

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-088

SHA-DONYA BRYANT

APPELLANT

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

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

APPELLEE

** **

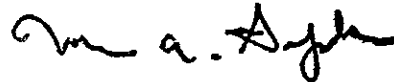
The Board at its regular January 2015 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated December 19, 2014, and being duly advised,

IT IS HEREBY 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 13th day of January, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Rebecca Wooldridge
Sha-Donya Bryant
J.P. Hamm

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-088**

SHA-DONYA C. BRYANT

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 an evidentiary hearing on September 19, 2014, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before E. Patrick Moores, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellant, Sha-Donya C. Bryant, was present and was not represented by legal counsel, although she had been advised of her right to legal counsel in this proceeding. Appellee, the Cabinet for Health and Family Services, was present and represented by the Hon. Rebecca Wooldridge.

I. STATEMENT OF THE CASE

1. **Sha-Donya C. Bryant** appeals the Cabinet's decision of April 16, 2014, in which she was issued a five-day disciplinary fine under an allegation of the lack of good behavior for her refusal to work mandatory overtime. The letter issued by Howard J. Klein, the Appointing Authority, informed Ms. Bryant that she was being disciplined for lack of good behavior by her refusal to comply with her employer's mandatory overtime policy and that pursuant to 101 KAR 1:345, Section 5, she was being assessed a five-day disciplinary fine, to be spread over two pay periods.

2. Ms. Bryant timely filed an appeal with the Kentucky Personnel Board on April 28, 2014, in which she alleged she had not been given adequate notice of the mandatory overtime and that she had not received in-service training of the mandatory overtime policy.

3. A pre-hearing conference was held before the Kentucky Personnel Board on June 12, 2014, during which the Appellant was advised of her right to have legal representation and the Hearing Officer explained the procedures of the Personnel Board for an evidentiary hearing. The matter was scheduled for an evidentiary hearing to be held before the Hearing Officer on September 19, 2014. The issue presented was whether the disciplinary decision by the Cabinet

was taken with just cause and that the penalty imposed was neither excessive nor erroneous.

4. The evidentiary hearing was conducted on September 19, 2014. The Appellee had the burden of proof, which is by a preponderance of the evidence. The hearing was conducted in a half-day presentation of evidence. At the conclusion of the presentation of the evidence, the Appellant chose not to make a closing statement, however, a closing statement was made by counsel for the Appellee.

II. FINDINGS OF FACT

1. The Appellant, **Sha-Donya C. Bryant**, was hired nine years ago by the Hazelwood Rehabilitation Center in Louisville as a Therapy Program Assistant. The behavioral facility serves as a residence treatment facility for persons with intellectual and developmental disabilities. Bryant serves a single resident on a one-to-one basis, although some aides serve four residents. She testified that during her employment she was never required to serve mandatory overtime and did not receive any in-service training on the policy. She testified she only became aware of the mandatory overtime policy in February 2014, but was not made aware that she would be disciplined with fines if she declined a request to do the mandatory overtime. On February 19, 2014, she was informed that she would be required to perform mandatory overtime that evening and she refused to do so.

2. Bryant testified that she is a single mom starting work at 6:00 a.m. and has to drop her child off at a day care facility at 5:30 a.m. She said that she was told a half-hour before the end of her shift that she was going to have to work until 10:00 p.m. that evening and that she was not in a position to have anyone pick up her child. She stated that she had no choice but to decline to work the additional hours. She claimed that if the supervisor had told her of the overtime requirement much earlier during her shift, she may have been able to arrange for her child to be picked up and cared for until she could leave. She was shown a statement from her supervisor of the persons asked to work the overtime, and it did not provide any reason given for Bryant's refusal. However, Bryant was insistent that she told her supervisor about her child care problem.

3. Bryant was shown an In-service Training Report dated 10/1/13 with a roster of attendees on the topic of "Mandatory Overtime." She acknowledged that her signature was on the report. She claimed that while she was made aware of the mandatory overtime policy, she said she was not told her refusal would result in her being penalized with a fine taken from her pay. She further complained that she was not told she would need to work mandatory overtime until the end of her shift, which left her with no opportunity to arrange for alternate care for her child. She said she is responsible for one resident, whose care needs would not allow her to leave to pick up her child and take her to an alternate care provider and then return to work.

4. Bryant acknowledged that she had previously been disciplined for refusing to work mandatory overtime only a month earlier, on January 7, 2014, which resulted in her receiving a three-day suspension. She denied, however, knowing that her subsequent efforts would result in a loss of pay.

5. **Tina Ashley** is the Human Resources Director of the Hazelwood Center, a position she has held for the last three years. Her responsibilities include payroll, assigning employee work schedules, and handling disciplinary matters. She testified that she received the request for disciplinary action against Bryant, which she reviewed. Ashley pulled Appellant's prior disciplinary record and found that she had previously been suspended for refusing mandatory overtime. Ashley testified that this was a major disciplinary action and that she forwarded the matter to the Cabinet. She added that she doesn't do suspensions, as that is a matter for the Cabinet.

6. Ashley testified that the Mandatory Overtime Policy is a separate personnel policy of the Hazelwood Center. Since the facility operates 24-hours, 7-days per week, the need to provide adequate staffing to maintain a safe and secure environment for the patients, residents, staff and visitors necessitates the need for the mandatory overtime policy. The Hazelwood Personnel Policy No 7.21 clearly states that refusal to work mandatory overtime will result in disciplinary action which will be progressive in nature. She said she understood the policy was based on a Federal regulation which required the facility not be understaffed and to prevent Office of Inspector General deficiencies.

7. Ashley testified that the decision to fine Bryant came from the Cabinet level and not from anyone at Hazelwood. Ashley said that the mandatory overtime policy always existed since she started at Hazelwood in 1994, but this year was the first she knew of the Cabinet using fines in their disciplinary actions. Nor was she aware of any specific announcement that the disciplinary actions would result in monetary fines. She testified that the policy states that the discipline would be progressive in nature. She said the fine is equivalent to a five-day suspension from work and pay.

8. **Howard Jay Klein** is the Division Director of Employment Management for the Cabinet, and the Appointing Authority. He prepared the letter setting forth the disciplinary action against Bryant. He said that since this was her second occurrence of refusing mandatory overtime, the Cabinet's progressive discipline policy called for a five-day suspension. He testified that the fine was the equivalent of her being suspended from work for five days without pay.

9. Klein testified that the fine had been in the regulations for a long time. He said, this past year, the Personnel Cabinet started figuring out how the fine could be imposed without dropping below the minimum wage or violating the Fair Labor Standards Act's policy on fines. He said the reason for the mandatory overtime policy at the Hazelwood facility is the staffing

needs and that enforcement of the policy by suspending the worker doesn't help the situation. The facility needs their employees taking care of the residents. Since the Appellant had already received a three-day suspension, the next step in the progressive discipline policy is a five-day suspension. He checked with the Personnel Cabinet and made sure that the five-day fine would be done correctly. He testified that the first paragraph of his April 16 disciplinary letter to Bryant addressed the five-day fine which was to spread over two separate pay periods

10. Klein answered the issue of the facility giving notice so late during the shift of the employee on duty. Each employee has access to the mandatory overtime list as to where they stand on the rotating order of service. Further, the facility often is not aware of the overtime needs until the last minute of a shift when the employee scheduled to report fails to show up for work and fails to call in. He said the "No show, No call" situation is a frequent problem which impacts their staffing needs. He has no knowledge of how the facility goes about giving the mandatory overtime, but because the facility often doesn't know until the end of a shift that a scheduled worker is not showing up, they have to utilize available staff for mandatory overtime.

11. Klein said he did some research recently on the matter of fines being levied as a disciplinary matter when he was seeking suggestions of how a letter should be worded, and to see how other states handled the matter. He said he was not aware of any legal actions that tested the fine procedure. He said that the purpose of the fine being levied is to enforce the need to maintain a staffing level and not defeat the purpose of the disciplinary action by making employees stay away from work. He testified that the fine is the equivalent to the number of days the employee would be forced to miss work. This way, the employee's loss of pay is spread over a couple of pay periods to ease the penalty on the employee while maintaining the staffing needs for the employer.

12. **Shawn Estep** has been the Human Resources Branch Manager for the Cabinet since November 1, 2010, and has responsibility over the Hazelwood Center. He testified that he received and signed the request for disciplinary action against Bryant and four other employees who refused the mandatory overtime. He said three employees got a three-day fine, and two received progressive discipline of a five-day fine. He testified that their review of Ms. Bryant's prior disciplinary actions revealed that she had two prior verbal warnings, and a prior three-day suspension, the latter for refusing mandatory overtime. He said the fine was calculated by the Personnel Cabinet, and that it was spread over two pay periods, which was explained to Bryant in the first paragraph of Mr. Klein's April 16 letter explaining the disciplinary action.

13. **Dinah Bevington** has been the General Counsel for the Personnel Cabinet since 2008. She said her involvement in this matter was to review the proposed disciplinary fine and make sure it was in compliance with state and federal laws. She also researched the FLSA requirements. Her testimony was that the fine imposed was compliant with the law.

III. CONCLUSIONS OF LAW

1. The Kentucky Legislature has the authority to make laws and regulate all conditions of employment applicable to all employees, public and private. KRS 18A.0751 specifies that the Personnel Board shall promulgate comprehensive administrative regulations for public employees in classified service to the Commonwealth governing dismissals, suspensions, fines and other disciplinary measures. The current regulations have been in effect since March 8, 1989, and are set forth in 101 KAR 1:345, which describes the discipline that may be imposed on employees for lack of good behavior or the unsatisfactory performance of duties. Section 5 provides that a disciplinary fine may be imposed and that shall "not exceed ten (10) days' pay."

2. One of the problems facing employers in both the private and public sector is the situation where employees who are expected to show up for work are a "no show, no call." Tina Ashley, Hazelwood's Director of Human Resources, testified that since the facility operates 24-hours, seven days per week, it has a critical need to provide adequate staffing in order to maintain a safe and secure environment for the patients, residents, staff and visitors. This necessitates the need for the mandatory overtime policy.

3. Hazelwood has a separate specific Personnel Policy No. 7.21, concerning mandatory overtime, under which the first provision states that "facility management **will require** individuals to work overtime, **as needed**, to maintain a safe and secure environment and **to maintain services**." (Emphasis added.) The policy further provides that should a volunteer not be available, the employee next on the rotating list for mandatory overtime "is to be initiated." Under this policy, "refusals to work mandatory overtime will result in a request for disciplinary action. Discipline will be progressive in nature."

4. Documentation was produced showing the Appellant underwent training as recently as October 2013 concerning the mandatory overtime policy. She was therefore aware of the requirements of the policy. Furthermore, the rotating list of employees facing immediate mandatory overtime service is available to all employees. The Appellant's argument that she was not aware that she could be fined does not carry much weight as she had just undergone a three-day suspension the previous month; she was aware of the mandatory nature of the overtime policy and that her next violation would result in progressive discipline. The loss of pay she received is the equivalent of a five-day suspension; however, she received the benefit of having it spread over two pay periods.

5. The Appellant's concern about her child's care cannot be a condition of her employment and provide her a pass from mandatory overtime. By her own admission, she is employed in a vital position providing one-on-one aide for a needy resident of a facility providing around-the-clock care for persons with intellectual and developmental disabilities. This resident under the care provided by the Appellant is a person in obvious need of constant

individual attention, and the Appellant's service provides a critical element of that resident's care.

6. While sympathy is appropriate to Appellant's situation as a single mother with day care restrictions imposed on her child's oversight while she is working, she was aware of the critical requirements of her job and the obligations it imposed. It is unquestionably a tough situation the Appellant faces trying to balance her family responsibilities with the needs of the resident she was paid by the Commonwealth to care for, and the burden on the employer in seeing to it that the constant care is continuously provided to the resident in accordance with state and federal regulations. In that situation, the Appellant was forewarned of the occasional need for her to provide mandatory overtime sufficient to impose on her a need to have available emergency situational care for her child.

7. No evidence was provided by the Appellant as to what good faith efforts she made concerning alternative care needs for her child, especially since she had just undergone a three-day suspension only a month earlier for the same offense. In fact, the Appellant's conduct of leaving her duties evinces a willful disregard for the employer's interests, the needs of the resident under her care, and constitutes conduct demonstrating a lack of concern by the Appellant for her job or her coworkers forced to cover for her. Further, the critical needs imposed at the end of the shift for the resident and the facility prohibits the employer from being able to make an accommodation.

8. The evidence clearly established the special circumstances creating the critical need for the mandatory overtime policy at Hazelwood, in order for the Cabinet to maintain adequate staffing around the clock to meet the specific special needs of each resident at the Hazelwood facility, as required by state and federal regulations. The evidence further established that Bryant had full knowledge of the policy and that she had just previously received a three-day suspension for refusing mandatory overtime.

9. The evidence established that the Hazelwood facility has a critical need for a means to enforce the mandatory overtime policy, and that suspending employees defeats the purpose of the policy for maintaining adequately trained staffing. The evidence also established that Bryant refused the mandatory overtime and left. Such conduct on her part imposed a burden on the facility and impaired the needs of the resident she was assigned to provide aide to.

10. The Hearing Officer concludes that the Cabinet met its burden of proof to establish the disciplinary action imposed on the Appellant was for just cause, and the fine assessed was neither erroneous nor excessive.

IV. RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **SHA-DONYA C. BRYANT VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2014-088)** 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).

Any document filed with the Personnel Board shall be served on the opposing party.

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 the **Hon. E. Patrick Moores**, Hearing Officer, this 19~~th~~ day of December, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Rebecca Wooldridge
Sha-Donya C. Bryant