

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2016-261

SCOTT SWINNEY

APPELLANT

VS.

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

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

*** **

The Board, at its regular February 2018 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated January 4, 2018, 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 15th day of February, 2018.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. D. Brent Irvin
Mr. Scott Swinney
Mr. Jay Klein

**COMMONWEALTH OF KENTUCKY
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**FINDINGS OF FACT, CONCLUSIONS OF LAW
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APPELLEE

** ** *

This matter came on for a pre-hearing conference on July 26, 2017, at 9:45 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, Scott Swinney, was present by telephone and was not represented by legal counsel. The Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Brent Irvin.

The purposes of the pre-hearing conference were to discuss the status of the appeal, address any other matters relating to the appeal and to schedule an evidentiary hearing.

BACKGROUND

1. The Hearing Officer notes this appeal was filed with the Personnel Board on September 29, 2016. The Appellant was appealing being placed on directed sick leave by written notice dated August 1, 2016. He was hospitalized on September 12, 2016, and presented a return to work statement dated September 20, 2016.

2. The Appellee rejected the return to work statement. The Appellee had previously sent a letter outlining six questions they wished to have answered by the Appellant's doctor. The return to work statement did not address the six questions and it was not signed by a doctor, having been signed only by the office manager.

3. At a pre-hearing conference on December 15, 2016, the Appellant stated that, around Thanksgiving, he suffered a fall and an additional leg injury as a result. He was no longer able to work.

4. The parties discussed these issues further at a second pre-hearing conference on January 25, 2017. The parties were trying to resolve this issue, and they agreed to schedule the matter for an evidentiary hearing.

5. An evidentiary hearing was scheduled for April 27, 2017, however, the Appellant was unable to attend. Staff contacted the Appellant, learned that he was hospitalized, and he requested 30 days to recuperate prior to setting a new hearing date.

6. The Appellee filed a Motion to Dismiss or for Summary Judgment. The Appellee believed the Appellant had failed to obtain a valid statement from a medical provider showing his fitness to return to work.

7. At the third pre-hearing conference, held on July 26, 2017, the Appellant stated he did not wish to file a written response to the Motion to Dismiss or for Summary Judgment. He stated his position was that he had presented a statement from the office manager for his doctor and that this should have been sufficient to allow him to return to work. He also made it clear he was not challenging the Cabinet's decision to place him on directed sick leave and was only arguing that on September 20, 2016, when he presented the statement from the office manager, he should have been allowed to return to work. The Appellant conceded that, over Thanksgiving of 2016, he suffered another injury and has not been able to return to work. Both parties agreed that the only issue was whether or not the Appellant was entitled to any back pay for the period of September 20, 2016, through Thanksgiving 2016.

8. Both parties agreed they had nothing further to present by way of evidence and that this matter could be decided based on the record, including the Appellee's motion and the Appellant's statements at the various pre-hearing conferences.

FINDINGS OF FACT

1. The Appellant, Scott Swinney, was employed with the Cabinet for Health and Family Services. On August 1, 2016, the Appointing Authority placed him on directed sick leave, based on information of his physical inability to perform his job duties and that he had demonstrated behavior that might endanger himself or others. The Appellant initially challenged the decision to place him on directed sick leave, however, at the time of the most recent pre-hearing conference, he was no longer appealing this determination.

2. On the same date, the Appellant was hand-delivered a healthcare provider letter asking that his healthcare provider respond to six specific questions in an effort to determine if he could return to his duties as a Medicaid Services Specialist II.

3. The Appellant provided a letter dated September 20, 2016, signed by the office manager for Louisville Hospitalist Associates, stating that he could return to work on September 22, 2016, with no restrictions.

4. The Appellee rejected the Appellant's letter signed by the office manager, stating the Appellant needed to provide a valid certificate from a medical provider and not from an office manager.

5. The Appellant contended that the notice he provided was sufficient and that the Cabinet should accept the letter from his doctor's office manager. At no time since he was placed on directed sick leave has the Appellant provided a letter signed by a medical provider.

6. Around Thanksgiving 2016, the Appellant suffered a fall and has been unable to return to work since that date. The Appellant contends he is entitled to back pay for the period of September 22, 2016, through Thanksgiving 2016 based on the letter signed by his doctor's office manager. The Cabinet contends that the Appellant's response did not comply with its request or the Kentucky Administrative Regulation (101 KAR 2:102) and, therefore, the Appellant is not entitled to any back pay.

7. The Appellant has subsequently retired.

8. The Hearing Officer finds that the letter signed by the Appellant's doctor's office manager does not constitute a certificate from an appropriate medical health professional certifying the employee's fitness to return to duty. As a result, the Appellee was justified in not allowing the Appellant to return to work based on this document.

CONCLUSIONS OF LAW

1. 101 KAR 2:102(2) Sick Leave reads in part as follows:

(2) Use and retention of sick leave.

(a) An Appointing Authority shall grant or may require the use of sick leave with or without pay if an employee:

1. Is unable to work due to medical, dental, or optical examination or treatment;
2. Is disabled by illness or injury. If requested by the Appointing Authority, the employee shall provide a statement from an appropriate medical health professional certifying the employee's inability to perform the employee's duties for the days or hours sick leave is requested. If requested by the Appointing Authority, the employee shall provide 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; (Emphasis added)

2. In this case the Appellant was placed on directed sick leave by the Appointing Authority as a result of a medical condition. The Appointing Authority then requested a certificate from an appropriate medical health professional certifying the employee's fitness to return to duty. In this instance the Appellant's letter from the office manager of his doctor's office did not constitute a certificate from an appropriate medical health professional. As a result, the Appellee did not penalize the Appellant when it refused to allow him to return to work.

3. Pursuant to KRS 18A.095(18)(a), the Board may deny an appeal after a preliminary hearing if it lacks jurisdiction to grant relief. In this instance, based on the undisputed facts, the Appellant has not been penalized and the Board can provide the Appellant with no relief.

RECOMMENDED ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Kentucky Personnel Board that the appeal of **SCOTT SWINNEY VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2016-261)** 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 Mark A. Sipek** this 4th day of January, 2018.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Brent Irvin
Mr. Scott Swinney