medical file, which is separate from his personnel file.
- 8. Appellee's Exhibit 6 was introduced into the record and is a copy of a written reprimand given to the Appellant on March 7, 2012, after he refused to work overtime on February 5, 2012.
- 9. Appellee's Exhibit 7 was introduced into the record and is a copy of the March 8, 2012 letter wherein the Appellee placed the Appellant on agency-directed sick leave, due to the Appellant's inability to work mandatory overtime. According to Ms. Ganschow, she drafted this particular letter on behalf of the Warden, Cookie Crews, because the Appellant's physician indicated he had permanent restrictions which prevented him from working overtime (which is an essential duty for all Correctional Officers).

- 10. The next person to testify was **Warden Clark J. Taylor**, who is the warden at the Kentucky State Reformatory, having started in said position on June 1, 2012. According to Warden Taylor, he is responsible for overseeing the medium-security institution with approximately 1960 inmates and 270 security staff. Mr. Taylor is the Appellee's appointing authority and indicated he has extensive experience handling disciplinary actions and directed sick leaves.
- 11. After reviewing the Appellee's Exhibits 5 and 7, it was Warden Taylor's opinion that placing the Appellant on directed sick leave was consistent with operating a 24-hour, 7-days a week, 365 days per year facility which has to be fully manned and secure at all times. According to Warden Taylor, overtime is clearly an essential requirement to being a Correctional Officer.
- 12. Appellee's Exhibit 8 was introduced into the record and is a copy of 101 KAR 2:102 with specific reference being made to Section 2(a)(2). This is the applicable regulation which allows an agency to place an employee on sick leave with or without pay if an employee is disabled by illness or injury. This also allows the Appellee to require the employee to provide a physician's statement certifying an employee's inability to perform his or her duties for the days or hours of sick leave requested.
- 13. According to Warden Taylor, Exhibit 5 clearly demonstrates that the Appellant is unable to perform an essential requirement of his position, the same being working an overtime shift. This document also indicates that the Appellant's restrictions were permanent. According to Warden Taylor, when overtime is necessary, they first look for volunteers. If there are none, then they mandate overtime based on a list, which is kept in order that such mandatory overtime is scheduled in a fair manner. According to Warden Taylor, accommodating the Appellant's restrictions by allowing for a 10 to 12 hour gap between shifts, clearly prevents the Appellant from working an overtime shift. Because the Kentucky State Reformatory must be able to mandate overtime to meet the minimum number of security staff and maintain institutional safety, he was unable to adhere to the physician's recommendation that the Appellant be allowed a gap of 10 to 12 hours between shifts.
- 14. Warden Taylor reviewed Exhibit 4 and indicated that 13 incidences of performing overtime were pretty low. He also noted that overtime requirements have been significantly higher in the last few years due to low staffing numbers. According to Warden Taylor, overtime for the year 2012 was just shy of one million dollars to date.
- 15. Warden Taylor also noted that it was Warden Cookie Crews who placed the Appellant on agency-directed sick leave because she was the warden at the Reformatory during that time period in question. However, Warden Taylor stated that he discussed the matter with Warden Crews and had a good idea of her thought process. Warden Taylor also reviewed Exhibit 5 and indicated that this form was required to be completed from all employees after any extended sick leave.

- 16. Appellant's Exhibit 1 was introduced into the record and is a copy of a fitness for duty assessment form for the Appellant, dated September 8, 2011, which sets forth the same permanent restrictions set forth on the document marked on Appellee's Exhibit 5.
- 17. Warden Taylor was asked to review Appellee's Exhibit 4 which demonstrates that the Appellant has worked no overtime since August 12, 2011. Warden Taylor did not know why the Appellant has not worked overtime from that date (until the directed sick leave went into effect). Warden Taylor indicated he knew of no change of circumstance which would explain this. However, upon review of Appellee's Exhibit 6, Warden Taylor indicated that the Appellant was at least asked to work overtime after August 12, 2011.
- 18. **Amy Ganschow** was recalled as a witness. Ms. Ganschow testified that the fitness for duty assessment form dated September 8, 2011, and marked as Appellant's Exhibit 1 was found in the Appellant's medical file. Ms. Ganschow was asked whether any action was taken on the form marked as Appellant's Exhibit 1, and she responded that there was not. When questioned as to why, Ms. Ganschow indicated she did not know.
 - 19. Ms. Ganschow's testimony marked the end of the Appellee's case in chief.
- 20. The next to testify was the Appellant, **Adam Duncan**. Mr. Duncan testified he was hired on April 25, 2008, as a Correctional Officer, working the 4 p.m. to 12 a.m. shift, i.e. the second shift. The Appellant indicated he had not received any complaints about performing his job duties and had even received an Employee of the Year award.
- 21. Mr. Duncan explained that his physical and mental health problems derive from his stint with the military. He currently suffers from bi-polar disorder with anxiety and depression. He also has an old back injury, which causes occasional pain. In addition, he is also diabetic and suffers from high blood pressure. Mr. Duncan indicated that at the time he was placed on sick leave he took medications for diabetes, arthritis, high blood pressure, and his mental condition.
- 22. When asked why his physician would have recommended a gap of 10 to 12 hours between shifts, the Appellant stated that he needed to have his medications working correctly. These medications not only help his mental condition, but also help him with sleep. He explained that he needs time to get in the right frame of mind in order to work a double shift. According to Mr. Duncan, he was first told by his physician, in June 2011, to try to keep a 10 to 12 hour gap between shifts. In spite of this, the Appellant worked some overtime as requested, which meant he could not take his medications. According to Mr. Duncan, it is not good for him to miss any doses of his medication. In fact, in the past, he has had to call in and miss work as a result of skipping doses of his medication.
- 23. The Appellant stated that he took the fitness for duty assessment form marked as Appellant's Exhibit 1 to his physician and then directly to work. From that point forward, he wasn't called on to work any overtime for a period of time. However, according to Appellee's Exhibit 6, Mr. Duncan admitted that on February 5, 2012, he did refuse to work the overtime,

and told his employer he had brought documentation in setting forth his permanent restrictions. The Appellant did not complain or file any grievances over this written reprimand. However, he did refuse to sign the document and the next day he was placed on agency-directed sick leave.

- 24. Mr. Duncan testified that mandatory overtime was typically required approximately once per week at the time he was placed on agency directed sick leave. Prior to that, he had not been called on for mandatory overtime for some time. Mr. Duncan was unaware of any changes which would have affected the strict mandatory overtime requirements. According to Mr. Duncan, his last full day at work was March 7, 2012, at which time he was able to fully perform the functions of his job and was prepared to continue to do so with the accommodations requested. He also stated that he could work approximately 4 hours of overtime if need be.
- 25. This matter is governed by 101 KAR 2:102, Section 2(2)(a)(2) and KRS 18A.140(1).
- 26. The Hearing Officer has considered the entire administrative record, including the testimony and statements therein.

FINDINGS OF FACT

- 1. The Appellant, Adam Duncan, was placed on agency-directed sick leave on March 8, 2012, based upon the fitness for duty assessment form dated February 23, 2012, and marked as Appellee's Exhibit 5, which demonstrates that the Appellant's physician recommended he maintain a 10 to 12 hour gap between working shifts due to his chronic health problems. These restrictions were deemed to be permanent. (See also Appellant's Exhibit 1).
- 2. The testimony of Amy Ganschow and Warden Clark Taylor, along with Appellee's Exhibits 1, 2, and 3, demonstrate conclusively that it is imperative for its safe and secure operation, that all employees of the Kentucky State Reformatory, including Correctional Officers, be available and able to work overtime. Further, Appellee's Exhibits 2 and 3 also demonstrate that the Appellant was well aware that working overtime was a mandatory part of his job.
- 3. The record demonstrates that the Appellant was not called on to work mandatory overtime between the dates of August 12, 2011, and February 5, 2012. However, on February 5, 2012, the Appellant was informed that he needed to work mandatory overtime due to institutional needs. At that time, the Appellant refused the request. See Appellee's Exhibits 4 and 6. There is no explanation of record as to why nearly 4 months passed between the Appellant's actual working of mandatory overtime and a request to do so. However, the testimony of Warden Taylor demonstrates clearly that the overtime needs of the Kentucky State Reformatory were increasing due to the staffing shortages during the year 2012.

- 4. It appears that the Appellant's refusal to work overtime on February 5, 2012, triggered Warden Cookie Crews to reconsider the Appellant's employment status and ability to perform the essential duties of his job. According to the letter dated March 8, 2012, and marked as Appellee's Exhibit 7, it is apparent that the Appellee, through Warden Crews, considered the Appellant's permanent inability to work mandatory overtime and the inability to place a Correctional Officer on light duty prompted the Appellee to place the Appellant on directed sick leave.
- 5. The record was devoid of evidence to suggest that working mandatory overtime was not an essential duty of a Correctional Officer or that working a light-duty shift as a Correctional Officer was feasible or fair to other Correctional Officers similarly situated.

CONCLUSIONS OF LAW

- 1. It is concluded that the ability to work mandatory overtime is an essential requirement for any Correctional Officer employed at the Kentucky State Reformatory and that due to the Appellant's physician's recommendation that there be a 10 to 12 hour gap between his work shifts, the Appellant was unable to meet such requirement.
- 2. Given the critical nature of a Correctional Officer being able to work mandatory overtime in order to maintain a safe and secure institution, and given that the record is devoid of any instance or inference that the Appellant has been singled out and improperly placed on agency-directed sick leave as result of his permanent restrictions, the Appellant has failed to demonstrate by a preponderance of the evidence, that he has been discriminated against.
- 3. Based upon a preponderance of the evidence, it is concluded that, pursuant to 101 KAR 2:102, Section 2(2)(a)(2), the Appellee properly placed the Appellant on agency-directed sick leave on March 8, 2012, and did so in a non-discriminatory fashion based upon the actual needs of the institution.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of ADAM DUNCAN V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS, (APPEAL NO. 2012-069) 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 Geoffrey Greenawalt** this _____ day of January, 2013.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK

MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Amber Arnett Hon. Michael Boylan