



**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2014-175**

**GERALD W. ELLERY**

**APPELLANT**

**VS.**

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

**CABINET FOR HEALTH AND FAMILY SERVICES**

**APPELLEE**

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This matter came on for an evidentiary hearing over the course of two days, on November 17 and 19, 2015, at 9:30 a.m., at the offices of the Kentucky Personnel Board, Frankfort, Kentucky, before E. Patrick Moores, Hearing Officer. The proceedings were recorded by audio-video equipment pursuant to the authority found at KRS Chapter 18A.

The Appellant, Gerald W. Ellery, was present and was not represented by legal counsel. The Appellee, the Kentucky Cabinet for Health and Family Services, was present and was represented by the Hon. Jennifer Wolsing, of the Cabinet's Office of Legal Services.

**I. STATEMENT OF THE CASE**

1. **Gerald Ellery** appeals the Cabinet's decision of August 1, 2014, to terminate his services as a Human Services Program Section Supervisor of the Kentucky Department for Income Support (DIS) office in Louisville, Kentucky. The letter of termination, issued by Howard J. Klein, the Cabinet's Appointing Authority, informed Mr. Ellery that he was being terminated for violation of 101 KAR 1:345 and KRS 18A.095 for lack of good behavior.

2. The seven-page letter of termination from Mr. Klein documented that the Cabinet had found sufficient evidence that Ellery had repeatedly failed to adhere to his assigned schedule and was absent from his workstation without authorization, and that he had intentionally falsified his timesheets for almost a year's work-time between July 1, 2013 to May 15, 2014. The letter of termination alleges he falsified his official cabinet timesheets on sixty-one (61) days, claiming work hours for twenty-three (23) hours and seventeen (17) minutes that he failed to work, receiving approximately \$523.57 from the falsified timesheets. The letter from Klein further states that Ellery's actions violated KRS 18A.145(4) (Other Acts Prohibited), KRS 523.100 (Unsworn Falsification to Authorities), KRS 519.060(1)(a) (Tampering with Public Records), and CHFS Personnel Procedure 2.1 (Employee Conduct).

3. Ellery timely filed an appeal with the Kentucky Personnel Board on August 6, 2014, in which he alleged that he was denied the "process" used prior to his termination and that he had been discriminated against. A pre-hearing conference was initially scheduled for September 23, 2014, however, in response to the Cabinet's Motion to reschedule due to an "unavoidable conflict," the pre-hearing conference was set for October 14, 2014.

4. A pre-hearing conference was held before the Kentucky Personnel Board on October 14, 2014, which the Appellant attended via telephone. Appellant Ellery denied the allegations that he falsified his time records, and alleged that he had been subjected to disparate treatment and discrimination by a coworker, and that he had an understanding with a previous supervisor that allowed his occasional tardiness due to a medical condition. The Cabinet responded that it was never made aware of a request for an accommodation by Ellery to the Cabinet or his previous supervisor. The matter was set for an evidentiary hearing to be held on January 13 and 14, 2015, in which the Cabinet would have the burden of proof, by a preponderance of the evidence, to establish whether the Cabinet's decision to terminate Ellery was taken with just cause and that the penalty of termination was neither excessive nor erroneous. The Appellant had the burden of proof as to any claims of discrimination.

5. The Appellant hired and changed legal counsel during the interim, and engaged in discovery. On December 29, 2014, the Cabinet requested a continuance of the hearing due to a key witness being subpoenaed for a jury trial that conflicted with the hearing date, and on January 5, 2015, an Order was entered by the Personnel Board canceling the evidentiary hearing.

6. A second pre-hearing conference was held on July 6, 2015, for the purpose of discussing discovery issues, and rescheduling the evidentiary hearing, which was set for September 21, 22 and 23, 2015. On September 16, 2015, an Order was entered granting Appellant's legal counsel leave to withdraw, and the scheduled evidentiary hearing date was converted to another pre-hearing conference scheduled for September 21, 2015, for purposes of reviewing the status of the appeal. On said date, the evidentiary hearing was scheduled for November 17, 18 and 19, 2015.

7. Prior to the hearing, an issue was presented by the Appellant concerning a subpoena that he had requested to be issued and served on the Cabinet to produce the logs of badge sign-ins of employees. The Appellant wanted the logs to show a pattern of an aberration of times of employee sign-ins. The Cabinet did not have these records. On the day of the hearing the Personnel Board contacted the Finance Administration Cabinet and gave verbal notice of the subpoena, which upon receiving notice of the subpoena advised once they had information as to the specific documentation wanted and arrangements made for the payment of the production of the documents, they would be produced forthwith. The Hearing Officer informed the Appellant of this arrangement and instructed him to contact the Finance Administration Cabinet during a recess of the hearing and make the arrangements needed to pick up the desired documents on the next day when the hearing would be in recess. In as much as the hearing was scheduled for three days, and the parties essentially completed their proof at the

end of the first day, at the conclusion of said first day of receiving proof the Hearing Officer recessed the hearing to the third scheduled day. The Hearing officer instructed the Appellant to contact the Finance Administration Cabinet to make arrangements to pick up the subpoenaed documents during the recessed second day on that afternoon, when they would be made available, and that he and the Appellee's counsel could have that afternoon to review the documents, and that the hearing would resume on the scheduled third day. At the start of the hearing on the third day, the Appellant informed the Hearing Officer on the record that he had not obtained the subpoenaed documents, due to the cost, and that he would proceed with his proof without said documentation. The Hearing Officer had noted on the record that the relevancy of said documents was doubtful, as the hearing was directed to the time falsification issues concerning the Appellant, and that unless the Appellant was able to prove a pattern of falsification concerning all employees the probative effect of said documentation was doubtful.

8. The evidentiary hearing was eventually conducted on November 17 and 19, 2015. At the conclusion of the presentation of the evidence, closing arguments were made following which the matter was submitted to the Hearing Officer for a finding of facts, conclusion of law and recommended order.

## **II. STATEMENT OF FACTUAL EVIDENCE PRESENTED**

1. **Antoinette Reeves** is a retired supervisor of the DDS in Louisville, from 1991 to 2014. She described Ellery as a good employee, and that she knew of only two occasions that she had to speak with Ellery about not showing up on time. She testified that she had recommended that Ellery be promoted to supervisor. She testified that once Ellery was promoted he started being late for his assigned work schedule. She testified that when he got off the elevator on their floor, he would pass by her office to go to his office next to her, so she would see what was going on. She said she spoke to him a couple of times as his lateness began to create problems within the office and impacting her staff with others being late for work. She went to her supervisors, Greg Bibb and Debbie Haydon, and showed them the notations she had made on her desk calendar of the times he was late for reporting to work. She said that Mr. Bibb sent her a message to mind her own business, leaving her with the impression that Ellery's situation of being late for work was being tolerated by her superiors. She testified that she became frustrated and decided to document the circumstances of her observations of Ellery's late reporting for work. She said that Ellery was a peer supervisor and that they each had no authority over each other's team.

2. Reeves testified that Ellery's conduct was impacting her staff, as people were beginning to disregard the rules and started coming in late, saying that everyone else was reporting late, including supervisors, and that this situation was creating a bad work environment. She said that eventually Ms. Haydon came to her office to do evaluations and that after their meeting she discussed the situation about Ellery with her. She testified that Haydon indicated to her that the matter would be looked into.

3. **Terry Brogan** is an Executive Staff Advisor, since February 14, 2014, to the Commissioner concerning personnel issues. He testified that in April 2014 Debbie Haydon came to him to discuss an issue concerning Ellery, saying that she had so far found some discrepancies in Ellery's timesheet documentation and the badge scans to enter the building. He said that he also reviewed the garage scans where Ellery parked his car. In addition to comparing Ellery's scans entering the garage and the building they also compared his log onto and off the Social Security Administration system on the computer on which the DDS did the work on the disability claims. Brogan said he looked at the log-in documentation from July 2013 through May 9, 2014 time period. Brogan also reviewed the performance evaluations of Ellery from 2009 through 2013, and noted that Ellery's supervisors had repeatedly addressed his attendance issues. Brogan testified that the records showed that Ellery had been warned numerous times over the five-year period about his attendance problems, which he did not correct.

4. Brogan testified that he discussed the circumstances of the time discrepancies with Ellery, and that he really didn't say much except that he would forget to sign in, or that he was out to meetings, or on interview panels. Brogan testified that there were a number of big time units in which he was over 15 minutes late. On December 26, 2013, Ellery reported on his timesheet that he was on the job over 30 minutes before he actually scanned in.

5. Brogan testified that he obtained a list of dates that Ellery was scheduled to attend a meeting or did interviews, and that he backed those dates out of the audit. He added that even though those dates were backed out of the audit, Ellery was still required to report to work by 9:00 a.m., as most meetings did not begin until 10:00 a.m. Brogan testified that the significance of doing the audit was the responsibility the DDS had to account for the Federal funds provided the DDS for determining the Social Security disability claims. He stated that had the Federal government become aware of the mismanagement of the funds, it would have resulted in a loss of the Federal money, which the Kentucky DDS could not afford. Brogan testified that Ellery's falsification of his time records was an intentional violation, as the Cabinet conducted many classes about timesheets and that he knew the Department policy, and that it was his responsibility to report to work on time.

6. **Howard J. "Jay" Klein** is the director of the Office of Human Resource Management for the Cabinet of Health and Family Services. He is the appointing authority and his primary responsibilities involve receiving, reviewing and determining appropriate disciplinary actions. Klein testified that when he received the evidence concerning Ellery, he assigned the matter to Jack Barnett to work on it.

7. Klein said he recognized the situation was significant under Federal case law. He said the actions of Ellery were clearly intentional from the sheer volume and repeated nature of the falsified time records and attendance issues over a five-year period. He testified that the Cabinet had previously dismissed employees for far less falsification of official documents and amounts of money than presented in this case. Klein said that if the evidence showed the matter did not involve falsification, but just mistakes, the Cabinet would have probably considered the

option of other forms of discipline, such as suspension and fines. Klein acknowledged that the review of Ellery's file did not reveal any other disciplinary problems. Klein testified that the situation he was presented involved big chunks of falsified time, and not just mere minutes or being off just a little bit on official documents, which was stealing.

8. Klein testified that the DDS office is funded entirely with Federal money, and that the Federal government closely monitors the use of its money, and that an audit showing payments based on falsified timesheets could have forced the Cabinet to face restitution payback problems. However, Klein did acknowledge that he did not know how many times a federal audit of the Cabinet's payroll resulted in a request from the Federal government for restitution.

9. Klein acknowledged that he spends a lot of his time testifying in matters involving disciplinary action taken against employees, which are appealed under the state's appeal rights provided by statute. Klein further acknowledged that at least a third of those cases involve employees charged with attendance issues. He said he gets a lot of requests from supervisors for badge scans of employees due to the supervisors' concern about employee attendance problems. Klein acknowledged that much of the attendance issues could be resolved by the use of time clocks, as prevalent in the private sector. He testified that he recalled years ago a time clock system was utilized at a state hospital in Western Kentucky. He said, however, that the state relies on an "honor system," placing "trust" in the staff in submitting their documentation reflecting their time worked. He also testified that the state provides a lot of training of employees concerning timesheets and of supervisors on the proper methods of reviewing timesheet documentation.

10. **Jack Barnett** is a Human Resources Administrator for the Cabinet for Health and Family Services. Prior to working for the state he spent 35 years with the U. S. Postal Service representing both the union and management in administrative hearings. For the past five years he has been reviewing cases involving requests within the Cabinet for disciplinary action, making sure all the necessary documentation is obtained and analyzed and writing recommended disciplinary letters. He said that he would go back into the database to find comparable matters regarding the offense and the discipline provided before he made the recommendation and that Klein has the final decision on all disciplinary matters.

11. Barnett testified that on the matter involving Ellery's attendance and time documentation falsification, he reviewed the building, garage and computer system scans from July 2013 through May 2014. He said he eliminated those dates where Ellery was attending meetings, and several other time discrepancies on which there was a reason given for the discrepancy. He said he also discussed the time discrepancies with Ellery's former supervisor, Greg Bibb, who told him that he knew Ellery was having trouble with his child and the school. Barnett said that after his review of all the documentation he concluded that falsifications had been made on the timesheets, and determined that disciplinary action was necessary, and researched comparable disciplinary actions.

12. **Greg Bibb** was the branch manager of the DDS office in Louisville from 2007 through 2013 and served as Ellery's first-line supervisor from 2009 through 2013. Bibb's duties included ensuring that his case units cleared enough disability cases to satisfy the Social Security Administration. He was also responsible for building security and personnel disciplinary actions. Bibb testified that from time-to-time Ellery would have to call in that he had a matter causing him to be late and that he would generally always make up his time to complete his work. He acknowledged that there were several times that he gave Ellery a low score on his performance evaluations due to attendance problems. He said that punctuality was a problem for Ellery, and that he discussed with Ellery the consequences of false timesheets.

13. **Scott Williams** has been the Louisville Branch Manager of the DDS office since July 2015. He testified that everyone had to badge scan in to get into the building and a key to obtain access into their offices on the fourth floor of the building. He also said that it would be very difficult for anyone to discuss the disability cases without scanning into the computer system. He said that he did not supervise Ellery.

14. **Robert Douglas LeFevers** is employed with the DDS as a Budget Officer and a Security Officer. He is in charge of the physical security of the facility, assigns badges to employees, and is responsible for the security of the badges and the security reports. He testified concerning an incident in which he needed to find Ellery on December 26, 2013, because he was the assigned supervisor of the day. He was unable to find Ellery and went looking for him, passing by his office 2-3 times, which was closed. He eventually observed Ellery entering the building and heading to his office at approximately 9:20 to 9:40 a.m. LeFevers commented that since Ellery was the supervisor of the day, one would have thought that he would have been on time. The record shows that Ellery's sign-in time recorded on that date, reflected in the August 1, 2014 termination letter from Mr. Klein, indicates that his office scan-in was 9:39 a.m., and his SSA system scan-in was recorded at 9:52 a.m., but that Ellery recorded on his timesheet that he came to work at 9:00 a.m. on that date.

15. LeFevers testified that 2-3 years earlier the badge system monitored by Sonitrol was upgraded due to a time "drift" problem that was repeatedly brought to their attention by an employee who arrived early each day. He testified that the drift was never more than two to four minutes, but that it was repeatedly brought to his attention by this employee. LeFevers testified that the badge scan system is now linked to a server, which is linked to a satellite, and that the recorded times are exact and accurate. He said that he is able to check badge scan-in times in live time, as they are electronically emailed to his office, allowing him to check any current issues concerning any person's sign-in record. He testified that there have been no further accuracy issues since before 2013, and that he has received no further complaints about the time drift from the employee.

16. **David Stephanski** has been employed with the DDS as the office's Information Technology Manager since 2011, and has been performing IT management for over 20 years. He stated that it takes an employee only 20-30 seconds to log into the Social Security Administration System. He described the computer talks to the server which puts an entry into the log-on file.

17. Appellant, **Gerald Ellery**, stated that he was able to work while not being chained to his desk. He said he had explained to his supervisor that he was involved in meetings or other matters and would be in late. He explained to Terry Brogan that he never intentionally wrote down that he was in at 9:00 a.m. when he was actually coming in much later. Any such entries were a mere mistake. However, he said he always used the 15-minute block to represent if he came in at 9:07 he would write down that he came in at 9:00.

18. Ellery said that during his pre-termination hearing, he stated that if he received over \$500 from mistaken entries he made, he would gladly pay that back. He said that he was a very private person and that he felt that his private medical and family issues were not something that others had to know about, other than his supervisor, Mr. Bibb, who was aware of his situation. He said Ms. Reeves was not someone that he had to report to, and she had no knowledge of where he had been or what he was doing.

19. Ellery testified that he believed that his termination was from retaliation against him for a grievance he filed concerning certain coworkers harassing him with coming in late. He said that his supervisor Bibb knew his situation. He acknowledged that there were times when he would not fill out his timesheets until a couple days later, when he would not be sure of the exact time he came in.

20. Ellery testified that a supervisor has to be able to face issues, and he disputed that his work activity was a cause of problems for Reeves' employees. He said it wasn't any business of Ms. Reeves as to any day he was considered by her to be late, particularly when he had already discussed any lateness issues with Mr. Bibb.

21. Ellery said he believed that Ms. Reeves reacted against him because he was a heterosexual Black man of a dark skin hue. He said he based this on things he would hear; however, he was not able to state any specifics.

22. **Terry Brogan** was brought back for rebuttal to testify that the so-called "15 minute rule" referenced by Ellery was not an accurate statement of DDS policy. He testified that the Department's policy required the actual time for sign-in and sign-out.



### **III. FINDINGS OF FACT**

1. Appellant, Gerald Ellery, has been employed with the Louisville Office of the DDS as a Human Services Program Section Supervisor of the Kentucky Department for Income Support (DIS) office in Louisville, Kentucky.

2. The record indicates that Ellery had been experiencing at least five years of attendance problems, reflected on his annual performance evaluation by his supervisor, Greg Bibb, and Ellery responded to each evaluation that he would do better.

3. Ellery demonstrated the skills that warranted his promotion to a supervisory position. Unfortunately, Ellery failed to perform the duty of the role of supervisor in adhering to the rules and policies of the employer. After Ellery was promoted to the position of supervisor, his attendance for reporting for work became worse, as reflected on documentation maintained by one of his peer supervisors, Antoinette Reeves, who complained that his signing in late was creating problems for workers under her supervision who began to believe they could report late because a supervisor was doing so.

4. Reeves' requests for assistance on Ellery's attendance and the problems it was creating for her staff appeared to at first to her that it was ignored by her supervisors higher up, until eventually Debbie Hayden began to look into the matter and brought her findings of discrepancies in Ellery's timesheet documentation and the badge scans to enter the building to Terry Brogan, an Executive Staff Advisor to the Commissioner on personnel matters.

5. Brogan reviewed the log-in documentation from the scans into the garage, the building and the computer Social Security Administration database from July 2013 through mid-May of 2014 time period. Brogan also reviewed the performance evaluations of Ellery from 2009 through 2013, and noted that Ellery's supervisors had repeatedly addressed his attendance issues, but that he failed to show improvement and that he intentionally falsified his time records from which he was paid.

6. Brogan's report was submitted to Howard J. Klein, the Cabinet's Director of the Office of Human Resources Management. Klein turned the matter over to Jack Barnett, a Human Resources Administrator, to follow up on the investigation and make a recommendation as to the appropriate disciplinary action to be taken. Barnett eliminated those dates where Ellery was allegedly attending meetings, and several other time discrepancies on which there was a reason given for the discrepancy.

7. Barnett found discrepancies in the time submitted by Ellery from July 1, 2013 through May 9, 2014, in which he falsified his official Cabinet timesheets for sixty-one days, claiming work for twenty-three hours and seventeen minutes in which he failed to work. As a result, he received payment of \$523.57 for time he did not work.

8. The falsified timesheets placed the Cabinet in jeopardy that concerned Klein a Federal audit would result in the Cabinet having to make restitution to the Federal government. He agreed with Barnett's recommendation that the large groups of falsified time records justified that Ellery be terminated.

9. There was no factual evidence of any discriminatory conduct directed towards the Appellant, nor that it was in retaliation to a grievance he filed against a coworker complaining about his time and attendance issues. Ellery provided no facts other than baseless assumptions.

#### **IV. CONCLUSIONS OF LAW**

1. The Cabinet was faced with allegations of Appellant's conduct involving dishonesty, fraud, deceit, or misrepresentation, supported by falsified time records turned in by the Appellant. The record discloses five years of attendance problems by the Appellant on which he was repeatedly confronted by his supervisor in his annual performance evaluations and warned that he had to follow the rules about punctuality, and on which he repeatedly promised to improve. Most of the Appellant's explanations for the attendance problems were related to mere matters of mistake, or illness issues personal to the Appellant and matters involving school issues with his child. However, the attendance issues never seemed to improve and the record is void of medical documentation or any effort of the Appellant for an accommodation. Unfortunately, this matter of the Appellant's falsification of his time records is not a mere blunder on his part, and the false start times on his time records and tardiness are shown to be for non-FMLA reasons. The plain facts submitted on the record discloses that once the Appellant was promoted to the level of supervisor, the attendance issue became worse, compounded with false timesheets for which he was compensated with wages for time not worked.

2. The facts presented showed by a preponderance of the evidence that the Appellant's submission of false timesheets was a clear act of willfulness and deliberate disobedience of the policies of the Cabinet and the expectations of the people of the Commonwealth of Kentucky, who have a right to expect that the civil servants appointed to fulfill vital positions performing the job before them, do so in a honest and truthful discharge of their duty for which they are compensated.

3. A detailed investigation of approximately one-year of Appellant's time records was thoroughly reviewed and compared against badge scans into the garage and building of the facility where the Appellant worked, and the scans into his computer patched to the Disability Claims System of the Social Security Administration. The reviewing officials took care to back out of the review those dates where the Appellant was scheduled to attend a meeting or other assignments, despite the fact that the evidence presented showed most of the meetings were scheduled for an hour after the Appellant was required to report to work.

4. Kentucky law enacted by the state's Legislature codified at KRS 18A.095 and the administrative regulations at 101 KAR 1:345 place the choice of employment sanctions of the state's personnel within the sound discretion of the appropriate appointing authority under the guidelines set forth in said provisions.

5. The Cabinet was confronted not only with the falsified time records of the Appellant, but with the fact that he was paid with Federal funds provided to the Commonwealth for performing the review of disability claims for the Social Security Administration, for which the Cabinet is accountable and subject to audit, which created the potential that the Commonwealth would be confronted with a demand for restitution to the Federal government.

6. The Hearing Officer, having reviewed all the evidence, finds that the Cabinet's appointing authority had the legal authority to impose the sanction of terminating the Appellant for his repeated acts of nearly one-year of tendering false timesheets for which he was improperly compensated, and that said termination was for just cause.

7. There was no evidence of discrimination or retaliation directed to the Appellant.

8. A final inquiry questions why the Commonwealth continues to dance around with the repeated attendance and false time claims it relentlessly faces, without seeking a more viable solution. The appointing authority in this case testified that over a third of the cases in which he is required to give testimony involves time and attendance matters. The Commonwealth claims to rely upon the "honor system" of its employees in submitting their time records, yet utilizes badge scans of all types, some of which allegedly utilize satellite communication systems, that still require an unnecessary review of documentation that is fraught with exceptions, required exclusions and other verification issues of the documentation to "justify" whether sanctions are appropriate. Years of case law shows that the private sector is better served by relying on time clock evidence to support whether an employee is paid for the time worked. The system used by the Commonwealth simply is not working if one-third of an appointing authority's time appearing to testify in support of employee discipline involves time and attendance issues.

#### **IV. RECOMMENDED ORDER**

Having considered and weighed all the evidence and the laws of the Commonwealth of Kentucky, and based upon the foregoing findings of fact and conclusions of law, it is the recommendation of the Hearing Officer that that the appeal of **GERALD W. ELLERY VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2014-175)** 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 E. Patrick Moores** this 21<sup>st</sup> day of January, 2016.

**KENTUCKY PERSONNEL BOARD**

  
**MARK A. SIPEK**  
**EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:

Hon. Jennifer Wolsing  
Gerald W. Ellery