

**CERTIFICATION OF PERSONNEL BOARD RECORDS**

I certify that attached hereto is a true and correct copy of the Findings of Fact, Conclusions of Law and Recommended Order and Final Order in the case of **LAQUITA FOSTER V. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2019-019)** as the same appears of record in the office of the Kentucky Personnel Board.

Witness my hand this 18<sup>th</sup> day of November, 2021.

  
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**MARK A. SIPEK, SECRETARY**  
**KENTUCKY PERSONNEL BOARD**

Copy to Secretary, Personnel Cabinet

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2019-019

LAQUITA FOSTER

APPELLANT

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

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

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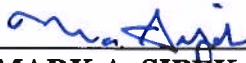
The Board, at its regular November 2021 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated September 30, 2021, and being duly advised,

**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 **SUSTAINED**.

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 18<sup>th</sup> day of November, 2021.

**KENTUCKY PERSONNEL BOARD**

  
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**MARK A. SIPEK, SECRETARY**

A copy hereof this day sent to:

Hon. Carmen Ross  
Laquita Foster  
Hon. Rosemary Holbrook (Personnel Cabinet)  
Jay Klein

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2019-019

LAQUITA FOSTER

APPELLANT

VS.

FINDINGS OF FACT, CONCLUSIONS OF LAW  
RECOMMENDED ORDER

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

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This matter came on for an evidentiary hearing on December 10, 2020 at 9:30 a.m. EDT, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky before the Hon. Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Laquita Foster was present and was not represented by legal counsel. The Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Carmen Ross. Also present was the Agency representative, Dawn Martin. The evidentiary hearing was conducted by video conference using Amazon Chime.

BACKGROUND

1. The Hearing Officer notes this appeal was filed with the Personnel Board on January 28, 2019. On the appeal form, the Appellant, a classified employee with status, indicated she was appealing a one (1) - day suspension. The Appellant further explained her claims in the narrative portion of the appeal from wherein she states, in full:

I was approved for FMLA – During suspension.<sup>1</sup>

2. The Appellant was issued a one (1) - day suspension in 2018 because on two (2) occasions, September 25 and September 27, 2018, she was scheduled to arrive to work at 8:00 a.m. and instead, arrived at 9:00 a.m. She had previously received a verbal warning and a written reprimand for similar offenses.

3. The Appellee called **Dawn Martin** as its first witness. She is a Field Services Supervisor with the Department for Community Based Services, Two Rivers Service Region, and has served in that capacity for two and one-half (2.5) years. She serves as Appellant's first-line supervisor. She stated that Appellant's duties consist of providing customer service including face-to-face interviews with clients.

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<sup>1</sup> FMLA - The Family and Medical Leave Act. A federal law that provides up to 12 weeks unpaid, job-protected leave to employees for certain family and medical reasons.

4. Martin introduced Appellee's Exhibit 1, which is a copy of the Time and Attendance Policy for the West Service Region. For employees such as the Appellant who start at 8:00 a.m., they must text, call, or email the supervisor by 8:15 a.m., if they are not going to be at work or if they are going to be late. Martin testified that this policy is necessary because the office must have adequate staff to serve their customers. Once she knows an employee will not show up or will be late, she can look at office coverage. The goal is to provide services for the customers without delay.

5. Martin testified that on September 25, 2018, she received a text from the Appellant at 8:29 a.m. stating, "I'm coming in." The Appellant arrived at 9:00 a.m.

6. Martin testified that on September 27, 2018, she received a text at 8:32 a.m. from the Appellant stating, "FMLA." The Appellant followed up with a text at 8:33 a.m. stating that she was coming in. The Appellant arrived at work at 9:00 a.m.

7. Martin testified that the Appellant did not follow the Time and Attendance Policy because her texts were received after 8:15 a.m. As a result, she received half-an-hour (.5) of leave without pay on September 25 and September 27, 2018.

8. Martin also reported these matters to her chain of command, which resulted in disciplinary action against the Appellant. Martin testified that she previously provided the Appellant with a verbal warning and a written reprimand.

9. Martin stated she was aware that the Appellant was approved for FMLA leave at the time of these events, however, the Appellant must still observe the call-in policy.

10. The Appellee called its next witness, **Howard J. Klein**, the designated appointing authority. He is the Assistant Director of the Office of Human Resource Management and has served in similar capacities for approximately twenty (20) years. He introduced as Appellee's Exhibit 2, a letter dated November 27, 2018, suspending the Appellant for one (1)-day.

11. Klein testified that he decided on a one (1) - day suspension because that was the natural progression. Appellant received a written reprimand on September 10, 2018. He felt that a one (1) - day suspension was progressive in approach. He also commented that this was the lowest level of discipline. He stated this was consistent with what they had done in the past with other employees. At the time Klein issued the suspension, he was not aware of the Appellant's FMLA status. He stated even if she was approved for FMLA in 2018, however, she still must abide by the Time and Attendance Policy. Klein did testify that the Appellant was approved for an accommodation under the Americans with Disabilities Act (ADA) in 2019.

12. The Appellant, **Laquita Foster**, testified that she has been employed with the Department of Community Based Services since 2016. She serves as a Case Management Specialist II. She has also served as an Equal Employment Opportunity (EEO) Counselor.

13. The Appellant testified she had no recollection of receiving a verbal warning. She testified that she did not agree with the designation of half-an-hour (.5) of leave without pay on September 25 and September 27, 2018. She stated she had an hour of overtime that she has never been paid for.

14. The Appellant reluctantly testified about her FMLA situation. She stated she suffers from Crohn's disease. She is required to take prescription medication that has side effects, including drowsiness, which disables her. Specifically, she testified that on September 25 and September 27, 2018, she was unable to get to the phone by 8:15 a.m., because she had to use the restroom as a result of her Crohn's disease. She stated that she texted Martin as soon as she could. The Appellant is pretty sure she told Martin she could not text sooner because of her medical condition.

15. Appellant stated that she had been a state employee for twenty-one (21) years. She stated she lives ten (10) minutes from the office. She also testified about her request for an accommodation under the ADA. She introduced as Appellant's Exhibit 1, an Agency letter dated March 28, 2019, approving her request for ADA accommodations.

16. The Appellee called **Dawn Martin** as a rebuttal witness. She testified that she was aware of the Appellant's medical condition during the two and one-half (2.5) years she supervised her. She does not recall whether there was any discussion of a medical emergency on September 25 or September 27, 2018, which prevented the Appellant from texting by 8:15 a.m. She stated that if she had been told that, she would have submitted the information to her chain of command.

### **FINDINGS OF FACT**

1. The Appellant was suspended for one (1) - day because, on September 25, 2018, she did not text the office until 8:29 a.m. that she would be late, and, on September 27, 2018, she did not text the office until 8:32 a.m. that she would be late.

2. Pursuant to the office policy, the Appellant was supposed to contact her supervisor by telephone, text, or email no later than 8:15 a.m., if she was going to be late, (Appellee's Exhibit 1).

3. The Appellant was unable to text her supervisor by 8:15 a.m. on September 25 and September 27, 2018, because of side effects of her Crohn's disease. The Appellant's supervisor, Dawn Martin, as well as human resource staff for the Appellee were aware of the Appellant's Crohn's disease and had in fact approved her for FMLA.

4. The Hearing Officer finds the Appellant's testimony credible when she testified that she was unable to text the office by 8:15 a.m. on these two (2) dates. This testimony is consistent with the Appellant's work record and her known medical condition. Also, the Appellant's testimony on this point was uncontradicted.

5. The Appellant notified her supervisor as soon as practicable that she would be in late on September 25 and September 27, 2018. It was not foreseeable that the Appellant would not be able to call by 8:15 a.m., until she was able to leave the restroom on these two (2) mornings.

6. The Appellant was suspended without just cause because she was unable to comply with the Time and Attendance Policy on September 25 and September 27, 2018, as a result of her medical condition.

7. The Appellant should not have been issued one-half hour (.5) leave without pay on September 25 and September 27, 2018 for the same reason.

### CONCLUSIONS OF LAW

1. The Appellee failed to carry its burden of proof that there was just cause for the Appellant's one (1)-day suspension. As a result, the suspension was excessive and erroneous. KRS 18A.095(2)(22).

2. As demonstrated by the Findings of Fact the Appellant contacted her supervisor as soon as practicable under circumstances that were not foreseeable. See *Oda Barnes v. Cabinet for Health and Family Services*, 2013 WL 1856184 (KY PB 2012-060) and *Twanya Kennedy v. Cabinet for Health and Family Services*, 2018 WL 6003563 (KY PB 2017-032 and 2017-186).

3. The facts of this case are almost identical to the case of *Oda Barnes v. Cabinet for Health and Family Services*, 2013 WL 1856184 (KY PB 2012-060). In both cases the Appellant was disciplined for violating the Time and Attendance Policy for a late call-in. In both incidents the Appellant called as soon as practicable under circumstances that were not foreseeable. See 29 CFR 825.303 and 29 CFR 825.302(e).

4. For the same reasons the Appellant should not have been charged without pay on either September 25 or 27, 2018.

### RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **LAQUITA FOSTER V. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2019-019)** be **SUSTAINED** and that the Appellant's one (1) - day suspension be **SET ASIDE**. Furthermore, the Hearing Officer recommends the Appellant: 1) be reimbursed for any leave already claimed on September 25 and 27, 2018, if applicable, 2) be permitted to use Appellant's leave as necessary and to be paid for a full "normal" work day as established by the Appellant's time sheet over the previous month and, 3) that she otherwise be made whole. KRS 18A.105 and 18A.095(24) and 200 KAR 12:030.

### NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this

Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any 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 Mark A. Sipek**, this 30<sup>th</sup> day of September, 2021.

**KENTUCKY PERSONNEL BOARD**



**MARK A. SIPEK  
EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:

Hon. Carmen Ross  
Laquita Foster