

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2020-144

ANTONIO WHARTON

APPELLANT

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

**JUSTICE AND PUBLIC SAFETY CABINET,  
DEPARTMENT OF CORRECTIONS**

**APPELLEE**

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The Board, at its regular April 2022 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated March 10, 2022, and being duly advised,

**IT IS HEREBY ORDERED** that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be altered as follows:

A.     **Delete** the Background paragraph 9 and substitute the following:

9.     The next witness to testify was **Cynthia Gilmore**, who is the Appellant's fiancée. Ms. Gilmore testified that she gleaned from general conversation with the Appellant that, once his FMLA papers were approved, he only had to call into work one time notifying his supervisor of his ongoing absences.

B.     **Delete** the Background paragraph 26 and substitute the following:

26.    According to Ms. Cole, Correctional Officers were considered security personnel and essential workers, whereas non-security personnel were not considered to be essential workers. The policies marked as the Appellee's

Exhibits 8 and 9 clearly state that security personnel had to call in at least one (1) hour before their shift started if they planned to be absent. Ms. Cole testified that Human Resources treated No Calls No Shows initially by showing it on the shift roster and preparing a memo that goes into the employee's personnel file. Failure to call in results in a "W-Day," which means the employee goes without pay for the missed day as a form of punishment. Ms. Cole explained that, for an employee to be eligible for FMLA, they had to be employed for at least one (1) calendar year. Further, if eligible, an employee can be on FMLA for up to twelve (12) weeks per calendar year; they also have to reapply for FMLA during each new calendar year. In the event an employee is granted continuous FMLA leave, the shift Captains, etc., are all notified beforehand of the dates the employee is to be off from work, which allows them to plan their shift rosters accordingly. Intermittent leave is much more difficult to plan for because the sporadic absences are not known in advance and are unpredictable. As such, when an employee is granted intermittent FMLA leave, those employees are required to call in each day they will be absent. According to Ms. Cole, the Appellant was approved for intermittent FMLA in both 2019 and 2020. Ms. Cole testified that she never told the Appellant that he only had to call in once prior to March 16, 2020. In fact, Ms. Cole testified that the exact opposite was told to the Appellant, who was told specifically that he had to call in each time he intended to be absent. Ms. Cole recalled telling the Appellant that he had been approved for intermittent FMLA, that he had to call in each day he was to be absent, and that the Appellant appeared to understand. However, after running into problems with No Calls No Shows and consulting with the Appellant, the Appellant did not correct his actions.

**IT IS FURTHER ORDERED** that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer, as Altered, are approved, adopted, and

incorporated herein by reference as a part of this Order, and the Appellant's appeal is **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 13<sup>th</sup> day of April, 2022.

**KENTUCKY PERSONNEL BOARD**



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**MARK A. SIPEK  
SECRETARY**

A copy hereof this day mailed to:

Antonio Wharton  
Hon. Mark Bizzell  
Hon. Rosemary Holbrook (Personnel Cabinet)  
Rodney Moore

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2020-144

ANTONIO WHARTON

APPELLANT

VS.

FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND RECOMMENDED ORDER

JUSTICE AND PUBLIC SAFETY CABINET,  
DEPARTMENT OF CORRECTIONS

APPELLEE

\*\*\*\*\*

This matter came on for evidentiary hearing on October 26, 2021, at 9:30 a.m., ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Geoffrey Greenwalt, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Antonio Wharton, was present and was not represented by legal counsel. The Appellee, Justice for Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Mark Bizzell.

By Interim Order dated July 8, 2021, the issue at evidentiary hearing is the Agency's action in separating the Appellant from state service in addition to the Appellant's claim that he was retaliated against for his prior use of the Federal Medical Leave Act (FMLA). The Appellee was assigned the burden of proof on the separation issue and the Appellant was assigned the burden of proof on his retaliation claim. Each issue was to be proven by a preponderance of the evidence.

**BACKGROUND**

1. The Appellant, Antonio Wharton, filed his appeal with the Personnel Board on June 17, 2020, appealing his dismissal as a Correctional Officer with the Justice and Public Safety Cabinet (JPSC), Department of Corrections (DOC), Luther Lockett Correctional Complex (LLCC), effective June 4, 2020.

2. The first witness called by the Appellee was the **Appellant, Antonio Wharton**. After being directed to his answer to Interrogatory No. 1, which can be found in the record attached to the Appellee's Motion for Order Compelling Discovery, the Appellant stated that Sherri Cole and Carmita Hardwood told him that, while he was on FMLA leave between January 1, 2020, and June 4, 2020, he was only required to call in to his supervisor one (1) time rather than each time he would be absent from work. According to the Appellant, Ms. Cole and Ms. Hardwood did not instruct him not to call in each day he was absent due to FMLA. Rather, he was told that one (1) call would be sufficient notice for his ongoing FMLA absences. The Appellant further testified

that, after being placed on FMLA, no one counseled him to call in at least one (1) hour prior to each shift from which he was going to be absent due to his FMLA medical condition.

3. The Appellee's **Exhibit 1** was entered into the record and is a copy of the Employee Performance Corrective System Training or Counseling Documentation form prepared by Kevin Drake and given to the Appellant on March 16, 2020. The exhibit plainly indicates the Appellant was placed on time and attendance requirements as a result of multiple instances where he had ten (10) or more No Call No Show days in a thirty (30) - day timeframe.

4. The Appellee's **Exhibit 2** was entered into the record and is a copy of the Appellant's appeal form to the Personnel Board with a letter from Warden Scott Jordan, dated June 3, 2020, attached thereto that notified the Appellant he had been administratively resigned from his position as a Corrections Officer as a result of being absent without leave or notice to a supervisor for a period of five (5) working days. Also attached to the Appellee's Exhibit 2 is FMLA paperwork provided by the Appellant's treating physician, Dr. Walter Bruning, indicating the Appellant's condition would cause episodic flare-ups which would periodically prevent him from performing his job.

5. The Appellant explained that he had hip replacement surgery in 2016, and a second hip replacement surgery in 2019. The Appellant was also experiencing recurring problems with his ankles. With regard to notifying the Appellee of his unscheduled absences from work under FMLA, it was the Appellant's understanding, after speaking with Ms. Sherri Cole, that all he had to do was call in one (1) time notifying his supervisor that he was on FMLA and, thereafter, for each subsequent absence, bring in a doctor's statement verifying the same.

6. As proof the Appellee retaliated against him by resigning from his job, the Appellant stated he never received a phone call or written notice from anybody at JPCS/DOC informing him he was violating policy each time he missed work without first calling in. Instead, according to the Appellant, JPCS/DOC improperly allowed his unexcused days off to accumulate. He also complained that he never received due process and did not receive a suspension from work before being administratively resigned like other employees had been. According to the Appellant, having one (1) counseling session was not enough to warn him of the seriousness of his unapproved absences.

7. On cross-examination, the Appellant testified that he did call in before his absences, but those messages were never conveyed to his supervisor or to Central Office. However, he was unable to provide credible evidence to support such a claim. Because FMLA is approved on a calendar year basis, the Appellant was first approved in the latter part of calendar year 2019, then had to resubmit his FMLA information to be approved for the 2020 calendar year.

8. The Appellee's **Exhibit 3** was entered into the record and is a letter from LLCC, dated September 29, 2017, regarding the Appellant's previous use of FMLA. The Appellee's **Exhibit 4**, regarding counseling, was entered into the record and is an Employee Performance Corrective System Training or Counseling Documentation form dated November 20, 2017. The Appellee's **Exhibit 5** was entered into the record and is a letter from LLCC, dated July 3, 2018, when the Appellant was previously administratively resigned for having been absent without leave

or notice for a period of ten (10) working days.

9. The next witness to testify was **Cynthia Gilmore**, who is the Appellant's fiancé. Ms. Gilmore testified that she gleaned from general conversation with the Appellant that, once his FMLA papers were approved, he only had to call into work one time notifying his supervisor of his ongoing absences.

10. **Carmita Hardwood** was the next to testify. Ms. Hardwood is currently employed with the Cabinet for Health and Family Services, but was previously employed with the DOC as a Human Resource Specialist II at LLCC. Part of her duties were to assist employees in signing up for FMLA.

11. According to Ms. Hardwood, FMLA is a federal program that protects an employee's job if they are on leave due to medical conditions. There are two (2) types of FMLA leave: 1) continuous leave, and 2) intermittent leave. Ms. Hardwood testified that continuous leave has a definite beginning and ending period, while intermittent leave is generally for recovery after surgery when absences are unknown but occur periodically due to follow-up doctor appointments, therapy, and/or flare-ups of the condition.

12. Ms. Hardwood testified that, in the Fall of 2019, she sent out an FMLA packet for calendar year 2020 to the Appellant for him to complete. She explained that FMLA leave is approved on a calendar year basis, so each new year that an employee needs to be on FMLA, the packet must be resubmitted. The packet consists of four (4) pages, which are completed mainly by the employee's treating physician. On page three (3) of the packet, under Part B: Amount of Leave Needed, No. 7, the form submitted by the Appellant indicates his condition would cause episodic flare-ups periodically preventing him from performing his job functions and that it would be medically necessary for the Appellant to be absent from work during the flare-ups. As such, the Appellant had been approved for intermittent FMLA.

13. Ms. Hardwood also testified she never had a conversation with the Appellant regarding the need for him to call into work each day he would be absent. However, according to Ms. Hardwood, the call-in policy was very important at LLCC and, as such, it was imperative that there be communication between an absent employee and his supervisor for both daily roster preparation and payroll purposes. According to Ms. Hardwood, each absence would be coded differently for payroll purposes depending on the circumstance. For instance, an absence due to FMLA would be coded differently than an unapproved absence and would have a different effect on the employee's level of compensation.

14. Ms. Hardwood stated that continuous leave does not require calling in each day because the employer is already aware that the employee will be off for a finite period of time and can plan for it well in advance. Intermittent leave requires calling into a supervisor each day because the absences are not predictable and affect the daily roster and payroll coding. According to Ms. Hardwood, in accordance with "Human Resources 101," she would never have told the Appellant not to call in each day he was to be absent.

15. On cross-examination, Ms. Hardwood referred to the FMLA packet contained

within the Appellee's Exhibit 2. She noted that, on page 3 of the FMLA Form, Part B, No. 7, would only be completed in the event of intermittent leave and not for continuous leave.

16. The next witness to testify was **Captain Kevin Drake**. Captain Drake testified that the current day shift at LLCC begins at 5:00 a.m. and ends at 5:00 p.m. He testified that one of the shift supervisor's duties was to set the roster for each shift by consulting with the prior shift supervisor to determine if there had been any call-ins or other high priority issues which needed to be addressed. If there were call-ins, the supervisor would have to cover the absences before assigning officers to their post. Captain Drake stated that, at LLCC, twenty-four (24) officers are needed to cover a shift. So, if someone does not come in, a supervisor will first ask for volunteers to work overtime and then look for available non-security personnel to cover the missing security post. According to Captain Drake, every security post at LLCC is essential.

17. Captain Drake testified that the policy at LLCC is that a Correctional Officer must call in at least one (1) hour prior to their shift starting if they plan to be absent. This allows the shift supervisor to set up the institutional roster and move people around as needed. He also testified that the Captain's Office is the central focal point of the institution and is where an employee should call to report his absence. He noted that, if an employee did not know the direct number to the Central Office, the general number to LLCC automatically prompted the employee to the Central Office number. He further testified that all security officers are advised that they must call the Captain's Office no later than one (1) hour prior to their shift if they plan to be absent, and that anything past the one (1) hour is considered a No Call No Show and is coded as such for payroll purposes. Captain Drake testified that when an employee is a No Call No Show, their supervisor will attempt to call them every fifteen (15) minutes in order to determine their reason for being absent. If after a few calls there is no answer or call back, the absent employee's payroll is marked accordingly.

18. Captain Drake testified that he prepared the counseling documentation marked as Appellee's Exhibit 1 and presented it to the Appellant. He also testified that when he would run into the Appellant at work, he would counsel him to call in whenever he planned to be absent and each time the Appellant would just tell him it was an FMLA absence. Captain Drake also stated that the Appellant never once said anything to him about having called in to Central Office to report his absences but that, for reasons unknown, Central Office somehow never let him know. Captain Drake testified that the Appellant's attendance problems did not improve after his counseling sessions.

19. The Appellee's **Exhibit 6** was entered into the record and is a copy of the LLCC 7:00 A.M./7:00 P.M. Security Shift Rosters for May 25, 2020, through June 2, 2020. Captain Drake explained that if an absence was coded with an "S", it meant it was a scheduled day off and if it was coded with a "U", it was an unscheduled sick day. Appellee's Exhibit 7 was introduced into the record and are copies of what Captain Drake referred to as "W-Day" memos. These memos reflect the Appellant's unapproved No Call No Show absences for five (5) consecutive days beginning May 25, 2020, and ending June 2, 2020, and are prepared whenever an employee fails to call in more than one (1) hour before his shift starts and does not show up for work. The W-Day memos are forwarded to the Correctional Major and the Deputy Warden of Security. Captain Drake stated he had nothing to do with the Appellant's administrative resignation and had

only found out that it had occurred.

20. On cross-examination, Captain Drake testified that there was no proof the Appellant ever called in within one (1) hour of his scheduled shift whenever he was a No Call No Show. Captain Drake reiterated that the Appellant never told him that he had called in, and Central Office never wrote it down or let him know. Captain Drake also testified that there were times when the Appellant would tell him he might be out due to his medical issues. Whenever those conversations occurred, the Appellant's absences were approved for those particular days. He explained that the absences referred to on the Appellee's Exhibit 1 were not days when these particular conversations occurred. Finally, Captain Drake testified that LLCC was understaffed in 2020, and that they were currently short staffed seventy (70) Correctional Officers positions. For that reason, they do their best to retain their Correctional Officers whenever possible.

21. The next to testify was **James Higgins**. He is presently a Recreational Leader at LLCC. Until July 6, 2020, he was employed at LLCC as a Correctional Captain on the security side and was a Shift Commander. Higgins would assist with filling out shift rosters and, if an employee was not present at rollcall and had not called in, he would personally try and contact them. Whenever that occurred and there was a No Call No Show, Higgins would prepare a "W-Day" Memo and payroll would be coded as an unauthorized leave. Higgins testified that he prepared the shift roster for May 29 and May 30, 2020, which was included in the Appellee's Exhibit 6. He also testified that he never attempted to counsel the Appellant about his time and attendance situation because Captain Drake was responsible for that. Higgins further testified that he had no input in the administrative resignation of the Appellant and did not know that it was to occur beforehand.

22. The next witness to testify was **Scott Jordan**, who is presently the Warden at the Kentucky State Penitentiary. He was previously employed as the Warden at LLCC between May 2016 and July 2020. Warden Jordan testified Sherri Cole informed him the Appellant failed to call in and was a No Call No Show for at least five (5) consecutive days. Because of this, Warden Jordan decided to have the Appellant administratively resigned from his position as a Correctional Officer. Warden Jordan testified that he signed the letter marked as the Appellee's Exhibit 2, and that he was then the appointing authority for LLCC.

23. Warden Jordan testified that it was DOC-wide policy that a security officer had to call in a minimum of one (1) hour before their shift started if they were going to be absent for that shift. The Appellee's **Exhibit 8** was entered into the record and is Kentucky Corrections Policies and Procedures (CPP), Policy Number 3.14. Warden Jordan singled out Policy and Procedure CPP 3.14, A.5., as the applicable policy that the Appellant failed to adhere to. The Appellee's **Exhibit 9** was entered into the record and is a copy of Luther Luckett Correctional Complex Policies and Procedures, LLCC 03-01-02, Attendance and Leave Requirements. Warden Jordan singled out Policy and Procedure LLCC 03-01-02, P, Unauthorized Absence, No. 2, as the policy broken by the Appellant. Warden Jordan testified that he was aware the Appellant had been on FMLA in 2017, but that it did not play into his decision to administratively resign the Appellant in 2020. According to Warden Jordan, the call-in policy is very clear that, even when the FMLA is intermittent, an employee still must call in each day they intend to be absent.



24. On cross-examination, Warden Jordan noted that DOC had no obligation to continually advise the Appellant of the time and attendance policy. He further noted that, since the Appellant's work history was such that he was basically not at work far more than he was at work, there was no reason to be overly concerned or to continuously advise him of the call-in policy.

25. The next witness to testify was **Sherri Cole**, who is now a JPSC Human Resource Administrator but was the head of Human Resources at LLCC during the times in question. Ms. Cole has been employed by the Commonwealth of Kentucky in the Human Resources field in some capacity for over twenty (20) years, and her duties included handling the payroll, hiring, and advising the Warden on employee discipline matters.

26. According to Ms. Cole, Correctional Officers were considered security personnel and essential workers, whereas non-security personnel were not considered to be essential workers. The policies marked as the Appellee's Exhibit 8 and 9 clearly state that security personnel had to call in at least one (1) hour before their shift started if they planned to be absent. Ms. Cole testified that Human Resources treated No Calls No Shows initially by showing it on the shift roster and preparing a memo that goes into the employee's personnel file. Failure to call in results in a "W-Day," which means the employee goes without pay for the missed day as a form of punishment. Ms. Cole explained that, for an employee to be eligible for FMLA, they had to be employed for at least one (1) calendar year. Further, if eligible, an employee can be on FMLA for up to twelve (12) weeks per calendar year; they also have to reapply for FMLA during each new calendar year. In the event an employee is granted continuous FMLA leave, the shift Captains, etc., are all notified beforehand of the dates the employee is to be off from work, which allows them to plan their shift rosters accordingly. Intermittent leave is much more difficult to plan for because the sporadic absences are not known in advance and are unpredictable. As such, when an employee is granted intermittent FMLA leave, those employees are required to call in each day they will be absent. According to Ms. Cole, the Appellant was approved for intermittent FMLA in both 2019 and 2020. Ms. Cole testified that she never told the Appellant that he only had to call in once prior to March 16, 2020. In fact, Ms. Cole testified that the exact opposite was told to the Appellant, who was told specifically that he had to call in each time he intended to be absent. Ms. Cole recalled telling the Appellant that he had been approved for intermittent FMLA, that he had to call in each day he was to be absent, and that the Appellant appeared to understand. However, after running into problems with No Calls No Shows and consulting with the Appellant, the Appellant did not correct his actions.

27. According to Ms. Cole, Ms. Hardwood was trained to look for patterns or problems with time and attendance and she was the one generally in charge of handling payroll and dealing with roster shifts every day. Ms. Cole believes it was Ms. Hardwood who let her know the Appellant was a No Call No Show for five (5) consecutive days between May 25, 2020, and June 2, 2020. Ms. Cole then pulled the Appellant's timecards and the applicable shift rosters, and otherwise documented the dates the Appellant had been absent. She then communicated the same to Warden Jordan. Ms. Cole stated that the Appellant had over thirty (30) absences after March 16, 2020, until he was administratively resigned. She reiterated that employees are oriented on the call-in policy at the time of hire and that the policy is reviewed annually. Normal disciplinary action is handled by the Captain until it becomes problematic. Then an unofficial verbal warning

is given to the employee followed by a documented counseling session. Ms. Cole was unable to explain why the Appellant had not been disciplined for his time and attendance prior to his resignation but noted that he finally hit the five (5) consecutive day mark in May 2020. Up until then, he would only miss two (2) or three (3) days in a row. According to Ms. Cole, Warden Jordan made the decision to administratively resign the Appellant and she had no input in the decision whatsoever. She also testified that the fact the Appellant was previously on FMLA had no influence on her decision to bring the situation up with the Warden.

28. The Hearing Officer has considered the entire administrative record, including the testimony and exhibits therein.

29. This matter is governed by KRS 18A.095(1), which states that a classified employee with status shall not be dismissed, demoted, suspended, or otherwise penalized except for cause. This matter is further governed by 101 KAR 2:102, Section 10, (3), which provides, in pertinent part, that an employee who has been absent without leave or notice to the supervisor for a period of five (5) working days shall be deemed resigned.

### **FINDINGS OF FACT**

The Hearing Officer makes the following findings of fact by a preponderance of the evidence:

1. The Appellant, Antonio Wharton, a classified employee with status, timely filed his appeal with the Personnel Board on June 17, 2020, appealing from his administrative resignation as a Correctional Officer with the Justice and Public Safety Cabinet, Department of Corrections, Luther Lockett Correctional Complex, effective June 4, 2020.

2. Pursuant to an Interim Order dated July 8, 2021, the issue before the Personnel Board was the Agency's action in separating the Appellant from state service in addition to the Appellant's claim that he was retaliated against for his prior use of FMLA. The Appellee had the burden of proof on the separation from state service claim, and the Appellant had the burden of proof on his retaliation claim, each of which were to be proven by a preponderance of the evidence.

3. The testimony of Sherri Cole and Carmita Hardwood, taken together with 1) the FMLA forms completed by the Appellant's treating physicians attached to the Appellee's Exhibit 2, and 2) the Appellant's response to Interrogatories contained in the record, clearly demonstrate that the Appellant was approved for intermittent FMLA in 2017, 2019, and 2020. Specifically, Dr. Walter Bruning indicated on the FMLA form he completed that the Appellant's condition would cause episodic flare-ups periodically preventing him from performing his job functions and that it would be medically necessary for him to be absent from work during the flare-ups. The Appellant was clearly approved for intermittent FMLA as opposed to continuous FMLA.

4. The testimony and evidence of record indicates that the applicable time and attendance policies required the Appellant to call in and notify his supervisor of any unauthorized absence no less than one (1) hour before his regular shift was to begin. See Appellee's Exhibits 8 and 9. See also 29 C.F.R., Subsection 825.303.

5. The testimony of Sherri Cole, Carmita Hardwood, Captain Kevin Drake, and James Higgins clearly demonstrates the Appellant was made well aware of the applicable call-in policy at LLCC, and that he knew, or should have known, that he was responsible for calling in and notifying his supervisor of any unauthorized absence no less than one (1) hour before his regular shift was to begin. The Appellant was especially made aware of the applicable time and attendance policy by Captain Drake on or about March 16, 2020, at which time the Appellant had already accumulated thirty-eight (38) documented No Call No Show violations. See Appellee's Exhibits 1, 8, and 9.

6. The testimony of Captain Drake and James Higgins, taken together with the shift roster marked as the Appellee's Exhibit 6, clearly demonstrate the Appellant violated the applicable time and attendance policies for five (5) consecutive regular shifts between May 25, 2020, and June 2, 2020.

7. The Appellant testified he had called in prior to many of his absences and that Central Office simply failed to forward that information on to his shift supervisors. However, this testimony is unsupported and, if anything, demonstrates the Appellant was well aware of his responsibility to call in to his supervisor no less than one (1) hour prior to any unplanned absence.

8. There is no evidence of record that supports the Appellant's claim of retaliation. If anything, the evidence suggests that the Appellee was extremely lenient with the Appellant, more than likely due to its chronic staff shortages, and that it was not until the Appellant had accumulated five (5) unapproved absences in a row that he was administratively resigned from his position as a Correctional Officer. As such, there is no causal connection demonstrated between the Appellant's use of FMLA in 2017 and his eventual administrative resignation in 2020.

### CONCLUSIONS OF LAW

1. The Appellee has demonstrated by a preponderance of the evidence that there was just cause to administratively resign the Appellant from his position as Correctional Officer with the Luther Luckett Correctional Complex, effective June 4, 2020. The Appellant clearly knew or should have known that he was responsible for calling in at least one (1) hour prior to the start of his shift for each unplanned absence while he was on intermittent FMLA. In addition, of the Appellant's roughly sixty-eight (68) unapproved absences occurring in 2020, five (5) of those No Call No Show absences occurred consecutively between the dates of May 25, 2020, and June 2, 2020. Therefore, the Appellee has also demonstrated by a preponderance of the evidence that the Appellant's resignation was neither erroneous nor excessive.

2. The Appellant has failed to demonstrate by a preponderance of the evidence that his administrative resignation as a Correctional Officer with the Luther Luckett Correctional Complex was a result of retaliation.

**RECOMMENDED ORDER**

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Personnel Board that the appeal of **ANTONIO L. WHARTON VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2020-144)**, 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 Geoffrey Greenwalt** this 10 day of March, 2022.

**KENTUCKY PERSONNEL BOARD**

  
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**MARK A. SIPEK**  
**EXECUTIVE DIRECTOR**

A copy hereof this day emailed and mailed to:

Hon. Mark Bizzell  
Antonio Wharton  
Hon Rosemary Holbrook (Personnel Cabinet)