CERTIFICATION OF PERSONNEL BOARD RECORDS

I certify that attached hereto is a true and correct copy of the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer and Final Order Altering the Hearing Officer's Findings of Fact, Conclusions of Law and Recommended Order in the cases of **TAWNYA KENNEDY VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NOs. 2017-032 and 2017-186)** as the same appears of record in the office of the Kentucky Personnel Board.

Witness my hand this 18th day of October, 2018.

MARK A. SIPEK, SECRETARY
KENTUCKY PERSONNEL BOARD

Copy to Secretary, Personnel Cabinet

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NOs. 2017-032 and 2017-186

TAWNYA KENNEDY **APPELLANT**

V. **FINAL ORDER ALTERING THE HEARING OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER**

CABINET FOR HEALTH AND FAMILY SERVICES **APPELLEE**

** ** ** ** **

The Board, at its regular October 2018 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated August 15, 2018, Appellant's Exceptions and Request for Oral Argument, oral arguments, 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 Findings of Fact** paragraph 10 through 13 and substitute the following:

10. Deanna Barker testified that there were reasons for not extending work past 5:00 p.m., citing safety, need of supervision, and need for accountability of one working without supervision. However, the reasons set out do not establish the Agency would suffer an undue hardship by accommodating the Appellant.

11. Similarly, Terry Brogan explained the reasons for the one-day, three-day, and five-day suspensions, but the reasons given fail to adequately consider the Appellant's disability.

12. The Appellant testified that, at certain times previously, she had worked as late as 6:30 or 7:00 p.m. Other testimony indicated that the workday was extended, with prior approval, for special projects. The Appellant insisted her duties could be accomplished between 5:00 and 7:00 p.m. without the need for a supervisor, as the KASES computer system, which she primarily used, did not shut down until 7:00 p.m.

13. While the testimony of Jay Klein and Deanna Barker give credible support to the Cabinet's position that it would generally prefer not to extend the Appellant's work schedule beyond 5:00 p.m. on a regular basis, the Agency has failed to prove that

authorizing the accommodations requested by the Appellant would constitute an undue hardship, as is required by the ADA.

B. **Delete Conclusions of Law** paragraph 15 through 19 and substitute the following:

15. Critically, however, there was no testimony that the Agency examined the Appellant's job duties and determined her essential job functions. There was no testimony that the Appellant could not perform her essential job duties. There was no testimony that the Agency deemed the Appellant to be a danger to herself, to her co-workers, or to the public. There was no real testimony the Agency conducted an individual assessment of the Appellant's disability and its impact on the Appellant's job duties. Instead, the Agency determined that they could not grant the Appellant greater accommodation because of a broad Cabinet policy that no one would work past 5:00 p.m., unless given special permission. The Agency stated the reasons for the broad, Cabinet-wide policy as being safety, need of supervision, and the need for accountability of one working without supervision. But, the Agency did not determine if the unique combination of factors presented by the Appellant's specific disability, the essential job duties specific to her position, and her specific requests for accommodation actually created an undue hardship for the Agency.

16. Therefore, the Agency cannot establish, as a matter of law, that they took sufficient action to reasonably accommodate the Appellant's disabilities under the ADA. The evidence of record does not establish that the Agency took reasonable steps to examine reasonable, available accommodations for the Appellant in her Child Support Specialist II position.

17. The Hearing Officer concludes, as a matter of law, that the two accommodations provided the Appellant, namely moving the start time to 9:00 a.m., and allowing call-in either the night before or the morning of prior to an anticipated absence or tardiness were not the product of individual assessment in an interactive process. The Hearing Officer concludes the accommodations afforded the Appellant were not

reasonable as they were not the result of the process authorized by the ADA. Moreover, the Hearing Officer affords significant weight to the testimony of Human Resource Administrator Larry Ibershoff who testified that the Agency's general practice when handling FMLA/ADA issues is, once an individual has been deemed to be covered by those acts, they did not have to contact a supervisor daily or provide a daily doctor's note covering their accommodation. Here, the Agency deviated from its standard FMLA/ADA practice without sufficient cause and, further, acted unreasonably as a whole.

18. The failure of the Agency to make reasonable accommodations for the Appellant constitutes disability discrimination, as established by the Sixth Circuit Court of Appeals in *Kleiber*. 485 F.3d at 868 - 869. Such discrimination is properly deemed a penalization as defined by KRS 18A.005(24).

19. Because the Agency failed to make reasonable accommodation to the Appellant's disability, the Appellee has failed to carry its burden of proof to establish, by a preponderance of the evidence, that the one-day, three-day, and five-day suspensions were appropriate under the circumstances.

20. Because the Agency failed to make reasonable accommodation to the Appellant's disability, the Appellee has also failed to carry its burden of proof to establish, by a preponderance of the evidence, that the 2016 Annual Employee Performance Evaluation was accurate and appropriate under all surrounding circumstances.

21. The Hearing Officer concludes as a matter of law that, although a written reprimand is normally not an appealable action, because it is based within the context of a claim of disability discrimination, such can be ruled upon. The Hearing Officer, therefore, concludes as a matter of law that the Appellant carried her burden of proof to show that the written reprimand was not properly issued.

22. The Hearing Officer concludes as a matter of law that the Appellant has carried her burden of proof by a preponderance of the evidence to show that she was subjected to disability discrimination on the part of the Appellant for failure to provide reasonable accommodations.

[**Board Note:** During the oral argument conducted by the Personnel Board in this matter, the Appellant distributed an exhibit not contained in the record, a document offered to establish the fact that, after the closure of the evidentiary record, the Appellant worked on a special project at the Agency's behest. The document offered during oral argument purports to establish that, during a certain period of time, the Appellant worked past 5:00 p.m. for 23 out of a 28 days. While the Agency failed to object to such evidence, the Board specifically finds that the document was not contained in the factual record, was improperly tendered, and, as such, was not considered by the Board in resolving this appeal.]

B. **Delete** the Recommended Order.

IT IS FURTHER ORDERED that the Hearing Officer's Recommended Order be altered and that the consolidated appeals of **TAWNYA KENNEDY V. CABINET FOR HEALTH AND FAMILY SERVICES, (APPEAL NOs. 2017-032 and 2017-186)** be **SUSTAINED**. The Agency is directed to rescind the one-, three-, and five-day suspensions without pay that were imposed on the Appellant, to remove the written reprimand from the Appellant's file, to restore to the Appellant her back pay and benefits lost as a result of the suspensions, to properly engage in the interactive process to determine if reasonable accommodations can be made, to reimburse the Appellant for any leave time she used to attend the evidentiary hearing and any pre-hearing conferences at the Personnel Board, and to otherwise make the Appellant whole. KRS 18A.105, 18A.095(26), and 200 KAR 12:030.

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law, and Recommended Order, as altered, be and they hereby are approved, adopted, and incorporated herein by reference as a part of this Order and the Appellant's appeals are therefore **SUSTAINED.**

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this 18th day of October, 2018.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK
SECRETARY

A copy hereof this day mailed to:

Hon. Lucas Roberts
Hon. Mike Kalinyak
Jay Klein

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NOS. 2017-032 and 2017-186

TAWNYA KENNEDY **APPELLANT**

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

CABINET FOR HEALTH AND FAMILY SERVICES **APPELLEE**

** ** ** ** **

These matters came on for an evidentiary hearing on May 21, 2018, and May 23, 2018, at 9:30 a.m., ET, each day at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. R. Hanson Williams, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Tawnya Kennedy, was present and was represented by the Hon. Michael Kalinyak. The Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Lucas Roberts. Appearing as agency representative was Terry Brogan.

At issue was the Appellant's claim of disability discrimination and a written reprimand. The burden of proof on these issues was upon the Appellant by a preponderance of the evidence. Additional issues were one (1) day, three (3) day, and five (5) day suspensions and Appellant's employee evaluation. The Appellee was assigned the burden of proof on these issues by a preponderance of the evidence.

By agreement of the parties, a series of joint exhibits were entered into the record. Also by agreement, the depositions of Dr. Jonathan D. Cole and Dr. Ryan G. Wetzler were submitted for the record.

At the opening, the Appellant announced she was withdrawing her appeal for her 2017 evaluation; therefore the only remaining evaluation at issue was the 2016 evaluation.

BACKGROUND

First Day of Hearing

1. The Appellant called **Dianne Darnell** as her first witness. She is a Distribution Section Supervisor within the Division of Child Support Enforcement. She was the Appellant's

supervisor, or lead worker, until December 15, 2017. She stated the Appellant's job was as a Child Support Specialist II. The witness has worked with the Appellant since 2009.

2. The Appellant's primary duties include moving money to the appropriate accounts, refunding money, and working with the child support debtors. In essence, she is primarily responsible for seeing that the distribution of child support funds is properly made to custodial parents.

3. The Appellant's job involves working with the KASES computer system, which is an accounting-type function. Darnell stated that as the Appellant's supervisor, she had no problems with the quality of her work until sometime in the fall of 2015. She stated that she was aware the Appellant had suffered the death of her son in October 2015. She testified that the Appellant returned to work in January 2016 and, after that point, the Appellant had obvious problems in getting to work, either being late or not appearing at all. She also stated that after the first of 2016, the Appellant's work accountability went down.

4. The witness testified as to the 2016 Annual Employee Performance Evaluation. (Joint Exhibit N). She stated she performed the First Interim Evaluation covering the period of January 1, 2016 through April 30, 2016. This review showed that the Appellant appeared to work appropriately without supervision. The witness then explained that she had also performed the Second Interim Evaluation of 2016, covering the period of May 1, 2016 through August 31, 2016. Again, this seemed to show that the Appellant did the job relatively well without supervision.

5. Darnell then related that in July 2016, a new Branch Manager, Wendy Shouse, was appointed. She was a "by-the-book" supervisor. The witness then stated that, at this point, the Appellant had already been placed on Family Medical Leave Act (FMLA), primarily for the reason that it was hard for her to appear timely for work. The witness was aware of this problem, and stated that in October 2016, the Appellant ran out of FMLA leave. Shortly thereafter, a meeting was held to review sick leave procedures with the Appellant. This meeting involved Shouse, the Appellant, and Darnell. At that point, the parties were all aware that the Appellant was having problems coming to work.

6. The final score for the Appellant's 2016 Annual Employee Performance Evaluation was 242, which is a "Needs Improvement" score. This is eight (8) points below a rating of "Good."

7. The witness then addressed Joint Exhibit A, an October 27, 2016 Memorandum from Branch Manager Shouse to the Appellant. This addressed the situation following the expiration of FMLA leave and required the Appellant to provide a healthcare provider's statement in order to receive approved sick leave. This further required any physician's statement to be an original document signed by the provider.

8. The witness then introduced Appellant's Exhibit 1, her notes regarding the Appellant from October 27, 2016, through October 6, 2017. These notes reflect that, during this

period, the Appellant had requested FMLA and the appropriate forms were given to her to be submitted by her to her physicians. During this period, the Appellant failed to follow the instructions of calling in prior to her start time if she was going to be tardy. These involved the dates of November 28, 2016, and December 1, 2016.

9. The Appellant was given a written reprimand on December 19, 2016, for failure on these two call-in times. Subsequently, the Appellant was given a one-day suspension dated January 4, 2017, for a lack of good behavior in failing to report to work timely and failure to follow call-in procedures. The suspension was based upon the fact that, on December 14, 2016, the Appellant called in at 10:24 a.m. to Darnell, reporting that she would be at work after seeing her doctor. Appellant's scheduled work hours were from 9:00 a.m. to 5:00 p.m. This failure to notify the supervisor prior to the start time resulted in this suspension.

10. In a January 10, 2017 determination letter to her, the Cabinet acknowledged that the Appellant was an individual with a disability under the Americans with Disabilities Act (ADA).

11. On January 20, 2017, the Appellant, by email, requested annual leave. When questioned as to whether this was to appear in court for a prior DUI arrest, the Appellant stated she was unaware she needed to report this to her supervisor. Thereafter, on February 23, 2017, the Appellant was issued a three-day suspension for failure to comply with Cabinet policy requiring a report to be made for the DUI arrest. Also as a part of this three-day suspension, the Appellant was cited for a lack of good behavior for failure to follow call-in procedures. Specifically, the Appellant was cited for failing to notify her supervisor on February 8, 2017, February 13, 2017, and February 15, 2017, prior to her start time of 9:00 a.m., that she would be tardy or absent from her workstation.

12. The Appellant has argued throughout this hearing that an accommodation should be made to allow her to work later than 5:00 p.m., in order to make up for the time she was tardy or absent. In support of this, Darnell was shown Appellant's Exhibit 2, a list of sign-in/sign-out sheets for her section, ranging from dates in September 2016 through January 2017. The witness answered that for these individuals, who were allowed to work as late as 6:30 or 7:00 p.m., they more than likely were working on a special project which had been approved for overtime. The witness added that work on the KASES computer system could continue until 7:00 p.m., when the system automatically shut down.

13. Darnell was then questioned as to Joint Exhibit BB. This is a flextime work schedule with various options of putting in 7.5 hours per day. Option B gives the option of choosing to work 7.5 hours between 7:00 a.m. and 6:00 p.m. However, the witness stated that Appellant had been told she could not work past 5:00 p.m. as, after January 2017, all overtime had been approved by Branch Manager Shouse. After that date, no one could work past 5:00 p.m. except for special projects with prior approval.

14. Joint Exhibit I shows that the Appellant was allowed to work overtime hours on January 23 and 24, 2017, because she was approved to work on a special project.

15. On cross-examination, the witness was directed to Joint Exhibit AA, Appellant's 2015 Annual Employee Performance Evaluation. The witness stated that the Appellant had been rated as "Good" by a previous supervisor, who had left. Darnell stated that she had not been there long enough in 2015 to complete the evaluation and, in any case, the Appellant's job position during 2015 was an Accounting Specialist II rather than a Child Support Specialist II.

16. The witness also added that when Branch Manager Shouse terminated all work after 5:00 p.m., except upon approval, she wanted a supervisor to be present during such times.

17. On redirect, the witness stated that the Appellant would have been capable of working from 5:00 to 7:00 p.m. without supervision, if Shouse had approved same.

18. Appellant's next witness was **Terry Brogan**. He has been employed as a Human Resources Administrator within the Department of Income Support since February 2014. His job involves working with FMLA relief requests and he stated that the Appellant has enjoyed FMLA time twice since he has been with the agency.

19. The witness stated that both Darnell and Shouse had contacted him regarding Appellant's tardiness or absence of even calling in prior to her shift. He suggested to them that an actual doctor's statement be required on any leave requests after her FMLA had expired. The witness went on to add that, after the Appellant's FMLA leave had expired on October 27, 2016, until December 31, 2016, she was required to provide an original doctor's statement for any day she requested leave. On December 6, 2016, the Appellant requested accommodations under the ADA. Forms were provided to the Appellant to be sent to Dr. Welling and Dr. Cole, seeking their opinions. Following the receipt of their reports, the aforementioned January 10, 2017 letter was sent to the Appellant, acknowledging the Cabinet's determination that she was an individual with a disability entitled to reasonable accommodations. Both Dr. Welling and Dr. Cole had suggested the Appellant be allowed to be tardy at the beginning of work for one to two hours when needed.

20. The witness explained that, at one point, the Appellant was first given the accommodation of beginning her workday at 9:00 a.m. instead of 8:45 a.m. He also addressed the suspensions for failure to timely call in prior to work by saying that he sees no excuse for not calling in timely. The witness added that he thinks there are two separate issues, the first being tardiness and the second involving not calling in as required.

21. The witness defended the one-day suspension of January 4, 2017, as being cumulative, taking in to account the previous incidents of failure to timely call in. He admitted that the EEO investigation, finalized on January 10, 2017, officially acknowledged that Appellant was under the ADA and entitled to accommodations.

22. Brogan then added that after the determination that she fell under the ADA and was entitled to accommodations, then there was no need for doctor's statements as long as she remained on FMLA.

23. The witness then addressed Joint Exhibit BB, the Appellant's choice under the flexible work schedule to be allowed to work until 6:00 p.m. However, he reiterated that the Cabinet-wide policy did not automatically apply to all departments within, except for special approval.

24. The witness then addressed the Appellant's three-day suspension. (Joint Exhibit T). He testified the decision was made to issue this for the Appellant's failure to report a DUI arrest and for her failure to timely call in prior to her start time on three different occasions. He stated the call-in accommodation had been provided to her after the January 10, 2017 decision regarding her ADA disability.

25. Finally, Brogan addressed the five-day suspension dated July 24, 2017. This was based upon two instances of failure to follow call-in procedures. Specifically, on Tuesday, May 31, 2017, the Appellant called in approximately one hour and 54 minutes past her start time, and on July 6, 2017, called in approximately three hours and 19 minutes past her start time.

26. On cross-examination, the witness stated he was not involved in any decisions involving who would be allowed to work after 5:00 p.m. He stated that the last accommodation made was to allow the Appellant to call in at any point prior to her start time, even the night before or the morning of, so as to advise her supervisor she might not be at work or would be tardy.

27. The witness also explained that one who qualifies can be on FMLA leave for up to 450 hours annually. One is not paid for any FMLA hours used. The witness further explained that the accommodation given to the Appellant for call-in prior to start time, could be done by email, text, or phone message to a supervisor.

28. On redirect, the witness stated that the Appellant was using her FMLA time faster in 2018 than in the previous year (2017). Along with this, he stated that the amount of time she is actually working is decreasing.

29. Appellant, **Tawnya Kennedy**, called herself as her next witness. She testified that she has worked for the Cabinet since 2009, when she transferred from the Revenue Cabinet. She began in the Accounting Section within Child Support, and then, in either June or July 2017, became a Child Support Specialist II. Her work involves distributing money owed to the custodial parents. Her caseload involves 21 counties, some of which are in western Kentucky. She confirmed that she primarily works with the KASES computer system.

30. The Appellant testified that her duties also include refund adjustments, which are for overpayments by a payor; reissuance of checks, for various reasons; and transferring money from case to case. She stated that these duties could be accomplished between 5:00 and 7:00 p.m. without the need for a supervisor.

31. She further stated that, prior to 2017, she had sometimes worked the hours of 5:00 p.m. to 7:00 p.m. without supervision. These times primarily involve tax intercept and special

projects. She added that, prior to 2016, she had never received a "Fails to Meet Expectations" evaluation.

32. The Appellant testified that, in October 2015, her son passed away. She then began having more trouble with interrupted sleep, which she described as "broken sleep," often causing her to stay up so long she would collapse. She added that she also had sleep walking issues.

33. She first went to her primary care physician, Dr. Welling, who initially diagnosed her condition as Insomnia. After some initial treatment, she referred her to sleep specialist, Dr. Jonathan Cole. She testified that Dr. Cole also had initially thought she suffered from Insomnia, but later diagnosed her with Delayed Sleep Phase Syndrome.

34. She testified that, in the summer of 2016, she began having trouble coming to work timely, as it was hard for her to wake up. She added that supervisor Darnell knew of her problems. She also met with Branch Manager Shouse in the fall of 2016 and, after asking for a flex schedule, was allowed to move her start time from 8:45 a.m. to 9:00 a.m.

Second Day of Hearing

35. The Appellant next called **Larry Ibershoff**. He has been employed by the Cabinet for the past five years as Human Resource Administrator in the Office of Human Resource Management (OHRM). His job duties include reviewing EEO requests, as well as accommodations requested under the ADA. He was involved in the investigation regarding the Appellant.

36. The witness stated that he contacted the Appellant and reviewed her medical information. He further talked with the EEO Liaison for her Department, Terry Brogan. After reviewing the responses of Dr. Welling and Dr. Cole, he made a determination that the Appellant was entitled to ADA status. His next step was then to determine whether a reasonable accommodation for her had been requested. He noted first that an accommodation had been made to move her start time from 8:45 a.m. to 9:00 a.m. Then he saw that she was also being allowed to call in the night before work, if she thought she might be tardy or not be able to appear. He noted that a January 10, 2017 letter from the Cabinet was addressed to the Appellant regarding her requests for a flexible work schedule. (Joint Exhibit J). He noted that Dr. Jonathan Cole had recommended that the Appellant be allowed to come to work one to two hours later than her assigned start time, and requested that she be allowed to make up this time after 5:00 p.m.

37. The witness further explained that the Appellant was advised in that letter that her workday could not be extended past 5:00 p.m.; however, she was given the option to call in the previous day to a supervisor explaining that she might be tardy or even absent because of her disability.

38. The witness was then asked as to how other cases of intermittent FMLA leave were handled. He stated that once an individual had been deemed to be "covered" and having a disability, they did not have to contact a supervisor daily or have a daily doctor's note covering their accommodation. The Appellant's counsel made the argument that this was similar to an individual in a wheelchair, needing a ramp to access the building, but not having to daily request the accommodation of a ramp.

39. The Appellant announced closed.

40. The Cabinet began its case by recalling **Dianne Darnell**. The witness explained that, as the Appellant's supervisor, she had performed the 2016 Annual Employee Performance Evaluation. The Appellant received a score of 242, which is a "Needs Improvement" evaluation.

41. Asked to address the caseload assignment factor, the witness testified that she had given a low rating of one (1) indicating that Appellant had not met the goal of 1200 monthly adjustments. The witness added that the time taken by the Appellant for FMLA leave had not been counted against her in determining whether she met this goal.

42. On page 2 of the evaluation, the witness stated that she had given the Appellant a "Meets Expectations" under the factor of adaptability. The same rating was given for teamwork and conduct.

43. However, the witness explained that she had given a lower rating of "2" for both attendance and punctuality. This rating was given even taking into account the FMLA leave which the Appellant had taken. In other words, the FMLA leave did not negatively impact the Appellant's score.

44. Darnell explained the final score of 242 ("Needs Improvement" category) by stating that, although the Appellant had performed adequately during the First and Second Interim Reviews, she had changed in the Third Interim Review, ranging from September 30, 2016 through December 31, 2016.

45. On cross-examination, the witness was again asked to address the attendance factor. She explained the rating of "2" by stating that, even though the Cabinet had given the Appellant an accommodation of calling in the previous night, she had failed to do so on at least two occasions. The witness admitted that the ratings regarding the time and attendance issues had caused the Appellant to slip from a "Meets Expectations" to a "Needs Improvement."

46. Regarding the failure to meet the caseload assignment goals, the witness stated that the adjustments were made taking into account the FMLA accommodations. However, she stated, the Appellant ran out of FMLA leave in October 2016 and, because of the time missed during the remainder of the year, failed to meet the adjustment goals.

47. The Appellee's next witness was **Tiffany Quarles**. She is a Section Supervisor in the Distribution Section of the Division of Income Support and has been the Appellant's

supervisor in that Division. She emphasized that the Appellant's primary duties involved the disbursement of child support funds, including tax intercept funds. She emphasized that the work done by the Appellant must be done in the office – it cannot be done at home. She corroborated the fact that there was a requirement for all employees to call in 2016 if they were to be absent. The policy at that time also included that, in 2016, the office would close at 5:00 p.m. She stated as one reason that a security guard normally on duty left at 5:00 p.m. and, additionally, there was no supervisor present after 5:00 p.m. The only exceptions were if time-sensitive cases or projects needed to be completed.

48. On cross-examination, the witness explained that, should the Appellant be given permission to work past 5:00 p.m., there would be no supervisor available to answer any questions she might have. She explained that even if an employee working after 5:00 p.m. had emailed with a question, that she, as supervisor, had no access to the state email after 4:00 p.m. and would not be able answer any such question until the following day.

49. The Appellee's next witness was **Deanna Barker**. She has been the Branch Manager of the Distribution Section since mid-June 2017. She supervises two sections involving process and disbursements and the Distribution Section.

50. She explained that, upon becoming Branch Manager, the Cabinet policy was that no one would work past 5:00 p.m., unless given special permission. She also stated the reasons as being safety, need of supervision, and the need for accountability of one working without supervision.

51. The Appellee's next witness was **Jay Klein**. He is the head of the Division of Disciplinary Matters within OHRM in the Cabinet. He addressed the three suspensions given the Appellant.

52. First, the one-day suspension given on January 4, 2017, was based on progressive actions involving previous time and attendance issues and the fact she had received a written reprimand.

53. The three-day suspension of February 23, 2017, was also based upon time and attendance issues, plus the failure to report the DUI arrest suffered by the Appellant.

54. The July 24, 2017 five-day suspension was given for time and attendance issues and the failure to call in as per the accommodation given her under ADA.

55. The witness was then directed to Joint Exhibit Z, a September 18, 2017 letter to the Appellant. In this letter, the witness noted that he had reviewed the recommendations of Dr. Wetzler as to the accommodations requested. Those accommodations were that she be allowed to start work at 11:30 a.m. and work as late as 7:30 p.m. on days she could not arrive at her scheduled 9:00 a.m. starting time.

56. The witness noted in that letter he had advised the Appellant that, because the work schedule at her office was from 7:00 a.m., ending no later than 5:00 p.m., Wetzler's accommodations could not be met and her workday could not be extended past 5:00 p.m.

57. On cross-examination, the witness confirmed that, in previous years, at various times, the Appellant had been given relief under FMLA. However, he stated that at this current time, the Appellant has no FMLA leave remaining.

58. The witness stated that, in making the determination the Appellant would be given the latitude to call in on the previous evening when she felt she might be absent or tardy the next day because of her disability, he had given the broadest interpretation possible as to her ability to advise her supervisors. He again noted that she could notify her supervisor by phone, text, or email.

59. In further explanation of why he could not approve a flex schedule outside the 9:00 a.m. to 5:00 p.m. timeframe, the witness testified that he had to consult with each department regarding their mission and any other factors in determining the various factors to consider in expanding a work schedule.

60. Lastly, asked to explain why the Appellant was disciplined for failure to report the DUI arrest, the witness stated that the Cabinet must know the reasons for an arrest, as it might relate to the employee's job.

61. The Cabinet closed.

Deposition of Dr. Jonathan D. Cole

62. **Dr. Jonathan D. Cole** is a Clinical Psychologist, whose main specialties are sleep, pain, and bariatrics. He explained that he first saw the Appellant on November 8, 2016, following a referral from Dr. Michele Welling. This referral was for sleep disturbance.

63. His initial observation was that she only had insomnia. However, that later changed and resulted in a referral to Dr. Ryan Wetzler, Psy. D.

64. The witness explained that he felt the Appellant was worried about things which were affecting her ability to get to sleep, and gave as an example, the significant stressor of her son's death.

65. The witness stated that he initially began behavioral sleep treatment, meaning a course in which one's behaviors and attitudes are changed regarding sleep so as to try to improve sleep functioning. The witness further stated that unless the course of treatment he prescribed was followed, he considered the sleep disturbance suffered by Appellant would cause a substantial impairment to her life activities.

66. The witness then explained that as time progressed, he began to realize the Appellant was suffering from more than insomnia and diagnosed it as Delayed Sleep Phase Syndrome. He stated this was important because the Delayed Sleep Phase Syndrome takes longer to treat than insomnia. He explained that on the questionnaire he initially returned to the employer, he had prescribed a treatment which might take two to three months. However, after realizing there was Delayed Sleep Phase Syndrome, he expanded the time for treatment to take four to five months.

67. Dr. Cole explained that his recommended course of treatment initially was to have the Appellant get up the same time every morning, restrict her sleep to five and a half hours, and show her how to do relaxation before going to bed. In other words, he wished to create a sleep routine. Then, every five days, the Appellant would increase her sleep approximately 30 minutes. He described, as an example, of having her sleep five and a half hours, then sleep six hours, then sleep six and a half hours, etc. By doing this, the witness stated, the body would increase a chemical which makes one sleepy, thus forcing them to get condensed sleep. After accomplishing that, then the doctor would have the patient back it up and go to bed, increasing their sleep by 30 minutes each time, until they are sleeping a normal amount.

68. Because this initial treatment did not seem to help, Dr. Cole then began treatment for the Delayed Sleep Phase Syndrome. He stated this treatment was not effective because the Appellant was not allowed to do the things he prescribed, primarily sleeping later in the morning and going to work later.

69. Finally, the witness stated that after having realized the Appellant suffered from Delayed Sleep Phase Syndrome, he referred her to Dr. Ryan Wetzler, a specialist in Circadian Rhythm and Delayed Sleep Phase Syndrome.

Deposition of Dr. Ryan Wetzler

70. **Dr. Ryan Wetzler** is a Psychologist at the Behavioral Sleep Medicine Clinic in Louisville, Kentucky. The witness stated that the Appellant was referred to him by Dr. Jonathan Cole sometime in 2017. He explained that Delayed Sleep Phase Syndrome occurs in a person and makes him or her incapable of getting to sleep at a normal time, and then impossible to awaken at a normal time. This is a disturbance of the natural Circadian Rhythm.

71. The doctor explained that if the Appellant was required to wake at a time that would contribute to the disturbance, it would make treatment impossible. The witness understood that the Appellant was being required to arrive at work in the early morning. As a result of trying to meet that requirement, it was not allowing her to sleep on the schedule which he was suggesting. The doctor stated that if the Appellant was allowed a flexible work schedule so that she could pursue the course of treatment he had recommended, he believed it would improve her condition.

72. The witness gave an example of a suggested treatment program whereby the Appellant would wake as late as 11:00 a.m. for approximately one week, then awake at 10:45 a.m. the following week, then 10:30 a.m. the next week, etc., until the Circadian Rhythm was reset. He further stated that the treatment would not work if the Appellant awoke at 7:00 a.m. one day and got up at 11:00 a.m. the following day. The witness concluded by stating that his recommendation as far as a flexible work schedule was that the Appellant not be forced to be at work at 9:00 a.m. every day and be allowed to make up for the missed time by working extended hours.

FINDINGS OF FACT

1. The Appellant returned to work in January 2016 following FMLA leave subsequent to the death of her son. After January 2016, she had intermittent problems in getting to work, either being tardy or not appearing at all.

2. Prior to July 2016, the Appellant was again placed on FMLA primarily for the reason that it was hard for her to appear timely for work. Branch Manager Wendy Shouse and Distribution Section Supervisor Dianne Darnell were aware of the Appellant's attendance problems and, after the Appellant's FMLA leave expired in October 2016, a meeting was held to review sick leave procedures with the Appellant. As a result of that meeting, an October 27, 2016 Memorandum from Shouse to the Appellant required the Appellant to provide an original healthcare provider's statement in order to receive approved sick leave.

3. On November 28 and December 1, 2016, the Appellant failed to follow the instructions of calling in prior to her start time if she was going to be tardy. These inactions resulted in a written reprimand on December 19, 2016, and a one-day suspension on January 4, 2017, for a lack of good behavior in failing to report to work timely and failure to follow call-in procedures.

4. On February 23, 2017, the Appellant was issued a three-day suspension for failure to comply with Cabinet policy requiring a report to be made for her earlier DUI arrest. A part of this suspension was also based upon lack of good behavior for failure to follow call-in procedures.

5. A January 10, 2017 letter was sent from the Cabinet to the Appellant determining that she was an individual with a disability under the ADA and entitled to reasonable accommodations. During the course of her coverage under the ADA, the Appellant was given two accommodations. The first was allowing her to move the starting time of her work day from 8:45 a.m. to 9:00 a.m. When this seemed to make no difference, the Appellant was then allowed the option of contacting her supervisor prior to the workday if she felt she was going to be tardy because of her sleep disorder. If done on the workday in question, the Appellant was required to call in prior to her scheduled work time. The Appellant was also given the option of calling the evening before the next workday to notify her supervisor if she felt she might be late or absent. This notification could be done by text, phone, message, or email.

6. The underlying issue surrounding the Appellant's attendance problems and subsequent disciplinary actions against her resulted from a sleep disorder, which was first diagnosed as Insomnia and, finally, as Delayed Sleep Phase Syndrome. The Appellant was treated by both Dr. Jonathan D. Cole and Dr. Ryan Wetzler for this condition. Dr. Cole's initial prescribed treatment was that the Appellant increase her sleep gradually for a period of time in the morning in order to reset her Circadian Rhythm. He initially thought this would take approximately two (2) months and would require her to go into work later than her required time. He testified this treatment was not effective because the Appellant was not allowed to sleep later in the morning and go to work later.

7. Following a referral from Dr. Cole, Dr. Ryan Wetzler began seeing the Appellant sometime in 2017. He treated her for Delayed Sleep Phase Syndrome, which is a disturbance of the natural Circadian Rhythm. Wetzler testified that if the Appellant was being required to arrive at work in the early morning, this would not allow her to sleep on the schedule which he was suggesting. He also was suggesting a flexible work schedule so she could arrive later in the morning and work past 5:00 p.m., in order to get the required number of hours at work. He testified this course of treatment might take several months.

8. A choice of flexible work schedules were listed in the Cabinet policy. However, all these work schedules were not necessarily available to all departments. At one point, the Appellant chose a work schedule which would allow her to work as late as 6:00 p.m. However, the department in which the Appellant was employed had a policy of no work beyond 5:00 p.m. The only exceptions were prior approval for special projects.

9. The Cabinet provided two accommodations for the Appellant. She was first allowed to move her starting time to 9:00 a.m., and then allowed to notify her supervisor the night before, or morning of, if she thought she might be tardy or absent.

10. Deanna Barker credibly testified that there were reasons for not extending work past 5:00 p.m., citing safety, need of supervision, and need for accountability of one working without supervision.

11. Terry Brogan plausibly explained the reasons for the one-day, three-day, and five-day suspensions.

12. The Appellant testified that, at certain times previously, she had worked as late as 6:30 or 7:00 p.m. Other testimony indicated that these were done with prior approval for special projects. The Appellant insisted her duties could be accomplished between 5:00 and 7:00 p.m. without the need for a supervisor, as the KASES computer system which she primarily used did not shut down until 7:00 p.m.

13. However, the testimony of Jay Klein and Deanna Barker give credible support to the Cabinet's position that it could not extend the Appellant's work schedule beyond 5:00 p.m. on a regular basis.

14. Regarding Appellant's 2016 Annual Employee Performance Evaluation (Joint Exhibit N), she received a final yearly score of 242, which is in the "Needs Improvement" category. Darnell testified that, for the first two interim evaluations of that year, the Appellant was meeting expectations. However, she testified that during the Third Interim Evaluation period of September 1 through December 31, 2016, the Appellant's work performance deteriorated. Her FMLA leave expired sometime in October 2016. As a result of the Appellant's attendance problems during this last rating period, her work performance suffered. Although allowances were made for the absences taken during the FMLA leave period, Darnell testified the Appellant had still failed to meet the goal of 1,200 monthly adjustments. Darnell also explained that a lower rating for attendance and punctuality was given, primarily for failure to meet the call-in requirements governing the Appellant's absences or tardiness.

CONCLUSIONS OF LAW

1. The primary issue herein is whether the Cabinet, after determining the Appellant was an individual covered under the Americans with Disabilities Act (ADA), then provided reasonable accommodations for her.

2. The Personnel Board has dealt with the issue of reasonable accommodations in the case of *Ralph Wilson v. Transportation Cabinet*, 2015 WL 5092108 (KY PB), Appeal No. 2015-007, August 20, 2015. The questions posed in both that appeal and herein were: 1) was the Appellant a "qualified individual" under the ADA, 2) whether there were reasonable accommodation(s) available that would allow the Appellant to continue performing the essential duties of his job, and 3) would allowing such accommodations pose an undue hardship on the employer?

3. Answering the questions posed by this case requires examination of the facts in conjunction with the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq*. Under the ADA, the following definitions are applicable to the instant appeal:

Disability – 42 U.S.C. §12102(1)(A) provides, in pertinent part:

> The term "Disability" means, with respect to an individual - "[A] physical or mental impairment that substantially limits one or more of the major life activities of such individual."

Major Life Activities – 42 U.S.C. §12102(1)(B) provides, in pertinent part:

> (2) Major life activities
>
> (A) In general
>
> For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing,

eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

Qualified Individual - 42 U.S.C. §12111(8) provides:

> The term "qualified individual" means "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."

Reasonable Accommodation - 42 U.S.C. § 12111(9) provides:

> The term "Reasonable Accommodation" may include –
>
> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modifications of equipment or devices, appropriate adjustment or modifications of examinations or training materials or policies, the provisions of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Undue Hardship – 42 U.S.C. § 12111(10) provides:

> (10) Undue hardship
>
> (A) In general
>
> The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).
>
> (B) Factors to be considered
>
> In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—
>
> (i) the nature and cost of the accommodation needed under this chapter;

> (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
>
> (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
>
> (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

4. 42 U.S.C. § 12112(a) provides:

> (13) No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training and other terms, conditions, and privileges of employment.

5. 42 U.S.C. § 12112(b) provides:

> "Discriminate Against a Qualified Individual on the Basis of Disability" includes –
> (1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee.

6. In applying the standards set out in the ADA, in *Kleiber v. Honda of America Manufacturing, Inc.* 485 F.3d 862 (6th Cir., 2007), the Sixth Circuit Court of Appeals reiterated the prohibition against discriminating against a qualified individual on the basis of disability and, further, prohibited "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability"

7. *Kleiber* goes on to hold that employers are not required, however, to effect reasonable accommodations that cause undue hardship to the employer. 42 U.S.C. § 12112(b)(5)(A) (citing *Hall v. United Postal Service*, 857 F.2d 1073 (6th Cir., 1988)).

8. Applying the ADA standards to the facts of this appeal, the Hearing Officer concludes that the Appellant is properly regarded as suffering a disability. Specifically, the Hearing Officer finds that the Appellant's diagnosed sleep disorders substantially limits the major life activity of sleeping.

9. The Hearing Officer further concludes that the Appellant is a qualified individual with a disability. Both Dr. Jonathan D. Cole and Dr. Ryan Wetzler determined that the Appellant could perform the essential functions of her job, if she were afforded certain accommodations.

10. Thus, the core question presented in this appeal is whether the Agency properly made reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability.

11. A reasonable accommodation is accomplished through an "interactive process." 29 C.F.R. §1630.2(o)(3). The burden is on the affected employee to propose such accommodation. *Jakubowski v. Christ Hospital, Inc.*, 627 F.3d 195 (6th Cir. 2010). Here, the Appellant, relying on her doctors' prescribed treatment plans, proposed being permitted a flexible work schedule so that she could pursue the course of treatment the doctor recommended.

12. Instead, the Agency afforded the Appellant two accommodations. The first was moving the starting time of her work day from 8:45 a.m. to 9:00 a.m. When this seemed to make no difference, she was then allowed the option of contacting her supervisor prior to the workday if she felt she was going to be tardy because of her sleep disorder. Importantly, the Appellant has consistently asserted that the Agency's accommodations were not reasonable and that the Agency's actions adversely affected the opportunities available to her, based on her disability.

13. It is clear that "reasonable accommodation" requires individual assessment in an interactive process. *Cripe v. City of San Jose*, 261 F.3d 877, 894 - 895 (9th Cir. 2001) [Where police departments practice of assigning disabled officers to only a narrow class of jobs, without individualized assessment, foreclose them from reasonable promotional opportunity, was condemned.]. Employers are not required, however, to effect reasonable accommodation that causes undue hardship to the employer. 42 U.S.C. §12112(b)(5)(A). Nor does it require the elimination of an essential function of the job. *Hall v. United States Postal Service*, 857 F.2d 1073, 1078 (6th Cir. 1988). If an employee cannot perform an essential function of his job, he is not a "qualified individual" and the employer has no duty to accommodate. *Barber v. Neighbors Grilling U.S.A., Inc.*, 130 F.3d 702 (5th Cir. 1997). The employer is not required to provide accommodation if the individual poses a "direct threat" to the health or safety of himself/herself or others unless such accommodation would either eliminate such risk or reduce it to an acceptable level. Deane v. Pocono Med. Ctr., 142 F.3d 138 (3d Cir. 1998).

14. After receiving the Appellant's request for accommodations, the Agency took certain steps to determine if the Appellant could perform the essential functions of her employment position, with or without accommodations. According to testimony, Larry

Ibershoff, Human Resource Administrator in the Office of Human Resource Management (OHRM), conducted an examination of the Appellant's medical condition and request for accommodations. Ibershoff contacted the Appellant, reviewed her medical information, talked with the EEO Liaison for her Department, and made a determination that the Appellant was entitled to ADA status. He then determined whether a reasonable accommodation for her had been requested. He noted first that an accommodation had been made to move her start time from 8:45 a.m. to 9:00 a.m. Then he saw that she was also being allowed to call in the night before work, if she thought she might be tardy or not be able to appear. He noted that a January 10, 2017 letter from the Cabinet was addressed to the Appellant regarding her requests for a flexible work schedule. (Joint Exhibit J). He noted that Dr. Jonathan Cole had recommended that the Appellant be allowed to come to work one to two hours later than her assigned start time, and requested that she be allowed to make up this time after 5:00 p.m.

15. Applying the ADA standards to the facts of this appeal, the Hearing Officer concludes, as a matter of law, the Appellee has carried its burden of proof by a preponderance of the evidence to show that the one-day, three-day, and five-day suspensions were appropriate under the circumstances.

16. The Hearing Officer concludes the Appellee has carried its burden of proof by a preponderance of the evidence to show that the 2016 Annual Employee Performance Evaluation was accurate and appropriate under all surrounding circumstances.

17. The Hearing Officer concludes, as a matter of law, that the two accommodations provided the Appellant, namely moving the start time to 9:00 a.m., and allowing call-in either the night before or the morning of prior to an anticipated absence or tardiness were reasonable under the circumstances.

18. The Hearing Officer concludes as a matter of law that, although a written reprimand is normally not an appealable action, because it is based within the context of a claim of disability discrimination, such can be ruled upon. The Hearing Officer, therefore, concludes as a matter of law that the Appellant failed to carried her burden of proof to show that the written reprimand was not properly issued.

19. The Hearing Officer concludes as a matter of law that the Appellant has failed to carry her burden of proof by a preponderance of the evidence to show that she was subjected to disability discrimination on the part of the Appellant for failure to provide reasonable accommodations.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the consolidated appeals of **TAWNYA KENNEDY V. CABINET FOR HEALTH AND FAMILY SERVICES, (APPEAL NOs. 2017-032 and 2017-186)** 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 R. Hanson Williams** this 15th day of August, 2018.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Lucas Roberts
Hon. Michael Kalinyak