

**CERTIFICATION OF PERSONNEL BOARD RECORDS**

I certify that attached hereto is a true and correct copy of the Findings of Fact, Conclusions of Law and Recommended Order and Final Order in the case of **KATHY HALEY VS. DEPARTMENT OF VETERANS AFFAIRS (APPEAL NO. 2020-164)** as the same appears of record in the office of the Kentucky Personnel Board.

Witness my hand this 25<sup>th</sup> day of February, 2020.

  
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**MARK A. SIPEK, SECRETARY**  
**KENTUCKY PERSONNEL BOARD**

Copy to Secretary, Personnel Cabinet



COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2020-164

KATHY HALEY

APPELLANT

VS. FINDINGS OF FACT, CONCLUSIONS OF LAW,  
AND RECOMMENDED ORDER

DEPARTMENT OF VETERANS AFFAIRS

APPELLEE

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This matter came on for an evidentiary hearing on November 2, 2020, at 9:30 a.m., ET, at the office of the Kentucky Personnel Board, 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Roland P. Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by KRS Chapter 18A. By agreement of the parties under KRS Chapter 13B, the evidentiary hearing was conducted by video teleconference using Amazon Chime.

The Appellant, Kathy Haley, was present and not represented by legal counsel. The Appellee, Department of Veterans Affairs, was present and represented by the Hon. Dennis Shepherd. Also present was Mark Bowman, Agency representative and Appointing Authority.

The issue on appeal was whether there was just cause for the dismissal of the Appellant, Kathy Haley, as a Nurse Aide State Registered I with the Department of Veterans Affairs, Paul E. Patton Eastern Kentucky Veterans Center, effective July 2, 2020, and whether that penalty was excessive or erroneous. The burden of proof was on the Appellee to prove its case by a preponderance of the evidence.

The Appellant waived presentation of an opening statement. The Appellee's counsel presented an opening statement. The rule separating witnesses was invoked and employed throughout the course of the hearing.

**BACKGROUND**

1. The first witness called by the Appellee was the **Appellant, Kathy Haley**. Ms. Haley, up until the time of her employment termination, had been employed as a Nurse Aide State Registered I with the Department of Veterans Affairs at the Paul E. Patton Eastern Kentucky Veterans Center. Her duties required her to attend to the

needs of residents, including provision of food and daily living needs. She had been in her position approximately eight months. At the beginning of her employment, she had been trained in matters pertaining to verbal abuse, presented varying scenarios, and cautioned about the use of tone in speaking to the veteran residents.

2. She acknowledged that, on June 2, 2020, an incident occurred in a resident's room. That incident had been reported by Jennifer Sturgill. She identified Appellee's Exhibit 1 as an accurate copy of the written statement submitted by Jennifer Sturgill during the course of the investigation. Ms. Haley disagreed with the accuracy of that statement, saying she mentioned the "f-word" on only one occasion, not two, and did not yell at the resident.

3. She identified Appellee's Exhibit 2 as an accurate copy of the written report she submitted on June 2, 2020. In that report as well as in her testimony, she admitted to using the "f-word" one time in speaking to the resident. She believed such act was verbal abuse. Following the incident, Charge Nurse Pamela Napier called the Appellant in for a discussion of the incident.

4. She identified Appellee's Exhibit 3 as an accurate copy of a written statement submitted by Pamela Napier on June 2, 2020.

5. The Appellant had received an Intent to Dismiss letter. Under the procedures accorded her though that letter, she requested a pre-termination hearing with the Appointing Authority. That pre-termination hearing was held on June 25, 2020, with the Appointing Authority, Mark Bowman.

6. Following the pre-termination hearing, she received a termination letter from Mr. Bowman, dated July 1, 2020, advising her that she had been dismissed from employment effective July 2, 2020. (Appellee's Exhibit 4.) Said letter makes reference to KDVA Policy Directive 19 - Prevention of Abuse, Neglect, and Misappropriation in Veterans Nursing Homes. A true and correct copy of the KDVA Policy Directive 19 was identified as Appellee's Exhibit 5.

7. The next witness for the Appellee was **Mark Bowman**. Mr. Bowman is employed by the Department of Veterans Affairs as Executive Director for the Office of Kentucky Veterans Centers. He is the Appointing Authority and responsible for the operation of all four Veterans homes in the Commonwealth of Kentucky. Such operation employs more than 800 individuals and serves over 600 veterans. Mr.

Bowman has worked in long-term care for various employers approximately twenty-nine years.

8. The Kentucky Veterans Centers provide skilled nursing facility care to veterans. The Centers and their programs are certified by state and federal authorities and, thereby, are allowed to participate in the Medicaid and Medicare programs.

9. The Department of Veterans Affairs employs a progressive approach to employee discipline. Such disciplinary steps include counseling and coaching, written reprimands, suspensions, and termination. In this case, Mr. Bowman held a pre-termination hearing with the Appellant on June 25, 2020. He testified there are provisions for employees' rights, but the Agency is also, under certain circumstances, allowed to "skip steps" in discipline for any incident of an egregious nature, including violation of regulations that may endanger the Agency's ability to take care of veterans, or to remain within the Medicare and Medicaid programs.

10. There are various forms of resident abuse: mental, physical, and verbal. The Appellee must abide by requirements and enforcement of those requirements to protect the veterans from any abuse. When one commits an act of abuse, and once it is substantiated, the Agency can no longer continue to employ that individual. In any allegation of abuse, the employee is suspended pending a facility-level investigation. Ms. Haley was placed on investigative leave pending the investigation. The investigator interviewed witnesses and all necessary parties, obtained their written statements, and gathered any other available evidence. Mr. Bowman took the Eastern Kentucky Veterans Center Resident Abuse Investigation Report Form and its contents (Appellee's Exhibit 6) in consideration in determining the type of disciplinary action.

11. The facility has a duty to decide whether abuse occurred. If abuse occurred, it then has a duty not to allow that individual to ever come back into the facility to provide care or service. There are mandates in the law that state such employment cannot continue. Those provisions are found in 38 CFR 51.90, KDVA Policy Directive 19 - Prevention of Abuse, Neglect, and Misappropriation in Veterans Nursing Homes, KRS 216.515, and 902 KAR 20.030.

12. In review of the termination letter, Mr. Bowman stated the quoted passage therein, "I don't fucking appreciate you talking to me that way" constituted verbal abuse. KDVA Policy Directive 19 is the guiding Agency directive regarding its policy on abuse. The Appellant's actions rose to the level of an exception to progressive discipline. The investigative report in this case was performed by Stephen Noe,

CSW/MSW. Mr. Noe is the Social Services Director in charge of investigating allegations of abuse. Mr. Noe drew a conclusion that the events constituted abuse against the resident.

13. Mr. Bowman made the ultimate decision regarding this disciplinary action. Due to the statutes and regulations, he had no choice but to apply the strict requirements of termination once the verbal abuse allegation was substantiated. Termination was appropriate despite the Appellant having immediately admitted to committing verbal abuse.

14. The Appellee closed its case-in-chief. The Appellant began her case by offering her own testimony.

15. The **Appellant, Kathy Haley**, testified she disagreed with the statement made by Jennifer Sturgill, that she had used the "F-word" twice that evening. (Appellee's Exhibit 1.) She also denied that she yelled at the resident on a 5:00 a.m. round, as it would have been heard in the hallway and beyond, at the nurse's station.

16. Ms. Haley testified that when she spoke to Pamela Napier later that morning, Ms. Napier said she felt that if Ms. Haley admitted to the matter then she would probably get written-up or suspended. The Appellant did admit to what happened and owned up to her mistake. She also apologized to the resident while in his room on June 2, 2020. She stated she has never spoken to a resident like that before.

17. The next witness for the Appellant was **Stephanie Jackson**. For the past sixteen years, Ms. Jackson has been employed as a Medication Aide at the Eastern Kentucky Veterans Center. At no time during the eight months she has known and observed Appellant at work has she ever observed Appellant to curse, be loud, or abusive toward any resident. She testified that on 5:00 a.m. rounds, it is very quiet in the morning and, had anyone yelled while in a resident's room, it would have been heard in the hallway and at the nurse's station.

18. The next witness was **Jane Hamilton**. For the past five years, Ms. Hamilton has been employed as a Nurse Aide State Registered I at the Eastern Kentucky Veterans Center. She was the individual who trained the Appellant when Ms. Haley first came to work. Training that preceded the Appellant's contact with Ms. Hamilton would have included matters pertaining to abuse. She testified that, at no time during her interaction with the Appellant or her knowing the Appellant at work, had she ever observed Ms. Haley curse, yell, or be abusive in any manner towards the

residents. On 5:00 a.m. rounds, while it is very quiet, one might be able to hear someone yelling from inside a resident's room, depending how far back down the hallway the room was located.

19. The Appellant concluded the presentation of her case. The Appellee recalled **Mark Bowman** to testify in rebuttal.

20. Having heard the testimony of the Appellant and her character witnesses, Mr. Bowman testified nothing he heard would have changed his decision to terminate her.

21. In reviewing the portion of the July 1, 2020 dismissal letter setting out a history of disciplinary and corrective actions (Appellee's Exhibit 4), Mr. Bowman testified he could not speak to, nor did he have much knowledge of the content of the program regarding the re-education for Nurse Aide duties. He is not certain why the Appellant participated. Sometimes such re-education is a reiteration of past training or it could have been corrective action, such as something the employee needed to work on. He did not have knowledge what the case was here. Such re-education could have been given to a group of employees or an individual. It may or may not have been a corrective action in this case.

22. With reference to the verbal counseling for resident care, Mr. Bowman, likewise, said he did not know the contents or context of that counseling.

23. No further testimony was offered by either party. Both parties presented closing arguments. The matter stood submitted to the Hearing Officer for his Recommended Order.

### FINDINGS OF FACT

1. The Appellant, Kathy Haley, had been employed for approximately eight months as a Nurse Aide State Registered I with the Department of Veterans Affairs at the Paul E. Patton Eastern Kentucky Veterans Center until her dismissal effective July 2, 2020. She was a classified employee with status. She was required to attend to the daily needs of residents.

2. The Eastern Kentucky Veterans Center provides skilled nursing care to veterans. The programs are certified by state and federal authorities, which allows the Center to participate in the Medicaid and Medicare programs.

3. On June 2, 2020, at approximately 5:00 a.m., the Appellant, while conducting rounds, was present in a resident's room. While changing the resident, he started to talk to the Appellant in a vulgar manner. Appellant responded, "Would you like my husband to talk to your daughter that way?" When the resident replied, "No," Appellant told him, "I don't fucking appreciate you talking to me that way." (Appellee's Exhibits 1, 2, and 3; Admission of the Appellant.) The Appellant immediately apologized to the resident for her statement to him.

4. The Appellant believed the statement she made to the resident using the "f-word" on June 2, 2020, was verbal abuse.

5. Charge Nurse Pamela Napier met with Appellant to discuss the incident.<sup>1</sup> When asked about the incident, the Appellant, while crying, said she was sorry: "I didn't mean to say it. It just came out." (Appellee's Exhibit 3.) Ms. Napier encouraged Ms. Haley to admit the matter to additional superiors and represented that a write-up or suspension would probably be issued.

6. The Appellant was placed on special investigative leave pending an investigation by the facility. The investigation was conducted by Stephen Noe, CSW/MSW, Social Services Director of the Center who was in charge of investigating allegations of abuse. Mr. Noe interviewed the resident but "...was unable to get any reliable information...he could not recall the incident." The resident's roommate also claimed he "can't remember anything." Mr. Noe indicated he also interviewed Jennifer Sturgill. It is unknown from the evidence whether he interviewed the Appellant.

7. Mr. Noe then completed an Eastern Kentucky Veterans Center Resident Abuse Investigation Report Form (Appellee's Exhibit 6). On page 2 of the form, he wrote his findings: "Ms. Haley used inappropriate language that was a violation of the professional code of conduct policy." A separate question on the form inquired "Did the findings indicate that abuse occurred?" Mr. Noe checked the box "(X) Yes-explain." He failed to provide an explanation on the form.<sup>2</sup>

8. Mark Bowman, Department of Veterans Affairs Executive Director for the Office of Kentucky Veterans Centers, was the Appointing Authority. He issued a Notice of Intent to Dismiss letter to the Appellant. Ms. Haley requested a pre-

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<sup>1</sup> Ms. Napier had not been called as a witness. However, Appellant offered her testimony about the meeting with Ms. Napier and the Appellee submitted Ms. Napier's June 2, 2020 written statement as Appellee's Exhibit 3.

<sup>2</sup> Neither party called Stephen Noe to testify.



termination hearing. That hearing was held via Zoom on June 25, 2020, between Mr. Bowman and Ms. Haley.

9. Only July 1, 2020, Mr. Bowman issued a dismissal letter terminating Ms. Haley's employment effective July 2, 2020. Mr. Bowman testified that such discipline resulted from the Appellant's behavior that constituted "verbal abuse" of a resident. The letter informed the Appellant she was dismissed for violation of 101 KAR 1:345, Section 1, Unsatisfactory Performance of Duties, as well as violation of EKVC Administrative Policies 7.46 and KDVA Policy Directive 14 - Standards of Professional Conduct; and KDVA Policy Directive 19 - Prevention of Abuse, Neglect, and Misappropriation in Veterans Nursing Homes. (Appellee's Exhibit 4.) Although the letter cites to specific items of the Appellant's history of "disciplinary and corrective actions," Mr. Bowman testified:

- A. He could not speak to, nor did he have knowledge of the content of the program regarding the re-education for Nurse Aide duties;<sup>3</sup> and
- B. He had no knowledge of the contents or context of Ms. Haley's verbal counseling for resident care.

10. The Department of Veterans Affairs applies a progressive approach to employee discipline. Those steps include counseling and coaching, written reprimands, suspensions, and termination. However, under certain circumstances of egregious behavior, including violation of regulations that might endanger the Agency's ability to take care of veterans, or to remain within the Medicare and Medicaid programs, the Agency may "skip steps" and employ a higher level of discipline, including termination.

11. Mr. Bowman testified that once the Agency substantiates an act of abuse by an employee against a resident, the Agency may no longer continue to employ that individual. He testified he relied on the following policy, statutes, and regulations: 38 CFR 51.90; KRS 216.515; 902 KAR 20:030; and KDVA Policy Directive 19 - Prevention of Abuse, Neglect, and Misappropriation in Veterans Nursing Homes.

12. In the July 1, 2020 dismissal letter, the Appellant was provided notice of alleged violations of 101 KAR 1:345, Section 1, Unsatisfactory Performance of Duties; EKVC Administrative Policy 7.46; KDVA Policy Directive 14; and KDVA Policy

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<sup>3</sup> He stated sometimes such re-education is a reiteration of past training, or it might have been corrective action. He was not certain why Appellant had participated.

Directive 19 (Appellee's Exhibit 4). The Appellant had not been provided prior notice of alleged violations of 38 CFR 51.90, KRS 216.515, and 902 KAR 20:030.

13. The Appellant timely filed her appeal of dismissal with the Kentucky Personnel Board.

### CONCLUSIONS OF LAW

1. A classified employee with status shall not be dismissed or otherwise penalized except for cause. KRS 18A.095(1). Appointing authorities may discipline employees for lack of good behavior or the unsatisfactory performance of duties. 101 KAR 1:345, Section 1. At the time of her termination from employment, the Appellant, Kathy Haley, was a classified employee with status.

2. The Appellant, as an employee of the Department of Veterans Affairs, was subject to and charged with knowledge of EKVC Administrative Policy 7.46, KDVA Policy Directive 14 - Standards of Professional Conduct,<sup>4</sup> and KDVA Policy Directive 19 - Prevention of Abuse, Neglect, and Misappropriation in Veterans Nursing Homes (Appellee's Exhibit 5). Such policies were in full force and effect at all times during the events described herein.

3. The July 1, 2020 termination letter also cited alleged violation of 101 KAR 1:345, Section 1, unsatisfactory performance of duties.

4. As stated in KRS 13B.090(7):

... The agency has the burden to show the propriety of a penalty imposed or the removal of a benefit previously granted... The party with the burden of proof on any issue has the burden of going forward and the ultimate burden of persuasion as to that issue. The ultimate burden of persuasion in all administrative hearings is met by a preponderance of evidence **in the record**. (emphasis added.)

5. "Preponderance of evidence" means:

...evidence which, as a whole, shows that the facts sought to be proved is more probable than not. With respect to burden of proof

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<sup>4</sup> Neither EKVC Administrative Policy 7.46 nor KDVA Policy Directive 14 were tendered as exhibits and therefore, are not in this administrative record and could not be examined or considered by the Hearing Officer.

in civil actions, means greater weight of evidence, or evidence that is more credible and convincing to the mind. (Black's Law Dictionary, 5th ed., p. 1064.) Failure to meet the burden of proof is grounds for a recommended order from the Hearing Officer. KRS 13B.090(7).

6. In her testimony, the Appellant acknowledged that, on June 2, 2020, while performing duties in a resident's room, the resident had been vulgar with her and she responded by telling the resident, "I don't fucking appreciate you talking to me that way." (See also Appellee's Exhibit 2). Jennifer Sturgill was in the resident's room with the Appellant. Although in her written statement (Appellee's Exhibit 1) Sturgill reported that she heard the statement the Appellant made to the resident, to which the Appellant admitted, she also alleged a follow-up statement by Ms. Haley: That she apologized to the veteran about the language used, but then said, "I'm fucking tired of it, the way he talks to me." In viewing the totality of the evidence, the Hearing Officer is convinced Ms. Haley only utilized the "f-word" in her initial reply to the resident. Such conclusion is supported by the July 1, 2020 termination letter (Appellee's Exhibit 4), as well as by the Resident Abuse Investigative Report Form submitted by Stephen Noe, CSW/MSW (Appellee's Exhibit 6). Furthermore, in the note below her written statement, Ms. Sturgill stated, "I put what she said in capital letters..." (Appellee's Exhibit 1). Ms. Sturgill had placed in capital letters only the initial statement by Ms. Haley to the resident.

7. Ms. Sturgill, in her written statement, also alleged that the Appellant used a hateful tone and made the statement while she was yelling. This was denied by the Appellant in her testimony and was not addressed in the Resident Abuse Investigative Report Form (Appellee's Exhibit 6) or the termination letter (Appellee's Exhibit 4). The Hearing Officer gives credibility to Appellee's Exhibits 4 and 6 on this issue as well as the testimony of the Appellant and a number of her witnesses. Their testimony was consistent that, at 5:00 a.m., anyone yelling from within a resident's room would most likely have been heard outside the room. It was a very quiet time of day.<sup>5</sup>

8. We turn to an examination of whether the Appellant's incident constituted any type of abuse towards the veteran. It is clear from the policy and explanation sections of the KDVA Policy Directive 19 that the Appellee had the duty to establish uniform rules, based on state and federal laws, aimed at preventing abuse and neglect of veterans who reside in the veterans nursing homes. "Veteran residents may

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<sup>5</sup> Investigator Noe reported that neither the veteran resident nor his roommate was able to provide any useful information in the investigation.

be incapable of protecting or caring for themselves. Abuse, neglect, or misappropriation would jeopardize the health, safety, and security of veterans whose care is entrusted to KDVA. KDVA is charged by law with preventing abuse, neglect, and misappropriation." Furthermore, pursuant to KRS 216.515(18), it is the duty of such facilities that "each resident shall be treated with consideration, respect, and full recognition of his dignity and individuality, including privacy in treatment and in care for his personal needs."<sup>6</sup>

9. That same policy cites a provision of 906 KAR 1:100, which pertains to the hearing procedures before the office of Inspector General in determinations relating to placement of Nurse Aides on the Nurse Aide Registry as it pertains to abuse:

'Abuse' means the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish and includes physical abuse, verbal abuse, sexual abuse, and mental abuse. (Appellee's Exhibit 5).

The Hearing Officer notes that the cited definition requires a "willful infliction" of the various types of abuse. A willful act is one that is done intentionally, knowingly, and purposefully without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly, or inadvertently. A willful act differs essentially from a negligent act. The one is positive and the other negative. (Black's Law Dictionary, 5th ed., p. 1434.) The Appellee's own policy defines "willful" as "...the voluntary, conscious decision to do the act which the law forbids, but does not require specific intent to cause harm, pain, or mental anguish."

10. It is near the end of Policy Directive 19, under the "Policy Definitions" section, that the Appellee apparently utilized previously cited "...statutorily and regulatory definitions applicable to Kentucky Nursing facilities and to state veterans nursing homes nationwide..." in formulating the definition of "abuse" for purposes of this Policy Directive:

'Abuse' means the infliction of injury, unreasonable confinement, intimidation, or punishment that results in physical pain or injury - including mental injury - and includes...verbal abuse...

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<sup>6</sup> KDVA Policy Directive 19 also quotes and incorporates provisions of 902 KAR 20:300, Sections 3(2) and 5(2). The official version of the regulation, as written, does not currently include any Section 3 or 5.

Verbal abuse includes the use of words to humiliate, degrade, insult, belittle, vilify, or convey disrespect toward a resident.

11. The evidence supports a conclusion that the Appellant, in making the statement to the veteran, had no specific intent to cause harm, pain, or mental anguish. Also, there was no evidence of "...resulting physical harm, pain, or mental anguish..." There was no evidence of resulting "...physical pain or injury - including mental injury." This was confirmed by Investigator Noe when he answered, "No" to whether the resident was injured (Appellee's Exhibit 6). While said act was wrong, the evidence does not support a conclusion that the Appellant made a conscious decision to do the act, which was forbidden by policy. In fact, the evidence shows that nearly immediately after uttering the statement to the veteran, Ms. Haley apologized to the veteran. That apology was witnessed by Jennifer Sturgill (Appellee's Exhibit 1).

12. There is no doubt that the incident, and the use of foul, inappropriate language on a single occasion by the Appellant to a veteran resident, was inappropriate and a violation of policy. It was a violation of professional conduct, but did not rise to the level of a willful intent of infliction of harm against the veteran resident, or an act that resulted in the resident's physical harm, pain, injury, or mental anguish or injury.

13. The Hearing Officer feels it is necessary to address the substance, and lack thereof, in the Resident Abuse Investigation Report Form, which was relied on by the Appointing Authority and cited in the termination letter of July 1, 2020. Mark Bowman, Executive Director, in his termination letter, stated, "All allegations of abuse are taken seriously and require a **thorough investigation**."<sup>7</sup> The investigation concluded that the allegation of verbal abuse was substantiated." (Emphasis added.) (Appellee's Exhibit 4.) The Resident Abuse Investigation Report Form, completed by Stephen Noe, which is assumed to be inclusive of the totality of his investigation, is incomplete, confusing, fails to cite any statutory, regulatory, or policy violations involved, and reaches a conclusion that abuse occurred without a required explanation. The Hearing Officer can only surmise that the Appointing Authority took the Investigator's single affirmative word of "Yes" to the question of an indication that abuse occurred, as the Investigator's substantiation. In his "Summary of interview with person(s) reporting the incident," Mr. Noe failed to identify who specifically he interviewed and what each witness specifically stated. He merely summarized the totality of information obtained without so much as delineating who said what. He made a finding that Ms. Haley used inappropriate language and that same was a violation of the Professional Code of Conduct Policy. He failed to specifically state why it was a violation, the policy he

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<sup>7</sup> The phrase used by Investigator Noe in his report (Appellee's Exhibit 6).

relied on, or what the policy stated. While the form itself requires the investigator to explain a finding of abuse, he completely failed to complete that task. Mr. Bowman testified the Department of Veterans Affairs employs a progressive approach to employee discipline and that such disciplinary steps include counseling and coaching, written reprimands, suspensions, and termination.<sup>8</sup> Although KDVA Policy Directive 2 was cited in the termination letter, the Hearing Officer gives credibility to the Appointing Authority regarding the progressive nature of discipline employed by the Appellee.

14. It was proper for the Appellee to consider and cite in its termination letter any prior disciplinary history that was employed against the Appellant. Furthermore, when the Appellee, through its Appointing Authority, decided to terminate Appellant, it was required to notify her in writing of the statutory or regulatory violations. KRS 18A.095(7)(b)(1). Such requirement of specific citation is required to be compliant with the due process of law. Although Mr. Bowman testified there were mandates in the law that require termination of employment for verbal abuse and cited 38 CFR 51.90, as well as KRS 216.515 and 902 KAR 20.030, the July 1, 2020 termination letter failed to give the Appellant notice of violation of these provisions. Mr. Bowman testified he had no choice but to apply the strict requirements of termination as required by such statutes and regulations.

15. On the matter of the citation of the "history" of the Appellant's "disciplinary and corrective actions" in that same termination letter, it was abundantly clear from Mr. Bowman's testimony on rebuttal that he had no idea whether the re-education for Nurse Aide duties or the verbal counseling for resident care constituted re-education for certain individuals or a group of individuals, or any type of corrective action, or why the Appellant had participated at all in those events. Without more, the Hearing Officer cannot consider those citations as a history of any prior disciplinary action of the Appellant.

16. The Appellee, under the totality of the evidence of this case, had discretion to properly issue disciplinary action against the Appellant, pursuant to its progressive disciplinary scheme. However, as such act did not rise to the level of being willful, and as there was no evidence of injury, termination was excessive or erroneous.

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<sup>8</sup> In the July 1, 2020 termination letter, Mr. Bowman confirms that the Appellee attempts to apply discipline in a progressive manner under KDVA Policy Directive 2, and that the same directive provides exceptions to this progressive approach when a violation is of a sufficiently serious nature. (Appellee's Exhibit 4.) KDVA Policy Directive 2 was not presented into evidence and, therefore, not available for consideration as a part of the administrative record.

17. While the Appellee has proven by a preponderance of the evidence that there was just cause for disciplining the Appellant, the Appellee failed to prove by a preponderance of the evidence that there was just cause for the dismissal of the Appellant, as such penalty was excessive and/or erroneous.

### RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **KATHY HALEY V. DEPARTMENT OF VETERANS AFFAIRS (APPEAL NO. 2020-164)** be **SUSTAINED to the extent** that she be reinstated to her previous positions or a position of like pay and status and, further, be awarded lost pay and benefits and that she otherwise be made whole. However, the Appellant shall be suspended from duty and pay for a period of ten (10) days, said suspension having already been served by virtue of her termination, and any award for lost pay and benefits should be reduced by said ten-day period. [KRS 18A.105, 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 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 Roland P. Merkel this 14<sup>th</sup> day of  
January, 2021.

KENTUCKY PERSONNEL BOARD

  
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MARK A. SIPEK  
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Mr. John Ostroske  
Ms. Kathy Haley