

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 **TODD MCGUIRE VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2012-173)** as the same appears of record in the office of the Kentucky Personnel Board.

Witness my hand this 14th day of August, 2013.



MARK A. SIPEK, SECRETARY
KENTUCKY PERSONNEL BOARD

Copy to Secretary, Personnel Cabinet

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2012-173

TODD MCGUIRE

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 August 2013 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated June 5, 2013, having considered Appellant's exceptions, Appellee's response, oral arguments, 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 **SUSTAINED to the extent** therein.

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 14th day of August, 2013.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy mailed this day to:

Hon. Cary B. Bishop
Todd McGuire
J.P. Hamm

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2012-173

TODD MCGUIRE

APPELLANT

VS.

FINDINGS OF FACT, CONCLUSION 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 February 14, 2013, and February 28, 2013, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Todd McGuire, was present at the evidentiary hearing and was not represented by legal counsel. The Appellee, Cabinet for Health and Family Services, was present and was represented by the Hon. Cary B. Bishop.

BACKGROUND

1. Appellant, Todd McGuire, filed an appeal on August 1, 2012, from a three-day suspension he received. In addition to challenging the suspension, he also alleged that the suspension was based on retaliation for reports he had made, as well as political discrimination. [The suspension letter dated July 18, 2012, is attached hereto as **Recommended Order Attachment A.**]

2. Pre-hearing conferences were conducted in this case regarding discovery. One of the charges against the Appellant was that he had taken longer than a one-hour lunch period and his timesheet did not reflect this. The Appellant requested a video tape showing his leaving the facility and his return from lunch. The Appellee reported that this recording was no longer available.

3. At the evidentiary hearing counsel for the Appellee gave a brief opening statement. Counsel stated that Mr. McGuire was suspended for three days for two reasons. The first was failure to produce verification of personal illness. The Appellant was placed under a requirement that he provide a doctor's statement for any leave time used and that on two instances he failed to do so. The Appellee stated that the proof would show that for June 8,

2012, the Appellant turned in his documentation late and for June 15, 2012, he did not turn it in at all. In addition, the Appellant was suspended for an additional incident of improper timekeeping. The Appellee stated that it would establish its procedure and show that the Appellant failed to follow that procedure in documenting his time. Counsel made it clear that the Appellee was not accusing the Appellant of falsification.

4. In his opening, the Appellant stated that the Cabinet for Health and Family Services did not follow its own policy with respect to both issues. He stated he had been retaliated against since he had reported an allegation of abuse and neglect against one of the facility's administrators.

5. The Appellee called **Anna Hall** as its first witness. By agreement of the parties, Ms. Hall testified by telephone. Ms. Hall has been Safety Coordinator at Bingham Gardens for approximately three years. As Safety Coordinator, Ms. Hall is responsible for doing rounds in-house and also monitoring video recordings. She stated that she works in a different department from Appellant, who is a supervisor. If she becomes aware of safety concerns, she addresses them with Appellant's supervisor.

6. Ms. Hall testified that at the request of Sheila Miles she reviewed video from May 4, 2012, to determine whether or not there was an inconsistency with the Appellant's timesheets. Upon receiving this request from Ms. Miles, who is the Appellant's supervisor, Ms. Hall received approval from Assistant Facilities Director David Corbett and Facilities Director Melissa Brock to view the video for that purpose. She reviewed the video with Ms. Brock on June 1, 2012, and determined that Appellant left the facility for lunch at 11:25 a.m. in Mr. Mark Schneider's vehicle and returned at 12:49 p.m. She prepared a statement which summarized these findings which was signed by herself and Ms. Brock and introduced into the record as Appellee's Exhibit 1, over the objection of the Appellant.

7. It was established the times noted were from the same camera facing the parking lot area and that the quality of the recording was good. Ms. Hall stated that when she reviewed the video, she was clear that it was Appellant. She recalled that it was a nice day and that both he and Mr. Schneider were wearing shorts.

8. Ms. Hall testified that the video was not available because they were only saved for thirty to thirty-five days. She stated that Patrick Spears, an employee who used to work at the facility, was the only one who knew how to operate the recording system. She stated that they learned during another Personnel Board hearing in September or October of 2012 that recordings were only available for thirty to thirty-five days. Since that time they have received additional training and now know how to preserve the recordings. She testified that no one intentionally destroyed the recording in this case, it simply was deleted in the normal course of events.

9. The Appellant objected to the admission of Appellee's Exhibit 1, stating that it was hearsay because the recording no longer existed. He also stated that the recording was supposedly deleted in thirty to thirty-five days and the review statement was not signed until June 8. He stated he had another exhibit that would show that the actual review was alleged to have taken place on June 8, which he states would have been after the date the recording was destroyed. Upon hearing all objections and responses, the Hearing Officer admitted the Appellee's Exhibit 1 and stated that he would decide on the weight to assign to the exhibit after hearing all the evidence, including Appellant's cross-examination of the witness, as well as any additional exhibits he had to introduce.

10. On cross-examination, Ms. Hall testified that she reviewed more than one camera when she did her review of these events. She stated she did not review every camera because many do not show the parking area. She testified that the main reason that the cameras were installed was for security reasons. She stated that there was no written policy regarding video cameras. She did not review any timesheets.

11. The Appellee called **Toni Mitchell** as its next witness. She has been the Acting Safety Director at Bingham Gardens for the last two months. Prior to that she served as a Home Manager for one year and was the Appellant's immediate supervisor during that period of time.

12. Ms. Mitchell testified that on February 1, 2012, she gave the Appellant a verbal counseling and placed him on physicians' statements for excessive absences. She specifically noted the dates he had missed of November 28, 29, 30; December 2, 3, 2011; and January 31 and February 1, 2012. In response to an objection, the witness admitted she did not issue the document on February 1, 2012, and gave the Appellant a verbal counseling on March 22, 2012. Although she stated he refused to sign the document, there was no place for signature for the Appellant and Ms. Mitchell herself did not sign the document. Nonetheless, the document was admitted as Appellee's Exhibit 2, over the Appellant's objection, keeping in mind the issues the Appellant raised.

13. The Hearing Officer also admitted Appellee's Exhibit 3 through the testimony of Ms. Mitchell, over the Appellant's objection. This document was a memorandum informing the Appellant that he would need to submit a doctor's statement in order to receive authorized paid or unpaid leave. Although the document was dated February 1, 2012, it was issued to the Appellant on March 22, 2012, the document was witnessed by Ron Cooper that the Appellant refused to sign.

14. During Ms. Mitchell's testimony, Appellee's Exhibit 5 was introduced into evidence which was the Time and Attendance policy from Bingham Gardens. Procedure #16 of this policy reads as follows:

After consulting with the Human Resources Director (HRD), supervisors may place employees on 'Verification of Personal Illness.' Employees on verification requirement shall be required to provide a medical certification, signed by the treating healthcare provider, in order to receive approved sick leave.

15. Ms. Mitchell testified that the statement from the doctor must be provided on the first day the employee returns to work. [Appellee's Exhibit 5, Procedures #18(g).]

16. Ms. Mitchell testified that the Appellant was scheduled to work on June 8 and 15, 2012. She also introduced Appellee's Exhibit 6 which showed this from the work schedule. She testified that on June 8 she received a text from Appellant on that morning that he would not be able to come in.

17. Following his absence on June 8, Ms. Mitchell testified that the Appellant was supposed to return the statement on June 11. She stated that Appellant said he left it on the table that day. She stated that on June 12, Appellant stated he had it, but was not able to give it to her as he left early that day due to his wife's illness. He turned in the statement to her on June 13, 2012. Introduced into evidence as Appellee's Exhibit 7, the doctor's statement turned in by the Appellant on June 13, 2012, showing that on June 8, 2012, he accompanied his mother-in-law to visit an orthopedic surgeon.

18. Ms. Mitchell testified that the Appellant was scheduled to work on June 15, 2012, and did not come into work. She states that he called her that morning and stated that he would not be in to work. She does not recall if he stated a reason or what type of leave he asked for. She stated that he next returned to work on June 18. He did not provide her with any type of doctor's statement that day or any explanation why he could not. He has not since provided any doctor's statement. After reviewing her notes, the witness stated that on June 15, the Appellant stated he had to take his wife to a doctor's appointment. Ms. Mitchell stated that she would not allow an employee to call in on the date they were requesting off to use comp leave or annual leave.

19. Introduced during Ms. Mitchell's testimony was Appellee's Exhibit 8, a three-page document concerning the pay period ending June 15, 2012, for the Appellant. The first page was an Overtime/Leave Reporting Form. On this form, Appellant requested 7.5 hours comp leave on June 8, 2012. Initially Ms. Mitchell approved this request. She later crossed out her initials and put her initials in "Supervisor Disapproval." For June 15, 2012, the Appellant requested an annual day. Ms. Mitchell initially put her initials in "Supervisor Approval," and later crossed it out and put her initials under "Supervisor Disapproval." She stated that she made this change after discussing this matter with HR and finding out that the Appellant had not submitted doctors' statements. She could not explain why the Appellant would need to submit a doctor's statement for a comp day or an annual day. Ms. Mitchell stated that she went to the

Appellant and told him she disapproved those two days for leave, because he had not turned in a doctor's statement. The third page of the Exhibit 8 was the actual timesheet. Initially comp time was keyed in for June 8, 2012, and annual for June 15, 2012. These were later crossed out and were written in as "Leave Without Pay" for those dates. Ms. Mitchell could not explain this and stated she did not make this change on this document. She stated this was done by HR. On the second page of Exhibit 8 is a Sign In/Out Sheet. This document reflects that Appellant had a comp day June 8 and an annual day on June 15. The document is signed by both Appellant and Ms. Mitchell. Ms. Mitchell's signature is dated June 18, 2012. She testified that she does not edit this page in any way.

20. The Appellant objected to the introduction of Appellee's Exhibit 8, stating that he had copies of the documents before Ms. Mitchell changed her original approvals. After discussion with both parties, the document was admitted noting the Appellant's objections and anticipating that he would introduce the version he had later.

21. Introduced as Appellee's Exhibit 9, was a response to a grievance filed by the Appellant given to him by Toni Mitchell on May 2, 2012. This response reiterated that the Appellant needed to provide doctors' statements on his first day back at work.

22. Over the objection of the Appellant, the Appellee introduced Appellee's Exhibit 10 which consisted of two e-mails from Toni Mitchell to Ron Cooper regarding the call-ins. These documents show that on June 8, she received a text from the Appellant at around 1:40 a.m. and she received the doctor's statement on June 13, 2012. With respect to June 15, on June 14, 2012, Appellant called in and said he would be unable to come into work due to his wife having a doctor's appointment. Ms. Mitchell stated he would need to provide a doctor's statement. In her e-mail, Ms. Mitchell stated that as of June 26, 2012, Appellant has failed to provide his statement. Also introduced during Ms. Mitchell's testimony were Appellee's Exhibit 11, an e-mail from July 2012 to the Office of Human Resource Management in Frankfort giving Ms. Mitchell's versions of the incidents the Appellant was suspended for and Appellee's Exhibit 12, Bingham Gardens' Employee Dress and Grooming Guidelines, OP-200.02.2. This policy states that employees shall wear a watch. Mitchell testified that she is not aware of any complaint that Appellant has filed against her and that she believes that they have a good working relationship.

23. On cross-examination, Ms. Mitchell testified that she originally approved leave time for the Appellant on June 8 and June 15, but later changed this to a disapproval when she realized he had not complied with policy by timely turning in doctors' statements. She stated she was not sure how long it took her to make this correction, although she believed she did it on the same day. Ms. Mitchell testified that during this timeframe she was a Mental Health Program Coordinator with a position title of Home Manager.

24. Ms. Mitchell testified that she is aware that she is being investigated regarding an abuse or neglect allegation. She stated she does not know the outcome of the investigation.

25. Ms. Mitchell is not aware of Sign In/Out binders being tampered with by residents. She also testified that there are clocks on microwaves, stoves, and other items in the housing units.

26. For a period of time, Ms. Mitchell was detailed to a position as a Mental Health Program Educator/Coordinator. She testified that she did not meet the minimum qualifications because she does not have a Bachelor's degree.

26. The Appellee next called **Sheila Miles**, who is a Unit Director at Bingham Gardens. She testified that during 2012 she was the Director of Residential Services and was Appellant's second-line supervisor in charge of day-to-day supervision over six group homes located within Bingham Gardens.

27. She testified that at approximately 1:00 p.m. on May 4, 2012, she overheard a conversation as the Appellant and Mark Schneider were returning from lunch. Later at the request of Melissa Brock, she wrote a report regarding this matter. Her report was entered into the record as Appellee's Exhibit 13 and reads as follows:

On 5/4/2012, at approximately 1:00 pm, I observed supervisors, Todd McGuire and Mark Schneider, entering Home 5 from the rear entrance. They proceeded to Home 4 and were talking about their lunch that they had taken together at a local restaurant, Hooter's, as I walked behind them. They entered Home 4, still discussing their lunch break.

28. Facility Director Melissa Brock was looking for supervisors from 11:15 to 11:30 on May 4, 2012, because there was a resident with escalating behaviors. Ms. Miles testified that the Appellant could not be found. Later as she was reviewing timesheets she remembered that there was a discrepancy with the entries on this date. This led Ms. Miles to request a video review for the time the Appellant and Mark Schneider left for lunch and returned for lunch with Melissa Brock's approval. Anna Hall and Melissa Brock watched these videos.

29. Ms. Miles testified that she reviewed a part of the recording. She recalled that the Appellant and Schneider left for lunch at 11:25 and returned at 12:49. She testified that the Appellant would turn in his timesheet and sign in/out sheet to Toni Mitchell.

30. Introduced as Appellee's Exhibit 14 through Ms. Miles was a timesheet for the Appellant for the pay period May 1 – 15, 2012, showing that the Appellant had 7.5 regular hours for May 4, 2012. There were some additional entries on that date as well. Introduced as Appellee's Exhibit 15 was a Sign In/Out Sheet for Appellant showing that his time in that day was 6:30 a.m.; lunch out was 12:00 p.m.; lunch in was 1:00 p.m.; and time out was 4:00 p.m. for total hours worked of 8.5, with one hour overtime. This document was signed by Sheila Miles on May 16, 2012 as having been pulled. At the time she reviewed the log, it did not have all the entries. It was later signed by Todd McGuire on May 20, 2012, and Ms. Miles signed it again on May 21, 2012.

31. Ms. Miles testified she is not aware of the Appellant having filed any complaint regarding treatment of residents at the facility. She is not aware of any retaliation against the Appellant.

32. On cross-examination, Ms. Miles testified that she was informed that Ms. Brock had concerns about discrepancies regarding time in May of 2012. She believes it was probably before May 21. Ms. Miles never questioned the Appellant about his timesheet or gave him a chance to correct his timesheet.

33. Ms. Miles stated that her initials along with Rawleigh Richardson's initials on the Sign In/Out Sheet for Todd McGuire for May 16, 2012, was her documentation that there were missing entries on that form. She does not recall what entries were missing, but by May 20 the entries were completed and Ms. Miles signed this as supervisor on May 21, 2012.

34. Ms. Miles testified that there have been complaints about Toni Mitchell's approach to staff.

35. The Appellee's next witness was **Melissa Brock**. She is currently the Facility Director at the Hazelwood Center. In 2012, at the time of these events, she was the Acting Facility Director at Bingham Gardens. She described her duties as being responsible for the day-to-day activities at the facility. She was the direct supervisor of all department heads. She was responsible for the safety and treatment of clients, developing policy and procedure, and making sure it was implemented. She described herself as the fourth-line supervisor for the Appellant.

36. On May 4, 2012, Ms. Brock recalled that she was looking for supervisors as a result of a resident acting out. She stated there was a support code, meaning that staff needed assistance. She stated she checked several homes and was unable to find the Appellant, as well as some other supervisors. She described the period of time she looked for the Appellant as approximately 15 minutes, perhaps from 11:05 through 11:20.

37. Ms. Brock testified that later that same day she was having a discussion with Ms. Miles when she learned that Ms. Miles witnessed the Appellant and Mark Schneider returning to the facility from lunch at approximately 1:00. She asked Ms. Miles to look into it. Ms. Brock stated that her attention was taken up with other issues, such as the incident with the resident and a plan of correction the facility was under as a result of a visit from the Office of Inspector General.

38. Ms. Brock reviewed the video tape along with Anna Hall and Sheila Miles on June 1, 2012. She noticed that the Appellant left the facility at 11:25 and returned at 12:49 for lunch. Ms. Brock testified that Appellee's Exhibit 1, the written report from Anna Hall was prepared at the request of the Office of Human Resource Management when they learned that the recording was not available. She stated that the quality of the recording was very good and that she could see clearly. She stated it was a clear day and that the Appellant was wearing shorts and a T-shirt.

39. Ms. Brock stated that timesheets are occasionally amended, usually when an error is discovered on the date of the entry. She stated that Sign In/Out Sheets are not usually amended and that these are an important tool to see that staff are held accountable and that they can be found at particular locations.

40. Ms. Brock testified that she was aware that the Appellant filed a complaint regarding management at the facility. She is aware that this complaint was investigated and that Toni Mitchell was cleared. Ms. Brock testified that since the time of these events, a time clock has been installed so that employees no longer sign in or sign out, but actually use a timecard.

41. Ms. Brock testified that she requested major disciplinary action against the Appellant based on her review of the May 4 incident, as well as Mr. McGuire not having provided a doctor's excuse for an absence on June 8, 2012, as of June 12, 2012. The date of the request for major disciplinary action was June 12, 2012. This document was admitted as Appellee's Exhibit 16. Ms. Brock testified that she requested major disciplinary action based on what she viewed as misconduct by Appellant. She stated she was in no way motivated to retaliate against the Appellant for his previous complaint.

42. During cross-examination of Ms. Brock, she admitted there was a discrepancy between her request for major disciplinary action and the disciplinary letter. She stated that the Appellant was supposed to take lunch from 12:00 to 1:00 and the suspension letter stated 11:00 to 12:00. In addition it was pointed out that the Appellant was not at work on February 1, 2012, and could not have been placed on physician's statements on that date. Introduced during Ms. Brock's testimony was Appellant's Exhibit 8, which verified through e-mail exchanges that the Appellant filed a complaint regarding allegations of exploitation in violation of a resident's rights on May 23, 2012.

43. The Appellee called **Ronald Cooper** as its next witness. Mr. Cooper is the Director of Human Resources at Bingham Gardens, a position he has held for approximately thirteen years. In his position, he is responsible for payroll, corrective actions, disciplinary actions and he works with the Cabinet's Office of Human Resource Management. He is also involved in general orientation of staff and has some involvement in policy training of staff.

44. Admitted into evidence during his testimony were Bingham Gardens policies on Daily Timekeeping (Appellee's Exhibit 18); Employee Breaks and Meal Periods (Appellee's Exhibit 19); and acknowledgement of Personnel Policies signed by Todd McGuire during his orientation (Appellee's Exhibit 17).

45. Mr. Cooper testified that the Appellant had a specified lunch period on May 4, 2012, which was from 11:00 a.m. to 12:00 p.m. He stated the Appellant was supposed to take his lunch during that timeframe unless he made other arrangements with his supervisor.

46. Mr. Cooper testified he was familiar with the notation at the bottom of Appellee's Exhibit 15 where the Sign In/Out Sheet was initialed by Sheila Miles and Rawleigh Richardson on May 16, 2012. The purpose of their initials was to document that the pay period was over and Appellant had not made entries on his Sign In/Out Sheet for those dates.

47. During cross-examination, Mr. Cooper was directed to Appellee's Exhibit 5, Bingham Gardens' Time and Attendance policy. Mr. Cooper acknowledged that paragraph #23 of this policy dictates that when an employee receives unapproved leave without pay as a result of an unexcused absence, due diligence is supposed to be taken to notify the employee before submission of the timesheet to Human Resources. The supervisor is also supposed to document the reason for the unexcused leave. The witness also was directed to paragraph #25 where it stated unexcused absences will result in progressive disciplinary measures including first occurrence "Verbal Warning" and second occurrence "Written Reprimand." It is not until there is a third occurrence is there a "Suspension Request." Mr. Cooper admitted that he was not aware of any earlier unexcused absences for the Appellant before the June 8 and June 15 dates.

48. The Appellee's last witness was **Jay Klein**, Acting Director of the Department for Employee Management and the Appointing Authority. Mr. Klein testified that he signed the three-day suspension letter which was introduced into evidence as Appellee's Exhibit 21. He testified that if the only issue had been the failure to bring in the doctor's statement he would have recommended that this matter follow the Bingham Gardens' policy and be handled as a verbal warning for the first occurrence and a written reprimand for the second. On the timesheet issue, he testified that they gave the Appellant the benefit of the doubt because the Sign In/Out Sheet turned up missing. Because of this they charged him with filing an inaccurate timesheet as

opposed to deliberately falsifying his timesheet. As a result, Mr. Klein approved the three-day suspension.

49. The Appellant recalled **Toni Mitchell** as his first witness. She stated that as far as she knows all employees that she supervises have had some form of disciplinary action when they violate policy. She does not remember any occasions when she has had employees fail to turn in a doctor's statement when they were required to.

50. The Appellant called **Mark Schneider** as his next witness. Mr. Schneider was a supervisor or TPSA at Bingham Gardens until he quit in June 2012. He stated that he was scheduled to graduate in December, had a clean record at Bingham Gardens until two major disciplinary actions and he thought it was in his best interest to leave before he obtained his degree. He currently works at Our Lady of Peace.

51. Schneider testified that he often went to lunch with the Appellant, including on May 4, 2012. Schneider testified that they did not spend more than an hour at lunch. He also stated that as supervisors neither of them had a set time for lunch. He stated that they went to lunch when they could. He stated things happen in their housing units and it works best for lunch to take it when the activity level has quieted down.

52. Schneider testified that his Sign In/Out Sheet came up missing two or three times. When this happened he notified HR and received a new sheet. He stated that he would fill it out to the best of his recollection.

53. On cross-examination, Schneider testified that he and the Appellant went to lunch from 11:00 a.m. to 12:00 p.m. on May 4, 2012. On cross-examination, Schneider stated that he was sure that he went to lunch from 11:00 to 12:00 on May 4. On redirect, he stated that he was sure that he went for an hour, but it could have been 12:00 to 1:00. Earlier he stated he was sure that the time was correct, because even though he lost his timesheet, he recreated it the next day after he discovered the timesheet was lost.

54. The Appellant next called **David Goldman** who is a Shift Coordinator at Bingham Gardens. He was not employed during the events for which the Appellant was suspended and testified he had no knowledge of those events. His current role as a Shift Coordinator works closely with what is referred to as the "mandation policy" or a policy requiring staff to work mandatory overtime. Mr. Goldman testified that although people have refused to work mandatory overtime and the policy calls for disciplinary action, no disciplinary action has yet been taken.

55. The Appellant called **Bianca Chambers** as his next witness. Ms. Chambers is a TPSA and works at Bingham Gardens. She testified that prior to time clocks being introduced, employees used to keep track of time using coffee pots, microwaves, or stoves in the units. She testified that Sign In/Out Sheets have been thrown away and come up missing. She stated she has to request a replacement from HR. Previous times have to be recreated by memory. She stated she has seen this happen with employees she supervised at least fifteen times.

56. Ms. Chambers testified that on one occasion she had an employee take longer than an hour for lunch. The timesheet did not reflect this. She mistakenly signed off as supervisor and later caught the mistake. She stated she was told by David Corbett that because she had signed off it was too late to do anything about it and it would stand.

57. In addition, Ms. Chambers testified that while Toni Mitchell was her supervisor, she was placed on physician's note requirement. She stated that she came to work without a doctor's note and her leave time was not denied and she did not face major disciplinary action.

58. Ms. Chambers testified that she was informed by Shift Coordinator that she would be marked as a call-in for coming to testify at this hearing, even though she had received a subpoena. [Hearing Officer Note: Counsel for Appellee assured the witness this would not occur and she should contact him if she had any problem regarding this issue.]

59. The Appellant next called **Chrissy Welker**, who is employed as a QMRP at Bingham Gardens. She testified that she has been investigated for Medicaid fraud by Anna Hall, the Safety Coordinator at the facility. She stated this investigation was unsubstantiated.

60. Ms. Welker stated that she reported two employees for placing residents in illegal restraints. She stated although she reported these matters, the employees have not been removed from duty, have not been let go from the facility and have not been suspended. These events happened in July and August of 2012.

61. Ms. Welker testified she has considered quitting because of harassment. Because of the stress at working at Bingham Gardens, she has seen a psychiatrist and her cardiologist.

62. Ms. Welker stated she filed an EEOC complaint which was unsubstantiated. She feared she would be retaliated against for testifying today.

63. The Appellant next called **Meliza Fonseca**. She is a Team Supervisor at Bingham Gardens. She testified regarding the sign in/out procedure. She stated that she was given a written reprimand for not creating a second version of a Sign In/Out Sheet. She testified she has been on physician note requirement. She stated that she usually provided these at the end of the pay period. On one occasion, when Toni Mitchell was her supervisor, Ms. Fonseca was

told to go home during work and get the doctor's note. She offered to do it during her lunch hour; however, she was told to do it immediately. She stated she received this directive from both Toni Mitchell and Sheila Miles.

64. The Appellant next called **Chris Merrifield** who was a Team Supervisor who worked at Bingham Gardens through an agency until February 21, 2013. On that date he was returned back to his agency because of his work performance. Mr. Merrifield stated that at that time he learned there were numerous written reprimands in his file that he was not aware of.

65. During his testimony, the Appellant introduced Appellant's Exhibit 13, which was a phone bill from the Appellant's cell phone showing that he called Mr. Merrifield at 11:40. Mr. Merrifield did not recall the exact content of the phone call although he stated it was common practice for supervisors to call other supervisors when they were going to lunch.

66. The Appellant called **William Danny Pollard**, who is a Training Specialist II at Bingham Gardens. He testified he is responsible for orientation and training of employees. He testified that in 2009 there was an allegation of abuse against him. Although this allegation was unsubstantiated, he received a written reprimand. Mr. Pollard filed a grievance regarding this matter. He has thought about quitting his job at Bingham Gardens. He thinks that there is a hostile work environment and that employees are not treated fairly. He testified that he fears retaliation for his testimony at the hearing.

67. The Appellant, **Todd McGuire**, was the last witness to testify. He testified that he is employed as a TPSA at Bingham Gardens.

68. With respect to the incident on May 4, 2012, the Appellant stated he took no more than an hour for lunch. He testified that he went to Hooter's restaurant on Dixie Highway which is no more than three miles from the facility.

69. The Appellant stated that somewhere around May 11 or 12 his Sign In/Out Sheet turned up missing. He did his best to recreate his hours for the time period. He insists, however, that he did not take longer than one hour for lunch. He stated that when he made the phone call at 11:40 to Chris Merrifield he was getting ready to leave the facility. He specifically denied leaving the facility at 11:25.

70. With respect to June 8, 2012, Appellant stated he had to take his mother-in-law to the doctor. He informed Toni Mitchell and was told to bring in a note. He was off on June 9, 2012, and June 10, 2012, because of the weekend. On Monday he was scheduled to work and was supposed to bring in a doctor's note. He forgot it on the kitchen table. After discussing this matter with Ms. Mitchell, it was decided he could turn it in the next day.

71. The next day was June 12, 2012. On that date Appellant stated that he informed Toni Mitchell that he had the doctor's note at work. She told him she would come and get it from him sometime during the day. Unexpectedly, Appellant had to leave the facility because his wife was dehydrated and needed to go to the emergency room. He testified he cleared this with Toni Mitchell. He turned in the doctor's statement the following day on June 13, 2012.

72. With respect to June 15, 2012, the Appellant stated he needed to be off again to take his mother-in-law to the doctor's office. He called Toni Mitchell the night before on June 14. He asked if he could use accumulated leave to take his mother-in-law to the doctor and then to run some other errands the rest of the day. He understood he was approved to use accumulated leave. There was no mention of sick leave and no mention that he was required to bring in a doctor's note. The Appellant stated that Toni Mitchell never requested that he present a doctor's note for that date and time.

73. While these matters were being reviewed as a possible major disciplinary action, Appellant stated that he asked to review his timesheets and was denied by Ron Cooper and the Bingham Gardens' HR Department because they were preliminary documents and part of an investigation.

74. The Appellant stated that he has not turned in a doctor's note for June 15, 2012, because he has never been asked to bring in a doctor's note for that day.

75. With respect to May 4, 2012, the Appellant stated he probably was out for approximately 55 minutes. He noted he keeps his cell phone in his pocket and checked it as he was leaving the facility and it read 12:02. He recalled that this was Oak's Day which they jokingly referred to as a "free activity day." He stated that most of the administrative staff were off that day. He stated that there would be no reason to take extra time for lunch because when they got back the administrative staff would not be there and they could have free activities at work.

76. On cross-examination, the Appellant also brought out that he reviewed his credit card statement and saw that his card was swiped at Hooter's at 12:42 p.m. on May 4. He stated that he did not bring this receipt with him. He stated that he requested to review the tape and that he could not. He also pinned down that he believed it was on May 9, 2012, that he discovered the Sign In/Out Sheet was missing. He went to HR and requested a reprinted Sign In/Out Sheet.

77. The Appellant testified he believed he was being retaliated against by Melissa Brock, Sheila Miles, David Corbett, and Toni Mitchell.

78. In response to questions from the Hearing Officer, the Appellant stated that even though the credit card receipt was timed at 12:42, he did not believe that his return time at 12:49 was correct. After additional questioning, he stated that it might be correct, but he stated he did not return to working until 1:00 p.m. He stated that in the past he has been told not to clock back in early.

79. **Ron Cooper** was recalled as a rebuttal witness. He responded to some of the allegations from Appellant's witnesses involving other employees.

FINDINGS OF FACT

1. Appellant, Todd McGuire, is employed as a Therapy Program Supervisory Assistant (TPSA) at Bingham Gardens. In that position, Appellant was responsible for the line staff and operation of homes within the facility. [Testimony of Appellant, Toni Mitchell and Sheila Miles.]

2. Appellant was working in this capacity on May 4, 2012. Appellant was scheduled to take a one-hour lunch break on that date. The practice was that supervisors, such as the Appellant, would inform other supervisors when they were leaving for lunch. There was no requirement that the Appellant report his actual lunch time to Toni Mitchell, his first-line supervisor. [Testimony of Appellant, Toni Mitchell, Mark Schneider, and Chris Merrifield.]

3. Appellant left for lunch at 11:25 a.m. on May 4, 2012. The Appellant returned from lunch at 12:49 p.m. The Hearing Officer makes this finding based on the testimony of Anna Hall, Sheila Miles, and Melissa Brock who reviewed the recording from facility cameras. [Testimony of Anna Hall, Sheila Miles, and Melissa Brock and Appellee's Exhibit 1.]

4. The recording for these dates only existed for 30 to 35 days. Due to staff reassignments, the staff whom were familiar with how to preserve such recordings was no longer available and during the normal course of events this recording was no longer available. The Hearing Officer specifically finds that the Appellee did not intentionally destroy the recording showing the Appellant's times for leaving for lunch and returning from lunch. [Testimony of Anna Hall and Melissa Brock.]

5. Appellant alleges that he took no more than an hour for lunch that day. The Appellant lost his Sign In/Out Sheet on May 9 and recreated the entry for that date sometime later based on memory. On his Sign In/Out Sheet he eventually wrote that he took lunch from 12:00 to 1:00. In support of his assertions, the Appellant offered a cell phone record that showed that he made a call to Chris Merrifield at 11:40 a.m. He stated this call was to inform Chris Merrifield, another supervisor, he was getting ready to leave for lunch. Appellant offered his

testimony that he also had a credit card receipt from the restaurant showing that he paid at 12:42. [Testimony of Appellant and Appellant's Exhibit 13.]

6. Appellant also presented the testimony of Mark Schneider who went to lunch with the Appellant on May 4, 2012. Mr. Schneider testified they were not gone for longer than an hour, although he wrote on his Sign In/Out Sheet that their lunch was from 11:00 to 12:00. Mr. Schneider testified he was sure that was the correct time until he learned that Appellant had written down a different time, at which point he stated he was sure they were not gone for more than an hour. Schneider testified that he also lost his Sign In/Out Sheet for that time period. [Testimony of Mark Schneider.]

7. In addition to the credible testimony from the three witnesses who reviewed the recording of the parking lot for May 4, 2012, the Hearing Officer finds that the Appellant was gone from lunch from 11:25 to 12:49 on May 4, 2012, because of other evidence. This evidence includes Ms. Miles' testimony and Appellee's Exhibit 13 that she observed the Appellant and Mark Schneider returning from lunch and talking about lunch shortly after 1:00 p.m. The Hearing Officer further believes that the Appellant's testimony regarding the credit card receipt supports the position that the Appellant returned from lunch at 12:49 p.m. Further, the Hearing Officer finds that the fact that both the Appellant and Mark Schneider lost their Sign In/Out Sheets for that time period and had to recreate them later and that they recorded completely different times for the lunch hour. This suggests that their memories are not as accurate as those of the witnesses who reviewed the actual recording.

8. Because of the missing Sign In/Out Sheet, the Hearing Officer agrees with the conclusion of Jay Klein that this was not a case of falsification, but merely a case of inaccurately recording time for May 4, 2012. [Testimony of Jay Klein and Appellee's Exhibit 21.]

9. Appellant was placed on the requirement to provide a doctor's statement for verification of personal or family illness on March 22, 2012. Although the memorandum was dated February 1, 2012, it was given to the Appellant on March 22, 2012, because he had been out previous to that. Appellant also received a verbal counseling on that date as a result of previous absences. [Testimony of Toni Mitchell, Appellant and Appellee's Exhibits 2 and 3.]

10. On June 8, 2012, the Appellant texted Toni Mitchell his supervisor around 1:40 a.m. stating he would not be able to come in to work the following morning. Ms. Mitchell responded that the Appellant should bring in a doctor's statement. The Appellant was off for the weekend on June 9 and 10. When the Appellant returned to work on June 11, he had forgotten the statement. Ms. Mitchell told him this was alright and he could bring it in the next day. The Appellant brought in his doctor's statement the next day, Ms. Mitchell was going to meet him at some point during the workday and get the statement. The Appellant received a call that he needed to go home and take care of his wife that day. The Appellant called Toni Mitchell telling

her he had to leave early which she approved. The Appellant turned in a doctor's statement for June 8 and his leaving early on June 12 the following day on June 13. [Testimony of the Appellant, Toni Mitchell and Appellee's Exhibit 10.]

11. On June 14, 2012, Appellant called Toni Mitchell telling her that he would not be able to come into work on June 15, 2012, due to his mother-in-law having a doctor's appointment and errands, he needed to take the rest of the day. He asked to use accumulated leave. [Testimony of the Appellant, Toni Mitchell and Appellee's Exhibit 10.]

12. To the extent there are discrepancies regarding the events for June 8 and June 15 between the Appellant and Toni Mitchell, the Hearing Officer finds the Appellant to be more credible. Ms. Mitchell did not appear sure of herself in her testimony and often changed her testimony regarding simple matters. In addition, the Hearing Officer finds more credible the Appellant's statement that he was not asked to bring in a leave statement for June 15 because there is no evidence in the record the Appellant has failed to present a doctor's statement when requested in the past.

13. The Hearing Officer also notes Jay Klein's testimony, that standing alone the doctor's statement issues would have been handled under the facility's policy through either verbal warning or written reprimand. [Testimony of Jay Klein and Appellee's Exhibit 5.]

14. Having found inaccurate timesheet entries for May 4, 2012, the Hearing Officer finds just cause for a suspension of the Appellant. The Hearing Officer finds, however, that the three-day suspension was excessive given the fact that the Appellee did not prove that the Appellant either failed to bring in a doctor's statement (June 15, 2012) or provided one late (June 8, 2012) and thus the Hearing Officer finds that the appropriate penalty is a one-day suspension.

15. The Appellant made an allegation of exploitation and violation of resident rights that involved Toni Mitchell on May 23, 2012. [Testimony of Melissa Brock, Appellant and Appellant's Exhibit 8.]

16. Although the Appellant sincerely believes that he was retaliated against for filing this complaint, the Hearing Officer finds no credible evidence that the disciplinary action in this case was in any way motivated by retaliation for that complaint. Based on the testimony of the witnesses, it appeared that the complaint was handled in a professional manner as a part of the business of working at a facility, such as Bingham Gardens. There was no indication that anyone took the complaint personally and most involved had no idea that the Appellant was the one who filed the complaint. [Testimony of Toni Mitchell, Sheila Miles and Melissa Brock.]

17. No evidence of political discrimination was presented.

CONCLUSIONS OF LAW

1. Based on the Findings of Fact, the Hearing Officer finds that because the Appellant inaccurately recorded his time for May 4, 2012, just cause existed for his suspension. KRS 18A.095(1).

2. Although there was just cause for a suspension of the Appellant, the Hearing Officer concludes the Appellee did not prove that the Appellant failed to timely bring in doctors' statements for the two occasions, thus the three-day suspension was excessive and a one-day suspension is more appropriate. KRS 18A.095(22).

3. Although the Appellant presented evidence that he engaged in protected activity by filing a report on May 23, 2012, he did not present any evidence that there was a causal connection between his report and the disciplinary action taken against him, thus the Appellant failed to establish a claim of retaliation.

4. The Appellant presented no evidence of political discrimination.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **TODD MCGUIRE VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2012-173)** be **SUSTAINED to the extent** that the three-day suspension be modified to a one-day suspension. The Hearing Officer further recommends that references to the Appellant's failure to bring in doctors' statements for June 8 and June 15, 2012, be expunged from his record, that he be awarded back pay and other benefits to which he is entitled for the two days' suspension which are being restored to him, that he be reimbursed for any leave time used to attend the hearing and any pre-hearing conferences at the Board, and that he otherwise be made whole. **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 Mark A. Sipek** this 5th day of June, 2013.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Cary B. Bishop
Todd McGuire



CABINET FOR HEALTH AND FAMILY SERVICES
OFFICE OF HUMAN RESOURCE MANAGEMENT

Steven L. Beshear
Governor

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Audrey Tayse Haynes
Secretary

July 18, 2012

Todd P. McGuire

Re: Three (3) Day Suspension

Dear Mr. McGuire:

Based on the authority of KRS 18A.095 and 101 KAR 1:345, you are hereby notified that you are officially suspended from duty and pay for a period of three (3) working days. The effective dates of your suspension are July 23, 2012; July 24, 2012; and July 25, 2012.

In accordance with 101 KAR 1:345, Section 1, you are being suspended from your position as a Therapy Program Supervisory Assistant with the Department for Behavioral Health, Developmental and Intellectual Disabilities, Bingham Gardens ICF/MR, for the following specific reasons:

Lack of Good Behavior. As reported by Acting Facility Director Melissa Brock, you continue to violate time and attendance procedures and failed to provide a required healthcare provider statement.

Bingham Garden's Operational Practice, Number OP-200.04.1, Time and Attendance Procedures, states in part, "21. Failure to submit a valid health care provider statement when required shall constitute an unauthorized absence, shall be documented on the employee's timesheet as unapproved leave without pay (Code 929), and appropriate disciplinary action taken."

Specifically, on March 22, 2012, you were placed on a Verification of Personal or Family Illness letter until August 1, 2012, requiring you to provide a physician statement in order to receive authorized paid or unpaid leave. On June 8, 2012, you were scheduled to work from 6:30 a.m. until 4:00 p.m. in homes 1 and 2. You texted Home Manager Toni Mitchell on June 8, 2012, at 1:41 a.m., notifying her that you would not be reporting for duty. Ms. Mitchell responded to you by text message informing you that you were required to provide a physician

statement upon your return to duty. Upon your return to duty, you failed to provide the required healthcare provider statement to cover this absence, but claimed you could provide it the next day, Tuesday, June 12, 2012. Ms. Mitchell provided you an additional day to provide the statement. However, you failed to provide the statement on June 12, 2012 and as a result, you received 7.50 hours of unauthorized leave without pay for this absence.

On June 15, 2012, you were scheduled to work from 6:30 a.m. until 4:00 p.m. in homes 1 and 2. You called Home Manager Toni Mitchell on June 14, 2012, notifying her that you would not be reporting for duty due to your wife having a doctor's appointment. Ms. Mitchell informed you that you were required to provide a physician statement upon your return to duty. Upon your return to duty, you failed to provide the required healthcare provider statement to cover this absence. As a result, you received 7.50 hours of unauthorized leave without pay for this absence.

Your actions violate Bingham Garden's Operational Practice, Number OP-200.04.1, Time and Attendance and the Cabinet for Health and Family Services' Personnel Procedures 2.1, Employee Conduct; 5.2, Annual Leave; and 5.13, Sick Leave. Your actions constitute grounds for disciplinary action pursuant to Bingham Garden's Operational Practice, Number OP-200.04.1, Time and Attendance; 101 KAR 2:102, Section 10(2)(c); and constitute lack of good behavior for which you may be disciplined pursuant to 101 KAR 1:345, Section 1.

Lack of Good Behavior. As reported by Acting Facility Director Melissa Brock, you failed to timely and accurately complete the sign-in/out sheet, Form 200.04.16-A; failed to maintain your scheduled lunch break period; and failed to accurately complete your timesheet and the accompanying CHFS-2 form.

Bingham Garden's Operational Practice, Number OP-200.04.15, Employee Breaks and Meal Periods, Procedures, states in part, "4. Break and meal period periods (sic) are to begin and end on time and are not to be exceeded without prior approval of the employee's Supervisor."

Bingham Garden's Operational Practice, Number OP-200.04.16, Daily Timekeeping states, "Employees of Bingham Gardens shall be responsible for accurate and timely documentation of daily arrival to and departure from work for the purpose of timekeeping and payroll purposes."

Bingham Garden's Operational Practice, Number OP-200.04.16, Daily Timekeeping, Procedure, states in part, "6. Employees are to sign in documenting the time they arrive at work and sign out at the time they leave work daily using the **Sign In/Out Timesheet Form 200.04.16-A**. (Emphasis in copy.) Employees are also to document the time they leave and return from lunch on this form daily."

Specifically, on May 4, 2012 you were scheduled to work the 6:30 a.m. until 3:00 p.m. shift, including a one hour lunch period from 11:00 a.m. until 12:00 p.m. A review of the surveillance video for May 4, 2012 by Safety Coordinator Anna Hall and Acting Facility Director Melissa Brock revealed that you left home 6 at 11:25 a.m. with Acting Therapy Program Supervisory Assistant Mark Schneider in Mr. Schneider's vehicle. You returned to the same parking area and entered home 6 at 12:49 p.m. You were out of the facility and off the premises for one hour and twenty-four minutes.

Despite whether you gave notice of your leave for lunch, you made inappropriate, inaccurate entries on your sign in/out sheet, Form 200.04.16-A, for May 4, 2012 and timesheet and CHFS-2 form for the May 1, 2012 to May 15, 2012 pay period. On the sign in/out sheet, you wrote that you left for lunch at 12:00 p.m. and returned at 1:00 p.m. In addition, on the May 1, 2012 to May 15, 2012 timesheet, you entered 7.50 hours as time worked instead of 7.00 hours, and on the accompanying CHFS-2 form, you failed to include 0.50 hours of leave time for May 4, 2012.

Your actions violate Bingham Garden's Operational Practice, Number OP-200.04.15, Employee Breaks and Meal Periods; Bingham Garden's Operational Practice, Number OP-200.04.16, Daily Timekeeping; and the Cabinet for Health and Family Services' Personnel Procedures 2.1, Employee Conduct. In addition, your actions constitute lack of good behavior for which you may be disciplined pursuant to 101 KAR 1:345, Section 1.

Further incidents in violation of policy may lead to further and more severe disciplinary action, up to and including dismissal.

For your information, the Kentucky Employee Assistance Program (KEAP) is a voluntary and confidential assessment and referral service for state employees. This service may help you with any personal problems that may be affecting your job performance. KEAP can be reached at 1-800-445-5327 or (502) 564-5788.

As you are 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. To appeal, you must complete the attached form and direct it to the address indicated on the form. Copies of KRS 18A:095 and 101 KAR 1:365 concerning appeal and hearing procedures are enclosed.

Sincerely,



Howard J. Klein
Appointing Authority

HJK:jcb

Attachments

cc: Secretary Tim Longmeyer, Personnel Cabinet
Executive Director Mark Sipek, Personnel Board
Acting Facility Director Melissa Brock, Bingham Gardens ICF/MR
Cabinet Personnel File