

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2009-283**

RUTH WALKER

APPELLANT

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

**CABINET FOR HEALTH AND FAMILY SERVICES
J. P. HAMM, APPOINTING AUTHORITY**

APPELLEE

**** ** ***

The Board at its regular June 2013 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated May 3, 2013, and having considered Appellee's exceptions, Appellant's response and being duly advised,

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

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 19th day of June, 2013.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Paul Fauri
Hon. Mona Womack
J. P. Hamm

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**V. FINDINGS OF FACT, CONCLUSIONS OF LAW,
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This matter came on for a pre-hearing conference on October 18, 2012, at 11:30 a.m., ET, at 28 Fountain Place, Frankfort, KY, before the Hon. Boyce A. Crocker, Hearing Officer. The proceedings were recorded by audio/video equipment pursuant to the authority found at KRS Chapter 18A.

Appellant Ruth Walker was not present, but was represented by the Hon. Paul F. Fauri. Appellee Cabinet for Health and Family Services was present and represented by the Hon. Mona Womack. Also appearing on behalf of the Cabinet was Jay Klein.

The purposes of the pre-hearing conference were to discuss the previous Order entered October 2, 2012, and the scheduling of an evidentiary hearing, if necessary.

The Hearing Officer discussed his Order entered October 2, 2012, which denied Appellant's Motion to Sustain the Appeal as a Matter of Law. The Hearing Officer explained why he denied this motion. The Hearing Officer stated that the previous Tramontin appeals, as well as others, all involved disciplinary actions taken against the employees. Understanding Appellant's argument that the administrative regulation in question uses the term "appointing authority," the Hearing Officer still had some hesitation in drawin a parallel between the action taken in placing Appellant on directed sick leave, and actions taken in Pigman, et al., in which disciplinary action was taken by a person not having appointing authority designation. Counsel for the Appellee stated she believed there were differences and legal arguments to be considered that have not been raised, and she will do so. The attorneys agreed this could be resolved without benefit of an evidentiary hearing.

This matter is now before the Hearing Officer for a ruling on the briefs submitted by the parties. Originally this appeal had been slated for evidentiary hearing, but by Interim Order dated October 25, 2012, a briefing schedule was instead established, by which the parties would brief the matter to the Hearing Officer, and the Hearing Officer would then prepare Findings of

Fact, Conclusions of Law and Recommended Order without need for evidentiary hearing. The Hearing Officer understood the parties to agree there are no issues of fact for the Hearing Officer to decide.

In accord with that Interim Order of October 25, 2012, Appellee timely filed a brief, and Appellant a response. Though given time in which to file a reply, Appellee did not do so. The matter is submitted to Hearing Officer Boyce A. Crocker for a ruling on the appeal.

BACKGROUND

1. During the relevant times, Appellant Ruth Walker was a classified employee with status.

2. The parties agree that Appellant was placed on Directed Sick Leave on September 18, 2009.

3. In an Interim Order dated December 16, 2011, the Hearing Officer noted that Appellant was returned from Directed Sick Leave on or about May 10, 2011. It was also noted that from September 18, 2009, until sometime in March 2010, Appellant used paid leave balances, and from March 2010 until the date she returned to work, was on unpaid Directed Sick Leave, having run out of any accrued leave balances.

4. The Hearing Officer will note that Appellant previously was represented by Attorney Jonathan C. Hardy, who had represented her in an earlier matter with this Appellee, and had filed the appeal on Appellant's behalf on November 9, 2009. The parties, subsequent to that time, had attempted to resolve the matter, unsuccessfully. By action dated July 14, 2011, Mr. Hardy withdrew as counsel, having accepted employment with a state agency. The Hon. Paul Fauri then entered his appearance as counsel for Appellant on August 15, 2011. The matter then proceeded with other discussions taking place until Appellant filed a motion to sustain the appeal, which was overruled. That led to this current situation in which the matter was briefed with the parties having acknowledged no need for evidentiary hearing.

5. The Interim Order entered on October 2, 2012, bifurcated the issues into separate questions of whether a person without proper appointing authority took the action placing Appellant on Directed Sick Leave, separating that from the issue of whether Directed Sick Leave was proper at all. The issue before the Hearing Officer now is whether the proper appointing authority placed Appellant on Directed Sick Leave, which may be dispositive of the entire appeal.

6. It is undisputed, and this is stated in Appellee's brief, Jay Klein did sign the letter placing Appellant on Directed Sick Leave on September 18, 2009. Counsel also states that "Ms. Walker acknowledges that Jay Klein became an appointing authority on October 1, 2009." (Underscore added.)

7. Counsel goes on to state "there is no dispute that just 12 days after Ms. Walker was placed on Directed Sick Leave, Jay Klein had the authority to place her on directed sick

leave. The crucial difference to note between this case and the previous signature authority cases this Board has heard is that in dismissal and suspension cases the dismissed employee has no remedy whatsoever to change the discipline other than to appeal to a higher authority other than the Cabinet. Therefore, the argument for dismissal and suspension cases may be compelling; that, if one does not have the appointing authority status, the disciplinary action issued is improper.”

8. Appellee argues “Ms. Walker voluntarily chose to remain on sick leave for 20 months, at which time she did provide medical documentation. Therefore, Directed Sick Leave is not discipline as that term is used for other employee penalizations.” Appellee continues by arguing that the principle of equitable estoppel would have required Appellant to have made this appointing authority argument in a reasonable period of time after the letter was issued, not three years later.

9. Appellee’s other argument made in its brief is that KRS 18A.095(29) prevents Appellant from raising this appointing authority argument years after the appeal was filed. Counsel states, “It was not until July 30, 2012, that a motion to sustain the appeal as a matter of law was filed, approximately eight weeks before the issues were to be litigated at an evidentiary hearing, with those issues not including the signature authority.”

10. Appellant filed a timely response brief. In a footnote in his brief, Appellant notes, “As acknowledged by the Appellee, Mr. Klein, when he signed the letter on September 18, 2009, was not an appointing authority.”

11. Counsel for Appellant also argues “Directed Sick Leave is a disciplinary action due to the fact it removes the employee from the work station and requires the employee to use sick leave or to be placed on sick leave without pay. It is a penalization as evidenced by the fact that Ms. Walker was given the right to appeal the action as set forth at the end of the September 18, 2009 letter, as well as the fact that Directed Sick Leave falls within the definition of penalization under the law in 2009 and current law.”

12. Appellant contends the argument made by Appellee that there is a difference between dismissals and directed sick leave, in that an employee such as Appellant could end the Directed Sick Leave by providing proper medical documentation, is meritless. Counsel contends Appellant was never given any medical reason why she was unable to work and, therefore, why would she need a certificate indicating she could return to work? Counsel also questions Appellee’s requirement to provide the medical documentation, noting it would have to be accepted by the Appellee in order to allow her to return to work, but that the Appellee had never provided Appellant with a specific notice of the physical inability.

13. Counsel points to 101 KAR 2:102, Section 2(2)(a)(2), which states, “An appointing authority shall grant or require the use of sick leave, with or without pay, if an employee: . . . 2. Is disabled by illness or injury.” Counsel argues, as that regulation requires the appointing authority to require the use of sick leave with or without pay in such a circumstance, that only an appointing authority could actually place the person on such sick leave. Counsel cites *Goss v. Personnel Board*, 456 S.W. 2d 819 (Ky. 1970), contending the action placing

Appellant on Directed Sick Leave was void *ab initio* because the regulation required an appointing authority to take the action, and the parties agree Mr. Jay Klein was not an appointing authority.

14. Counsel for the Appellant disputes the action placing Appellant on Directed Sick Leave as of September 18, 2009, was “ratified” when Mr. Klein was properly delegated appointing authority on October 1, 2009. Counsel states, “Only if she (Walker) had been returned to work, paid (made whole), and then given proper notification after October 1, 2009, would there be any type of the ratification of the action.”

15. Appellant also disputes that KRS 18A.095(29) would disallow the argument raised by counsel in his motion to sustain appeal. Counsel notes that a jurisdictional matter can be raised at any time, and that otherwise the appeal was timely filed subsequent to Appellant having been placed on directed sick leave by letter dated September 18, 2009.

16. Finally, counsel for Appellant argues that “he (Klein) was not the appointing authority and, therefore, took an action which, pursuant to personnel regulations, required the action of an appointing authority and deprived Ms. Walker of her rights to be at work and/or to have proper notification of a medical reason for being placed on sick leave.”

17. 101 KAR 2:102, Section 2(2)(a) states:

(2) Use and retention of sick leave with pay.

(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. 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;
3. Is required to care for or transport a member of his immediate family in need of medical attention for a reasonable period of time. The appointing authority may require the employee to provide a doctor’s statement certifying the employee’s need to care for a family member;
or

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.

(b) At the termination of sick leave with pay, the appointing authority shall return the employee to his former position. . .

18. KRS 18A.005(1) states:

As used in this chapter, unless the context indicates otherwise:

(1) "Appointing authority" means the agency head or any person whom he has authorized by law to designate to act on behalf of the agency with respect to employee appointments, position establishments, payroll documents, register requests, waiver requests, requests for certification, or other position actions. Such designation shall be in writing and signed by both the agency head and his designee. Prior to the exercise of appointing authority, such designation shall be filed with the secretary;

FINDINGS OF FACT

1. During the relevant times, Appellant Ruth Walker was a classified employee with status.

2. The Hearing Officer finds that Jay Klein was not properly delegated as an "appointing authority" as of September 18, 2009, when the letter was issued to Appellant purporting to place her on Directed Sick Leave. The Hearing Officer finds Appellant was ultimately returned from Directed Sick Leave on or about May 10, 2011. The Hearing Officer finds that the administrative regulation in question, 101 KAR 2:102, Section 2, clearly requires an appointing authority take the action placing an employee on directed sick leave.

3. The Hearing Officer finds that Appellee, in its letter placing Appellant on Directed Sick Leave on September 18, 2009, did not do so properly because it was executed by a person not acting with the properly delegated appointing authority. This is not in dispute. The Hearing Officer is not persuaded by Appellee's arguments regarding the timeliness of raising the issue of appointing authority, that Appellant could have stopped the Directed Sick Leave by merely providing medical documentation, or that the Appellant should be equitably estopped from raising the claim now, almost three years after she was placed on Directed Sick Leave. The Hearing Officer finds that it is a jurisdictional question as to whether the Appellee properly placed Appellant on Directed Sick Leave pursuant to the regulation. The Hearing Officer finds this is the case, and Appellant was not properly placed on Directed Sick Leave on September 18, 2009.

CONCLUSIONS OF LAW

1. The Hearing Officer concludes as a matter of law that the placement of Appellant on Directed Sick Leave was contrary to the personnel regulation, cited above, and contrary to KRS 18A.005 as Jay Klein did not have appointing authority at the time he took the action purporting to place Appellant on Directed Sick Leave. The Hearing Officer notes that, while not a disciplinary action, Appellant was clearly penalized by being placed on Directed Sick Leave and was, to some degree, at the mercy of the Appellee in returning from same, because as counsel for the Appellant noted, she would have had to provide medical documentation acceptable to the agency. Regardless, by not having the proper authority to place her on Directed Sick Leave, the merits as to whether Appellant should have been placed on sick leave are not reached.

2. The Hearing Officer concludes that the case of *Cabinet for Health and Family Services v. Pigman and Personnel Board*, 2011-CA-002085-MR (rendered March 15, 2013) supports this result. Debora Pigman was an employee of the Cabinet for Health and Family Services who was terminated for various allegations by Jay Klein when he did not possess the required appointing authority to do so.

3. The Hearing Officer concludes the Appellee, at the time this appeal was filed or soon thereafter, was aware there were challenges being made to the "appointing authority" issue.

4. The Hearing Officer thus concludes Appellee could have easily remedied this situation by undoing the action, making Appellant whole, and then reinstituting the action, if necessary. This it did not do at its peril.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **RUTH WALKER V. CABINET FOR HEALTH AND FAMILY SERVICES, (APPEAL NO. 2009-283)** be **SUSTAINED**. Appellant shall be made whole for any paid leave balances she expended when improperly placed on Directed Sick Leave from September 18, 2009, through the expiration of such paid leave balances, and shall also be made whole by being reimbursed for periods she was required to be on leave without pay from the time the paid leave balances expired to on or about May 10, 2011, when she was returned to work. Likewise, the Appellant shall be reimbursed for any time she spent pursuing this appeal in pre-hearing conferences, and otherwise be made whole. **KRS 18A.105, KRS 18A.095(25) and 200 KAR 12:030.**

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within five (5) days of the date on

which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

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

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

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

ISSUED at the direction of **Hearing Officer Boyce A. Crocker** this 3rd day of May, 2013.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Paul Fauri
Hon. Mona Wornack