

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 **CLAUDIA JACKSON VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2014-041)** as the same appears of record in the office of the Kentucky Personnel Board.

Witness my hand this 15th day of October, 2014.

A handwritten signature in cursive script, appearing to read "Mark A. Sipek", written over a horizontal line.

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

Copy to Secretary, Personnel Cabinet

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-041

CLAUDIA JACKSON

APPELLANT

VS.

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

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

APPELLEE

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

This matter came on for evidentiary hearing on July 23, 2014, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before Colleen Beach, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellant, Claudia Jackson, was present and represented by the Hon. Gregory Butram. Appellee, Cabinet for Health and Family Services, was present and was represented by the Hon. Mona Womack.

BACKGROUND

1. Appellant, Claudia Jackson, was an employee with status employed by the Cabinet for Health and Family Services as a Patient Aide I at the Hazelwood Center. By letter dated February 14, 2014, she was notified of her dismissal from her position for unsatisfactory performance of duties and lack of good behavior. A copy of her termination letter is attached hereto as "**Recommended Order Attachment A.**"

2. Appellant filed a timely appeal with the Personnel Board on March 10, 2014, appealing her dismissal, and stating specifically:

The investigation the whole package was a lie – the only truth was what I said. They have lost nothing. I've suffered great lost (sic). And it's not fair. Please check the cameras. Please check on why I haven't recv'd my comp. & annual time. I am a good worker, they've marked me as a bad one.

3. The Cabinet went first in the presentation of proof.

4. **Patrick Spears** is an Investigative Officer and Acting Director of Risk Management at Hazelwood Center. He has been employed at the facility for the past two and a half years. His job duties include conducting investigations into all reported incidents that occur

at Hazelwood (injuries and deaths) and supervising the other facility investigators. Spears explained that after an investigator completes his Final Investigation Report, the Administrative Review Committee meets to discuss the investigator's findings. The Committee then decides if it agrees with the report and the recommended corrective action.

5. Spears investigated the incident that led to Appellant's dismissal. He concluded that Appellant's actions constituted poor work performance, but he did not find that she neglected the two clients under her care as "neglect" is defined in Hazelwood Policy and Procedure 12.7.

6. Spears' report was submitted to the Administrative Review Committee, which did not agree with his findings. Spears stated that the issue was discussed at length at the Review, but in the end "the discussion concluded with a preponderance of the Committee members assessing that [Appellant's] actions in fact constituted neglect of [Client 1] and [Client 2]."

7. Spears was asked to describe his investigative findings. Spears testified that Appellant was to provide "intensive supervision" of the clients housed in Room 327. Client 1 was to be monitored for his breathing machine [Continuous Positive Airway Pressure (CPAP)]. Client 2 had a tracheotomy tube. At approximately 2:30 a.m., Appellant briefly left the clients to deposit dirty linen in a closet whose door was adjacent to the door of Room 327. According to the different witnesses Spears interviewed, there was some dispute as to how long Appellant was actually gone from her assignment. The absence was estimated to be as long as a minute to as little as one or two seconds. Appellant told Spear she was gone for less than five seconds.

8. Spears was asked why he concluded that Appellant was guilty of poor work performance rather than neglect. Spears explained that Appellant's motivation was "primarily to improve the environment" of the room. Additionally, Spears found it unlikely that an absence of such a short duration would endanger the health of the clients. But Spears added that a caregiver's absence for any reason could potentially result in serious injury or death.

9. Appellant's assignment in Room 327 was a "1:2 requirement," meaning that there was one staff for two individuals. Spears added that while her orders did not specify continuous supervision, in his opinion it is "implicit" in the assignment that she could not actually "supervise" her clients unless she could observe them at all times.

10. On cross-examination, Spears stated that the linen closet – where Appellant put the soiled linens – was two to three steps away from the door of the room to which she was assigned.

11. Spears stated that to his knowledge the two clients were asleep when Appellant disposed of the linens, and were still asleep upon her return. He also stated that the linens were "full of feces." Spears was asked how Appellant should have disposed of the linens while maintaining continuous observation of the clients. Spears answered that she should have "monitored the traffic in the hallway and asked someone passing by to dispose of them for her."

12. The Appellant, **Claudia Jackson**, testified on her own behalf. She was employed as a Patient Aide I, at Hazelwood Center, where she had worked for four years until her dismissal on February 14, 2014. She worked third shift, 11 p.m. to 7 a.m.

13. Appellant testified that when she returned from her lunch break, and entered the room to which she had been assigned, she immediately smelled a foul odor. She noticed a pile of feces-soiled linens in the room. She went to the door and looked out to the hallway seeking assistance. No one came, she stated, so she made a "judgment call." She opened the door to the linen closet, approximately four steps away, and deposited the linens there. In her estimation, she was gone perhaps three seconds, but no more than five. Both clients were sleeping when she left and were still sleeping when she returned.

FINDINGS OF FACT

1. Appellant was a classified employee with status, employed as a Patient Aide I at Hazelwood Center. By letter dated February 14, 2014, she was notified of her dismissal for unsatisfactory performance of duties and lack of good behavior.

2. Appellant worked the 11 p.m. to 7 a.m. shift. On October 26, 2013, Appellant was assigned to Client 1 and Client 2, in Room 327. Her assignment was to provide supervision of both clients, one who was on a breathing machine (CPAP), and the other who had a tracheotomy tube.

3. At approximately 2:30 a.m., upon Appellant's return from her "lunch" break, she entered Room 327 and noticed a foul odor emanating from a pile of soiled linens on the floor. According to Appellant, she gathered the feces-stained linens and went to the door of the room to seek assistance. When she saw no one walking down the hall, she proceeded to the linen closet herself. It was uncontroverted that the linen closet was a mere two to four feet from the door of Room 327. She deposited the linens in the closet and directly returned. Appellant estimated she was absent from the room "less than 5 seconds." Both clients were asleep when she left, and were still asleep when she returned.

4. Patrick Spears, an Investigator at Hazelwood Center, conducted an investigation into the allegations against Appellant and completed a report (introduced into the record at the evidentiary hearing as Appellee's Exhibit 2). According to his Investigative Report, Melinda Renner, Appellant's coworker and the reporting witness, estimated that Appellant was absent from Room 327 "thirty seconds to a minute." Another witness, Mark Schmidt, estimated that Appellant was gone "1 to 2 seconds." Neither Renner nor Schmidt testified at the evidentiary hearing. The Hearing Officer accepts the testimony of the Appellant that she was absent from her assigned room less than 5 seconds.

5. After finishing his investigation, Spears concluded that Appellant's actions constituted poor work performance because she left the room in which Clients 1 and 2 were housed, which resulted in a lack of supervision. He did not believe her actions rose to the level of "neglect" (as defined in Hazelwood Policy and Procedure #12.7) because Appellant's motivation was to "improve the environment of the room," and because her absence was of such a short duration.

6. Spears admitted that while Appellant's patient-care directive did not explicitly state she must provide continuous supervision, he felt that her instructions "implicitly" required it. In his estimation, Appellant could not adequately supervise her clients if she could not actually observe them at all times.

7. Spears' Investigative Report was submitted to Hazelwood's Administrative Review Committee. Their written review, submitted November 1, 2013, states in pertinent part: "The Committee had a lengthy discussion regarding whether or not Appellant's action constituted neglect. Some Committee members concluded that Appellant's actions constituted neglect, while others concluded that those actions constituted poor job performance only. The discussion concluded with a preponderance of the Committee members assessing that Appellant's actions in fact constituted neglect of Clients 1 and 2."

8. Because the Committee concluded that Appellant's actions constituted adult neglect, she was found to have also violated 42 CFR 483.440(c)(1) and (7), as well as the Department for Behavioral Health, Development and Intellectual Disabilities' Zero Tolerance for Client Abuse Policy. Consequently, she was terminated from her position on February 14, 2014.

9. Hazelwood Policies and Procedures #12.7 defines "Adult Neglect" as:

A situation in which an adult is unable to perform or obtain for himself the goods or services that are necessary to maintain his health or welfare, or the deprivation of services by a caretaker, i.e., the failure to provide goods and services necessary, to maintain the health and welfare of an adult, which may result in physical harm, mental anguish, or mental illness.

10. 101 KAR 1:345, Section 1, "Disciplinary Actions" reads in pertinent part:

Appointing authorities may discipline employees for lack of good behavior or the unsatisfactory performance of duties.

11. KRS 18A.095(1) states:

A classified employee with status shall not be dismissed, demoted, suspended, or otherwise penalized except for cause.

CONCLUSIONS OF LAW

1. Appellee Cabinet did not prove by a preponderance of the evidence that Appellant's dismissal was for just cause.
2. Appellant left her assigned work location at Hazelwood Center-- Room 327-- for a few seconds for the sole purpose of removing soiled linens that caused a foul odor to permeate the room in which Clients 1 and 2 were sleeping. Appellant's patient-care instructions were to provide "supervision" to Clients 1 and 2. No evidence was presented at the evidentiary hearing that Appellant was explicitly instructed to provide continuous supervision to the effect that a brief absence—for less than five seconds and done for a legitimate reason—would constitute a dereliction of her assigned duties.
3. Appellant's actions did not constitute "neglect" as defined by Hazelwood Policy and Procedure 12.7.
4. Appellant's actions did not constitute unsatisfactory performance of duties or lack of good behavior.
5. The Appellee Cabinet's termination of Appellant was excessive and erroneous.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **CLAUDIA JACKSON VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2014-041)** be **SUSTAINED** and that she be reinstated to her previous position and further awarded lost pay and 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 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 Colleen Beach** this 2ND day of September, 2014.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof mailed this date to:

Hon. Mona Womack
Hon. Greg Butram



MAR 13 2014

**CABINET FOR HEALTH AND FAMILY SERVICES
OFFICE OF HUMAN RESOURCE MANAGEMENT**

Steven L. Beshear
Governor

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Frankfort, KY 40621
502-564-7770
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Audrey Tayse Haynes
Secretary

February 14, 2014

Claudia E. Jackson

Re: Dismissal

Dear Ms. Jackson:

In a letter dated February 11, 2014, you were provided written notice of the Appointing Authority's intent to dismiss you from your position with the Cabinet for Health and Family Services, and advised of your right to request a pre-termination hearing with the Appointing Authority or his designee. On February 13, 2014, this office received a pre-termination hearing request form from you and you marked the box beside the statement, "I do not wish to request a pre-termination hearing". Therefore, pursuant to KRS 18A.095 and 101 KAR 1:345, you have waived your right to such a hearing.

Therefore, based on the authority of KRS 18A.095 and 101 KAR 1:345, you are hereby notified that you are officially dismissed from your position as a Patient Aide I, in the Department for Behavioral Health, Developmental and Intellectual Disabilities, Hazelwood Center effective February 15, 2014. Your last working day will be February 14, 2014.

Further, in a letter dated February 11, 2014, in accordance with the authority of KRS 18A.095 (2)(c), the Appointing Authority placed you on administrative leave until the Cabinet for Health and Family Services' final action. As your dismissal is effective February 15, 2014, your administrative leave is hereby concluded.

You are being dismissed from your position for the following specific reasons:

Unsatisfactory Performance of Duties and Lack of Good Behavior. As reported by Facility Director Melissa Brock, and as substantiated in a Hazelwood Center investigation, you failed to provide 1:2 supervision of clients, resulting in the facility substantiating neglect against you.

Specifically, you were scheduled to work third shift, from 10:00 p.m. on October 25, 2013, to 6:15 a.m. on October 26, 2013. You were assigned to care for Client *1 and Client *2 who were both assigned to room 327 and on 1:2 supervision. As part of your assignment, you were given care instructions according to each client's individual program plan.

Kentucky

**APPELLEE'S
EXHIBIT**

Kentucky
UNBRIDLED SPIRIT

Recommended Order Attachment A

Per 42 CFR 483.440(c) Standard: Individual program plan (1), "Each client must have an individual program plan developed by an interdisciplinary team that represents the professions, disciplines or service areas," and, (7), "A copy of each client's individual program plan must be made available to all relevant staff, including staff of other agencies who work with the client, and to the client, parents (if the client is a minor) or legal guardian."

Accordingly, the Level of Supervision (LOS) was discussed with you during Intensive Staffing Education on October 24, 2013 and October 25, 2013, and you signed the Intensive Staffing Attendance sheet attesting that you were made aware of the requirements.

Client *2's Intensive Staffing Education, required that Client *2 was, "to be on 1:1 to prevent from pulling trach, Gtube, and ensure safety re: ambulation while awake. Then 1:2 w/ roommate while in bed x72°."

Client *1's Independent Living Plan (ILP) – Part III. Risk Management, Section RM2, Has Suprapubic Catheter, specifically states in Line 2i, "[First name of Client *1] receives one to two staffing to prevent him from pulling his catheter out on third shift and during reposition time in the afternoon while in bed he requires one on one staffing." Section RM6, At Risk of Hypoxia, line 6b specifically states, "[First name of Client *1] receives one on one staffing to prevent [First name of Client *1] from removing his CPAP (continuous positive airway pressure) during third shift and during repositioning time in bed."

On October 26, 2013, Direct Care Professional I (DCPI) Melinda Renner of Nurse Staffing (a contract agency) provided a signed statement regarding the events she witnessed during the third shift. Ms. Renner specifically stated, "On 10/26 at approximately 2:30 a.m., I was walking down the hallway, returning from my lunch break. I saw Claudia Jackson standing in the door way with 2 bags of soiled linen or trash. She was talking to Patient Aide II (PAII) Mark Schmitt who was 1:1 across the hallway. Ms. Jackson was assigned to 1:2 with Client *2 and Client *1. Ms. Jackson then left the room, unattended, and went next door to the soiled utilities closet. By the time I made it to [last name of Client *2] and [last name of Client *1's] room she was walking back in. I glanced in the room and didn't see anyone there to relieve her." Ms. Renner also stated, "I estimate that she left the clients unattended between 30 seconds to 1 minute."

On October 28, 2013, Direct Care Professional II (DCPII) Angel Weathers of River Valley Behavioral Health (a contract agency) provided a signed statement regarding her observation of your behavior on October 26, 2013. Ms. Weathers stated, "On 10-26-13 in between 2 a.m. – 2:30 a.m. I was in Module 330 standing at counter in hallway. I seen (sic) Ms. Jackson leaving the soiled utility room going back in [last name of Client *2] and Client *1's room."

On October 26, 2013, you provided a signed statement regarding your actions. In your statement, you admitted, "On 10-26-13 approx. 2:15a, I want (sic) to get ride (sic) of foil (sic) linen left in the room. I looked outside the door, no one was there, I took 3 step (sic) to open the soil linen room door and tossed it into the ben (sic), took 3 steps back into the clients (sic) room, that when Ms. Renner cam (sic) through the double doors from the elevator." Further, you admitted, "I was only out of the room for maybe 2-3 seconds."

On November 6, 2013, you provided a signed statement in response to the notification of request for major disciplinary action. In this statement, you confirmed your previous admission by stating, "There was a large bag of soil linen and trash behind door, I looked out the clients door no one was around to

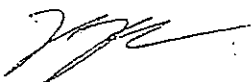
ask for help, I took 3-4 steps outside there (sic) room open the trash/soil linen and tossed them in to their bends (sic), turned around and stepped back into their room."

Your actions subject you to disciplinary action as outlined in Hazelwood Center's Standards of Practice C-13.2, Misconduct: Non-Threatening and A-14, Abuse, Neglect, Exploitation, and Mistreatment Prevention. Additionally, your neglect of Client *1 and Client *2 violates 42 CFR 483.440(c)(1) and (7) as well as the Department for Behavioral Health, Developmental and Intellectual Disabilities' Zero Tolerance for Client Abuse policy. Further, your actions violate the Cabinet for Health and Family Services' Personnel Procedure 2.1, Employee Conduct and constitute unsatisfactory performance of duties for which you may be disciplined pursuant to 101 KAR 1:345, Section 1.

To keep confidential the identities of Client *1 and Client *2 as required by law, the names of the clients referred to is transmitted by the attached list marked "CONFIDENTIAL" which is not to be disclosed without proper authorization. Further, you are not authorized to disclose the following client's names to anyone, including any attorney who may be representing you as counsel.

A copy of this notice is being furnished to the Personnel Cabinet in accordance with personnel rules. As an employee with status, you may appeal this action to the Personnel Board within sixty (60) days after receipt of this notice, excluding the day of receipt. Appeals must be made by completing the attached form and directing it to the address indicated on the form. (See KRS 18A.095 and 101 KAR 1:365, Appeal and Hearing Procedure.)

Sincerely,



Howard J. Klein
Appointing Authority

HJK:gil

cc: Secretary Timothy Longmeyer, Personnel Cabinet
Commissioner Mary Begley, DBHDID
Facility Director Melissa Brock, Hazelwood Center
Cabinet Personnel File