

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2012-244

CRYSTAL BREWER

APPELLANT

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

DEPARTMENT OF VETERANS AFFAIRS
HEATHER FRENCH HENRY, APPOINTING AUTHORITY

APPELLEE

** ** *

The Board at its regular April 2015 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated March 3, 2015, Appellant's motion to file late exceptions, Appellee's response and being duly advised,

IT IS HEREBY ORDERED that the Appellant's Motion to File Late Exceptions is **DENIED**.

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be, and they hereby are approved, adopted and incorporated herein by reference as a part of this Order, and the Appellant's appeal is therefore **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 21st day of April, 2015.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Dennis Shepherd
Crystal Brewer

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2012-244

CRYSTAL BREWER

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VS.

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

DEPARTMENT OF VETERANS AFFAIRS
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APPELLEE

** ** ** ** **

This matter came on for evidentiary hearing on January 21, 2015, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the R. Hanson Williams, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Crystal Brewer, was present and was not represented by legal counsel. The Appellee, Department of Veterans Affairs, was also present and represented by the Hon. Dennis Shepherd.

BACKGROUND

1. This matter involves the termination of the Appellant from the Agency by letter dated August 28, 2012. The termination letter is attached hereto as **Recommended Order Attachment A**. In summary, the Appellant was dismissed following some time and attendance issues and, after having been placed on restricted leave, the Appellant called in on July 19 and July 20, 2012, stating she would not be at work and, allegedly failed to speak to her supervisor or supply her with a physician's excuse.

2. The burden of proof was placed upon the Appellee by a preponderance of the evidence to show that the disciplinary action taken was appropriate and was neither excessive nor erroneous after all surrounding circumstances. In addition, the Appellant declared that she would not be pursuing any claim of retaliation for having filed an earlier Workers' Compensation claim.

3. Appellant, **Crystal Brewer**, was called as Appellee's first witness. She testified that she had been employed prior to termination at the Eastern Kentucky Veterans' Center in (EKVC) at Hazard, Kentucky. She was employed as a Nurse Aide State Registered I (NASRI). Her duties included providing any types of service needed to the veterans housed at the Center.

4. Appellant then identified Appellee's Exhibit 1, a collective exhibit of prior counseling, reprimands, and disciplinary actions imposed upon the Appellant.

5. Specifically, the Appellant had received a Written Counseling on May 25, 2011, for failure to report to work and to notify anyone; a written reprimand dated December 14, 2011, for at least five instances of failing to communicate to a supervisor that she would be tardy and six instances where the Appellant arrived tardy without notice; a one-day suspension dated January 25, 2012, for acting in an unprofessional and disrespectful manner toward her supervisor; and a three-day suspension by letter dated July 9, 2012, for unprofessional and disrespectful conduct.

6. In addition, the Appellant was given an intent to dismiss letter dated July 27, 2012, informing her of her right to request a pre-termination hearing. After having failed to respond to this letter or request a pre-termination hearing, the Appellant was then issued the dismissal letter.

7. The Appellee's next witness was **Gilda Hill**. Before retiring, she was the Executive Director of the Office of the Kentucky Veterans Centers. She stated that there are three such state veterans' homes. As Executive Director, she had the authority to issue the dismissal letter, and testified that she did so, after having followed the progressive discipline policy.

8. The witness then introduced Appellee's Exhibit 3, the Agency's Time and Attendance -- Policy Directive 1. This policy provides that all employees are expected to be on time for work and requires a two-hour advance notice if an employee is to be absent or tardy. The witness explained that adherence to this policy is important so as to allow the Agency to provide the necessary services to the veterans at the various centers.

9. The witness then introduced Appellee's Exhibit 4, the Agency Policy Directive #14 regarding Standards of Professional Conduct. This policy requires employees to refrain from using words or engaging in conduct that undermines or detracts from work performance.

10. Regarding the notice of pre-termination hearing available to the Appellant, the witness testified that after initially giving this to Appellant, that on the day of the scheduled pre-termination, the Appellant called and explained that her attorney was sick. Following various attempts by the Agency to reschedule this, neither the Appellant nor her attorney responded. This caused the Agency to then schedule on its own a pre-termination hearing of which notice was given; again the Appellant failed to appear and was deemed to have waived the pre-termination hearing.

11. The witness then testified that she based her reasons for dismissal primarily on the time and attendance issues which had been exhibited by the Appellant. Specifically, the witness stated that because of such issues the Appellant had been placed on restricted leave, which meant her attendance would be closely monitored and which required a doctor's excuse for any

absences. The witness then added that on July 19 and 20, 2012, the Appellant failed to contact her supervisor or to submit a doctor's statement.

12. On cross-examination, this witness denied ever having seen a letter from the Appellant's former attorney dated August 12, which contained a doctor's excuse. The witness also explained that once an employee is placed on restricted leave, that situation remains even if the employee's supervisor should change.

13. At this point, the witness then identified Appellant's Exhibits 4, 5 and 6, the Annual Evaluations for the years 2009 through 2011. Specifically, the Appellant was rated "Highly Effective" in 2009; "Highly Effective" in 2010 and "Good" in 2011. The witness then noted that on the 2011 evaluation, the Appellant had received a "2" out of a possible 5 points for the time and attendance category. Lastly, the witness denied that the filing of a Workers' Comp Claim by the Appellant had any bearing on her decision to terminate.

14. The Appellee's next witness was **Crystal Compton**. She has been employed at the EKVC as a Nurse Shift Program Supervisor for approximately the last ten years. She explained that the facility has three units consisting of 120 beds. Her duties as Unit Supervisor include overseeing resident care and supervising the employees there.

15. She stated that following Appellant's return from Workers' Comp Leave, she became her supervisor. She issued the written reprimand on December 14, 2011, to the Appellant. This followed her identification on December 7, 2011, of a pattern of time and attendance problems with the Appellant, and that as a result, she placed the Appellant on restricted leave. The restricted leave policy requires that the employee furnish the supervisor with a doctor's excuse and also mandates the employee contact her immediate supervisor regarding any absence. The witness then explained that on or about December 9, 2011, she saw a typed notice from the Appellant's physician placing her on leave for a few days. This notice stated that the Appellant could return to work December 14, 2011. Apparently this doctor's notice was taped to the witness' door and the witness was never personally contacted by the Appellant, although she was available to Appellant.

16. On cross-examination, the witness testified that she supervised the Appellant from approximately November 2011 through January 2012, after the Appellant had returned from an earlier Workers' Compensation leave. She explained that in making the future monthly schedule for each employee, she attempts to complete that and give them to the employees prior to the upcoming month. She added that the Appellant first began her duties on the dayshift under her, but was then given some evening shifts for financial reasons, per the Appellant's request.

17. The Appellee's next witness was **Rita Gilbert**. She has been employed at the EKVC for approximately ten years. She is now a Registered Nurse, but at the time of Appellant's employment was the Nurse Manager/Supervisor over the Appellant for approximately five months.

18. She testified that the Appellant had received written counseling regarding her time and attendance issues and was given a three-day suspension for July 9, 2012, for unprofessional conduct exhibited by the Appellant on April 6, 2012. The explanation for the gap between these two dates was that the Appellant was on medical leave for Workers' Compensation as of April 7, 2012.

19. Appellee closed. The Appellant, **Crystal Brewer**, called herself as her only witness. She testified that she is currently unemployed, but had worked at the EKVC for approximately six years until the time of her termination.

20. She testified that her initial supervisor upon employment was Sarah Caldwell, succeeded by Shawn Thacker for the majority of the time while employed and then Crystal Compton for approximately three months, followed by Rita Gilbert as her supervisor from February until her dismissal in July 2012.

21. The witness testified that after filing a Workers' Compensation Claim, she was placed on leave for approximately five months in 2011 and again for approximately three and a half months beginning April 6, 2012.

22. The witness explained that she began working the nightshift sometime in 2009. She stated that she enjoyed working on that shift and during the periodic times when she was switched between the day and nightshifts, she had trouble sleeping. She explained this caused her to have problems working the dayshift as her body rhythms were upset.

23. On cross-examination, the witness admitted that she had prior time and attendance problems. However, she stated that the majority of those are because of childcare issues and she could not leave her children by themselves. Her husband also worked during the time she was employed at the EKVC.

24. The witness then introduced Appellee's Exhibit 6, which she acknowledged signing and which is an Employee Acknowledgement of Time and Attendance – Policy Directive 1. The Appellant then introduced Appellant's Exhibit 1 an Excuse Slip dated July 19, 2012, from her physician in Hazard, Kentucky, stating that she had been in his office for professional attention on July 19 and 20, 2012. Also introduced as Appellant's Exhibit 2 was an August 7, 2012 letter from her former attorney, which among other things points out that the Appellant had provided an excuse from her physician for the two days mentioned above.

25. There was no testimony from the Appellant that she had submitted the physician's excuse slip for July 19 and 20, 2012, (Appellant's Exhibit 1) to Rita Gilbert or had personally contacted her regarding this absence. Neither was there any testimony from Gilbert that she had seen or received this physician's excuse for July 19 and 20, 2012.

FINDINGS OF FACT

1. The Appellant was dismissed by letter dated August 28, 2012.
2. At the time of her dismissal, the Appellant was on restricted leave which required any requests for leave to be closely monitored. In addition, this required the Appellant to furnish a physician's statement excusing her for any leave taken, and to personally contact her supervisor regarding any such absences.
3. The Appellant failed to do either of those requirements prior to her termination.

CONCLUSIONS OF LAW

1. The Hearing Officer concludes that as a matter of law that the Appellee has proven by a preponderance of the evidence that the Appellant failed to follow the mandates of the restricted leave policy by furnishing a physician's excuse to her immediate supervisor, Rita Gilbert, for the days of July 19 and 20, 2012. Neither did the Appellant contact Gilbert to make her aware of the reason for the absences.
2. The Hearing Officer further concludes that as a matter of law the penalty imposed upon the Appellant was neither excessive nor erroneous under all surrounding circumstances.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **CRYSTAL BREWER VS. DEPARTMENT OF VETERANS AFFAIRS (APPEAL NO. 2012-244)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

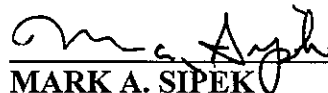
Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are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

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 R. Hanson Williams** this 3rd day of March, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Dennis Shepherd
Crystal Brewer



COPY

DEPARTMENT OF VETERANS AFFAIRS

STEVE BESHEAR
Governor

Office of the Commissioner
1111B Louisville Road
Frankfort, Kentucky 40601
Phone (502) 564-9203
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KENNETH R. LUCAS
Commissioner

August 28, 2012

Ms. Crystal Brewer

Dear Ms. Brewer:

This correspondence is a follow up to the letter dated July 27, 2012 in which you were notified of our intent to dismiss you from the position of Nurse Aide State Registered I with the Paul E. Patton Eastern Kentucky Veterans Center.

In accordance with KRS 18A.095, the previous notification offered you the opportunity to respond to the charges that were outlined, via a pre-termination hearing. Attempts to schedule this hearing were delayed due to the fact that you did not return phone calls. Finally, a pre-termination hearing was scheduled on August 16th 2012. You called on that date and requested that the hearing be postponed due to the illness of your Attorney. I requested that you send me an e-mail requesting that the hearing be delayed. I did not receive the requested e-mail and have had no further contact from you. Finally, a registered letter was sent to you on August 22, 2012 notifying you of the hearing having been rescheduled for August 27, at 1:00. As of this date, you have not picked up the letter and have not contacted my office in any manner. Therefore, you waived your right to a pre-termination hearing.

Therefore, based on the authority of KRS 18A.095, you are hereby notified that you are officially dismissed from duty and pay effective August 29, 2012.

You are being dismissed in accordance with 101 KAR 1: 345, Section 1, which authorizes disciplinary action for lack of good behavior or for unsatisfactory performance of duties. The reason for your dismissal includes both a lack of good behavior and unsatisfactory performance of duties as indicated by the following specific incident:

On December 7, 2011 you were placed on restricted leave status due to you receiving discipline for attendance issues. You were told that your absences would be closely



monitored and that you would have to speak directly with your supervisor, Rita Gilbert RN, Jackson Unit Nurse Manager and supply a physician's excuse when absent. On July 19, 2012 and July 20, 2012, you called into work telling the charge nurse you would not be reporting for your shift. You did not speak to Ms. Gilbert and you did not supply her with a physician's excuse. This action resulted in twenty (20) hours of no pay for unauthorized leave.

You were placed on restricted leave status because you have exhibited a pattern of absenteeism and for repeated violation of the Time and attendance policy. Since that time there has been no improvement. Your actions have placed your fellow employees in undue hardship due to having to cover your shifts in order to adhere to the mission of this facility which states that our Veterans will receive the respect and care which they deserve.

Your actions on this date were a direct violation of:

- EKVC Administrative Policy 7.02.6 (13), Time and Attendance which states that a supervisor may recommend to the appointing authority that an employee be placed in the status of leave restriction. It further states this means the employee's attendance record shows a pattern of absenteeism or tardiness. Leave restriction status requires the supervisor to closely monitor an employee's leave requests. An employee in this status must provide justification to the supervisor in advance of any leave being approved.

The decision to take this action was made after careful consideration of the above policy violation and a thorough review of your work record, and after speaking with those in your chain of command. Every effort has been made to apply a progressive approach to discipline as evidenced by your record as follows:

- 3/6/2007- Written Counseling-Time and Attendance;
- 9-19-2007-Verbal Counseling-Time and Attendance;
- 11-14-07-Written Counseling-Time and Attendance;
- 5/25/2011-Written Counseling-Time and Attendance;
- 12/8/2011-Written Reprimand-Time and Attendance.
- 1/25/12-Suspension-Code of Conduct
- 7/9/12-Suspension-Code of Conduct

In accordance with KRS 18A.095, you may appeal this action to the Personnel Board within sixty (60) days after receipt of this notice, excluding the date notification is received. Such appeal must be filed in writing using the attached appeal form and in the manner prescribed on the form.

Sincerely,



Gilda Hill, OKVC Executive Director

Cc: Secretary, Personnel Cabinet
Personnel File