

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-028**

IFUNANYA C. ISEHERIEN

APPELLANT

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

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

APPELLEE

*** **

The Board at its regular November 2015 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated September 17, 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, 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 24th day of November, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Rebecca Wooldridge
Ifunanya C. Iseherien
J. P. Hamm

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KENTUCKY PERSONNEL BOARD
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This matter came on for evidentiary hearing on August 7, 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, Ifunanya C. Iseherien, was present at the evidentiary hearing and was not represented by counsel. The Appellee, Cabinet for Health and Family Services (the "Cabinet") was present and was represented by the Honorable Rebecca Wooldridge. Also present on behalf of the agency was agency representative Tarron Ray, Director of Personnel Services for Hazelwood Center.

The Hearing Officer outlined the burden of 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. The burden of proof was upon the Appellee to prove by a preponderance of evidence that the penalty was neither excessive nor erroneous. The Parties waived opening statements and the Cabinet began its case in chief.

BACKGROUND

1. The Cabinet called Appellant, **Ifunanya Iseherien**, as its first witness. After being sworn, the Appellant testified that she has been employed with the Cabinet for three years as a Nurse Aide. Her duties are providing direct care to the clients of Hazelwood to include changing them, feeding them and providing companionship. She admitted that she had been trained on the mandatory overtime requirements of the Cabinet, but could not remember the exact date of training. Appellee's Exhibit 1 was marked and identified by Appellant as a two-page In-service Training Report Form. She identified her name and signature on the document, along with a sign-in date for the mandatory overtime training that occurred on November 12, 2014.

2. The Appellant testified that she was aware, through the training, that refusing mandatory overtime could result in discipline to the employee although she added that she was not mandated to work overtime on the dates in question. Appellee's Exhibit 1 was entered into the record without objection.

3. The Appellant testified that on January 9, 2015 she was presented a Notice of Major Disciplinary Action (MDA) for her alleged refusal to work mandatory overtime on December 31, 2014. She identified what was marked as Appellee's Exhibit 2, a document she wrote in response to being notified of the impending MDA. Upon review of the document at the hearing, she admitted that she wrote the statement on January 9, 2015, and outlined that she had refused mandation because she had to pick up her child from daycare. She admitted that nowhere on the document did she deny being mandated to work overtime, but instead she provided a reason for refusing to work mandatory overtime.

4. At the close of direct examination, the Appellant testified in the narrative and responded to questions by the Hearing Officer. The Appellant testified that the mandation was done "behind her back" and there was no conversation with her telling her that she was being mandated to work overtime. She stated that she was asked to volunteer and declined to do so, but contends that her supervisor, Bridgette, never came back to have a conversation with her that she was being required to work mandatory overtime. Upon questioning by the Hearing Officer and upon being directed to review Appellee's Exhibit 2, her written statement, the Appellant was asked why she wrote the words, "The reason I couldn't stay back for mandation . . ." instead of writing a statement consistent with her testimony now, such as "I wasn't mandated to work..." The Appellant responded that her written statement was a mistake.

5. The next witness to testify on behalf of the Appellee was **Bridgette Shacklett** who serves as a senior shift supervisor at Hazelwood. She testified that in the organizational chart, her position is two levels above the Appellant. Her duties include deployment of staff, assigning Direct Care Professionals (DCPs) or Nurse Aides to the floor to take care of the clients. She outlined the process for instituting mandatory overtime. At the time of the mandation in question, the required staff to client ratio was 1:8. She testified that she utilizes a master list of all staff which is listed in order of the last time the staff member worked overtime. She testified that the list is kept in the office next to the staff sign-in sheet so that the staff can see where they fall on the list for mandatory overtime. The witness testified that a DCP has some degree of control over where their name falls on the list because they can choose to work an extra shift or volunteer when asked so that their name is placed on the bottom of the mandation list.

6. She testified that before utilizing the mandation list, the supervisor goes around to every staff member to see if there are sufficient volunteers to meet the staffing requirements. Once the round of volunteer seeking is complete, if the staffing is still inadequate, they go to the mandatory list and have a conversation with each person starting at the top of the list, telling them their number on the list that they are being mandated and asking if they accept or refuse the mandation. The witness testified that on December 31, 2014, she had two conversations with the Appellant. During the first conversation, she asked if Appellant wanted to volunteer to work the upcoming third shift. She stated that the Appellant declined. The witness testified that when the number of volunteers was insufficient, she went back to the Appellant and notified her that she was being mandated to work overtime. She testified that the Appellant stated that she was not accepting the mandatory overtime because she was pregnant and she was unable to stay up for the extra shift.

7. The next witness to testify on behalf of the Appellant was **Geoffrey Gioche**. He serves as a senior supervisor for Hazelwood, a position he has held for nearly three years. He testified to the process of seeking volunteers and then instituting mandatory overtime to meet staffing needs. He testified that on January 17, 2015, he had to institute mandatory overtime after he was unable to obtain sufficient staff through volunteers. He testified that he notified the Appellant of the mandation and asked if she was accepting or declining. He stated that she declined and that she did not provide a reason for declining the mandatory overtime. He stated that while there is now a form that is required to be signed by the individuals declining mandation, at the time of his conversation with the Appellant in January, only the supervisor made a notation of the date and time of the refusal on the list and submitted it to superiors.

8. The fourth witness to be called by the Appellee was the agency representative, **Tarron Ray**. Mr. Ray testified that Hazelwood is an intermediate care facility for the developmentally disabled. They have eighty-seven (87) clients that reside in the facility and twenty-four (24) in group homes. He testified that they are responsible for providing complete care to the residents; some of whom are medically fragile. He stated that Hazelwood is a 24-hour per day/365-day per year facility and they must adhere to the staffing minimums set by statute. He testified that adequate staffing is important to prevent injury to clients, staff and visitors.

9. Mr. Ray testified that the staffing process utilizes a system of mandatory overtime when the facility is at risk of falling below the minimum staffing levels. He outlined that they first seek volunteers, and then resort to mandatory overtime. He stated that the names of the staff are maintained on a rotating list based upon the last time the employee worked overtime. The witness identified what was marked as Appellee's Exhibit 3, Policy 3.21, dated October 23, 2014. He outlined that this policy takes a stronger approach than the standard attendance policy which includes a verbal and then written style of progressive discipline. He testified that Number 7 of this policy outlines that an unexcused failure to work mandatory overtime "will lead to a suspension or a fine for the first offense."

10. The witness identified Appellee's Exhibit 4 as Hazelwood's policy on Misconduct: Nonthreatening and testified that refusing mandation constitutes a violation of this policy under subsection (J) because it is a failure to perform duties as assigned since mandatory overtime is a directive. Appellee's Exhibits 3 and 4 were entered into the record without objection. The witness stated that every refusal will result in a request for an MDA, but in the Appellant's case, while they were in the process of issuing the recommendation for discipline for Appellant's first refusal, the second refusal occurred; therefore, she was only disciplined once.

11. The next witness to testify on behalf of the Appellee was **Howard J. Klein**, the Appointing Authority for the Cabinet for Health and Family Services. He testified that when he receives a request for MDA he reviews the documents and then assigns it to one of the branches in his division to draft the disciplinary letter. The Branch Manager reviews and then the document comes to him for review and signature. He testified that in this instance, because it was a request for a disciplinary fine, it was forwarded to the Personnel Cabinet for review.

12. The witness identified what was marked as Appellee's Exhibit 5, the February 11, 2015 letter imposing a three-day disciplinary fine upon the Appellant. He testified that a three-day disciplinary fine was standard for a refusal to work mandatory overtime and while the disciplinary fines have been in the regulation for quite a while, the Personnel Cabinet took some time to determine the process for imposing them. He stated that in this particular case, the Appellant only received a three-day disciplinary fine for two refusals, when that is normally the punishment imposed for a single refusal. He stated that the reason that occurred was that while they were in the process of recommending discipline for Appellant's December 31, 2014 refusal to work overtime, the Appellant refused again on January 17, 2015 before the first disciplinary fine could be issued.

13. He stated that disciplinary fines are now the standard form of discipline used because addressing this problem by suspending the staff member created a situation in which the facility would struggle with adequate staffing. He testified that by using a disciplinary fine, the discipline is administered and the individual still loses the money, but no staffing problems are created. He stated that adequate staffing is important because many of the clients need constant attention, some even require one-on-one care. He testified that the disciplinary fine is consistent with the policy contained in Policy 7.21, Appellee's Exhibit 3. Appellee's Exhibit 5 was entered into the record without objection.

14. Mr. Klein testified that disciplinary fines had previously been appealed to the Personnel Board and had been upheld. He cited the *Bryant* case as an example. He stated that the Personnel Cabinet's review of the disciplinary fine includes ensuring that by imposing the disciplinary fine the staff person does not fall below minimum wage. He identified Appellee's Exhibit 6 as a copy of regulation 101 KAR 1:345 promulgated by the Personnel Board authorizing disciplinary fines as a form of discipline for classified employees. Appellee's Exhibit 6 was entered into the record without objection.

15. The next witness to testify on behalf of the Appellee was **Dinah Bevington**. She testified that she serves as General Counsel to the Personnel Cabinet, a position she has held since 2008. She testified that in January 2015, Mr. Klein sent over a draft letter imposing a disciplinary fine upon the Appellant. She reviewed it and said that it was fine to issue. She stated that the review provided by her office includes ensuring that by imposing the fine they do not violate the Fair Labor Standards Act or state laws that require that the individual's pay not fall below minimum wage. They also ensure that the individual does not incur overtime during that period and that the discipline is being imposed uniformly. She stated that in the case of the Appellant, there were no problems with the letter and it was approved. The Cabinet rested.

16. The Appellant then called her witnesses, **Nicholas Senior, Todd McGuire, Kevin Magee, Rashad Myers** and **Linda Weyler**, all of whom testified that they serve in supervisory capacities at Hazelwood. Each of them testified, separately as to the process for instituting mandatory overtime at Hazelwood. Their testimony was consistent with the Appellee's witnesses who had testified on this issue. Mr. McGuire testified that he had witnessed errors in mandation to include not following the list and not mandating the right people. Mr. Senior testified that he was aware of a supervisor being mandated, but not being disciplined.

17. The Appellant, **Ifunanya Iseherien**, then called herself as her final witnesses. She testified that the process for mandation was not followed and she was not told that she was being required to work overtime. The Hearing Officer asked the Appellant whether she declined to work when mandated by Bridgette Shacklett, citing her pregnancy and inability to stay awake. The Appellant admitted that she was about seven months pregnant at the time, but contended she did not have a conversation with her supervisor about mandation at all on December 31, 2015. She contended that she was mandated by Bridgette Shacklett on December 24, 2015, and refused that mandation because of child care issues, but when questioned on that admission during cross-examination, the Appellant cited confusion.

18. The Appellee then called as a rebuttal witness, agency representative **Tarron Ray** who testified that he had not been made aware of any instances of supervisors failing to implement the mandatory overtime process correctly.

19. Each party made a closing statement. During the Appellee's closing, counsel asked that the Hearing Officer review prior Personnel Board decision 2014-088, issued in December 2014, which upheld disciplinary fines.

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

FINDINGS OF FACT

1. The Appellant, Ifunanya Iseherien, was employed as a Direct Care Professional with Hazelwood Center within the Cabinet for Health and Family Services. (Appellant's testimony, Appellee's Exhibit 5).

2. The Hazelwood Center is a 24-hour/365-day intermediate care facility responsible for providing care to developmentally disabled adults, some of whom are medically fragile. (Testimony of Ray, Klein)

3. 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)

4. Hazelwood instituted a revised Mandatory Overtime Policy 7.21, with an effective date of October 23, 2014. (Appellee's Exhibit 3)

5. 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 3)

6. On November 12, 2014, the Appellant was trained on the mandatory overtime procedures and understood that a refusal would result in discipline. (Testimony of Appellant, Appellee's Exhibit 1)

7. On December 31, 2014, Bridgette Shacklett instituted mandatory overtime after she was unable to secure sufficient staff through volunteers. (Testimony of Shacklett, Appellee's Exhibit 5)

8. On January 17, 2015, Supervisor Geoffrey Gioche instituted mandatory overtime when he was unable to secure sufficient staff through volunteers. (Testimony of Gioche, Appellee's Exhibit 5)

9. The Appellee alleges that on each of these occasions, Shacklett and Gioche had a conversation with Appellant notifying her that she was being mandated to work overtime on the next shift. The Appellant denies this and states that she was only asked to volunteer and was never directed to work mandatory overtime by either of the supervisors on the dates in question. The parties have presented a factual dispute as to whether the Appellant refused these directives to work mandatory overtime. The Hearing Officer resolves this dispute in favor of the Appellee. The Hearing Officer relies upon the testimony of Gioche and Shacklett, both of whom appear credible. The Hearing Officer also relies upon Appellant's own written statement dated January 9, 2015, prepared only 10 days after the December 31, 2014 mandation. In her own hand, she put forth a reason for refusing mandation, but nothing to indicate that she was never told of her

mandatory overtime. Because the Appellant's testimony is inconsistent with her written statement about the December 31, 2014 mandation, the Hearing Officer also finds she lacks credibility relative to the January 17, 2015 mandation.

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, some of whom are medically fragile, 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 Iseherien was trained on the Mandatory Overtime Policy on November 12, 2014, and acknowledged during her testimony that she knew a refusal would result in disciplinary action.

4. The Appellant's stated reason for not working overtime on December 31, 2014, changed from the date of the mandation, to the date of her January 9, 2015 written statement in response to the notice of MDA. Her purported reason changed again by the date of her August 7, 2015 testimony at the hearing. But neither reason proffered for the December or January mandations fit within the limited exception of illness supported by a physician's statement as outlined in the Policy.

5. The evidence of record reveals that a three-day disciplinary fine imposed was standard for a first refusal to work mandatory overtime, but because of the timing of Appellant's second refusal on January 17, 2015, she received only a three-day disciplinary fine for two separate refusals. 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 case of **IFUNANYA C. ISEHERIEN VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2015-028)** 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 17th day of September 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy this day mailed to:

Hon. Rebecca Wooldridge
Ifunanya C. Iseherien