

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2016-265

ERASTO MORAN

APPELLANT

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

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

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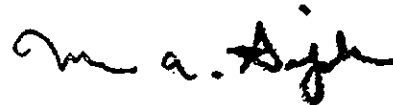
The Board, at its regular June 2017 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated May 15, 2017, and being duly advised,

**IT IS HEREBY ORDERED** that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer 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 15<sup>th</sup> day of June, 2017.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Mona Womack  
Mr. Erasto Moran  
Mr. Jay Klein

**COMMONWEALTH OF KENTUCKY  
KENTUCKY PERSONNEL BOARD  
APPEAL NO. 2016-265**

**ERASTO MORAN**

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

**CABINET FOR HEALTH AND FAMILY SERVICES**

**APPELLEE**

\* \* \* \* \*

This matter came on for evidentiary hearing on March 13, 2017, 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, Erasto Moran, was present and was not represented by counsel. The Appellee was present and was represented by the Honorable Mona Womack. Also present was Agency representative Larry Gearlds, Human Resource Director of the Glasgow State Nursing Facility for the Cabinet for Health and Family Services.

The Hearing Officer outlined the burden proof and the issues before the Hearing Officer. The first issue was the appropriateness of a five-day suspension without pay imposed upon the Appellant. The burden of proof was upon the Appellee to prove, by a preponderance of evidence, that the penalty was neither excessive nor erroneous. Additional issues were the Appellant's claim of retaliation for being a whistleblower and claims that he was being discriminated against based upon race, ethnic origin, sex, and age.

**BACKGROUND**

1. The Appellant timely appealed the imposition of a five-day suspension without pay for lack of good behavior for failing to abide by the policies and procedures for time and attendance.

2. The Appellee made an opening statement followed by an opening statement by the Appellant.

3. The Cabinet for Health and Family Services (the "Cabinet") then called **Larry Gearlds** as its first witness. Mr. Gearlds testified that he serves as the Facilities Services Supervisor for the Glasgow State Nursing Facility. He stated that Glasgow is a 24-hour per day, 7-day per week, long-term care facility for those that are mentally and physically handicapped. He testified that residents are referred to Glasgow from acute care hospitals and must have a

mental disability, although many of the residents have medical needs, as well. He stated that all residents are limited in their ability to care for themselves.

4. He testified that, on a daily basis, the staff provides minimal care for some, but 100% care for others, to include feeding and bathing. He stated that Mr. Moran serves as a Nurse Aide, in the Nursing Department, and the staffing of this department is critical. If an employee does not show up for work, it is necessary to institute mandatory overtime in order to meet the legally mandated staffing levels.

5. The witness identified **Appellee's Exhibit 1**, the Glasgow State Nursing Facility Policy, ER-103, on Time and Attendance. He outlined the provisions on Page 2, regarding Timely Notification of Tardiness or Absences, and stated that an employee is required to provide notice two hours prior to the employee's scheduled reporting time. Appellee's Exhibit 1 was entered into the record, without objection.

6. Mr. Gearlds testified that Mr. Moran was issued a five-day suspension for failing to abide by this policy. The witness identified **Appellee's Exhibit 2**, the suspension letter issued to Mr. Moran on August 26, 2016. The witness read the basis for the decision to suspend Mr. Moran, which was that he called in 20 minutes prior to his scheduled reporting time, stating that he had run out of gas en route to work. Mr. Moran ultimately came to work one hour after his scheduled reporting time. Mr. Gearlds stated that the decision as to what disciplinary action to impose is not made by officials at Glasgow, but rather it is a determination made by Cabinet level officials in Frankfort. Appellee's Exhibit 2 was entered into the record, without objection.

7. The witness identified **Appellee's Exhibit 3**, the document entitled Verification of Personal or Family Illness. He stated that this document is a part of the policy on time and attendance and, based upon prior attendance issues, required Mr. Moran to verify any sick leave by providing an original doctor's statement. Appellee's Exhibit 3 was entered into the record, without objection.

8. The next witness to testify on behalf of the Appellee was **Amanda Francis**. After being sworn, she stated that she is a nurse, employed at the Glasgow State Nursing Facility. She stated that her duties include providing nursing care for the residents and serving as the shift supervisor, which includes making staff assignments. She testified that Nurse Aides provide continuous care to the residents, to include daily interaction, monitoring, incontinent care and feeding. She stated that she currently works the 3:00 p.m. to 11:00 p.m. shift.

9. When asked about the call-in procedure, Ms. Francis stated that if an employee calls in, facility administration may require someone on the outgoing shift to stay over. She stated that there is a general resident/staff ratio that must be met.

10. The witness identified **Appellee's Exhibit 4**, the Glasgow State Nursing Facility Call-In Notice. She advised that she completed this form when she spoke to Mr. Moran by phone on July 17, 2016, fifteen minutes before his assigned shift. She stated that upon her arrival in the room, another staff member was already speaking with Mr. Moran by phone and it was handed to her at 10:45 p.m. She testified that she wrote on the form the time and

information that Mr. Moran relayed to her, specifically that he ran out of gas on the way to work and wanted someone to bring him gas. Ms. Francis stated that they had checked, but no one getting off work was able to take Mr. Moran gas for his vehicle.

11. The next witness to testify was **Erasto Moran**. After being sworn, the Appellant testified that he has been employed with the Glasgow State Nursing Facility off and on for 137 months, and continuously since 2010. Mr. Moran admitted to being familiar with the policies and also admitted to receiving prior discipline, including a verbal warning on December 1, 2015, a written reprimand on December 30, 2015 and a three-day suspension on May 20, 2016, all for time and attendance policy violations.

12. Mr. Moran admitted to calling in approximately 20 minutes prior to his assigned shift on July 17, 2016, because he ran out of gas. He advised that he ultimately got to work one hour late for his shift, resulting in him receiving one-hour of unauthorized leave without pay.

13. Mr. Moran tendered a number of documents to the Hearing Officer relative to prior sick leave and doctor's notes submitted. However, the Cabinet objected based upon relevance. The objection was **SUSTAINED** and the tendered documents were not admitted.

14. The next witness to testify on behalf of the Cabinet was **Jay Klein**, Division Director in the Division of Employee Management in the Office of Resource Management for the Cabinet. Upon being sworn, Mr. Klein stated that he oversees the division that handles disciplinary matters. Mr. Klein reviewed Appellee's Exhibits 1, the Glasgow Policy on Time and Attendance. He advised that he was involved in developing this policy. He stated that the branch he oversees reviews the request for disciplinary action from the facility, he will then review and, if he agrees that the disciplinary action is appropriate, he will forward it on for final disposition.

15. Mr. Klein testified that in this case, the five-day suspension issued was appropriate because Mr. Moran had been issued a three-day suspension less than six months prior to this incident. He advised that the disciplinary action was in accordance with the policy, and was consistent with disciplinary action issued to other employees within the Cabinet. Mr. Klein stated that there was no discrimination in imposing this suspension upon Mr. Moran.

16. The Cabinet rested.

17. Appellant, **Erasto Moran**, then took the stand as his only witness for his case in chief. The Hearing Officer asked the Appellant for any evidence of discrimination with regard to the imposition of the five-day suspension. He testified that he had none. There were no questions posed on cross-examination and the Appellant had no additional testimony.

18. The Appellant made a brief closing statement. The Cabinet waived closing.

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

**FINDINGS OF FACT**

1. The Appellant, was employed as a Nurse Aide State Registered II within the Cabinet for Health and Family Services, Glasgow State Nursing Facility. (Testimony of Appellant.)

2. The Glasgow State Nursing Facility is a 24-hour per day, 365-day per year, facility with responsibility for providing all aspects of medical and daily care of its developmentally disabled residents. (Testimony of Gearlds)

3. In order to address the critical staffing needs, the facility has developed comprehensive policies and procedures governing time and attendance and the consequences of violations thereof. (Testimony of Gearlds, Klein, Appellee's Exhibit 1.)

4. The Appellant received a verbal warning and a written reprimand in December 2015 related to violations of the Time and Attendance Policy. He also received a three-day suspension in May 2016, for violation of the Time and Attendance Policy. (Appellee's Exhibit 2, Testimony of Moran).

5. The Time and Attendance Policy requires that staff provide notice of absence or tardiness, two hours prior to the employee's assigned reporting time. The policy also prohibits unexcused absences. (Appellee's Exhibit 1, Testimony of Gearlds).

6. On July 17, 2016, the Appellant was scheduled to work from 11:00 p.m. to 7:00 a.m. (Testimony of Moran, Francis, Appellee's Exhibit 2.)

7. The Appellant called in to work at 10:40 p.m., 20 minutes before his shift, advising that he ran out of gas. He arrived to work one hour after his assigned start time. (Appellee's Exhibit 2, 4, Testimony of Appellant.)

8. On August 26, 2016, the Appellee issued a five-day suspension, citing violation of the Glasgow Time and Attendance Policy. (Appellee's Exhibit 2)

9. The Hearing Officer finds that the Appellant has put forth no evidence of retaliation or discrimination.

### **CONCLUSIONS OF LAW**

1. The Appellant, Erasto Moran, engaged in violations of the Glasgow State Nursing Facility Policies on Time and Attendance on July 17, 2016 when he failed to provide a two-hour notice that he would be tardy.

2. The Appellant, Erasto Moran, engaged in violation of the Glasgow State Nursing Facility Policy on Time and Attendance on July 17, 2016 when he had an unexcused absence of one hour, the first hour of his 11:00 p.m. to 7:00 a.m. shift.

3. The evidence of record reveals that the five-day suspension without pay imposed upon the Appellant was consistent with the manner in which similar cases had been handled by the Cabinet and was in accordance with the established policy.

4. The Hearing Officer concludes that the Cabinet has met its burden of proof to show that the five-day suspension imposed upon Appellant was for just cause and was neither excessive nor erroneous.

5. The Hearing Officer concludes that the Appellant has failed to meet his burden of proof to show that the five-day suspension was retaliation or discrimination based on race, ethnic origin, sex, or age.

### **RECOMMENDED ORDER**

The Hearing Officer recommends to the Personnel Board that the case of **ERASTO MORAN VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2016-265) 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).

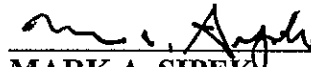
**Any document filed with the Personnel Board shall be served on the opposing party.**

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 5<sup>th</sup> day of May 2017.

**KENTUCKY PERSONNEL BOARD**



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

A copy this day mailed to:

Hon. Mona Womack  
Erasto Moran