

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-254**

GILLIAN FELL

APPELLANT

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

**TOURISM, ARTS AND HERITAGE CABINET
DEPARTMENT OF PARKS**

APPELLEE

*** *** *** *** ***

The Board, at its regular September 2016 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated June 24, 2016, Appellee's Exceptions, Appellant's Response to Exceptions 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** Findings of Fact paragraphs 2, 3, 4, and 5 and substitute the following:

2. Mr. Bailey, My Old Kentucky Home State Park Manager, and the Appellant both admit they met in early July. Although a memo regarding the meeting was amended to record only the tardiness issues, both parties admit that there was a discussion regarding the content of the tour. The Board finds credible Mr. Bailey's testimony that he gave Ms. Fell a copy of the new script in early July 2015. The Board further finds credible Mr. Bailey's testimony that he addressed with the Appellant issues regarding her tardiness to work, not starting tours on time, leaving rooms unattended, and leaving the front door of the building unlocked.

3. The Board also finds credible Mr. Bailey's testimony that he witnessed the Appellant giving an incorrect tour in July 2015. On July 23, 2015, Mr. Bailey established the Appellant gave a tour and left out information pertaining to the duel. Mr. Bailey spoke with the Appellant on two occasions regarding this. On one occasion she forgot the information, on another, she stated that she did not see a point in providing the information. The Board finds this second meeting as evidence of the Appellant's insubordination regarding instructions from Mr. Bailey on how to conduct the tour.

4. The Board finds, based on the misconduct proven by the evidence at the hearing, the Appellee has established proper cause for the four-day suspension of the Appellant and this penalty was neither excessive nor erroneous. The Board bases this finding not only on the testimony regarding the Appellant's misconduct, but also on the undisputed evidence of the Appellant's disciplinary history.

B. **Delete** the Conclusion of Law and substitute the following:

The Board concludes the Appellee proved Appellant committed misconduct pursuant to 101 KAR 1:345, and her misconduct constitutes just cause for a four-day suspension without pay. In addition, the Board finds this penalty is neither excessive nor erroneous. [KRS 18A.095(1) and (22)(c).]

C. Delete the Recommended Order and substitute the following:

IT IS HEREBY ORDERED that the appeal of **GILLIAN FELL V. TOURISM, ARTS AND HERITAGE CABINET, DEPARTMENT OF PARKS (APPEAL NO. 2015-254)** is **DISMISSED**.

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 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 September, 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day mailed to:

Hon. William T. Hutchins
Hon. Jean W. Bird

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-254**

GILLIAN FELL

APPELLANT

**V. FINDINGS OF FACT, CONCLUSION OF LAW,
AND RECOMMENDED ORDER**

**TOURISM, ARTS AND HERITAGE CABINET
DEPARTMENT OF PARKS**

APPELLEE

**** ** ***

This matter came on for an evidentiary hearing on March 1, 2016 at 9:30 a.m., at the office of the Personnel Board, 28 Fountain Place, Frankfort, Kentucky before the Hon. Darren L. Embry, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellant, Gillian Fell, was present at the evidentiary hearing and was represented by the Hon. William T. Hutchins. Appellee, Kentucky Department of Parks, was present at the evidentiary hearing and represented by the Hon. Jean W. Bird.

The Hearing Officer notes this appeal was filed with the Personnel Board and received on September 30, 2015. Appellant was suspended for four days without pay by letter dated August 4, 2015, for allegations of lack of good behavior, tardiness, and general insubordination. In this appeal, Appellant denies the allegations. As relief, Appellant seeks to have the matter expunged from her record and to receive any back pay due.

After being rescheduled twice, this matter came on for a pre-hearing conference at 1:30 p.m., ET, on December 10, 2015. Following the pre-hearing conference an Interim Order was issued directing the parties to mediation through the Personnel Cabinet. On a letter dated February 5, 2016 a party from the Personnel Cabinet stated that the parties met for mediation on February 4, 2016 and were unable to reach an agreement.

The Interim Order following the pre-hearing conference, dated December 18, 2015, scheduled the evidentiary hearing to be held March 1, 2016. The issue set forth in the Interim Order was the disciplinary action taken against the Appellant. The Appellee was assigned the burden of proof, which is by a preponderance of the evidence, to demonstrate the disciplinary action taken was neither excessive nor erroneous and was taken with just cause.

BACKGROUND

1. The appellant, Gillian Fell, has been an employee of the Kentucky Department of Parks as a tour guide for My Old Kentucky Home State Park in Bardstown, Kentucky since April 1, 2000 [Exhibit B].

2. The appellant received a letter, dated August 4, 2015, indicating she was to be suspended from employment for 4 days: August 5, 6, 7 and 9, 2015. The letter stated that the appellant's suspension was pursuant to 101 KAR 1:345 (lack of good behavior), DOP Policy 01-03 (conduct), the State Employee Handbook, and by recommendation of the Department of Parks. [Exhibit B]

3. The letter of suspension specifically alleges that the appellant insubordinately: ignored 2-3 requests to perform tours based on a new information sheet; refused to sign a memo outlining a meeting addressing the appellant's tardiness to work, failed to start tours on time, left guests unattended; displayed disruptive behavior in discussing her opposition of new content of the tour that forced the manager to reassign her to ticket sales; failed to comply with requests to wear the correct uniform; and has displayed a history of insubordination that dates back to 2007. [Exhibit B]

4. The Appellant, Gillian Fell, filed a timely appeal, received on September 30, 2015, alleging that her four day suspension was not proper because: 1) she had previously been granted leniency for tardiness that resulted from attending to her disabled husband; 2) fellow employee, Trish Epperson wrote a letter stating that she got along with Ms. Fell; 3) her past 15 day suspension was given without cause by a previous supervisor.

5. The Appellee's first witness was, **Ms. Laurie Googe**, acting Executive Director of the Tourism, Arts and Heritage Cabinet, a Director of Human Resources for the Department of Parks. Ms. Googe, in her capacity, acts as the custodian of personnel records for the agencies she is involved with, particularly supervising managers in collecting all paperwork pertaining to disciplinary action.

6. Ms. Googe worked with the park manager, Mr. Bailey, while he coached the Appellant. As he continued to have issues, Ms. Googe reviewed the Appellant's file and recommended, drafted, and issued the suspension letter. [Exhibit B]

7. Ms. Googe stated that she is aware of several disciplinary issues in the Appellant's employment history. Including but not limited to the following exhibits:

Exhibit F.1¹ - On March 30, 2007, the Appellant was given a Written Reprimand by her supervisor, Ronald Langdon. The content of the Written Reprimand references the appellant leaving guests waiting for 20-25 minutes, which the supervisor states is a violation of KRS 101 KAR 1:345 Section 1 (lack of good behavior and unsatisfactory performance of job duties). Attached to the letter are notes from a staff meeting, that the Appellant was present for, outlining job expectations including: time and attendance, hospitality and customer service, tours/tour times, and period clothing/historic dress. [Exhibit F] The Written Reprimand was signed by the Appellant, as well as the attached staff meeting notes.

Exhibit G - On August 27, 2007, the Appellant was suspended for two days without pay for violation of 101 KAR 1:345, Section 1, My Old Kentucky Home Hospitality/Customer Service Museum Policy, and DOP Policy 01-03 Dress Code Policy. The suspension letter states that the suspension was the result of: 1) a written complaint made by a customer stating that the Appellant made comments "trashing Iowa" after learning he was from there, 2) continued violation of the Hospitality/Customer Service Policy by reading unapproved materials in public, 3) failure to adhere to dress code (not wearing "day cap"). The suspension letter also indicated the Parks Department had not received a written response to a Written Reprimand dated January 4, 2007. Appellant signed the suspension, which included an acknowledgement of her right to appeal [Exhibit G]. The Appellant stated that the appropriate appeal forms were not attached to the letter, and that Mr. Langdon told her that she would receive them soon.

Exhibits C & D - Performance evaluations in 2008 cite that the Appellant "barely meets expectations" in job tasks including answering questions, dress code, general assistance, communication, teamwork, conduct, and interpersonal skills. The evaluation states that the Appellant "Adequately Meets Expectations" in adaptability, initiative, attendance, and career development. The Appellant "Failed to Meet Expectations" in regards to other duties assigned, punctuality, and dependability/responsibility. The Appellant's supervisor noted that she was on time 60% of the time [Exhibit D].

Exhibit F - Ron Langdon, the Museum Curator, sent a letter to Ms. Googe on October 1, 2008, entitled "Intent to Terminate." The letter states that the Appellant's "continued insubordinate behavior in regards to policies is creating a very negative environment in the museum.... I feel we have exhausted all reasonable means to work with Gillian within the confines of protecting the museum and entertaining our guests. Therefore, regretfully I see no other alternative than to request the termination of Gillian

¹ During the hearing the Exhibit was admitted as "Exhibit F", due to duplication it is now being denoted as exhibit F.1.

Fell.” Ms. Googe stated that she considered the letter, but chose to move forward with a 15-day suspension rather than termination.

Exhibit E - On October 24, 2008, Ms. Googe sent the Appellant a Revised Suspension letter the letter states that her suspension is based on: 1) violations of Hospitality/Customer Service Policy, 2) violation of the dress code, 3) violation of Museum Artifacts. The suspension specifically states that the Appellant was rude to visitors, slept on the job, scolded fellow employees in front of guests, and did not adhere to the dress code. [Exhibit E]. The original letter had to be revised to correct dates. The October 24, 2008 suspension letter contains no signature by the Appellant. The Appellant states that she attempted to appeal this suspension, although she is not sure whether it was sent to the correct board. The personnel board does not have any information regarding an appeal in the Appellant’s file.

8. Ms. Googe stated that following a 15-day suspension she would typically issue an intent to terminate. However, since there was a significant time lapse (2008-2015) for disciplinary action in the Appellant’s personnel file she chose to issue a suspension instead. Ms. Googe also stated that prior to any disciplinary action she reviews the employees file to make sure they have been properly trained, looks at past evaluations, drafts a recommendation, then meets with the park’s legal department to be sure that her recommendation is consistent with past disciplinary action.

9. The Appellee’s next witness was **Christy Combs**, Assistant Director of Recreation and Historic Sites for the Department of Parks, testified at the hearing that the park has adjusted the tour start time from 9AM to 9:15AM to accommodate the Appellant and her need to care for her ailing husband. Ms. Combs also stated that the Appellant’s supervisors working from 2008-2015 told her they had issues with the Appellant regarding insubordination, tardiness, and an argumentative attitude.

10. **Matthew Bailey**, Park Manager at My Old Kentucky Home, was the Appellee’s next witness to testify at the hearing. At the time of the hearing Mr. Bailey had been the manager of My Old Kentucky Home State Park for eleven months.

11. Mr. Bailey stated that in July of 2015 he adopted a previously used tour guide script that was more historically accurate than the one the park was then using. He testified that on July 10, 2015 he personally gave copies of the new script to each guide, including Ms. Fell.

12. Mr. Bailey stated that in early July he had addressed the Appellant regarding tardiness to work, not starting tours on time, leaving rooms unattended, and leaving the front door of the building unlocked. He stated that the Appellant was given a memo outlining the content of this meeting, and she refused to sign it. Mr. Bailey claims that he edited the memo down to just address time issues, and the Appellant signed the revised version. The 2015 letter of suspension states that the meeting took place on July 7, 2015. However, the memo/letter corroborating the meeting was not submitted to the hearing officer as an exhibit.

13. The 2015 letter of suspension alleges that Mr. Bailey witnessed the Appellant giving an incorrect tour on July 21, 2015. Mr. Bailey did not mention this date at the hearing, and there is no record of it outside of the Letter of Suspension.

14. Mr. Bailey stated that on July 23, 2015 the Appellant gave a tour and left out information pertaining to a duel. He stated that he spoke with the Appellant on two different occasions about her failure to use information provided. He alleges that on occasion the Appellant said that she forgot to include the information, and the second time she stated that she did not see a point in providing the information.

15. **Gillian Fell**, the Appellant, testified next at the hearing. Ms. Fell stated that she and Mr. Bailey met in early July to discuss her evaluation. She stated that she signed a partial copy of the evaluation, because she had issues with the content. The initial evaluation reprimanded her for not wearing a corset, which was not a part of the costume at the time. The final evaluation only contained issues of tardiness.

16. Ms. Fell stated that Mr. Bailey never gave her a new tour sheet. However, she says she did find a copy of one at the Home that she used and took notes on.

17. Ms. Fell testified that she did have a conversation with Mr. Bailey concerning the content of the tour. Ms. Fell claims that she had questions regarding the new "script" because it contained information that she was previously told not to provide for insurance purposes. Ms. Fell stated that during this conversation there was no yelling, or cussing. She does remember discussing the duel with Mr. Bailey, but does not recall the specific details of that conversation.

18. Ms. Fell testified that she was reprimanded for not wearing the proper costume. However, she stated that the costume most recently ordered for her did not fit. She said that she asked someone to assist her with ordering a new costume, as she is "computer illiterate". She stated that in the past all costumes had been provided for her. Also, she stated that she was given a doctor's note that stated that she is required to wear lifts in her shoes.

FINDINGS OF FACT

1. The Appellant, Gillian Fell, at the time of suspension had been employed by the Kentucky Department of Parks, My Old Kentucky Home State Park, since April 2001. She appeals the four-day 2015 suspension rendered for several reasons including: insubordination, tardiness, and costume issues. The appeal stated that the Appellant had been provided leniency for tardiness. The suspension letter states that tardiness is a factor to the suspension, but both Ms. Googe and Mr. Bailey testified that it was not a significant factor in their decision to suspend the Appellant. The second assertion, a letter from a fellow employee stating that she enjoyed working with Appellant, is irrelevant to the suspension. The third assertion, that the 2008 fifteen-day suspension was given without cause, is irrelevant.

2. Mr. Bailey, My Old Kentucky Home State Park Manager, and the Appellant both admit that a meeting between them occurred in early July. However, Mr. Bailey for the Appellee testified that a memo regarding the meeting was amended to record that only tardiness was addressed at said meeting. Ms. Googe, who issued the suspension in question, clearly stated that tardiness and timeliness were not significant factors considered in said suspension.

3. Neither Mr. Bailey, nor Ms. Googe, provided any documentation that the Appellant was corrected for giving a tour that provided false information. The Appellant admitted that a conversation about the content of the tour was had, but the facts regarding the circumstances, content, and tone of that discussion are not clear.

4. The Appellant stated that the content of each tour varies based on the tour group's interests and questions. The tour guides are not expected to cover every detail on every tour. Therefore, it is impossible to say, based on the information provided, that the Appellant's failure to provide information about a duel on one tour was an act of insubordination, rather than a result of a shortage in time.

5. Based on the information provided, the Hearing Officer finds that the Appellee has not demonstrated by a preponderance of the evidence that the suspension of the Appellant was neither excessive nor erroneous. The record only corroborates insubordinate behavior relating to the 2007-2008 incidents. While it is important to prove that there is a history of progressive discipline, the Appellee failed to provide any proof of the behavior alleged in the 2015 suspension letter. The testimony and documents provided by the Appellee do not prove that the Appellant ignored 2-3 requests to perform tours based on a new information sheet. The testimony does reflect that the Appellant refused to sign and initial a memo outlining a meeting addressing several issues, but the final memo, reprimanding tardiness, was signed by the Appellant and was agreeable to both parties. The Appellee did not produce evidence that the Appellant failed to start tours on time and left guests unattended, other than evaluations dating back to 2007-2008, which cannot be used as proof of the Appellant's current work behavior. Both parties agree that the Appellant did not possess appropriate costumes, but it is not clear if that was the result of miscommunication or insubordination.

CONCLUSION OF LAW

The Hearing Officer concludes as a matter of law that Appellant did not commit misconduct per 101 KAR 1:345 so egregious as to justify a four-day suspension without pay.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **GILLIAN FELL V. TOURISM, ARTS AND HERITAGE CABINET, KY DEPARTMENT OF PARKS (APPEAL NO. 2015-254)** be **SUSTAINED** and that Appellant's four-day suspension without pay be expunged. The Hearing Officer recommends that the Appellant be awarded four days back pay, other lost benefits and that she otherwise be made whole. Further, the Appellee is ordered to reimburse Appellant for any leave time she used attending the hearing and any pre-hearing conferences at the Board. **[KRS 18A.105, KRS 18A.095(25), and 200 KAR 12:030.]**

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 part 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 Darren L. Embry** this 24th day of June, 2016.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. William T. Hutchins
Hon. Jean Bird