

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2021-014**

JENNIFER SLUSS

APPELLANT

VS.

ORDER DISMISSING APPEAL

CABINET FOR HEALTH AND FAMILY SERVICES

and

PERSONNEL CABINET

APPELLEES

*** **

The Board, at its regular March 2022 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated February 15, 2022, and being duly advised,

IT IS HEREBY 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 16th day of March, 2022.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

Copies hereof this day sent to:

Jennifer Sluss

Hon. Lucas Roberts

Hon. Catherine Stevens

Hon. Rosemary Holbrook (Personnel Cabinet)

Jay Klein

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2021-014**

JENNIFER SLUSS

APPELLANT

VS.

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

CABINET FOR HEALTH AND FAMILY SERVICES

and

PERSONNEL CABINET

APPELLEES

******* ****

This matter came on for a pre-hearing conference on August 23, 2021, at 10:30 a.m., ET, at 1025 Capital Center Drive, Suite 105, 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, Jennifer N. Sluss, was present and was not represented by legal counsel. The Appellee Cabinet for Health and Family Services was present and represented by the Hon. Lucas Roberts. The Appellee Personnel Cabinet was present and represented by the Hon. Catherine Stevens.

The purposes of the pre-hearing conference were to determine the specific penalizations alleged by the Appellant, to determine the specific section of KRS Chapter 18A that authorizes this appeal, to determine the relief sought by the Appellant, to define the issues and address any other matters relating to this appeal, and to discuss the option of mediation.

FINDINGS OF FACT

1. The Appellant filed her appeal with the Personnel Board on February 19, 2021. The Appellant alleged she was penalized when she worked three and a half (3.5) hours on February 15 and seven and a half (7.5) hours on February 16 after the Governor had announced that state offices were closed. The Appellant alleged that, because she was telecommuting, she was treated differently, and this was not in compliance with MS 2.11, which is, apparently, an internal office policy. The Appellant also pointed out that, the previous week, she had worked two (2) days from home after state offices were closed, and she received closure leave in addition to being compensated for her work hours.

2. The Cabinet for Health and Family Services stated that they followed the guidelines from the Personnel Cabinet regarding employees who were working in state offices and employees who were working from home. The Personnel Cabinet pointed out that the Appellant was treated fairly on February 15 and 16, based on Personnel Memo 21-05, which was issued on February 15, 2021. This memo stated that, when state offices were closed, employees working from home should continue working and employees who were scheduled to go into the office should work from home, if possible.

3. After discussing these issues, the parties stated they were interested in trying to arrive at a set of stipulated facts that could be briefed for the Hearing Officer and submitted for a Recommended Order. After discussion with the parties, a schedule was set for stipulations and briefing.

4. On September 28, 2021, the parties entered the following Joint Agreed Stipulations:

- a. In February 2021, due to hazardous winter weather, Governor Beshear ordered state office buildings to be closed at the following dates and times:

2/10/2021	Closure beginning at 2:30 p.m.
2/11/2021	Closure All Day
2/15/2021	Closure at 1:00 p.m.
2/16/2021	Closure All Day

- b. On February 15, 2021, the Personnel Cabinet issued Personnel Memorandum 21-05 regarding Executive Branch Closure of state office buildings. A true and correct copy of Personnel Memorandum 21-05 is attached hereto as Exhibit 1.
- c. In February 2021, Appellant was regularly scheduled to work from 8:00 a.m. – 4:30 p.m. EST, Monday – Friday, 7.5 hours per day/37.5 hours per week.
- d. On February 10, 11, 15, and 16, Appellant was scheduled to telework from her home workstation from 8:00 a.m. to 4:30 p.m. EST.
- e. A true and correct copy of the telecommuter agreement between CHFS and Appellant is attached hereto as Exhibit 2.
- f. A true and correction copy of the CHFS Telecommuting Policy is attached hereto as Exhibit 3.

- g. The parties stipulate that Appellant's timesheets reflect as follows for the dates in question:

Date	Closure Status	1REG	CLOS	6ADL
2/10/2021	Building Closure at 2:30 p.m.	4.5	3.0	3.0
2/11/2021	Building Closure All Day		7.5	7.5
2/15/2021	Building Closure at 1:00 p.m.	7.5		
2/16/2021	Building Closure All Day	7.5		

5. Personnel Memo 21-05 provides that the Governor may close Executive Branch state office buildings due to weather, roads, or other hazardous conditions. This memo states that when state office buildings are closed, "all telecommuting employees shall continue to work based on their scheduled work hours." The memo further states that non-essential employees who are scheduled to work in state office buildings shall continue to work their scheduled work hours if they are able to perform their duties remotely. Only non-essential employees scheduled to work in state office buildings who cannot perform their duties remotely will receive closure pay. There is no reference in this memo that employees who are able to work will receive closure pay.

6. Nothing in Cabinet for Health and Family Services (CHFS) Telecommuting Policy 2.11 or the CHFS Telecommuter Program Responsibilities and Agreement between the Agency and the Appellant, states that the Appellant will receive closure pay if state office buildings are closed while she is telecommuting. CHFS Telecommuting Policy 2.11 specifically states, "the employee's duties, responsibilities, and conditions of employment remain the same as if the employee were working at their primary workstation."

7. CHFS and the Personnel Cabinet filed motions for summary judgment consistent with the schedule established by the Hearing Officer. Although given the opportunity to file her own motion or respond to the Cabinets' motions, the Appellant failed to do so.

8. No party offered an explanation as to why the Appellant's time was coded differently on February 10 and 11, 2021, from the way it was coded on February 15 and 16, 2021. Personnel Memo 21-05 was issued on February 15, 2021.

9. There are no genuine issues of material fact, and this appeal can be decided as a matter of law based on the appeal form, the statements of the parties at the pre-hearing conference, the stipulations of fact, and the motions for summary judgment.

CONCLUSIONS OF LAW

1. The issue on this appeal is whether or not the Appellant was penalized when she was required to work eleven (11) hours on February 15 and 16, 2021, without additional compensation.

2. Pursuant to 101 KAR 1:102, Section 11(5)(a), an employee who is prevented from reporting to a work location that has been shut down is not required to make up the time that is lost. Pursuant to Personnel Memo 21-05, state employees who could not work in their office buildings on February 15 and 16, 2021, and who were unable to telework were not required to work and were paid at the regular rate of pay using closure pay.

3. Based on the Findings of Fact, the Appellant did not fall into either of these categories. The Appellant was scheduled to telecommute and was able to work from home on February 15 and 16, 2021. She was paid at her regular rate of pay for this work. The Appellant has failed to cite any statute, regulation, or policy which would entitle her to additional pay.

4. Penalization is defined at KRS 18A.005(24) as follows:

"Penalization" means 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.

The allegations made by the Appellant in this case do not constitute a penalization. The Appellant has not alleged any statute or regulation was violated when she did not receive additional pay for the work she performed on February 15 and 16, 2021.

5. There are no material facts in dispute. This appeal may be decided as a matter of law, based on the appeal form, the statements of the parties at the pre-hearing conference, the stipulation of facts, the motions to dismiss, KRS 18A.095(18)(a), and KRS 13B.090(2).

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **JENNIFER SLUSS VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2021-014)** 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 Mark A. Sipek** this 15th day of February, 2022.

KENTUCKY PERSONNEL BOARD



**MARK A. SIPEK
EXECUTIVE DIRECTOR**

A copy hereof this day emailed and mailed to:

Jennifer Sluss
Hon. Lucas Roberts
Hon. Catherine Stevens
Hon. Rosemary Holbrook (Personnel Cabinet)