

Hon. James Maxson
Susan C. Boyd

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-253**

SUSAN C. BOYD

APPELLANT

VS.

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

**EDUCATION AND WORKFORCE DEVELOPMENT CABINET
THOMAS O. ZAWACKI, APPOINTING AUTHORITY**

APPELLEE

** ** *

This matter came on for an evidentiary hearing on February 27, 2015, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Roland P. Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellant, Susan C. Boyd, was present and not represented by legal counsel. Appellee, Education and Workforce Development Cabinet, was present and represented by the Hon. James Maxson. Also present as Agency representative was Ms. Misti Hodges.

The issue in this case pertains to the disciplinary action taken against the Appellant, that is, the one-day suspension from duty and pay from her position as Unemployment Insurance Auditor II effective August 21, 2014, based on allegations of unsatisfactory time and attendance. The burden was on the Appellee to demonstrate by a preponderance of the evidence that there was just cause for this disciplinary action and that the one-day suspension was neither excessive nor erroneous.

The rule separating witnesses was invoked and employed throughout the course of the proceedings. Each party presented their respective opening statement.

BACKGROUND

1. The first witness for the Appellee was **Misti Hodges**. Ms. Hodges is the Unemployment Insurance (UI) Audit Area supervisor with a worksite at Madisonville, Kentucky. She is the Appellant's direct supervisor. Ms. Hodges briefly described her duties and those of Ms. Boyd. She described Ms. Boyd as a very capable, talented and intelligent employee who had achieved a CPA. However, her overall history of performance is "hit and miss" having a good year, followed by a lower rated year, followed by a good year, etc. Ms. Boyd usually received annual evaluations in the "Good" category.

2. Appellant was required to work from 8:00 a.m. to 4:30 p.m. She had previous problems with time and attendance. She had been granted Family Medical Leave Act (FMLA) accommodations from and since the time of her husband's accident.

3. It is extremely important for supervisors to know when auditors will and will not be in the office. The Appellant is the only local representative in her area for UI Tax and the only one able to answer questions in that area from the public. She also performs other duties.

4. If an employee she supervises is not going to be in the office, Ms. Hodges prefers such employee give her notice.

5. On January 10, 2014, a Performance Improvement Plan (PIP) had been issued to the Appellant (Appellee's Exhibit 1). She met with Appellant again on February 10 and March 11. By March 11 Appellant had shown no real improvement in her time and attendance, even taking into account the FMLA accommodations. From and after the March 11 meeting, Appellant was required to contact Hodges before 8:15 on any morning she was unable to report to work by 8:00. Appellant did not have a home telephone or internet access. It was agreed between them that Ms. Boyd would send text messages as her phone would be satisfactory for that purpose. Boyd was required to send a text stating the time she estimated she would arrive at the office. If she later determined she could not make it by such time, Appellant was required to text Hodges with a new time; however, a second such text was required before expiration of the arrival time stated in the immediately preceding text.

6. Ms. Hodges noticed that after the March 11 meeting there was no significant improvement in Appellant's time and attendance. Hodges began to keep a log showing the dates and times Appellant sent texts, the accompanying estimated times of arrival, and the times Appellant sent the text to notify that she had arrived. Every Auditor under her supervision was required to send a text to advise when they would leave the office or be back in the office. She identified Appellee's Exhibit 2 as a true copy of the log she kept for Appellant. On 28 percent of the workdays Appellant had sent a text after the required 8:15 a.m.

7. She identified Appellee's Exhibit 3 as the screen shots she had taken from her own telephone showing the text messages from and to Appellant. She identified Appellee's Exhibit 4 as the printouts of e-mails she received from Appellant when Ms. Boyd announced her arrival at the office.

8. There were fifteen examples up to April 15, 2014, of Appellant having not sent timely notification to Ms. Hodges. As a result she was issued a verbal reprimand.

9. After April 15 Appellant performed much better until May 2 when she provided no notice at all of her absence. Due to this incident Appellant was issued a written reprimand (Appellee's Exhibit 5).

10. Following issuance of the written reprimand there were two more late occurrences, as well as one incident of unauthorized leave. On July 8 through 10 of 2014 there had been a field audit meeting for all state auditors at Lake Cumberland State Park. The meeting location was approximately a two-hour drive from Appellant's residence. The meetings started each morning at 11:00 a.m. All participants were required, if they had the time, to report first to their respective office to work. After the meeting concluded, again, if they had time, they were required to report back to work until the end of the workday.

11. On July 10 Appellant left the meeting about noon when that meeting ended. She was accorded a one-hour lunch break which lasted to 1:00 p.m. Driving back to her office would have taken anywhere between two and two and a half hours making her arrival time no later than 3:30 p.m. She would have then been required to work from 3:30 to 4:30 p.m. that day at her office. However, when Appellant left the meeting she went home. Subsequently she recorded that one hour as annual leave on her timesheet. The witness identified Appellee's Exhibit 6 as a copy of Appellant's timesheet for that period. On p. 1 it shows Appellant coded her one hour on July 10 as annual leave. She was thereafter required to change it to one hour unapproved leave without pay, as shown on p. 2 of that exhibit.

12. On July 31, 2014, as shown on p. 5 of Appellee's Exhibit 2, Appellant had sent a text at 8:45 a.m. indicating she would arrive by 9:30 a.m. She thereafter texted at 9:22 a.m. indicating she would arrive by 9:35 a.m. She then sent a text indicating she arrived at 9:31 a.m. Appellant failed to send the first text by 8:15 a.m. and therefore was thirty minutes late providing that notification.

13. On August 12, 2014, shown on p. 6 of Appellee's Exhibit 2, Appellant sent a text at 8:35 a.m. indicating she would arrive by 8:50 a.m. Another text was sent indicating she signed in at 8:43 a.m. The initial text should have been sent by 8:15 a.m. and in this instance had been twenty minutes late.

14. Based on these last three incidents, Ms. Hodges believed the matters needed to be addressed to prevent recurrences. She herself did not participate or have any input on the level of discipline to be issued. She reported the facts up her chain of command.

15. A letter dated August 25, 2014, was generated by the Appointing Authority, notifying Appellant she would be suspended for one-day. (Appellee's Exhibit 7.) Ms. Hodges delivered the suspension letter to the Appellant. Appellant told her at that time she had not been able to keep a copy of the July 31 text, but did have a copy of the August 12 text. She showed that text to Ms. Hodges and it showed that on August 12 she had sent the first text message in a timely manner.

16. Appellant had asked her after the July 10 incident, whether anything else or any other repercussions would result from that event. The witness told her, as far as she knew, nothing at that point would be done.

17. The next witness for the Appellee was **Elizabeth Steinle**. Ms. Steinle is the Director of Human Resources for the Education and Workforce Development Cabinet and also the designated Appointing Authority for personnel actions.

18. She identified Appellee's Exhibit 7 as the August 25, 2014 suspension letter she had authored. When a request for discipline was received, supporting information was requested. The letter was then drafted. Ms. Steinle reviewed everything and considered the totality of the circumstances. She considered the past disciplinary actions issued to Appellant; the time span between such disciplinary actions; the timing of the last disciplinary action; how many incidents were involved in this particular matter; other similar actions; and an appropriate level of progressive disciplinary action. Upon consideration of all these factors, and taking into account the progressive disciplinary policy, she felt it appropriate that in view of the most recent written reprimand issued the prior spring, a one-day suspension was appropriate.

19. The Appellee rested its case.

20. The sole witness for the Appellant was the Appellant, **Susan C. Boyd**. Ms. Boyd is employed by the Education and Workforce Development Cabinet as an Unemployment Insurance Auditor II in the Office for Employment and Training. She specifically addressed the three incidents identified in the suspension letter.

21. Upon discussion with Ms. Hodges of the July 10, 2014 incident, Boyd asked her whether there would be any further repercussions. Hodges told her "no." Boyd was surprised to subsequently discover this incident comprised a part of the suspension letter. She does not agree that it should have been part of the letter or a basis for the suspension.

22. Ms. Boyd does not have a house phone or good telephone reception where she lives. She does have a pre-paid phone plan on her cell phone and did indeed choose to send notifications to the employer by text. She was unaware that Ms. Hodges had not received the texts she sent on time on July 31, 2014. Hodges did not notify her that she did not receive the text in a timely manner.

23. She was able to retain on her phone the text message she sent to the employer on August 12, 2014. After showing Appellee's counsel the cell phone message directly from her phone, she displayed the message to the Hearing Officer. That message, read by the Hearing Officer, showed that it was sent on August 12, 2014, at 8:01 a.m. to "Misti" on her cell phone with the message "8:45," signifying Appellant's estimated time of arrival at the office. She did not receive immediate notice that there had been a problem with this text.

24. Appellant rested her case. There were no further witnesses.

FINDINGS OF FACTS

1. Susan C. Boyd, the Appellant, is a classified employee with status. At the time of the subject disciplinary action, she was employed as an Unemployment Insurance Auditor II by the Education and Workforce Development Cabinet. Her regular work hours were 8:00 a.m. to 4:30 p.m.

2. Ms. Boyd's husband had been involved in an accident. From and since that accident she had been accorded Family Medical Leave Act accommodation.

3. On January 10, 2014, Ms. Boyd was placed on a Performance Improvement Plan (PIP) for time and attendance problems (Appellee's Exhibit 1). Misti Hodges, Unemployment Insurance Audit Area Supervisor, who was Appellant's supervisor, met with Boyd on February 10 and March 11.

4. From and after March 11, Appellant was required to follow the following procedure when she knew she would not be able to report to work by 8:00 a.m.:

- a. She was to send text notification to Ms. Hodges no later than 8:15 a.m. that morning;
- b. Her text was to indicate her estimated time of arrival (ETA) at work;
- c. If she determined she could not arrive by such ETA, she was required to send Hodges another text prior to expiration of the ETA to advise of a new ETA;

- d. In any event, she was then required to text Hodges her actual time of arrival.

Appellant agreed to utilize text messages as the best way she could communicate with her employer.

5. After March 11, Hodges kept a log of texts received from the Appellant (Appellee's Exhibit 2). Up through April 15, 2014, Appellant had failed to send timely texts on fifteen different occasions. As a result she was issued a verbal reprimand.

6. On May 2, 2014, Appellant failed to provide any notice of her absence. As a result she was issued a written reprimand (Appellee's Exhibit 5).

7. On July 10, 2014, Appellant attended a field audit meeting at Lake Cumberland State Park. The park was a two-hour drive from her residence. All participants were required to report back to work at the conclusion of the meeting, if enough time remained in the workday.

The meeting that day ended at noon. Appellant is accorded a one-hour lunch break. The drive back to the office from the park would have taken her approximately two and a half hours, with an overall estimated arrival time of 3:30 p.m. Instead of driving to work, Appellant drove home.

On her next timesheet, Appellant recorded this one-hour as annual leave (Appellee's Exhibit 6, p. 1). She was thereafter required to change this to one-hour unapproved leave without pay (Appellee's Exhibit 6, p. 2).

8. On July 31, 2014, Ms. Boyd sent Hodges a text at 8:45 a.m. indicating her ETA at 9:30. Her notification text was thirty minutes late (Appellee's Exhibit 2, p. 5).

9. On August 12, 2014, Appellant attempted to send a text to Hodges at 8:01 a.m. indicating her ETA as 8:45. Hodges never received this text. Boyd sent a subsequent text at 8:35 a.m. amending her ETA to 8:50. Hodges did receive that text (Appellee's Exhibit 2, p.6).

10. Hodges reported the incidents of July 10 and 31, and August 12, 2014, up the chain of command.

11. A request for discipline was received by Elizabeth Steinle, Director of Human Resources for the Education and Workforce Development Cabinet and designated Appointing Authority for personnel actions. She considered the incidents, Appellant's past disciplinary history, similar actions by others and accompanying discipline. Taking into account a policy of progressive discipline, she decided a one-day suspension was appropriate.

12. A suspension letter was drafted which Steinle signed and had delivered to the Appellant (Appellee's Exhibit 7). The discipline was issued based on allegations of poor work performance, specifically involving time and attendance.

13. Appellant timely filed her appeal of this disciplinary action with the Kentucky Personnel Board.

CONCLUSIONS OF LAW

1. A classified employee with status shall not be suspended, 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. A suspension shall not exceed thirty days. 101 KAR 1:345, Section 4(1).

2. Appellee issued Ms. Boyd a one-day suspension by letter of August 25, 2014 (Appellee's Exhibit 7). That suspension was based on an allegation of unsatisfactory performance, allegations of attendance problems and absence without leave, citing 101 KAR 1:345, Section 1; 101 KAR 2:095, Section 2; and 101 KAR 2:102, Section 10.

3. Appellant and her supervisor had entered into an agreement that from and after March 11, 2014, should Ms. Boyd be unable to report to work by 8:00 a.m., she would send a text message to Misti Hodges no later than 8:15 a.m. In that text message she was to indicate her estimated time of arrival. In the event Boyd later discovered she could not meet that ETA, she was required to send another text prior to the lapse of the first ETA, to indicate a new ETA. She was then required to send a text notifying Hodges of her actual arrival time.

4. On July 10, 2014, Appellant attended a field audit meeting at Lake Cumberland State Park. Although required to report back to work following the noontime conclusion of the meeting that day, she drove home.

5. Subsequently, she recorded the one-hour of time away from work as annual leave. This had not been approved by the employer. Appellant was thereafter required to change the code to one-hour unapproved leave without pay.

6. On July 31, 2014, Appellant sent a text to Ms. Hodges at 8:45 a.m. indicating she would arrive at work by 9:30 a.m. She failed to send the text by 8:15 a.m. and, therefore, had been thirty minutes late in providing that notification.

7. On August 12, 2014, Appellant sent a text to Ms. Hodges at 8:01 a.m. indicating she would arrive at the office by 8:45. This was shown by the text message retained by Appellant on her cell phone. Apparently there had been some technical difficulty that prevented Ms. Hodges from receiving that text. The Hearing Officer believes the Appellant when she produced evidence showing her notice had been timely. Since that date, the parties have modified their notification system to take into account the possibility of technical difficulties in receipt of such texts.

8. Appellant had previously been issued discipline of a verbal reprimand and a written reprimand for time and attendance problems.

9. Appellee has shown by a preponderance of the evidence that there was just cause for disciplinary action against the Appellant, based on the incidents of July 10, 2014, and July 31, 2014. Appellee employs progressive discipline, and, therefore, it has shown by a preponderance of the evidence that the disciplinary action taken was neither excessive nor erroneous.

RECOMMENDED ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Kentucky Personnel Board that the appeal of **SUSAN C. BOYD VS. EDUCATION AND WORKFORCE DEVELOPMENT CABINET (APPEAL NO. 2014-253)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13.B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal, a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

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

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

ISSUED at the direction of **Hearing Officer Roland Merkel** this 30th day of March, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. James Maxson
Susan C. Boyd