

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2018-210

ANNE SANCHEZ

APPELLANT

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

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

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The Board, at its regular August 2019 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated July 8, 2019, Appellant's Request for Extension, Appellant's Amended Request for Extension, Appellant's (Second) Request for Extension, and being duly advised,

**IT IS HEREBY ORDERED** that the Appellant's Request for Extension to file late exceptions is **DENIED**. Appellant's Exceptions and Request for Oral Argument were Tended, but not considered.

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

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 14<sup>th</sup> day of August, 2019.

KENTUCKY PERSONNEL BOARD

  
MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:  
Hon. Carmen Ross  
Ms. Anne Sanchez  
Mr. Jay Klein

COMMONWEALTH OF KENTUCKY  
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\* \* \* \* \*

This matter came on for evidentiary hearing on April 5, 2019, at 9:30 a.m., ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. John C. Ryan, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by KRS Chapter 18A.

Appellant, Anne Sanchez, was present and was not represented by legal counsel. Appellee, Cabinet for Health and Family Services, was also present and was represented by the Hon. Carmen Ross.

This matter was the subject of at least two pre-hearing conferences and a quantity of discovery. The possibility of settlement was also broached by the Hearing Officer along the way and mediation discussed, but apparently never invoked.

**BACKGROUND**

1. By letter of October 9, 2018, over the signature of Howard J. Klein, designated Appointing Authority, Cabinet for Health and Family Services, Office of Human Resource Management, Anne Sanchez was informed of her termination from the position of Social Service Worker I in the Department for Community Based Services (DCBS), Salt River Trail Service Region, effective the following day. The letter, a true copy of which is attached hereto as **Recommended Order Attachment A**, pointed out that she, as a probationary employee, was afforded no right of appeal from the action other than "...you may file a claim of discrimination with the Kentucky Personnel Board if you believe the action was based on unlawful discrimination." As will be evident, the letter further alerted her that any claim must be filed within 30 days and in writing.

2. By appeal officially entered on October 18, 2018, Ms. Sanchez challenged the action under dismissal, removal from register, and discrimination – disability, and further wrote:

In accordance with KRS 18A.095, I am appealing the termination and removal from the register on the basis of being discriminated against due to my disability when, on October 10, 2018, I was terminated from my position, by action of the appointing authority, as a Social Service Worker I for CHFS at the Hardin County DCBS office in Elizabethtown, KY. This action was in direct violation of state and federal laws including, but not limited to, the Americans with Disabilities Act of 1990 (ADA)/Rehabilitation Act of 1973, the ADA Amendments Act of 2008, Title VII of the Civil Rights Act of 1964, and the Kentucky Civil Rights Act of 1966. Furthermore, this action was in violation of agency policies relating to discrimination and the requirement to provide reasonable accommodations to qualified individuals with a disability as written in the employee handbook. The “interactive process” for determining approval of ADA accommodations was more of a directive process, rather than interactive. In fact, there was no discussion of reasonable accommodations that may help me perform an essential function of the job. I was only given two choices by Mr. Daniels and Ms. Shular: voluntarily resign or be separated from probation. This does not constitute an interactive process.

3. Upon convening the hearing, following opening summaries, Appellant, assigned the burden of proof under established authority, sought the testimony of **Teresa Sowards**, who holds the position of Social Services Clinician, a management role, in the Agency’s Health and Family Services Division, employed in Hardin County. She did not participate in Appellant’s initial interview for employment, but did offer her a position in early 2018. She recalled that Appellant commenced in a back-up/on-call role. However, the manager was not initially informed concerning, and was not then aware of, her medical condition, which necessitated sleep-inducing medication. When she learned of this “sometime in July or August,” Appellant was then removed from the on-call status after she produced, when requested, a confirmation of her medical circumstance from her doctor.

4. The witness is not trained nor knowledgeable concerning EEO policies, noting that this aspect is dealt with entirely by another division within the Agency. She asserted that she was first made aware that Appellant sought accommodation(s) for her medical circumstance, within the “July or August” timeframe, when she was formally removed from the on-call status. Appellant presented an email from herself to the witness reflecting that it was sent on April 30, 2018, at 11:29 p.m. wherein she advised Sowards that “I am prescribed a sleep aid from my physician, please advise on whether I should take as prescribed or not.” This was a response to a reminder sent to her earlier in the day concerning her status as backup/on-call for the following Sunday.

5. Under inquiry by the Agency, Sowards ratified that all times germane to this matter she was Appellant's supervisor, which position comes with a variety of duties involving the oversight and management of five or six teams of staff, dealing with several degrees of caseloads. She explained that all workers are required to be available for overtime and travel, which is made clear to them as part of the job description at the time of hire. This includes availability for "after hours on-call" as needed in matters of an emergency nature, examples of which she cited that would necessitate such. Appellant was to be included in this rotation, initially "shadowing" or observing more seasoned workers in keeping with the learning process and possibly, in more extreme situations where no one else was available, taking the call alone.

6. Relative to Appellant's status, she was initially assigned to cases in April 2018, and when she came into the system, she was "a joy to work with, good personality, wanted to do things the right way." The supervisor, upon review, then recalled that she actually first became aware of her sleep aid requirements via the April 30, 2018 email, which came to her at 11:29 in the evening addressing a need for such medications in response to the reminder earlier that day of up-coming on-call requirements. After conferring with her own supervisor, Appellant was informally not inserted into the on-call rotation and was never requested to go out after hours, pending further review. The witness added that, for that matter, such participation was not always needed in the backup role.

7. The witness continued that despite Appellant's assertion that she would be unavailable for duty after 8:30 p.m. if she took her sleep aids, she came to learn that she was preparing case reports and performing other activities late into the evening and, in due course, seeking overtime compensation. She produced a series of email correspondence from Appellant reflecting asserted time accumulated in the evening hours, some of which was incurred without permission. She explained that the voluntary use of overtime (i.e. working after 4:30 p.m.) must be expressly requested, which is ordinarily approved if shown to be productive and in the furtherance of assigned duties. She recalled that Appellant did not fully comply with requirements in this regard, citing examples thereof.

8. The witness recalled that in June 2018, by which time Appellant was being assigned a full load, she commenced to demonstrate signs of being "overwhelmed." This was reflected in the tone and content of her email correspondence ranging through August and September 2018, most notably when the witness reminded her of timeframes for court reports and the performance of other duties attendant to the position. She presented copies of Appellant's correspondence, complaining at some length about the heavy caseload, her exhaustion, and being "...close to a breaking point..." due to the workload and reporting expectations.

9. The witness ratified that she was made aware of Appellant's request for accommodations, specifically an ADA process which Appellant initiated. She reiterated that, as a manager, she was not and is not involved with ADA proceedings. Among the accommodations sought was the option of being on-call only on weekends, in the nature of a compromise. The manager opined that, although fellow workers would without doubt be thankful for a designated coworker to permanently assume this duty, such arrangement would not be practical nor good

policy for a variety of reasons, which she recited. This witness was not involved with Appellant's separation from service, and became aware of it through communication from management the day before it occurred.

10. Under further brief inquiry by both Appellant and the Agency, Sowards urged that most of the administrative duties attendant to the position for which Appellant was hired could, and should be, routinely performed during regular working hours rather than evening. She was never made aware of either the exact nature or extent of Appellant's medications, nor was she familiar with their impact. She confirmed that Appellant was never reprimanded, nor was she placed under performance plans or other remedial or structured work arrangements. She recalled that, after her separation, Appellant requested a reference letter, but she did not respond.

11. Appellant produced and filed portions of two text messages, one exchange of which occurred in the evening on Saturday, August 4, 2018, wherein the witness suggested another worker should be called out rather than Appellant. The witness explained that Appellant was not selected for the reason that her ADA application was pending at the time and a "hold" placed upon calling her. The other text, undated, addressed her request for overtime, which the witness acknowledged Appellant handled properly in that instance. She reiterated that Appellant, as did other staff, sometimes followed policy concerning overtime and sometimes not.

12. (**Hearing Officer Note:** Certain of the foregoing exhibits contained names of Agency clients. Although one or two of the documents were redacted, in the interest of time and efficiency, the Hearing Officer directed that all unredacted documents be entered under seal.)

13. **Elaine Stirling** is a Social Worker II employed by the Agency in Hardin County, Kentucky, where she has been so employed for approximately three and one-half years. She ratified the overtime and on-call policies in place, recalling that Appellant was not always in the on-call rotation due to sleep aid medication needs, and concerning which she discussed with her from time to time. She was also aware that Appellant informed the supervisor, Sowards, of this. Pressed to discuss the supervisor's attitude concerning Appellant's medical circumstance, she overheard her comment at one point, "What am I supposed to do with you?"

14. The witness confirmed that Appellant offered, upon one or more occasions during her probation, to aid her in on-call, late night trips. However, at least once, when she suggested utilizing Appellant upon a particularly difficult late night visit which required backup, the manager steered her to another worker, the event evidenced by the text previously discussed in the prior testimony.

15. **Jerrilynn Whaley** is a Social Service Clinician I employed by the Agency in Hardin County, Kentucky. Similar to the prior witness, she was a member of the same team as Appellant and responded to one or more on-call visits with her. She was aware that Appellant asserted a disability, requiring sleep aid medication. She insisted that all of this was known to the supervisor, having been present when Appellant so informed her, ratifying that Appellant was removed from her on-call rotation "at some point." She viewed that Appellant applied for and

reported all overtime properly, as did she. Under very brief cross-examination, the witness insisted that the team was close-knit; the members discussed each other's concerns, and it was due to that circumstance that she became aware of Appellant's need for medication.

16. **Appellant, Anne Sanchez**, testified in her own behalf. She currently resides in Alabama and is not employed. She essentially confirmed the sequence already depicted – she interviewed for the position of Social Service Worker I in the Hardin County office on December 8, 2017. Concerned about drug testing issues, she brought her medications with her since she was aware she would test positive. Upon inquiry, she was informed that it was improper to be quizzed about that aspect by the potential employer. She also expressly agreed in the interview to work overtime as required.

17. Appellant was employed in due course and commenced training on February 16, 2018, which continued for two months without any cases assigned to her. She insisted that she made the supervisor abundantly aware of her medical needs throughout. Her first cases were assigned in April and, at that time, she served as a backup in the on-call rotation but received no calls. Duties routinely proceeded into May and assignments of cases became more consistent and she remained on standby in the on-call rotation. Upon those occasions when she was assigned, she did not take her sleep aid medications, remaining awake for as long as 24 hours and never refusing to serve if called upon.

18. In May 2018, Appellant felt the need to discuss her circumstance with the supervisor, Sowards, since she could not continue to miss her sleep. However, when she approached the manager about what might be arranged, she was rebuffed, the explanation then being that management was not permitted to discuss employees' medical issues. Nonetheless, she urged, the manager was insistent that the on-call function was essential to ever attaining status in the position.

19. Appellant continued that, until July 2018, she was unaware of EEO options or the availability of reasonable accommodations. Upon inquiry, she was startled to learn that the supervisor insisted she, the supervisor, had no training nor knowledge of the process or its benefits. Appellant contacted Regional Administrator Shular, discerned the first step and obtained the requisite form, completed it, and forwarded it to the EEO Administrator. She was still unaware as of that time exactly what to seek by way of accommodation, nor was she familiar with what was available.

20. Appellant recalled forwarding the form seeking accommodation in July 2018 and having only one conversation with the EEO staff person thereafter. She felt that this individual was unfamiliar with the Social Service Worker position or its on-call requirements and appeared not to grasp what she was seeking. Other than the one communication, no one from the EEO office made any contact with her and she heard nothing between July 24 and October 1, 2018, when she was informed that she was not eligible for accommodation and that her probation would be terminated. Meanwhile, she was removed from the on-call rotation in July 2018 and never returned

thereto. She assumed at the time of the removal that that was the granting of her request for reasonable accommodation.

21. Appellant produced and cited provisions from the Americans with Disabilities Act of 1990 as Amended. She likewise made the Commonwealth of Kentucky Employee Handbook part of her testimony, pointing to particular provisions thereof as favoring her claim. She insisted that both the ADA and the Employee Handbook contradict the determination of upper management that as a probationary employee she is ineligible for lateral transfer as a reasonable accommodation. Specifically, she urged, neither tract makes any exception between probationary and status personnel. Further, she challenged whether the Agency conducted a proper interactive review as called for or as asserted as having occurred in the correspondence, pointing to the absence of any contact of her by the EEO office between July 24 and October 1.

22. Under questioning by the Agency, Appellant confirmed that her spouse is in the military and received orders transferring him to Alabama in August 2018. She insisted that “we had them stopped.” Directed to a statement from her doctor dated August 31 but apparently submitted in early October 2018, she explained that the recommendation therein that she work a 4-day week with a 3-day weekend related to a temporary medical condition pertaining to her heart and had no connection with the reasonable accommodation being sought due to her insomnia condition. She acknowledged that stress at work in Hardin County contributed to her heart complaint, adding that the duties were demanding. She asserted that, additionally, the manager “had her own issues” which added to the pressure. She undertook to clarify or explain this by her correspondence in early October. However, Mr. Klein, although acknowledging her explanation, deferred to the doctor’s recommendation that she not be assigned “night calls,” thereby precluding the availability of any accommodation that could relieve her from performing this assertedly essential function.

23. Appellant explained early on that the relief she seeks herein is her accrued salary for the period of time following her separation through, presumably, any successful disposition of this appeal and that she be reinstated in order to permit her to then resign rather than stand separated involuntarily. Under further brief re-direct and Agency inquiry, Appellant reiterated that she never sought to be fully removed from on-call duties and voluntarily remained in the rotation until officially removed without her input for the final 90 days of her probation.

24. Appellant, having concluded her proof-in-chief, the Agency presented **Marjorie Shular**, who has served as Service Region Administrator Associate with the Agency since April 2015. Based in Bullitt County, Kentucky, she oversees the region which includes Hardin County, managing a myriad of duties, including the hiring process, supervision of new hires, and dealing with matters of salary. Any employee seeking accommodation under the ADA commences with her office. The witness elaborated upon the needs, volume, and other aspects of the Hardin County office, pointing out that it is the largest of the seventeen counties in her region and is quite busy, utilizing the services of 40 workers when it is fully staffed. It also sustains a high rate of turnover among its workers.

25. Directed to her familiarity with Appellant, the witness knew her but never worked in the same office with her. She met her in February 2018 at a new employee orientation. Thereafter, she next heard from her in July 2018 when she sought accommodation under the ADA. The witness outlined for the record the procedure to apply, commencing with a medical statement defining the disability and specifying what the employee requires to enable him or her to perform the assigned duties. She instructed Appellant to complete the appropriate forms, and she then referred the matter to the EEO office in Frankfort. She and/or her office served essentially as a conduit thereafter, receiving and delivering information as generated among Appellant, her manager, and upper management.

26. The witness continued that in September 2018, with a medical statement in hand suggesting that Appellant be assigned a four-day work week with three-day weekend, the accommodation request was submitted to upper management. By letter of October 2, 2018, it was not approved. The explanation supplied to the witness was that since the work schedule was recommended, but not mandated by Appellant's doctor, no accommodation was warranted and that she should instead utilize her then-extensive leave time already accumulated during her probation.

27. The witness continued that Appellant, confronted with the rejection and recognizing that she would be unable to perform the requisite on-call duties attendant to the position, sought a lateral transfer. She was deemed ineligible therefor due to her probationary status. She was presented with her options, i.e., either resign or be involuntarily separated from the service, it being made clear to her that if she resigned, she might remain on the register for future positions. Ultimately, she was separated upon the basis that she was unable to perform the essential duties of the position, so determined by management under ADA rules. Neither the witness nor Appellant's first-line supervisor instigated or initiated the separation.

28. Under inquiry by Appellant, Administrator Shular acknowledged that during the interval between July 24 and October 2, 2018, in her role as conduit for information and documentation between Appellant and the ADA reviewer, she received few, if any, contacts from the reviewer. On the other hand, she recalled, there were a variety of communications, inquiries, and other requests from Appellant, which she detailed as part of her testimony. Meanwhile, she supplied whatever was requested, which included a definition of Appellant's duties and related information pertaining to the position in which she was serving her probation. This included Appellant's history of initially serving and participating in the on-call requirements and her removal from the rotation during the last 90 days of her probation.

29. Appellant pressed the Administrator concerning whether she, or others, are charged with educating or coaching an employee seeking accommodation where the individual has no training or blueprint to aid them in submitting the application properly. The witness reiterated that her role in the process consists solely of informing the employee whom to contact and supplying whatever information is requested concerning the position and its duties. She amplified that neither she nor managers under her supervision are afforded any input in the disposition of an



ADA accommodation request, nor is she familiar with the appeal process, if any, following issuance of the decision.

30. **Jasmine (Thornton) Milliner** has served with the Agency as a Family Services Office Supervisor for two and one-half years. She was previously assigned to Hardin County and was, at the time of hearing, based in Breckinridge County, where she oversees seven Social Workers, one secretary, and one social services aid, dealing with a broad array of duties.

31. This witness participated in the panel which interviewed Appellant, who was one of ten candidates seeking a total of four positions at that time in the Hardin County office. She outlined what she asserted to be an extremely thorough vetting process designed to select the appropriate individual for the particular position, in this instance Social Service Worker I. She recalled that Appellant, as well as the others, was thoroughly questioned concerning her ability to perform all of the duties associated with the position, particularly working overtime with little notice, travel, and on-call duties. She produced and introduced an interview questionnaire worksheet that she completed following the interview, memorializing Appellant's asserted willingness to serve on-call and to travel as needed. The witness also introduced a copy of the Commonwealth Job Class Specification sheet detailing the requirements of the Social Service Worker I position. She urged that its contents were likewise discussed with Appellant, as well as all other candidates; she pointed out that its specifications expressly include all of the foregoing together with a variety of other duties, which the candidate is expected to understand and be able to perform without exception.

32. Under brief questioning by Appellant, the witness reiterated that in her interviews of candidates for the Social Service Worker I position, all candidates are questioned extensively concerning their on-call availability, views of overtime, and other requirements attendant to the job. She explained that these factors are deemed critical for the reason that many prospective applicants have family requirements and/or other concerns that could preclude their fulfilling the specifications.

33. **Howard J. Klein**, the designated Appointing Authority, is an Assistant Division Director for the Division of Employee Management in the Office of Human Resource Management for the Cabinet. He has been with the Agency for approximately 18 years. He explained that his division consists of two branches, one dealing with disciplinary matters and the other overseeing EEO matters, under which ADA is included.

34. The Assistant Director outlined the process utilized when a request for accommodation under ADA is received. The program is required to be an interactive process; a medical questionnaire is issued for the applicant's doctor to complete and, simultaneously, the Branch commences gathering information deemed germane to the request. The staff also confers with individuals having knowledge or input, including the employee's supervisor. The extent and nature of the accommodation sought is analyzed and options of what might be available for the applicant reviewed. Choices available to a status employee might be a lateral transfer to a position

more in keeping with his or her ability, or a demotion to a position involving duties that he or she is able to perform. Probationary personnel are not eligible for these options.

35. The witness produced and identified a facsimile document prepared and submitted by Appellant on July 14, 2018, constituting her request for accommodation. He pointed out that as to the specific accommodation sought, Appellant wrote, "I am requesting that no on-call be placed on my schedule as I cannot safely complete the tasks that surround that due to medications." By way of additional comments, Appellant advised that, "I can perform on-call duties from 4:30 p.m. – 8:30 p.m., but then I must go home and take my medications."

36. The Assistant Director produced and submitted a copy of a letter by date of October 8, 2018, wherein he advised Appellant:

Thank you for your follow-up October 5, 2018 email in which you attached a copy of the Interactive Process Questionnaire, that Dr. Michelle Signs signed on August 31, 2018, regarding your impairment and need relative to the Americans with Disabilities Act (ADA). Previously, you only had provided a letter dated September 11, 2018 from Dr. Signs prior to our issuance of the October 2, 2018 ADA determination letter. Accordingly, we have reviewed the questionnaire responses and Dr. Signs stated that you are taking prescribed insomnia medication, which results in you being unable to perform your job duties after taking such medicine and cannot have "night calls."

...

Dr. Signs' questionnaire responses confirm that you are unable to perform the essential function of being on-call and such responses do not alter the determinations stated in my letter dated October 2, 2018.

Klein concluded his direct testimony, confirming that by letter of October 9, 2018, Appellant was terminated from her position.

37. Under questioning by and in response to Appellant, the witness explained that medical information is critical in a ADA determination, but not necessarily controlling. Pressed as to whether anyone in the Branch is designated to explain the application process to those unfamiliar therewith, he reacted that such staffing is not seen as essential for the reason that the entire "package" is carefully studied and, if further information or explanation is required, it is supplemented before any dispositive action is taken.

38. The witness expanded upon the so-called “interactive” aspect alluded to in his prior testimony and in the correspondence, which he explained to be the thorough collection and study of the arrangement that the applicant seeks compared to the essential duties of the position. Pressed to discuss what Appellant characterized as a lengthy lapse of time with no communication by anyone with her (urged to be July 24 through October 1, 2018), he explained that whether or not the Branch was in regular contact with her during that interval, information was being gathered. She had already outlined her request, and nothing further was needed from her. He also pointed to the contents of his letter to her of October 8, 2018, wherein it was noted that she delayed in submitting certain medical information.

39. Appellant sought further explanation concerning options available to a probationary employee. The Assistant Director explained that probationary personnel are eligible for reasonable accommodation if it can be arranged, dealt with upon a case-by-case basis. He reiterated that the usual remedies available to an employee with status, i.e., lateral transfer or demotion to another position with duties compatible with abilities, are unavailable to a probationary employee, thereby limiting the options. He noted that the recommendation of Appellant’s doctor, that she be afforded a 4-day work week with 3-day weekends, was not deemed reasonable for the reason that it would unduly burden coworkers required to perform the duties, and the Agency was not in a position to grant such a specialized schedule. He reiterated that since Appellant, by her own account, is unable to perform the essential on-call function of Social Service Worker I, nothing can be done to accommodate her. The sworn testimony was thereupon concluded and the matter stood submitted for recommended order.

40. KRS 18A.111(1) provides, in part:

An employee may be separated from his position, reduced in class or rank, or replaced on the eligible list during this initial probationary period and shall not have the right to appeal, except as provided by KRS 18A.095.

41. KRS 18A.095(12) requires that:

Any classified employee may appeal to the board an action alleged to be based on discrimination due to race, color, religion, national origin, disability, or age...

A further provision of the statute, at (14)(a) allows that:

Any employee, applicant for employment, or eligible on a register, who believes he has been discriminated against may appeal to the board.

42. The Americans with Disabilities Act (ADA), which is binding in the Commonwealth of Kentucky, provides the right of a reasonable accommodation to employees so qualified to enable them to continue to be employed in some capacity. The ADA does not require unreasonable accommodation nor require guarantee of a position in all circumstances.

- a. Section 12111 of the ADA contains the definitions utilized in the Act. Subsection (8) provides that:

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

- b. Subsection (9) discusses "reasonable accommodation" and provides that it may include:

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

- c. Undue hardship, which would relieve an employer from affording accommodation, as set forth in the Act, is defined as "an action requiring significant difficulty or expense, when considered in light of the factors set forth in (reasonable accommodation). Among the factors, in addition to financial considerations, is "the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity..."

### **FINDINGS OF FACT**

1. At all times germane to this proceeding, Anne Sanchez was a probationary employee, without status, serving as a Social Service Worker I in the Department of Community Based Services of the Agency at its Hardin County, Kentucky facility. She was initially deemed qualified for the position and hired in early 2018, whereupon she commenced a two-month training sequence and was then inserted into active duty rotation, which included at the time backup/on-call status. Although she disclosed, or at least attempted to volunteer, information concerning her

medical circumstance at or near the time of her hiring, apparently it was perceived to be insignificant, possibly overlooked, or ignored. Her supervisor was first made aware of her need for sleep-induced medication by an email late in the evening on April 30, 2018, after reminding Appellant of her upcoming standby/on-duty assignment.

2. The “on-call” duty is a critical function of the position in which Appellant was serving and to which she aspired to attain merit status. The workers so-assigned are expected to be available upon short notice at all hours for home visits. These visits may well become an emergency nature, involving the safety and welfare of individuals, particularly children. This feature is logically emphasized at the outset of any interview for the position, and candidates are quizzed and screened closely concerning their ability and availability for this function. The proof indicates that Appellant neither balked at so serving nor, however, did she expressly disclose that her condition could preclude her unlimited availability.

3. Although actual calls were minimal, Appellant commenced by undertaking to be available by simply not taking her medication and remaining awake throughout the night. The proof is that she did not waste this time, performing instead other job-related tasks, but thereupon seeking overtime compensation, sometimes without prior approval. Unable to continue that routine, in due course Appellant sought relief, which was provided by way of her removal from the on-call rotation, at first informally and then officially, for the remainder of her probation. Meanwhile, she familiarized herself with the provisions of the ADA and applied for reasonable accommodation.

4. Commencing around July 24 and concluding in early October, 2018, the Branch responsible for EEO/ADA matters collected what it determined to be sufficient information, although its staff had minimal contact directly with Appellant. The record demonstrates one or more miscommunications and/or misunderstandings. Appellant’s doctor recommended two accommodations: (1) that she be placed upon a four-day workweek/three-day weekend and (2) that she not be assigned “night calls.” The workweek portion was explained by Appellant to be temporary, arising from a heart condition (possibly from work-induced stress), which she asserts was and is resolved. Although both recommendations factored into an ultimate denial of reasonable accommodation, the core obstacle, according to the proof, was her inability to perform the on-call requirements, an essential function. Asserting that policy dictates that a probationary employee is ineligible for either lateral transfer or demotion, the Agency afforded her the option of either resigning or being involuntarily separated, whereupon she chose the latter. She now seeks to undo and reverse the choice, together with accrued salary.

5. The Hearing Officer finds the testimony of all witnesses, including Appellant, to be credible.

### CONCLUSIONS OF LAW

1. The Agency acknowledges that Appellant is a “disabled” individual as defined under the ADA, and this is not under challenge. Her medical circumstance is clear and is, without doubt, burdensome to her in her employment efforts. However, her burden in this proceeding is to demonstrate that the Agency has illegally denied her reasonable accommodation within the ADA requirements and, if so, to justify the relief she seeks.

2. Among the many duties prescribed in the job class specification for Social Service Worker I is the clearly-stated “provides emergency services on 24-hour basis, including accepting referrals and completing investigations at any hour without prior warning.” This on-call provision cannot be waived and, simply put, Appellant’s medical condition presents an insurmountable obstacle to her availability therefor. Whether it was she or the interviewer who overlooked this critical factor is academic, but the clear evidence is that Appellant, although otherwise eligible, was not qualified for the position from the outset. Secondly, although Appellant asserts that her doctor’s recommendation of a four-day workweek was for a short-term stress condition that was resolved at the time of hearing, the proof is that this arose from other assignments attendant to the position, thereby overwhelming her.

3. The ADA affords the employer/Agency the right to define “essential functions” and does not require it to accommodate unreasonably. It also does not require accommodation of an applicant who was never eligible for the position for which accommodation is sought. Given that, Appellant has not met her burden to establish that the Agency either failed to properly analyze her need under the requisite interactive process or illegally refuses to grant that which she seeks, and her appeal must fail. The actions of the Agency were neither erroneous nor excessive in light of the overall circumstances.

### RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of ANNE SANCHEZ V. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2018-210) be **DISMISSED**.

### NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

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

The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

Each party has thirty (30) days after the date the Personnel Board issues a Final Order in which to appeal to the Franklin Circuit Court pursuant to KRS 13B.140 and KRS 18A.100.

**ISSUED** at the direction of **Hearing Officer John C. Ryan** this 8<sup>th</sup> day of July, 2019.

**KENTUCKY PERSONNEL BOARD**

  
\_\_\_\_\_  
**MARK A. SIPEK**  
**EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:

Hon. Carmen Ross  
Ms. Anne Sanchez



**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  
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[www.chfs.ky.gov](http://www.chfs.ky.gov)

**Adam M. Meier**  
Secretary

October 9, 2018

Anne Sanchez

PERNR:

Re: Separation

Dear Ms. Sanchez:

Pursuant to KRS 18A.111, you are advised that you will be terminated from your position as a Social Service Worker I, in the Department for Community Based Services (DCBS), Salt River Trail Service Region, effective October 10, 2018. Your last working day will be October 9, 2018. You shall not be certified on future registers for employment within DCBS unless DCBS so requests.

As an employee serving an initial probationary period as provided by KRS 18A.111, you do not have the right to appeal this action to the Kentucky Personnel Board. However, KRS 18A.095 provides that you may file a claim of discrimination with the Kentucky Personnel Board if you believe the action was based on unlawful discrimination. In accordance with KRS 18A.095, any claim of discrimination must be filed within thirty (30) days, excluding the date notification is sent. Such appeal must be filed in writing using the attached appeal form and in the manner prescribed on the form.

Sincerely,

  
Howard J. Klein  
Designated Appointing Authority

HJK:arc

Attachment: Appeal Form

cc: Secretary Thomas B. Stephens, Personnel Cabinet  
Executive Director Mark Sipek, Personnel Board  
Commissioner Eric Clark, DCBS  
Acting Service Region Administrator DeDe Sullivan, Salt River Trail Service Region  
Cabinet Personnel File