

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-074**

MICHELLE CARMODY

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 2, 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 7 and substitute the following:

7. The evidence of record reveals that the three-day disciplinary fine imposed upon Ms. Carmody was standard for a first refusal to work mandatory overtime. However, the Board in further reviewing the matter concludes that the three-day disciplinary fine imposed upon Appellant was excessive given the overall nature of the matter in view of Appellant's previous work record and, thus, will reduce the disciplinary fine accordingly. 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 **MICHELLE CARMODY V. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2015-074)** 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. Jennifer Wolsing
Michelle Carmody
J.P. Hamm

COMMONWEALTH OF KENTUCKY
KENTUCKY PERSONNEL BOARD
APPEAL NO. 2015-074

MICHELLE CARMODY

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 Tuesday, August 25, 2015, at 9:30 a.m., at 28 Fountain Place, Frankfort Kentucky before Brenda D. Allen, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Michelle Carmody, was present at the evidentiary hearing and was not represented by legal counsel. The Appellee, Cabinet for Health and Family Services (the "Cabinet"), was present and was represented by the Honorable Jennifer Wolsing. Also present on behalf of the agency was Agency representative Tarron Ray, Director of Personnel Services for Hazelwood Center. Appellant objected to the Agency representative's presence in the hearing room during testimony. The objection was **OVERRULED**.

The Hearing Officer outlined the burden proof and the issue before the Hearing Officer. The issue was the appropriateness of a three-day disciplinary fine imposed upon the Appellant for lack of good behavior for refusing to work mandatory overtime. The burden of proof was upon the Appellee to prove by a preponderance of evidence, that the penalty was neither excessive nor erroneous.

BACKGROUND

1. The Appellant timely appealed the imposition of a disciplinary fine. After prehearing conferences and discovery, the Cabinet stipulated that as it relates to a refusal to work mandatory overtime, the penalty imposed upon the Direct Care Professionals who were assigned to Hazelwood by a medical staffing agency was less stringent than the penalty imposed upon merit employees governed by Hazelwood Policy No. 7.21.

2. The Appellant waived opening statement. After an opening statement by the Appellee, the Cabinet called the Appellant, **Michelle Carmody**, as its first witness.

3. Ms. Carmody testified that she is employed by Hazelwood as a Direct Care Professional (DCP), a position she has held for nearly three years. She outlined her responsibilities are to assist the clients with activities of daily living to include changing and dressing her clients. She is also responsible for and trained in a wide range of patient care and has worked in the field prior to Hazelwood for many years.

4. The Appellant identified what was marked as Appellee's Exhibit 1, Hazelwood Center's policy on Mandatory Overtime. The Appellant testified that she received training on the policy and believed the training occurred in November 2014. She testified that she did not recall being provided a copy of the policy, but does recall that the trainer went over the document and mentioned that the discipline for "agency" staff was different than the discipline for "merit staff." Appellee's Exhibit 1 was entered into the record without objection.

5. The Appellant identified Appellee's Exhibit 2, the letter dated March 31, 2015 imposing the three-day disciplinary fine upon her. She testified that on March 2, 2015, her supervisor, Detra Bryant, came around and asked for volunteers to work the next shift from 6:15 a.m. to 2:15 p.m. The witness testified that she volunteered to work until 11:15 p.m., but was told that she could not volunteer to work a part of the shift. Ms. Carmody stated that she was then told that she was being mandated to work the entire shift. Ms. Carmody testified that Ms. Bryant did not follow the appropriate procedure, which was to make rounds to all of the staff to determine if there were enough volunteers to staff the shift. After that, the discussions about mandatory overtime, (mandations) were to begin. Ms. Carmody testified that the conversation with Ms. Bryant about volunteering and being mandated to work took place at the same time. Appellee's Exhibit 2 was entered into the record without objection.

6. The Appellee then called **Detra Bryant** as its second witness. Ms. Bryant testified that she is a Therapy Program Supervisor Assistant (TPSA) with the Hazelwood Center and that she is responsible for staffing, training and evaluations. She identified Appellee's Exhibit 3 as an email that she sent outlining what occurred on the day that Ms. Carmody and others refused mandation. She stated that she first asked for volunteers for the upcoming shift, and then when staffing was still inadequate, she began to mandate according to the mandation list. Ms. Bryant testified that when she goes through the process, she always has another supervisor with her as a witness. She testified that on March 1st she took supervisor Missy Leach with her. Ms. Bryant testified that she always conducts her first round with the staff asking for volunteers around 10:30 p.m. Later, she comes back through with the supervisor for mandation. She testified that the mandation list is kept by the sign-in sheet so that each DCP can see his or her position on the list when they sign in and out for their shift and for breaks. Appellee's Exhibit 3 was entered into the record without objection.

7. The witness identified Appellee's Exhibit 4 as the mandation list for March 1, 2015. She stated that the list is updated by the timekeeper and includes all third shift staff, both agency and merit. She testified that every person on the list may not be present on that particular day because it could be a day off. She testified the handwriting on the document is hers and it details who volunteered, who refused mandation and the time of the refusal. She testified that Ms. Carmody did not volunteer and that when she refused the mandation, she cited childcare as the reason. Appellee's Exhibit 4 was entered into the record without objection.

8. The next witness to testify on behalf of the Appellee was **Missy Leach**. Ms. Leach testified that she is a TPSA and that on the night in question, she accompanied Ms. Bryant as Ms. Bryant sought volunteers and was with her again later when she began to mandate overtime. She testified that on this night, Ms. Carmody was sitting one-on-one with a client and that she did not volunteer when asked. She testified that Ms. Carmody later refused the mandation. She stated that she did not recall whether Ms. Carmody provided a reason for the refusal. She testified that the timekeepers update the mandation list daily during the week, and that on the weekends, when the timekeepers are off from work the supervisors have to update the list themselves.

9. The next witness to testify on behalf of the Cabinet was **Tarron Ray**, the agency representative. Mr. Ray testified that he serves as the Director of Personnel Services in the Human Resources Department for Hazelwood Center. Mr. Ray testified that he has been employed for seven months and that Hazelwood is a 24-hour per day, 365-day per year facility, for the developmentally and intellectually disabled. He testified that there are both residential services and group homes in the community and that the services they provide keep the clients engaged in active treatment. He stated that it is an Intermediate Care Facility and it requires a certain amount of staffing to maintain the safety for staff, visitors and clients.

10. He stated that if there is insufficient staff for an upcoming shift, they first seek volunteers and then, if necessary, implement mandatory overtime. He stated that they utilize a list and that the staff on the list is in order based upon the last time the person worked mandatory overtime or volunteered. He testified that if a merit employee refuses to work mandatory overtime, it is a significant occurrence and the consequences are outlined in Policy 7.21, Appellee's Exhibit 1. He stated that in the few months that he has been at Hazelwood, disciplinary fines have been imposed upon the staff because suspensions created a staffing problem, while fines allowed the person to work at a reduced rate.

11. Mr. Ray testified that "agency" staff are not employed by Hazelwood, but they are employed by another company and assigned to Hazelwood. He stated that when agency staff refuse to work mandatory overtime, the refusal is documented and then provided to the staffing agency to address. He testified that all employees are advised that because of the nature of their work, staffing is key and mandatory overtime is a part of the job.

12. The witness identified Appellee's Exhibit 5 as the Cabinet's Policy 2.1. He testified that Ms. Carmody's refusal to work overtime constituted a violation of Number 20 under the category "duties." He testified that there is an exemption from mandatory overtime based upon illness if the employee provides a physician's statement, but because Ms. Carmody did not fit within the exemption, she was subject to the discipline outlined in Policy 7.21. Mr. Ray identified Appellee's Exhibit 6 as the Hazelwood policy on Misconduct: Non-threatening and testified that Ms. Carmody's conduct was a violation of procedure 1.A, and J.

13. On cross-examination, Mr. Ray testified that agency employees are not employees of the Cabinet and while they are provided a copy and sign off on Policy 7.21 like the merit employees, Hazelwood is without the ability to enforce the discipline outlined in the policy upon those who are not employed by the Cabinet. He testified that they document the violation of the policy and provide it to the agency staff's employer to address.

14. The next witness to testify on behalf of the Appellee was the Appointing Authority, **Howard J. Klein**. He testified that he serves as the Director in the Office of the Human Resource Management, a position he has held for 15 years. He testified that adequate staffing for Hazelwood is important. He testified that the Office of Inspector General is an extension of the federal government and conducts surveys or investigations to ensure compliance with the rules. He testified that a refusal to work mandatory overtime is insubordination and it is treated differently than general time and attendance matters. He stressed the importance of adequate staffing and testified that he issued the three-day disciplinary fine letter to Ms. Carmody. He testified that this is now the standard discipline for a refusal to work mandatory overtime.

15. The Cabinet rested.

16. The Appellant then began her case in chief and called **Ramsey Ismaili, Trenina "Nicole" Watkins, Linda Weller** and **Todd McGuire**, each of whom serves as a TPSA at Hazelwood. Through separate testimony, all of the witnesses stated that agency staff are given a series of three or four verbal reprimands when they refuse to work mandatory overtime, a sanction different than that imposed upon merit employees for the same violation. After that, the agency staff are reassigned. Mr. McGuire testified that he has worked the same shift as Detra Bryant and has never accompanied her to seek volunteers or mandate overtime. Upon

questioning from the hearing officer, however, Mr. McGuire testified that he has witnessed Missy Leach accompany Ms. Bryant while she completed these tasks.

17. The Appellant, **Michelle Carmody**, then called herself as her final witnesses. She testified that her supervisor did not have any conversation with her until about 5:00 a.m. on March 2, 2015, slightly more than an hour before the 6:15 a.m. shift began. She testified that at that time she volunteered to work until 11:15 a.m., but was told that working a partial shift was not an option and that she was being mandated for the entire shift. Ms. Carmody stated that her children, who are 5 and 6 years of age, are at daycare overnight and must be picked up by 6:30 a.m. and transported to school. She stated that she tries to provide her daycare with a day's notice of the possibility of mandation and that if she is able to give them adequate notice, the daycare can transport her children to school, although she had never asked them to do so. Ms. Carmody testified, however, that on this day because of the late notice of the mandation, she was unable to have the daycare or her backup sitter pick up the children from daycare and transport them to school.

18. Ms. Carmody admitted on cross-examination, however, that she did not even call the daycare to make arrangements to have her children transported to school so that she could work the mandatory overtime. She then testified that she did not attempt to make any arrangements with the daycare on this date because she had not packed her children's school clothes or her son's seizure medication, which he needed to take prior to going to school. The Hearing Officer takes note of Ms. Carmody's testimony that she refused the mandation because her children had to be picked up from daycare by 6:30 a.m. and transported to school. However, the Hearing Officer also finds that this stated reason calls into question Appellant's earlier testimony that she had volunteered to work until 11:15 a.m.

19. Ms. Carmody testified that she was aware through her in-service training on Policy 7.21, of the consequences for refusing mandation and the limited exemptions from discipline.

20. Ms. Carmody rested her case and then made a closing statement where she emphasized that the discipline imposed upon merit employees is unfair as compared to the penalties imposed on agency employees for a violation of the same policy.

21. Ms. Wolsing made a closing statement where she emphasized that Ms. Carmody was trained on the policy for mandatory overtime and was provided the standard disciplinary action for violating it. She emphasized that because Ms. Carmody was not subject to the exemption from discipline, the sanction imposed was appropriate and in accordance with the policy.

22. The record was closed. The Hearing Officer considered the entire administrative record.

FINDINGS OF FACT

1. The Appellant, Michelle Carmody, was employed as a Direct Care Professional with Hazelwood Center within the Cabinet for Health and Family Services. (Appellant's testimony, Appellee's Exhibit 2).

2. The Hazelwood Center is a 24-hour, 365-day per year intermediate care facility responsible for providing care to developmentally disabled adults. (Testimony of Ray, Klein).

3. Hazelwood is staffed by merit employees as well as agency staff who are employed by an outside agency and assigned to Hazelwood. (Testimony of Ray).

4. Hazelwood is required by law to maintain sufficient staffing levels at all times in order to provide for the safety of clients, staff and visitors. (Testimony of Ray, Klein)

5. Hazelwood instituted a revised Mandatory Overtime Policy 7.21, with an effective date of October 23, 2014. (Appellee's Exhibit 1)

6. The policy outlined the process, including the existence of the mandatory overtime list, the call for volunteers and the method of implementing mandatory overtime. The policy also outlined the limited means of obtaining an excuse from mandatory overtime and the consequences for refusing the mandation. (Appellee's Exhibit 1)

7. For merit employees, a violation of Policy 7.21 results in a disciplinary fine or suspension for a first offense. For agency staff, a violation of the same policy results in counseling for a first offense.

8. On or around November 12, 2014, the Appellant received in-service training on the mandatory overtime procedures and understood the requirement and the resulting consequence for a refusal. (Testimony of Appellant)

9. On March 2, 2015, Detra Bryant instituted mandatory overtime after she was unable to secure sufficient staff through volunteers. (Testimony of Bryant, Leach, Appellee's Exhibit 2, Appellee's Exhibit 5)

10. The Appellant refused to work mandatory overtime and cited childcare considerations. (Testimony of Appellant, Bryant)

11. The Appellant imposed a three-day disciplinary fine for the refusal to work mandatory overtime consistent with the provisions of Policy 7.21. (Testimony of Ray, Appellee's Exhibits 1, 2)

CONCLUSIONS OF LAW

1. KRS 18A.0751 provides that the Personnel Board shall, among other things relative to classified service, promulgate administrative regulations governing "[f]ines, suspensions and other disciplinary measures." The Personnel Board regulation, 101 KAR 1:345, effective March 1989 provides for the imposition of disciplinary fines for lack of good behavior or unsatisfactory performance of duties and further outlines that the disciplinary fine shall "not exceed ten (10) days' pay."

2. The nature of Hazelwood as a 24-hour per day, 365-day per year facility, for the developmentally disabled necessitates adequate staffing to provide for the safety of clients, visitors and staff. To that end, Hazelwood established a policy that states "employees. . . will be required to work overtime as needed." The policy also provides "The Mandatory Overtime Policy is not part of the Time and Attendance Policy therefore an unexcused failure to work mandatory overtime will lead to a suspension or a fine for the first offense, rather than going through the typical verbal-written suspension chain." See Policy 7.21.

3. Appellant Carmody was trained on the Mandatory Overtime Policy on November 12, 2014, and acknowledged during her testimony that she understood that discipline was a consequence of violating the policy and that the discipline for merit employees and agency staff was different.

4. The Appellant's stated reason for not working overtime on the morning of March 2nd was childcare, but during her testimony admitted to a lack of planning on her part in packing school clothes and medication for her children. She also admitted that she never inquired of the daycare whether they could transport her children to school so that she could work the mandatory overtime.

5. Appellant's stated reason for refusing overtime does not fit within the limited exemption of employee illness supported by a physician's statement as outlined in Policy 7.21.

6. The sanction imposed upon merit employees for violating the policy is different than the sanction imposed upon "agency" staff that are employed by another entity and assigned to Hazelwood. The Appellant contends that this disparity between the treatment of the two categories of DCPs should eliminate her consequence altogether. The Hearing Officer is not persuaded and finds that the DCPs are legitimately governed by the disciplinary rules of their respective employers.

7. The evidence of record reveals that the three-day disciplinary fine imposed upon Ms. Carmody was standard for a first refusal to work mandatory overtime. The Hearing Officer concludes that the Cabinet has met its burden of proof to show that the three-day disciplinary fine imposed upon Appellant was for just cause and was neither excessive nor erroneous.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **MICHELLE CARMODY VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2015-074)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen 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 exception 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 the 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).

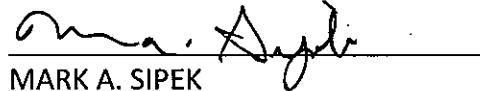
Any document filed with the Personnel Board shall be served on the opposing party.

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 Brenda D. Allen this 2ND day of October, 2015.

KENTUCKY PERSONNEL BOARD

A handwritten signature in black ink, appearing to read "Mark A. Sipek", is written over a horizontal line.

MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy this day mailed to:

Hon. Jennifer Wolsing
Michelle Carmody