

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NOS. 2016-256 and 2017-011

SCOTT MOSLEY

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**

APPELLEE

*** **

The Board, at its regular November 2017 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated October 11, 2017, Appellee's Request for Oral Argument, Appellee's Motion to Withdraw Request for Oral Argument, 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 appeals are 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 8th day of November, 2017.

KENTUCKY PERSONNEL BOARD



MARK A. SIPER, SECRETARY

A copy hereof this day sent to:

Hon. Ellen Benzing
Hon. Matt Lynch

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NOs. 2016-256 and 2017-011

SCOTT MOSLEY

APPELLANT

V. FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER

TOURISM, ARTS & HERITAGE CABINET,
KENTUCKY STATE FAIR BOARD

APPELLEE

** ** ** ** **

This matter came on for an evidentiary hearing on May 25, 2017, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Geoffrey Greenawalt, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Scott Mosley, was present and was represented by the Hon. Matthew Lynch. The Appellee, Tourism, Arts and Heritage Cabinet, Kentucky State Fair Board, was present and represented by the Hon. Ellen Benzing.

By Interim Order dated March 1, 2017, Appeal Nos. 2017-011 and 2016-256 were consolidated. Also, the issues for the evidentiary hearing were as follows:

- a) The dismissal of the Appellant; the Appellee shall have the burden of proof to establish just cause for the dismissal and that the penalty was neither excessive nor erroneous.
- b) The Appellant's claims of disability discrimination and retaliation; the Appellant shall have the burden of proof on these issues.
- c) All burdens of proof were to be by a preponderance of the evidence.

BACKGROUND

1. The Appellant, Scott Mosley, filed Appeal No. 2016-256 with the Personnel Board on September 22, 2016, alleging discrimination and retaliation arising from reporting serious health and safety concerns; constructive demotion and suspension; and violations of FMLA and ADA.

2. The Appellant, Scott Mosley, filed Appeal No. 2017-011 with the Personnel Board on January 17, 2017, appealing his dismissal from his position as an Administrative Assistant in the Access Control Branch of the Kentucky International Convention Center (KICC) and disciplinary fine.

3. The first to testify at the evidentiary hearing was **Ms. Holly Simpson**, the Assistant Director of Human Resources with the Kentucky State Fair Board (KSFB) since 2004. Ms. Simpson testified she knew the Appellant, who had been a full-time employee with KSFB since 2009. Appellee's Exhibit 1 was introduced into the record and shows that the Appellant attended his initial orientation in September 2009. Ms. Simpson testified that during orientation employees receive a binder with many pages of policies and procedures, including workplace requirements, leave policy, sick leave, etc.

4. Appellee's Exhibit 2 was introduced into the record and is a KSFB Employee Orientation Checklist dated July 9, 2013. This exhibit demonstrates that various policies had been reviewed with the Appellant. Ms. Simpson explained that, in 2013, the Appellee instituted a new "onboarding" process that was intended to be more user friendly. This revised checklist was sent to all employees, who were required to read the policies and return the checklist indicating they had reviewed the policies. Appellee's Exhibit 3 was introduced into the record and is a copy of a March 12, 2015 Memorandum from Jim Erickson, Director of Venue Services, setting forth the call-in procedures for Appellee's employees. The Appellant reviewed this policy and signed it on March 17, 2015.

5. The Appellee's Exhibit 4 was introduced into the record and is a copy of a Performance Improvement Plan (PIP) given to the Appellant for the period of September 1, 2013, through December 31, 2013. According to this PIP, the Appellee was having issues with the Appellant's punctuality and use of leave. For reasons unknown, the Appellant refused to sign the PIP. Appellee's Exhibit 5 was introduced into the record and is a PIP for the review period of January 29, 2014, through April 30, 2014. Again, it appears the Appellee was having difficulties with time and attendance, punctuality and dependability. The Appellant also refused to sign this PIP.

6. Appellee's Exhibit 6 was introduced into the record and is a copy of the Appellant's Annual Employee Performance Evaluation for the 2015 calendar year. Interim reviews included within this evaluation indicate the Appellee had ongoing difficulty with the Appellant's attendance and leave use. However, with the exception of eight (8) hours of unauthorized work leave between May 1 and August 31, 2015, all leave time appears to have been approved.

7. Appellee's Exhibit 7 was introduced into the record and is a copy of the PIP given to the Appellant on June 13, 2016. Attached to this PIP was a copy of the Appellant's written response.

8. Appellee's Exhibit 8 was introduced into the record and is a copy of the September 19, 2016 "where are you" letter sent to the Appellant by the Appellee. This letter informed the Appellant that after September 16, 2016, his continued absences would be considered unauthorized leave without pay. It further instructed the Appellant to return to work immediately or contact his supervisor to explain the reason for his absence. In addition, the letter noted that if the Appellant was able to return to work, he was to do so immediately with a fitness for duty certificate from a medical provider.

9. Appellee's Exhibit 9 was introduced into the record and is a copy of the October 18, 2016 Intent to Dismiss letter delivered to the Appellant. The letter speaks for itself but, in essence, the Appellee intended to dismiss the Appellant for his continued unauthorized leave without pay. Ms. Simpson further testified that the Appellant requested a pre-termination hearing, which she participated in. According to Ms. Simpson, during the pre-termination hearing, the Appellant failed to provide any reason or medical documentation for his absences.

10. Appellee's Exhibit 10 was introduced into the record and is a copy of the November 17, 2016 dismissal letter whereby the Appellant was notified he was being dismissed from duty and pay effective November 23, 2016, from his position as Administrative Assistant in the Access Control Branch of KICC as a result of his continued unauthorized absences from work.

11. On cross-examination, Ms. Simpson testified the PIP marked as Appellee's Exhibit 7 also addressed the Appellant's personal use of the garage's First Aid kit stemming from his facial bleeding condition. She noted the Appellant had left blood on the floor and on certain papers, and had used the First Aid kit for his own personal needs. During a review of the PIP, the Appellant was instructed to take personal responsibility for his own health issues and not use the emergency First Aid kit for personal reasons. Ms. Simpson testified she was first made aware of this issue by the Housekeeping staff

in May, 2016. Apparently the Appellant's supervisor was aware of these issues before she was. Ms. Simpson testified that the PIP was issued on June 13, 2016, and on June 18, 2016, the Appellant turned in his keys and never returned to work. She testified in the spring of 2016, the parking garage at KICC had been automated and the Appellee was moving employees, including the Appellant, to non-automated areas. As a result of the automation, the Appellant was no longer needed at KICC and was being moved to the Kentucky Exposition Center (KEC).

12. Ms. Simpson testified she was aware the Appellant had made contact with the Appellee during his time off from work. She testified that some weeks there would be frequent communication, while during others he would simply inform the Appellee he was taking the week off. The Appellant would generally communicate via email to let the Appellee know when he would be off, and that he would be sending corresponding doctor's notes. However, the Appellee never received these notes.

13. Ms. Simpson testified the Appellant self-reported some of his ongoing medical conditions as far back as 2015. Specifically, he reported his facial bleeding condition, so the Appellee was aware of the same. Ms. Simpson testified the Appellant was eventually placed on Family and Medical Leave (FML) based on a variety of self-reported medical conditions. By the time the Appellant's FML had been exhausted, the Appellee was still waiting on the medical information it had requested from the Appellant. However, no such medical documentation was ever provided.

14. Finally, Ms. Simpson took it upon herself to meet with the Appellant to discuss his issues and see what it would take to get him back to work. Ms. Simpson set up a meeting which took place on September 6, 2016, and was attended by herself, the Appellant, the Appellant's attorney, Patricia Abell, and Ms. Benzing. Appellant's Exhibits 1 and 2 were introduced into the record. Ms. Simpson testified that during the meeting, the Appellant seemed to consider the PIP as being punitive. However, she and Ms. Benzing informed the Appellant that the PIP was meant to be a corrective document, specifically regarding his use of unauthorized leave and his failure to provide doctor's statements for his absences. They explained to the Appellant what actions he needed to take regarding his employment while dealing with his medical conditions. According to Ms. Simpson, the Appellant was mainly concerned about what was to be expected from him in his new job, and that proper accommodations were being put in place for him. The Appellant was also concerned about providing the fitness for duty form as requested by Paul Herberg. Ms. Simpson testified she and Ms. Benzing made it clear to the Appellant and his attorney that they had the authority to lift the fitness for duty requirement and allow the Appellant to come back to work the very next day or soon thereafter. According to Ms. Simpson, any treating physician should have easily been able to fill out a fitness for duty certificate. Ms. Simpson also explained that to

accommodate the Appellant's facial bleeding, his proposed new work station was within a building close to the restrooms so he could readily manage any unexpected issues he experienced with his facial bleeding.

15. Ms. Simpson and Ms. Benzing did, in fact, lift the fitness for duty requirement as implied by the letter dated September 13, 2016 to the Appellant's attorney, Patricia Abell, with copy to the Appellant. Appellant's Exhibit 3 was introduced into the record.

16. Ms. Simpson testified that after the September 6, 2016 meeting, the Appellee expected the Appellant to return to work the very next day. Instead, the Appellant inquired as to what would happen to him if he reported to work without a fitness for duty form, and whether by returning to work without his bleeding issues being in control, if he would be in noncompliance with the most recent PIP. According to Ms. Simpson, the Appellant continued to inquire about these type of concerns repeatedly via email.

17. Ms. Simpson testified that after an employee's FML is exhausted, an employee can be placed on a one-year sick leave. However, in order to do so, the Appellee needed actual medical documentation. The "where are you" letter references this necessity.

18. Finally, Ms. Simpson testified the Appellant provided doctor's notes for his September 7, 8, 9, 12 and 13, 2016 absences. These were the last doctor's notes provided by the Appellant that the Appellee received.

19. On re-direct, Appellee's Exhibit 11 was introduced into the record. This form acknowledges that the Appellant received a copy of the May 2008 Employee Handbook in 2009. Appellee's Exhibit 12 was introduced into the record and references the problems with the Appellant's loss of blood issues while at work. Appellee's Exhibit 13 was introduced into the record and is a forwarded copy of an email from Mr. Mosley stating when he would be absent from work and that he would provide a doctor's note for same. Appellee's Exhibit 14 was introduced into the record and are emails from the Appellant indicating he would be absent from work. Appellee's Exhibit 15 was introduced into the record and is a copy of an email from the Appellant requesting information regarding his FMLA usage. Appellee's Exhibit 16 was introduced into the record and is a response to the Appellant's request, setting forth his FMLA balance. Appellee's Exhibit 17 was introduced into the record, and is a copy of a doctor's note for the Appellant's absences on September 7, 8 and 9, 2016. Appellee's Exhibit 18 was introduced into the record and is a copy of an email from the Appellant requesting clarification on the definition of a "serious chronic health condition." Appellee's Exhibit

19 was introduced into the record and is self-explanatory. Appellee's Exhibit 20 was introduced into the record and is a copy of a doctor's note regarding a September 12, 2016 visitation. Appellee's Exhibit 21 was introduced into the record and is an email from the Appellant to Ms. Simpson regarding his September 7 through September 9, 2016 absences. Appellee's Exhibit 22 was introduced into the record and is a copy of the emails (Appellee's Exhibit 20 and 21) sent by the Appellant to Ms. Simpson, which she forwarded to Ms. Benzing. Appellee's Exhibit 23 was introduced into the record and is a copy of a doctor's note indicating the Appellant was seen by a physician on September 13, 2016. Appellee's Exhibit 24 was introduced into the record and indicates the Appellant was seen by a (different) physician on September 13, 2016. Appellee's Exhibit 25 was introduced into the record and is an email to Ms. Simpson from the Appellant indicating he would be absent from work on September 14, 2016. Appellee's Exhibit 26 was introduced into the record and is an email from the Appellant to Ms. Simpson indicating he would be off work on September 15 and 16, 2016.

20. Ms. Simpson testified that she or the Appellee received no more guidance or documentation from the Appellant's medical providers past the document marked as Appellee's Exhibit 24.

21. On recross-examination, Ms. Simpson testified regarding Appellee's Exhibits 18 and 19 that she did not respond to Appellant's request for corrections, as it was a Payroll Department duty. She testified she forwarded the information to Payroll and has no idea if they ever followed up. Regarding Appellee's Exhibit 19, Ms. Simpson testified she did not respond to the Appellant because it appeared he knew which was which, so there was no need for a response.

22. The next to testify was **Mr. Paul Herberg**, Human Resources Director for the Kentucky State Fair Board since February 2009. Mr. Herberg is the Appellee's Appointing Authority designee.

23. Appellee's Exhibit 27 was introduced into the record and is an email string regarding certain June 2016 absences and the Appellant's inquiry as to his annual leave balance. Appellee's Exhibit 28 was introduced into the record and is a copy of an email string between the Appellant and Mr. Herberg dating to July/August 2016. It appears the Appellant understood that if he returned to work in his then-present physical condition, he would be violating state safety procedures as well as his PIP, which was in place at that time. Mr. Herberg was of the opinion these type of questions had already been addressed with the Appellant and no further response was necessary.

24. Appellee's Exhibit 29 was introduced into the record and documents an additional response to the Appellant's email inquiry of July 30, 2016. Mr. Herberg

testified that, in March and June of 2016, the paperwork for the medical certification was sent to the Appellant to be completed by his treating physicians and was never returned. According to Mr. Herberg, the certification was a key piece which would have allowed the Appellee to determine exactly what was going on medically with the Appellant.

25. Appellee's Exhibit 30 was introduced into the record and is an email chain between the Appellant and Mr. Herberg where the Appellant indicates he will be off work July 25 through 27, 2016. Mr. Herberg responded by asking if the Appellant had returned to work and, if not, whether he had provided the medical statements to support his time off. In response, the Appellant continued to seek clarification regarding his ability to work while his face was bleeding and whether that would violate his PIP or any other state regulations or laws.

26. Appellee's Exhibit 31 was introduced into the record and is another email chain between the Appellant and Mr. Herberg. Again, Mr. Mosley was attempting to clarify whether he would be violating any health and safety policies or his PIP if he was to return to work while still suffering from the facial bleeding condition. Mr. Herberg's reply was direct and indicated clearly that the Appellant was to provide doctor's statements in support of absences, that Appellant had yet to return his FMLA paperwork and informing him that designating his absences as FMLA was prudent. According to Mr. Herberg, during this period of time he was getting ready for the state fair, which is a busy time, and addressing every point the Appellant continued to bring up was no longer beneficial.

27. Appellee's Exhibit 32 was introduced into the record and is another email chain regarding the Appellant's placement on FMLA, and his ability to report to work given his ongoing medical conditions. Again, Mr. Herberg's response was direct, to the point, and self-explanatory. Appellee's Exhibit 33 was introduced into the record and is an email chain between the Appellant and Mr. Herberg wherein the Appellant indicated he would be calling off work for the upcoming week of October 16, 2016 through October 22, 2016, due to his inability to provide a fitness for duty certificate. Mr. Herberg responded by informing the Appellant he had not reported to work as expected and that his absences were considered unauthorized. He also informed the Appellant that an intent to dismiss letter would be forthcoming. Mr. Herberg testified that he repeatedly requested medical information from the Appellant and received very little in return.

28. On cross-examination, Mr. Herberg testified he did not tell the Appellant that if he returned to work, he would be disciplined. However, he could not go as far as to say he would never be subject to disciplinary action, because in actuality, every employee is subject to being disciplined. Following a review of Appellee's Exhibit 31, Mr. Herberg was asked what policy the Appellant was allegedly violating. According

to Mr. Herberg, he did not provide a specific policy, but generally referred to basic concepts of safety, which had been provided to the Appellant regarding bloodborne pathogens.

29. Mr. Herberg was aware that in 2015 the Appellant had raised issues regarding the exhaust and air handling equipment located in the parking lot where he worked. Mr. Herberg was also aware that the Appellant had also filed an OSHA complaint regarding the same, but was otherwise uninvolved.

30. Appellant's Exhibit 4 was introduced into the record and is an email chain regarding a June 20, 2016 absence from work. Appellant's Exhibit 5 was introduced into the record and is a copy of an email from the Appellant to Donna McMillen regarding his work environment. Also included on this exhibit was Mr. Herberg's response. According to Mr. Herberg, Ms. McMillen had responded via separate emails to the Appellant's previous questions and noted the Appellant just continued to ask the same questions over and over, but each time in a different way. Accordingly, Ms. McMillen was getting frustrated, so the Appellant responded succinctly and directly as shown on the exhibit.

31. Appellant's Exhibit 6 was introduced into the record and is, essentially, another email chain following up on the email chain set forth on Appellee's Exhibit 30.

32. Mr. Herberg testified he was aware the Appellant had collected a dust and debris sample from the KICC garage and asked that it be tested for toxicity. According to Mr. Herberg, Ms. McMillen was given the sample bag, which was never tested as far as he was aware. On re-direct, Appellee's Exhibit 34 was introduced into the record and is an email chain between the Appellant and Mr. Herberg which took place in early October 2016. Again, Mr. Herberg explained to the Appellant what was needed to get him back to work.

33. Mr. Herberg's testimony marked the end of the Appellee's case-in-chief.

34. The next to testify was **Ms. Donna McMillen**, who is employed as an Access Control Manager for the Appellee, and was the Appellant's immediate supervisor.

35. Ms. McMillen testified the Appellant was never a supervisor, but he would give breaks to the cashiers and provide change, fill up tickets and help as necessary when things were busy. Ms. McMillen was on Worker's Compensation leave between January 27, 2016 and May, 2016. She returned to work full-time in the middle of May 2016, by

which time the Appellant's duties had changed somewhat. The Appellant had been placed in the Cowger Garage as a cashier because they were shorthanded.

36. Ms. McMillen reviewed Appellant's Exhibit 5 and testified she could not recall seeing this document. She explained that she had suffered a concussion around that time period, which has affected her memory. She could, however, remember that the Appellant complained about all the dust in the garages, and that the alarms and fans did not appear to be working. Ms. McMillen forwarded the Appellant's concerns on to Scott Fluhr. In response, Mr. Fluhr gave her a manual related to the alarm and fan systems, which she passed directly on to the Appellant.

37. Ms. McMillen was asked to review Appellee's Exhibit 7, which was the June 16, 2016 PIP given to the Appellant. Again, Ms. McMillen could not recall giving this PIP to the Appellant, but could recall that the problems mentioned were ongoing. According to Ms. McMillen, the Appellant was late quite a bit to work and did not come back from lunch break in a timely manner. She was also getting complaints from the cleaning crews and employees regarding blood on the sinks or Band-Aids left visible in the bathrooms. Ms. McMillen had spoken to the Appellant about his personal use of the First Aid kit, and since it was not getting better, that concern was included in the June 2016 PIP.

38. On cross-examination, Appellee's Exhibit 35 was introduced into the record and is an email chain between the Appellant and Ms. McMillen regarding follow-up questions the Appellant had in connection with his June 2016 PIP. According to Ms. McMillen, the Appellant never returned to work to ask his follow-up questions in person. Also according to Ms. McMillen, June 20, 2016, was supposed to be the Appellant's first day at the Kentucky Exposition Center.

39. The next to testify was **Mr. Scott Fluhr**, the Director of Operations and Fair Board Administrator since the summer of 2015. According to Mr. Fluhr, construction at the KICC garage began in the spring 2013. The garage was resurfaced, CO sensors were replaced, new concrete was put down and the parking lot was re-striped. General maintenance was also performed, all of which ended sometime in late 2014. No issues regarding the environment of the garage were brought to his attention during this time period.

40. Appellant's Exhibit 7 was introduced into the record. Mr. Fluhr recalled these issues and stated that the fans, etc. were all fixed at that time. Mr. Fluhr acknowledged he received complaints from the Appellant through Donna McMillen and, each time, he would send an engineer out to the garage to check on the Appellant's

concerns. In one instance, he even sent a CO system manufacturer representative to the garage to double-check the system.

41. Mr. Fluhr was aware the Appellant made an OSHA complaint. According to Mr. Fluhr, OSHA came onto the site and ran tests but he never heard anything back from them. Appellant's Exhibit 8 was introduced into the record and is a copy of OSHA's response to the Appellant's complaint. Mr. Fluhr stated he never saw this particular document. Appellant's Exhibit 9 was introduced into the record. According to Mr. Fluhr, the Appellant relayed his concerns to him and through his supervisor, Ms. McMillen. Each time Mr. Fluhr would have an engineer look into the concerns. Mr. Fluhr himself did not follow up with the Appellant.

42. On cross-examination, Mr. Fluhr testified he never notified the Appellee's Human Resource Department about the receipt of the OSHA complaint.

43. The next witness to testify was the **Appellant, Mr. Scott Mosley**. Mr. Mosley is presently unemployed, having been terminated from his position as an Administrative Assistant in the Access Control Branch of KICC effective November 23, 2016.

44. Mr. Mosley testified he had concerns about his work environment prior to 2016. After the garage construction ended in November 2015, he began having health issues. He stated there was a constant bombardment of concrete dust during the construction/maintenance period. He took it upon himself to investigate and determined the ventilation fans in the garage were not working.

45. He attended a meeting on March 24, 2015, which was called by Ms. McMillen. Also in attendance were Holly Simpson and Paul Herberg. The purpose of this meeting was to discuss the Appellant's tardiness. However, at this time he voiced his concerns to Ms. McMillen, who was new to her job, about his work environment. According to the Appellant, he noticed the fans never seemed to come on. After voicing his concerns to Ms. McMillen, she gave him a manual regarding the fan control systems and CO sensors. The Appellant eventually procured a sample of the dust from the garage and asked that it be tested. In response, he received an email from Mr. Herberg indicating that the system was working, and if he did not like the environment, he could discontinue his employment there. The Appellant asked Ms. Simpson if she had ever had the sample tested and she indicated she had not. In addition, no one else approached the Appellant about his concerns with the ventilation system.

46. According to the Appellant, Mr. Herberg essentially told him the Appellee was not going to test the dust sample, which more or less forced him to file his OSHA

complaint. Following this communication with Mr. Herberg, the Appellant continued to voice his concerns to his supervisor, Ms. McMillen, but never went higher up the Appellee's chain of command with his concerns.

47. In January 2016, the Appellant started working more as a cashier. He was told by Ms. McMillen that the garage was slow, and rather than hire more part-time workers, it was best that he be utilized in that position. Shortly thereafter, Ms. McMillen was injured on the job and the Appellant worked as a cashier by himself. The Appellant was unsure why he was being utilized only as a cashier while Ms. McMillan was out as there were plenty of workers, some of whom complained about him taking their hours. Despite this, the Appellant had no more complaints until March 24, 2016, at which time Teresa McClain (Ms. McMillen's secretary) told him she would be taking over his supervisory duties. The Appellant did not elaborate on what "supervisory" duties were being assumed by Ms. McClain. In addition, it appears the Appellant's duties had already been limited to those of a cashier back in January 2016.

48. Appellant's Exhibit 10 was introduced into the record and demonstrates the Appellant began speaking directly with OSHA regarding his work environment concerns. According to the Appellant, the official initiating date of the OSHA investigation was March 23, 2016. The Appellant admitted he did not inform Ms. McMillen, Mr. Herberg or Ms. Simpson that he filed his OSHA complaint.

49. According to the Appellant, he met with Ms. McMillen, Linda Edwards and Scott Fluhr on May 31, 2016. He had been asking for this meeting for two months and finally got it. It was during this meeting that Ms. Edwards told him he could not meet the public with blood showing through his Band-Aids, etc. Although he had not been made aware of any coworker complaints, the Appellant was aware housekeeping had complained about bloody tissues and band-aids being left in the bathroom trash can.

50. The Appellant testified that his supervisor, Ms. McMillen, told him she was not sure why she was being asked to give him the June 2016 PIP considering his last day at KICC was to be the following Friday, after which she would no longer be his supervisor. According to the Appellant, during his PIP counseling, the only thing discussed in earnest and reiterated was what Ms. Edwards had told him on May 31, 2016, regarding his facial bleeding being in violation of safety codes. The Appellant was never presented with what he considered to be a workable solution to his bleeding condition. His impression following the PIP review was that his facial bleeding condition was, in and of itself, a violation of safety policy and the PIP, which had to be remedied by the following Friday, which was only a few days away. The Appellant did not return to work after his June 13, 2016 PIP review.

51. The Appellant was to report to the Kentucky Exhibition Center (Fairgrounds) on June 20, 2016, and Steve Kelly was to be his direct contact. He did not know exactly what his new duties would entail but was told they would be administrative in nature.

52. According to the Appellant, he continually provided the Appellee with doctor's notes through June and July 2016 until finally his doctor would no longer provide notes, stating there was nothing further he/she could do for him.

53. According to the Appellant, the Appellee never adequately responded to his inquiries regarding whether or not he would be in automatic violation of his PIP or safety policies if he was to return to work while still struggling to control his facial bleeding. He also asked if any accommodations could be made.

54. On September 6, 2016, the Appellant and his attorney (at the time), Patricia Abell, met with Holly Simpson and Ellen Benzing, and discussed at length how the Appellant could deal with his facial bleeding issues and return to work. According to the Appellant, nothing was mentioned about retracting the requirement that he provide a fitness for duty certification before reporting back to work. The Appellant also testified that his concerns with being in automatic violation of existing safety policies or his PIP if he returned to work with his facial bleeding condition being unresolved were not alleviated during this meeting. The Appellant also testified it was during this meeting that he first heard anything about leaving blood drops in the bathroom constituting a violation of the bloodborne pathogens policy.

55. The Appellant admitted he was never too sick to work. However, because his facial bleeding condition would be unresolved, he believed that by returning to work, he would be in automatic violation of his PIP or existing safety policy and would end up getting fired. As such, the Appellant was of the opinion he was never given a real choice to return to work.

56. The Appellant went on to contradict his previous testimony by admitting that following the September 6, 2016 meeting, he knew the Appellee agreed that if he returned to work, he would not be in violation of his PIP so long as he dealt with his facial bleeding by using bathroom breaks appropriately.

57. Despite having resolved his PIP concerns, the requirement that he provide the Appellee with a fitness for duty certificate before returning to work remained a problem for the Appellant. According to Mosley, he could not comply with this requirement.

58. Noting how everything seemed to snowball, especially after he had filed his OSHA complaint, the Appellant reiterated he had been having the same medical issues for years which the Appellee was well aware of. Then he met with Linda Edwards on May 31, 2016. Then, just two weeks after meeting Linda Edwards, he received a Performance Improvement Plan, which he believed was impossible to comply with considering his ongoing medical issues. Then, despite the assurances received at the September 6, 2016 meeting from Ms. Simpson and Ms. Benzing, Mr. Herberg continued to request that he provide a fitness for duty certification before returning to work. Because he was unable to obtain a fitness for duty certification, he did not return to work. This resulted in the "where are you" letter, followed by an "intent to dismiss" letter, followed by a pre-termination hearing, followed by his eventual dismissal.

59. On cross-examination, Appellee's Exhibit 36 was introduced into the record and is a June 6, 2016 memorandum to the Appellant regarding his workstation change.

60. The Appellant's testimony ended the Appellant's case-in-chief.

61. **Holly Simpson** was recalled as a rebuttal witness. Ms. Simpson testified that the Appellant was the only cashier to complain about his work environment. She acknowledged she received a bag of dust and simply placed it in a locked cabinet. According to Ms. Simpson, she never held any of the Appellant's complaints against him. She also knew the Appellee had received OSHA complaints in the past and that they were simply used as a learning tool. Ms. Simpson reiterated that at the September 6, 2016 meeting, the Appellant's attorney, Ms. Abell, requested information about the fitness for duty certification requirement and was specifically told that this requirement could be lifted.

62. Appellee's Exhibit 37 was introduced into the record and details the Appellant's leave usage for the year 2016. Ms. Simpson noted the Appellant had been exhausting his leave well before June 2016, when his balance was finally exhausted. Once the Appellant's leave balance was exhausted, the Appellee placed him on FML retroactively to June 20, 2016. She stated this was a good faith move and allowed the Appellant to continue receiving his other benefits. The only other option would have been to terminate the Appellant.

63. On cross-examination, Ms. Simpson stated she took the sample bag of dust from Ms. McMillen and locked it up, which she thought was within the scope of her job duties. She then had a conversation with the Appellant within one or two days of that time and informed him of other avenues he could take to get the samples tested. Finally, Ms. Simpson admitted that as far as she was aware, the Appellant's OSHA complaint was the only such complaint the Appellee received during her tenure.

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

FINDINGS OF FACT

The Hearing Officer makes the following Findings of Fact by a preponderance of the evidence:

1. The Appellant, Scott Mosley, a classified employee with status, timely filed Appeal No. 2016-256 with the Personnel Board on September 22, 2016, alleging discrimination and "Other Penalization" including retaliation for reporting serious health and safety violations.

2. The Appellant, Scott Mosley, a classified employee with status, timely filed Appeal No. 2017-011 with the Personnel Board on January 17, 2017, appealing his dismissal from his position of Administrative Assistant in the Access Control Branch of the Kentucky International Convention Center, effective November 23, 2016.

3. Pursuant to Interim Order dated March 1, 2017, the issues before the Personnel Board were the dismissal of the Appellant, and whether the same was taken with just cause and was neither excessive nor erroneous; and the Appellant's claim of disability discrimination and retaliation.

4. The Appellant was properly oriented with regard to the Appellee's call-in and leave policies. (See Appellee's Exhibits 1, 2, and 3.)

5. Over a period of approximately two years, the Appellee experienced problems with the Appellant's punctuality and tardiness. (See Appellee's Exhibits 4, 5, 6 and 7).

6. Between spring 2013 and November 2014, the parking garage where the Appellant was stationed underwent major re-construction and maintenance. According to the Appellant, in late 2014, he began experiencing medical issues, which he thought were connected to his dusty work environment.

7. The Appellant became concerned with the air quality in his work environment and he continually brought his concerns to the attention of his immediate supervisor, Donna McMillen. Ms. McMillen passed the Appellant's concerns on to Scott Fluhr who responded by providing written systems information to the Appellant. Mr. Fluhr also sent engineers, and in one instance, the CO sensor's manufacturing representative, to inspect the fans, filters and sensors each time he received a complaint.

The Appellant ultimately provided Ms. McMillan with a sample bag of dust he had collected from his work environment for purposes of analysis. The Appellee never had the dust sample tested. In the end, it was the Appellee's opinion the Appellant's work environment was safe and that the air quality systems were fully operational. It appears the Appellee took prompt and reasonable measures to alleviate the Appellant's ongoing concerns about the quality of his work environment.

8. Dissatisfied with the Appellee's response, the Appellant began speaking to representatives at the Kentucky Labor Cabinet, Department of Workplace Standards, Division of Occupational Health and Safety Health Compliance (OSHA) regarding his work environment and eventually filed a formal complaint with OSHA on March 23, 2016. OSHA determined that based upon its investigation, a citation would not be issued. (See Appellant's Exhibit 8).

9. The Appellant testified that prior to March 24, 2016, in addition to those of a cashier, certain of his job duties were supervisory in nature. He further testified that following March 24, 2016, his job duties were reduced solely to that of a cashier. Although he did appear to perform some menial supervisory tasks such as scheduling breaks, there is no credible proof of record that supports a finding the Appellant was ever a supervisor, regularly performed substantive supervisory duties, or that following the filing of his OSHA complaint on March 23, 2016, his substantive duties were reduced, stripped or limited in any meaningful way by the Appellee. In fact, the record supports a finding that the Appellant's job duties were limited to those of a cashier as early as January 2016. In addition, there is no credible evidence of record to support a finding the Appellee retaliated in any way against the Appellant for complaining to his superiors about his work environment or for filing his OSHA complaint.

10. The Appellant suffered from a medical condition resulting in periodic facial bleeding for two or three years prior to his termination. The Appellee had long been aware of this condition. In early 2016, the Housekeeping staff at the KICC garage complained about finding the Appellant's blood on bandages, towels and on the sink in the workplace bathroom. As a result, Linda Edwards met with the Appellant in late May 2016, and advised him to be more careful with his personal hygiene, to discontinue using the emergency First Aid kit for his own personal use, and to start disposing of his bloody bandages, etc., properly.

11. On June 13, 2016, the Appellant received his Performance Improvement Plan (PIP). Following the review of this PIP, the Appellant was under the impression that if he returned to work without his facial bleeding being under control, he would automatically be in violation of his PIP or existing safety codes, regulations, or policies and thus subject to termination.

12. The Appellant did not return to work following the June 13, 2016 PIP review. By June 20, 2016, the Appellant had exhausted his sick leave, so the Appellee took it upon itself to place him on Family and Medical Leave (FML). Placing the Appellant on FML was in the Appellant's best interest as it allowed him to maintain his employee benefits. Had the Appellee not placed the Appellant on FML, the only other option would have been to characterize his ongoing absences as unauthorized and terminate his employment.

13. Between June 20, 2016 and October 2016, numerous email exchanges were made between the Appellant, Holly Simpson, and Paul Herberg, whereby the Appellant sought clarification and reassurance from the Appellee that he would not be in violation of his June, 2016 PIP or other safety codes, regulations, or policies in the event he returned to work without his medical conditions being under control.

14. In an effort to alleviate the Appellant's ongoing concerns and get him back to work, Holly Simpson took it upon herself to schedule a meeting with the Appellant and his attorney, Patricia Abell. Also in attendance was counsel for the Appellee, Ms. Ellen Benzing. The meeting was held on September 6, 2016, after which the Appellant left with the understanding he could return to work immediately without fear of termination for violating the terms of his June 2016 PIP so long as he properly attended to his facial bleeding condition. However, based upon communications with Paul Herberg, the Appellant remained convinced he could not return to work without providing a fitness for duty certification. According to Ms. Simpson, it was made clear to the Appellant and his attorney during their meeting that any requirement to provide a fitness for duty certification could be and would be lifted if the Appellant would simply return to work. (See Appellant's Exhibits 2 and 3.)

15. Following September 6, 2016, the Appellant was free to return to work in his new position at the Kentucky Exposition Center, which position included reasonable accommodations (i.e., a workspace with close proximity to bathroom facilities so he could tend to any medical issues that may have arisen), without fear of retribution, retaliation or termination so long as he was able to reasonably manage his ongoing medical conditions.

16. Despite the understanding reached during the September 6, 2016 meeting, the Appellant remained absent from work. On or about September 19, 2016, the Appellee advised the Appellant that any continued absences after September 16, 2016, would no longer be FMLA eligible, and would be considered unauthorized leave without pay. He was also informed that, if he were to remain absent without proper

authorization for ten days following September 16, 2016, he could be dismissed from his position. (See Appellee's Exhibit 8).

17. The Appellant continued with his absences and by letter dated October 18, 2016, the Appellant was advised of the Appellee's intent to dismiss him from his position as Administrative Assistant in the Access Control Branch of KICC. (See Appellee's Exhibit 9.)

18. Following a pre-termination hearing held on November 14, 2016, on or about November 17, 2016, the Appellant was advised he had been dismissed from his position as an Administrative Assistant in the Access Control Branch of KICC effective November 23, 2016. (See Appellee's Exhibit 10).

19. The Hearing Officer finds that the Appellant had more than 10 unauthorized absences from work following September 16, 2016.

20. In addition, it is found the Appellant was not disabled from work and chose not to return to work of his own free will.

21. The Appellee continually, promptly and directly responded to the Appellant's ongoing concerns via email and otherwise made a good faith effort to entice the Appellant back to work without fear of retribution, retaliation or termination.

22. The only way to have determined with certainty that his concerns were justified was for the Appellant to return to work under the terms provided by the Appellee. Since he chose not to do so, these concerns can now only be described as speculative at best and paranoid at worst.

CONCLUSIONS OF LAW

1. The Appellee has demonstrated by a preponderance of the evidence that the termination of the Appellant was neither excessive nor erroneous and was taken with just cause.

2. The Appellant has failed to demonstrate by a preponderance of the evidence that he was discriminated against or retaliated against by the Appellee as a result of his disability or making an OSHA complaint.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **SCOTT MOSLEY V. TOURISM, ARTS AND HERITAGE CABINET, KENTUCKY STATE FAIR BOARD, (APPEAL NOS. 2016-256 AND 2017-011)** 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 Greenawalt this 11th day of October, 2017.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:
Hon. Ellen Benzing
Hon. Matthew Lynch