

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-051**

MAMAYOU BAMAZI

APPELLANT

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

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

** ** ** ** **

The Board at its regular December 2015 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated October 14, 2015, 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** Conclusion of Law number 4 and substitute the following:

4. While the term "insubordination" has a negative tenor, such behavior includes a refusal to follow the directive of a supervisor or superior. On January 17, 2015, the Appellant, by refusing mandation, was insubordinate and, therefore, violated Policy/Procedure No. 7.13.2. Such conduct constituted a lack of good behavior.

5. However, the Board in taking into account that this was Appellant's first refusal of mandation that had resulted in a disciplinary fine, believes that a lesser fine would be sufficient to achieve the desired result, that is, to have Appellant's behavior conform with expectations and policy. Therefore, the Board concludes a lesser

disciplinary fine is in order. A one-day disciplinary fine is appropriate under all the surrounding circumstances.

B. **Delete** the Recommended Order, and substitute the following:

IT IS HEREBY ORDERED that the appeal of **MAMAYOU BAMAZI V. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2015-051)** be **SUSTAINED** to the extent that the three-day disciplinary fine imposed upon Appellant is reduced to a one-day disciplinary fine. Appellant shall be awarded back pay, and benefits pursuant to KRS 18A.095(22)(c) and otherwise be made whole. The Board orders Appellee shall reimburse the Appellant for any leave time she used attending the evidentiary hearing and any pre-hearing conferences at the Personnel Board pursuant to KRS 18A.095(25).

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

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this 15th day of December, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day mailed to:

Hon. Matthew Perdue
Mamayou Bamazi
J.P. Hamm

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-051**

MAMAYOU BAMAZI

APPELLANT

VS.

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

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

APPELLEE

** ** ** ** **

This matter came on for evidentiary hearing on September 8, 2015, at 9:30 a.m., ET, at 28 Fountain Place, Frankfort, Kentucky, before Roland P. Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Mamayou Bamazi, was present and not represented by legal counsel. The Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Matthew Perdue. Also present as Agency representative was Tarron Ray.

The issue in this case concerns the disciplinary action taken by Appellee against the Appellant in the nature of a disciplinary fine. On February 13, 2015, Appellant was notified by letter of issuance of a three-day disciplinary fine in the amount of \$304.88. The burden of proof is on the Appellee to demonstrate by a preponderance of the evidence that issuance of the disciplinary action was taken with just cause and was neither excessive nor erroneous.

The rule separating witnesses was invoked and employed throughout the course of the proceeding. Each party waived presentation of an opening statement.

BACKGROUND

1. The first witness for the Appellee was **Tarron Ray**, employed through River Valley Behavioral Health, who, since January 15, 2015, has served as Director of Personnel Services at Hazelwood Center, Department of Behavioral Health and Developmental Disabilities. He described his job duties as Human Resources Director, as well as his duties in Personnel Services. He conducts day-to-day operations of HR matters and recommends to the facility supervisor whether major disciplinary action should be taken.

2. Hazelwood is an intermediate care facility that operates 24 hours a day, 7 days a week, 365 days a year, providing residential care for persons with intellectual or developmental disabilities. There are state guidelines and federal requirements pertaining to the minimum number of staff required on-site to protect clients, employees and visitors. The proper number of staff is required to prevent any injuries and provide required care.

3. In the event it becomes apparent that there will be an insufficient number of staff for an upcoming shift, certain staff will be required to "stay over" to meet staffing requirements. He identified Appellee's Exhibit 1 as Hazelwood, Del Maria, Windsong, and Meadows Policies/Procedures, Mandatory Overtime, Policy No. 7.21. The facility first will seek out volunteers to work overtime. If enough volunteers have been secured there is no need to employ mandatory overtime. If there is an insufficient number of volunteers, then employees are required to work overtime based on a list that shows who is in line to be "mandated." If a staff member volunteers to work overtime, their name goes to the bottom of the mandation list. This also occurs if an individual is mandated and does work the overtime. Staff members who have not recently worked overtime are those who are mandated.

4. At the Hazelwood Center there are three separate shifts. It is normally the senior shift supervisor (TPSA) who calls for volunteers. That individual may delegate that responsibility to the floor supervisors.

5. After January 2015 a change in procedures for mandated overtime was implemented. Since about April 1, a new form has been generated and an employee is required to sign the form to indicate whether they accept or refuse to work mandated overtime.

6. He identified Appellee's Exhibit 2 as Hazelwood, Del Maria, Windsong and Meadows Policies/Procedures, Misconduct: Non-Threatening; Policy No. 7.13.2. In this instance, Ms. Bamazi, by failing to work mandated overtime, violated Procedure 1(A) Insubordination, and (J) Failure to perform duties as assigned. After a complete review of the matter, Mr. Ray made the recommendation that as the two previous policies had been violated, major disciplinary action be instituted.

7. The next witness was **Trenina "Nikki" Watkins**. Ms. Watkins is a Therapeutic Program Supervisor Assistant (TPSA) at Hazelwood, working as a senior shift supervisor. She has been in that position approximately one year and has in the past supervised the Appellant.

8. On January 17, 2015, Geoffrey Gioche, senior shift supervisor, telephoned the supervisors on each wing. Ms. Watkins, second shift supervisor, advised Appellant of her number on the mandation list. Mr. Gioche came to the floor himself to question those who had been mandated. Mr. Gioche called Watkins to advise that mandated overtime was required because employees on the next shift had "called out." He told her Appellant was next on the mandation list.

9. Ms. Watkins told Appellant she had been mandated and asked if she was going to stay. Appellant told her she could not stay that night but she could stay the next day. Ms. Watkins then reported to Mr. Gioche that Appellant had refused mandation.

10. After making his rounds, a senior shift supervisor will go back to his office and start working up the third shift staffing. If the numbers of staff are short, he will go around and ask for volunteers to work overtime. If enough volunteers are secured, there is no mandation. At that point staff members are advised what number they are on the mandation list in the event mandation is required. If a staff member had worked a double shift, they cannot be mandated to work overtime. That night (January 17, 2015) they did not obtain enough volunteers so mandation was instituted. Numbers of staff required for each shift changes from day-to-day.

11. **Geoffrey Gioche**, who for the past two and a half years has been employed by River Valley Behavioral Health at the Hazelwood Center as a TPSA Senior Supervisor, offered his testimony. On January 17, 2015, the facility did not have enough staff to man the third shift. Mr. Gioche started asking for volunteers. When an insufficient number of employees volunteered, he gave out the mandation list which showed in chronological order the identity of the employees to be mandated. The list had previously been distributed that night to all four floors. He started at the top of the list and mandated Ms. Bamazi.

12. In January 2015, Mr. Gioche used to make telephone calls to all the floors. The supervisors on each floor were advised which staff member was to be mandated. That floor supervisor, while on the phone with Mr. Gioche, then so advised the mandated employee. If the employee refused mandation, Mr. Gioche wrote that down and the time of such refusal.

13. When Appellant said she could not work overtime that night, but would do so the next day, Mr. Gioche left his office and spoke to her personally. She told him the same thing. He told her, "No, we need your help tonight." He indicated on his paper, the time she refused and handed that in. He then moved on to the next person on the mandation list. At that date, Ms. Bamazi did not qualify for any exemption from mandation.

14. Since January 2015 the mandation procedure has changed. Now Mr. Gioche goes to the floor personally and asks the DCPs whether or not they are staying for mandated overtime. The employee then signs a form indicating whether they accept or refuse mandation.

15. **Howard J. Klein** was the next witness. For the past fourteen years, Mr. Klein has been employed by the Cabinet for Health and Family Services, Office of Human Resource Management, as Division Director and one of the appointing authorities. When a facility such as Hazelwood sends him a request for disciplinary action with supporting material, he assigns the matter to the branch that works on disciplinary issues. The materials will be reviewed, additional information gathered, if necessary, and that branch then puts together a first draft of a disciplinary letter. Mr. Klein reviews comparable cases to ensure consistency of discipline. He also reviews the proposed final document. If the proposed discipline is acceptable, he approves it in his capacity as Appointing Authority.

16. A three-day disciplinary fine is consistent with other cases of employees having refused to work mandated overtime. Refusal to work such overtime is not a time and attendance issue, but constitutes insubordination. Proper staffing is required and the facilities must make certain they have proper staff ratios maintained in order to take care of the patients. Refusal to work overtime is a much more egregious act than time and attendance issues. Furthermore, if one were to suspend an employee who refuses overtime, the facility would have to cover that employee's absence. Consideration of prior disciplinary action for an employee is not relevant. If Appellant did not have any prior disciplinary action, she still would have received a three-day disciplinary fine. If she had been issued a previous disciplinary fine for the same type of act, a larger disciplinary fine would have been issued.

17. He examined Appellee's Exhibit 3 and identified it as some type of verbal warning issued to the Appellant on November 20, 2013. Human Resources did not provide this document. This document was unique in that Appellant received a verbal warning for failure to work mandatory overtime in 2013. Normally, such an incident would have been sent to Human Resources for consideration of a disciplinary fine. Individuals who issued this verbal warning were not HR personnel, as this did not match the verbal warning template issued by Human Resources. By receiving a verbal warning in 2013, Appellant got a "free pass" in the manner of discipline.

18. A suspension can be issued for failure to work mandatory overtime in the instance where an employee does not earn enough money and a disciplinary fine would, therefore, drop them below minimum wage. Disciplinary fines cannot be applied to wages already earned by the employee or to compensatory time. The Personnel Cabinet established that disciplinary fines are to be assessed against a future paycheck.

19. Mr. Klein reviewed the entirety of the matter and approved the issuance of a three-day disciplinary fine. He identified Hearing Officer's Exhibit 1 as the February 13, 2015 letter he signed and issued to the Appellant. A request for disciplinary action had come from the Hazelwood Center. Mr. Klein assigned the matter to the proper branch for review. A draft letter was sent to Mr. Klein after a check was made to ensure the proper statutes were cited and the correct computations were made with regard to the amount of the fine. He then approved the letter in his capacity as Appointing Authority.

20. Appellee rested its case. Appellant then presented her case.

21. The first witness for the Appellant was **Nicholas Senior**, who, since June 2011 has been employed at the Hazelwood Center as a TPSA. Mr. Senior normally works the first shift and described the procedure for institution of mandatory overtime. Once his shift personnel are deployed, he reviews the numbers of staff for the second shift. He then makes rounds in the facility and asks all DCPs if they would like to volunteer to work overtime. He returns to his office and calculates the numbers one more time. If there is still a shortage of required staff for the second shift, he secures the mandation list and contacts those on the list in person, in order. Each staff member contacted advises him whether they will accept or refuse mandatory overtime. He goes through that list until he has enough staff members for the next shift.

22. Prior to a form having recently been generated for mandatory overtime, he made a copy of the master shift list and the mandation list. As he went around the facility, he recorded the pertinent information on those copies.

23. He has no personal knowledge of the incident involving the Appellant which led to today's proceedings.

24. The next witness was **Kevin Magee**. For the past four years, Mr. Magee has been employed by River Valley Behavioral Health at the Hazelwood Center as a TPSA. Supervisors normally ask for overtime volunteers at the beginning of a shift to try to avoid having to mandate staff. This is done even if it appears the next shift has enough staff members, as there are times employees on the next shift call in their absence late. One can mandate a staff member right up to the end of that employee's shift.

25. Mr. Magee has no personal knowledge of the incident involving the Appellant which led to today's proceedings.

26. The next witness was **Todd McGuire**. For the past five years, Mr. McGuire has been employed by the Commonwealth at the Hazelwood Center as a TPSA. He has worked on second shift at 3 East. The time in which staff members may be mandated varies, anywhere from 3:00 p.m. to 10:00 p.m., depending on when they are made aware of the need. Staff that

are on the mandation list are usually spread out among the units in the facility. It takes him more than an hour to contact each staff member to be mandated.

27. When Mr. McGuire reports to work and gets his shift up and going, he examines the numbers of staff available for the next shift and determines whether there is a staff shortage. He will then go around the facility and ask for volunteers. If he secures an insufficient number of volunteers, he begins the mandation process. Should those mandated refuse to work overtime, he sends a list of those employees to his own boss.

28. Mr. McGuire has no personal knowledge of the incident involving Appellant which led to today's proceedings.

29. The next witness was the Appellant, **Mamayou Bamazi**. For the past eight and a half years, Ms. Bamazi has been employed by the Cabinet for Health and Family Services as a DCP (Patient Aide) at the Hazelwood Center. She normally works the second shift from 2:00 p.m. to 10:00 p.m.

30. On January 17, 2015, Appellant was working the second shift. That day, Ms. Watkins was her supervisor and Mr. Gioche was the senior shift supervisor. Ms. Watkins came to her later in the shift and asked for volunteers to work overtime. Ms. Watkins told her there might be mandatory overtime and that Appellant was number 4 on the mandation list. Ms. Bamazi explained to Watkins that she did not think she could stay that day, but if it were tomorrow, she would be able to stay. Ms. Watkins told her "okay," but she was still fourth on the list and they were still in the process of enlisting volunteers.

31. By the end of the shift, no one had come back to Appellant, telephoned her or had her sign any document telling her she was required to stay over for another shift. She completed her shift and went home as usual.

32. After a few days, Appellant's other boss, Mike Lewis, called her to his office and told her she had to sign a paper because she had been fined for having refused to work overtime. She was very surprised to hear this. She explained the entirety of the situation to him and that she had not been told she had been mandated.

33. Ms. Bamazi disagrees with Mr. Gioche's testimony. She does not recall speaking to him on January 17, 2015. She only spoke to Ms. Watkins one time that night about overtime.

34. Subsequently, Mr. Tarron Ray told her that she would be fined three days' pay which would be taken out of her check. She then filed her appeal with the Kentucky Personnel Board.

35. Appellant closed her case.

36. **Tarron Ray** offered rebuttal testimony for the Appellee. He explained the difference between agency employees and state employees. Agency employees are employed by temporary agencies and are contracted to provide services to the Cabinet. The Cabinet and its' staff have very little control over the discipline of agency employees. They may make recommendations to the agency for separation in the event that particular employee does not work out in the position.

37. State employees are employed by the Commonwealth of Kentucky through the Cabinet for Health and Family Services and are subject to the full range of disciplinary action issued by the Commonwealth.

38. No further testimony was offered by either party. Appellant waived presentation of a closing argument. Appellee presented a closing argument. The matter stood submitted to the Hearing Officer for his recommended order.

FINDINGS OF FACT

1. Mamayou Bamazi, the Appellant, is a classified employee with status. She is employed as a Nurse Aide State Registered I by the Cabinet for Health and Family Services, Department for Behavioral Health, Developmental and Intellectual Disabilities, at the Hazelwood Center.

2. Ms. Bamazi has worked the second shift at Hazelwood Center (2:00 p.m. to 10:00 p.m.) and did so on January 17, 2015. During that shift, Geoffrey Gioche, TPSA Senior Supervisor, determined there were not enough employees to staff the upcoming third shift. He began to ask for employees to volunteer to work third shift.

3. Earlier in the second shift, Trenina Watkins, Therapeutic Program Supervisor Assistant (TPSA), working that day as a Senior Shift Supervisor, advised Appellant where she was on that day's mandation list.

4. Ms. Bamazi did not volunteer to work overtime. There was an insufficient number of volunteers to properly staff the third shift. Mr. Gioche then began to mandate employees to work overtime according to the then-current mandation list.

5. The mandation list is a document, revised each day, which shows the order of mandation of employees from a particular shift. If an employee selected for mandation had just completed working two shifts, or had come down with a sudden illness, that employee could not be mandated.

6. Mr. Gioche telephoned Ms. Watkins and told her Appellant was next on the mandation list to work overtime. While they were still on the telephone, Watkins approached Appellant and so advised her. Ms. Bamazi stated she could not work overtime that night.

7. Upon hearing this, Mr. Gioche left his office and personally approached Ms. Bamazi. She responded again she could not work that night but would work the next night. Gioche recorded the time when Appellant refused mandation, and moved on to the next person on the mandation list. Appellant did not qualify that evening for any exemption from mandation. Mr. Gioche thereafter handed in the mandation refusal information.

8. The facility sent a request for disciplinary action against Appellant, with documentation, to Howard J. Klein, Cabinet for Health and Family Services, Office of Human Resource Management, Division Director and Appointing Authority. He assigned the matter to the branch that handles disciplinary issues. That branch reviewed all the materials and returned same to Klein with a draft of a disciplinary letter. The proposed discipline was a three-day disciplinary fine.

9. Mr. Klein again reviewed the matter as well as other comparable cases to ensure consistency of discipline. As a result of Ms. Bamazi's mandation refusal, Mr. Klein approved the proposed discipline.

10. On February 13, 2015, Appellant was notified by letter from Mr. Klein that her act constituted a lack of good behavior. The letter stated such act violated certain policies and, as a result, she would be assessed a three-day disciplinary fine reducing her wages for one pay period by \$304.88. (Hearing Officer's Exhibit 1.)

11. At the time of the alleged act cited in the February 13, 2015 disciplinary fine letter, the following policies were in full force and effect:

- Hazelwood, Del Maria, Windsong and Meadows Policies/Procedures, Mandatory Overtime, Policy No: 7.21 (Appellee's Exhibit 1.);
- Hazelwood, Del Maria, Windsong and Meadows Policies/Procedures, Misconduct: Non-Threatening, Policy No: 7.13.2 (Appellee's Exhibit 2.).

12. A facility such as Hazelwood operates 24 hours a day, seven days a week. It is crucial that the facility be properly staffed to meet minimum required staffing ratios. Issuance of discipline to an employee who fails to work mandated overtime must be of a nature to (1) place the employee on notice that such refusal is a serious act, and (2) keep the employee at her worksite to avoid additional staff shortage issues.

13. Mr. Klein as Appointing Authority took into account the seriousness of the employee's failure to work mandated overtime when he issued the February 13, 2015 three-day disciplinary fine. (Hearing Officer's Exhibit 1.)

14. The Appellant timely filed her appeal with the Kentucky Personnel Board on March 15, 2015.

CONCLUSIONS OF LAW

1. "A classified employee with status shall not be . . . otherwise penalized except for cause." KRS 18A.095(1). Appointing authorities may discipline employees for lack of good behavior for the unsatisfactory performance of duties. 101 KAR 1:345, Section 1.

2. Appellee issued Ms. Bamazi a three-day disciplinary fine by letter of February 13, 2015 (Hearing Officer's Exhibit 1). That penalization was based on an allegation of lack of good behavior by insubordination on January 17, 2015, when Appellant refused mandation to work overtime. Appellant was alleged to have violated Hazelwood Center's Policy 7.21, Mandatory Overtime, and Hazelwood Center's Policies/Procedures 7.13.2, Misconduct: Non-Threatening, as well as the Cabinet for Health and Family Services' Personnel Procedure 2.1, Employee Conduct. Her actions were further alleged to constitute a lack of good behavior under 101 KAR 1:345, Section 1. The three-day disciplinary fine resulted in a reduction in wages in the amount of \$304.88.

3. The evidence shows that Mamayou Bamazi did refuse to work mandatory overtime on January 17, 2015. Appellee followed proper policy in first requesting volunteers for such overtime, in compliance with Hazelwood Policy/Procedures 7.21. There was an insufficient number of volunteers and thus, mandatory overtime was properly initiated. On that date the Appellant did not qualify for the mandatory overtime exemption.

4. While the term "insubordination" has a negative tenor, such behavior includes a refusal to follow the directive of a supervisor or superior. On January 17, 2015, the Appellant, by refusing mandation, was insubordinate and, therefore, violated Policy/Procedure No. 7.13.2. Such conduct constituted a lack of good behavior. Therefore, Appellee has demonstrated by a preponderance of the evidence that the disciplinary action taken in the nature of a three-day disciplinary fine in the sum of \$304.88, by letter of February 13, 2015, was taken with just cause and was neither excessive nor erroneous.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **MAMAYOU BAMAZI VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2015-051)** 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 Roland P. Merkel** this 14th day of October, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Matthew Perdue
Mamayou Bamazi