

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-089**

WADE HESTER

APPELLANT

VS.

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER**

**FINANCE AND ADMINISTRATION CABINET
LORI H. FLANERY, APPOINTING AUTHORITY**

APPELLEE

** ** ** ** **

This matter came on for evidentiary hearing on October 9, 2014, at 9:35 a.m. at 28 Fountain Place, Frankfort, Kentucky, before John C. Ryan, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by KRS Chapter 18A.

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

The matter was the subject of at least one pre-hearing conference, conducted on June 25, 2014, at which the issues were defined and procedural concerns resolved.

BACKGROUND

1. Through March 2014 Wade Hester was a classified employee with status, officially holding a position in the Finance and Administration Cabinet, Office of Administrative Services, Commonwealth Office of Technology, job station at Covington, Kentucky. By letter of March 6, 2014 over the signature of Troy Robinson, Executive Director of the Office of Administrative Services of the Cabinet, he was placed upon involuntary sick leave effective that date. This action was taken due to concerns raised by one or more staff of another agency, the Personnel Cabinet's Office of Employee Relations, relative to the potential of harm or injury by his own hand to himself or others. A true copy of the letter enacting the step is attached as part of this Order as "**Recommended Order Attachment A.**"

2. Although the sick leave letter did not reference any right of appeal of the action, actually insisting that it was not a disciplinary action or penalization, Appellant nonetheless took issue therewith and challenged the process by appeal initiated on May 2, 2014 under the category of "Other Penalization – Mandatory sick leave under fraudulent claim." He further wrote therein that:

I was placed on "mandatory sick leave" under a fraudulent claim that I suicidail (sic). The letter informing me of this action was based (sic) a 20 minute telephone conversation where isolated portions of the call were taken out of context and presented with such intellectual dishonesty that it conveyed a fraudulent foundation and presentation to justify a preconceived intent to cause financial hardship.

3. It was discerned in due course that that which Appellant seeks is restoration of his consumed sick leave and removal of the episode from his personnel file.

4. Nearly seven weeks later, by letter of April 23, 2014 over the signature of Honor Barker, Appellant's actual Appointing Authority, was advised he had provided appropriate medical documentation concerning his health status and returned to duty effective April 28, 2014. A true copy of that notice is attached as a part of this Order as "**Recommended Order Attachment B.**" He was, however, at that time temporarily re-assigned to a different work location, specifically to Franklin County, Kentucky, and directed to attend certain training classes related to workplace behavior. This assignment was made permanent in August, 2014.

5. Upon convening the evidentiary hearing, the parties presented fairly detailed summaries of their respective positions. They stipulated that the evidence presented in this matter should be placed under seal for the reason that it addresses to a great extent Appellant's personal health concerns and should not be the subject of public scrutiny.

6. The Agency thereupon offered the testimony of **Troy Robinson**, who is the Executive Director of the Office of Administrative Services in the Finance and Administration Cabinet and is an Appointing Authority. He recited that the General Counsel for the Cabinet contacted him by phone in early March, 2014 and informed him that staff personnel were expressing concerns relative to statements just made by an employee, Appellant Hester. Following a discussion among management as to the appropriate handling of the matter and upon review of what was perceived to be the relevant regulation, the witness decided to place Appellant upon directed sick leave under the "danger to himself or others" provision of the regulation. He had a letter accomplishing this prepared and delivered to Appellant; the letter also outlined the criteria for returning to duty, including an evaluation of his mental and physical status by a professional medical person. The witness noted that he was subsequently made aware that Appellant voluntarily went to a hospital and was evaluated on March 5, in due course reviewing an undated Discharge Summary which was furnished by Appellant's then-attorney on or about March 11, 2014. He explained that this summary was deemed insufficient and would not, standing alone, support Appellant returning to his job duties. A more specific form is utilized by the Agency for purposes of medical certifications and this form was issued to Appellant on or about March 14 through the attorney.

7. The witness continued that during at least a portion of the relevant timeframe Appellant was incarcerated in the Boone County Detention Center but on work release. Accordingly, management was uncertain whether he could return to work even if medically acceptable and a process was implemented to deal with this aspect. Upon receiving the requisite medical information confirming Appellant's fitness for duty on April 9, management commenced the necessary steps for having him come back to work. However, due to complaints concerning his behavior, it was not acceptable for him to return to his prior workstation in Northern Kentucky and the Agency undertook to locate an alternate location for him. It determined that its needs were best matched to his skills at a Frankfort, Kentucky office, specifically at 101 Twin Oaks Circle there. This change, however, necessitated communications and arrangements with Boone County authorities relative to the work release circumstance, since he was allotted twelve hours each day to be absent from detention and the roundtrip commute to and from Frankfort approximates three hours. Administrative details were resolved and Appellant resumed his duties, at Frankfort, on April 28, now made permanent. The witness noted that much of this was handled by Honor Barker, Appellant's actual Appointing Authority who operates under the supervision of this witness. He made the documentation evidencing all of the foregoing part of his testimony without objection by Appellant.

8. The witness continued that, notwithstanding Appellant's claim that his medical leave was instigated as a form of conspiracy to get rid of him, such was not the case. It was, he reiterated, initiated due to the nature and tone of the inquiries which Appellant made, detailed in the medical leave letter. He pointed to one or more specific references attributed to Appellant concerning a violent act by another individual as a particular concern and which he viewed had escalated the need for the Agency to take action. There have been no further incidents since Appellant's return, by all accounts he is performing his duties adequately, and no further action is anticipated arising from the sequence.

9. Under cross-examination, the witness was directed to the hospital Discharge Summary discussing Appellant's visit there on March 5, 2014. He acknowledged that the summary references that a behavioral health provider presumably saw Appellant and released him to "resume pre-hospital activity." He also acknowledged that it appears to assess no restriction of activities for Appellant upon his release. The witness insisted, however, that the summary did not fully acquaint the employer with sufficient information that Appellant could safely return to his job. As a consequence, he explained, an additional review was requested and in due course received which satisfied the criteria for having Appellant come back.

10. The witness agreed that his letter of March 6, 2014 placing Appellant on mandatory sick leave did not supply the form which the Agency eventually required certifying him as competent. He noted that in some instances medical persons provide their own form and in other instances request the Agency version and such was supplied in this instance. He ratified

that it was he and Honor Barker, Appellant's specific Appointing Authority, who determined the criteria of how and when Appellant might return after reviewing information, admittedly hearsay, supplied by others having direct contact with Appellant. He agreed that much of the decision process relied upon others more fully trained in medical and mental issues and the actions were based in great part upon their advice.

11. Appellant pressed the witness as to whether management investigated, and if so to what extent, the context wherein the comments attributed to him in the medical leave letter were made. The witness reacted that the individual reporting the conversation had concern for the welfare of the caller, then unidentified, due primarily to the combination of a reference to being worth more dead than alive with an allusion to a publicized episode involving an individual who barricaded himself in his home and exchanged gunfire with authorities approximately four months prior to the call in question. He recalled that management sought advice as to the best handling from those trained in such matters and thereupon took the steps under discussion. He agreed that Appellant had previously voluntarily transferred his job station from Finance and Administration to the Transportation Cabinet to alleviate further concerns at his existing job station. That transfer was unrelated to the episode under appeal.

12. Under redirect and re-cross examination variously, the witness further explained the need and basis for more thorough documentation to satisfy management that Appellant was not a danger to himself or to others. He again noted that the hospital Discharge Summary, which was furnished through Appellant's attorney, was too general and broad to confirm that he actually received whatever treatment may have been needed, or that he needed no treatment as the case may be. He further expanded that he could not discern from the summary if the treating physician dealt in mental health issues. He reiterated that the entire process was implemented to assure the safety of Appellant after it was confirmed that the comments attributed to him were in fact made. He ratified that the report from the licensed clinical Psychologist of April 9, 2014, combined with completion of the requisite forms "was exactly what we needed."

13. **Deanna Boden** has held the position of Administrative Specialist III for three years in the Transportation Cabinet. She numbers among her duties matters of personnel, human resources, hiring and discipline, and resolution of insurance questions. She recalled that Appellant, an IT expert employed to resolve issues with computers and assigned to the Transportation Cabinet at the time, casually came into her office inquiring about insurance in March, 2014. Her specific recollection was that initially he intimated that he was checking on behalf of a "friend" concerning the handling of insurance payouts for suicide, but in due course the conversation changed to the first person, with him referencing his own spouse and children. Appellant did not frame his inquiries in the nature of hypothetical questions nor did he reference matters of estate planning in the approximately ten-minute conversation. She was unable to answer some of his questions concerning the suicide aspect but circulated e-mails to others to obtain answers and supplied some information to him, including a booklet concerning insurance.

14. The witness felt growing apprehension due to the nature and content of Appellant's inquiries, having lost a cousin to suicide and feeling that she recognized certain symptoms. She conveyed her concern that Appellant might be a danger to himself to one or more supervisors in her office and that constituted the extent of her involvement in the matter. She had no role in the process thereafter.

15. Under brief cross-examination, the witness ratified that Appellant came to her office with certain general questions about insurance, inquiring as to whether she or "Frankfort" might have the information he needed. She reiterated that the inquiry was first posed as if on behalf of a friend and the express question was, "Does our health insurance plan pay benefits for suicide . . ." She did not recall any reference to estate planning or wills.

16. **Mary Hook** is Executive Director of Employee Relations in the Kentucky Personnel Cabinet. She holds a Master's degree in Rehabilitation and Counseling and previously worked for ten years in the mental health field. She also numbers among her duties oversight of the Workers Compensation Program for the Commonwealth. She recalled that on March 5, 2014, the life insurance staff person in her office received a call in which the caller was asking about suicide. The staff person was uncomfortable with the nature of the inquiry and referred the caller to her in light of her training. The caller did not identify himself, but in the course of the conversation made one or more comments that were alarming to her, including a reference to a "land deal" obligation combined with an inference that he is worth more dead than alive. He also spoke of an episode in Northern Kentucky concerning an individual involved in a violent episode (Vaughn) with which she was unfamiliar at that time. She promptly requested that staff research this event and was rather quickly presented with a news article detailing a stand-off with police wherein the individual's children were placed at risk. She viewed the call as a "cry for help" and workplace violence prevention protocol dictated that she take further action. She thereupon contacted a staff psychologist and the Agency attorney and acquainted them with the substance of the matter. Finally, upon advice the Kentucky State Police were also contacted and were able to trace the call to Appellant. She later learned that he voluntarily submitted himself to an examination at a hospital.

17. The witness continued that in the course of the conversation she gave the caller her name and phone number with the request that he call her back anytime, but he did not. At no time in the conversation did he indicate that he was merely posing a hypothetical circumstance, nor did he reference estate planning, wills, or a similar agenda as the basis for his inquiry. The conversation was the first and last contact between herself and Appellant and she had no further input as to the disposition of his status.

18. Under cross-examination, Appellant quizzed the witness at length concerning her recollection of the specifics of their phone conversation. She reiterated that he referenced a "land deal" in the conversation. He also disclosed that he was under a work release program from the Boone County Detention Center, arising from an alleged obligation to a former spouse, and had been jailed under a civil contempt charge. She recalled that he had insisted that he was incarcerated without being officially charged and felt extreme frustration therewith. She ratified that his focus was initially the handling of life insurance proceeds, seeking further explanation concerning to whom such proceeds are paid upon death of the insured. She reiterated that when he broached suicide, a subject concerning which her staff had not previously dealt, the staff person handed him off to her. She confirmed that in the course of the conversation treatment of military veterans under the life insurance structure was discussed and applicability of a two-year waiting period as to veterans committing suicide came into the conversation. She reiterated, or confirmed as the case may be, that the caller (Appellant) also introduced the subject of the Michael Vaughn episode at some point and at the time she was unfamiliar with the person or the episode.

19. The witness continued that although she made no judgment during the conversation as to Appellant's demeanor or mood, she felt she was detecting, in light of the subjects being raised and the tone in which they were being presented, a sense of hopelessness and desperation, as well as extreme frustration with his financial circumstances. Her concern was heightened when Appellant alluded to being worth more dead than alive, presented in the context of suicide, and the reference to another individual who had acted out his frustrations in a shootout with police.

20. Appellant undertook to challenge the witness as to whether she either misunderstood, conveniently forgot, or simply mischaracterized his words and the context in which some statements were made; she reiterated variously under cross- and redirect examination that she had no agenda concerning Appellant's status other than his welfare and that her perception of his demeanor, whether accurate or not, led her to have grave concern as to what he might be planning. The witness confirmed that she is an employee of the Personnel Cabinet and accordingly is under no duress or influence from the Finance and Administration Cabinet concerning the disposition of Appellant's circumstance.

21. **Kimberly Prokopchak** currently holds the position of Information Systems Supervisor in the Finance and Administration Cabinet; on March 5, 2014 she was Acting Branch Manager, Northern Field Services, for the Agency. She recalled that in March she supervised Appellant and approximately 44 other "techs," managing their day-to-day assignments, timesheets, and related agendas. She was Appellant's first-line supervisor. He was assigned at that time to the Transportation Cabinet.

22. It was this witness whom employee Deanna Boden contacted by telephone concerning the inquiries being made by Appellant. She was advised that he had appeared at Boden's office with certain questions concerning retirement, insurance, and more particularly insurance payouts "if he committed suicide." Given the nature of the inquiry and concerns for his safety, the witness implemented protocol within her line of supervision to provide for his safety and that was the extent of her involvement. She recalled no similar prior incidents with him, other than she had witnessed occasional emotional outbursts on his part but did not see these as extraordinary. Under very brief cross-examination, she expanded that Appellant had sometimes become upset or frustrated when discussing events or occurrences which he viewed as unfair, particularly in dealing with the court system and with his former spouse.

23. **Kim Mitchell** is the Agency Human Resources Administrator and includes among her duties the processing of personnel matters for the Office of Technology, under which Appellant works. Her role in the sequence dealing with concerns about him was that on March 5, 2014 employee Kim Prokopchak contacted her to report that a staff person at the Kentucky Transportation Cabinet District 6 office in Northern Kentucky was approached by an individual, who developed to be Appellant, inquiring about criteria for insurance payouts. This witness did not recall that the word suicide was used in her conversation with Prokopchak, but the nature of the inquiry gave the employee concern for Appellant's safety and the employee viewed there to be a signal of potential danger to himself and/or others. She conveyed the message to her supervisor and that was the extent of her involvement. Under brief cross-examination, the witness disavowed any knowledge or information pertaining to the background of the employee, Boden, who initiated the concern relative to his inquiries. This witness had no input in the makeup of the correspondence directed to Appellant placing him on leave.

24. **Honor Barker** is Director of the Division of Human Resources in the Finance and Administration Cabinet. As previously developed in the proof, she was Appellant's official Appointing Authority but was on leave on March 5, 2014 when the concerns for his safety were generated. She ratified that Troy Robinson was both her supervisor and her backup and she further ratified his handling of the matter in her absence. She and he coordinated their efforts and the majority of her testimony essentially mirrored his depiction of events. She confirmed that the relevant regulation was reviewed and thereupon implemented to place Appellant upon forced leave. She outlined for the record the conditions and criteria for return of an employee in such circumstance, namely that called for in the regulation. In summary, her role in the matter amounted to concurrence with the handling thereof by Executive Director Robinson.

25. Directed to expand upon the criteria for return, the witness agreed that the hospital Discharge Summary was insufficient for Agency purposes to clear Appellant for return to duty and explained the reasons, i.e. those previously set forth by Mr. Robinson. She expanded that the Agency requires what amounts to a "hands-on" workup from a physician which indicated that the physician was aware of and was acknowledging the circumstances of the consultation

and/or treatment, and outlining what, if any, treatment should be administered. She ratified that the form ultimately supplied through Appellant's attorney was properly completed, with backup, and returned without protest from the attorney and ultimately cleared the way for Appellant to come back to work.

26. The witness briefly addressed the reason for the lapse of time between receipt of the all clear medical certificate, approximately April 9, and Appellant's actual resumption of duties on April 28, 2014. She explained that there was a lapse of eight working days between the April 9 letter clearing him and the April 23, 2014 letter from her, informing him to return. She recalled that she was on leave for two of the working days, Mr. Robinson was out for two other days in that interval, and, there being a need to reassign Appellant, his new supervisor would be returning effective April 28. Management preferred that Appellant report to his new job station, in Frankfort, when his new supervisor was on hand.

27. The witness expressly urged that there was never a hidden agenda or sinister motive behind either the placement of Appellant on leave or his assignment. She noted that there have been no penalizations or discipline of him, nor have there been any further incidents reported to her, the perception being that what was intended was accomplished and the matter is closed.

28. Under cross-examination, Appellant conducted a relatively wide range of inquiries of the witness dealing with the handling of his circumstances before, during, and since his placement upon medical leave. He directed her to a letter over her signature of August 28, 2014, rendering his temporary assignment to the Frankfort, Kentucky, workstation permanent and requested her interpretation of certain language contained therein, which she explained. The language, constituting the basis for his new assignment, relates to complaints being made about his behavior variously.

29. Appellant discussed the witness' letter of April 23, 2014 returning him to duty. He alluded to one provision therein which appears to require that he attend "... some training classes related to workplace behaviors which will be coordinated through your new supervisor." She agreed that this has not to-date been implemented, explaining that ordinarily it is more within the purview of the first-line supervisor than her office and that she had no explanation as to the reason it was not yet provided. Appellant also addressed (at length) her input concerning the provisions of his hospital Discharge Summary already discussed in the proof, specifically her basis for deeming the contents thereof insufficient to allow him to return to work without additional examinations, forms, and another certificate. Her explanation was similar to that of Troy Robinson; management saw the release summary as incomplete because it did not confirm or ratify that the doctor or other hospital medical personnel either were aware of or acknowledged the basis for the hospital visit, nor did there appear to be any indication of whether Appellant might need additional treatment or counseling. She ratified that the

subsequent doctor's statement, which was supplied through Appellant's attorney without complaint on his part, resolved Agency concerns.

30. Under redirect examination, the witness further addressed the protocol for additional training, namely that ordinarily it is supplied at the request of, and coordinated through, a supervisor. She also expanded upon her understandings of the work release circumstance in which Appellant was functioning during the relevant timeframe; she explained that she was not fully familiar with the terms or conditions thereof but recalled that it had been implemented and accommodated through the office of Appellant's supervisor at the time without her involvement. She ratified that there is a "history" of incidents involving Appellant which have resulted in management's decision to relocate his workstation upon more than one occasion. The Agency's proof-in-chief was thereupon concluded.

31. Appellant presented the testimony of **Ronald Gilbert**, who is a Senior Trooper with the Kentucky State Police. It was this officer who came to Appellant's workstation on March 5, 2014 for what he characterized as a "welfare check." He recalled that at the time of his arrival Appellant was at lunch but returned soon, whereupon the trooper and Appellant conferred. Appellant's demeanor was calm, but in the course of the conversation, Appellant did become distraught but not threatening. The officer's observations led him to suggest that Appellant obtain medical advice, whereupon he accompanied him to St. Elizabeth Hospital to confer with the appropriate health officials there. No citation was issued nor any report prepared; Appellant's trip and visit were voluntary. He recalled that Appellant met with a counselor at the facility, but staff was busy at the time and the trooper left him there and returned to other duties. At no time did he observe any threats, risk of violence, or other behavior that caused him concern with the exception of Appellant being upset with his overall circumstances. The officer was not privy to any disposition of the matter by the hospital, when Appellant was released, or where he went thereafter.

32. Under brief and redirect examination, the officer discussed the conditions under which an individual might be placed in hospital care for a mandatory 72 hours. Specifically, if a citizen is extremely distraught, refuses to obey lawful orders, is threatening, or appears to be a danger to himself or others law officers have the authority to issue a citation, but where the individual is cooperative and seeks treatment or counseling voluntarily there is no "hold" placed upon them.

33. **Dorothy Nash** is Appellant's spouse. They have known each other eight years and have been married for approximately two years. She is employed as an Administrative Secretary with the Commonwealth of Kentucky and they are the parents of two small children and one step-child who is disabled. She ratified for the record that Appellant's forced medical leave placement caused personal and financial hardship for the family, especially when combined with his other issues, including his incarceration and work release circumstance in

process at the time.

34. The witness urged unequivocally that Appellant has never been, to her knowledge, suicidal. On the other hand, she explained, he does not filter his comments or think through his thoughts before expressing them, resulting in frequent misunderstandings and misinterpretations of his statements and behavior. She ratified that on the date in question she and he lunched together around 12 noon; there was discussion of their financial circumstances and, more particularly, information he received earlier that day. He had learned in a phone conversation with appropriate officials that his former spouse was still the beneficiary upon his retirement and his life insurance and this was upsetting to both him and her.

35. The witness continued that in the course of their lunch they also discussed his incarceration, which was viewed as inappropriate and unjust, and the hardships connected therewith. All of this arose due to the actions of the former spouse, whom the Boone County court had determined was owed considerable sums and had ordered Appellant to pay (he could not) or be jailed for contempt (he was). She recalled that in making the computations about what they as a couple could pay, the arithmetic led Appellant to somewhat flippantly comment that he was worth more dead than alive, whereupon both he and she chuckled at the irony thereof. The witness also discussed certain other pending matters being pursued by Appellant relative to enforcement of certain military rights, it appearing that his prior marriage was dissolved while he was under military deployment without representation. The Agency had no questions for this witness.

36. **Wade Hester** testified in his own behalf. He is a Network Analyst III with the Commonwealth Office of Technology, now assigned to Frankfort. He ratified his work release circumstance in process on March 5, 2014 and urged that his inquiries concerning his life insurance, retirement, and other related matters pertained to his estate planning. He related that he was deployed upon active military duty in Iraq in 2011 while still married, but separated from, his former spouse and during the deployment the marriage was dissolved. Upon his return, he married his current spouse, Dorothy Nash, and then realized, in the course of court activity wherein he was jailed, that the former spouse was still his officially designated beneficiary upon his insurance, retirement, and other records.

37. Appellant continued that he went to see employee Deanna Boden concerning his insurance benefits and she was able to answer some questions but not all and referred him to officials in Frankfort. He ultimately spoke with someone in the office of Mary Hook and that individual apparently "panicked" for no reason, he urged, and put him in contact with Ms. Hook. Appellant insisted that he had learned of discrepancies in the treatment of returning veterans between military law and matters of their life insurance, which appeared to provide conflicting criteria, timeframes, or other issues should a returning veteran commit suicide. In attempting to obtain advice about this, he ultimately utilized his own history as a hypothetical situation.

However, in doing so the personnel to who he addressed his inquiries completely misunderstood his motivation. He expressly denied that he ever threatened, intended, or even hinted at the possibility that he is personally suicidal. He insisted that the stress level on his part apparently detected in one or another phone conversation arose from the fact that he was under what he viewed as an illegal incarceration for failure to pay money which he does not owe. This was misinterpreted by the recipients of his calls as threatening to either himself or others.

38. Under very brief cross-examination, Appellant reported that he has formed, and serves as a spokesperson for, a small advocacy group acting in behalf of returning veterans who perceive they have been mistreated by the court system. However, his inquiries leading to his forced leave were not in behalf of this group and he did not reference it; the questions he posed were general in nature. There was thereupon concluded the sworn testimony and the matter stood submitted for recommended order.

39. KRS 18A.095(1) requires that "A classified employee with status shall not be dismissed, demoted, suspended, or otherwise penalized except for cause." Although the Agency did not, in its placement of Appellant upon forced medical leave consider the action a penalization Appellant, and in due course the Personnel Board, has treated it as such.

40. 101 KAR 2:102 is the regulation pertaining to classified leave. Section 2 thereof addresses accrual of sick leave and its utilization either voluntarily by the employee or involuntarily under specific conditions by the Agency. Subsection (2)(a) allows that "An appointing authority may grant or may require the use of sick leave with, or without, pay if an employee . . . would jeopardize the health of himself or others at his workstation because of a contagious disease or demonstration of behavior that might endanger himself or others." Similarly, Subsection (2)(b) requires that upon termination of the leave the appointing authority shall return the employee to his former position, although not necessarily to his former workstation.

41. 101 KAR 2:102, Section 2(5)(e) provides that "A medical certificate may be required, signed by a licensed practitioner and certifying to the employee's incapacity, examination, or treatment." Invocation of this provision may presumably apply either to justification for the taking of the leave or termination thereof as occurred here, indicating to the satisfaction of management that the employee is capable of returning.

FINDINGS OF FACT

1. At all times germane to this matter Appellant, Wade Hester, was a classified employee with status, holding the position of Network Analyst III in the Commonwealth Office of Technology under the Finance and Administration Cabinet, Office of Administrative Services. Sometime prior to March 5, 2014 he was incarcerated by court order in Boone County arising from issues relating to funds allegedly owed to a former spouse. He was able to continue performing his job duties under a work release arrangement coordinated through his employer and the court. This arrangement presumably enabled him to support his new family as well as develop some portion or all of the funds asserted as owed the former spouse. Appellant also either is or was a member of the Kentucky National Guard and was called to active duty, serving in Iraq and returning therefrom sometime in 2011. He was separated from his former spouse for at least three years prior to the call to active duty, and the marriage was dissolved while he was so serving. He married again around 2012.

2. Given the foregoing, Appellant came to realize at some point that he had not updated or corrected his employment records, particularly his insurance and his retirement, to accommodate his current circumstances. He apparently also researched his rights as a returning combat veteran as they relate to his incarceration due to the alleged domestic financial obligation and further, for reasons never fully developed, in this proceeding, the rights of veterans who commit suicide pertaining to their life insurance.

3. In the course of performing his duties, actually on assignment to the Transportation Cabinet at the time, on March 5, 2014 Appellant approached the staff person who deals with personnel and human resource matters in Northern Kentucky and posed, among other questions, the handling of benefits following suicide. This staff person did not have all of the information and referred him to an insurance specialist in the Personnel Cabinet at Frankfort. That staff person, in turn, felt unqualified to guide Appellant, as well as uncomfortable with the suicide inquiry and ultimately referred him to the Personnel Cabinet Executive Director of Employee Relations, who previously worked in the mental health field.

4. The tone and tenor of the phone conversation raised further concern on the part of the Personnel Cabinet executive that Appellant might be signaling an intent to harm himself. This impression was heightened by a reference which Appellant interjected at some point to a violent episode incited an individual in the northern Kentucky area who ultimately placed himself and his family in danger. Given the further impression that the caller, subsequently learned to be Appellant, was not posing a hypothetical but seemingly seeking to confirm that his own family would be cared for if he died, the executive's training caused her to have sufficient concern to invoke workplace violence preventative protocol, namely to contact police authorities, discern the whereabouts and name of the caller, and have him checked.

5. Upon establishment of Appellant's identity, a Kentucky State Police Officer met with him and accompanied him to a local hospital. In due course the hospital essentially cleared up the concerns surrounding the perceived jeopardy threat. However, in keeping with violence prevention requirements, Appellant's management immediately placed him upon forced sick leave and requested that he obtain an appropriate medical evaluation, with treatment if necessary. He complied, ultimately conferring with a Licensed Clinical Psychologist who prepared and supplied a report expressly addressing the specific aspects which had provoked the leave. Appellant was certified as not suicidal and returned to his duties at a reassigned job location, in Frankfort, Kentucky.

6. The Clinical Psychologist with whom Appellant eventually consulted, although certifying him as mentally competent, summarized his demeanor as follows:

Mr. Hester can be quite sarcastic and cynical when he gets frustrated. After reviewing the document from Mr. Robinson with Mr. Hester, it is very clear to me that his comments were made with cynicism and sarcasm given his level of frustration. I spoke with Mr. Hester quite candidly about his demeanor in this regard and he understood completely that his sarcasm and cynicism when he is frustrated is not only detrimental to his communication with others, but can also cause others to have concern about his mental stability.

The Psychologist also reported that he advised Appellant to engage in counseling after his discharge from detention, presumably to deal with the foregoing.

7. The Hearing Officer finds the testimony of all witnesses, including Appellant, to be credible. Appellant does still need the counseling recommended by the Psychologist.

CONCLUSIONS OF LAW

1. Although the Agency did not treat its placement of Appellant upon mandatory sick leave as a penalization he has, through his appeal, considered that he was penalized. Commensurate therewith, the matter has been processed by the Board under that assumption and will be likewise dealt with in its disposition herein.

2. Appellant's challenge of management's action is two-fold:

a. The intent of his inquiries, both in person and by telephone, was misinterpreted by those to whom they were addressed, resulting in overreaction by management and

b. Although the perceived risk to the safety of himself and/or others was rather promptly dispelled by a visit to a medical facility, Appellant was not promptly returned to duty and was required to consume his sick leave while awaiting approval.

3. Appellant has alleviated the concern that he is a risk to either himself or others. In fact, the Agency acknowledged this by ultimately returning him to duty. However, his allegation that the statements or concerns leading to the action were "fraudulent" is misplaced. Subsequent review by professional health care personnel revealed the perceptions to have been, at most, erroneous but well intentioned. Management cannot be faulted for its abundance of caution approach. When an alarm is sounded, until it can be determined whether or not there is actual danger or risk, management has little choice but to exercise extreme caution. While it is fortunate the alarm was false in this instance, Appellant's unfortunate mode of combining issues of suicide with insurance while alluding to violence obviously created a perception of risk that could not be ignored.

4. Any employer, including the Commonwealth of Kentucky, should be afforded reasonable flexibility in assessing conditions of employment. As the employer, it is responsible for providing the best environment available for personnel while on duty, including matters of physical and mental health. It would follow that the criteria for workplace safety may be unilaterally determined and the requirements implemented within the relevant regulatory scheme. In the immediate application, while the Discharge Summary issued by the medical facility which Appellant voluntarily visited made a preliminary determination that he was not at risk to himself or others, it was reasonable for management to require additional "hands-on" steps, and documentation, in order to satisfy itself concerning Appellant's mental health. While the delay of his return was regrettable, it was occasioned at least in part due to circumstances specific to him and his historical behavior.

5. Neither the placement of Appellant upon voluntary sick leave nor the length of time consumed thereby was erroneous or excessive in light of the overall circumstances.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **WADE HESTER VS. FINANCE AND ADMINISTRATION CABINET (APPEAL NO. 2014-089)** 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 John C. Ryan** this 10th day of December, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Cary Bishop
Wade Hester



Commonwealth of Kentucky
FINANCE AND ADMINISTRATION CABINET
OFFICE OF ADMINISTRATIVE SERVICES

STEVEN L. BESHEAR
Governor

Room 183, New Capitol Annex
Frankfort, Kentucky 40601
(502) 564-0410
(502) 564-4279 Facsimile
Troy.Robinson@ky.gov

LORI H. FLANERY
Secretary

TROY ROBINSON
Executive Director

March 6, 2014

Mr. Wade Hester

Dear Mr. Hester:

Please be advised that pursuant to 101 KAR 2:102, Section 2, (2)(a)(4), you are being placed on mandatory sick leave effective immediately. You are being placed on sick leave for the following reasons.

On March 5, 2014, it was brought to my attention that you approached Ms. Deanna Bowden in the District 6 Transportation office and asked her for information on health and life insurance and retirement and, specifically, what those would pay should a state employee commit suicide. Ms. Bowden advised that she did not know the answers but could give you some names and phone numbers. Mr. Rob Hans, Chief District Engineer, Kentucky Department of Highways, District 6, advised Ms. Bowden to provide you with the link to the Kentucky Employee Assistance Program (KEAP).

You then contacted the Personnel Cabinet's Office of Employee Relations by phone, asking specific information pertaining to state employee's life insurance payouts. At some point in this conversation, you stated you were worth more dead than alive. You later stated, "no one listened to Michael Vaughn until he did that..." At this point, the Kentucky State Police were notified of the situation and a trooper was dispatched to your work location. As you are currently on a work release program, the Boone County Sheriff's Office was also notified of the situation. Upon your return from your lunch, the Boone County Sheriff's Office and the Kentucky State Police trooper had been in contact with you. At 1:48 p.m., you sent an email to Kimberly Prokopchak stating, "Going to the hospital."

From what I have researched, the aforementioned Michael Vaughn incident occurred in December 2013 in Latonia, KY. Mr. Vaughn was a former combat veteran and had barricaded himself and his three children in their home. During this nearly 20-hour standoff with SWAT teams, Mr. Vaughn exchanged gun fire with authorities and set his home on fire. Eventually, Mr. Vaughn was apprehended by police.

The Cabinet has a duty to provide a safe working environment for its employees. The provisions of 101 KAR 2:102, Section 2, (2)(a)(4), state:

(2) (a) An appointing authority shall grant or may require the use of sick leave with or without pay if an employee:

4. Would jeopardize the health of himself or others at his work station because of a contagious disease or demonstration of behavior that might endanger himself or others;

Until such time as you can provide me a letter from a mental health professional that you are capable of performing the essential functions of your position in a safe and effective manner, with or without reasonable accommodations, you will remain on leave. During the period of time you are on sick leave, your access to Finance and Administration Cabinet owned / operated facilities will be revoked, as will your access to your computer and any programs that you may have access to. You are not permitted to visit any Finance and Administration Cabinet owned / operated facilities for any reason.

Once you obtain a letter from your mental health professional stating you are fit to return to duty, with or without reasonable accommodations, you will need to contact me by phone (502-564-0410 or 502-330-9221) to discuss the specifics of your return to work.

While on sick leave, accrued leave will be used from your account in the following order: sick leave, annual leave, and compensatory leave. If you are unable to return to work once accrued leave has been exhausted, you will be placed on leave without pay and an additional notification will be issued. You may apply for Family Medical Leave, for which the appropriate application forms are enclosed.

If you and your treating mental health professional are of the opinion that you need any reasonable accommodation to perform the essential functions of your job, please return to me no later than 15 business days after date of this letter is issued, a letter from your treating health professional setting forth any reasonable accommodations that are recommended. A copy of your job duties which you will need to submit to your treating mental health professional is attached hereto.

Wade Hester
March 6, 2014
Page 3 of 3

The Cabinet would like to advise you that the Kentucky Employee Assistance Program (KEAP) is available to you. The Cabinet urges you to contact KEAP and utilize the resources available, if necessary, to you through that agency. The phone number for KEAP is 502-564-5788 or 1-800-445-5327.

This is not a notice of disciplinary action or a penalization, but to insure your safety, the safety of others and that you are fit to return to duty. If you have questions regarding this action, please contact me at 502-564-0410 or 502-330-9221.

Sincerely,

A handwritten signature in black ink, appearing to read "Troy Robinson". The signature is fluid and cursive, with the first name "Troy" and last name "Robinson" clearly distinguishable.

Troy Robinson, Executive Director
Office of Administrative Services
Finance and Administration Cabinet

Attachments: Description of Job Duties
FMLA Application

cc. Tim Longmeyer, Secretary, Personnel Cabinet
James Fowler, Deputy Commissioner, Commonwealth Office of Technology
Terry Stephens, Executive Director, Office of Infrastructure Services
Eugene Raines, Director, Division of Field Services
Personnel File



Commonwealth of Kentucky
FINANCE AND ADMINISTRATION CABINET
OFFICE OF ADMINISTRATIVE SERVICES

STEVEN L. BESHEAR
Governor

DIVISION OF HUMAN RESOURCES

Room 388, New Capitol Annex
Frankfort, Kentucky 40601
(502) 564-7233
(502) 564-2613 Facsimile

LORI H. FLANERY
Secretary

HONOR F. BARKER
Director

April 23, 2014

Wade Hester

Dear Mr. Hester:

On March 6, 2014 you were placed on directed sick leave pursuant to 101 KAR 2:102, Section 2, (2)(a) which states that an appointing authority shall grant or may require the use of sick leave with or without pay if an employee would jeopardize the health of himself or others at his work station because of a contagious disease or demonstration of behavior that might endanger himself or others.

You have since notified this office of your ability and intent to resume your duties and have provided appropriate medical documentation indicating that you are able to perform the essential functions of your job without accommodation. Therefore, you may resume duties as a Network Analyst III within the Commonwealth Office of Technology effective Monday, April 28, 2014.

However, you are being temporarily assigned to a different work location and county and those details are included via separate notice. In addition, you will be required to attend some training classes related to workplace behaviors which will be coordinated through your new supervisor.

Please contact me directly at (502) 782-1596 should you have questions.

Sincerely,


Honor Barker, Appointing Authority
Finance and Administration Cabinet

cc: Tim Longmeyer, Secretary, Personnel Cabinet
Troy Robinson, Executive Director, Office Administrative Services, FAC
Terry Stephens, Executive Director, Office of Infrastructure Services, COT
Eugene Raines, Director, Division of Field Services
Aric Porter, Systems Consultant IT, Enterprise Field Services Branch
Personnel File