

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 and Final Order in the case of **RITA RICHARDSON V. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NOs. 2018-215 and 2018-227)** as the same appears of record in the office of the Kentucky Personnel Board.

Witness my hand this 12th day of September, 2023.



**MARK A. SIPEK, SECRETARY
KENTUCKY PERSONNEL BOARD**

Copy to Secretary, Personnel Cabinet

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NOS. 2018-215 and 2018-227

RITA RICHARDSON

APPELLANT

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

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

* * * * *

The Board, at its regular September 2023 meeting, having considered the record, including the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer dated July 11, 2023, Appellee's Request for Oral Argument, Appellee's Exceptions, Appellant's emailed Response to Exceptions dated July 27, 2023, 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** the first (1st) paragraph from the Findings of Fact, Conclusions of Law, and Recommended Order (first page) and substitute the following:

This matter came on for an evidentiary hearing on January 21, 2021, January 26, 2021, April 22, 2021, July 19, 2021, July 20, 2021, and July 26, 2021, at 9:30 a.m., ET, each day at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A. By prior agreement of the parties, the proceedings were conducted by Amazon Chime teleconferencing.

B. **Delete** Finding of Fact 10 and substitute the following:

On November 2, 2018, Beard gave the Appellant the "Dear Health Care Provider" letter in a sealed envelope. Beard explained to the Appellant that the envelope contained a document that explained the specific concerns that prompted the decision to put the Appellant on Directed Sick Leave and that the Appellant could not return to work until she took the document to a physician and obtained a statement from the physician indicating that she was able to fulfill the essential duties of her job. This "Dear Health Care Provider" letter informed the Appellant's health care provider that the Appellant "has been directed off on sick leave due to concerns about the employee's mental health and ability to perform her job duties." (**Appellee's Exhibit 3**). This letter also included twelve (12) bullet points, identified as "The behaviors that prompted this action." This information was included so the health care provider would know why the Appellant was


placed on sick leave. (Testimony of Belinda Beard, Theresa Harvey, Jay Klein, and **Appellee's Exhibits 3, 24, and 25**).

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

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

SO ORDERED this 12th day of September, 2023.

KENTUCKY PERSONNEL BOARD



**MARK A. SIPEK
SECRETARY**

A copy hereof this day mailed to:

Rita Richardson
Hon. Olivia Peterson
Hon. Rosemary Holbrook (Personnel Cabinet)
Jay Klein

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NOs. 2018-215 and 2018-227**

RITA RICHARDSON

APPELLANT

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

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

** ** ** ** ** **

This matter came on for an evidentiary hearing on January 21, 2021, January 26, 2021, April 22, 2021, July 19, 2021, and July 26, 2021, at 9:30 a.m., ET, each day at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A. By prior agreement of the parties, the proceedings were conducted by Amazon Chime teleconferencing.

The Appellant, Rita Richardson, was present at the offices of the Personnel Board and was not represented by legal counsel. The Appellee, Cabinet for Health and Family Services, was present and was presented by the Hon. Brent Irvin, who appeared by Amazon Chime. Also appearing by Amazon Chime as Agency representative was Belinda Beard. As of the date of this Order and due to the retirement of Mr. Irvin, the Appellee, Cabinet for Health and Family Services is being represented by the Hon. Olivia Peterson.

BACKGROUND

1. The Hearing Officer notes Appeal No. 2018-215 was filed with the Personnel Board on October 23, 2018, and Appeal No. 2018-227 was filed on November 9, 2018. In Appeal No. 2018-215, the Appellant, a classified employee with status, indicated she was appealing a reallocation, reclassification, the improper assignment of duties, and an employee evaluation as well as advancing claims of discrimination. In Appeal No. 2018-227, the Appellant indicated she was appealing an employee evaluation, harassment, discrimination, and the denial, abridgement, or impediment of her right to inspect or copy records. Attached to the appeal form in Appeal No. 2018-227 was a copy of the Appellee's letter placing the Appellant on Directed Sick Leave. The Appellant stated that she is also appealing being placed on Directed Sick Leave. In Appeal No. 2018-215, the Appellant further explained her claims in the narrative portion of the appeal form wherein she states, in pertinent part:

I am using the resources available to state employees to address increasing violations and enabling from the top down to continue RETALIATION against me for addressing the harassment and violations and unequal treatment and preferential treatment of staff who blatantly violate rules and regulations and it continues that even with the high quality of work I do that others should be doing, and constantly having to push aside other duties that I was hired to do that increasingly not given for carrying out tasks that should have been done by Grades 15 and up.

Following significant discussion, it became clear that the Appellant disputes the allegations made against her. She also seeks to advance allegations against coworkers and supervisors that she believes have acted improperly. After the Appellant stated her various claims, the Appellee requested the opportunity to issue discovery requests and to file a dispositive motion on certain allegations.

2. Following the first pre-hearing conference, the Hearing Officer identified the primary issue associated with these appeals to be the Appellant's challenge of the Appellee's action placing her on Directed Sick Leave on November 2, 2018. A copy of this letter was introduced into evidence as **Appellee's Exhibit 2** and is attached hereto as **Recommended Order Attachment A**.

3. The Appellee submitted discovery requests to which the Appellant failed to respond. As a result, the Appellee was instructed it did not have to respond to the Appellant's discovery request. The Hearing Officer informed the parties that they would be given ample time to respond to testimony at the evidentiary hearing.

4. The primary issue to be resolved during the evidentiary hearing was the Appellee placing the Appellant on Directed Sick Leave. The Appellee had the burden to establish just cause for this action by a preponderance of the evidence. Additional issues included the Appellant's claims of race, age, and disability discrimination in addition to her claims of retaliation and harassment. The Appellant had the burden of proof on these claims by a preponderance of the evidence.

5. At the evidentiary hearing, the Appellee called the **Appellant Rita Richardson** as its first witness. Counsel for the Appellee called the Appellant to find out more about her complaints since she had declined to participate in pre-hearing discovery.

6. The Appellant testified that, on the Appeal Form submitted in Appeal No. 2018-215, she checked the box for reallocation because she wanted to know why her job duties had changed. The Appellant wanted clarification of her job duties. The Appellant said that she did not go to her supervisors in the Office of the Inspector General (OIG) and talk to them about her concerns of her job reallocation. The Appellant then stated, on the Appeal Form submitted in Appeal No. 2018-215, she checked the box for Employee Evaluation because she believed that her 2018 Annual Employee Performance Evaluation performed by Belinda Beard did not accurately

reflect the duties she was performing. She argued that she started performing some of the duties before Beard became the Regional Program Manager (RPM). The Appellant admitted she did not ask for a desk audit by the Personnel Cabinet. Asked why, she claimed that she was denied access to records. The Appellant said Jay Klein with the Agency's Office of Human Resource Management (OHRM) denied her records, but she could not remember the date. The Appellant admitted the Appellee provided her with records when she made an Open Records request.

7. The Appellant stated she was alleging discrimination based on her age, race, and disability. She described her disability as a mobility issue. The Appellant used a cane to walk. She also has hand and back issues causing her to have difficulty lifting heavy objects. The Appellant admitted she never requested any special accommodations. When asked to expound on her claim of discrimination, as an example, the Appellant claimed that another African American employee, Angela White, got to work overtime yet the Appellant claimed her requests to work overtime were denied. The Appellee introduced into evidence **Appellee's Exhibit 3**, the "Dear Health Care Provider" letter dated November 2, 2018. A copy of this letter is attached hereto as **Recommended Order Attachment B**.

8. The Appellant testified that evidence of race and age discrimination in this case includes the "ridiculous allegations" against her in the Appellee's Exhibit 3. She stated the lies employees made up against her demonstrated the discrimination she endured. She also mentioned outrageous behavior of other employees without consequences as further evidence of discrimination. The Appellant felt that these other employees should have been placed on Directed Sick Leave.

9. At the time the Appellant was placed on Directed Sick Leave, she was sixty-four (64) years old. During the period in question, she was the only African American employed in her office. She worked for the Office of Investigator General (OIG) for eighteen (18) years.

10. The Appellant offered testimony about the twelve (12) bullet points in **Appellee's Exhibit 3** as follows:

1. She stated she was never questioned about the boxes in a storage cubicle. She also stated the alleged personal bank statements were her ProCard statements that documented when she had purchased office supplies.
2. No one ever questioned the Appellant about boxes on another floor.
3. The Appellant acknowledged that she did think "she is mocked and picked on for her health issues."
4. The Appellant testified it was Belinda Beard who was crying and yelling during a recent team meeting. Beard would not let the Appellant speak at this meeting.

5. The Appellant denied ever stating there were two (2) guards at the front desk because “there must be something terrible going on in the building.”
6. She denied that she talked about the news.
7. The Appellant denied that she talked to a coworker about her husband’s and daughter’s thoughts regarding her medical issues.
8. The Appellant denied talking to coworkers about a truck driver cutting her off on the way to work.
9. The Appellant denied calling a coworker and complaining that management was out to get her.
10. The Appellant denied that she glared at her supervisor as if she wanted to harm her.
11. The Appellant called the allegation a lie that she created postings in numerous places in and around her cubicle. She stated she only has a verse from a church hymnal posted inside her cubicle.
12. The Appellant stated the last bullet point - that she exhibited paranoia, that she was out to get coworkers, and that she was unable to perform her work duties - was not true.

11. The Appellee called its next witness, the Appellant’s former supervisor **Belinda Beard**. Beard currently is employed with the Cabinet for Health and Family Services’ (CHFS) OIG in Frankfort as an Assistant Director. Beard testified about her education and work history. She previously worked as a Registered Nurse in Louisville and Virginia. She also holds Bachelor and Associate degrees in Criminal Justice. Beard first worked at CHFS in August 2005, serving as a Nurse Consultant/Inspector with the OIG until February 2010. At that time, she started employment with Jewish Hospital in Louisville as a Manager and Director overseeing several hospitals in Kentucky. Beard returned to state employment with the OIG when Jewish Hospital eliminated her position due to restructuring. Beard was rehired in October 2014 as a Nurse Consultant/Inspector. Beard returned to the OIG in March 2017 and served as a Nurse Consultant/Inspector until March 2018, when she was promoted to Assistant Regional Program Manager (RPM). Shortly after that promotion, the RPM resigned. Beard was promoted to RPM on May 1, 2018. Beard held that position until May 1, 2020, when she was promoted to the Assistant Director position in Frankfort.

12. Beard explained the function of the OIG Division of Health Care. The Division oversees the survey and certification of healthcare facilities, such as nursing homes, to make sure

the facilities are operating according to federal and state regulatory statutes on long-term care, hospice care, hospital care, and home health care. Beard also described the functions of the OIG Division of Regulated Child Care. This Division surveys and inspects childcare facilities and has a separate Division of Investigation. The Louisville office (Northern Division) includes about twenty (20) Nurse Surveyors that report to the RPM.

13. Beard testified that, due to a reorganization, administrative support staff such as the Appellant began doing work for both the Division of Regulated Child Care and the Division of Health Care. Before the reorganization, the Division of Health Care had one Administrative Assistant (the Appellant) and one Secretary, Angela White. They shared some job duties such as picking up mail from the mailroom, scanning documents, and answering the phone. After the reorganization, answering the phone for both the Division of Regulated Child Care and the Division of Health Care was added to their duties. The Appellant had additional duties to justify her higher pay. She did timekeeping that caused her to interact with employees about their timesheets. The Appellant and Angela White did not always work the same hours together. Angela White worked a four (4) - day week. The Appellant was also the back-up Complaint Coordinator when the employee assigned that task was absent.

14. Beard knew the Appellant from her time at the OIG, before she left to work at Jewish Hospital. Based on those prior years working together, Beard described the close working relationship that they enjoyed. During Beard's first tenure at OIG, she and the Appellant would talk every day when they both were in the office. They were such good friends that they even told each other fairly personal details about their families. Beard felt that they also had a good working relationship. At that time, the Appellant had a very cordial and pleasant attitude. Beard stated that, even after she left the OIG, the Appellant would email her at Jewish Hospital to keep in touch and let Beard know about job openings at the OIG. They were so close that the Appellant would share her medical concerns about her high blood pressure. Beard testified the Appellant's behavior had changed in notable ways upon her return to the OIG, despite her attempt to maintain a positive relationship with the Appellant.

15. Beard stated that the Appellant was upset when she learned that she would also be performing duties for the Division of Regulated Child Care. Beard explained that she sat in on a team meeting with the Appellant and Sandra McDonald (the RPM at the time), Jackie Aitkin (Assistant Director of the OIG), and Theresa Harvey (RPM for the Northern Region of the Division of Regulated Child Care), to discuss the Appellant's new job duties and the changes to her Position Description. The Appellant became so distraught that she was talking over everyone and would not let McDonald inform her of all the changes, even though the restructuring gave the Appellant a pay raise.

16. Beard testified that, due to McDonald retiring, it fell to her as Assistant RPM to do the Appellant's Interim Employee Performance Evaluation in 2018. Beard affirmed that, despite her friendship with the Appellant, she evaluated her job performance honestly. On the 2018 Interim Employee Performance Evaluation, Beard gave the Appellant average scores of 2 for

working under pressure, communication, working with others, and employee conduct. The Appellant was not happy with these scores.

17. Beard confirmed that she was hoping to help the Appellant with some of the workplace issues. Beard wanted the Appellant to do her best. Beard observed that the Appellant was having a hard time adapting to the change in her new duties and responsibilities. When Beard tried to discuss the Appellant's work performance with her, the Appellant would continually change the subject. The Appellant kept bringing up past issues with the other RPMs and coworkers. Beard felt stressed and found it difficult to keep the Appellant focused. Moreover, the Appellant's coworkers felt stressed and did not want to work with the Appellant if they could avoid it. One coworker in particular, Dana Scruse, would not talk to the Appellant anymore for fear of being accused of being a racist. Beard witnessed a discussion with the Appellant and Chuck Ballou when Ballou was trying to instruct the Appellant with specific job duties. The Appellant was defiant towards Ballou, saying it was not part of her job duties. The Appellant expressed anger towards coworkers and Beard.

18. Beard testified that, when managers in Frankfort would ask why packets were not being uploaded in a timely manner in the system, she would check to see who was working on the packets. When Beard asked the Appellant why her packets were not completed, the Appellant made excuses. She would say, "I don't know where the packets are" or "someone took them." When the Appellant called in sick, Frankfort managers would email Beard about the late packets and were emphatic that the packets needed to be uploaded immediately. On those occasions, Beard would go into the Appellant's cubicle to look for the late packets. Beard found them on the Appellant's desk. Beard took the packets and uploaded them into the system for Frankfort. When the Appellant came back to the office, she noticed that someone had been in her cubicle. Beard told the Appellant that she (Beard) had because Frankfort was wanting some packets uploaded to the system immediately. The Appellant became defensive with Beard. Beard testified that the Appellant was possessive of the packets and expressed that only she should handle them. The Appellant's cubicle was so full, she started placing packets in other areas, such as metal filing cabinets, conference rooms, and rolling carts. Beard offered to help the Appellant upload the packets into the system. The Appellant became frustrated with Beard, so Beard decided to leave the Appellant alone. Beard then notified Frankfort management about the situation.

19. Beard confirmed that items with the Appellant's handwriting were found in the storage cubicle, but the Appellant denied placing items in the storage cubicle and told her someone else could have taken her things to the storage cubicle on the first floor of the building without her knowledge, implying conspiracy against her. However, Beard stated, the storage boxes had labels in the Appellant's handwriting on them. The boxes were found in a cubicle that was assigned for the Appellant's use to store her archive boxes. The Appellant denied knowing anything about the boxes or how the boxes got into that storage cubicle.

20. Beard declared that it was not brought to her attention that the Appellant wanted to move to a different cubicle. Angela White was in the cubicle next to the Appellant, who later testified that she (the Appellant) asked to move because of the stressful relationship with White.

When asked, White told Beard about her feelings regarding the Appellant. White informed Beard that the Appellant's behavior was concerning to her, and she thought the Appellant was paranoid and angry about everything that was going on in the office. White told Beard that, when White started working in OIG, the Appellant would tell White how the people in the department acted towards her (the Appellant) and calling her coworkers "racists." White also told Beard that the Appellant confided to her that both the Appellant's husband and her daughter said that they thought she had post-traumatic stress disorder (PTSD). White said the Appellant called her several times a day complaining about other coworkers, including Beard. White could regularly hear the Appellant become angry with other coworkers. The Appellant's behavior was so bad that White described working with her as working in a hostile working environment. She expressed to Beard that she was fearful of what would happen if the Appellant really "went off." White became so concerned with the Appellant's anger issues, that White had made plans on how to escape and get out of the building if the Appellant brought a gun to work. After hearing about White's experiences and her ongoing concerns, Beard moved White to a different cubicle for White's safety.

21. Beard next testified regarding Kim Travis's complaint that the Appellant would send her a lot of emails just to rant to her about other staff. Travis revealed to Beard that she was not sure what the Appellant would do when angry.

22. Beard also spoke with Carmen Ferguson, an African American surveyor who was newly employed with OIG. Ferguson told Beard that she and the Appellant had previously developed a friendship. When Ferguson called the Appellant "Ms. Rita" one time, the Appellant told Ferguson that she did not like to be called that. Ferguson accidentally called the Appellant "Ms. Rita," again. Ferguson said that did not mean to disrespect the Appellant and she repeatedly apologized to her in emails, but the Appellant would not let it go. Ferguson went to Beard and told her that she tried to work it out with the Appellant, but the Appellant was still angry. Ferguson showed Beard the emails where she had apologized to the Appellant. Ferguson tried to be respectful to the Appellant in calling her "Ms. Rita" and was not attempting to discriminate against her. Ferguson said that she had addressed older African American women this way previously. Ferguson told Beard that she and the Appellant were unable to work out their differences and Ferguson was leery of what the Appellant would do. After discussing the Appellant's behavior with multiple OIG employees, Beard asserted that everyone in the office was concerned with the Appellant's mental health.

23. After being made aware of the issues surrounding the Appellant, Beard attempted to discuss the matters with the Appellant. Despite those conversations, Beard acknowledged that matters did not improve and, given the significant complaints and concerns expressed by her staff, she felt obligated to inform OIG management in Frankfort about the situation.

Beard reported the Appellant's behavior to her supervisor in Frankfort, Jackie Aitkin. Aitkin then notified Bob James, the OIG Human Resource Liaison, and Steve Davis, the Inspector General. Beard was instructed to come to Frankfort for a meeting to discuss her concerns. The meeting took place in Frankfort on or about October 30, 2018. In addition to Aitkin, James, and Davis, other attendees in the meeting included Jay Klein, Assistant Director of the Office of Human

Resource Management (OHRM) and CHFS Staff Attorney Jennifer Wolsing. It was at this meeting that Beard was informed the Appellant could be placed on Directed Sick Leave. The attendees of the meeting were informed that, if an employee's behavior is believed to be based on a mental health issue and not a disciplinary intentional bad behavior issue, Directed Sick Leave can be considered. Beard verified that this was the first time she had heard about placing an employee on Directed Sick Leave. Beard was asked to document, in writing, the concerns that she discussed during the meeting. Beard testified that she prepared the Directed Sick Leave document and sent it by email to Jay Klein, as instructed. Beard's documentation was introduced into evidence as **Appellee's Exhibit 4**.

24. Beard thought that placing the Appellant on Directed Sick Leave was appropriate. Because of her prior training and experience as a Registered Nurse, Beard believed Directed Sick Leave would be the best option. Beard testified that her understanding was that a doctor would assess the Appellant regarding her paranoia and anger issues and the Appellant would be able get mental health assistance for her behavior at the workplace.

25. Beard testified about one of the items noted in the Dear Health Care Provider Letter – the Appellant's misguided belief that she was being mocked and picked on due to her health issues. Beard stated that the Appellant would continually bring up issues that had already been resolved.

26. Beard described an incident where the Appellant thought a truck had pulled out in front of her vehicle. The Appellant told Beard that she had followed the truck driver to confront him and that she would be late arriving to the office because of her confrontation with the driver. Beard testified that the Appellant's voice sounded very shaken. Beard stated that the Appellant would also come to the office distraught regarding news stories she heard, and the Appellant was then unable to concentrate on her work for a significant period of time. In part because of her obsessions with past grievances, Beard believed that the Appellant has mental health issues. Beard testified that she is a Registered Nurse who dealt with nursing home patients and is familiar with the signs of paranoia and obsessive-compulsive behavior. She felt that the Appellant exhibited those same behaviors.

27. Beard opined that work conditions and employee morale in the office improved after the Appellant was placed on Directed Sick Leave. Further, the Appellant's backlog of packets was caught up within two (2) months.

28. Beard was then questioned about the November 1, 2018 email she sent to Jay Klein, the document she prepared after Klein asked Beard to set out, in writing, all of the concerns she had discussed during the meeting in Frankfort. Beard testified that bullet points in November 1 email were all the things that she either witnessed herself, had been told to her by the Appellant, or were directly told to her by the Appellant's coworkers.

29. Beard testified that, in Theresa Harvey's presence, she handed the Appellant the Directed Sick Leave letter and the "Dear Health Care Provider letter." **Appellant's Exhibit 2 and**

3. The Appellant told them she was not going to leave the building; she said she had to go to the bathroom. Beard was concerned the Appellant was not going to leave, and she called security to escort the Appellant out of the building. Beard said she then documented what happened after she handed the Appellant the Directed Sick Leave letters in a written memorandum, which was introduced into evidence as **Appellee's Exhibit 24**.

30. The Appellee called as its next witness, **Jay Klein**. Klein attended law school in Boston and worked as an attorney there for ten (10) years defending civil cases. He moved to Kentucky in 1999 and started working at CHFS's predecessor, the Cabinet for Families and Children, in 2001, working, among other duties, with Human Resources on discipline matters. When the Cabinet for Families and Children was reorganized to create the Cabinet for Health and Family Services, Klein began working in CHFS's Office of Human Resources Management (OHRM) as Assistant Director working on grievances, Equal Employment Opportunity and Directed Sick Leave matters, and Open Record requests.

31. Klein was shown a copy of the Directed Sick Leave regulation, 101 KAR 2:102, Section 2(2)(a)2, which reads as follows:

- (2) Use and retention of sick leave.
 - (a) An appointing authority shall grant or may require the use of sick leave with or without pay if an employee:
 - 2. Is disabled by illness or injury. If requested by the appointing authority, the employee shall provide a statement from an appropriate medical health professional certifying the employee's inability to perform the employee's duties for the days or hours sick leave is requested. Before an employee is permitted to return to work, if requested by the appointing authority, the employee shall obtain and present a fitness-for-duty certification from an appropriate medical health care professional indicating the employee is able to resume work.

Having utilized it for about twenty (20) years, Klein was familiar with the regulation. Klein testified he created the procedure where the employee is given the Directed Sick Leave letter and provided a second letter for the employee to give to their health care provider for them to complete. Klein testified that the Directed Sick Leave procedure is utilized when an employee's behavior is believed to be based on a mental health condition, whereas discipline is utilized for an employee who exhibits bad behavior. Directed Sick Leave can be used when an employee's physical or

mental disability is interfering with their ability to perform work duties. 101 KAR 2:102, Section 2(2)(a)2, **Appellee's Exhibit 1.**

32. Klein referred to the Directed Sick Leave letter, which is addressed to the employee, as a "standard letter." He referred to the second letter as a "Dear Health Care Provider" letter, which included details about the employee's job, the fact pattern of the employee's behavior, and questions about the employee's fitness for duty for the physician to complete.

33. Klein then testified in detail about the November 2, 2018 letter placing the Appellant on Directed Sick Leave. Klein referred to this as the "shell letter." During the October 30, 2018 meeting with Belinda Beard, Steve Davis, Jennifer Wolsing, and Jackie Aitkin, they decided that the best course of action was to place the Appellant on Directed Sick Leave because of the mental health issues she exhibited. When questioned regarding the Directed Sick Leave letter provided to the Appellant, he admitted the second sentence stated, "you have provided information regarding your behavior and physical inability to perform your job duties." Klein admitted he did not receive any information regarding the Appellant's physical inability to perform her job duties.

34. Regarding the Dear Health Care Provider letter, Klein had no independent knowledge of these facts and accepted the information he received from the OIG staff. Much of this information was obtained from the email he requested from Beard.

35. Klein received a November 16, 2018 letter from the Appellant's doctor. This letter included the sentence, "We have determined that because these concerns have arisen from her employment setting and not problems that she personally feels is affecting her activities of daily living, we recommend that further evaluation of the situation should be deferred to an occupational health care provider of your choice." **Appellee's Exhibit 5.**

36. The Appellant was not allowed to return to work because the November 16, 2018 letter from her health care provider did not answer the question as to whether the Appellant was released to return to work. Klein sent the Appellant a letter dated November 21, 2018, informing her that her health care provider did not state the Appellant was able to return to work and restart performing her job duties. He also informed the Appellant that choosing a health care provider was her responsibility. Klein's letter was introduced into evidence as **Appellee's Exhibit 6.**

37. Klein introduced into evidence several "Dear Health Care Provider" letters he had provided to other employees together with the letters that placed them on Directed Sick Leave. He testified that this was a standard procedure, and he did nothing out of the ordinary in the Appellant's case. No Directed Sick Leave letters were produced that stated they were based on information provided by the employee themselves. See Appellee's Exhibits 7 through 15.

38. Klein was aware of previous grievances the Appellant had filed that alleged discrimination. He stated that none of those grievances resulted in a finding of discrimination.

Klein testified that he did not discriminate against the Appellant in any way by taking the action to place her on Directed Sick Leave.

39. Also admitted into evidence, during Klein's testimony, was a Personnel Board Final Order dismissing a prior appeal in which the Appellant was alleging age and disability discrimination. See **Appellee's Exhibit 16**. An EEO/Civil Rights Compliance Branch Investigation into the Appellant's allegations of race discrimination, retaliation, and a hostile work environment against the OIG was admitted into evidence as **Appellee's Exhibit 17**. This EEO investigation determined there was no evidence to support the Appellant's allegations of race discrimination, retaliation, or a hostile work environment. Witness statements regarding the Appellant's behavior when she was given the Directed Sick Leave letter were introduced into evidence as **Appellee's Exhibits 23 through 26**.

40. Klein testified the Appellant did not return to work after she was placed on Directed Sick Leave. She remained on paid leave from November 2, 2018, until March 28, 2019. On that date she went on unpaid sick leave by Personnel Action Notification, a status which she retained for one (1) year. On March 31, 2020, the Appellant was resigned for being absent without leave, pursuant to 101 KAR 2:102, Section 10(3).

41. Lastly, Klein testified that the Appellant was reclassified from an Administrative Secretary, Grade 10, to an Administrative Specialist III, Grade 12, effective September 1, 2017.

42. The Appellee then called **Chris Ann Violet**, a Program Investigative Officer II in the EEO Civil Rights Compliance Branch. She testified she conducted the investigation of the Appellant's October 2018 complaint against Beard alleging race discrimination, retaliation, and a hostile work environment. After interviewing witnesses and reviewing documents, Violet determined that the Appellant's claims were unfounded. **Appellee's Exhibit 17**.

43. The Appellee next called **Theresa Harvey**. Harvey is currently the Regional Program Manager (RPM) for the Office of Inspector General (OIG) Division of Regulated Child Care (DRCC). Harvey has a degree in early child education and work force management. Prior to working at CHFS, Harvey was a Head Start teacher, worked at a child abuse treatment program, and was a preschool teacher. Harvey explained her current duties and the function of her division at the OIG, the Northern Branch of DRCC in Louisville. The OIG Inspectors that she supervises conduct investigations and surprise inspections to assure regulatory compliance of the licensed childcare centers in Jefferson County and thirteen (13) surrounding counties. Harvey testified that, as RPM, she provides supervisory support and oversight to the team, reviewing inspection reports, processing applications to Licensees, and being a liaison to the public and childcare centers.

44. Harvey testified that, due to a reorganization and downsizing, some of her duties were restructured to take advantage of changing technology and the use of electronic records. CHFS also restructured some of the work of the administrative support staff. Harvey knew about the Appellant's change in job duties; that she was doing work for childcare as well as healthcare. In the previous ten (10) years, prior to the restructuring of duties, the Northern Region had two (2)

support staff in the Division of Health Care and one (1) support staff in the Division of Regulated Child Care. Each of the geographic regions had the same support staff. During the reorganization, OIG and OHRM reassessed the needs of the support staff since letters were now being automatically generated and most were sent electronically instead of being mailed. The support staff of DRCC and Division of Health Care were merged, and the staff duties of employees were realigned, with support staff now working for both divisions. Harvey explained that this realignment was a statewide change and was specifically the Appellant's job.

45. Harvey testified that the Appellant was frustrated and objected to having additional duties such as answering the phone and providing support for her division. The Appellant expressed the opinion that the additional duties were "unfair." Harvey believed the Appellant did not understand that the restructuring was conducted statewide and not because of anything the Appellant had done or was imposed on her alone. Referring to the Appellant's Appeal No. 2018-215 where the Appellant objected to her duties, Harvey said the restructuring was not retaliatory and was not based on the Appellant's age, race, gender, or any protected class.

46. Asked about the Appellant's accusations that she was the victim of discrimination, Harvey testified she never witnessed any type of discrimination or retaliation against the Appellant. Harvey stated that the Appellant did not want any special accommodations, expressing that she did not want to be treated differently based on her age or because she used a cane. At the same time, however, the Appellant appeared upset when she was not treated differently. For example, the Appellant objected to an African American surveyor who called the Appellant "Ms. Rita." Harvey offered to move the Appellant's cubicle because she uses a cane, but the Appellant did not want to be moved or accommodated.

47. Harvey next testified that the support staff have a mail cart that they can use when they go to the mailroom to pick up the mail. The Appellant was responsible for going to the mailroom regularly. Harvey heard the Appellant complain about Joe Lally requesting that she pick up a box from the mailroom. The Appellant seemed to be obsessed with the Joe Lally "situation," repeatedly bringing up the subject in many conversations over an extended period. Harvey often let the Appellant vent her frustrations. They also had very pleasant conversations at times, sometimes talking after work hours when both were in the office.

48. Harvey stated that, because the Appellant talked about Joe Lally "situation" so often, Harvey eventually talked to Lally about it. Lally explained that someone from the mailroom had called him to notify him that a box had arrived. Lally knew the Appellant was one of the employees assigned to retrieve the mail, so he asked the Appellant to take her cart when she went to pick up the mail, so she would not have to carry the box. Lally said the box was for one of his staff, although he did not know that at the time he talked with the Appellant. The Appellant had repeatedly complained that she should not have been notified about the box, and that Lally should have done it himself. From her discussion with Lally, Harvey gathered that he went to discuss the box with an employee responsible for retrieving the mail, instead seeking out the Appellant specifically. Tangentially, the Appellant told Harvey she felt that Lally was somehow

disrespecting her when he smiled at her. Harvey stated that Lally is just a very pleasant person who smiles.

49. Describing Supervisor Beard's interactions with the Appellant, Harvey never saw anything that was inappropriate. To Harvey's knowledge, no one in OIG conspired, lied, retaliated, or said anything untrue about the Appellant.

50. Harvey said the purpose of her November 2, 2018 statement was to document her observations of the events of the meeting when Beard issued the Directed Sick Leave letter to the Appellant. The Appellant was very upset and did not want to accept the statement. Instead of just taking the letter and leaving the office, the Appellant excused herself to go to the bathroom. When the Appellant came back from the restroom, she was upset, saying that this was unfair, and that she was being targeted. Harvey stated that Beard was never overtly threatened, but she expressed concern about the Appellant's anger, which prompted Beard to have a security officer escort the Appellant from the building. Harvey testified she and Beard were calm, respectful, professional, and appropriate when they presented the Appellant with the Directed Sick Leave letter and they tried to explain the reason for the letter. Harvey said Beard did not laugh at the Appellant during this encounter. See Appellee's Exhibit 25 admitted into evidence.

51. Harvey next testified about her knowledge of the Appellee's **Exhibits 3 and 4** and what she knew about each bullet point of the Appellant's "Dear Health Care Provider" letter. Bullet point number 3 referenced where the Appellant imagined others were mocking her; Harvey said this did not occur in her presence. Harvey testified about what workers had told her what the Appellant had done. The Appellant called her coworkers several times a week expressing her opinion that "management is out to get her." She recalled White being one of the workers who had relayed this information. Harvey noticed that when the Appellant was upset, she sent many more emails. The Appellant expressed that people were out to get her. For example, the Appellant constantly obsessed about Lally and the mailroom incident, and the Appellant accused someone of tapping on her cubicle to target her. Harvey stated that the incidents described in the Appellee's **Exhibit 3** are consistent with concerns Beard expressed to her about the Appellant's behavior and discussions.

52. The Appellee called **Joe Lally** as its next witness. Lally reviewed his background as a state employee working at the Human Rights Commission, OIG, and the Board of Nursing. When he was at the OIG, Lally supervised staff in special investigations. Lally opined that his division was mostly self-sufficient but did rely on support staff from the other divisions to pick up the mail and transfer phone calls. Lally testified that he was friendly with the Appellant and did not have any issues with her prior to the mailroom incident.

53. Lally then described the mailroom incident, which stemmed from a package delivery that occurred in 2017. Someone from the OIG mailroom called him regarding the delivery of a box without a name. Lally told the Appellant and White, who were responsible for picking up his division's mail from the OIG mailroom, that they may need to take a cart to pick up the mail on that particular day because of the box. Lally said that he intended to convey this information

to both the Appellant and White because it was his understanding that the administrative staff took turns retrieving the mail. When he walked up to the front of the office, the first person he saw was the Appellant as she was walking out the front door. Lally asked her whose turn it was to get the mail, and she said it was White's turn that day. Lally then explained why he asked and mentioned the box. That was the end of the conversation and he left.

Later, Lally ran into White, told her about the box, and volunteered to go with her. They both went down to the OIG mailroom with a cart and retrieved the box. After opening the unaddressed box, it turned out to be some medical records for an employee he supervises, which Lally delivered and considered the matter settled. However, two (2) or three (3) weeks later, the Appellant emailed him and accused him of targeting her. In her email, she asked why he mentioned the big box and the call from the OIG mailroom. She said he was being racist when he told her to bring up the box from the mailroom to his division. Lally forwarded the Appellant's email to management and did not respond to the email or discuss it with the Appellant. Later, he learned that the Appellant had complained and OHRM asked him about the incident. He recalled that the conversation he had with the Appellant regarding the box took about twenty (20) seconds. Lally was very surprised that the Appellant had emailed him and filed a complaint about the issue. Lally felt it best not to talk further with the Appellant about the issue. He did not treat the Appellant differently than any other employee. He did not remember doing or saying anything that might have been disrespectful to the Appellant. He would always refer to her as "Rita" and she would call him "Joe." Lally also did not observe anyone else at the OIG treating the Appellant in a disrespectful or demeaning way.

54. The Cabinet called its next witness, **Ronald "Chuck" Ballou**. Ballou has a Bachelor of Science in Nursing, a Master's in business administration, and he is a Registered Nurse. Prior to working at CHFS, he was a nurse at Jewish Hospital in Louisville, then an Assistant Unit Manager, then a Unit Manager. His first position with state government was with the Board of Nursing as a Nurse Investigator. Then he began work at OIG. Ballou noted that the Appellant was already an employee when he was hired. He began as a Nurse Consultant and Surveyor. The Appellant was one of the administrative support staff at that time who helped with administrative duties and timekeeping. The Appellant would come to him and ask questions or if she needed clarification. When he moved into the Assistant RPM position, he became the Appellant's supervisor. On August 1, 2020, Ballou was promoted to RPM. Since the Appellant had been placed on Directed Sick Leave, they were down to one (1) support position.

55. Ballou was made aware, by Beard, that the Appellant was unhappy regarding the reorganization. Beard said that the Appellant was unhappy to be working with DRCC. Ballou understood all the changes were for cost saving purposes and the changes were statewide, including all of the regional branches.

56. Concerning the bullet points in the "Dear Health Care Provider" letter, Ballou personally witnessed some of the Appellant's behavior and outbursts. He was unaware of the entire list until he saw Appellee's Exhibit 3 at the hearing. He was the one that found the bank statements with the Appellant's name on them and, therefore, believed they were her personal bank statements. He gave the bank statements to Beard since the Appellant was not there that day. Ballou denied anyone would conspire to move the Appellant's boxes on the other floors. He also

testified regarding a meeting where the Appellant was upset, and Beard told the Appellant that she would be happy to discuss those things with her in private. The Appellant then became more upset, and stood up, looking frustrated, and began raising her voice. Other people in the office were looking wide-eyed into the room and Beard dismissed the meeting at that point.

57. Ballou observed the item mentioned in Appellee's Exhibit 4, bullet point 1, regarding the Appellant's job duties changing; she was frustrated and upset to have to assume those responsibilities. He told Beard he felt he was walking on eggshells around the Appellant because he never knew what might set her off. As a nurse, Ballou said the Appellant's behavior, lack of focus, and inability to take instructions caused him to suspect she had mental health issues, such as depression or bi-polar disorder. He said that staff members in the office who had medical backgrounds thought there was something medically wrong with the Appellant and were generally concerned for her.

58. On October 5 and 9, 2018, Ballou told Beard that he felt like he had a target on his back because of the Appellant's paranoia and anger. Ballou told Beard he felt he might be the next target on a grievance that the Appellant would file.

59. Ballou never saw Beard acting unfairly or retaliating against the Appellant in any way. He opined that Beard acted properly in taking those concerns to Frankfort. Ballou knew about the clutter in the Appellant's cubicle; he was the one who boxed up her belongings and took the photographs of them. Ballou did not see anything done to discriminate or retaliate against the Appellant at any time.

60. At the conclusion of Ballou's testimony, the Appellee rested its case-in-chief.

61. The **Appellant, Rita Richardson**, testified on her own behalf. She testified that she was always a cooperative team player but felt she was always treated differently. The Appellant said that all the Cabinet witnesses had made up their testimony, but she would tell the truth. The Appellant speculated that Beard was out to get her because she had been invited to social events at coworkers' homes, where she was the only support staff in attendance. The Appellant believed Beard resented that. The Appellant said a certain nurse "cursed the RPM (Beard) out" but was still allowed to come back to work.

62. Going back into her work history from the beginning, the Appellant said the OIG "ran off other African Americans" or "so she heard" prior to her employment. The Appellant said people are lying about her and "African Americans are treated like crap."

63. On cross-examination, the Appellant said she was treated differently than a Nurse Surveyor who had cursed out Beard, and also someone named Stacy Inman. The Appellant denied ever being friends with Beard. The Appellant denied the statements she made during the pre-hearing conferences about not using video software for remote testimony for fear people could spy on her. The Appellant said no one had concerns about her anger issues until Beard made them up. The Appellant was asked if she believed what happened was that all the Cabinet's witnesses got

together, made up a bunch of lies, and sent it to Frankfort to get the Appellant put on Directed Sick Leave. The Appellant responded, "that's what happened." The Appellant stated that Beard did not know how to do her job and implied Beard was out to get her.

64. The Appellant then recalled **Belinda Beard** as her next witness. Beard was asked whether she was contacted by Chuck Ballou on the day prior to the evidentiary hearing to discuss her testimony. Beard replied, no. When asked about work packets, Beard stated that the Appellant kept packets in her cubicle, on her desk, and on the adjacent table when information contained therein was being requested by Central Office in Frankfort. Beard had to go to the Appellant's cubicle to find them.

65. The Appellant recalled **Joe Lally** and **Teresa Harvey** as witnesses. No significant new testimony was introduced.

66. The Appellant then called **Sandra MacDonald** as her next witness. MacDonald confirmed that staff did not screen phone calls prior to transferring them. The Appellant asked why MacDonald would not answer phone calls when the Appellant transferred a call to her. MacDonald stated that if she did not answer a phone call that was transferred, it was most likely because she was away from her desk, or she was on another call talking to someone. The Appellant challenged that statement, pointing out that she could see when MacDonald was on a call. MacDonald pointed out that she also has a state-issued cell phone, so she would often take surveyor's phone calls on that phone.

67. The Appellant next called **Chris Ann Violet**. The Appellant asked Violet about Marjorie Payne's religious beliefs. The witness said she knew Payne's deceased husband was a minister.

68. The Appellant rested her case.

69. On rebuttal, the Appellee called former CHFS Attorney, **Jennifer Wolsing**. Wolsing testified that, while working on another case, she met with Beard as a witness. Beard indicated she had a concern regarding the Appellant. Wolsing testified that Beard was emotional while discussing the Appellant's actions, which included alleged bullying and disobeying directives from her supervisor. Beard told Wolsing that she thought the Appellant might have a mental health issue. Wolsing suggested a meeting with Inspector General Steve Davis. Wolsing, Beard, and Klein were in that meeting. Klein suggested that the Appellant be placed on Directed Sick Leave to seek help for her personal issues. Wolsing testified she felt Beard wanted to help the Appellant.

FINDINGS OF FACT

1. The Appellant, Rita Richardson, was an Administrative Specialist III, who had worked with the Cabinet for Health and Family Service's (CHFS) Office of Inspector General

(OIG) for eighteen (18) years. She was a classified employee with status. (Testimony of the Appellant, Belinda Beard, and Jay Klein).

2. Effective September 1, 2017, the Appellant was reclassified from her position as an Administrative Secretary to Administrative Specialist III. As a result, she received an increase in pay. (Testimony of Jay Klein, the Appellant, and **Appellee's Exhibit 17**).

3. Following a statewide reorganization of OIG, the Appellant's job duties expanded from just providing support services to the Division of Health Care to also include the Division of Regulated Child Care (DRCC). The Appellant performed these new duties reluctantly. She frequently expressed her opinion that she was being asked to do too much. The record is clear that the Appellant was not singled out for additional duties. CHFS management decided that, because of technological advances, they could function with fewer administrative employees. (Testimony of the Appellant, Jay Klein, Belinda Beard, Theresa Harvey, and the **Appellee's Exhibits 20 and 28**).

4. The Appellant has some physical challenges. She has mobility issues and walks with a cane. She also has difficulty lifting heavy objects due to hand and back problems. Despite these issues, the Appellant did not request any special accommodations. (Testimony of the Appellant, Belinda Beard, and Theresa Harvey).

5. The Appellant is African American. At the time she filed her appeals, she was sixty-four (64) years old. During her employment with OIG, the Appellant filed nine (9) separate complaints resulting in investigations by CHFS's EEO/Civil Rights Compliance Branch. Her complaints included claims of disability, age, gender, and race discrimination in addition to allegations of harassment, hostile work environment, unsafe cubicle, and retaliation. Investigators found all her complaints to be unsubstantiated. Her nine (9) complaints were filed between 2003 through 2018. (Testimony of the Appellant, Jay Klein, Chris Ann Violet, and **Appellee's Exhibit 17**).

6. In 2018, Belinda Beard, the RPM for the Division of Health Care and the Appellant's first-line supervisor, grew concerned about the Appellant's behavior at work. Beard believed the Appellant's work had suffered because the Appellant felt she was retaliated against by being assigned new job duties. After being unsuccessful in addressing these issues herself, Beard expressed her concerns about the Appellant's behavior to her supervisors. As a result, Beard attended a meeting in Frankfort on October 30, 2018, with Jay Klein (Assistant Director in the Office of Human Resource Management), Jennifer Wolsing (CHFS attorney), Steve Davis (Inspector General), and Jackie Aitkin (Beard's supervisor). After a discussion of Beard's concerns regarding the Appellant's behavior, a decision was made to place the Appellant on Directed Sick Leave. (Testimony of Belinda Beard, Jay Klein, and Jennifer Wolsing).

7. The determination to place the Appellant on Directed Sick Leave was based on 101 KAR 2:102, Section 2(2)(a)2. The personnel action was specifically based on concern that the Appellant was unable to perform the essential functions of her position as a result of a mental

condition. Importantly, the placement on Directed Sick Leave was not based on the Appellant's physical condition nor was the action based on sub-parts (4) or (5) of that same regulation. Likewise, this action was not taken based on any concern over potential workplace violence. (Testimony of Belinda Beard, Jay Klein, and **Appellee's Exhibits, 1, 2, 3, and 4**).

8. The Appellant was placed on Directed Sick Leave based on information reported by Beard to Jay Klein, the appointing authority. (Testimony of Belinda Beard, Jay Klein, and the **Appellee's Exhibits 3, and 4**).

9. On November 2, 2018, Beard and Theresa Harvey met with the Appellant and informed her that she was being placed on Directed Sick Leave and presented her with the letter to that effect. Despite evidence at the hearing establishing that the placement on Directed Sick Leave was based on a report from Beard on the Appellant's mental condition, the letter explicitly included this sentence:

“You have provided information regarding your behavior and physical inability to perform your job duties.”

Further, Klein specifically denied the action was based on the Appellant's “physical inability to perform” her job.” (Testimony of Belinda Beard, Theresa Harvey, Jay Klein, and **Appellee's Exhibits 2, 3, 4, 24, and 25**).

10. On November 20, 2018, Beard gave the Appellant the “Dear Health Care Provider” letter in a sealed envelope. Beard explained to the Appellant that the envelope contained a document that explained the specific concerns that prompted the decision to put the Appellant on Directed Sick Leave and that the Appellant could not return to work until she took the document to a physician and obtained a statement from the physician indicating that she was able to fulfill the essential duties of her job. This “Dear Health Care Provider” letter informed the Appellant's health care provider that the Appellant “has been directed off on sick leave due to concerns about the employee's mental health and ability to perform her job duties.” (**Appellee's Exhibit 3**). This letter also included twelve (12) bullet points, identified as “The behaviors that prompted this action.” This information was included so the health care provider would know why the Appellant was placed on sick leave. (Testimony of Belinda Beard, Theresa Harvey, Jay Klein, and **Appellee's Exhibits 3, 24, and 25**).

11. The Appellant did not want to go on sick leave and immediately protested the action stating that she would not even leave the building. She left after a short period of time. The Appellant opened the envelope containing the **Appellee's Exhibit 3** and read the letter. In an email from the Appellant's personal email account sent to Klein at 2:11 p.m. on November 2, 2018, she referred to some of the bullet points as “lies” and asked to know who made these statements. (Testimony of the Appellant, Belinda Beard, Theresa Harvey, Jay Klein, and **Appellee's 23, 24, 25, and 26**).

12. After review of the relevant documents, the Hearing Officer finds that Appellee did not provide the Appellant with adequate notice of the reason she was placed on Directed Sick Leave. The Appellee's Directed Sick Leave letter contained two (2) crucial errors. First, it is clear that the Appellant did not provide the information that resulted in her being placed on Directed Sick Leave, so the letter is factually inaccurate as to why the Appellee is taking the challenged personnel action. Second and perhaps more importantly, the Appellee did not place the Appellant on Directed Sick Leave because of her "physical inability to perform" her "job duties," so the letter inaccurately asserts grounds for penalization that the Appellee explicitly rejects; it is clear that the Appellant was placed on Directed Sick Leave because of concerns about her mental health, not concerns about her physical abilities. The Hearing Officer finds the Appellant's Directed Sick Leave letter did not provide the Appellant with adequate grounds as to the basis of the penalization being taken against her and, thus, violates KRS 18A.095. (Testimony of Belinda Beard, Jay Klein, and **Appellee's Exhibit 2**).

13. Next, the Appellant believed she was the victim of discrimination and retaliation throughout her employment with the Appellee. Her claims are based on the following:

- a) The Appellant believed she was assigned additional duties in retaliation for filing a grievance on February 12, 2018. The Appellant's 2017 Annual Employee Performance Evaluation included those extra job duties and demonstrated it was impossible for the assignment of those job duties to be the result of retaliation. (Testimony of the Appellant, Chris Ann Violet, and the **Appellee's Exhibit 17**).
- b) The Appellant also believed she was singled out for extra duties for the Division of Regulated Child Care because of her race, age, and disability. The evidence demonstrated, however, that the additional duties were the result of a statewide reorganization within the Office of Inspector General. (Testimony of the Appellant, Belinda Beard, and Theresa Harvey).
- c) The Appellant claimed she was denied the right to work compensatory time because of race discrimination. In support of her claim, she offered testimony that a coworker, White, who was also African American, was allowed to accrue compensatory time. The Appellant offered no proof that she was denied the use of compensatory time as a result of race discrimination. (Testimony of Belinda Beard, Chris Ann Violet, and **Appellee's Exhibit 17**).
- d) The Appellant has mobility issues and uses a cane to walk. She alleged that she was required to do extra walking, such as picking up the mail, for the Division of Regulated Child Care. The Appellant admitted, however, that she never requested any

accommodation. She also testified that she was proud of herself for never asking for help in lifting heavy boxes. The Appellant did not present any evidence that she was treated differently because of a disability. (Testimony of the Appellant, Belinda Beard, and Theresa Harvey).

- e) The Appellee investigated the Appellant's complaints of discrimination and retaliation on a least nine (9) separate occasions. No findings of discrimination or retaliation were ever substantiated. (Testimony of Jay Klein, Chris Ann Violet, and **Appellee's Exhibit 17**).
- f) The Hearing Officer finds that the Appellant sincerely believed she was discriminated against based on her race, age, and disability, and that she was retaliated against. Nonetheless, the evidence does not support that the Appellee took any actions against the Appellant that were discriminatory or retaliatory.

14. After the Appellant was placed on Directed Sick Leave, she did not return to work. She remained on paid leave from November 2, 2018, until she ran out of leave time. On March 28, 2019, by Personnel Action Notification, she was placed on unpaid sick leave. She remained in that status for one (1) year and, on March 31, 2020, was resigned for being absent without leave, pursuant to 101 KAR 2:102, Section 10(3). (Testimony of Jay Klein).

CONCLUSIONS OF LAW

1. As a classified employee with status, the Appellant had a right to not be penalized except for good cause. KRS 18A.095(1).

2. The Appellant was entitled to receive notice of any penalization, which complied with the provisions of KRS 18A.095(8). Section 8 of KRS 18A.095 provides, in full:

- (8) A classified employee with status who is demoted, suspended, or otherwise penalized shall be notified in writing of:
 - (a) The demotion, suspension, or other penalization;
 - (b) The effective date of the demotion, suspension, or other penalization;
 - (c) The specific reason for the action including:
 - 1. The statutory or regulatory violation;

2. The specific action or activity on which the demotion, suspension, or other penalization is based;
 3. The date, time, and place of the action or activity; and
 4. The name of the parties involved; and
- (d) That he or she has the right to appeal to the board within sixty (60) days, excluding the day that he or she received notification of the personnel action.

3. The Appellee's November 2, 2018 involuntarily placement of the Appellant on Directed Sick Leave, pursuant to 101 KAR 2:102, Section 2(2)(a)(2), constituted a penalization under KRS 18A.005(24) as such action required the Appellant to use her accrued sick leave against her wishes. See *Dan Hall vs. Transportation Cabinet*, 2000 WL 35675296 (KY PB 2000-088).

4. Here, it is clear from the testimony and the contemporaneous documentation that the Appellant was placed on Directed Sick Leave based on information from her supervisor Belinda Beard and concerns that the Appellant's mental condition was such that she could not perform the essential duties of her job. However, the Appellee's **Exhibit 2**, the letter from Jay Klein placing the Appellant on Directed Sick Leave, explicitly stated, "**You have provided information regarding your behavior and physical inability to perform your job duties.**" This letter does not comply with the provisions of KRS 18A.095(8) because it does not tell the Appellant the reasons she was placed on Directed Sick Leave.

5. The Hearing Officer rejects the Appellee's argument that it complied with KRS 18A.095(8) by also providing the Appellant the Appellee's Exhibit 3, the "Dear Health Care Provider" letter. That letter also did not adequately provide the Appellant with the notice required by KRS 18A.095 and, moreover, was not addressed to the Appellant. That letter did not cite any statutory or regulatory authority for having placed the Appellant on Directed Sick Leave, but merely informed the Health Care Provider that the Appellant "has been directed off on sick leave."

6. The Appellee penalized the Appellant when it placed her on Directed Sick Leave and did not provide the statutorily required notice. The difficult issue in this case is determining the appropriate remedy for the Appellee's failure to comply with KRS 18A.095. Clearly, the Appellee should return all the Appellant's sick leave (or other paid leave) she was forced to use from November 2, 2018, through March 31, 2020 (the date she was resigned). She should also receive back pay for periods she was on leave without pay from November 2, 2018, through March 31, 2020. The difficulty is determining whether she is entitled to be reinstated to her former position and whether her back pay and benefits should stop on March 31, 2020, when she was resigned by regulation from unpaid sick leave. On the one hand, the Appellant did not appeal her resignation, a separate personnel action which was appealable in and of itself. On the other hand,

the Appellant should not have been on sick leave and, therefore, would not have been on sick leave without pay, and would not have been resigned by regulation. Although not directly on point, the case of *Dan Hall v. Transportation Cabinet*, 2005 WL 6152029 (KY PB 2000-088) provides some guidance. In the *Hall* case, Hall was resigned from sick leave even though there was a Franklin Circuit Court order reinstating him to his former position with back pay and instructing his employing agency to correct his employment record to reflect that he was not on sick leave. The Transportation Cabinet appealed the order to the Court of Appeals but did not obtain a stay. As a result, Hall was reinstated to his former position with full backpay even though he did not file an appeal following his resignation by regulation from unpaid sick leave.

7. In this case, no adjudication had been made regarding the Appellant's sick leave at the time she was resigned. The Hearing Officer believes that, in order to make the Appellant whole, she should be reinstated to her position with no back pay from April 1, 2020, until the date of the Board's Final Order. It is beyond dispute that if the Appellant was not properly placed on Directed Sick Leave, there is no proper basis to resign her on March 31, 2020. Nonetheless, the Appellant did not appeal her resignation and the Board should not ignore that fact. This remedy is within the Board's authority in KRS 18A.095(22)(b) and (d).

8. The Appellant failed to carry her burden of proof on her claims of race, age, and disability discrimination, retaliation, and harassment. KRS 13B. 090(7).

- a) Although the Appellant presented evidence of her race (African American), age (over 40) and that she suffered from medical conditions that may have constituted a disability, the overwhelming evidence established the Appellee relied on work-related reasons for placing the Appellant on Directed Sick Leave. The Appellant's belief that she was discriminated is not sufficient to prove a case of discrimination. *Kentucky Center for the Arts v. Handley*, 1991 WL 228036, 827 S.W.2d 697 (Ky App. 1991).
- b) In order to establish a *prima facie* case of retaliation, the Appellant must demonstrate:
 - 1) That she was engaged in protective activity;
 - 2) That she was subjected to adverse treatment by her employer; and
 - 3) That there was a causal connection between the activity engaged in and the employer's treatment of her.

Kentucky Dept. of Corrections v. McCullough, 2003 WL 21990227, 123 S.W.3d 130 (Ky. 2003).

While arguably the Appellant established the first two (2) elements for retaliation claims, she failed to demonstrate a causal connection between her protected activity (grievances she filed) and the alleged adverse treatment (being placed on Directed Sick Leave). The proof established that the Appellee placed her on Directed Sick Leave for work-related matters.

- c) The Appellant did not establish that she was harassed based on her race, age, or disability. KRS 18A.095(12).

9. The Appellee argued that the claim of being placed on Directed Sick Leave should be dismissed based on administrative *res judicata*.

- a) The Appellee stated:

Administrative *res judicata* bars former state employees from repeatedly bringing the same claim. The doctrine of *res judicata* provides that a final judgment rendered upon the merits is conclusive and bars subsequent legal action involving the same parties based upon the same conduct. BTC Leasing, Inc. v. Martin, 685 S.W.2d 191 (Ky. App. 1984). “Decisions of administrative agencies acting in a judicial capacity are entitled to the same *res judicata* effect as judgment of a court.” Kentucky Bar Association v. Harris, 269 S.W.3d 414, 418 (Ky. 2008). Therefore, the dismissal of Appeal No. 2019-030 precludes Appellant from pursuing (sic) her current nearly identical appeals. (Appellee’s Closing Argument, page 42).

- b) The Appellant filed Appeal No. 2019-030 on February 11, 2019. The Appellant was appealing a reallocation, discrimination, and other penalization. She specified: “Bogus directed sick leave as Retaliation for reporting hostile environment, violating of EEO laws & lies told on me.”

On February 14, 2019, the Appellee filed a Motion to Dismiss or Consolidate. The Appellee asked that Appeal No. 2019-030 be dismissed because it was duplicative of her pending appeals. In the alternative, the Appellee moved to consolidate Appeal No. 2019-030 with the Appellant’s pending appeals.

Appeal No. 2019-030 was set for a pre-hearing conference on April 29, 2019. The Appellant failed to appear, and the Hearing Officer issued a Recommended Order recommending dismissal of Appeal

No. 2019-030 unless the Appellant explained her failure to appear within fifteen (15) days. The Appellant did not respond, and the Board issued a Final Order on June 19, 2019, dismissing Appeal No. 2019-030 for failure to prosecute.

- c) The Appellee filed two (2) Motions to Dismiss before the evidentiary hearing in these consolidated appeals. The first Motion to Dismiss was filed on March 11, 2019, before Appeal No. 2019-030 was dismissed. The Appellee also filed a Motion to Dismiss or for Summary Judgment on April 29, 2020. The Appellee argued that the Appellant failed or refused to respond to written discovery. The Appellee also argued that the undisputed proof was that the placement of the Appellant upon Directed Sick Leave was appropriate, and the Appellant could not demonstrate illegal discrimination. The Appellee referenced the Board's dismissal of Appeal No. 2019-030 but did not argue its *res judicata* effect on the current case. In this case, the Appellee first raised the affirmative defense of *res judicata* in its Post Hearing Closing Argument filed on September 1, 2021.

- d) In civil cases, *res judicata* is an affirmative defense which must be raised pursuant to Civil Rule 8.03. This defense can be raised in a Motion to Dismiss. See *Sedley v. City of West Buechel*, 461 S.W.2d 556 (Ky.1970). As an affirmative defense, *res judicata* can be waived by not being raised in a timely fashion. The Kentucky Court of Appeals determined an affirmative defense (arbitration) was waived fifteen (15) months after an answer was filed and after defendant's substantial participation in discovery, including ten (10) depositions. See *Jackson v. Mackin*, 2009 WL 103230, 277 S.W.3d 626 (Ky. App. 2009). The Court of Appeals also found that the affirmative defense of workers' compensation being the exclusive remedy in a particular fact pattern was waived when it was raised for the first time in a Motion for Directed Verdict at the end of trial. *Northeast Health Management, Inc. v. Cotton*, 2001 WL 1042860, 56 S.W.3d 440, (Ky. App. 2001). In *Bailey v. Bailey*, 231 S.W.3d 793 (Ky. App. 2007), the Court of Appeals held that the former husband waived his argument that *res judicata* barred former wife's claim that former husband owed her for one-half (1/2) of the funeral expenses incurred due to the death of their oldest child, where husband failed to affirmatively plead the defense.

- e) Here, given the procedural posture of the consolidated appeals, the Hearing Officer concludes that the Appellee waived the affirmative defense of *res judicata*. Although a responsive pleading is not

required or allowed in Personnel Board appeals, the case law demonstrates raising the defense post hearing after having litigated the merits, constitutes a waiver.

10. Because all of the events with these appeals occurred before the effective date of Senate Bill 153, all references to KRS Chapter 18A are to the sections in effect at the time of the events associated with these appeals.

RECOMMENDED ORDER

The Hearing Officer recommends to the Kentucky Personnel Board that the appeals of **RITA RICHARDSON V. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NOS. 2018-215 AND 2018-227) BE SUSTAINED to the extent** regarding the Appellant's claim of being improperly penalized by her placement on Directed Sick Leave and **BE DISMISSED** as to all other claims. The Appellant shall be reinstated to her former position or a position of like pay and status effective the date of the Board's Final Order. The Appellant shall be reccredited with all sick leave or other paid leave she was forced to use from November 2, 2018, through March 31, 2020, and she should otherwise be made whole. The Appellee shall pay the Appellant backpay and all other benefits for all periods of time she was on sick leave without pay and to otherwise make the Appellant whole from November 2, 2018, through March 31, 2020. The Appellant shall not receive backpay or other benefits from April 1, 2020, through the date of the Board's Final Order. KRS 18A.105 and 200 KAR 12:030.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

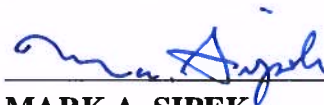
Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within fifteen (15) 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).

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.

SO ORDERED at the direction of the Hearing Officer this 11 day of July, 2023.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day emailed and mailed to:

Hon. Oliva Peterson
Rita Richardson
Hon. Rosemary Holbrook (Personnel Cabinet)



CABINET FOR HEALTH AND FAMILY SERVICES
OFFICE OF HUMAN RESOURCE
MANAGEMENT
275 E. Main Street, 5CD
Frankfort, KY 40621
(502) 564-7770
Fax: (502) 564-3129
www.chfs.ky.gov

Matthew G. Bevin
Governor

Adam M. Meier
Secretary

November 2, 2018

Rita Richardson
P.O. Box 482
Jeffersonville, IN 47131

Re: Directed Sick Leave

PRNER: 161149

Dear Ms. Richardson:

Pursuant to 101 KAR 2:102, Section 2, this correspondence is to advise you that effective November 2, 2018 you shall be placed on sick leave. You have provided information regarding your behavior and physical inability to perform your job duties. Based on this information, it is necessary to place you on leave.

Please understand that the reason you are being placed on directed sick leave is out of concern for you and your ability to perform your job duties. You are encouraged to contact the Kentucky Employee Assistance Program at 1-800-445-5327 or (502) 564-5788 if you wish assistance in seeking proper medical advice and treatment.

You shall continue on sick leave until you are fit to return to work and perform your assigned job duties. If needed, you may request to use accrued annual and compensatory leave after exhaustion of your sick leave. You also may be able to take unpaid leave under the Family and Medical Leave Act and you should discuss with your supervisor the use of Family Medical Leave for 2018. Once you deplete your paid leave and Family Medical Leave, you will be placed on sick leave without pay.

As a merit employee with status, you may appeal this action to the Personnel Board within sixty (60) days of receipt of this notice.

Sincerely,


Howard J. Klein
Designated Appointing Authority

Enclosure: Appeal form

CC: Secretary Thomas Stephens, Personnel Cabinet
Executive Director Mark Sipek, Personnel Board
Steven Davis, Inspector General
Cabinet Personnel File

Recommended Order Attachment A



CABINET FOR HEALTH AND FAMILY SERVICES

Matthew G. Bevin
Governor

OFFICE OF HUMAN
RESOURCE MANAGEMENT
275 E. Main Street, 5CD
Frankfort, KY 40621
(502) 564-7770
Fax: (502) 564-3129
www.chfs.ky.gov

Adam M. Meier
Secretary

November 2, 2018

Dear Health Care Provider:

Your patient, our employee Rita Richardson, has been directed off on sick leave due to concerns about the employee's mental health and ability to perform her job duties. Ms. Richardson is employed as an Administrative Specialist for the Office of Inspector General and her duties include general office support work. She was placed on sick leave effective November 2, 2018, for she has exhibited erratic and unstable behavior that caused concern for this employee's mental health and ability to perform job duties. The behaviors that prompted this action include:

- Three boxes, labelled in Ms. Richardson's handwriting, were found in a storage cubical that contained random office supplies and her personal bank statements. When questioned, she claimed that she did not put such boxes there.
- Several boxes were found on another floor that contained items from her desk as well as personal effects. When questioned, she stated that she thinks others have done this to her and blames them for some type of sabotage.
- Ms. Richardson stated that she thinks she is mocked and picked at for her health issues.
- At a recent team meeting, she became upset, started waiving her arms, stood up, and angrily spoke about her personal grievances and would not listen to direction from her supervisor to talk privately about her concerns after the meeting.
- Ms. Richardson stated that, since there are two guards at the building's guard desk, there must be something terrible going on in the building. However, the building regularly has had two guards at the desk for many years.
- She talks daily about current news events regarding deaths, missing children, fires and road fatalities. She becomes very distraught, states how upsetting it is and why can't authorities do more. She is then unable to focus on work tasks.
- She has stated to a co-worker that her husband and daughter believe that she needs psychiatric help and that she has PTSD.
- Ms. Richardson called her supervisor while driving to work and stated that a truck cut in front of her and that she was going to follow him in order to confront him about pulling in front of her. She called back and stated that she followed the truck to a construction site and confronted the man and then spoke to his supervisor, wanting something done about his reckless driving. Once she arrived at work, she repeatedly spoke about the incident as if "she could not let it go."
- She calls a co-worker several times a week to claim that management is out to get her.
- The supervisor recently went to her desk after the end of the workday to ask why she was still working and if she would be leaving soon. Ms. Richardson then glared at her, asked why she was being treated this way, stated "I know you are out to get me", and looked at her supervisor as if she wanted to harm her.



Recommended Order Attachment B

- Whenever Ms. Richardson has an issue or disagreement with staff, she creates postings in numerous places inside and outside of her cubical referencing the claimed disagreement or "targeting" as she calls it.
- She makes statements regarding other staff that are not true, exhibits paranoia and seems to be out to get certain co-workers. Due to being so focused on an issue that she is paranoid about, she is unable to perform her assigned work.

Before Ms. Richardson can return to work, we respectfully request that you answer the following questions in regards to her condition:

1. Is the behavior described above likely due to a medical condition?
2. If the behavior is attributable to a medical condition, is it possible to treat the condition to alleviate this type of behavior?
3. If this type of behavior can be alleviated with treatment, is Ms. Richardson able, in your opinion to perform her duties?
4. When, in your opinion, will Ms. Richardson be able to return to work?

Please provide a signed, written response on your letterhead. I appreciate your cooperation as we attempt to ensure that this employee is medically able to return to work and perform her job duties.

Sincerely,



Howard J. Klein
Designated Appointing Authority