

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2012-171**

JAMES SCHULTZ

APPELLANT

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

**TOURISM, ARTS AND HERITAGE CABINET
KENTUCKY STATE FAIR BOARD
HAROLD WORKMAN, APPOINTING AUTHORITY**

APPELLEE

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

The Board at its regular March 2013 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated January 31, 2013, having considered Appellant's exceptions 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 **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 _____ day of March, 2013.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Ellen Benzing
James Schultz
Paul Herberg

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

This matter came on for evidentiary hearing on November 27, 2012, at approximately 9:35 a.m. at 28 Fountain Place, Frankfort, Kentucky, before John C. Ryan, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by KRS Chapter 18A.

Appellant, James Schultz, was present and was not represented by legal counsel. The Agency, Tourism, Arts and Heritage Cabinet, Kentucky State Fair Board, was also present and was represented by the Hon. Ellen Benzing. Also present as Agency representative was Paul Herberg.

The appeal was the subject of one pre-hearing conference conducted on September 10, 2012, at which the issues were defined and the burden of proof assigned. Specifically, by Interim Order on September 11, 2012, the Agency was assigned the burden to establish the propriety of placement of Appellant on directed sick leave and Appellant was assigned the burden relative to an asserted claim of discrimination or retaliation toward him by the Agency. Establishment of each burden is by a preponderance of the evidence.

BACKGROUND

1. At all times germane to this matter Appellant, James Schultz, was a classified employee with status of the Tourism, Arts, and Heritage Cabinet, Kentucky State Fair Board. He held the position of Automotive Mechanic III, job station at the Kentucky State Fair and Exposition Center, Louisville, Kentucky. By letter of July 30, 2012 over the signature of Paul Herberg, Director of the Division of Personnel Management of the Kentucky State Fair Board (KSFB), he was placed on agency directed sick leave effective that date. A true copy thereof is attached hereto as “**Recommended Order Attachment A.**”

2. Mr. Schultz took issue with this action by timely appeal on July 31, 2012, alleging “Discrimination” without designation of the nature thereof, and “Other Penalization.” He further wrote:

I am made to be checked out by a phyc. (sic) doctor before I can come back to work. I show emotion sometimes when I know I’m right and I take medicine for this condition that Kevin McCoy knows about.

Because I am not mental and I am a good employee without actions taken on me the whole time I have been employed. I because I told Kevin McCoy here (sic) was a liar. He retaliated with this crap. This is a real abuse of his power, I am head tech his friend is my help, has never helps (sic) ect (sic).

He is allowed by Kevin McCoy to work in another shop when he was hired as Mech. II. I told Kevin a month ago I wanted my first shift back for the Fair and he gave it to my Mech. II who don’t (sic) even work in the shop.

I was told a month ago I would have 1st shift on Fair. He gave me no reason and up till the day I left still had no help. Now I off (sic) he will get all kinds of help if he works in the garage.

3. At evidentiary hearing, commensurate with its initial assignment of the burden, the Agency presented the testimony of **Kevin McCoy**, who has been Assistant Director of Operations at the KSFB for approximately four years. He holds a total of more than seventeen years with the facility and has been a supervisor variously for sixteen years. He related his duties to include the oversight of maintenance of the facility including engineering, electrical, grounds maintenance and horticulture requirements. He also oversees a section designated as preventive maintenance, relative to which he prepares all scheduling of personnel, noting that the various facility events present needs unique to each. The preventive maintenance group includes welders, carpenters, painters, plumbers, mechanics and others. All functions are performed in-house where possible instead of through expensive outside contractors and are accomplished, he pointed out, with a relatively small staff. Previously, the function had its own section supervisor, but due to budgetary constraints he assumed its duties approximately one year previously.

4. The witness produced a thirty-one day work schedule for the month of August, 2012 which was prepared for the annual Kentucky State Fair. Appellant objected thereto upon the basis that the document presented did not match that previously shown him preparatory to the hearing, but agreed that his own schedule thereon was as depicted. The tendered schedule was allowed with the objection noted for the stated reason. The witness was unable to verify whether it was a draft or final schedule, reiterating that, in any event, that of Appellant is accurate. He acknowledged that Appellant was assigned the 10:30 p.m. to 6:00 a.m. (third) shift for the

duration of the 2012 Fair. He explained that this was necessary for that particular event due to its many requirements. Specifically, a certified welder was required to be on duty during the first and second shifts to make repairs, particularly in the horse show arena whenever the metal structure surrounding the ring is struck by equipment and must be immediately repaired. He recalled that at the time the operation had no licensed welder on payroll. Accordingly, scheduling was adapted to the availability of the hired welder, thus requiring that Appellant, a mechanic, be moved to the third shift to assume adequate coverage. He urged that he always prefers that Appellant be assigned to first shift but, in that instance, such was not feasible in light of the overall needs of the facility during the fair.

5. The witness continued that ordinarily when making changes in scheduling of full-time personnel such as Appellant, managers attempt to notify the impacted employee at least thirty days in advance. He recalled that Appellant approached him “a month or so” prior to the 2012 Fair and requested that he remain on first shift as before and, at the time, he viewed that this could be arranged. However, when the schedule was prepared and issued on or about July 27, 2012, Appellant was moved due to the need previously described. He recalled further that Appellant contacted him that same day to report that a repaired item of equipment was ready for pickup and in the conversation Appellant quizzed him briefly as to the reason for the change. He suggested that Appellant stop by his office on the following Monday to discuss his concerns, to which he understood Appellant agreed. However, approximately fifteen minutes thereafter he encountered him in the facility office hallway, at which time he observed him to have a “blank stare” and Appellant immediately commenced to rant and rapidly pace back and forth, speaking in a very loud tone with escalating level. He recalled that much of what Appellant was saying made no sense to him and appeared to be about subjects unrelated to the schedule.

6. The manager continued that in the course of the loud rant, Appellant approached him in a threatening manner and he felt himself to be in danger of being physically attacked. He then addressed Appellant sternly, advising that “the best thing you can do is go back to your office” with which he complied while continuing to utter indistinguishable comments. The witness returned to his own office, and at approximately 4:15 prepared to leave for the day. However, as he exited the building to reach his vehicle he observed Appellant sitting nearby in the parking area which, he urged, had never occurred before, since routinely Appellant leaves promptly at 4:00 p.m. He returned to his office and prepared a written statement. He then went back to the parking area around 4:40 p.m. and Appellant was no longer there. He introduced the statement, which was directed to Paul Herberg, his supervisor, as part of his testimony.

7. The supervisor continued that this was the first such behavior that he has ever encountered throughout his time of employment at the facility, insisting that he feared for his own safety at the time. Some of the accusations directed at him made no sense or were simply untrue. Appellant depicted him as a “liar” and he could not recall any reason for this. He urged that all work assignments are based entirely upon the needs of the facility and the particular

function without regard to individual personalities or favoritism, other than mandated accommodations. He insisted that he has no personal issues with Appellant nor with his job performance, and undertakes to accommodate the requests of all personnel where possible.

8. Under cross-examination, Appellant questioned the supervisor at some length concerning the mix of preventive maintenance personnel and their duties. He quizzed the witness concerning whether or not there is a certified welder on staff. The witness acknowledged that one employee holds a certificate. Appellant also discussed with him the volume of repairs and assignments assigned to him and the help afforded him when he is overloaded. The witness responded that he has always been amenable to providing him with additional assistance upon request, which Appellant disputed.

9. The witness acknowledged a communication from Appellant about his 2012 State Fair schedule approximately one month prior to the episode under scrutiny, recalling that he advised him at that time that he did not see any problem with him working first shift. He reiterated that facility needs must always dominate, and staff will ultimately be allocated to best obtain the requisite coverage, particularly during large events. Appellant debated with him the sequence giving rise to his forced leave on the day in question, essentially disputing certain details thereof.

10. **Joseph Bowers** is employed in preventive maintenance, primarily as a carpenter at the KSFB where he has worked in excess of four years. He performs tasks as assigned including concrete, drywall, and general maintenance with the exception of the licensed trades, such as plumbing and electrical. His shop is in the same building as that containing supervisor McCoy's office. He recalled that on July 27, 2012 he was working in his shop, which he depicted as extremely noisy due to large cooling fans operating and a radio blaring. However, he heard a loud voice despite the noise. He went to the door and looked down the hallway, where he saw Appellant and the supervisor. Although they were both facing away from him, he observed that Appellant appeared extremely upset, complaining about his work schedule. He did not hear the supervisor respond during the exchange, other than to direct Appellant to return to his office. Appellant's tone was loud and he was uttering obscenities which, the witness recalled, continued for "a couple of minutes." He viewed the behavior as quite inappropriate and extremely rare in this workplace from his experience. After a brief interval, McCoy went into his office and Appellant continued his rant while also departing the hallway.

11. Under cross-examination, Appellant did not address the sequence recited other than to confirm that the witness did not prepare a written statement capturing his observations. Appellant directed his questioning to previous events, such as a joke which the witness initiated involving an employee parking area sign sometime in 2011. Appellant also discussed with the witness certain aspects of behavior of coworkers and utilization of shop supplies and materials for personal use by other personnel. In response to questioning, the witness confirmed that the

preventive maintenance staff schedules are shuffled and extended during the Kentucky State Fair to provide adequate coverage of all needs throughout its duration.

12. **Michael Sausman** is Executive Director of Operations for the KSFB. He has been employed by the Agency in excess of seventeen years and his duties currently include oversight of the facilities operated by the Board, specifically setup and removal of shows, maintenance, and all other operational aspects connected therewith. Kevin McCoy answers to him.

13. Mr. Sausman received a call from McCoy on July 27, 2012 near the end of the work day. He recalled that the caller was extremely upset, citing a verbal confrontation with Appellant over scheduling. He noted that this was extraordinary on the part of McCoy, who is routinely quite patient, level-headed, and decisive in his management abilities, and his being upset and shaken was taken seriously by the witness. The supervisor informed him that he was concerned that he could be physically assaulted. The Director instructed him to prepare a written statement capturing the sequence and confirmed that previously introduced to be a correct copy thereof.

14. Following the contact, the witness immediately called Paul Herberg, Human Resources Director, to discuss appropriate handling of the matter. The two officials reviewed the relevant options, seeking a disposition that would be in the best interests of the facility and Appellant. They concluded that he should be evaluated by a psychologist, which was implemented.

15. The witness continued that his office routinely receives complaints about scheduling from one or another employee since many of them dislike working weekends, nights, and holidays. Those issues are resolved to the best extent possible, but at no time previously had he encountered a display of temper such as conveyed to him on the part of Appellant over a scheduling matter. He pointed out that all scheduling is structured to enable the facility and its events to be presented in the best possible light; specific talents are required at particular times and must be keyed to the overall need. The intent is to always “put the best team forward” and supervisor McCoy, in his view, accomplishes this very well.

16. Under very brief cross-examination, the witness verified that work schedules have been changed after being prepared to accommodate an unexpected event or need and staff understands this.

17. **Paul Herberg** is Human Resources Director for the KSFB, in which position he has served since July 2008. His experience in personnel with the Commonwealth extends from August of 1998. He ratified the contact(s) from Executive Director Sausman and the processing thereof, including review and handling of the statement prepared by McCoy. He recited that upon receipt thereof he commenced e-mail correspondence with the Kentucky Personnel Cabinet, specifically the Kentucky Employees Assistance Program (KEAP), seeking input and advice as to the best disposition in the best interests of Appellant and the Commonwealth. Among the options presented was Appellant's placement upon forced sick leave. He initiated that process under guidance and expertise of Personnel Cabinet officials, whom he viewed could provide helpful, as well as necessary, objective overview of the facts. He was supplied appropriate material for implementation of the leave. He urged that a primary factor in the disposition was McCoy's concern for his own physical safety, which dictated the selected approach. He introduced copies of the correspondence and materials exchanged arising from these contacts.

18. The Directed Sick Leave letter was duly issued to Appellant together with other recommended or mandated forms including his right of appeal to the Kentucky Personnel Board. Appellant did in fact promptly take appeal and thereafter on September 10, 2012 Herberg met with him in conference. The primary purpose of the conference was to arrange for, and make Appellant aware of, handling of payment for the services of an appropriate psychologist for interview and recommendation. A release was prepared for Appellant to sign and on November 1, 2012 he was supplied with the proper information to obtain the evaluation. On November 8, 2012 he was referred to a specified professional through Agency counsel. The witness introduced copies of the referenced correspondence and material in the course of his testimony. He viewed that the option chosen and its handling were conducted in accordance with accepted protocol, having ratified each step with the proper agency, KEAP.

19. Under cross-examination, Director Herberg verified that Appellant contacted him on the day of the event, specifically July 27, 2012 and again on July 30, 2012, upon which date Appellant performed his job until approximately 1:30 p.m. until he was called to the appropriate office and supplied the sick leave letter. He was unable to verify or comment specifically as to the amount of Appellant's then-available sick leave, urging that disposition of his circumstance was unrelated to any existing leave time, or lack thereof as the case may be. He confirmed that Appellant previously initiated a grievance in 2011 arising from a parking lot sign episode referenced in the prior testimony, not recalling its disposition.

20. Under further redirect and cross-examination, the witness reiterated that the forced sick leave action was not connected to the status of Appellant's earned leave time, nor was that aspect reviewed or considered. Appellant produced and reviewed with him a series of partial, interim meeting evaluations ranging from 2005 through 2011, prepared and signed by one or another supervisor. These generally reflect that he satisfactorily performs his duties,

follows instructions, and meshes well with coworkers. The HR Director was not aware of any other work episode involving Appellant such as that under scrutiny, noting that he did not thoroughly review his personnel file. He further disavowed any knowledge of, or inquiry into, the nature or extent of medications being utilized by Appellant prior to his placement upon leave. He declined comment concerning whether previous medical episodes, injuries, or medications of Appellant might have impacted either his behavior or the current disposition of his status by the Agency.

21. The Agency having completed its case in chief Appellant, **James Schultz**, offered his own testimony. He holds the position of Mechanic III with KSFB, employed in the Preventive Maintenance Section. At the time of hearing, he was receiving Workers' Compensation, having been injured on the job approximately thirty days prior to the episode giving rise to this appeal. Although he did not indicate his service time at KSFB, he related that he has thirty years experience as a mechanic and manages the mechanic garage on the KSFB premises. He insisted that he considers supervisor Kevin McCoy "a good friend" and would not harm him under any circumstances. He further asserted that McCoy has always been responsive to him and has repeatedly, over the years, offered him help in his shop if he requested it.

22. Appellant's direct testimony consisted in large part of complaints concerning certain of his coworkers, particularly an individual who commenced in 2008 and was assigned to his shop as his assistant. He did not view that this employee was of any relevant benefit to him, urging that after six months certain elements of his behavior irritated Appellant. In due course, he insisted, the coworker commenced "hanging out" in another area with other personnel and Appellant was forced to accomplish most of his chores without help. Later on, this employee was assigned first shift for the annual State Fair and Appellant received third shift.

23. Appellant continued that there was considerable horseplay and other antics by various of the personnel, with perceived tension and turmoil in the workplace which diminished the work product and output. He asserted that some workers abused equipment, such as forklifts, which increased his own workload repairing or rebuilding them. He alluded to hardship in obtaining replacement parts when on third shift with vendors closed resulting in delay, combined with his working alone, of accomplishing his assigned tasks. He was also injured in 2010, was out for one year and, upon his return, McCoy undertook to locate help for him in the shop.

24. Appellant continued working after being injured again in mid-2012, insisting that he was never informed that a doctor or doctors supplied a statement that he should be off. The injury was apparently aggravated when he fell from a machine while attempting to answer the telephone when no one was in the shop to help him. He recalled that sometime in May 2012 he approached McCoy, whom he insisted had variously assured him previously that if he needed or wanted anything he should come to him, to exercise the "favor" of assignment to the first shift for the 2012 Kentucky State Fair. He recalled that McCoy advised him at the time that this

should be accomplished. However, around the fourth of July weekend the Fair schedule was circulated and he again found himself on third shift. He was aware that McCoy was away on a baseball trip and reached him there concerning the assignment. McCoy informed him that he did not prepare this particular schedule and could not advise who made the assignment. There was further discussion concerning the status.

25. Appellant continued that upon the day in question, around 10:30 a.m., he contacted the supervisor on-site and requested a conference, but was informed he was busy at the time and to check later. Thereupon, at 3:45 p.m. that day, he insisted McCoy approached him and advised that he could not alter the schedule, asserting to him that he done other "favors" for Appellant in the past and that that should be sufficient. Appellant insisted that both individuals were angry in the conversation but that no overt threats ensued, although ultimately Appellant did call him a liar and left. He did not view that the supervisor was intimidated but rather angry or himself upset. He denied any use of profanity on his part. He reiterated that neither then nor presently does he harbor ill feelings towards the supervisor, and depicted his own demeanor as more upset than angry. He urged that if his attitude or actions were perceived as dangerous, the supervisor could have contacted security personnel and had him removed rather than merely instructing him to go to his office and calm down. He did linger in the parking area for a short time before leaving, explaining that he needed the opportunity to become calm rather than attempt to drive home while under stress.

26. Appellant offered the series of portions of performance evaluations previously reviewed with witness Herberg for the stated purpose of demonstrating that he has no history of erratic behavior or other requirement of anger management reflected in the interim workups offered. He disputed the testimony depicting his behavior during the confrontation, insisting that no other personnel were there to observe it, notwithstanding the claim(s) made. He recalled that he immediately telephoned Paul Herberg and was informed that he, Herberg, would need to obtain the entire story. However, he was never requested nor did he supply a written statement capturing his version of events.

27. In concluding his testimony, Appellant urged that he desires to return to his position in the shop, which he enjoys, and that any requirement for or reference to a psychological examination be deleted from his file.

28. Under brief cross-examination, the Agency filed additional performance evaluation materials, specifically Appellant's 2012 interim meeting report, prepared by McCoy, for purposes of completion of the evaluations in the record. The parties agreed that his off-work Workers Compensation status, which coincidentally coincides with his forced medical leave, is unrelated to this proceeding and is not before the Personnel Board. Appellant commented that, had the appropriate medical leave materials been timely processed when he was injured in May, he would have been off in July and the episode would not have occurred.

29. The Agency offered rebuttal testimony from **Paul Herberg**. Addressing Appellant's claim of retaliation, he urged that whatever Appellant's allegations may be in that regard, he did not review any prior history or complaints nor consider any aspect of that nature in making the disposition of this circumstance. Further, he noted, no coworker or manager sought any action toward Appellant. All information and recommendations were obtained and received by this witness from officials at the Personnel Cabinet, who guided the matter entirely. He reiterated that following the episode on Friday afternoon, the weekend intervened and the following Monday morning was entirely consumed with analyzing the options and preparing the requisite materials. The leave letter was thereupon presented to Appellant as promptly as possible in the early afternoon of July 30.

30. The witness explained the reason that no written statement was obtained from Appellant. The event was not treated as a disciplinary matter and consequently no "evidence" was gathered seeking to support that form of penalization. Those with whom he consulted at the Personnel Cabinet perceived that corrective action, including discerning the underlying cause and developing a remedy for the behavior, would be more appropriate. There was never any intent to discipline Appellant and mental health and safety, rather than punishment, were the focus.

31. The witness continued that it was assumed, once the appropriate protocol was in place, that Appellant's consent would be obtained promptly, the psychological analysis accomplished, and the matter fairly quickly resolved. However, Appellant declined to sign the consent and considerable time has elapsed without a resolution. He acknowledged that the employee has the right to accept or reject the evaluation. Addressing the matter of Appellant's Workers' Compensation status, he noted that his office was not aware of any injury until the forced sick leave letter was delivered on July 30. He did then receive a doctor's statement on July 31, dated July 30, placing Appellant upon medical leave effective July 11, 2012. He perceived that the doctor had been unaware that Appellant was still working after July 11 but did not confirm this. The sworn testimony was thereupon concluded and the matter stood submitted for recommended order.

32. KRS 18A.095(1) requires that "A classified employee with status shall not be dismissed, demoted, suspended, or otherwise penalized except for cause."

33. KRS 18A.005(24) defines "Penalization" to include, but not be limited to, "demotion, dismissal, suspension, fines, and other disciplinary actions; involuntary transfers; salary adjustments; any action that increases or diminishes the level, rank, discretion, or responsibility of an employee without proper cause or authority, including a reclassification or reallocation to a lower grade or rate of pay; and the abridgment or denial of other rights granted to state employees."

34. 101 KAR 2:102, Section 2(2)(a) provides that “An appointing authority shall grant or may require the use of sick leave with or without pay . . .” This provision may be invoked for a recited series of reasons set forth in the regulation, including the following:

2. Is disabled by illness or injury. The appointing authority may require the employee to provide a doctor’s statement certifying the employee’s inability to perform his duties for the days or hours sick leave is requested. The appointing authority may also require an employee to produce a certificate from an appropriate medical health professional certifying the employee’s fitness to return to duty before the employee is permitted to return to work;

...

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

FINDINGS OF FACT

1. At all times germane to this appeal Appellant, James Schultz, was a classified employee with status of the Tourism, Arts and Heritage Cabinet, holding the position of Mechanic III with the Kentucky State Fair Board (KSFB). He is assigned to the Preventive Maintenance Section situated at the Kentucky State Fair and Exposition Center. His duties include the maintenance and repair of equipment owned and/or operated by the Agency at that location. No proof is presented that negates his competency in the performance of his duties.

2. The issue before the Personnel Board pertains to his reaction to his work assignment for the duration of the August 2012 Kentucky State Fair, an around-the-clock maintenance event. Specifically, he received a perceived, early commitment from his supervisor that he would be assigned first shift but he was ultimately assigned third shift, with hours from 10:30 p.m. through 6:00 a.m. each day. Appellant, who coincidentally was working while injured during the relevant time period when he learned of the assignment, did not receive the news well. He accosted the supervisor late in the day on July 27, 2012, angrily expressed his displeasure in a rant, and accused the supervisor of being a liar. There was no physical contact, but the supervisor felt threatened with physical harm and reported the incident via telephone and written statement to the appropriate management.

3. The episode having occurred late on a Friday, the Agency Human Resources Director utilized the weekend to discern an appropriate disposition of the matter, seeking advice from relevant personnel with the Kentucky Personnel Cabinet. In light of Appellant's longevity and positive work history, he was placed upon forced medical leave the following Monday and instructed to obtain a psychological evaluation at the Agency's expense to discern whether he might be safely returned to his duties or some other disposition made. However, Appellant declined to grant his consent and as of the time of hearing of his appeal in November 2012, the evaluation has not occurred.

4. As management was implementing the forced medical leave, it came to learn that Appellant was injured earlier and should have been off awaiting corrective surgery. Accordingly, by medical statement belatedly received on July 31, Appellant commenced receiving Workers' Compensation time off simultaneously while under forced medical leave, which is uncompensated.

5. Notwithstanding the account of the supervisor and another coworker who overheard and observed his behavior, Appellant denies ever threatening the supervisor but admits calling him a liar. He disputes the need for psychological evaluation or remedy, and points to absence of reference to any threatening behavior on his part in his performance evaluations while competently performing his mechanic duties without sufficient help.

6. The Hearing Officer finds the testimony of all witnesses to be credible, with that of Appellant, which is not independently substantiated, to be subjective.

CONCLUSIONS OF LAW

1. It is clear that management does not seek to penalize Appellant through any deprivation of salary or loss of job. Rather, its focus is his health and well-being combined with an assured safety of his fellow coworkers including, primarily, his supervisor. Accordingly, it did not investigate or attempt to document grounds for suspension or dismissal, electing instead to urge him to seek psychological evaluation. Nonetheless, there is little doubt that the outcome of this evaluation may have substantial impact upon whether he be returned to his position. Appellant has declined to consent to the evaluation, resulting in an impasse as to whether he is emotionally fit for duty.

2. Appellant readily admits that he suffers from an anxiety condition and takes medication to control it. He has also sustained multiple physical injuries which, if cured, may or may not impact his job performance but which likewise could impact his demeanor. The Agency currently has no dispositive proof, other than his assurances, that will give it sufficient comfort that no risk exists if he is returned to duty. The obligation of the Agency to provide a safe

workplace for its personnel, including Appellant, greatly outweighs Appellant's denial of any need to be evaluated.

3. The Agency has sustained its burden to establish by a preponderance of the evidence that the rant episode occurred as depicted by the supervisor and that independent evaluation of Appellant must be a requisite toward determining his job status. Appellant, although elaborating upon a series of workplace behavior by coworkers, has not established that the placement of him upon forced medical leave arose as retaliation for any prior actions or complaints made by him. It follows that the action of the Agency was not unconscionable or excessive in light of the overall circumstances.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **JAMES SCHULTZ VS. TOURISM, ARTS AND HERITAGE CABINET, KENTUCKY STATE FAIR BOARD (APPEAL NO. 2012-171)** 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).

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 _____ day of January, 2013.

KENTUCKY PERSONNEL BOARD

**MARK A. SIPEK
EXECUTIVE DIRECTOR**

A copy hereof mailed to:

Hon. Ellen Benzing
James Schultz