

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2013-042

WADE HESTER

APPELLANT

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

FINANCE AND ADMINISTRATION CABINET  
LORI H. FLANERY, APPOINTING AUTHORITY

APPELLEE

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The Board at its regular November 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated October 22, 2014, and being duly advised,

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

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 19<sup>th</sup> day of November, 2014.

KENTUCKY PERSONNEL BOARD

  
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MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Cary Bishop  
Wade Hester  
Honor Barker

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
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This matter came on for evidentiary hearing on September 17, 2014, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before Roland P. Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Wade Hester, was present and not represented by legal counsel. The Appellee, Finance and Administration Cabinet, was present and represented by the Hon. Cary Bishop.

Mr. Hester appeals the matter of his having been placed on special investigative leave by the Finance and Administration Cabinet. The burden of proof was on the Appellee to show by a preponderance of the evidence that the placement of the Appellant on special investigative leave was employed for just cause and that such action was neither excessive nor erroneous.

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

BACKGROUND

1. The first witness for the Appellee was **Troy Robinson**. For the past year and a half, Mr. Robinson has been employed by the Finance and Administration Cabinet as the Executive Director of the Office of Administrative Services. He also serves as the Appointing Authority. At the time of the subject incident of December 13, 2012, Mr. Robinson was the Cabinet's Appointing Authority and Director of the Division of Human Resources. He had the ultimate responsibility to address workplace violence issues when they arose.

2. He identified Appellee's Exhibit 1 as the December 18, 2012 letter he had written which placed Mr. Hester on special leave with pay for investigative purposes, for a period not to exceed sixty working days, effective December 18, 2012. The rationale for the investigation, as stated in the letter was:

On December 13, 2012, you allegedly approached a Cabinet for Health and Family Services (CHFS) employee in a hostile manner related to her inquiry of Ms. Dorothy Nash, CHFS employee within DCBS, as to whether she had recently signed for copy paper. Your conversation and subsequent slamming of your office door was loud enough to be overheard by other employees nearby. You then allegedly sent an unprofessional email to a CHFS employee which made this employee uncomfortable.

Your actions leading up to and following this incident have allegedly resulted in the creation of a hostile workplace environment.

3. Appellant was placed on special leave to allow the Cabinet time to investigate the allegations. Such leave separates the parties to ensure there are no further altercations. The letter also advised Appellant that during that period he would not be allowed admittance to any Cabinet for Health and Family Services (CHFS) or Finance and Administration Cabinet facilities, specifically the P&P office, unless he had a scheduled appointment.

4. He identified Appellee's Exhibit 2 as the regulation which gave him the authority to place Appellant on special leave: 101 KAR 2:102, Classified Leave General Requirements. Section 9(3) 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 an allegation of employee misconduct.

5. An allegation of employee misconduct is all that is required to place an employee on such leave. It is a broad term and does not necessarily require a showing of an allegation of workplace violence. Allegations had been brought to Mr. Robinson's attention by Kim Mitchell regarding an employee's concerns of possible workplace violence. Someone from the Commonwealth Office of Technology (COT) had brought that allegation to Ms. Mitchell.

6. Kim Mitchell in her conversation with the CHFS employee learned that immediately following the incident, Appellant was alleged to have slammed his office door and then sent an e-mail that "bothered this person."

7. Upon receipt of the information, Mr. Robinson surmised the employee was frightened. It had been related to him she had been fearful to park in the same parking lot as the Appellant, and she had her husband drive her to work. These allegations took the matter to another level that warranted special leave until the Cabinet was able to determine what had happened.

8. It took the Cabinet awhile to determine what to do. COT had gone through a consolidation with Infrastructure Services around November 1, 2011. All COT employees were detailed to special duty and remained at their then current workstations until COT could assess what individual employee's job duties were to be and how to move forward with consolidation. At that time, the Appellant was in Northern Kentucky at a CHFS location and was detailed to the Finance and Administration Cabinet.

9. He identified Appellee's Exhibit 3 as Finance and Administration Cabinet Standard Procedure #2.8, Workplace Violence. This policy is very broad with reference to the inclusion of behaviors that would be deemed violent. From the subject allegations alone and the described acts, Mr. Robinson believed they fell within the definition of workplace violence.

10. When an employee is fearful and there is a potential for further violence, such special leave provides a means to allow the situation to calm down and for the Cabinet to investigate the truth of the allegations. Even if allegations are borderline workplace violence, the Cabinet would take an employee out of the situation and err on the side of caution.

11. Mr. Robinson directed the investigation. He assigned certain COT employees including Kim Mitchell, HR Administrator, to interview all involved in the matter. The investigators were not able to confirm allegations of the existence of workplace violence. Mr. Robinson, Ronnie Boggs and Terry Stevens, interviewed the Appellant via telephone conference call.

12. He identified Appellee's Exhibit 4 as the March 14, 2013 letter he authored which notified Mr. Hester the Cabinet had concluded its investigation and did not confirm that he or his actions created a hostile work environment. However, Hester was advised his actions in sending the December 13, 2012 e-mail did make several CHFS employees uncomfortable and was "unprofessional." By agreement of the parties, Mr. Hester's workstation was changed to the Kentucky Transportation Cabinet District 6 office in Covington, Kentucky, where he was to report on March 18, 2013. A March 14, 2013 memorandum identifying the change of workstation had also been attached to the aforementioned letter (Appellee's Exhibit 5).

13. Appellant's special leave had been for a period of 59 working days. He had been paid all during this time and did not lose any benefits. In addition, he received holiday pay, annual and sick leave accruals, all benefits, and his months of service. Nothing about Appellant's job changed other than his workstation. Mr. Robinson stated that Appellant's personnel records have not been purged of this matter, because as stated in the March 14, 2013 letter, the e-mail he sent was considered "unprofessional." Mr. Hester was neither disciplined nor counseled for that e-mail.

14. The next witness was **Ronald Boggs**. For the last year, Mr. Boggs has been employed by the Finance and Administration Cabinet, COT, as Executive Advisor. Previously he had been the COT Assistant Director. Mr. Boggs had been asked to be part of the interview team with David Kincaid to investigate the allegations against the Appellant. Eugene Raines had been assigned to the interview team with Kim Mitchell. He interviewed four CHFS employees at 624 Madison Street, Covington, Kentucky.

15. On December 13, 2012, it had come to Mr. Boggs' attention that Appellant had sent an e-mail that had made "several folks uncomfortable." Other e-mails had come to Mr. Boggs that demonstrated employees were alarmed at some of the behaviors they witnessed from Appellant. The e-mails described Appellant to have been very upset and having slammed a door. Employees' comments include "he scares me," "he's intimidating staff," and from Lisa Prewitt: "I would call law enforcement."

16. During the course of the interviews, Mr. Boggs determined no new information had been uncovered. They did not find evidence of a hostile work environment. He summarized his findings and sent them to Kim Mitchell at the Finance and Administration Cabinet. The final determination was made by someone else; however, he was aware that determination did not conclude Mr. Hester had created a hostile work environment.

17. Mr. Boggs participated in the March 12, 2013 telephone conference call with Appellant when Appellant was informed his workstation would be changed. Appellant did not object to that action. Mr. Hester's main concern appeared to be what he was going to tell the people he had worked with about where he had been for the last two months. With a change of workstation he now did not have to address that concern.

18. The December 13, 2012 e-mail from Wade Hester to Robin McGuire and others was read into evidence (this document was later admitted into evidence by stipulation of the parties, as Appellee's Exhibit 6).

19. **Kim Mitchell**, who for the past ten years has been the HR Administrator for the Finance and Administration Cabinet, was the next witness.

20. The Division of Human Resources had received a telephone call from Daniel Arnold at COT advising that some employees had become unnerved by certain comments and actions of the Appellant. It was alleged Appellant had approached an employee, was very loud with her, and employees heard doors slamming. Employees were afraid or nervous.

21. Such matters raised concerns with Ms. Mitchell as they appeared to fall within the behaviors that would constitute workplace violence under the Cabinet's workplace violence policy (Appellee's Exhibit 3).

22. Ms. Mitchell was asked to participate on the interview team during the investigation. She was paired with Eugene Raines. They interviewed Jennifer Newman and Nicole Kippenbrock. They did not find enough evidence to confirm there existed workplace violence. It had been reasonable, however, to place the Appellant on special leave as they did not want anything to happen to anybody while the investigation was being conducted. It was Troy Robinson who made the final determination pertaining to the allegations.

23. Ms. Mitchell confirmed she had previously seen Appellee's Exhibit 6, the December 13, 2012 e-mail, as it had been given to her to review as part of the overall incident.

24. **Lisa Prewitt** was the next witness. For the past six years, Ms. Prewitt has been employed by CHFS as a Service Region Administrator (SRA). She supervised CHFS employees from the Kenton County facility, which was Appellant's workstation. Appellant provided desktop support to Prewitt's staff, which included DCBS staff in twelve counties.

25. An SRA associate in the Kenton County office had made Ms. Prewitt aware of the Appellant's behavior and the allegations. One employee, Vanessa Ashley, had been "verbally assaulted." Ms. Prewitt called and spoke directly to Ms. Ashley to determine what happened. She was told Appellant entered her office, waved his arms and accused her of accusing Dorothy Nash of signing for some paper. Prewitt then spoke with Nicole Kippenbrock. Staff had provided her with concerns. They were very scared their names would be made known as they feared retaliation. They had described the Appellant as "irrational" and "crazed." Ms. Prewitt then reported the matter to Appellant's management. During the course of the investigation Ms. Prewitt was one of the individuals who had been interviewed.

26. After Mr. Hester had been placed on special leave, Prewitt held a conference call with all the supervisors in her region. She advised the supervisors that Mr. Hester was not to be on the premises of any state offices and if he was, they were to ask him to leave. If that became a problem, they were to call law enforcement. The purpose of her telephone call was to let staff know that Appellant was on leave and what to do if they needed desktop support. If he showed up, he was to be asked to leave and if he did not cooperate, law enforcement was to be contacted.

27. Ronnie Boggs had sent an e-mail to Prewitt advising her the investigation had been completed. Once the Cabinet completed its investigation, Ms. Prewitt did not communicate to her staff that no action had been taken against the Appellant or that he returned to work and was allowed back on state property.

28. The Cabinet rested its case. The sole witness for the Appellant, was the Appellant, **Wade Hester**.

29. Mr. Hester has been employed as a Network Analyst III in the Commonwealth Office of Technology (COT) for a little over eight years. In August of 2011 he was mobilized to Iraq with the Kentucky National Guard. He returned to the United States in May 2012 as his wife was undergoing a medical procedure. He was thereafter released from active duty and returned to work for the Commonwealth on May 21, 2012.

30. In 2012, he had filed an appeal of a MDA which alleged his misappropriation of resources. He testified this current appeal (2014-042) is a continuation of that former case as it involved the same individuals. He alleged certain individuals participated in fabricating the allegations against him in order to justify placement of the Appellant on special leave by the Finance and Administration Cabinet; that those individuals cooperated in a scheme to have him terminated.

31. On March 12, 2013, he had been contacted and offered a relocation to a different workstation to "get a fresh start." Appellant's area of responsibility today continues to cover CHFS properties. The only thing that changed was the location from where he conducts his duties.

32. It was in July or August of 2013 that a coworker at the new location, Kim Prokopchak, had been working on a ticket from CHFS. She told Appellant she was unfamiliar with their processes. Appellant asked her why they just did not send him over there. Ms. Prokopchak said she was told that Appellant was not allowed on CHFS property.

33. The parties stipulated that as far as the Finance and Administration Cabinet is concerned and aware, there is no prohibition against Mr. Hester, from and after March 18, 2013, performing his job on any state-owned property or at any state-owned facility, or from visiting his wife at her workstation.

### **FINDINGS OF FACT**

1. Wade Hester, Appellant, is a classified employee with status. He is employed as a Network Analyst III in the Commonwealth Office of Technology (COT), detailed to the Finance and Administration Cabinet. His workstation was at the Kenton County facility of the Cabinet for Health and Family Services, where he provided desktop support.

2. Mr. Hester's wife, Dorothy Nash, had been a CHFS employee within DCBS. On December 13, 2012, Appellant confronted a CHFS employee for the purpose of protecting his wife from certain allegations, which allegations were later found to have been false. Subsequently, Appellant sent an e-mail to Robin McGuire and others. (Appellee's Exhibit 6).

3. Lisa Prewitt, Service Region Administrator (SRA) in the Kenton County office, was made aware by her staff of the incident, as well as certain allegations against Appellant. On December 13, 2012, she reported this matter to Ronald Boggs, who at that time was the COT Assistant Director.

4. When the matter was reported to Troy Robinson, Director of the Division of Human Resources at the Finance and Administration Cabinet, he assessed the situation. He determined the allegations could constitute workplace violence as set out in the Finance and Administration Cabinet's Standard Procedure #2.8 (Appellee's Exhibit 3). Pursuant to 101 KAR 2:102, he placed Appellant on special leave for investigative purposes. The regulation gives an Appointing Authority, if approved by the Secretary, the ability to place an employee on special leave with pay for investigative purposes pending investigation of allegations against that employee for misconduct. He notified Appellant of same on December 18, 2012, by letter, which he signed in his capacity as the Appointing Authority. (Appellee's Exhibit 1). Appellant was placed on special leave with pay for investigative purposes to allow the Cabinet time to investigate the December 13, 2012 incident. That letter also contained the following language:

During this period of special leave of absence, you will not be allowed admittance to any Cabinet for Health and Family Services or Finance and Administration Cabinet facilities, specifically the P&P Office, unless you have been scheduled an appointment.

5. Having learned of Appellant's placement on special leave, Lisa Prewitt conducted a conference call with supervisors in her region. She advised the supervisors that Mr. Hester was not to be on the premises of any state offices and if he was, they were to ask him to leave. If Hester did not leave after such request, the supervisors were directed to call law enforcement.

6. Troy Robinson directed that an investigation into the allegations be conducted and assigned COT employees, Kim Mitchell, Ronald Boggs, David Kincaid, and Eugene Raines, to conduct interviews and report back. Possible witnesses were interviewed. Appellant was interviewed by telephone by Messrs. Robinson, Boggs, and Terry Stevens.

7. Following all interviews, everyone concluded Appellant's acts had not constituted workplace violence.

8. On March 14, 2013, Mr. Robinson issued a letter to the Appellant notifying him that the investigation had been concluded. While it was determined that the December 13, 2012 e-mail sent by the Appellant was "unprofessional," the investigation did not confirm that he, by his actions, created a hostile work environment, although having made several CHFS employees "uncomfortable." (Appellee's Exhibit 4.)



9. By agreement of the parties, Mr. Hester's workstation was changed to the Kentucky Transportation Cabinet, District 6 office in Covington, Kentucky, where he reported to work on March 18, 2013. A March 14, 2013 memorandum identifying the change of workstation had been issued (Appellee's Exhibit 5).

10. Once he returned from special leave, Appellant's responsibilities were identical to his previous duties, with the exception of a change of workstation. During the period of special leave, Appellant had been paid all wages and did not lose any benefits. He also received holiday pay, annual and sick leave accruals, all benefits, and his months of service.

11. The parties stipulated that as far as the Finance and Administration Cabinet is concerned and aware, there is no prohibition against Mr. Hester, from and after March 18, 2013, performing his job on any state-owned property or at any state-owned facility, or from visiting his wife at her workstation.

12. Lisa Prewitt has never contacted supervisors in her region to advise that no action had been taken against Mr. Hester and he returned to work and was allowed back on the premises of all state offices.

13. All during the time spanning these allegations, the Cabinet had in full force and effect its Procedure, No. 2.8, Workplace Violence (Appellee's Exhibit 3). Also in effect during this time was 101 KAR 2:102, Classified Leave General Requirements (Appellee's Exhibit 2).

14. Mr. Hester 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. The burden of proof was on the Appellee to show by a preponderance of the evidence that the placement of the Appellant on special investigative leave was employed for just cause and that such action was neither excessive nor erroneous.

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 evidence which is more credible and convincing to the mind." Black's Law Dictionary, 5<sup>th</sup> Ed., p. 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. A “penalization” includes, but is not limited to a demotion, dismissal, suspension, fines and other disciplinary actions, involuntary transfers; salary adjustments; any action that diminishes the level, rank, discretion, or responsibility of an employee without proper cause including a reclassification or reallocation; and the abridgement or denial of other rights granted to state employees. KRS 18A.005(24).

5. The applicable regulation, 101 KAR 2:102, Section 9(3), allows 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 was well within his authority to take the reasonable and necessary steps to diffuse any alleged volatile situation and protect the safety of employees. The allegations as presented to Troy Robinson, when examined in conjunction with the Finance and Administration Cabinet Standard Procedure, #2.8, Workplace Violence (Appellee’s Exhibit 3) led to a reasonable determination by him that there were allegations of “employee misconduct.” Certainly, since there was possible workplace violence, Mr. Robinson properly utilized 101 KAR 2:102, Section 9(3) when he placed Mr. Hester on special leave with pay for investigative purposes.

6. The Appellee has shown by a preponderance of the evidence that the placement of Appellant on special leave with pay for investigative purposes was employed with just cause and was neither excessive nor erroneous.

7. However, the evidence brought to light other circumstances. The above ruling does not mean that additional steps are not required as a result of this appeal.

8. First, the testimony of Ronald Boggs revealed that Lisa Prewitt, following the incident, had told him “I would call law enforcement.” Once Mr. Hester was placed on leave, Prewitt conducted a conference call with supervisors in her region advising them Hester was not to be on any state premises; if he appeared on state property he was to be asked to leave; and if he did not leave, they were to call law enforcement. Certainly this type of communication leads others to speculate about the reasons they have been provided such instructions.

9. As a result of the investigation, Mr. Hester has been cleared of any of the allegations of workplace violence and returned to work. He now performs the same duties he did prior to the leave, and may perform such services at or in the presence of the same supervisors who participated in the conference call with Ms. Prewitt.

10. The parties to this appeal have stipulated that from and after March 18, 2013, Mr. Hester is allowed on all state properties to perform his job or visit his wife. None of this, however, has been communicated by Ms. Prewitt to her supervisors. In order to avoid anyone from asking Mr. Hester to leave the premises, or from summoning law enforcement, all based on Prewitt's conference call, it is important that proper communication of the results of the investigation be communicated to the CHFS supervisors.

11. Second:

If the investigation reveals no misconduct by the employee, records relating to the investigation shall be purged from agency and Personnel Cabinet files.

101 KAR 2:102, Section 9(3)(c).

12. The March 14, 2013 letter (Appellee's Exhibit 4) stated:

As a result of our investigation, it was determined that the email you sent on December 13, 2012 at 10:46 AM to various CHFS employees was unprofessional. The investigation did not confirm that you or your actions created a hostile workplace environment. However, your actions, as well as the aforementioned email, did make several CHFS employees uncomfortable.

13. The Appellee's use of the terms "unprofessional" and "uncomfortable" are vague and undefined in the letter. It is not clear from that paragraph that any of that was considered to be "employee misconduct." An employee who is found to have engaged in employee misconduct either is issued some type of discipline (suspension or termination), a written or oral reprimand, Performance Improvement Plan, or counseling. None of that was instituted against Appellant following the investigation. Therefore, one must conclude there was no finding from the investigation of any employee misconduct particularly since no action was taken against the Appellant.

**RECOMMENDED ORDER**

The Hearing Officer recommends to the Personnel Board that the appeal of **WADE HESTER VS. FINANCE AND ADMINISTRATION CABINET (APPEAL NO. 2013-042)** be:

1. **SUSTAINED to the following extent:**

A. The Finance and Administration Cabinet, by and through its appropriate Appointing Authority, shall notify in writing the appropriate CHFS supervisory staff who had been contacted in the conference call of Lisa Prewitt, that Wade Hester:

(1) Has returned to his employment position as a Network Analyst III without restriction or administration of any disciplinary action;

(2) He is allowed on all state properties to conduct the duties of his position or to communicate with his wife.

(3) A copy of such communication shall also be provided to Appellant with a separate copy tendered to the Kentucky Personnel Board.

B. The Finance and Administration Cabinet and the Personnel Cabinet shall **PURGE** from its files any and all records relating to the subject investigation of Wade Hester.

C. The Appellee is ordered to reimburse Appellant for any leave time he used attending the hearing and any pre-hearing conferences at the Board. **[KRS 18A.095(25)]**

2. **DISMISSED** with reference to Appellee having placed Appellant on special leave with pay pending an investigation of allegations of employee misconduct.

**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 22<sup>nd</sup> day of October, 2014.

**KENTUCKY PERSONNEL BOARD**

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

A copy hereof this day mailed to:

Hon. Cary Bishop  
Wade Hester