

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2017-034

FRANCISCO GARZA

APPELLANT

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

JUSTICE AND PUBLIC SAFETY CABINET,  
DEPARTMENT OF JUVENILE JUSTICE

APPELLEE

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The Board, at its regular January 2018 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated December 15, 2017, 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 18<sup>th</sup> day of January, 2018.

KENTUCKY PERSONNEL BOARD

  
MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. William Codell  
Hon. Brian Abell  
~~Mr. Rodney E. Moore~~  
Mr. Scott Whitaker

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This matter came on for evidentiary hearing on August 15 and 16, and October 12, 2017, at 9:30 a.m., EST, 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 virtue of KRS Chapter 18A.

The Appellant, Francisco Garza, was present and represented by the Hon. Brian Abell. The Appellee, Justice and Public Safety Cabinet, Department of Juvenile Justice, was present and represented by the Hon. Adam Adkins, accompanied by Paralegal, Ms. Tiffany West. Also present was the Agency representative, Ms. Billie Monk.

The issues in this case pertain to Appellant's claims that he (1) was subject to constructive discharge, (2) had been discriminated against based on his disability and veteran's status, and (3) had been retaliated against. The burden was on the Appellant to prove his case by a preponderance of the evidence.

The Hearing Officer discussed the matter of stipulations raised in the Appellant's witness and exhibit list. The parties stipulated Appellant had been issued a 2014 and 2015 Annual Employee Performance Evaluation and that said documents could be referred to throughout the hearing. There were no other stipulations. The Hearing Officer did not take judicial notice of any matter. The rule separating witnesses was invoked and employed throughout the course of the hearing.

Mr. Adkins advised that one of his witnesses, LaDonna Koebel, would not be available on the second day of hearing due to being subject to a subpoena in a criminal case. He requested Ms. Koebel's testimony be taken out of order. Appellant objected. The Hearing Officer **GRANTED** Appellee's motion and stated Ms. Koebel may testify out of order immediately after the lunch recess on Day One.

At the request of counsel, three witnesses who were present in the Personnel Board waiting area, were brought into the hearing room. The Hearing Officer explained the rule separating witnesses and admonished them not to discuss the case or their testimony with each other or with anyone else. Each counsel then presented their respective opening statements.

## BACKGROUND

### **First Day of Testimony**

1. The first witness for the Appellant was the **Appellant, Francisco Garza**. For approximately three years, Mr. Garza had been employed by the Justice and Public Safety Cabinet, Department of Juvenile Justice (DJJ) as a Corrections Instructor Coordinator II. He is a high school graduate and, in 1993, graduated from military police school. He has completed an Associate's Degree and is currently pursuing a Bachelor's Degree. In 1992, he joined the United States Army, where he served as a Military Policeman. While in the military, he served in Korea, Germany, Bosnia, Guantanamo Bay, Iraq, Afghanistan, and several bases in the United States. He has been awarded the Bronze Star, Military Service Medal and, in 2013, received an Honorable Discharge.

2. He identified Appellant's Exhibit 1 as his military DD-214 form (sealed in the record).<sup>1</sup> While serving in combat in Iraq, he witnessed many deadly events, including a suicide bomber. There were several instances where he witnessed the death of many of his soldiers. At Guantanamo Bay, detained terrorists threw urine, feces and vomit at him and other soldiers while they still had to treat the prisoners with dignity.

3. From his experiences in the service, he suffered sleepless nights, feelings of helplessness and other problems. In 2011, at the request of his commander, he began to see a psychiatrist. When he retired from the military, he began counseling through the Veteran's Administration and started seeing Dr. Shaw at Fort Knox, Kentucky. Appellant was then diagnosed with Post Traumatic Stress Disorder (PTSD).

4. Appellant had been an instructor in the military and had experience dealing with children and incarcerated adults. He applied for an employment position as an instructor with DJJ. In March 2013, he was hired by Billie Monk, the Training Branch Manager. He started as an Instructor Coordinator I and, in 2015, was promoted to Instructor Coordinator II at Pay Grade 14.

5. During his employment, he received two "Good" Annual Employee Performance Evaluations. Ms. Monk was his direct supervisor and Grace Smith, Director of Professional Development, was his second-line supervisor.

6. Mr. Garza described his duties, as well as how and where academy trainings occurred. Newly hired employees attended a five-week academy session. These academies

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<sup>1</sup> The parties indicated they did not see the necessity for sealing Appellant's testimony in the record.

were held four times a year. Appellant taught ethics, report writing, motivational interviews and Aikido Control Techniques.

7. He identified Appellant's Exhibit 3 as an email chain of September 10, 2013. The Training Branch needed projectors for use in the field. Appellant wanted to know the conditions under which the projectors would be used in order to determine the adequate amount of lumens. In her email, Ms. Monk stated she did not ask him for any information on lighting and told him to look at the link. He told her 500 lumens was not a lot of light.

8. During the first six months of his employment, he had two types of relationships with Ms. Monk. At times, she was "cordial, a nice lady." Other times, she was mean and nasty when Appellant asked questions or told her something she did not want to know. She regularly told him to "Shut the f—k up."

9. He identified Appellant's Exhibit 4 as an email chain of October 31, 2013, discussing t-shirts that had been purchased by Ms. Monk for the trainers. A training took place at Eastern Kentucky University, when a box of t-shirts arrived. Garza took the shirts to Ms. Smith, who was on the premises. Smith told him to open the box, find Smith's t-shirt and give it to her. He did so. He asked what was to be done with the remainder of the shirts. Ms. Smith told him to distribute them. The trainers took their respective shirts. Monk wanted to know who had passed out the t-shirts. He told Monk, "I am the mysterious shirt distributing outlaw, I apologize and will await my punishment."

10. Garza did not know that Ms. Monk wanted to pass the t-shirts out herself. She was very upset. That is why Appellant said, "can we get on with 'real stuff'" in his email. He interpreted her responses as humiliating.

11. Appellant described his subsequent relationship with Monk as "up and down." He identified Appellant's Exhibit 5 as an email chain of June 27, 2014, from Gary White to others. Appellant's relationship with Smith at that time was without problems.

12. Ms. Smith started to yell at Appellant beginning May 2015 and, thereafter, once or twice a week.

13. He identified Appellant's Exhibit 6 as an email chain of September 4, 2014. Ms. Monk reminded the trainers about mileage requirements in order to lodge during an academy training. A trainer had to live more than 40 miles from the site or his workstation had to be more than 40 miles from the site in order to qualify for lodging. Trainers could also receive mileage reimbursement when they traveled to and from those sites.

14. Mr. Garza's understanding was if one taught during a training session, that individual could lodge the night before. When this occurred, he set up his classroom the night before. He would usually stay a full eight hours at the site on his training days. If he were only required to be on site one day, he would not stay overnight. He would drive back and forth. It is

111 miles from his house, which takes him one hour and 15 minutes to drive one way. When he goes to a training, he usually stays three nights.

15. He identified Appellant's Exhibit 7 as an email chain from August 2015 detailing work schedules for an upcoming academy. Normally, no distinction was made for lodging purposes between those who trained in the morning and those who trained in the afternoon. Appellant had always been allowed lodging if he trained more than one day. That "policy" was in effect at the time of these emails.

16. He identified Appellant's Exhibit 8 as an October 2015 email chain between Ms. Monk and himself. Every Friday the trainers are required to submit the following week's itinerary. The original email told the trainers to make sure their itineraries matched the training schedule. He informed Ms. Monk that the trainers never got the academy schedule until it was signed off. Trainers did not know the academy schedule before they filled out their itinerary. After October 20, 2015, the trainers started to receive the schedule before having to submit their itineraries.

17. The phrase "hot minute" was a critical remark Ms. Monk had made to him. She would criticize him for making comments and tell him, "You have only been here a hot minute." That is why he said it in his own email. She was always attacking Appellant; that he did not know anything and no one wanted to hear what he had to say. She talked to the Appellant that way in public and in staff meetings, as well as behind closed doors.

18. In Appellant's Exhibit 9, an email chain of February 2015, Ms. Monk explained the policy on meals: meals were limited to trainers except if one stays overnight. Appellant replied to her, concluding his comment with a smiley face, that there was no confusion as some others knew they were wrongfully taking meals. Had he been the one to have been taking those meals wrongfully, he would have been disciplined more harshly than Monk's description of the situation as "confusion." She responded, "At ease, Commander!!!!!!!!!!!! we know." Monk knew Appellant had been in the military, as she had possession of and seen his DD-214.

19. Appellant's Exhibit 10 is an email between Billie Monk and the Appellant. At 1:05 p.m. on September 25, 2015, Ms. Monk stated she was "waiting on itineraries." He responded that Monk had told them to submit the itineraries before the close of business (COB). She replied, "Hush and send me that." Appellant had a habit of occasionally forgetting to send in his itinerary, but sometimes trainers waited until the end of the day on Friday to send them in.

20. Appellant's Exhibit 11 is an email chain of February 11, 2016, between the Appellant and Ms. Monk. Grace Smith had been detailed to a position at Central Office at that time. Kristie Stutler was detailed to assume responsibilities of the Training Branch. Appellant asked if Ms. Stutler was going to be Director of Professional Development. Monk replied no, this was just temporary. When Appellant stated, "I like it when a plan comes together," Monk replied, "Shut up Frank."

21. In 2013, Appellant and others were tasked with the duty of preparing a facility in Elizabethtown for an academy training. Appellant examined the bathrooms and noticed they had respective signs, male and female. When he entered the male bathroom, he noticed it had a holder for sanitary napkins. The female bathroom did not. In order to get the facility ready, he changed the signs on the bathrooms.

22. A few days later, Ms. Monk inadvertently walked in on Mr. Reed in the men's room. Reed told her Appellant had changed the signs. Monk later asked Appellant, "Frank, who told you you could change signs?" Appellant stated he was told to get it ready and he made a common sense change. Monk replied, "Well, you are not paid to think, you're just paid to do. You don't need to be changing no doggone signs. I just walked in on John." Appellant asked a follow-up question and she told him, "Shut up, Frank."

23. This was the first time he had such an interaction with Ms. Monk. He had been through military basic training where he experienced instructional yelling. This was different. "I had never felt so humiliated in my life." This conversation had taken place in the presence of other staff.

24. In July 2013, Appellant and the trainers were at Bluegrass Army Depot. Appellant's daughter had come and stayed with him for the summer. The training was conducted in classrooms on the second floor of the golf course Pro Shop. The first floor was the Pro Shop and snack bar, which continued operation for golfers. Appellant's daughter came with him to the Pro Shop. He asked her to stay on the first floor, watch television and feel free to use his car.

25. At lunchtime, Grace Smith came downstairs and Appellant introduced her to his daughter. The meeting was very cordial. Appellant's daughter never came to the second floor or interfered in any way with the classes.

26. The following week, Ms. Monk asked Appellant why his daughter had been at the training site. He told her he was going to take her, later that day, around the mountains near Corbin. Monk told him that Ms. Smith did not appreciate him having his daughter there. He told her he had introduced his daughter to Smith and heard nothing contrary about it. Monk replied, "Well, I'm going to tell you your daughter has no place being up there. That is for Training Branch purposes only... Your daughter has no right to be there."

27. Appellant told her that his daughter is a Department of Defense dependent and has her own military ID card, which allows her entrance to the post, even in Appellant's absence. Monk replied, "As long as you work for me, your daughter won't be anywhere near this academy training center."

28. An issue arose pertaining to academy linens. Ms. Monk was not onsite for this academy. Ms. Smith was onsite. All the trainers discussed the matter and decided it was an academy issue, so they informed Ms. Monk, the academy Training Branch Manager. She directed that, as Ms. Smith was located on premises, Smith should be advised.

29. Ms. Smith got angry because the trainers had not contacted her first. She came into the room and slammed the door. Mr. Settles, Mr. White and the Appellant were sitting at their desks. Smith started yelling at them, but never told them why she was angry. Appellant started taking notes of Smith's statements. Smith responded, "Frank, put that goddamn pen down and look at me." He put the pen down and said, "Ma'am, I don't appreciate being talked to like that." She replied, "I'll talk to you any way I want."

30. On June 6, 2016, Appellant had gone into the dining hall of an academy training at Red River Gorge State Resort Park. From the middle of the cafeteria, Ms. Monk called out Appellant's name, snapped her fingers and pointed for Appellant to come and sit. Appellant told Monk, "Billie, I don't like being snapped at." She replied, "Shut up, Frank. I own your ass for 37.5 hours. Sit down." Appellant sat down. Ms. Monk started talking about the following week's training schedule.

31. The following Wednesday, Appellant, Mr. Campbell and Ms. Shaw were all sitting at the lunch table. Ms. Monk came over and said she needed them up there all next week, and Mr. Campbell would be lodging. Appellant asked if he could lodge and Ms. Monk, after a while, approved lodging for all of them.

32. On Thursday, Appellant sent a lodging request to Ms. Hartman.

33. On Friday, Appellant received an email from Ms. Monk telling him he did not need to lodge and his request was denied. She explained they were cutting down on costs. Appellant believed he was being picked on. Ms. Shaw and Mr. Campbell got to lodge. Monk told Appellant they would talk about the subject later. Appellant told her he was an instructor who lived the greatest distance from the site.

34. The following Monday morning Appellant had an appointment with his psychiatrist. He had previously advised Ms. Monk of this appointment. While in session with his psychiatrist, Appellant received a text from Monk about 9:00 a.m., reminding him that she and Appellant were supposed to have a meeting.

35. After his session, he met with Ms. Monk in Elizabethtown. She yelled at him, "You don't tell me what to do. I tell you what to do." He responded affirmatively and she said, "You're not going to lodge, I have made that decision. I don't see why you have got to be so damned difficult." Appellant testified that Monk just kept going on and on. He told her he would be back.

36. Mr. Garza went to another building and got John Reed to accompany him back to the meeting with Ms. Monk. He was tired of being yelled at and had had enough. When he returned to the meeting, Monk immediately ended the meeting and said she and Appellant would discuss it with Ms. Smith in Frankfort. She then told Reed to leave and he did.

37. After Reed left, Monk began yelling at the Appellant. "Frank, we have got things to discuss." Garza asked if the meeting was not over. She stated, "Shut up. Sit down."

Appellant sat down and she started talking about Appellant and his mouth, always having something to say, and being "so damned difficult."

38. She then reached into her purse and retrieved a piece of paper. She said, "Frank, I have got this anonymous letter against you." Appellant read it and asked what made her think that it was against him, as the letter did not identify anyone except Grace Smith. He believed it contained "unreasonable" accusations. He told her the only accusation that fit him at that time was that he cussed when he trained. He asked for a copy of the letter, but Ms. Monk refused to give one.

39. "I had enough. You just go to Rough River." And she snapped her fingers. "You go lodge if you want to."

Appellant went and sat in his office for 10 to 15 minutes. He then went home with the intention to pack and go to Rough River. Once at home, he sat down, typed the resignation letter and took it in to Ms. Atcher. He had had enough. Ms. Monk's conduct toward him interfered with his ability to do his job. He no longer wanted to be around her or Ms. Smith. Ms. Monk was the primary reason he resigned.

40. He identified the first page of Appellant's Exhibit 12 as the June 13, 2016 resignation email he sent to Billie Monk and Nicole Hartman, with cc to Grace Smith and Cynthia Atcher. Attached to that email was (page 2 of the exhibit) a letter detailing his reasons for resignation. He had resigned "effective immediately."

41. He identified Appellant's Exhibit 14 as the June 14, 2016 letter he had written to Commissioner Koebel to provide a "snapshot" of what he had gone through. This letter was made an attachment to the email he sent (Appellant's Exhibit 13). "I made a rash decision to resign and I was trying to explain to her that, after calming down, thinking about it...I spoke to my mentor [who told me I should not resign]." He did not want to resign, but felt there was no other way to resolve this. The grievance process would not have worked. Grace Smith was in charge in Personnel.

42. John Reed, Kelly Hibbitts and all his coworkers previously told him that if he filed a grievance, things would only get worse. He felt the letter was the only way to relieve the situation. "I felt no other recourse."

43. Appellant takes 100 mg. of Zoloft to help with his depression and anxiety resulting from PTSD. He had not been on this medication at the time of his hire. He was prescribed the medicine in 2014 when he was having a hard time adjusting to what was going on at work via the treatment by Ms. Monk.

44. In December 2015, academy personnel and three individuals from Louisville were in attendance at a staff meeting. They discussed the direction of future academy classes. Ms. Monk addressed the issue of how trainees dressed for the academy. Trainers explained that emails go out to superintendents advising them of the proper dress code for trainees. Monk



stated, "Well, you need to get more involved. They should know." Appellant told her that Mr. Campbell sends out three emails on the subject and asked why that burden did not rest with the superintendents. Trainers had no recourse over how trainees are dressed or whether they are wearing outlandish jewelry.

45. Monk responded, "Frank, ain't nobody here going to listen to what you gotta say." (sic) Appellant stood up to leave and Monk said, "Frank, what are you doing?" He told her he was leaving, as she was not going to listen to what he had to say. She responded, "Frank, shut up and sit your ass down." He sat down and felt embarrassed because "everyone was there." He felt that every time he expressed a rational thought, he was yelled at.

46. Grace Smith often told the trainers "snitches get stitches" and that if anyone complained about anything, it would not go well for them. Ms. Monk was present at times when Smith made that statement. He felt that if he had not resigned, but instead merely sent the letter to the Commissioner, he would be subject to reprisal. He felt he was subject to that most of the time.

47. On May 15, 2015, he and others were in attendance at an outdoor academy graduation. Appellant wore a suit and a hat. The colors were presented and Appellant stood to face the flag while at attention. The national anthem played and Appellant saluted. The graduation proceeded and ended.

48. Subsequently, Grace Smith approached him and said, "Frank, next time the national anthem is playing, you will take your hat off." He told her he provided the proper honors to the flag. She replied, "I don't care. You will take your hat off." He told her again that as a former combat veteran, he was allowed by law to present a salute; in so doing, he was not required to remove his hat. She became angry and stated, "You will take your hat off while I am the Director of Professional Development." He responded, "Yes, ma'am" and went inside. Ms. Smith had made him feel worthless. He has the utmost respect for, and would be the last person to disrespect, the flag.

49. After he had sent his resignation letter, an EEO investigation began. The EEO investigator asked Appellant who they should speak to. He was advised he would be interviewed the next week. He was never interviewed. Three weeks later, he called to ask about his interview. He was told his interview was not needed, as they had all the information they required.

50. While in the military, Appellant had conducted a number of EEO investigations as part of his investigative tasks. He always began those investigations with an interview of the complainant and sometimes followed up with a second interview. He never conducted an investigation without interviewing a complainant.

51. Billie Monk "is like a Dr. Jekyll and Mr. Hyde." She would let Appellant go whenever he had medical appointments. However, she was not a good judge of character.

However, an email of August 12, 2013, to Ms. Smith (Appellee's Exhibit 7) shows Appellant identified Smith and Monk as being "good judge of characters."

52. He identified Appellee's Exhibit 1, page 1, as the document appointing him to his position on March 16, 2013, with pay up to midpoint. He was hired by Ms. Smith and Ms. Monk, who knew he was a veteran at that time. Page 2 of the document shows he received a five percent pay increase when he came off probation. Page 4 shows that, in 2014, he received an annual pay increment increase. Page 5 shows he was reclassified and received a five percent increase at the request of Ms. Monk.

53. On May 7, 2014, Appellant sent an email to Grace Smith requesting approval of outside employment as a volunteer firefighter (Appellee's Exhibit 2). That request was approved.

54. Appellee's Exhibit 3 are the signature pages from Appellant's 2014 and 2015 Annual Employee Performance Evaluations. Each year he received a score of 360, which was in the "Highly Effective" range. He had agreed to both evaluations. He has never received any disciplinary action during the entirety of his employment.

55. At no time had Appellant ever advised Ms. Monk in writing that she had treated him badly. In the spring of 2015, he spoke directly to Ms. Smith, as well as Ms. Monk, with that belief.

56. He identified Appellee's Exhibit 4 as a May 2016 email he sent telling Ms. Monk "Thank you, I love you!!" in response to getting time off.

57. He identified Appellee's Exhibit 5 as a June 20, 2017 email he sent to Ms. Monk telling her "I love you too Mama :)".

58. He identified Appellee's Exhibit 6 as a May 3, 2016 email he sent to Ms. Smith where he addressed her as "Mama". He read the entirety of the email into evidence.

59. He identified Appellee's Exhibit 8 as the June 27, 2014 email he sent to Ms. Smith stating, "You have the best employees in the state." Appellant never notified anyone in writing of bad treatment prior to his resignation.

60. He acknowledged having received a copy of the Employee Handbook and that he had reviewed it, particularly sections on retaliation, discrimination, and grievances. He identified Appellee's Exhibit 10 as the Employee Handbook where, on page 92, it details the procedures for filing a grievance. He never filed a grievance nor notified the Agency of any mistreatment prior to his resignation.

61. Appellee's Exhibit 9 is the form Appellant signed acknowledging he had received a copy of the Employee Handbook. Appellee's Exhibit 11 is the form he signed acknowledging he had reviewed the policies, agreements, and handbooks listed on that form. Appellee's Exhibit

12 is an email of May 2013 to Ms. Smith where he stated he had reviewed the 500 Series policy. He was aware of the grievance policy set forth in Appellee's Exhibit 14.

62. Appellant may have called Ms. Smith or Ms. Monk "Hitler" but does not recall any specific event. He may have called Cynthia Atcher the same, as one can hear her coming down the hall. He admitted calling someone "Hitler" is offensive.

63. He acknowledged Appellee's Exhibit 15 is his email to Ms. Monk referring to Atcher by "Hitler is here to make sure we do that right." He also made a separate reference to the "Gestapo", with both references having been made only to refer to authoritative natures.

64. On Monday, June 6, 2016, Ms. Monk told him and Mr. Campbell the schedule for the following week. Appellant told her he did not mind attending all week, but would need to lodge. Appellee's Exhibit 18 is an email chain of June 9, 2016, when Appellant made a request to Nicole Hartman for lodging.

65. He was scheduled to teach on Wednesday of that week and Ms. Monk had approved his being there all week. She later changed his schedule of attendance.

66. He identified Appellee's Exhibit 19 as the June 13, 2016 email exchange with Ms. Smith following submission of his resignation letter. He did not ask to rescind his resignation at that time. Policy requires an employee give 14 days' advance notice of resignation. He did not give such advance notice.

67. He identified Appellee's Exhibit 20 as the June 14, 2016 email sent to him from Ms. Smith at 9:39 a.m. stating, "Resignation accepted." Appellant did not see that email at that time. On the evening of June 13, 2016, Appellant had spoken to one of his coworkers and told him "I messed up"; that he was not in the right frame of mind. The coworker recommended he call Sharon Cook to see what could be done and to send a letter to Commissioner Koebel. He subsequently called Sharon Cook at Personnel to ask if he could rescind his resignation. She acknowledged she had his resignation on his desk and advised that the only person who could rescind it was Commissioner LaDonna Koebel.

68. He then sent an email to Ms. Koebel on June 14, 2017, immediately after the telephone call with Ms. Cook. This email was sent after Ms. Smith had accepted his resignation. He advised Commissioner Koebel that he wanted to "pull" his resignation. "I did make a mistake" by resigning. "I really loved my job. I enjoyed doing my job."

69. He acknowledged that he had sent an email (Appellee's Exhibit 21) at 3:49 p.m. on his DJJ account. The contents were written by Mr. Hibbitts as a suggestion for the language to use in an attempt to rescind his resignation.

70. Appellant was unaware there was any policy pertaining to family members at training sites. Counsel then presented him with policy (Appellee's Exhibit 22) and referred to Section IV.(E). Appellant stated the training held at Bluegrass Army Depot was on the second

floor of the facility. His daughter was never on the second floor. He was later told his daughter's presence was unprofessional. While training was ongoing, the Pro Shop continued to be used by others, particularly military personnel and dependents. He disagreed that anything unprofessional happened as a result of his daughter's presence.

71. He identified Appellee's Exhibit 23 as the June 16, 2016 letter he received from LaDonna Koebel, Acting Commissioner.

72. None of his physicians or mental health service providers had ever issued Appellant any work restrictions. Although his psychiatrist advised him he should probably leave his job, Appellant did not want to do so. Instead, the psychiatrist taught Appellant the utilization of coping mechanisms. Appellant had never asked for any accommodations from his employer.

73. In reviewing Appellee's Exhibits 4, 5, and 6, he testified that in the May 16, 2016 email, when he told Ms. Monk that he loved her, she responded, "Shut up Frank." In his emails to Ms. Smith showing such terms of affection, Appellant testified he was trying to find "an out" to being yelled at. He was trying to reach out so they would not yell at him. In the teaching branch, one either has to conform or one is "belted down." He was trying to conform and trying to let things go.

74. He is currently taking prescribed Zoloft. It initially made him feel good and he could ignore Smith and Monk for a while. But after a while, he had to get his medication increased. Thereafter, 100 mg. of Zoloft was just not enough.

75. He referred to Ms. Monk as a "Dr. Jekyll and Ms. Hyde" as she is a real nice lady until she turns into a mean person. One day you can do something, and the next day you are not supposed to do something. If he did what Ms. Smith instructed him, Ms. Monk would yell at him. If he did what Ms. Monk told him to do, Ms. Smith would yell at him. He believed Grace Smith is an intimidating presence, and when she yells "it is scary."

76. When he referred to someone as "Hitler" it was in reference to a matter of control. It was not meant to be an anti-Semitic statement. It referred to the work environment.

77. By agreement of the parties, the testimony of Appellee's witness, **LaDonna Koebel**, was taken out of turn. Ms. Koebel has, since October 1, 2016, been employed by the Personnel Cabinet as Chief of Staff. Prior to that time, from February 16, 2016, she was employed as Acting Commissioner for the Department of Juvenile Justice. In that position, she was the Appointing Authority for all personnel decisions.

78. On Monday, June 13, 2016, Ms. Koebel received a forwarded email showing Appellant had resigned. She telephoned Grace Smith and asked what was going on. Smith told her Appellant had accepted another position somewhere else and resigned. Smith said she was going to accept the resignation. Ms. Koebel indicated she was alright with that action.

79. She sent the email, with attachments (Appellee's Exhibit 24), to the Personnel Branch and to Brenda Wood in EEO, as it was the first time she had been made aware Appellant had concerns about his work environment. She asked that Mr. Garza be contacted for an exit interview. She wanted his stated concerns to be addressed. It sounded to her like Appellant just "had a bad day at work" and had a dispute with his supervisor. The phrase "constructive discharge" never entered her mind.

80. Ms. Koebel, in her capacity, could accept resignations. Resignations could also be accepted by other employees who had signature authority, including Grace Smith. There were no options available other than to accept a resignation. The only person who could reverse a resignation was Ms. Koebel.

81. With reference to Appellant's Exhibits 13 and 14, those came to her email on June 14, 2016. However, she was out of the office that day at Lake Cumberland, and did not open the emails until the following morning. As she was out of her office, Ms. Smith had authority to accept the resignation.

82. Pursuant to the Employee Handbook, if something is going on in the workplace, an employee should notify his supervisor. However, if the supervisor is the problem, one would contact the agency EEO Coordinator or the HR Branch Manager to make a report. The Personnel Cabinet website lists all the EEO Coordinators an employee may contact. That website, as well as the Employee Handbook, detail what an employee should do if they feel they are harassed. If Appellant was unhappy with his work conditions, there were procedures in place available for him to follow instead of resigning.

83. She has seen grievances filed by employees of the Training Branch. None of those employees suffered retaliation as a result. There are policies in place to protect employees from retaliation after they have filed a grievance.

84. With regard to resignations, the Department could not treat some employees differently from others. They could not give employees time to think about their resignations and change their minds. "If they resigned, they resigned."

85. She was not aware, prior to Appellant's resignation letter, that he had PTSD or had made any requests for disability accommodations. She did not treat Appellant any differently because of his veteran's status.

86. The Kentucky Administrative Regulations (KAR) require that if an employee fails to give a 14-day notice in a resignation, the employee would forfeit any accrued time or leave. The Agency practice was to enforce forfeiture for all employees who failed to give that notice, and that was done in Appellant's case.

87. She identified Appellee's Exhibit 25 as the July 11, 2016 Memorandum of Concern from Brenda Wood. This Memorandum detailed Ms. Wood's findings of her

investigation into Appellant's allegations. Wood concluded there was a lack of evidence to substantiate the allegations of a hostile work environment.

88. Resignation acceptance, in this case on June 14, 2016, at 9:49 a.m., was effective when the agency sent such acceptance to the employee. She did not believe an employee could rescind a resignation prior to acceptance by the agency. She then testified that the resignation was effective when it was tendered by the Appellant.<sup>2</sup>

### Second Day of Testimony

89. The next witness for the Appellant was **Ronnie W. Bowman**. Mr. Bowman has been employed by state government since 2001, and has worked for the Department of Juvenile Justice, Training Branch, as a Corrections Coordinator II for about four years. He has worked with the Appellant at the Training Branch, although he himself is stationed in Lexington.

90. Bowman has heard Appellant curse, but not during training sessions. It usually occurred after hours when both of them were "cutting up." He believed Mr. Garza had a good work ethic and good mood. He thought everyone thought Appellant did really well at work. He often hung out with the Appellant and went fishing with him.

91. Billie Monk is Mr. Bowman's direct supervisor and Grace Smith his second-line supervisor. Ms. Monk is a "real forward person." If you have done something wrong, she lets you know. He has not really been yelled at, however, Monk speaks in a very firm manner.

92. He is of the opinion that if one "tells on someone else" in DJJ, that would be trouble. He has been told "Ronnie, that would be career suicide." He has heard Ms. Monk tell the Appellant to shut up. Monk has also told him to shut up.

93. He was familiar with the use of the phrase, "Frank said..." In staff meetings, it was used as a joke. It meant that they did not want to hear anyone say "Frank said..."

94. It took a while for Mr. Bowman to adjust on the job to his supervisors being "firm and forward." Less than six months ago, he told Ms. Smith that she was creating a hostile work environment by the way she had talked to him. He had filed a grievance in the past and knew that you had to let someone know about problems by putting it on paper. There was a situation he felt it necessary to talk with Monk and Smith. After their talk, the matter was resolved.

95. **William A. Campbell**, who, for the past 10 years has been employed by the Department of Juvenile Justice in the Professional Development Training Branch as Cabinet Coordinator, offered his testimony. An academy had been held at Rough River Dam State Park in 2016. There was an informal meeting that morning at the breakfast table. Appellant was the

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<sup>2</sup> Due to certain time constraints, the first day of hearing was concluded. Appellee had concluded its direct examination of Ms. Koebel. It was agreed by the parties that Ms. Koebel would return on the third day of hearing, and such testimony would begin with cross-examination by Appellant's counsel.

last person to arrive. Campbell, Wanda Shaw, and Billie Monk were sitting at a table. Monk raised her hand to summon the Appellant over and snapped her fingers, as if to say, "Hurry up and get over here." Campbell did not think anything of it. Ms. Monk was Campbell's supervisor. He felt Mr. Garza was his (Campbell's) own "right hand."

96. Mr. Campbell has been yelled and cursed at while at DJJ. He had been performing daily checks on mechanical restraints. He received a telephone call from Ms. Monk, who told him to make sure to do these checks on a regular basis. Some expletives were said, like to make sure "the damn check's on time, like you're supposed to." Campbell replied that he had done it, and also "used some choice syllables." He did not take the matter personally. He found out that, as Grace Smith was in the building with him, she, as a practical joke, told Ms. Monk that Campbell had missed that particular item. It was then that Monk responded to Campbell with her phone call. Campbell stated he was not going to get fussed at for something he had already done.

97. He has seen Ms. Monk yell at Mr. Garza as often as she yelled at any of the rest of them. All of the group have jokingly used the term "snitches get stitches." There is no culture that employees should refrain from reporting on others. Campbell has reported matters regarding juveniles and academy trainees. It is part of his duty to send a daily report during an academy.

98. He has heard Ms. Monk tell Appellant to shut up. She has told Campbell the same thing, as well as Clay Settle, Gary White, and Wanda Shaw. Mr. White had expressed to Campbell that he hated getting fussed at or "jumped on" for something that should not be targeted at him or others. Wanda Shaw told Campbell that it bothered her. If something really bothered Campbell, he would sit down with the supervisor to talk about it. Mr. Garza confided in Campbell about how things were said or done that he did not like. However, he would usually go and talk to supervisors about it.

99. Campbell has "playfully" texted Ms. Monk to say that he loved her, because they have a good relationship. He also has a good relationship with Ms. Smith and, when she moved, he did tell her that he missed her. He sometimes got a playful response back from them, such as "Oh shut up."

100. Mr. Campbell had served in the military. He testified that, when there is an outdoor event and the National Anthem is played, former members of the military are allowed to wear a hat. They should stand up and put their hand over their heart.

101. Ms. Monk has "a fiery personality"; she is very passionate about what she does and "sometimes can be a little gruff." Based on his relationship with Monk, he believed "her intentions are meant well."

102. **Laura McCauley**, who has been employed at the Department of Juvenile Justice since November 1999, was the next witness. For the past two years, she has been employed as a Correctional Trainer Coordinator II.

103. The day after Appellant tendered his resignation, Ms. McCauley received a text from him, saying he was gone and had screwed up. She texted back, asking what he meant. Appellant replied he had quit. He then called McCauley to advise he previously had a meeting with Ms. Monk and then quit his position. Ms. Monk is currently Ms. McCauley's immediate supervisor. She has known Appellant to have been very productive on the projects they worked together.

104. McCauley herself had experienced a hostile work environment at her former position.

105. On December 1, 2015, she attended her first academy staff meeting. At one point, Appellant stood up and Ms. Monk told him to shut up and sit his ass down. "I got a little shell-shocked" at it, but let it go. On the drive home, McCauley thought whether she had made a mistake transferring to that division. She did not do well with that kind of talk. There had been instances like that which she had observed, and spoken up to both Ms. Monk and Ms. Smith.

106. McCauley has an ADA diagnosis. In her first meeting with Ms. Monk, Monk asked, "What's wrong with you, Laura?", which took her aback. McCauley told her she was fine and a good worker. Monk advised she had been hesitant about McCauley coming into the department. Once Monk got used to her and how she worked, a mutual respect developed. However, that went "backwards" in meetings she had when Ms. Smith and Ms. Monk were together. In those meetings, Smith usually led the conversation. Monk would not stand up for her (McCauley), and it was usually "two against one." "For me, it felt like a gang mentality...you cannot win because the numbers are against you." She always dreaded being called into the office by Ms. Smith.

107. She believed Smith treated her in an unprofessional manner. In January 2016, she met with Smith and Monk to review her 2015 Annual Employee Performance Evaluation. In 2015, McCauley had been under the supervision of another person. For that reason, she assembled a folio of what she had done and accomplished to assist Monk with the evaluation. They had not known the work she had done. "Ms. Smith made me feel like crud as a result of having that compiled to show an objective measurement of what I had accomplished...I walked out feeling like crap." During that meeting, Smith had stated, "How many more times we gotta hear about that award you got?"(sic) It was just demeaning.

108. On September 12, 2016, Ms. Monk was kind enough to enlist help to move McCauley's office, including her personal refrigerator. During the move, the refrigerator was damaged. Ms. Smith told her to "get over it." McCauley thought that was rude. To her, losing two hundred dollars for the refrigerator was a lot of money. Smith demeaned her, but McCauley just tried to learn to "get over" things.

109. Within the next two weeks, Smith had come to McCauley's office and closed the door. She told her, "You need to move your car." When McCauley asked why, Smith pointed out the window and said, "You need to move your car. You cannot park there." McCauley viewed where Smith had pointed and replied that it was not her car.



110. In that same building, McCauley could hear things going on in the hall. She heard Nicole Hartman being addressed in a demeaning manner by Ms. Smith. Smith said she had asked Hartman a question and did not need a story from her. Subsequently, Hartman told McCauley she was used to this, and tried to ignore it; she tries to do good work and hopes that would stand up for her.

111. The following week, McCauley was called into Smith's office. Ms. Monk was present. Then, "all heck breaks loose." McCauley was told she had encouraged Hartman to file a grievance. McCauley denied it. McCauley requested they bring Hartman into the meeting and they would talk about that. Hartman was not brought in. There was pointing and yelling. Ms. Smith again brought up the matter of McCauley's clothing. McCauley told both of them she has difficulty with the way they speak to people and it made her uncomfortable. This included how Smith spoke to Monk in front of others. Smith replied that she had 30 years under her cuff, did not have to change, and that she "ain't gonna change." (sic) McCauley asked if they could just tone things down and stop using the "f-word," as it bothered her. She believed Smith "tried to put the fear factor in me" to not advocate for her coworkers.

112. In a separate meeting with Smith and Monk after Appellant had resigned, Monk told McCauley that other people did not have a problem with them (Smith or Monk). McCauley leaned back and made a face. She was told she was the only one that had a problem with them. When they observed her face, they asked, "Who?" McCauley replied, "Frank." Ms. Smith pointed her finger at McCauley and retorted, "Don't you ever say that name in here again. Don't you ever mention Frank Garza's name again."

113. Mr. Garza told McCauley he felt it was not right how people were treated with such disrespect. McCauley agreed. In her current position, she felt more of a dread of going to work. She has used more sick and vacation time than she has ever done during her employment. The job has gotten stressful for her, and she believes others are starting to ignore her. She used her time to remove herself from the situation.

114. The next witness for the Appellant was **Grace Smith**. Since January 5, 2005, Ms. Smith has been employed by the Department of Juvenile Justice as Director of Staff Development. She testified she has never used the phrase "snitches get stitches" or threatened others if they reported anyone or anything. Her style of talking to people is "abrupt"; she has always been abrupt, and that is her character.

115. She interacted with the Appellant a fair amount of time. She was not aware there were any problems between herself and the Appellant. She also interacted with Ms. Monk on a daily basis.

116. She was familiar with the term "Frank said..." She did not want to hear from anyone about what Mr. Garza had said. Anytime she directed staff to do something, Mr. Garza would change it. When she asked the staff why it was changed, they would always reply, "Well, Frank said..." She told them she did not want to hear what Frank said.

117. In Elizabethtown, Smith had instructed someone to perform a task. When the task was not done, she asked why. She was told, "Frank said..." In a separate meeting, she told the staff she did not want to hear anything about what Frank had said.

118. Ronnie Bowman had spoken with her on the telephone to complain about a directive requiring him to move his workstation. He said he felt this created, for him, a hostile work environment. Within the last year, she has had reports from Ronnie Bowman, Frank Garza and Laura McCauley that each felt they had a hostile work environment. She felt one has to consider who is filing such a complaint and the circumstances. In Mr. Bowman's case, the office move was not per her direction, but was from an outside source. She showed Bowman the letter. Subsequently, the Administrative Office of the Courts changed its mind and Bowman did not have to move his office.

119. She admitted having played a joke on William Campbell. Mr. Campbell had completed a task he was supposed to perform and Ms. Monk had no knowledge of that. She played a joke in order to bring a little humor into the workplace.

120. Appellant had sent her an email telling her he loved her; he also called her mama. She believed this was probably because she had left for Central Office.

121. She acknowledged Ms. Monk has told subordinates to shut up, either because they were redundant or engaged in a side discussion. This was done playfully. It was not to hurt or demean anyone. Neither Smith nor Monk considered this to be insulting. It had gone on so long it was a part of the culture of the Training Branch. She does it less frequently now, particularly since she knows that some employees felt insulted or demeaned.

122. At a staff meeting following Appellant's resignation, she addressed the group by saying, "Let's talk about the pink elephant in the room." She wanted to put rumors about Mr. Garza to rest.

123. Garza's reputation at the Training Branch was that he was "a know it all." They could not get him to do anything without asking him two to three times. He knew more than anyone else and had a habit of dismissing people if they did not want to hear what he was saying. These behaviors did not manifest themselves until Appellant came off his six month probation period. Such behaviors were never reflected in his Annual Employee Performance Evaluations. He was talked to about the behaviors, but they were not extreme enough to warrant discipline.

124. Smith admitted she singled-out Laura McCauley for the way she dressed because she was directed to do so by the Deputy Commissioner.

125. Smith had been at Central Office when she received a phone call advising her Appellant had resigned. She also received a separate telephone call advising her that Mr. Garza wanted to rescind his resignation. A resignation could only be rescinded by Acting Commissioner Koebel.

126. She had believed Appellant and Ms. Monk got along very well. He called Monk "mama," particularly when he asked for something or made a vacation request. He had also hugged her.

127. On one occasion, an outdoor academy graduation had taken place. When the national anthem played, she saw Appellant had not taken his hat off. She asked him to please take his hat off when the national anthem played. Appellant responded he did not have to and got very upset. Weeks later, he handed Smith an internet printout explaining, in an opinion piece, that hats could be worn under such circumstances. She never yelled at Appellant or became upset about the incident. She was aware he had served in the military, however, she was never told he had PTSD.

128. When she read Appellant's resignation letters, she was surprised he had complaints, as he had never made these known before. She was not aware of any disability Appellant might have had, as he never said anything other than how he enjoyed his work.

129. She had signature authority and could accept resignations of staff at the time Appellant resigned. She identified Appellee's Exhibit 20 as the email she sent to Mr. Garza's email account, accepting his resignation.

130. She identified Appellee's Exhibit 26 as a November 3, 2015 email she received from Ms. Monk. They had been tasked with a program to recruit new employees. The task was assigned to Ms. Monk. Appellant told them he had done recruiting in the military. He was asked to be on that team and submit his proposal. This email showed Ms. Monk's frustration at Appellant not having performed his assigned task.

131. At least once a week Appellant stated how much he liked his work. Smith had seen Appellant hug Ms. Monk quite a few times, and never thought it was unprofessional in the family atmosphere that was the Training Branch. She thought he would be comfortable voicing any concerns he had.

132. She identified Appellee's Exhibit 27 as a photograph taken at the Christmas staff meeting, the last such meeting Appellant attended. The photograph shows Appellant hugging Ms. Monk.

133. There is no policy that prohibits an employee from encouraging another employee to file a grievance.

134. With reference to the Army Depot training incident, Smith saw Appellant's daughter present and had asked someone who that was. She was never introduced to the daughter. She did not want DJJ responsible for Appellant's daughter. She directed Ms. Monk address the matter, as Smith did not feel it was appropriate. The training had taken place on the second floor of a building that was separate from the golf course Pro Shop.

135. She received Appellant's email resignation on June 13, 2016. She emailed Appellant to ask where he was. Appellant responded. Smith replied by telling him to turn in his keys and wished him well.

136. The following day at about 9:00 a.m., Smith spoke to Ms. Koebel about the resignation. At 9:39 a.m., she sent Appellant an email accepting the resignation, and moved on. She knew the Commissioner would handle the matters raised in Appellant's letters.

137. She believed the Agency could reject a resignation, but she has never known it to be done. Such act would have to be done by the Commissioner. Likewise, the Commissioner could rescind an acceptance of a resignation. The Agency can also reject a resignation, subject to a termination proceeding.

138. The next witness was **Billie Monk**. For the last 10 years, Ms. Monk has been employed by the Department of Juvenile Justice as Branch Manager of the Training Division. The majority of the time, her relationship with Appellant was very good. When she hired Appellant, he seemed to be an overly-friendly person, happy-go-lucky, and that did not bother her. Appellant was very much a part of the team. When Appellant came off probation, he appeared to be less committed and not as happy as when he started. She could just see a change in him.

139. She has told employees in her department to shut up. She might say it teasingly, jokingly, or sarcastically. She did not bellow it out or say it viciously or vindictively to hurt anyone. She has told Appellant to shut up. Appellant never expressed any concerns about it.

140. At one point, Director Smith and Commissioner Hayter asked Monk to meet with them. At the meeting, she was asked if she would consider having Laura McCauley in the Training Branch. Monk did not know a lot about McCauley. She heard hearsay about some problems McCauley had with her supervisor; that she had complaints and filed grievances. At first, Monk was hesitant. However, she knew McCauley had a background in research and data collection, and Monk was looking for a curriculum coordinator. She agreed to take her into the Branch. Monk testified that decision was a mistake.

141. At an academy training lunch in the summer of 2016, Monk was in the cafeteria and saw Mr. Garza enter. Appellant stopped and talked with the waitresses. Monk raised her arm to wave to get his attention to come on back. She testified snapping her fingers is a habit and not meant to be forceful.

142. Appellant had been up front with the waitresses. "I found that to be a little irritating." At the table, they all had a conversation about lodging arrangements. Monk tried to give everyone what they wanted, while still being responsible with the finances. She wanted three people at the academy at all times, in case one person got sick or hurt. She did not want to leave a sole trainer at the facility. However, it would have been irresponsible for her to let three trainers live at the park for five weeks. Mr. Campbell, the coordinator, would stay the entire

time. From the discussion, they all reached an understanding that none of them would stay and "lodge" the entire time.

143. The next day she received an email from Appellant requesting lodging for the week. She knew that was not what they had agreed. "Frank had a habit of telling me what he was and was not going to do." "That kind of irritated me a bit, and I shot back and said, 'You don't tell me what to do, I tell you what to do...'" His tone was disrespectful.

She set up a meeting with the Appellant for the following Monday. When he came in, he was on edge. They had a brief discussion and Frank left to go to the other cottage. He returned with John Reed and said he wanted Mr. Reed to be a witness. Monk refused, stating she did not want to involve another person. She advised they could go to Frankfort to meet with Director Smith or an EEO person, or Appellant could record it. Mr. Garza put his phone on the table.

He then told Monk she was a horrible person and she did not know how to treat people; that she treated him like a dog and discriminated against him. "This is the first time, since I have known Frank that I got angry at him...because he attacked me."

Then Appellant told her "Don't get me wrong," he loved her and she was the best supervisor he ever had. That made Monk confused and angry.

Earlier that morning, she had gotten a telephone call from Director Smith. Smith told her she received an anonymous letter and was not sure who it was about; she thought it might be about Appellant. She asked Monk to speak to Appellant about the matter and faxed a copy of the letter to her.

Monk read the letter to the Appellant. Appellant started grinning and stated, "I know how you all are." When asked by Ms. Monk whether there was any truth to the letter, he replied no, but that he did curse in training class. Monk told him not to curse in class anymore and he said okay. Monk then was done with all the issues in the letter. She told Appellant to go to Rough River and gave him permission to lodge. Appellant stated he would go home and pack.

Appellant did not show up at Rough River. Monk received a telephone call from the Director about Appellant's resignation.

144. There were a lot of rumors of Appellant having been flirtatious with staff at the park and with academy participants. She never saw that behavior. At times when staff were all sitting at a cafeteria table, she saw Appellant out on the patio with the participants, constantly talking to the females. "That is an absolute 'no'" and was a concern.

145. Appellant had a habit of dismissing Monk when he thought what she had to say was not important. He also did that to the Director. He "did not make it a secret that he thought he was smarter than everyone else"; that he could do things better; "he might have been able to do it better, I don't know. But that was not his position."

146. He would ask and say things over and over. It got to a point where Monk told him, "Frank, I do not want to hear about it anymore."

147. Appellant had never discussed his PTSD condition with Monk, nor had he ever asked her not to interact with him in certain ways. He had disclosed to her the type of medications he was on. She also knew he frequently took time off to go to the doctor.

148. Appellant rested his case. Appellee presented four separate motions for directed verdict. The Hearing Officer **GRANTED** the Appellee's motion on Appellant's claim of discrimination based on veteran's status. The Hearing Officer **OVERRULED** the Appellee's motions on Appellant's claims of discrimination based on disability, constructive discharge/hostile work environment, and retaliation.

### **Third Day of Testimony**

149. The first witness called by the Appellee was **Brenda Wood**. For the past two years, Ms. Wood has been employed by the Department of Juvenile Justice as Human Resource Administrator. Part of her duties include handling all Department grievances, including EEO complaints. She forwards such complaints to her supervisor and proceeds accordingly. Most times, a complaint is followed by an EEO investigation. She and Cynthia Watson conduct the investigations. Ms. Wood had been an EEO counselor for her office in Louisville, has attended annual EEO conferences as well as online trainings, and trainings on issues of equality, and anti-harassment.

150. She contacted Mr. Garza to set up an in-person or telephone interview. She records all interviews. When Mr. Garza identified the other parties involved, as well as potential witnesses, Wood set up interviews. Once all interviews were completed, she drafted and submitted her report. The report includes a statement of the allegations, identifies the witnesses who were interviewed, and describes the actions the Department took. She rendered a conclusion whether or not the allegations are substantiated. Such report is then sent to Cynthia Watson, her supervisor, who is the Branch Manager, with a copy to William Codell, DJJ General Counsel. The findings result from Ms. Wood's own impressions and judgment.

151. She was made aware of Mr. Garza's complaints and had been asked to investigate by Acting Commissioner Koebel. She identified Appellee's Exhibit 25 as a part of her report on that matter. Appellee's Exhibit 28 is the complete report with attachments.

152. She and Ms. Watson spoke to Mr. Garza by telephone. They told him they would follow-up the complaint with an investigation. Both Wood and Watson went onsite to interview the witnesses. They then had a follow-up telephone conversation with Garza to update him. They asked if he had any additional information. All during the conversations with Appellant they took notes. They then told him that his own interview would not be necessary. Mr. Garza was given the opportunity to respond in writing via completion of an exit interview he had been previously sent. Appellant never completed or returned the exit interview.

153. Wood recorded the witness interviews. She then reviewed the recordings and summarized everyone's statement. She concluded that Appellant's allegations were unsubstantiated.

154. She recalls that in an interview of a female witness, that person had been in tears after talking to Grace Smith. That individual had quite a number of personnel issues pending at the time. Wood did not learn what caused that person to have cried.

155. During the investigation, she found no one she had interviewed from the Training Branch, other than the Appellant, had concerns about any raised voices by supervisors or anyone else. It was more like a discussion within a family when someone did not agree. Clay Settle stated he had an excellent relationship with Monk and Smith and felt very supported by them. Suzanne Fisher told her that the communication was very open and good, and that the supervisors were always supportive. John Reed advised he had a good relationship with his supervisors and coworkers; the supervisors were open to talking about any issues and were very supportive; they were not hostile or disrespectful.

156. She defined a hostile work environment as a series of threatening or unwelcome actions or comments toward an individual on a repeated basis, where the environment becomes toxic or poisoned to such an extent that it affects an employee's ability to perform his job.

157. During the investigation, a letter had been supplied to her that accused Appellant of drinking alcohol with youth workers. This letter had either been sent to Ms. Watson or given to Wood during the investigation. She believed Monk and Smith had made an assumption that the anonymous letter referred to Mr. Garza, and that Appellant had resigned based on such information. When asked by the Hearing Officer about the relevance of such document to Mr. Garza's accusations, Ms. Wood stated, "to try to have me remain unbiased." She clarified by stating it allowed information to be submitted from both parties and to show whether Appellant was trying to "get back" at someone. When asked whether she gave any credibility to the letter, she testified she did not know how to answer the question; that she just included the letter in her report. She did so because it "possibly" showed inappropriate behavior by Garza, and could have been what Ms. Monk spoke to him about behind closed doors on the day he resigned.

158. Her conclusion had been "unsubstantiated" based on the witness statements. She had been focused on the allegations made by Appellant against Ms. Monk. When asked why she made the anonymous letter a part of her report, she testified she felt she had to provide all documents given to her. She had weighed the credibility of the witnesses. When asked if she weighed the credibility of the documents, she stated, "Well, maybe not adequately enough...I assumed I did at the time."

159. None of the interviewed individuals, other than Appellant, indicated there existed a hostile work environment or that anything like that permeated the workplace. Their statements were consistently quite the opposite of Mr. Garza's allegations. Two of the individuals interviewed (Holbrook and Koontz) were individuals who had left the Training Branch.

160. **Gary White**, who for the past two years has been employed by the Department of Juvenile Justice as Training Instructor Coordinator II, offered his testimony. For three years prior, he had been employed as a Training Coordinator and has 19 years of total service with the Department. When his workstation was at a facility, he had been the EEO Officer and handled grievances.

161. He had worked in the office with Appellant and interacted with him. Appellant never mentioned any disability. Mr. White knew Garza was a veteran. He never saw Appellant treated any differently from any of the other employees.

162. Upon his review of page 9 of Appellee's Exhibit 28, he confirmed that this was an accurate summary of the statement he had made to Brenda Wood. White had not observed any hostile work environment or had any problems working with Ms. Monk or Ms. Smith. Communication was good with everyone. He observed Garza had been told, "Oh, shut up" but White saw it as having been said in "a joking manner". He never saw Appellant react in any way that would indicate he was uncomfortable with it.

163. He recalled Grace Smith had come into their office when Appellant was present. She started yelling at them. He does not recall anything having been said by Ms. Smith telling Appellant to put a pen down. She was, however, highly upset about the way she thought they had been handling meal vouchers. Mr. Settle and Mr. White both gave Smith their side of the issue. It was the first time Smith had ever confronted White.

164. Mr. White knew Appellant to be a person who would "speak his piece." He has never seen Mr. Garza drink or party with youth workers.

165. The next witness was **Clay Settle**. Mr. Settle has been employed by the Department of Juvenile Justice for 13 years. For the past four years, he has been a Trainer Instructor, with three of those years overlapping his role as an instructor with that of the Appellant. He had interacted with Mr. Garza almost daily. He knew Appellant is a veteran.

166. Early on, he and Garza had a good relationship, but they grew distant over time. Appellant conducted himself appropriately in the classroom and in the office. At times, Appellant used an excessive amount of cursing in the classroom.

167. Ms. Monk was Settle's supervisor and Ms. Smith was his next-line supervisor. He had nearly daily interaction with both of them. He never saw Appellant treated badly or differently from other employees. Sporadically, he had seen Appellant to have been told to "shut up," but this was told to him in jest. It was never a hostile act. He believes he had also heard Monk tell Garza at one point to "sit his ass down."

168. Sometimes in the office where there are strong personalities, disagreements arise and voices are raised. It was not a hostile manner. It was generally a good working environment with Ms. Monk.



169. He acknowledged that page 5 of Appellee's Exhibit 28 was an accurate recitation of the statement he had given to Brenda Wood. Appellant's relationship with Ms. Monk vacillated between good and tense. He heard Garza call Monk "Mama" and tell her that he loved her. He has never seen Appellant provide alcohol to minors or youth workers.

170. Grace Smith speaks in elevated tones at times because it is necessary. She has raised her voice at Settle and others. His relationship with Ms. Smith is "excellent."

171. He saw a disability license plate on Appellant's vehicle.

172. **Wanda Shaw**, who has been employed by the Department of Juvenile Justice since 1988, was the next witness. She is a Corrections Training Instructor II.

173. She saw Appellant on almost a daily basis. There were four employees sharing the same office, including the Appellant. Shaw interacted with Ms. Monk a couple of days a week at most.

174. She confirmed that page 7 of Appellee's Exhibit 28 was an accurate recitation of the statement she had given to Brenda Wood. Her relationship with the Appellant started out well. Some disagreements then developed between them. At the first or second academy, she told Appellant he had left a cottage door open. Garza got very upset about it, "screaming and yelling" in response.

175. In another incident, Shaw had performed "HSP" work for nurses. She set up a table in an open doorway to set up a class. All of a sudden, the table was loudly shoved aside in the presence of participants. Mr. Garza had done this and said it constituted a fire hazard while he yelled at Shaw.

176. Appellant started to bother Shaw when he belittled her in the classroom. While she presented a PowerPoint, Appellant loudly yawned and acted like he was bored. It interfered with her presentation until he began his own presentation.

177. Four trainers shared an office: Clay Settle, Gary White, Frank Garza and Ms. Shaw. One day Shaw entered the office and found Smith talking to the other three. Smith asked Garza to put his phone down and listen to her. He said it was okay, he could hear her. Smith then said, "I said, put the damn phone down." Mr. Garza set the phone down.

178. At a staff meeting, Appellant became upset because some superintendents could not control their staff. He just went on and on about that topic. He was told to let it go, however, he continued. One of the supervisors said, "Frank, shut up. We need to get on with the meeting." Appellant sat down and started reading a newspaper.

179. She has heard Appellant tell Ms. Monk on several occasions that he loved her, in a joking manner, and seen him put his arm around her. He got along with men pretty well. He

did not get along with Ms. Hatcher. Shaw thought they all got along pretty well though. She never saw Garza treated any differently from any of the other employees.

180. On another occasion, Shaw was present at the Rough River Cafeteria. Appellant was outside talking to participants. Ms. Monk was trying to get his attention. Garza did not come right away. Monk snapped her fingers to get his attention. He came over to the table, still talking all the while. Monk told him to shut up and sit down.

181. On another occasion, Mr. Garza came to a ceremony wearing a hat. Grace Smith saw this and asked him to remove his hat. He did so. Ms. Smith told him in a tone such that "it was not sweet" or nice, but she did not yell at him.

182. Ms. Shaw has never seen Appellant supply alcohol to minors or youth workers.

183. **Suzanne Fisher**, who has been employed by the Department of Juvenile Justice since late 1998, offered her testimony. Since 2005, she has been a Corrections Training Instructor Coordinator II.

184. She interacted with the Appellant daily, doing many of the same trainings as he. She never saw Appellant treated differently from anyone else. She and Appellant were friends. She considered all her coworkers and supervisors friends.

185. While she had seen Ms. Monk yell at Mr. Garza, Ms. Monk had also yelled at Fisher. Monk would yell down the hallway of the building for one of the staff to come to her office. At a staff meeting, Appellant had been going on a tangent about superintendents. "She finally had to shut him down" and told him to "shut up." Fisher believed telling Appellant to be quiet in that manner was not inappropriate under the circumstances.

186. Appellant never told Fisher that he thought he was in a hostile work environment or that he ever wanted to file a grievance.

187. She stated that page 4 of Appellee's Exhibit 28 is an accurate reflection of the statement she gave to Brenda Wood.

188. **Veronica Koontz** was the next witness. She is currently employed by the Department of Juvenile Justice as Director of Placement Services, and had been its Acting Director. She had previously been the Classification Branch Manager. She is familiar with Appellant and his work while she had been in Program Services where she performed training. She continues to assist the Training Branch on occasion.

189. She confirmed that page 11 of Appellee's Exhibit 28 is a true and accurate recitation of the statement she gave to Brenda Wood. She had never seen the Appellant treated differently from any other employee. He never told her he felt he was being discriminated against.

190. On one occasion, Grace Smith and Ms. Bone had a conversation behind closed doors. They came out and Ms. Bone was in tears. Smith continued the conversation in a raised voice. Koontz did not know what they had been discussing.

191. She has never heard Appellant say he was not happy. He never really mentioned anything about a hostile work environment. When he did complain, it was just a normal complaint about the boss, like any other employee; it never impressed her that he felt it was a hostile work environment.

192. **Cynthia Atcher**, who, for the past four years has been employed by the Department of Juvenile Justice as an Administrative Specialist II, offered her testimony. She had worked with the Appellant at the Training Branch on a daily basis. She never saw the Appellant treated any differently than any other employee for any reason, particularly due to any disability or veteran status. He had told Atcher that he had PTSD.

193. Smith and Monk both have a "projecting voice." There has been yelling. Each of them have told Appellant, jokingly, during staff meetings, to shut up. They would say "shut up Frank," which would be followed by laughter in the group. This occurred infrequently. She also heard the supervisors tell Clay Settle "shut up Clay." It was always done in a joking manner. Appellant never mentioned he was being unfairly treated or that he experienced a hostile work environment.

194. She acknowledged that page 6 of Appellee's Exhibit 28 was an accurate reflection and recitation of the statement she had given to Brenda Wood. She did not observe any hostile work environment in the Training Branch. Ms. Monk would yell down the hall of the office, but did so to everyone. Atcher was uncomfortable with it at first, but got used to it.

195. She had seen a change in Appellant's behavior over time. He started out very motivated, but tapered off. He is a good, hard worker, but he is not "a satisfied person." Appellant was always looking for that next thing that he wanted to do. She knew he was looking for other employment and had applied for other jobs. She knew he was not satisfied where he was. She did not know why, but he said he wanted to make more money.

196. She has seen Grace Smith yell at people. It would be easy to be offended by that, but no one ever told her they were upset.

197. For the past three years, **Jarrod Holbrook** has been employed by the Department of Juvenile Justice in the Quality Assurance Branch as Corrections Program Administrator. He started working with the Department in December 2005 and was assigned to the academy. He was with the Training Branch until October 2014.

198. When Appellant was hired, Mr. Garza "shadowed" Mr. Holbrook to observe the classes he taught. Holbrook was lead Trainer at the time. He evaluated Garza when Appellant began to teach classes. He has never seen Appellant treated differently than any other employees, or because of veteran status or disability status.

199. He acknowledged that page 10 of Appellee's Exhibit 28 is an accurate recording of the statement he gave to Brenda Wood. He has seen Ms. Monk tell the Appellant to shut up. Staff meetings at trainings usually get intense and the staff blow off steam. In order to get back on track and back to business, the managers tell employees to hush or shut up.

200. He has seen Ms. Monk yell at Appellant in the office, but do so in her "Billie manner." "Billie is Billie. She is a little high-strung...she...likes to have things done her way in a timeframe that she wants it, yet sometimes you cannot meet those deadlines. And she means well. She is just high-strung," and a demanding boss.

201. He was not aware of Appellant having been singled-out or treated any differently than anyone else.

202. Grace Smith is an imposing person. He has seen Ms. Smith yell at other employees and she has yelled at him. He understands where she was coming from. "We had a great relationship."

203. He had heard that a trainer had been supplying alcohol to youth workers. When asked who it was, he testified "probably would be me. It was me, sir." He continued, "I brought some from my stash, and if they wanted it, we made an arrangement." The alcohol was provided to coworkers and people he was training.

204. **LaDonna Koebel**, due to a previous scheduling conflict, was recalled to the stand. She is the Chief of Staff and Communications Director for the Kentucky Personnel Cabinet. Previously, she had served as Assistant General Counsel and Acting Commissioner at the Department of Juvenile Justice.

205. With reference to Appellee's Exhibit 20, she recalled Appellant resigned on June 13, 2016. She was out of the office and, therefore, Grace Smith accepted the resignation on her behalf. Smith was authorized to do so whenever Koebel was out of the office. Koebel approved Smith's acceptance of the resignation. She then reviewed the matter to decide whether she would allow Garza to withdraw his resignation and come back.

206. She spoke to Smith about Appellant's request to rescind the resignation. She explained to Smith the process and the background why they did not allow resignations to be rescinded. In the past they had experienced that every time someone wanted to be off on a weekend, wanted to go to an event, or did not want to work a third shift, they would quit. That employee knew the Department was in such need of staff, that they would come back the following week, say they had changed their mind and wanted to come back to work. In the meantime, the Department had to call on staff, sometimes in the middle of the night, to make up the absence of the resigned employee. So many people had done this, it became hard to manage programs.

207. Koebel, in conjunction with the Deputy Commissioner of Facilities and the Deputy Commissioner of Communities, came up with a policy not to allow people to resign and

come back after they changed their mind. Directors and Deputy Commissioners were given authority to accept resignations under circumstances when Koebel was not immediately available. One could not make exceptions for some and not for others, and they did not want to face accusations pertaining to race, age, gender or other. It was "an across the board" policy to accept a resignation. This policy was not placed in writing, nor did it become a written policy of any kind.

208. She first learned of Appellant's allegations of a hostile work environment early in the morning of June 15, 2016. She sent those allegations to the EEO Coordinator, Brenda Wood, that same day.

209. She vaguely remembers information that a Trainer had been accused of providing alcohol to youth workers. It was not uncommon to get anonymous letters, as they came in from various parts of the state pertaining to different areas of the Department.

210. Laura McCauley has lodged several grievances while employed by the Department, including against individuals in the Training Branch. She has been the only one, other than Appellant, in the Training Branch who has made such accusations.

211. **Sharon Cook**, who, for the past 10 years has been employed by the Department of Juvenile Justice as Human Resource Administrator, offered her testimony. She does not recall ever talking to Appellant or talking to him on the telephone about his resignation. No paperwork regarding Appellant's attempt to rescind his resignation ever came across her desk.

212. The Appellee rested its case. No further witnesses or rebuttal was offered by the Appellant. Each of the parties presented their respective closing arguments and indicated they did not wish to submit briefs. The matter stood submitted to the Hearing Officer for his recommendation.

### **FINDINGS OF FACT**

1. The Appellant, Francisco Garza, had been employed by the Justice and Public Safety Cabinet, Department of Juvenile Justice, as a Corrections Instructor Coordinator II. He was a classified employee with status.

2. Mr. Garza had served in the United States Army from 1992 to 2013 and had been a Military Policeman. He served at several locations internationally and domestically. It was as a result of his service that, post discharge, he was diagnosed with Post Traumatic Stress Disorder (PTSD) and entered counseling.

3. In March 2013, Appellant was hired to his DJJ position by Billie Monk, the Training Manager, and Grace Smith, Director of Staff Development. Monk became Appellant's direct supervisor and Smith his second-line supervisor. He began his employment in an initial probationary period. He successfully completed his probationary time and, as a result, received a five percent pay increase.

4. Appellant's Annual Employee Performance Evaluations for 2014 and 2015 show that each year he received a score of 360 which was in the "Highly Effective" range (Appellee's Exhibit 3). In 2015, he was promoted from Corrections Instructor Coordinator I to Corrections Instructor Coordinator II. In 2014, he received an annual pay increment increase (Appellee's Exhibit 1). At the request of Ms. Monk, Appellant was reclassified and received a five percent increase.

5. Appellant's most recent duties were to prepare and present instruction to new DJJ employees at training sessions, known as an "academy." An academy was held several times each year. Appellant taught ethics, report writing, motivational interviews, and Aikido Control Techniques. Academies span five-week periods and were usually conducted either at the facilities provided at Kentucky State Parks or on the grounds of the Bluegrass Army Depot.

6. During the entirety of his employment, Appellant never received any disciplinary action or corrective measures.

7. Appellant never advised his supervisor, Ms. Monk, his second-line supervisor, Ms. Smith, or anyone in his chain of command that he had been diagnosed with Post Traumatic Stress Disorder (PTSD). Appellee had no knowledge of Appellant's diagnosis, nor did it have a reason to know of the existence of same prior to Appellant's resignation.

8. Appellant never requested reasonable accommodations. He never reported in writing to anyone in his chain of command, prior to the day of his resignation, that he was subjected to a hostile work environment, that he had been retaliated against, or that he had suffered discrimination based on his veteran's status or disability. He never filed a grievance, although he was aware and knowledgeable of the grievance policy and procedures.

9. The evidence has shown, as well as by Appellant's own testimony, his Annual Employee Performance Evaluations, his progression through increases in salary, and the absence of disciplinary or corrective measures, that Mr. Garza was more than able to perform the duties of his job, and that his PTSD did not interfere with or impair his ability to perform his duties.

10. The anonymous letter, a copy of which had been provided by Ms. Smith to Ms. Monk, found its way into the documents included by Brenda Wood in her EEO investigation. Although Ms. Wood was uncertain as to the credibility she gave the documents in her possession during that investigation, or what role they played in her conclusion that Appellant's allegations were unsubstantiated, the anonymous letter definitely played a role in that investigation. Ms. Wood believed that Ms. Monk and Ms. Smith assumed the anonymous letter referred to Mr. Garza and that Appellant had resigned because of that information.

11. Quite a bit of testimony and evidence was presented about the management styles of both Ms. Smith and Ms. Monk. Ms. Smith described her own style of talking to people as "abrupt" and she has always been of such nature, as it is her character. She had also seen Ms. Monk tell subordinates to "shut up" either because they were redundant or engaged in a side discussion. Smith believed Monk's action was not insulting, but playful. Ms. Monk testified she

herself has told employees to shut up, but in a teasing, joking, or sarcastic manner. She also testified she had a habit of snapping her fingers at employees, but that it was not meant to be forceful.

12. Grace Smith testified she interacted with Appellant a fair amount of time and was not aware there were any problems between them or that Appellant had any complaints. However, she also testified:

- “Anytime” she directed staff to do something, Appellant would change it, and when she asked the staff member why something had not been done or was changed, the staff member would begin with “Frank said...” She told staff individually and in staff meetings she did not ever want to hear what “Frank said...”
- Appellant’s reputation at the Training Branch was that of a “know-it-all”; he knew more than anyone else and had a habit of dismissing people if they did not want to hear what he had to say.
- At one academy graduation held outdoors, she confronted Appellant about the way he behaved during the playing of the national anthem, aware he had served in the military.
- She had observed a young woman present on the grounds of the training site of the Bluegrass Army Depot. When she was told it was Appellant’s daughter, she directed Ms. Monk to advise Appellant his daughter’s presence was inappropriate.

13. Billie Monk testified:

- She has told employees under her supervision, including Appellant, to “shut up,” but did so “teasingly, jokingly, or sarcastically.”
- She snapped her fingers at her staff to get attention, and this was a “habit” of hers.
- Appellant “did not make it a secret that he thought he was smarter than everyone else...he might have been able to do it better, I don’t know. But that was not his position.” (sic)

14. Ronnie Bowman, Corrections Coordinator II, testified that while he has never been yelled at by Ms. Monk, she speaks in a very firm manner and is a “real forward person.” At one point, he told Ms. Smith that she created a hostile work environment. He filed a grievance. After speaking with Monk and Smith, that issue was resolved. Mr. Bowman believed there was a culture within DJJ that if one “tells on someone else” it would be trouble, and he has been told by coworkers it would be “career suicide.”

15. William Campbell, Cabinet Coordinator, testified he has been yelled and cursed at while working at DJJ. He specifically related an incident of a telephone call from Ms. Monk (which had been instigated by the practical joke of Grace Smith). He has seen Monk yell at

Appellant as often as she yelled at any of the other employees. He did not believe there was a culture that employees should refrain from reporting the acts of others. He described Ms. Monk as having “a fiery personality,” that she is very passionate about what she does and “sometimes can be a little gruff.”

16. Laura McCauley, Correctional Trainer Coordinator II, testified that in her prior position she had experienced a hostile work environment and filed a grievance. At her current position, she had witnessed Ms. Monk tell Appellant to shut up and sit his ass down. While she believes she and Monk developed a mutual respect, she believed progress in that went “backwards” whenever Ms. Monk and Ms. Smith were together in meetings. On those occasions, McCauley believed it was “two against one” and that it “...felt like a gang mentality...you cannot win because the numbers are against you.” She also testified that in meeting with Ms. Smith and Ms. Monk to review her 2015 Annual Employee Performance Evaluation, “Ms. Smith made me feel like crud as a result of having that [folio of past accomplishments] to show an objective measurement of what I had accomplished...I walked out feeling like crap.” (Bracketed information added.) On one occasion Smith came to McCauley’s office and demanded she move her car in the parking lot. When Smith pointed out the window to a specific car and told her she could not park there, McCauley responded that was not her car. In another meeting with Monk and Smith, McCauley was accused of having encouraged a coworker to file a grievance. Although McCauley denied that, there was pointing and yelling. When McCauley told them she did not appreciate the way they spoke to her and to other people, and that it made her feel uncomfortable, Smith told McCauley she herself had 30 years under her “cuff,” did not have to change, and that she “ain’t gonna change.” (sic) She believed Ms. Smith tried to intimidate her not to advocate for her coworkers.

17. The Hearing Officer believes Appellant’s statement that at times Ms. Monk told him to “shut the f—k up” and that such testimony is credible. It is also credible to believe she yelled at him once or twice a week, as Ms. Monk had a habit of telling her staff to “shut up” and, in view of her having cursed on occasion at Appellant, it is likely she told other staff members to “shut up,” which at times would have been something other than “teasingly, jokingly, or sarcastically.”

18. On Monday, June 13, 2016, Monk met with Garza in Monk’s office to discuss the issue of lodging for an upcoming academy at Rough River. It was at this meeting that Monk first produced and showed to Appellant the anonymous, accusatory letter. At the conclusion of the meeting, Monk told Appellant he could go to Rough River and lodge if he wanted to.

19. Appellant went home with the intention to pack and travel to Rough River. Once at home, he typed out his resignation letter in email form. (Appellant’s Exhibit 12.) He attached to that email a letter detailing his reasons for resignation. He made the resignation “effective immediately” and emailed it at 2:06 p.m. to Billie Monk and Nicole Hartman, with cc to Grace Smith and Cynthia Atcher.



20. On June 13, 2016, at 2:40 p.m., Grace Smith emailed the Appellant to ask where he was. Appellant responded at 4:33 p.m. that he was home. At 4:35 p.m., Ms. Smith emailed asking Appellant to turn his equipment and keys into Ms. Atcher. (Appellee's Exhibit 19.)

21. Subsequently, Appellant believed he had made a rash decision and counseled with others about what action he could take to rescind his resignation.

22. At 9:39 a.m. on June 14, 2016, Grace Smith emailed Appellant to tell him "resignation accepted". (Appellee's Exhibit 20.)

23. At 12:42 p.m. on June 14, 2016, Appellant sent an email to Commissioner Koebel advising her of his allegations of certain mistreatment while on the job. (Appellant's Exhibit 13.) He had attached to that email a separate letter to Commissioner Koebel of even date where he advised her he had resigned, but had not wanted to, and that he was faced with a hostile work environment. (Appellant's Exhibit 14.)

24. On June 15, 2016, at 7:40 a.m., Commissioner Koebel emailed Mr. Garza to thank him for his concerns and advise him that DJJ had workplace policies and procedures to report and address concerns whenever employees believed they had been subjected to harassment or abuse of any kind; that she was forwarding his concerns to DJJ's Personnel Branch for review and investigation. She also advised that Ms. Brenda Wood handled EEO matters for the Department and would contact him for additional information. (Appellant's Exhibit 13.)

25. By letter of June 16, 2016, Commissioner Koebel advised Appellant he had officially resigned his position as an Instructor Trainer II with the Department of Juvenile Justice on June 13, 2016, which had been officially accepted by the Agency on June 14, 2016. He was further advised that although he subsequently requested to rescind his resignation, it was not the normal practice of the Agency to accept such a request after a resignation had been accepted. Appellant was also advised the Agency would begin a review and investigate the concerns he had described to the Commissioner with his most recent correspondence. (Appellee's Exhibit 23.)

26. During the entirety of all events leading up to Appellant's resignation, the following policies and procedures were in full force and effect:

- Employee Handbook issued by Personnel Cabinet, Department of Human Resources Administration (Appellee's Exhibit 10);
- Justice and Public Safety Cabinet, Department of Juvenile Justice, Policy and Procedures, 4-JCF-6D-04, Grievance (Appellee's Exhibit 14);
- Justice Cabinet, Department of Juvenile Justice, Policy and Procedures, Code of Conduct (Appellee's Exhibit 22).

27. Appellant timely filed his appeal with the Kentucky Personnel Board.

**CONCLUSIONS OF LAW**

**Claim of Disability Discrimination**

1. Appellant has lodged a claim that Appellee discriminated against him on the basis of a disability. Appellant alleged his disability is due to Post Traumatic Stress Disorder (PTSD). He was required to prove his allegations by a preponderance of the evidence. KRS 13B.090(7). Any employee who believes he has been discriminated against may appeal to the Kentucky Personnel Board. KRS 18A.095(14)(a).

2. In Kentucky, any person is afforded a right of action against his employer due to discrimination because the person is a qualified individual with a disability. KRS 344.040(1)(a). The general purposes of Chapter 344 of the Kentucky Revised Statutes include the safeguarding of all individuals within the state from discrimination based on disability and to "...protect their interest in personal dignity and freedom from humiliation..." KRS 344.020(1)(b).

3. Federal law prohibits "a covered entity" from discriminating against a "qualified individual" on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training and other terms, conditions, and privileges of employment. 42 U.S.C. §12112(a). A "covered entity" includes an employer. 42 U.S.C. §12111(2). In this case, Appellee, as employer, is a "covered entity".

4. A "qualified individual" is one "...who, with or without reasonable accommodations, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. §12111(8). The evidence in this case was clear that Appellant performed the essential functions of his job. The employer's act of permitting Appellant to attend appointments with his doctors and psychiatrist, although not known to Appellee at the time as an accommodation, was in substance, a reasonable accommodation to the Appellant.

5. The Appellant bears the initial burden of establishing a *prima facie* case of disability discrimination against the Appellee. *Hedrick v. Western Reserve Care System*, 355 F.3d 444 (6th Cir. 2004); *Snead v. Metropolitan Property & Cas. Ins. Co.*, 237 F.3d 1080 (9th Cir. 2001). To establish a *prima facie* case of discrimination based on a disability, Appellee must show: (1) That he had a disability as that term is used under the statute; (2) That he was "otherwise qualified" to perform the requirements of the job, with or without reasonable accommodation; and (3) That he suffered an adverse employment decision because of the disability. *Henderson v. Ardco Inc.*, 247 F.3d 645, 649 (6th Cir. 2001); *Wright v. Comp USA, Inc.*, 352 F.3d 472, 475 (1st Cir. 2003); *Cameron v. Community Aid for Retarded Children, Inc.*, 335 F.3d 60, 63 (2nd Cir. 2003).

6. A "disability" is defined in KRS 344.010(4) as:

- (a) A physical or mental impairment that substantially limits one or more of the major life activities of the individual;

- (b) A record of such an impairment;
- (c) Being regarded as having such an impairment.

7. Appellant claimed he was diagnosed with PTSD, and that he, therefore, had a disability. A diagnosis, however, is not the same as an impairment. Evidence in the case showed none of Appellant's medical or mental health service providers advised Appellant he had an impairment that substantially limited one or more of his major life activities. He was never placed on any type of restrictions for work. Although his psychiatrist may have recommended Appellant terminate his employment with Appellee, instead, he helped Appellant with "coping mechanisms" to apply at work. Furthermore, Appellant's record of performance, as shown by his Annual Employee Performance Evaluation scores, absence of any disciplinary or corrective measures, and his progression through various salary increases, all demonstrate that if he had an impairment, such did not limit one or more of his major life activities to interfere with his job performance.

8. The Hearing Officer believes Appellant was diagnosed with PTSD. However, the evidence shows that he, at no time, advised his supervisors or those in his chain of command, or anyone with Personnel, that he required reasonable accommodations due to PTSD or that he suffered an impairment. The evidence did not show that there was a record of impairment pertaining to Appellant's PTSD.

9. In order for Appellant to meet the requirement of "being regarded as having such an impairment," he must establish that he has been subjected to an action prohibited by statute. The United States Supreme Court stated that an individual may fall within the provision for being "regarded as" having a disability if: (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, non-limiting impairment substantially limits one or more major life activities. In both cases, it is necessary that a covered entity entertain misperceptions about the individual – it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting. *Sutton v. United Airlines, Inc.*, 527 US 471, 489 (119 Sup. Ct. 2139, 2149-500), 114 L.Ed. 2d 450 (1999), as cited in *Hallahan v. The Courier-Journal*, 138 S.W.3d 699 (Ky. App. 2004). In *Hallahan*, the Kentucky Court of Appeals stated that although the Courier-Journal did not contest the fact that Hallahan had a physical impairment, the mere fact that the Courier-Journal had knowledge of Hallahan's medical problems was insufficient to show that it regarded him as having a disabling impairment. *Id.*, at 708.

10. "In analyzing whether an impairment substantially limits a major life activity, these two factors should be considered in tandem with respect to the particular individual claimant and life activity. The Supreme Court has noted that generally, "substantially" suggests "considerable" or "specified to a large degree". *Hallahan*, 138 S.W.3d at 708 (citing *Sutton*, 527 U.S. 471, 491, (1999 Sup. Ct. 2150)...and "major life activities" are terms of art under the statutes. The EEOC defines "substantially limited" as meaning "(i) unable to perform a major

life activity that the average person in the general population can perform; or (ii) significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform the same major life activity.” *Id.* at 708 (citing 29 C.F.R. §1630.2(j)(1).)

11 A plaintiff must demonstrate not only that the employer thought he was impaired in his ability to do the particular job, but also that the employer regarded him as substantially impaired in either a class of jobs or a broad range of jobs in various classes. *Murphy v. United Parcel Service, Inc.*, 527 US 516, 523, (119 Sup. Ct. 2133, 2138), 144 L.Ed. 2d 484 (1999); *Hallahan*, 138 S.W.3d at 709 (Ky. App. 2004).

12. The evidence showed Appellee, through its supervisors and managers, neither had knowledge of Appellant’s PTSD, nor were they approached for reasonable accommodations. The Appellee did not perceive or have actual knowledge that Appellant had a physical or mental impairment. Without such actual or perceived knowledge, any alleged act by Appellee against Appellant would lack a link to such act being discriminatory based on disability. Furthermore, there was no evidence showing Appellant was “substantially limited” in one or more of his major life activities. For these reasons, Appellant could not be “regarded as having such an impairment” in this case by the Appellee.

### **Constructive Discharge**

13. Appellant has alleged that his resignation from employment was, in fact, a constructive discharge. He was required to demonstrate by a preponderance of the evidence that he had been constructively discharged from his position with the Justice and Public Safety Cabinet, Department of Juvenile Justice.

14. It is clear from the email and documents submitted by the Appellant, as well as his own testimony, that his resignation had been tendered unconditionally. Under Kentucky law, when a public employee’s resignation is once made and accepted by the appointing authority, it may not be withdrawn by the employee who made it, unless his resignation was conditional so as to make it voidable if the condition was not performed. *Hogg v. Miller*, 298 Ky. 128, 182 S.W.2d 242 (Ky. App. 1944), as cited in *James Robinson v. Department of Military Affairs, Personnel Board, Commonwealth of Kentucky*, 2010 WL 2936005. Once the resignation of an employee is accepted, effective at a future date, it may not be withdrawn after its acceptance. *Redmon v. McDaniel*, 540 S.W.2d 870 (Ky. 1976).

The facts and documentary evidence show, without dispute, that Mr. Garza made an unconditional resignation, “effective immediately”, when tendered June 13, 2016 (Appellant’s Exhibit 12). The resignation was accepted by the employer (Appellee’s Exhibit 20), processed and approved, and acted upon thereafter by the Appellee. The Appellee acted within its authority to deny Mr. Garza’s request to withdraw or rescind his resignation.

15. The commonly accepted standard for constructive discharge is whether, based upon objective criteria, the conditions created by the employer's action are so intolerable that a reasonable person would feel compelled to resign. *Brooks v. Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d 790, 807 (Ky. 2004), citing *Northeast Health Management, Inc. v. Cotton*, 56 S.W.3d 440, 445 (Ky. App. 2001). A finding of constructive discharge requires an inquiry into both the objective feelings of an employee, and the intent of the employer. *Brooks*, *Id.* at 808 *supra*, citing *Ford v. General Motors Corp.*, 305 F.3d 545, 554 (6th Cir. 2002). The latter requires a party to show "that the employer intended and could reasonably have foreseen the impact of its conduct on the employee." *Id.*

16. The objective feelings as expressed by Mr. Garza to his situation were that he felt under duress and, when he tendered his resignation, he had no choice but to resign. However, he was well aware of his right to appeal any acts by his employer to the Kentucky Personnel Board, as well as having knowledge of the policies and procedures in effect pertaining to the filing and processing of grievances, and complaints suitable for investigation by the EEO officer.

17. When examining the intent of the employer, one must consider whether the employer utilized tactics of duress. "The general rule regarding duress under such circumstances is to the effect that it is not duress to threaten to do what one has a legal right to do, nor is it duress to threaten to take any measure authorized by law and the circumstances of the case." *Redmon*, 540 S.W.2d at 872. As a guide, Title VII of the federal Civil Rights Act provides that the applicable standard is "when the workplace is permeated with discriminatory behavior that is sufficiently severe or pervasive to create a discriminatorily hostile or abusive work environment. This standard requires an objectively hostile or abusive environment; one that a reasonable person would find hostile or abusive...as well as the victim's subjective perception that the environment is abusive." [*Harris v. Forklift Systems, Inc.*, 510 U.S. 17-21 (see also *Meritor Savings Bank v. Vinson*, 477 U.S. 57-64.)] The determination whether an environment is "hostile" may be made only by looking at all the circumstances, which may include the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. Furthermore, the effect on the employee's psychological well-being is relevant in determining whether plaintiff actually found the environment abusive." *Harris v. Forklift Systems, Inc.*, *supra*.

18. There can be no doubt from Mr. Garza's own testimony that he had a subjective perception his environment was hostile or abusive. However, such perception is also tempered by the following: He was allowed unfettered permission to attend his medical and psychiatric appointments; he had Annual Employee Performance Evaluation ratings that were "Highly Effective"; he was granted permission to engage in outside "employment" in the nature of participation with a volunteer fire department; he was reclassified and received a pay increase due to same; he was never prevented from participating as an instructor at academy sessions; and there is no record of his work performance having suffered up through the time of his resignation.

19. In examining what may have been the intent of the employer, by and through its agents, the evidence is, at best, conflicting. The testimony of the witnesses showed:

Frank Garza – There is no doubt Mr. Garza viewed certain comments made to him by Monk and Smith to be humiliating, particularly when made in front of coworkers.

Laura McCauley – She had an ADA diagnosis. She was taken aback when, on her first meeting with her supervisor, Ms. Monk asked her, “What’s wrong with you, Laura?”<sup>3</sup>

- At her 2015 Annual Employee Performance Evaluation, when she brought a portfolio of her accomplishments for the past year to assist Monk, who had supervised her a very short time during that year, she left the meeting “feeling like crap” by the tone and demeanor of her supervisors;

- Smith inexplicably directed McCauley to move her car until McCauley told her the car to which Smith pointed was not hers.

- Smith criticized McCauley for the way she dressed at work.<sup>4</sup>

- In a meeting with Smith and Monk, “all heck [broke] loose” when they falsely accused McCauley of encouraging a coworker to file a grievance (bracketed information added);

- In a separate meeting with Smith and Monk, after Appellant had resigned, McCauley was told by Smith to never “mention Frank Garza’s name again.”

Gary White – He had never observed any hostile work environment, nor did he have any problems working with either Monk or Smith;

- Communications with everyone in the Branch was good;

- He never saw Appellant treated differently from any of the other employees.

Clay Settle – He had interacted with Appellant, as well as with Monk and Smith, on a nearly daily basis. He never saw Appellant treated differently from other employees;

- He had sporadically seen Appellant to have been told to “shut up” by Monk, who also, on one occasion, told him to “sit his ass down;”

- There was generally a good working environment;

- His own relationship with Monk vacillated between good and tense.

Wanda Shaw – While she and Appellant had a good working relationship at first, their relationship deteriorated over time;

- She has seen Monk snap her fingers at Appellant to get his attention, and tell him to shut up and sit down.

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<sup>3</sup> Monk testified she had been hesitant to accept McCauley transferring to her Branch because of McCauley’s previous problems with supervisors and having filed grievances.

<sup>4</sup> Although the specifics of such criticism were not addressed in the hearing, Smith testified she had done so at the direction of the Deputy Commissioner.

Suzanne Fisher – She interacted with Appellant on a daily basis and never saw him treated differently from anyone else;

- She has seen Monk yell at the Appellant;
- She herself has been yelled at down the hall by Monk.

Veronica Koontz – She has never seen Appellant treated differently from any other employees;

- She had seen Ms. Bone in tears when she left a closed-door meeting with Smith. Smith continued addressing Bone in a raised voice as they exited Smith's office.

Jarrold Holbrook – He has seen Monk tell Appellant to shut up. Staff meetings are “intense” and staff “blow off steam.” Managers tell employees to hush or shut up to get the meeting back on track;

- He has never seen Appellant treated differently from others because he was a veteran or due to disability status;
- He testified about Ms. Monk that “Billie is Billie...is a little high-strung...likes to have things done her way” and is a “demanding boss;”
- He described Grace Smith as “an imposing person” who has yelled at Holbrook as well as other employees. However, he testified he and Smith had a “great relationship.”

Ronnie Bowman – He described Monk as a “real forward person” and both his supervisors as “firm and forward;”

- He told Smith six months ago she was creating a hostile work environment by the way she talked to him.

William Campbell – Mr. Campbell has been yelled and cursed at while working at the Department of Juvenile Justice;

- He has seen Monk yell at Appellant as often as she yelled at any of the other employees;
- He has heard Monk tell Appellant, himself, Clay Settle, Gary White, and Wanda Shaw, to shut up;
- Mr. White, Ms. Shaw, and the Appellant indicated to him that such interaction with the supervisors bothered them and they did not like it;
- Monk has a “fiery personality” and “sometimes can be a little gruff.”

21. The evidence indicates that some of these employees are definitely bothered by the management styles of Monk and Smith, while others have employed coping mechanisms to get on with their work, despite the yelling and strong language. While the respective management styles and techniques of Monk and Smith fall short of being abusive to the point that a reasonable person would resign, or that such acts could reasonably have been foreseen to cause employees to suffer, they certainly do not add anything pleasant to an employee's everyday work experience.

**Retaliation**

22. Appellant claims he was the victim of retaliation. 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(2). A “penalization” includes...any action that diminishes the level, rank, discretion, or responsibility of an employee without proper cause...” KRS 18A.005(22). It also includes “...the abridgement or denial of other rights granted to state employees;” KRS 18A.005(24).

23. On his appeal form filed February 10, 2017, Appellant alleged that when he “complained about this humiliating treatment, he was retaliated against.” Appellant has alleged and testified that the alleged humiliating treatment by Ms. Monk and Ms. Smith, of which he voiced concern and complaint, thereafter resulted in retaliation by them or his employer. Appellant was not clear in describing specifically how it was they retaliated.

24. Perhaps it was the issue of lodging at academy sessions that Appellant believes was a form of retaliation. By his own testimony, there was no problem with lodging up through August 2015. A problem did arise in June 2016. Although he and Ms. Monk disagreed on the issue initially, she relented and agreed he could lodge at Rough River.

25. By his own admission, Appellant never advised anyone, prior to his resignation, that he had been treated badly, or suffered retaliation. He never filed a grievance, although he was aware of the grievance policies and procedures. If he had misgivings of reporting anything to either Ms. Monk or Ms. Smith, he knew he could have reported to Acting Commissioner Koebel (as he did at his resignation) or to the EEO Officer, Brenda Wood.

26. Appellant has failed to prove by a preponderance of the evidence that he was (a) subject to constructive discharge, (b) discriminated against based on a disability status or his veteran’s status, or (c) retaliated against.

**RECOMMENDED ORDER**

The Hearing Officer recommends to the Personnel Board that the appeal of **FRANCISCO GARZA V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF JUVENILE JUSTICE, (APPEAL NO. 2017-034)** 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 15<sup>th</sup> day of December, 2017.

**KENTUCKY PERSONNEL BOARD**

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

A copy hereof this day mailed to:

Hon. Adam Adkins  
Hon. Brian Abell