

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2018-256**

RONALD GODSEY

APPELLANT

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

**JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF CRIMINAL JUSTICE TRAINING**

AND

PERSONNEL CABINET

APPELLEES

* * * * *

The Board, at its regular March 2022 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated December 6, 2021, Appellant's Exceptions and Request for Oral Argument, Appellee Personnel Cabinet's Response to Exceptions, Appellee Justice and Public Safety Cabinet, Department of Criminal Justice Training's Response to Exceptions, oral arguments, the Hearing Officer's Interim Order dated February 8, 2021, Appellant's Objection to the Interim Order of February 8, 2021, and being duly advised,

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

A. **Delete** Background paragraphs 14 and 15 and substitute the following:

14. KRS 18A.110 is the statute whereby the General Assembly gave the Secretary of the Personnel Cabinet the authority to promulgate regulations. Importantly, the statute specifically mandates the Secretary to regulate special leaves of absence. To meet the statutory obligation, the Secretary promulgated the regulations that are found in

101 KAR 2:102 – Classified Leave, including Section 9, which governs special leaves of absence.

Notably, 101 KAR 2:102, Section 9(3) provides, “if approved by the secretary, an appointing authority may place an employee on special leave with pay for investigative purposes pending an investigation of a work-related incident or an allegation of employee misconduct.

- (a) Leave shall not exceed sixty (60) working days.
- (b) The employee shall be notified in writing by the appointing authority that the employee is being placed on special leave for investigative purposes, and the reasons for being placed on leave.
- (c) If the investigation reveals no misconduct by the employee, records relating to the investigation shall be purged from agency and Personnel Cabinet files maintained in accordance with KRS 18A.020(2)(a).
- (d) The appointing authority shall notify a current employee, in writing, of the completion of the investigation and the action taken.”

Special leave for investigative purposes may be instituted - authorizing the employee be placed on leave with pay during the investigative period, amongst other things - only if approved by the Secretary of the Personnel Cabinet. Here, during the evidentiary hearing, Stevens testified that KRS Chapter 18A places no other requirement on the Secretary to place an employee on special leave for investigative purposes.

15. Critically, however, 101 KAR 2:102, Section 9 merely governs the placement of an employee on special leave. **The regulation does not impose mandates or limitations upon the Agency’s conduct of any subsequent investigation into an employee’s alleged misconduct.** Stevens testified that when an employee is notified in

writing of the reasons for being placed on leave, specific facts in the notification are not required. No accompanying documentation is required to be provided at that time to the employee.

Here, the witness was asked a number of questions about the document purge provision of the regulation. She testified that one could not erase the fact that there had been an investigation, however, only records kept in the files at the Agency and the Personnel Cabinet could be expunged under the stated conditions. With reference to Appellant's Exhibit 5, the email to all staff, she testified this document, while it pertains to Appellant's special leave, is not required to be purged from the email system.

B. Delete Background paragraph 18 and substitute the following:

18. When Moss telephoned Stevens, she explained Appellant's schedule was such that he was not expected to be back in the office until December 3, 2018. The Agency wanted to place him on leave due to allegations of misconduct centered on observations of harassment of coworkers and staff, discrimination against women, and creating a hostile workplace for coworkers. Matters of harassment and creating a hostile workplace need to be addressed promptly. The case law on the matter refers to the phrase "prompt remedial measures," which are required under such circumstances.

C. Add Finding of Fact paragraph 13:

13. The Appellees carried their burden of proof that there was just cause for placing the Appellant on special leave for investigative purposes. This action was neither excessive nor erroneous under all of the surrounding circumstances.

D. Delete Conclusion of Law paragraph 2 and substitute the following:

2. At issue was the Agency's placement of Appellant on special investigative leave (specifically, the standards applicable to placement on special investigative leave and an assertion that the standard was not met herein). The burden of proof was on the Agencies to prove by a preponderance of the evidence that the placement of Appellant on special investigative leave was employed for just cause and that such action was neither excessive nor erroneous. KRS 13B.090(7).

E. **Delete** Conclusion of Law paragraph 8 and substitute the following:

8. KRS 18A.095(1) reads as follows:

(1) A classified employee with status shall not be dismissed, demoted, suspended, or otherwise penalized except for cause.

9. KRS 18A.005(24) defines "penalization" as follows:

(24) "Penalization" means demotion, dismissal, suspension, fines, and other disciplinary actions; involuntary transfers; salary adjustments; any action that increases or diminishes the level, rank, discretion, or responsibility of an employee without proper cause or authority, including a reclassification or reallocation to a lower grade or rate of pay; and the abridgment or denial of other rights granted to state employees[.]

10. Review of the definition of "penalization" provided by KRS 18A.005(24) makes clear that placing an employee on special investigative leave constitutes a penalization. This is because placement of an employee on leave, by its very nature, diminishes the level of discretion and responsibility of the employee placed on leave.

Because placement on leave is a penalization by definition, the question then becomes “Was the action taken ‘without proper cause or authority?’”

In this case, Appellant was placed on special investigative leave based on the authority of 101 KAR 2:102, Section 9(3). The question of whether the challenged action was taken without “proper cause” as defined by statute can only be determined following an evidentiary hearing because such a determination must always be resolved given the specific facts of the underlying appeal. This is because, circularly, the very definition of “penalization” means that almost any action taken against an employee could be a “penalization” if the action was taken without “proper cause or authority.” In this case, because there is an unresolved question of fact as to whether or not Appellant was placed on special investigative leave for “proper cause,” this action fits the definition of a penalization, and the Board has jurisdiction to determine whether Appellant’s placement on leave constituted a penalization given the underlying facts of the appeal.

11. In a number of previous Board Orders, the Personnel Board has discussed the issue of whether placing an employee on special investigative leave amounts to an appealable penalization. See e.g. Cathy Meeks v. Cabinet for Health and Family Services, 2005 WL 6154538 (KY PB 2004-355). In another separate line of Board Orders, without specifically stating that placement on leave constitutes a penalization, the Board has applied a “just cause” standard in analyzing an Agencies’ placement of an employee on special investigative leave. Previous Board Orders have also been resolved on the determination as to whether placement on investigative leave was “excessive or erroneous,” as defined by KRS 18A.095(1). Kenneth Fogle v. Justice and Public Safety Cabinet, Department of Corrections, 2008 WL 4757730 (KY PB 2007-071 and 2007-178). Lastly, there are also a number of earlier Board decisions that state that placing an employee on special investigative leave does not constitute a penalization. James Howitz v. Revenue Cabinet, 1996 WL 34442845 (KY PB 95-564 and 96-038). After significant

review of KRS Chapter 18A, the Board's previous precedent, and the applicable appellate case law, the Board resolves this dispute in its precedent by specifically ruling that the placement of an employee on special investigative leave constitutes a penalization as defined by KRS 18A.005(24).

12. This is consistent with the Board's ruling in the case of Jason Tackett v. Cabinet for Health and Family Services, 2017 WL 11426647 (KY PB 2016-164). In the Tackett case, the Board held that placing an employee on desk duty amounted to an appealable penalization because it diminished his discretion and responsibility, noting specifically that "what constitutes "proper cause" in any given situation is directly proportional to the extent of the penalization; stated differently, the more significant the penalization, the higher the "proper cause" threshold." The same reasoning applies to placing an employee on special investigative leave, which removes even more discretion and responsibility than placement on desk duty.

13. Because placement of Appellant on special investigative leave constitutes an appealable action, the letter placing Appellant on special investigative leave must comply with both the requirements of the leave regulation - here, 101 KAR 2:102, Section 9(3) - because Appellant is a classified employee, in addition to the provisions of KRS 18A.095(8). This statute reads as follows:

- (8) A classified employee with status who is demoted, suspended, or otherwise penalized shall be notified in writing of:
 - (a) The demotion, suspension, or other penalization;
 - (b) The effective date of the demotion, suspension, or other penalization;
-

- (c) The specific reason for the action including:
 - 1. The statutory or regulatory violation;
 - 2. The specific action or activity on which the demotion, suspension, or other penalization is based;
 - 3. The date, time, and place of the action or activity; and
 - 4. The name of the parties involved; and

- (d) That he or she has the right to appeal to the board within sixty (60) days, excluding the day that he or she received notification of the personnel action.

14. In applying the provisions of KRS 18A.095(8), it is important to remember that the penalization is placing the employee on leave, not conducting the investigation. As a result, a letter placing an employee on leave must contain information primarily related to the facts that led the Agency to the decision to place the employee on leave, not the subsequent conduct of the investigation. Stated differently, an employee is entitled to be told they are being placed on leave and why they are being placed on leave; an employee is not entitled to notice about the details of how an Agency is conducting an investigation and, as of now, it is unclear what specific rights, if any, KRS Chapter 18A or the attendant regulations afford employees during the investigative process.

To the extent that any information regarding the substance of the subsequent/underlying investigation is required to be disclosed in the letter placing an employee on investigative leave, it is understandable and expected that the appointing authority will not have complete and detailed information at the very start of an investigation. Importantly, complete and detailed information about the underlying

allegations is not required; instead, the combination of the applicable statutes and regulations require the letter placing an employee on leave to provide notice as to what action the Agency is taking and what facts/allegations compel the Agency to take the action. When applying this standard to the letter issued to Appellant in this case, it is clear that the letter complies with both the statutory requirements of KRS 18A.095(8) as well as the regulatory requirements.

15. As a result, the Appellees complied with all statutory and regulatory requirements, the action of placing Appellant on special leave for investigation was taken for proper cause and was neither excessive nor erroneous.

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer, as Altered, be and they hereby are, approved, adopted and incorporated herein by reference as a part of this Order, and 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 16th day of March, 2022.

KENTUCKY PERSONNEL BOARD



**MARK A. SIPEK
SECRETARY**

A copy hereof this day mailed to:
Hon. Paul Fauri
Hon. Deaidra Douglas
Hon. Rosemary Holbrook (Personnel Cabinet)

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2018-256

RONALD A. GODSEY

APPELLANT

VS.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER

JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF CRIMINAL JUSTICE TRAINING

and

PERSONNEL CABINET

APPELLEES

This matter came on for an evidentiary hearing on August 17, 2021, at 9:30 a.m., at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky 40601, before the Hon. Roland Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A. By prior agreement of the parties, the proceedings were conducted via Amazon Chime video teleconferencing in accordance with COVID-19 guidelines, KRS 13B.080(7).

The Appellant, Ronald A. Godsey, was present and represented by the Hon. Paul F. Fauri. The Appellee Justice and Public Safety Cabinet, Department of Criminal Justice Training was present and represented by the Hon. Katie George and the Hon. Deaidra Douglas. The Appellee Personnel Cabinet was present and represented by the Hon. Rosemary Holbrook and by its Agency representative, the Hon. Catherine Stevens.

At issue was the Agency's placement of Appellant on special investigative leave (specifically, the standards applicable to placement on special investigative leave and an assertion that the standard was not met herein). The burden of proof is by a preponderance of the evidence. The Agencies shall have the burden of proof on the penalization of placing Appellant on special investigative leave. KRS 13B.090(7).

The rule separating witnesses was invoked and employed throughout the course of the proceedings. Appellant presented his opening statement. The Justice and Public Safety Cabinet presented its opening statement. The Personnel Cabinet waived presentation of an opening statement.

BACKGROUND

1. The first witness for the Appellee, Justice and Public Safety Cabinet, Department of Criminal Justice Training (hereafter "DOCJT") was **Tina Moss**. Since December 1, 2017, Moss has been employed as the Human Resources Branch Manager for Human Resources Branch, in Richmond, Kentucky. She also serves as a Staff Assistant. She oversees the Department's Human

Resources Branch and staff and provides guidance to leadership of the agency in all matters regarding personnel and payroll.

2. Moss is notified whenever an investigation is initiated or conducted. When any employee is placed on special investigative leave,¹ the Commissioner contacts Moss and requests she draft a memorandum for his signature for submission to and approval by the Personnel Cabinet, prior to the letter being issued to the employee. Special investigative leave is a type of leave that is initiated when there is to be an investigation of an employee. The appointing authority of the agency conducting the investigation makes the decision to place the employee on leave. A draft of the letter placing the employee on leave is sent to the Personnel Cabinet before it is issued to the employee. The employee, when placed on special investigative leave, receives full pay during that time. Appellant was placed on special investigative leave as an investigation was to be initiated by the Agency. Commissioner Payne directed Moss to draft the letter which was sent to the Personnel Cabinet.

3. She identified Appellee's Exhibit 1 as a redacted copy of the November 28, 2018 letter notifying Appellant, he was being placed on special investigative leave with pay for a period not to exceed sixty (60) working days, effective December 3, 2018, pending further investigation of allegations of misconduct. Such letters normally include the employee's name, address, effective dates of leave, and the reasons for being placed on leave. Commissioner Payne also told Moss what reasons to put in the letter: "allegations have been received of the following misconduct: observations of harassment of co-workers and staff; discrimination against women and creating hostile workplace to co-workers."

4. The draft letter was sent to and reviewed by Commissioner Payne who approved it by signature. It was then sent to the Personnel Cabinet for legal review. The Personnel Cabinet approved and returned the letter. The final letter was delivered to Appellant in its entirety. The letter was signed by Commissioner Alex Payne, by Catherine Stevens, of the Personnel Cabinet's Office of Legal Services, and by signature stamp of the Secretary of the Personnel Cabinet, Thomas Stephens.

5. She identified Appellee's Exhibit 2 as an email she sent on November 28, 2018, to Rick Davis, Staff Assistant with the Personnel Cabinet, requesting approval of the special investigative leave letter.

6. She identified a portion of Appellant's Exhibit 1 as emails she sent to the Personnel Cabinet requesting approval of the November 28, 2018 letter.

7. Catherine Stevens, counsel for the Personnel Cabinet, asked Moss by email to give her a call. (See Appellant's Exhibit 2). Moss called and advised Stevens the allegations in the letter came from Commissioner Payne; and that apparently several employees had told Commissioner Payne about Appellant's behavior when those employees participated in exit interviews. She had previously attached Exit Interview forms to the documents she sent to Commissioner Payne as part

¹ Also known per 101 KAR 2:102, Section 9(3) as "special leave with pay for investigative purposes pending an investigation...."

of his request for information for the subject investigation. The purpose of Stevens' inquiry was to ask about the difference in time between the letter issuance date and the December 3, 2018 effective date of the leave. Moss told her that, due to Appellant's schedule, he was currently not at work but would be returning on December 3, 2018.

8. On November 29, 2018, at 3:00 p.m., Moss participated in a meeting with Deputy Commissioner John McGuire, Investigator Joey Barnes, and Kevin Rader. (Kevin Rader was the Assistant Director of the Administrative Division of DOCJT and had been Appellant's supervisor).

9. She identified Appellant's Exhibit 4 as a questionnaire for Case 18-13 prepared by Barnes for purposes of his investigation. Moss had, in the previous meeting, recommended questions 6 and 7 be added.

10. Moss did not have any documentation of the "observations" mentioned in the special investigative leave letter. Moss believed there were "several" employees who made allegations and believes the allegations were made firsthand either to Commissioner Payne, Rader, or McGuire. She had no knowledge of time frame of when the allegations had been made.

11. She identified Appellant's Exhibit 5 as a December 3, 2018 email she had sent to all DOCJT personnel. It advised such personnel that, "per Commissioner Payne, as an FYI, please be advised that Appellant is on Special Leave starting today. Therefore, he will only be permitted access into DOCJT facilities through normal visitor protocol until returning from leave or further notice. If you have any IT related questions, please contact Kevin Rader."

12. Commissioner Payne directed Moss to draft a letter advising Appellant of the end of his leave period and when he was to return to work. She identified Appellant's Exhibit 6 as the March 1, 2019 letter she drafted for Commissioner Payne's review and signature. The Appellant's leave period began December 3, 2018. The letter directed Appellant to return to work on March 5, 2019, at 8:30 a.m. It is Moss's understanding that Appellant did not return to work at any time during the leave period.² She identified Appellant's Exhibit 10 as a copy of the DOCJT Policy and Procedure, Complaint Investigations, No. 2001-004. Complaints against employees are covered in Section IV of the Policy.

13. The next witness for the Appellees was **Catherine Stevens**. Since July 2017, Stevens has been employed by the Personnel Cabinet in the position of Staff Attorney III. From February 2015 to July 2017, she had been employed as a Staff Attorney with the Justice and Public Safety Cabinet. Prior to February 2015, she was in private legal practice.

14. KRS 18A.110 is the statute whereby the Legislature gave the Secretary of the Personnel Cabinet authority to promulgate regulations and it specifically mentions special leaves of absence. The Secretary had promulgated the regulations on special leave which are found in 101 KAR 2:102 – Classified Leave. Section 9 of the Regulation pertains to special leave of absence. Sub Section 3 states; "If approved by the secretary, an appointing authority may place an

² Appellant's Exhibits 7, 8, and 9 were not admitted into evidence over objections of Appellee DOCJT which objections were sustained by the Hearing Officer.

employee on special leave with pay for investigative purposes pending an investigation of a work-related incident or an allegation of employee misconduct.

- (a) Leave shall not exceed sixty (60) working days.
- (b) The employee shall be notified in writing by the appointing authority that the employee is being placed on special leave for investigative purposes, and the reasons for being placed on leave.
- (c) If the investigation reveals no misconduct by the employee, records relating to the investigation shall be purged from agency and Personnel Cabinet files maintained in accordance with KRS 18A.020(2)(a).
- (d) The appointing authority shall notify a current employee, in writing, of the completion of the investigation and the action taken.”

Special leave for investigative purposes may be instituted authorizing the employee be on leave with pay during the investigative period only if approved by the Secretary of the Personnel Cabinet. KRS Chapter 18A places no other restrictions on the special leave for investigative purposes.

15. 101 KAR 2:102 (hereafter “the regulation”) Section 9, governs special leave. It does not govern investigations. When an employee is notified in writing of the reasons for being placed on leave, specific facts in the notification are not required. No accompanying documentation is required to be provided at that time to the employee. The witness was asked a number of questions about the document purge provision of the regulation. She testified that one could not erase the fact that there had been an investigation, however, only records kept in the files at the Agency and the Personnel Cabinet could be expunged under the stated conditions. With reference to Appellant’s Exhibit 5, the email to all staff, she testified this document, while it pertains to Appellant’s special leave, is not required to be purged from the email system.

16. The use of special investigative leave is rare. Most investigations are conducted while an employee continues to work in the workplace. When safety requires that the employee be taken out of the workplace with pay, special investigative leave is utilized. The Human Resources Office of the affected agency contacts the Office of Legal Services of the Personnel Cabinet. The Personnel Cabinet assigns the matter to an attorney. At that time, a letter signed by the agency appointing authority placing the employee on special leave, has already been prepared in draft form. Moss had sent an email to Rick Davis in the Office of Legal Services. Ms. Stevens was the attorney assigned that day to handle special investigative leave and the information was forwarded to her.

17. She identified Appellee’s Exhibit PC-2 as the November 28, 2018 email from Rick Davis to her providing some information as noted in the email. She examined the draft letter from Moss, and it raised one question. That same day she sent an email to Moss requesting Moss call her (Appellee’s Exhibit PC-3). Her question pertained to the gap between the date of the letter, November 28, 2018, and the starting date of investigative leave, December 3, 2018. She identified Appellee’s Exhibit PC-3 as the November 28, 2018 email she sent to Moss asking Moss to call her.

18. When Moss telephoned Stevens, she explained Appellant's schedule was such that he was not expected to be back in the office until December 3, 2018. The Agency wanted to place him on leave due to allegations of misconduct centered on observations of harassment of coworkers and staff, discrimination against women, and creating a hostile workplace for coworkers. Matters of harassment and creating a hostile workplace need to be addressed promptly. The case file on the matter refers to the phrase "prompt remedial measures," which are required under such circumstances.

19. Any allegations made by employees to Human Resources need not be in writing. The agency, upon receipt of a complaint, needs to begin the process as soon as they are aware of such allegations. According to the Employee Handbook, the behavior of "bullying" would be considered part of creating a hostile workplace.

20. Stevens identified Appellee's Exhibit PC-4, page 1, as the handwritten notes she had taken during her telephone conversation with Moss. She wrote that the matter was not about harassment of a sexual nature. The more the Agency looked into things, the more they were finding. She made other notes on her copy of the November 28, 2018 letter, as well as the Personnel Action Notification (PAN) with Start Date September 1, 2018. As Appellant supervised four (4) employees, it was reasonable, based on the allegations, to remove him from the workplace.

21. In her legal opinion, Stevens believed DOCJT had complied with the regulatory requirements when they placed Appellant on special investigative leave. The letter contained the reasons for leave and "checked all the boxes" they recommend be checked. It notified Appellant he would be placed on special investigative leave pending an investigation of misconduct and stated reasons for the investigation. It also advised that the leave would not exceed sixty (60) working days. Furthermore, it stated that if the investigation revealed no misconduct, records would be purged.

22. The following day, Stevens contacted Secretary Thomas Stephens of the Personnel Cabinet. He approved the leave and since he was not present in the building, he approved the use of his signature stamp on the letter.

23. Although the agency begins an investigation based on allegations in the leave letter, it is not prohibited from investigating matters that come to its attention during the course of the investigation. Any investigation could lead to other matters. The regulation only governs the leave and not how an investigation is conducted. Even if the Personnel Cabinet Secretary were to deny such leave, the agency could still have conducted an investigation. The sixty (60) day limit stated in the regulation pertains only to the length of time an employee may be placed on paid leave. It does not limit the length of time for an investigation.

24. Appellee's Exhibit PC-6, Kentucky Personnel Board Appeal Form, submitted by Appellant in this case and received December 19, 2018, by the Personnel Board, was admitted into evidence without additional testimony.

25. Stevens had asked Moss how far back the subject allegations went. Moss told her she did not know. The "observations" came from exit interviews. When asked about the importance of when the observations were made, whether recently or ten (10) years ago, and which gave rise to the leave and investigation, she separated a need for the investigation from the need to put someone on leave for a finite period of time.

26. The Secretary of the Personnel Cabinet bases approval of leave on what was stated in the letter. If the elements of the regulation are met, that is all that is required for the Secretary's approval. She had provided the Secretary only with the draft of the leave letter and no other document. The Secretary was only concerned with whether leave was justified under the elements of the regulation. Stevens had no further involvement in the matter once the letter for special investigative leave was approved by the Secretary and the Agency notified of same.

27. If an investigation were to find no misconduct, the leave letter would then be purged. It applies to a finding of any misconduct, not just what was alleged in the letter.

28. Poor work performance is not misconduct and therefore one cannot be placed on special investigative leave for poor work performance.

29. There were no further witnesses for the Appellees and the Appellees' case was closed.

30. The Appellant orally renewed his Motion to Sustain Appeal as a Matter of Law and asked that his written motion and supporting brief thereon be incorporated by reference and considered by the Hearing Officer. The Appellees requested that their respective responses to Appellant's motion previously submitted in writing also be considered. All requests were granted and a ruling on the motion was considered by the Hearing Officer at the time of issuance of this recommended order.

31. The first witness for Appellant was **Joey Barnes**. For the past four (4) years, Mr. Barnes has been employed as an Investigator Manager of the DOCJT Compliance Section. He had previously been employed thirty (30) years with the Kentucky State Police. He has been with DOCJT since 2012.

32. The investigation of the current matter was assigned to Barnes on November 27, 2018, when he met with Tina Moss along with Kevin Rader in her office. They related the allegations to him. Rader had received complaints about Appellant's behavior. Rader had done some preliminary inquiries to see if there was anything to these complaints. Over the course of several days Barnes had received notes and emails that Rader had already accumulated. There were apparently no signed complaints. The complaints were employee emails as well as notes taken by Rader during conversations with such employees.

33. He identified Appellant's Exhibit 3 as a portion of his case report. On November 29, 2018, he had a meeting with McGuire, Rader, and Moss. The bold-faced portions of the bullet

points shown on page 36 of Appellant's Exhibit 3 were Barnes' answers to the questions posed by Rader, such answers having been inserted after completion of the investigation.

34. Barnes was present with Appellant in the Commissioner's Office on December 3, 2018, when the special investigative leave letter was read to Appellant. This was the first time Barnes had seen that letter. During that meeting, Barnes filled out a complaint and investigative notice and provided a copy to Appellant.

35. During the course of the investigation, Barnes looked into the allegations contained in the special investigative leave letter as well as the bullet point items subsequently provided to him.

36. Barnes prepared the questionnaire (Appellant's Exhibit 4) based on the allegations made against Appellant. Moss had suggested two (2) of the questions that were added to the questionnaire. The questionnaire was distributed to employees.

37. On February 19, 2019, Barnes turned in his report of investigation. The report made no conclusions. It presented the facts and information he obtained during the investigation, which were then to be considered by others who would draw their own conclusions.

38. The next witness was Appellant, **Ronald A. Godsey**. Appellant is currently employed as a Resource Management Analyst I, grade 13 with the Justice and Public Safety Cabinet, Department of Criminal Justice Training. Before being placed on leave, he had been employed as Information Systems Manager, grade 17.

39. On December 3, 2019, Commissioner Payne and Joey Barnes made Appellant aware of his placement on special investigative leave with pay. The entirety of the November 28, 2018 letter was read to him. He started asking questions of how this came about. He did not receive any specific answers until later when he was interviewed by Barnes, after Barnes had completed and submitted the investigation report.

40. He signed the investigation form to which was attached a copy of the leave letter. He was then escorted out of the building. Later, he received an email sent to all staff notifying that he had been placed on leave. The leave lasted from December 2, 2018, to March 5, 2019.

41. He identified Appellant's Exhibit 11 as the "attachment" that had been a part of his appeal form filed with the Personnel Board. He adopted the statements therein, relevant to the issue in this case, as part of his testimony.

42. There were no further witnesses for Appellant. There were no rebuttal witnesses for Appellees. The parties reserved closing arguments for briefs. A briefing schedule was issued by separate Interim Order.

FINDINGS OF FACT

1. Ronald A. Godsey, Appellant, was a classified employee with status. When he was placed on special investigative leave he was employed as an Information Systems Manager, grade 17, with the Justice and Public Safety Cabinet, Department of Criminal Justice Training (DOCJC).

2. Special investigative leave is a type of leave that is initiated when there is to be an investigation of an employee. When placed on special investigate leave, the employee continues to receive full pay during that time. An employee is taken out of the workplace when circumstances of employee or workplace safety are involved.

3. The Kentucky Legislature, in KRS 18A.110, authorized the Secretary of the Personnel Cabinet to promulgate regulations, including matters of special leaves of absence. The Secretary promulgated regulations including 101 KAR 2:102. Classified leave general requirements, Section 9. Special Leave of Absence. (3) which states:

“If approved by the secretary, an appointing authority may place an employee on special leave with pay for investigative purposes pending an investigation of a work-related incident or an allegation of employee misconduct.

(a) Leave shall not exceed sixty (60) working days.

(b) The employee shall be notified in writing by the appointing authority that the employee is being placed on special leave for investigative purposes, and the reason for being placed on leave.

(c) If the investigation reveals no misconduct by the employee, records relating to the investigation shall be purged from agency and Personnel Cabinet files maintained in accordance with KRS 18A.020(2)(a).

(d) The appointing authority shall notify a current employee, in writing, of the completion of the investigation and the action taken.”

4. It is the appointing authority of the agency, in this case, the Justice and Public Safety Cabinet, Department of Criminal Justice Training, that makes the decision to place an employee on special leave for investigative purposes. Commissioner Payne contacted Tina Moss, Human Resource Branch Manager for DOCJT and requested she draft a letter placing Appellant on special investigative leave. He provided the following reasons to be included in the letter: “allegations have been received of the following misconduct: observations of harassment of coworkers and staff; discrimination against women and, creating a hostile workplace to coworkers.”

5. Moss put together a draft of the letter (Appellee’s Exhibit 1, redacted). Commissioner Payne reviewed and approved the draft, per his signature. Moss then sent the letter to Rick Davis in the Personnel Cabinet, Office of Legal Services, for legal review.

6. Once the letter was received in the Office of Legal Services, the matter was assigned to a Personnel Cabinet Attorney. Catherine Stevens (Staff Attorney III) was the attorney assigned to handle special investigative leave the day this letter arrived (Appellee's PC-2).

7. Stevens examined the letter and contacted Moss for additional information (Appellee's Exhibit PC-3). Moss explained the letter bore a November 28, 2018 date with a December 3, 2018 starting date for special investigative leave since Appellant was out of the office and not expected to return until December 3, 2018.

8. Stevens reviewed the allegations in the letter and concluded that since Appellant supervised four (4) employees, it was reasonable to remove him from the workplace during the investigation. She also concluded that the Agency had complied with all the regulatory requirements of 101 KAR 2:102, Section 9(3). The regulation only governs how an employee may be placed on special leave for investigative purposes. It does not govern how an investigation is to be conducted.

9. The following day, Stevens contacted Personnel Cabinet Secretary Thomas Stephens. He approved the special investigative leave. As he was not present in the building at that time, he approved use of his signature stamp on the letter. Secretary Stephens approved the letter based solely on what was stated in the letter.

10. On December 3, 2019, Commissioner Payne and Joey Barnes (Investigator Manager of the Compliance Center of DOCJT) presented Appellant with the November 28, 2018 letter placing him on special leave for investigative purposes (Appellee's Exhibit 1). The entirety of the letter was read to Appellant. The letter had been signed by Commissioner Payne, Catherine Stevens of the Personnel Cabinet, Office of Legal Services, and by signature stamp of Thomas Stevens, Secretary of the Personnel Cabinet.

11. Once an agency begins an investigation based on allegations contained in the letter that places an employee on special leave for investigative purposes, it is not prohibited from investigating matters that come to its attention during the investigation.

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

CONCLUSIONS OF LAW

1. A classified employee with status shall not be dismissed, demoted, suspended, or otherwise penalized except for cause. KRS 18A.095(1). At the time Appellant was placed on special investigative leave, he was a classified employee with status.

2. At issue was the Agency's placement of Appellant on special investigative leave (specifically, the standards applicable to placement on special investigative leave and an assertion that the standard was not at herein). The burden of proof was on the Agencies to prove by a preponderance of the evidence that the placement of Appellant on special investigative leave was

employed for just cause and that such action was neither successive nor erroneous. KRS 13B.090(7).

3. "Preponderance of evidence" means, "...evidence which as a whole, shows that the fact sought to be proved is more probable than not. With respect to burden of proof in civil actions, means greater weight of evidence or where evidence which is more credible and convincing to the mind." Black's Law Dictionary, 5th Edition, page 1064. The ultimate burden of persuasion in all administrative hearings is met by a preponderance of evidence in the record. Failure to meet the burden of proof is grounds for a recommended order from the Hearing Officer. KRS 13B.090(7).

4. The applicable regulation, 101 KAR 2:102 Section 9(3), permits an appointing authority, if approved by the Secretary, to place an employee on special leave with pay pending an investigation of allegations of "employee misconduct." The term "employee misconduct" includes a broad array of improper behaviors in the workplace. While it does not necessarily require an allegation "of workplace violence," the appointing authority in this instance could take reasonable and necessary steps to safeguard the safety of any employee or of the employee placed on special investigative leave, should allegations warrant such.

5. On December 3, 2019, Commission Payne and Joey Barnes provided Appellant a letter, authored by the Commissioner, notifying Appellant that, effective December 3, 2018, pending further investigation of allegations of misconduct, he was being placed on special investigative leave with pay for a period not to exceed sixty (60) days. Such letter was approved by the Secretary of the Personnel Cabinet and recommended for approval by the Office of Legal Services of the Personnel Cabinet (Appellee's Exhibit 1). The letter also provided sufficient notice of the reasons for being placed on special leave for investigative purposes. "Allegations have been received of the following misconduct: observations of harassment of co-workers and staff; discrimination against women and creating hostile workplace to co-workers."

6. Commissioner Payne, by letter of March 1, 2019, notified Appellant that he was directed to return to work on Tuesday March 5, 2019, at 8:30 a.m., and report directly to Steven Long, Division Director, Training Operations Division. The letter also stated Appellant would be notified of the results of the special investigation by separate correspondence (Appellant's Exhibit 6).

7. That separate correspondence was a letter dated March 28, 2019, from Commissioner Payne to Appellant (Appellant's Exhibit 8). Such letter confirmed to Appellant the completion of the special investigation and action taken as result of same. While the regulation limits the time an employee may be on special investigative leave with pay to sixty (60) working days, there is no time limit or requirement by which the appointing authority is to notify the current employee in writing of the completion of the investigation and the action taken.

8. The Appellees' have shown by a preponderance of the evidence that the placement of Appellant on special leave with pay for investigative purposes was properly employed and that they complied with all requirements of the applicable regulation. Therefore, Appellees have shown by a preponderance of the evidence that placement of Appellant on special leave with pay for investigative purposes was employed with just cause and was neither excessive nor erroneous.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **RONALD A. GODSEY VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CRIMINAL JUSTICE TRAINING AND PERSONNEL CABINET (APPEAL NO. 2018-256)** be **DISMISSED**. Based on this Recommendation, Appellant's Motion to Sustain Appeal as a Matter of Law is deemed **MOOT**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this 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 Merkel** this 6 day of December, 2021.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Katie George
Hon. Deaidra Douglas
Hon. Catherine Stevens
Hon. Paul F. Fauri