

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 **EMERY RICHARDSON VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2013-008)** as the same appears of record in the office of the Kentucky Personnel Board.

Witness my hand this 17th day of September, 2013.



MARK A. SIPEK, SECRETARY
KENTUCKY PERSONNEL BOARD

Copy to Secretary, Personnel Cabinet

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2013-008

EMERY RICHARDSON

APPELLANT

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

JUSTICE AND PUBLIC SAFETY CABINET
DEPARTMENT OF CORRECTIONS
J. MICHAEL BROWN, APPOINTING AUTHORITY

APPELLEE

** **

The Board at its regular September 2013 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated July 24, 2013, having considered Appellee's exceptions, Appellant's response, 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, and they hereby are approved, adopted and incorporated herein by reference as a part of this Order, and the Appellant's appeal is therefore **SUSTAINED to the extent** therein.

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

SO ORDERED this 17th day of September, 2013.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy mailed this day to:

Hon. Amber Arnett
Emery Richardson
Stephanie Appel

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2013-008**

EMERY RICHARDSON

APPELLANT

VS.

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

**JUSTICE AND PUBLIC SAFETY CABINET
DEPARTMENT OF CORRECTIONS
J. MICHAEL BROWN, APPOINTING AUTHORITY**

APPELLEE

** ** *

This matter came on for an evidentiary hearing on May 29, 2013, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Emery Richardson, was present and was not represented by legal counsel. He was accompanied by his wife, Sharolyn. The Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Amber Arnett. Also present for the Appellee was Warden Clark Taylor.

BACKGROUND

1. Appellant, Emery Richardson, filed his appeal with the Personnel Board on January 14, 2013. The Appellant alleged that after being off work with congestive heart failure and being on FMLA he was not allowed to return to work on October 25, 2012, when he was released to return to work with the only restriction being he could not work more than a forty-hour week. He stated that Deputy Warden Ravonne Sims denied him returning to work to his position as a Correctional Officer at the Kentucky State Reformatory (KSR). He alleged that the position was a forty-hour per week position. The Appellant alleged the decision was based on race, color, ethnic origin and disability discrimination.

2. A pre-hearing conference was held in this matter on February 22, 2013. At that time it was learned that the Appellant had resigned from his position as a Correctional Officer at KSR on or about January 25, 2013. The Appellant stated he was forced to do so when he was not allowed to return to work. He stated that he had to resign due to the expense of maintaining his health insurance.

3. The Appellant stated he believed he was singled out because he was an officer of color who speaks his mind and had been a previous union steward. In an order following the pre-hearing conference, the Appellant's claim was identified as constructive discharge and also claims of discrimination based on race, color, ethnic origin and disability. The Appellant was assigned the burden of proof.

4. At the outset of the evidentiary hearing, the Hearing Officer identified that the initial issue that the Appellant had appealed was the decision by the Appellee to not allow him to return to work. Both parties acknowledged that this was an issue for the hearing and that the burden of proof on this issue should be on the Appellee. The Hearing Officer determined that the Appellee would go first in presenting proof.

5. In her opening statement, counsel for Appellee argued that the Appellant understood that mandatory overtime was a condition of employment. He was offered FMLA and was not allowed to return to work because of his inability to work overtime. The Appellant voluntarily resigned. The Appellee argued the Appellant was not discriminated against and was treated similarly to other officers under the mandatory overtime policy.

6. In his opening statement, the Appellant argued that under the FMLA when an employee is able to return to work they are allowed to return to work.

7. The Appellee called **Amy Ganschow** as its first witness. Ms. Ganschow is a Human Resources Administrator Institutional at KSR. She has worked for the state for twelve years. She stated that she maintains a personnel file, a medical file, and payroll documents regarding employees at KSR.

8. Ms. Ganschow introduced as Cabinet's Exhibit 1 was a Conditions of Employment for Security and Non-Security Staff form, signed by Appellant where he acknowledged that he might be required to work overtime.

9. Introduced as Cabinet's Exhibit 2 was a letter dated December 6, 2012, signed by Ms. Ganschow addressed "To whom it may concern." In the letter, Ms. Ganschow stated they are unable to allow the Appellant to return to work due to his restriction of "no work over 40 hours." Attached to the letter was a doctor's statement wherein the doctor stated that following a visit on October 19, 2012, the Appellant was restricted to no more than forty hours per week.

10. Introduced as Cabinet's Exhibit 3 was a U.S. Department of Labor form entitled "Notice of Eligibility and Rights & Responsibilities." The form was dated August 10, 2012, and was addressed to the Appellant informing him that he was eligible for FMLA leave.

11. Introduced as Cabinet's Exhibit 4 was a Timecard for the Appellant for January 1, 2011, through February 15, 2013. The Timecard form demonstrated that the Appellant last worked on August 28, 2012. Beginning on August 29, 2012, he used up his sick leave, compensatory leave, and vacation pay. Beginning on October 31, 2012, the Appellant began using FMLA leave along with other leave. This continued through the end of 2012. For 2013, the Appellant was not on FMLA leave, but was coded as "approved leave without pay" through February 15, 2013.

12. Cabinet's Exhibit 5 was a Notice of Eligibility and Rights and Responsibilities under FMLA addressed to the Appellant dated January 14, 2013. Ms. Ganschow testified that this was sent to the Appellant and never returned.

13. Ms. Ganschow introduced as Cabinet's Exhibit 6 a Request for Personnel Action which was to resign the Appellant with a proposed effective date of January 1, 2013. The document was dated February 7, 2013, and signed by Warden Taylor on that date. Attached to the Personnel Action was a resignation signed by the Appellant on January 25, 2013, requesting that his official resignation date be effective January 1, 2013. He stated that the reason for his resignation is "pursuing other employment."

14. Ms. Ganschow testified that Correctional Officers, such as the Appellant, work a forty-hour week and that overtime is mandatory due to staff shortages.

15. **Ravonne Sims**, Deputy Warden for Security at KSR, testified as the next witness. She has been an employee of the Department of Corrections for fourteen years starting as a Classification and Treatment Officer. She has been the Deputy Warden of Security for approximately eight months. She testified that in that position she supervises 330 security staff who are responsible for providing security for 2,000 offenders.

16. She stated that the Appellant was employed as a Correctional Officer at KSR and that his job duties were to provide basic security. She stated he worked on the second shift which is scheduled from 3:30 p.m. through 11:30 p.m. Ms. Sims testified that when it is necessary for employees to work overtime, they first try and find volunteers. If they cannot find volunteers they go to the mandatory Draft List. A copy of this list was introduced as Cabinet's Exhibit 8. This document showed that when employees work overtime they are placed at the bottom of the list. The employees at the top of the list are those who have gone the longest time since they worked overtime.

17. Introduced as Cabinet's Exhibit 7 was a Shift Roster for the 3:30 p.m. to 11:30 p.m. shift at KSR. This document shows all the posts which need to be filled and showed an example of how many employees were off on leave for a particular date.

18. Ms. Sims testified that when employees are required to work mandatory overtime and refuse they are reported to the Senior Captain or Deputy Warden and given an opportunity to explain. She said that unless there is a valid explanation, such employees are subject to disciplinary action. If an employee, such as the Appellant, cannot work overtime ever they are placed on directed sick leave. This was the situation with the Appellant. Introduced as Cabinet's Exhibit 9 was policy KSR 03-00-01, Employee Leave Regulations. This policy states that employees may be required to work overtime on a scheduled or unscheduled basis. Cabinet's Exhibit 10 was an e-mail sending a memo regarding this policy to all supervisors. Supervisors were instructed to talk with their officers over the next few days to make sure they are informed of the policy and the memo was posted in selected areas. Ms. Sims noted that the Appellant's supervisor, Leslie Eldridge, was not listed in the recipients of the e-mail.

19. **Warden Clark Taylor** testified for the Appellee that he has been employed with the Department of Corrections for twenty-five years. He has been the Warden at KSR since June of 2012 and is the Appointing Authority.

20. Kentucky Administrative Regulation, 101 KAR 2:102, was introduced as Cabinet's Exhibit 11 through his testimony. This regulation allows the appointing authority to require the use of sick leave if an employee is disabled by illness or injury and the appointing authority may require the employee to certify fitness for duty before being allowed to return to work. Introduced as Cabinet's Exhibit 12 was 101 KAR 2:095, which states that an appointing authority may require an employee to work hours and days other than their regular schedule including overtime if it is in the best interest of the Agency.

21. Warden Taylor testified that working overtime is mandatory for Correctional Officers at KSR. He stated that officers who refuse are subject to disciplinary actions. In 2012, there were 54 refusals subject to disciplinary action. He stated that 48 received written reprimands and 6 repeat offenders received suspensions. For 2013, there have been 6 written reprimands and 7 suspensions. Introduced as Cabinet's Exhibit 13 was a Personnel Board Final Order in the case of *Adam Duncan vs. Department of Corrections*. Mr. Duncan's appeal was dismissed by the Personnel Board. He appealed being placed on agency-directed sick leave based on a physician's statement which recommended he maintain a 10-12 hour gap between working shifts. In Mr. Duncan's case it was concluded that the ability to work mandatory overtime was an essential requirement for any Correctional Officer employed at KSR. It further concluded that the Appellee properly placed Duncan on agency-directed sick leave based on 101 KAR 2:102.

22. Warden Taylor testified that he made the decision to place the Appellant on directed sick leave when he reviewed the medical statement which stated that the Appellant could not work more than forty hours per week.

23. On cross-examination, Warden Taylor stated that he had no medical credentials.

24. In response to a question from the Hearing Officer, the Warden stated that he interpreted no work over forty hours as restricting the Appellant from overtime. The Hearing Officer asked whether the Appellant could work overtime on one day during the week and then take off later in the week. Warden Taylor testified that they do not require officers to work overtime unless they have forty hours in a week. He stated that if employees are going to be required to work mandatory overtime they should be rewarded with time and a half pay.

25. At the conclusion of Warden Taylor's testimony the Appellee rested.

26. The Appellant, **Emery Richardson**, testified that he was employed as a Correctional Officer at KSR from January 4, 2008, through January of 2013. He stated that on August 29, 2012, he went to the emergency room and was found to have congestive heart failure. He stated that he had been isolated, alienated and singled out by the officials at KSR when he was not allowed to return to work. Appellant offered as evidence, Appellant's Exhibit 1, a copy of 29 CFR 825.204 and 205. In 29 CFR 825.205(c) there is a section entitled "overtime." This section reads as follows:

If an employee would normally be required to work overtime, but is unable to do so because of a FMLA-qualifying reason that limits the employee's ability to work overtime, the hours which the employee would have been required to work may be counted against the employee's FMLA entitlement. In such a case, the employee is using intermittent or reduced schedule leave. For example, if an employee would normally be required to work for 48 hours in a particular week, but due to a serious health condition the employee is unable to work more than 40 hours that week, the employee would utilize eight hours of FMLA-protected leave out of the 48-hour workweek ($8/48 = 1/6$ workweek). Voluntary overtime hours that an employee does not work due to a serious health condition may not be counted against the employee's FMLA leave entitlement.

27. The Appellant stated that he was given a full release by his doctor in February 2013.

28. The parties offered closing arguments and this matter was submitted to the Hearing Officer for a recommended order.

29. On the day following the hearing, the Appellee filed a Notice of Applicable Law stating that the Appellant added new claims to his appeal the day of the hearing and failed to file a witness and exhibit list and thus the Appellee requested the Hearing Officer to consider the law provided by the Appellee. The law in question was 29 CFR §825.312, Fitness-for-duty certification. The Appellee highlighted subsection (b) which read in part: "The certification from the employee's health care provider must certify that the employee is able to resume work. Additionally, an employer may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job." The Appellee also highlighted

subsection (g) which states: "If State or local law or the term of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied."

FINDINGS OF FACT

1. The Appellant, Emery Richardson, worked as a Correctional Officer at the Kentucky State Reformatory (KSR) and was assigned to the second shift. [Testimony of Appellant, Amy Ganschow, and Deputy Warden Ravonne Sims.]

2. On August 28, 2012, he went to the hospital with heart trouble. He had to be off work for a period of time using sick leave and other accumulated leave. [Testimony of Appellant and Cabinet's Exhibit 4.]

3 The Appellant was released to return to work on October 24, 2012. He had no physical restrictions except that he was restricted to no more than forty hours per week. [Testimony of the Appellant, Amy Ganschow and Cabinet's Exhibit 2.]

4. Warden Clark Taylor has consistently taken the position that mandatory overtime is an essential function of the job of a Correctional Officer and he denied the Appellant's request. Appellant was placed on directed sick leave. He used up all his sick leave, vacation and compensatory time and eventually was placed on FMLA leave. [Testimony of Warden Clark Taylor, Amy Ganschow and Cabinet's Exhibit 4.]

5. Mandatory overtime may be required as part of the job of a Correctional Officer. Officer's are informed when they start their employment that they may be required to work any shift, weekends, holidays and overtime. Employees are also informed in KSR Policy 03-00-01 that they may be required to work overtime or work hours or days other than their regularly scheduled days and hours. Appellee also issued and posted a memorandum regarding mandatory overtime and employees were informed of the overtime roster. State regulation also supports these policies. [Testimony of Amy Ganschow, Warden Clark Taylor, Deputy Warden Ravonne Sims, Cabinet's Exhibits 1, 9, 10, 11 and 12.]

6. KSR maintains a draft list for overtime. Whenever an employee works overtime of at least four hours, they are moved to the bottom of the list. Warden Taylor testified that during the time in question, overtime was averaging about one day a month for most Correctional Officers. [Testimony of Deputy Warden Ravonne Sims, Warden Clark Taylor, Cabinet's Exhibits 8 and 10.]

7. Despite these policies, practices and lists, the Appellant worked very little overtime during 2011 and 2012. According to his timecard, the Appellant worked the following overtime hours:

March 28, 2011	.5 hours
April 20, 2011	2.0 hours

April 28, 2011	.75 hours
September 8, 2011	1.75 hours
October 5, 2011	1.5 hours
October 18, 2011	1.25 hours
March 15, 2012	1.0 hours
March 21, 2012	.5 hours
August 11, 2012	8.0 hours

Other than Saturday August 11, 2012, a couple of weeks before he took off work with heart trouble, the Appellant had every Saturday and Sunday off and never worked more than two hours overtime. There was a mandatory overtime list or draft list, and it appears it never included the Appellant until briefly before he was not allowed to return to work. Also according to the testimony and his timecard, the Appellant usually worked a post outside the institution, such as an outside hospital. Thus the Hearing Officer finds that mandatory overtime was not an essential function of the Appellant's job. [Testimony of Amy Ganschow, Deputy Warden Ravonne Sims, and Cabinet's Exhibit 4.]

8. Because mandatory overtime was not an essential function of the Appellant's job, the Appellee has failed to carry its burden of proof that it properly did not allow him to return to work when he presented a doctor's statement giving him a full release except limiting him to a forty-hour week. Once he had exhausted his leave, the Appellant remained on FMLA through the end of calendar year 2012. [Testimony of the Appellant, Amy Ganschow and Cabinet's Exhibit 4.]

9. On February 5, 2013, following a phone conversation with Amy Ganschow, the Appellant submitted a resignation which he asked to be effective January 1, 2013. [Testimony of Amy Ganschow and Cabinet's Exhibit 6.]

10. The Appellant was aware he had been offered FMLA for 2013, however, he declined to use it. He understood he would have to pay for his own insurance and stated he did not have any funds to pay for it with. In addition, the Appellant stated that he had a mortgage and other bills piling up and had no income coming in. The Appellant testified these were the reasons he resigned. On his actual resignation form he stated, "Pursuing other employment." [Testimony of the Appellant and Cabinet's Exhibit 6.]

11. Appellant presented testimony regarding his heart problems which were discovered in August of 2012. Although there was no testimony regarding this issue, the Hearing Officer takes official notice of the fact that the Appellant is African-American. [Testimony of the Appellant.]

12. The Hearing Officer finds that the decision to not allow the Appellant to come back with his medical restriction was in no way based on discrimination based on race, color, ethnic origin or disability. [Testimony of Warden Clark Taylor.]

13. The Appellant was given a full release to return to normal activities in February 2013. [Testimony of the Appellant.]

CONCLUSIONS OF LAW

1. The Appellee failed to carry its burden of proof to establish just cause for not allowing the Appellant to return to work with the medical statement he presented on October 25, 2012. For this reason the Appellant is entitled to back pay from October 25, 2012, through the date of his resignation which appears to have been effective January 1, 2013. The determination that mandatory overtime is not an essential function of the job is limited to this Appellant based on the evidence in this appeal. The determination as to whether a function is essential is made on a case-by-case basis. 42 U.S.C. §12111(8). This determination involves a number of factors including the amount of time spent on the job performing the functions and the consequences of not requiring the function. 29 C.F.R. 1630.2(n)(3). See *Gillen v. Fallon Ambulance Service, Inc.*, 283 F.3d 11 (1st Cir. 2002).

2. Although the record contains evidence of the Appellant's race, color and ethnic origin and his medical condition, he did not present any proof that the Appellee's decisions were in any way motivated by illegal discrimination based on these factors. KRS 18A.095(12)

3. State employees can assert claims of constructive discharge before the Personnel Board. *Commonwealth, Tourism Cabinet, v. Stosberg*, 948 S.W.2d 425 (Ky. App. 1997).

4. The standard for establishing a claim of constructive discharge is whether, "Based upon objective criteria, the conditions created by the employer's actions are so intolerable that a reasonable person would feel compelled to resign." *Northeast Health Management, Inc. v. Cotton*, 56 S.W.3d 440 (Ky. App. 2001). Constructive discharge also requires a finding that the employer, "intended and foresaw" that its actions would compel the employee to resign. *Brooks v. Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d 790 (Ky. 2004). Applying these standards, the Hearing Officer is not convinced that the Appellant established that the condition of not being allowed to return to work, however, being offered the option of FMLA were conditions so intolerable that a reasonable person would feel compelled to resign. Mr. Richardson put in very little evidence regarding these conditions other than he had a mortgage to pay and could not afford his share of the health insurance. Even if these conditions were deemed sufficient to meet this standard, there is no proof that the Appellee intended and foresaw that its actions would force the Appellant to resign. The Appellee offered the Appellant FMLA and the evidence appears to demonstrate that the Appellee was merely waiting for the Appellant to return to work without the forty-hour limitation. The evidence establishes the Appellant received his medical clearance less than a month after he turned in his resignation. Based on applying the law to the evidence in the record, the Hearing Officer cannot conclude that the Appellant has established a claim of constructive discharge.

5. The Hearing Officer concludes that the Appellant has failed to prove a case of constructive discharge even though he has found that the Appellee incorrectly did not allow the Appellant to return to work when he presented his doctor's statement in October of 2012. The Hearing Officer compares this case to *Relford v. Lexington-Fayette Urban County Government Civil Service Commission*, 2003 WL 21126798 (Ky. App.). In *Relford*, the Court of Appeals found that although his employer had ordered him to take a drug test improperly, this error was the product of a poorly drafted drug policy and not a deliberately arbitrary action. This decision is further supported by the case of *Wingfield v. South University of Florida, Inc.*, 2010 WL 2465189 (M.D. Fla.) In *Wingfield*, the employee was improperly placed on unpaid sick leave, returned to work and placed under the supervision of the individual who had improperly placed her on unpaid sick leave. The court found this was not sufficient to establish a constructive discharge claim. The Hearing Officer finds the conditions here were unfortunate, but there is no proof that they were intentionally designed to make the Appellant quit.

6. The Hearing Officer finds that 29 C.F.R. 825.204 and 29 C.F.R. 825.205 cited by the Appellant establish that an employer may transfer an employee to an alternative position during intermittent leave or a reduced leave schedule. In addition, the employer may take an employee back who cannot work their normal overtime schedule. However, these provisions do not compel this result. The provisions cited by the Appellee, 29 C.F.R. 825.312 establishes that the employer may require the Appellant to establish they can perform the essential functions of the job and apply provisions of state law.

7. This was a difficult case for the Hearing Officer to analyze. It is hard to understand how the Appellant and Appellee allowed a five-year career in Corrections to end with so little communication regarding options available to both parties. In addition, it appears that there was no consideration of the fact the Appellant rarely worked overtime, mandatory or otherwise, when the decision was made not to allow him to return to work. If the Appellant is interested in returning to work with the Appellee, the Hearing Officer strongly recommends that the Appellee consider reinstatement. The Appellant meets the criteria for reinstatement as an employee who resigned in good standing, pursuant to KRS 18A.005(34).

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **EMERY RICHARDSON VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2013-008)** be **SUSTAINED to the extent** that Appellant be awarded back pay for the period from October 25, 2012, through January 1, 2013, as well as other benefits to which he is entitled and otherwise be made whole. 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 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).

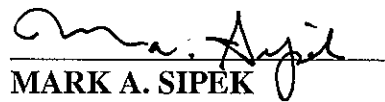
Any document filed with the Personnel Board shall be served on the opposing party.

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.

SO ORDERED at the direction of **Hearing Officer Mark A. Sipek** this 24th day of July, 2013.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Amber Arnett
Emery Richardson