

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. 2013-065)** as the same appears of record in the office of the Kentucky Personnel Board.

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



MARK A. SIPEK, SECRETARY
KENTUCKY PERSONNEL BOARD

Copy to Secretary, Personnel Cabinet

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2013-065

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

** **

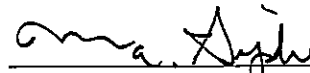
The Board at its regular October 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated August 21, 2014, having noted Appellant's exceptions, Appellee's exceptions, Appellant's response to Appellee's exceptions, oral arguments and being 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 15th day of October, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Carrie Cotton
Todd McGuire
J.P. Hamm

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2013-065**

TODD P. MCGUIRE

APPELLANT

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

**CABINET FOR HEALTH AND FAMILY SERVICES
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** ** ** ** **

This matter came on for an evidentiary hearing on July 24 and 25, 2014, at 9:30 a.m., ET, 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, Todd P. McGuire, was present and was not represented by counsel. The Appellee, Cabinet for Health and Family Services, was present and represented by Hon. Carrie Cotton. Also present as agency representative was Tina Ashley, Human Resource Director at Hazelwood.

BACKGROUND

1. The Appellant, Todd McGuire, filed an appeal with the Personnel Board on March 15, 2013. The Appellant appealed a seven-day suspension, which was dated February 15, 2013. A copy of the suspension letter, which was introduced as Appellee's Exhibit 1, is attached hereto as **Recommended Order Attachment A**. On his appeal form, the Appellant alleged that the allegations against him were "made up" and "unproven" and that he was suspended in retaliation for whistle blowing activity, more specifically for reporting abuse and neglect committed by administrators of the facility. He alleges that after his reports of abuse and neglect he was issued a Major Disciplinary Action (MDA).

2. A prehearing conference was held on April 24, 2013, at 9:30 a.m., during which the Hearing Officer outlined the burden of proof and the discovery process. The parties agreed that the evidentiary hearing should take no more than two days. The hearing was set for December 5 and 6, 2013, at 9:30 a.m.

3. On August 6, 2013, the Appellant filed the first of several discovery requests. An August 9, 2013 Interim Order was issued by the Hearing Officer, granting discovery. The order provided that objections to the discovery request could be filed by Appellee. The interim order set a deadline of September 9, 2013, for the Appellee to produce the requested items.

4. Thereafter, the Appellee made a motion for and was granted a Qualified Protective Order to address the Private Health Information (PHI) of the residents of Bingham Gardens, the intellectual disability care facility at which Appellant worked at the time he was issued the MDA.

5. During the October 18, 2013 prehearing conference, Appellant indicated his interest in issuing subpoenas for four residents of Bingham Gardens. The Cabinet was unaware of this and objected. The parties discussed and disagreed on the issue of whether all residents of Bingham Gardens were free to come and go as they pleased and whether they were competent to testify. Ultimately, in off the record discussions it was determined that only two of the residents at issue might potentially have relevant information. The Hearing Officer ordered that the Appellee determine whether these individuals had been involuntarily committed, and whether the documents of commitment reflected anything relative to the issue of legal competency. Appellee was ordered to submit those records to the Hearing Officer for review and determination. Other discovery matters were discussed and ruled upon by the Hearing Officer.

6. During an October 31, 2013 prehearing conference, new discovery requests by the Appellant were discussed and ruled upon. Additionally, the Appellee was ordered to file a pleading to accompany the Hearing Officer's *in camera* review of the commitment documents submitted for the two residents the Appellant sought to call as witnesses.

7. On November 12, 2013, the Appellant filed a Motion to Continue the Hearing with no objection being filed by the Appellee. Accordingly, the December 5, 2013 hearing was converted to a pre-hearing conference during which the Appellee was ordered to provide all discovery to Appellant by February 3, 2014. The evidentiary hearing was re-scheduled for March 24th and 25th 2014.

8. On February 4, 2014, the Appellee filed a Motion for Extension of Time to respond to the discovery, citing the reorganization of Bingham Gardens to ResCare and sweeping change in operations, requiring the attention of the management of the facility who bore responsibility for fulfilling the discovery requests. The Hearing Officer granted the Motion, setting a deadline of February 25, 2014, for the Appellee to respond to the discovery requests.

9. In the weeks that followed, there were a series of pre-hearing conferences and motions and the Hearing Officer granted two additional continuances of the hearing to allow adequate time to address discovery and witness competency issues. Ultimately, the hearing was set for July 24th and 25th 2014.

10. On April 25, 2014, the Hearing Officer, after an *in camera* review of the documents relative to witness competency, **DENIED** the Appellant's motion to be allowed to issue subpoenas to secure the presence of Client #1 (CEM) and Client #2 (DEM) as they were identified in the letter of suspension. The Hearing Officer did not specifically determine the relevance of the testimony of these residents or their competence to testify. Instead, the Hearing Officer relied upon the broad grant of power found in KRS 13B.080 relevant to the conduct of administrative hearings to determine that it was more likely than not, that the presence of Client #1 and Client #2 at the hearing would not prove beneficial to the conduct of the hearing, and

could prove detrimental to the well-being of both residents. The Hearing Officer further determined that this matter should be preserved as a matter from which the Appellant could file exceptions to the Personnel Board and ordered that the April 25, 2014 Order be attached to the Findings of Facts, Conclusions of Law and Recommended Order issued in this case. Accordingly, the April 25, 2014 Order is hereby attached as **Recommended Order Attachment B.**

11. At the evidentiary hearing which commenced on July 24, 2014, before witnesses were called, pre-hearing motions were heard and ruled upon relative to discovery and evidentiary issues. The Appellee gave oral Notice of Filing of the Deposition of Melissa Brock, the former Director of Bingham Gardens and Hazelwood. The Hearing Officer granted the Appellee permission to mark and enter the deposition and its attachments at the appropriate time during the proceeding. The Hearing Officer also ordered that the attachments to the deposition were to be marked and entered as a separate exhibit subject to a Qualified Protective Order.

12. **Howard J. Klein** was called as the first witness for the Appellee. He is the Division Director for the Division of Employee Management. Klein testified that he serves as the Appointing Authority and signs off on all disciplinary actions and described the process. Upon receipt of a recommendation for disciplinary action, the Branch Manager of his division will assign staff to review the request and to answer any questions that may arise. Once that process is complete, it is reviewed by the Branch Manager and then forwarded to Klein who reviews and if he believes it to be appropriate, signs the letter and has it issued to the employee.

13. Introduced as Appellee's Exhibit 1 during Klein's testimony was the February 15, 2013 letter that Klein signed and sent to McGuire, notifying him of his seven-day suspension.

14. On cross-examination, Klein stated that he was not present for any of the events outlined in the letter of suspension, but that he doubted that the allegations were fabricated because it was not typically a practice of the administration of Bingham Gardens to fabricate allegations against an employee.

15. He stated that he was not aware of any Bingham Gardens policy that required that an employee be given notice of intent to suspend if a suspension of five-days or more were being proposed. He stated there was an old Cabinet policy that provided for such notice to an employee prior to suspension of ten days or more. He testified that this policy permitted the employee to provide additional information prior to the imposition of a suspension. He stated that the policy went away several years ago because the policy went over and above what was required by the regulations. He stated that there was a determination to follow the law and not give the employees more than the law required.

16. Upon re-examination, Klein admitted that it was possible that the information from Melissa Brock in the request for disciplinary action was false, but that his office is an independent entity that reviews the allegations and will check what is claimed in the requesting memorandum and the supporting documentation. He testified that his office will ask for witness statements and other information to determine if the request for disciplinary action is appropriate and to catch any mistake. He indicated that Galen Linville whose initials appear below his

signature on Appellee's Exhibit 1 would have conducted an independent review of the allegations.

17. Klein testified that the individual is given an acknowledgement that an MDA is being considered against them so that they could have another opportunity to present information and so they are not blind-sided by the MDA.

18. Upon re-cross, Klein testified that he relies upon the branch employee assigned and branch manager to review the documents and supporting policies because he receives hundreds of them.

19. He testified that a suspension of seven days in this situation seemed appropriate and that in handling such matters, there is an attempt to review analogous infractions by others in order to maintain consistency with other cases. He stated that each case is different and needs to be reviewed separately, but that a seven-day suspension seemed solid. Six or eight days would have been appropriate, but that it was not worth ten days or more nor was it worth a suspension of three days or less.

20. He stated that the three-day suspension for time and attendance was listed in the letter of suspension, but that he attempts to keep time and attendance issues on a separate tract than work performance issues. He acknowledged that he did not issue a Notice of Intent to Suspend but stated that he did not do so because it was not required by policy or state law.

21. Introduced as Appellee's Exhibit 2 was the Position Description for the Appellant as a Therapy Program Supervisory Assistant. Klein stated that he does use the position of the employee in determining the level of suspension to impose, testifying that a supervisor or person with higher level of expertise, might be given a more significant sanction than an employee who performs a similar function without supervisory authority because there is an expectation of better work from a supervisor.

22. On re-cross Klein acknowledged that there was nothing in the Position Description specific to the charge against Appellant relative to his alleged failure to complete abuse probes, but stated that the Position Description is general and would not contain the specific detail of the duties of the work the employee is to perform.

23. **Karen Henderson** was called as the next witness for the Appellee. She currently serves as the Executive Director of Bingham Gardens, managed by ResCare. In February 2013, at the time of the issuance of the letter of suspension, she served as the Director of Risk Management and Risk and Quality, but also served as the Facilities Supervisor for Melissa Brock who had two facilities at that time. She testified that she served in that role because someone had to assume responsibility for Bingham Gardens

24. Henderson described that Bingham Gardens was an Intermediate Care Facility for Intellectual Disability (ICF/ID) and that the individuals are court ordered to be there because they are unable to care for themselves on their own and a parent or guardian cannot care for them in their home environment.

25. Henderson stated that the Bingham Garden campus consists of six homes with four residents in each home. The homes are divided by need. Some residents have behavior needs while others have health needs, but all have some sort of intellectual disability. She stated that the staff are assigned to specific homes so there is continuity of care and range of professional staff to provide care including Behavior Analysts, Occupational Therapists, Physical Therapists, Social Services professionals and transitions. She testified that a Qualified Intellectual Disability Professional pulls together all documentation to meet the resident's needs.

26. Henderson stated the goal is to transition residents, but some have been there as long as thirty years, while others have been there for a year or less. The goal is to find jobs, fix meals, bathe, choose their own clothing and dress themselves. These are their Activities of Daily Living (ADL) requirements and they are national requirements so are non-negotiable. There is a schedule for each resident to follow so that they maintain a structure.

27. Henderson reviewed the letter of suspension, which had been entered into evidence and stated that to the best of her knowledge the allegations were true.

28. Henderson stated that in February 2013 she worked with Mr. Cooper in Human Resources and that she was familiar with Mr. McGuire. She testified that she provided information to the Office of Human Resource Management (OHRM) related to the MDA requested on Mr. McGuire.

29. Henderson stated that the Office of Inspector General is the local branch and the Center for Medicaid Services (CMS), is the national branch but both govern how the facility operates when caring for residents with intellectual disabilities.

30. Henderson identified a series of Bingham Gardens' policies, Appellee's Exhibits 3, 4, 5, 6 and 7. She briefly discussed them in turn indicating that all were in effect from July 2012 to December 2012, the period of time during which the Appellant was charged with violating them. Appellee's Exhibit 3, Employee Conduct; Appellee's Exhibit 4, Incident Reporting; Appellee's Exhibit 5, Abuse/Neglect Responsibilities; Appellee's Exhibit 6, Mandatory Overtime; and Appellee's Exhibit 7, Time and Attendance, were entered into the record.

31. Henderson stated that Appellee's Exhibits 4 and 5 are part of the Cabinet's protocols and policies so all state facilities use them. There are no deviations from them because they are a part of CMS regulations. She testified that she directs her staff to these policies and consistency in following them is important when issues arise.

32. Henderson stated that there were five charges outlined in the letter of suspension, Appellee's Exhibit 1. Appellee's Exhibit 8 and 9 were identified as emails to Appellant and others about canceling classes and work activity. Henderson compared Appellee's Exhibit 1. Charge 1 in the suspension letter outlined an unsatisfactory performance of duties that related to Client 1, identified by the initials CEM.

33. Henderson testified that she is very familiar with CEM, and that he has been there for a couple of years and his mother works at Hazelwood and stops by frequently. CEM works at Hazelwood as well and his guardian is persistent about CEM getting to work. He also has some medical needs which include seizure activity. CEM has a 1:1 (staff to resident) level of supervision which requires that he have a staff member with him at all times. While others may have a level as high as 1:4, with CEM 1:1 is appropriate based upon his needs.

34. Henderson stated that Appellee's Exhibit 8 was an email that she had received from Melissa Brock. The email was sent to all employees of Bingham Gardens. Henderson testified that it was sent as a reminder that the only person who could change a work schedule or activity due to a resident's medical need was the physician. Appellee's Exhibit 8 was entered into evidence.

35. Henderson then identified Appellee's Exhibit 9 and stated that she reviewed the document in the process of making the request for MDA and also had a conversation with Ms. Brock relative to this email which was sent to Appellant and Brock by CEM's mother.

36. Henderson testified that Appellant's first charge in the disciplinary letter was an unsatisfactory performance of duties because he did not follow the protocol for CEM to not go to work that day due to a medical need. His mother was not pleased that CEM had missed work as it is important for him to have structure and consistency in his schedule because when he is still and sedentary, there can be an increase in seizure activity. Appellee's Exhibit 9 was entered into evidence.

37. Appellee's Exhibits 10, 11, 12 and 13 were identified by Henderson. She testified that Exhibit 10, the Positive Behavior Support Plan, is utilized on a daily basis to watch the behavior and follow precursors. The interdisciplinary treatment team consists of every person who has a hand in treatment. The team is trained, and then Behavior Techs and Behavior Analysts train everybody on campus about how to deal with these situations. Plans go through the process and are approved by a guardian.

38. Henderson testified that the Crisis Intervention Plan, Appellee's Exhibit 11, is the next step when the resident is a danger to self and others and is the plan for how to deal with aggression. Residents can't always control the behaviors. The Crisis Intervention Plan is unique to that individual resident. The document is located in the Individual Live Plan (ILP), in the Medical Record and in the Life Book, so that if any person walks into the home, they can pick up the Life Book and know exactly what to do. She stated that the staff deals with a lot of paper and they may forget things, and there are changes, so the document stays in the Life Book and a copy is the possession of the Behavior Analysts.

39. Henderson testified that the Appellant would have received training on these documents and training on DEM, specifically. She testified that training is documented on a blue training form.

40. Henderson outlined the process of training and stated that the person who starts the plan or policy starts the process of training by training 50% of the staff who have to work with these particular clients. Supervisors were part of the 50%. Then, the supervisors take over and have to train their shifts to make sure the remaining 50% is trained. The training information is input from the blue training form and input into a training database.

41. Henderson stated that as a supervisor, Appellant would have been trained and the training would go into a database with name, date and time. She stated that she had personally seen Appellant come for training and then pass the sign-in sheet to the next person without signing. Appellee's Exhibits 10 and 11 were entered into the record.

42. Appellee's Exhibits 12 and 13 were identified by Henderson. She briefly outlined the use of both forms, stating that Appellee's Exhibit 13 is an incident report that is completed for anything from a minor scratch to a major incident of neglect, abuse or exploitation and everything in between. It is a report required by the Cabinet.

43. She stated that if there is an emergency restraint of a resident necessary, they utilize a program called Safety Care to hold someone to deescalate them. If the restraint lasts for more than five seconds, it has to be documented on an Emergency Restraint Monitoring and Review Form, which is Appellee's Exhibit 12. This relates to the charge in the suspension letter on page 2.

44. Henderson stated that Appellee's Exhibit 13 was the Incident Report that relates to Charge 2 on page 2 of the letter of suspension. She testified that this form is usually completed by the first person who is there, the person with the most information. The first person completes the Reporter's Section. In this situation, Chris Merrifield, a supervisor, completed the form but normally it is completed by the person with the most information, usually the person assigned to that client.

45. She stated that in this situation, Merrifield initiated a Support Code or "call for help" because the resident is going to be a danger to self or others. The individuals who are in the home at that time need more hands on deck to deal with the situation.

46. Henderson testified with additional background information on DEM, Client 2 in the letter of suspension. He is self-injurious; he does bite himself, biting chunks out of his arm, and does bite, scratch and injure others. He is possessive of his space and can provide some care for himself. He is clear on what he wants, what he needs and what he will not do.

47. Henderson outlined three of the five steps a staff person will use when dealing with a support code which are: 1) separate the resident, move things away; 2) Contact the Supervisor to come and help or support, 3) Notify the nurse so that the nurse can assess for injury. She stated that there are times that these support codes can continue for some time, the nurse assesses and checks vital signs every 15 minutes and otherwise checks for injury.

48. Henderson stated that Page 3 of the form shows that there are two sets of writings, which is one nurse, Mr. Slater, and a second nurse who came because this lasted for quite some time. A seated stability hold was used on DEM, as outlined on page 4 of the document. Appellee's Exhibits 12 and 13 were entered into evidence.

49. Henderson testified Safe Crisis Management was the physical restraint system utilized until May 2012 when a different program (Safety Care) was implemented to be used from that point forward. It is a less restrictive form of physical management. One hundred (100) percent of staff are required to re-certify and demonstrate the holds each year.

50. Appellee's Exhibit 14 was identified by Henderson as the Safety Care Training Manual. Behavior Analysts train in this, but also Certified Safety Care Trainers train the staff. Lead Trainers followed up on every incident. Jennifer Salvina is a Behavior Analyst and Lead Trainer. The Crisis Intervention Plan of DEM (Appellee's Exhibit 11) outlines the need of the resident utilizing the techniques of Safety Care.

51. She testified that in this situation, DEM was getting aggressive and the Crisis Intervention Plan detailed that the Safety Care techniques authorized were forward escort, two-person stability hold and chair restraint.

52. Henderson stated that Appellant was trained on Safety Care more than once. He was required to be aware of the Crisis Intervention Plans not for all clients, but for the clients he was responsible for. If he was to work on the other side of the campus, and was to cover for a supervisor on the other side, he would have to know the Crisis Intervention Plans for the clients on the opposite side of the campus. He had to be intimately aware of the plans for his assigned residents, but he was trained on all Crisis Intervention Plans.

53. Henderson testified that she did not know if Mr. Merrifield, who utilized the improper hold on DEM with Appellant was disciplined. Appellee's Exhibit 14 was entered into evidence.

54. Henderson identified Appellee's Exhibit 15 and 16. She testified because Bingham Gardens is licensed under the Center of Medicare and Medicaid Services (CMS), the facility self-reports to the Office of Inspector General (OIG) and there are annual surveys. These exhibits are Statements of Deficiency. Exhibits 15 and 16 are identical, but one comes from the state and one comes from the federal government.

55. She stated the facility must show that they are meeting both sets of regulations. In this situation, there were some violations of regulations noted so they found deficiencies, specifically that some employees did not know the definition of abuse, neglect and exploitation, nor how to report them. In this case, the individuals were contract security guards. Appellee's Exhibit 15 and 16 were entered in the record.

56. Appellee's Exhibits 17 and 18 were identified by Henderson as Bingham Gardens' response to the two Statements of Deficiency. In response, the Appellee agreed to conduct abuse and neglect probes to help staff remember and educate them on abuse, neglect and exploitation. The probe included examples per policies in Appellee's Exhibit 7. It was a one page probe still in use today.

57. Henderson stated that if the Appellee failed to maintain the agreed upon Plan of Correction, they would be assessed with a twenty-three day jeopardy which requires shutting down the facility for twenty-three days to get into compliance. They submit their Plan of Correction to OIG, and had a firm completion date for completing the plan. Appellee's Exhibit 17 and 18 entered into evidence.

58. Henderson testified that Appellant was assigned to complete the probes because the Plan of Correction stated that supervisors were going to query staff and contractors monthly. Appellant was a shift supervisor, so was assigned to complete these probes.

59. She said Appellant's direct supervisor was Sheila Miles who worked at the facility at that time, but is no longer employed. She had problems getting Mr. McGuire to complete them. Those reports were required to be submitted to Henderson monthly, and when they weren't done she became aware of it and asked. Ms. Miles told Henderson that Mr. McGuire had not completed the probes after she had told him to do so. Ms. Henderson stated that that after being told a second time to complete the probes, Appellant still did not comply. Ultimately, another staff member completed the probes.

60. Appellee's Exhibit 19 was identified by Henderson as an Incident Report for REH identified as Client 3 in the letter of suspension. This relates to Charge Number 4 in the suspension letter and is related to supervisor follow up after REH fell out of the bed after his medication was administered and the nurse and assigned staff disagreed as to appropriate height of the bed after the fall occurred.

61. Henderson testified that REH is 69 years old, blind, in a wheel chair and on a feeding tube. His bones are deteriorating and he has an Individual Life Plan and a Positive Behavioral Support Plan. He does not necessarily have a Crisis Intervention Plan because he is not as mobile as other residents.

62. She testified that she reviewed Appellee's Exhibit 19 in the course of preparing the MDA. When there is an incident, the supervisor is responsible for getting to the scene, talking to the staff there and completing the Incident Report.

63. Henderson testified that on page 4 of Appellee's Exhibit 19, the Incident Report, the Appellant did not complete the investigation follow-up section required to be completed by the supervisor and on page 4 wrote, "Out of my scope of profession. RN, Medical and L.E.S. Departments need to meet to discuss."

64. In this situation, the incident occurred at 8:30 a.m., the report was written at 10:30 a.m. and Appellant signed the form at 1:52 p.m. He is required to complete the form due to resident safety requirements imposed and by the policies of Bingham Gardens and by his job description. Task Number 3, "Investigate Client Injuries and Incidents. Writes Reports and Attends Meetings"

65. She stated the day after every Incident Report is completed and submitted, it is sent to a morning meeting and reviewed, and then sent to her in the Risk Management Office. She made her comments on page 5 that it was not complete and it was sent back to Sheila Miles. Sheila Miles told her that she went back to speak to Appellant and he said that he was not there at the time of the incident and this was all he was going to put on the form.

66. Henderson stated that after learning that, she then reached out to Appellant and made clear what her expectations were. She said she would leave it intact, but stated that he needed to go talk to the staff and she gave him examples of how to complete the form by email identified as Appellee's Exhibit 20.

67. She said Mr. McGuire's resistance to following policy was not new, that policies were readily available in the Director's office every day and that Mr. McGuire had requested and received policies in the past. Appellee's Exhibits 19 and 20 were entered into the record.

68. Henderson then reviewed the charge outlined on page 3 of the letter of suspension and affirmed that the information was true. Henderson stated that even though Appellant wasn't present at the time of the incident, he was required to follow up with the nurse and obtain the information to complete the report with information from the nurse and the ILP in the resident's chart.

69. Henderson identified Exhibit 21 as the staff schedule for supervisors and direct support professionals (DSP). She testified that this exhibit relates to the final charge of the letter of suspension. The supervisor is responsible for maintaining the shift to ensure the level of supervision is maintained and to complete incident reports, probes and other documentation. All supervisors had the opportunity to come in and work as a DSP if someone had called in and if they were shorthanded.

70. She stated there are two supervisors per shift. All DSPs must call the same phone, which is always assigned to one of the supervisors. If that person calls in and states they won't be at work, the supervisors have to call other people to come in if they need to maintain the levels of supervision that are outlined in the individual plan of the resident.

71. She said a "breaker" is someone that works to provide breaks and lunch breaks for staff to continue to maintain the same level of supervision as required by their plans. The breaker also cooks for the residents. A breaker can cover one or two homes. The witness reviewed Appellee's Exhibit 21 and notes that Appellant was usually assigned to homes 4, 5 and 6 and believes on this day, August 25, 2012, he was working as a breaker which is a DSP. She stated that she did not remember what the "X" on the schedule meant and cannot recall what was occurring in August 2012 so that Mr. McGuire is not listed with a shift number like the other

supervisors. She testified that as it pertains to the letter of suspension, on August 25, he was not acting as a supervisor, so should not have been calling anyone in.

Henderson outlined the process for calling staff in and stated there was a rotating PRN (part time on call staff) list that are to be called in first. PRNs do not get paid overtime, but Ms. Oller did get paid overtime because she was already on the schedule. The supervisor is to call PRNs first, then go down the mandatory overtime pick list. If overtime is exceeded then there is a payment of overtime. She stated that Appellant violated the policy on mandatory overtime as outlined in Appellee's Exhibit 6. Appellee's Exhibit 21 was entered into the record.

72. Henderson stated that there were other aspects of the request for MDA that did not make it into the letter of suspension. She testified that Melissa Brock determined what did and did not go into the MDA because other things were already in the hands of HR. She said she does not feel that McGuire was treated differently than other similarly situated staff.

73. On cross-examination, Ms. Henderson stated that she gathered the information for the request for the MDA, but did not write it. She said that included checking to make sure he was trained on the policies and procedures. She stated she doesn't have information to show that he was trained but knows that all supervisors had the opportunity to be trained.

74. She testified that policies listed in the letter were in effect at the time. Appellee's Exhibit 7, the policy on Time and Attendance was reviewed. The letter of suspension states that August 25, 2012, was the date Appellant violated the Policy on Time and Attendance.

75. She testified that the policy had an effective date of September 1, 2011, but that it had a revised date of October 22, 2012. She stated that the policies are reviewed annually and that the revised date is really a review, she stated that she is 100% confident that the policy that was effective September 1, 2011, is the same policy that was entered as Appellee's Exhibit 7.

76. Appellant's Exhibit 1 was identified as the policy on the Right to Refuse Treatment. She stated that if a resident refuses, they cannot force them to do anything for treatment. If they decide they do not want to go outside, they have a right to say "no" but they should be prompted. She said a resident can refuse to go to work and acknowledged that the email from Appellant to CEM's guardian states, "When trying to get him ready for work today he kept refusing to move towards the door, instead of opting to sit on the couch or in room."

77. Henderson stated that CEM's Individual Life Plan stated to continue to prompt him. She stated that she recalls reviewing the home log, but cannot recall whether it stated that CEM was prompted to go to work on the day in question. She testified that part of the home log was missing so it was not available for the hearing.

78. Henderson stated that all supervisors have the opportunity to be trained. They have the opportunity to know more about the residents. DEM is in Home 3, Team 1. Said she reviewed Appellant's training log and made sure he was trained prior to the disciplinary action being entered.

79. Henderson testified that Appellee's Exhibit 11, DEM's Crisis Intervention Plan, had been revised four times. Appellee's Exhibit 10, DEM's Positive Behavior Support Plan has been revised three times. She had no documents in front of her to know that Appellant was trained on each of the revisions of those plans. She stated that Jennifer Salvina was the last person to revise on 3/20/12, so she would have been the trainer on that change.

80. She stated since Safety Care was implemented, all Crisis Intervention Plans had to be updated to reflect the new physical restraint program. She said she has no idea whether Appellant was specifically trained on the change in DEM's Behavior Plan when it was revised. She said the Appellant should have been trained because all supervisors had the opportunity to be trained.

81. The witness reviewed Appellee's Exhibit 6, the Policy on Mandatory Overtime and testified that she does not know if a Home Manager was working on August 25, 2012. The Home Manager was responsible for making sure the shift was appropriately staffed. The Home Manager was the supervisor of the supervisor. The policy does not outline what a supervisor is to do if the Home Manager is not present. She stated because it is a twenty-four hour per day, seven day per week facility the supervisor is responsible for carrying out the directives of the Home Manager when they are not there.

82. She stated that the policy on Mandatory Overtime, Appellee's Exhibit 6, was effective September 1, 2011, but like the other policy, Time and Attendance, it was revised October 22, 2012. The policy does permit supervisors to ensure that there are enough direct support staff to care for the residents, but only if that person is acting in the role as a supervisor at the time. Henderson testified that Appellant was suspended because on August 25, 2012, he was acting as a DSP so did not have the authority to call in anyone, and that violated the overtime policy.

83. Appellant's Exhibit 3 was identified by Henderson as the policy on Support Codes. She stated that in responding to a Support Code the policy states in #2: "All available staff shall quickly report to the designated area." She stated the policy was in effect at the time of the incident and it lists Safe Physical Management as the restraint system, but Safety Care was the only physical restraint system at that time of the November 25, 2012 incident. If the policy was missed, it was an error. Safety Care was the new plan implemented and all people were trained by May 30, 2012. She testified that Chris Merrifield called the Support Code, so he would have been the Support Code Leader, since he had the most information.

84. She read from the Support Code Policy, Appellant's Exhibit 3, Number 7, "Upon arrival, responding staff shall request instruction about help needed for the Support Code leader." She stated she did not recall if Chris Merrifield was a Safety Care Instructor.

85. Henderson said the Support Code leader gives the directives to incoming staff. She stated that Merrifield was the assigned supervisor for Team 1. She does not know when Merrifield was trained on DEM. She stated an employee should not have to flip through the Life Book to review the behavior plans if previously trained on that individual.

86. As it pertains to the issue of the abuse probes, she stated she does not know if Appellant did not complete the probes, but she stated she knows that Ms. Miles said that was the case.

87. On re-direct Ms. Henderson agreed that the suspension letter does not indicate that Appellant was serving as a DSP at the time that he called in the additional staff. She states that what he did do wrong was to call in someone who was not PRN staff, resulting in overtime.

88. She testified that Appellant's 1, 2 and 3 are all policies but they are not listed in the suspension letter. The effective date on all of the policies was September 1, 2011, which was before the incidents in the letter. As it pertains to the revision date of the policies, which is after the incidents, she stated that it was reviewed and looked at the policy and slight changes or no changes at all. She does not know if revisions were made with the policies.

89. She stated that Mr. Linville asked her for the policies that were in effect at the time and she gave them to him. She said she is certain that the policies entered by the Appellee are the ones that were in effect at the time of the violations committed by Appellant, but the ones that Appellant provided as exhibits, she is not sure.

90. Henderson stated that if Appellant has a question at any time there is a twenty-four hour a day Administrator on Call (AOC). There was also an investigator on call twenty-four hours a day. There was always an opportunity to reach a person and ask a question.

91. She stated that she personally witnessed Mr. McGuire pass the sign-in sheet at trainings to the next person. She caught it later and asked him to sign and he would not sign the sheet.

92. Henderson stated that as a supervisor, Appellant had to be knowledgeable about client needs and model it. If there were questions on anything that the person was trained on, or was not clear, they could go back to the individual who implemented the change and started the training, or call the AOC who may not have the information, but would follow-up the following shift.

93. Upon re-cross, Henderson said the policy book is kept in the Facility Director's office. There is no requirement that they be in each home because someone may have a policy that had been revised and may not be the most recent one.

94. Henderson said that by the policy, the Home Manager has certain duties, but the supervisor is responsible for carrying out the responsibilities in the absence of the Home Manager. The list of PRN staff, she believes, was with the schedule, but does not know for sure.

95. The AOC was aware of where the policies were kept. She stated the policy on training says that if you are the author, you begin the training.

96. Upon questioning from the Hearing Officer, Henderson testified that there is a two-person seated hold in both Safety Care and the former Safe Crisis Management. The problem was that this hold was not authorized for DEM. She stated she did not know why the Positive Behavior Support Plan for DEM, Appellee's Exhibit 10, is not the signed copy. She said she believes it to be the one in effect at the time of the issuance of the MDA.

97. As it pertains to calling in the staff, Henderson said the documentation required is a call in log to document when a PRN staff was called. At the end of the shift there is a document that the supervisor sends out on an email blast at the end of their shift, detailing who called in and who was called in to sub for the person.

98. Henderson stated that changes on the Positive Behavior Support Plan and Crisis Intervention Plan are started by the author, Jennifer Salvina. She said that the policy states that after a change, full training is to be completed in five days. She said that the Appellant was responsible for knowing the plans for homes 1, 2 and 3 and also for 4, 5 and 6. If he was going to float or cover, he had to know the information on all twenty-four residents. If he was not trained in those five days, the plan was in the Life Book.

99. She stated that regardless of whether the policy was reviewed or revised, the policy requiring that PRN staff be called in first has always remained the same.

100. The next witness for the Appellee was **Jennifer Salvina** currently employed at the Hazelwood Center, but who formerly served as a licensed and Board Certified Behavior Analyst at Bingham Gardens. She began working in November 2011. A behavior analyst looks at challenging behaviors of the residents and then develops plans to reduce or eliminate them and teach replacement behaviors.

101. She stated as a Behavior Analyst she had an opportunity to train the Appellant. She reviewed Appellee's Exhibit 1, page 2, and stated that aggressive behavior resulting in physical restraint was common for DEM, although it fluctuated. Appellee's Exhibits 10, 11, 12, 13 and 14 were reviewed.

102. Salvina stated she was familiar with Appellee's Exhibit 10, Positive Behavior Support Plan, but did not create it. She used his diagnosis, the challenging behaviors, and other data, and previous Crisis Intervention Plans to develop the Crisis Intervention Plan that she revised for DEM on March 20, 2012.

103. She testified that DEM has high levels of verbal aggression, but his main behaviors that brought about the need for a Crisis Intervention Plan are his self-injurious behaviors. He is borderline personality and will shift. The revision in March 2012 was because of the change in physical restraint systems from Safe Crisis Management to Safety Care. DEM was never approved for a 2-person seated stability hold in Safety Care, but it was possible that he was approved for the 2-person hold under Safe Crisis Management.

104. She stated she is a Safety Care Trainer which is more focused on proactive techniques. When you use physical restraints there are always a consequence, there could be injury or psychological consequences.

105. Salvina reviewed Appellee's Exhibit 14 and identified it as the training manual for Safety Care, that was used to train. Two people were sent to become trainers in February 2012, then they started to train the current staff at Bingham Gardens. She and four others went for training the end of March, and then helped to complete training staff. After that, all new staff were trained on Safety Care.

106. Salvina testified that training documents would be turned into staff development and training. Karen Henderson was not the keeper of the training records. Salvina said that she did not train Todd McGuire in Safety Care. She did state she had a conversation with one of her colleagues that Appellant often would not sign the training record when he was trained.

107. She said all incidents are reviewed at morning stand ups. Every morning, key members of the team discuss instances the previous day. Supervisors are typically part of these morning stand ups. Also a special team meeting is held after every physical restraint to review the Physical Restraint Reporting Form. Meetings are to discuss the incident and how to prevent future incidents and to discuss retraining or re-programming.

108. Salvina said that it is the responsibility of any individual who is going to interact and be a part of the care of a resident to be trained with the specific Crisis Intervention Plans. Supervisors should know the Positive Behavior Support Plan and the Crisis Intervention Plans. The original is in the medical chart, and a copy is in the Life Book and it goes with the resident if they leave the home.

109. She testified the 2 person seated stability hold is very restrictive. When people are given the option of choosing, the staff will typically use more restrictive holds than is necessary. Five minutes is not a long hold. With DEM, there is no reason to utilize a 2 person seated stability hold.

110. On cross-examination, Salvina testified that Appellee's Exhibit 11, DEM's Crisis Intervention Plan, has been revised four times, the Positive Behavior Support Plan for DEM has been revised three times. She was employed at Bingham Gardens the last time it was revised. She did not do the training on the revision. She said the goal is to train all staff, but she cannot testify that 100% of staff was trained. She testified that if a Support Code is called, all available staff should report.

111. Salvina said all Certified Trainers for Safety Care included herself, Anna Hall, Deante Malone, Maria Burns, Tony Mitchell, Josh Hanna and Chris Merrifield. Merrifield became a certified Safety Care Instructor in March 2012. In Appellee's Exhibit 13, the narrative by Merrifield states when he went to the ground, they let him up.

112. Salvina reviewed Appellant's Exhibit 1, the policy on the Right to Refuse Treatment. She is familiar with the policy. Residents do have the right to refuse treatment and they cannot physically force a resident out of the home or into a car to go to a work activity. She has seen other improper holds on other residents and has reported it.

113. The witness identified Appellant's Exhibit 4 which was marked for identification. [The Appellant did not move to enter Exhibit 4, indicating that he may do so later.] It is an Incident Report with a resident and there were some injuries to staff and physical restraint was used. The incident occurred in May 2013, and the Appellee objected since it was after the discipline was issued to Appellant. Appellant indicated he was questioning Ms. Salvina on the document in order to show that similarly situated individuals were treated differently for an improper hold, so it went to his claim of retaliation. The Hearing Officer allowed questioning to allow Appellant to attempt to lay a foundation.

114. The witness stated that the supine hold was utilized in the May 2013 incident and stated that it was an authorized hold of Safety Care. She stated that the hold was not listed in the Safety Care Manual, Appellee's Exhibit 14, but it was listed in a separate update document.

115. On redirect, Salvina testified that she was not the author of DEM's Positive Behavior Support Plan, Appellee's Exhibit 10. They work as a department in training, no one person does it. Updates and changes to a plan should be trained. She stated that Appellant's Exhibit 3, the Support Code Policy was signed by Brett Ryan, the facility Director, but Melissa Brock was the Director when she began working in November 2011. She stated she does not recall whether the policy was updated.

116. Salvina stated that in Appellee's Exhibit 11, the Crisis Intervention Plan on DEM, a two-person stability hold is listed. She stated the two-person is initiated when you are standing. The individual may drop their weight. If that occurs, they are trained to release, unless the plan allows for a two-person seated stability hold. In that case you can continue to hold.

117. She reviewed DEM's Incident Report, Appellee's Exhibit 13 and stated that Merrifield and McGuire were incorrect because they should have released when DEM went to the ground.

118. She stated that the Positive Behavior Support Plans are kept on the server, but those are the working documents for the Behavior Department. The official one is in the medical chart, and a copy in the Life Book for staff to refer to. On the date of the incident involving DEM, November 25, 2012, she does not know whether the updated Crisis Intervention Plan was in his Life Book, but audits are done to insure that documentation is correct. She does not know whether Appellant was trained on DEM's Crisis Intervention Plan.

119. On redirect, Salvina stated that DEM was never approved for a two-person seated stability hold at any time.

120. On re-cross, she clarified her previous testimony stating that DEM was never approved for a two-person seated stability hold under Safety Care, she does not know if he was approved for a two-person seated stability hold under the previous plan.

121. On redirect, Safety Care came about in April 2012, by November 2012 (the month of the incident) Safety Care was the only approved plan.

122. The Appellee marked Appellee's Exhibit 24 as the Deposition of Melissa Brock and 24a as the attachments to the Deposition of Brock. Appellee's Exhibit 24a consists of Cabinets' Deposition Exhibits 1 through 21 and Appellant's Deposition Exhibits 1 through 21. The Hearing Officer entered both into the record, with 24a being placed under seal.

123. Through her deposition taken June 17, 2014, **Melissa Brock** testified on behalf of the Appellee. The deposition was read in its entirety by the Hearing Officer upon the conclusion of the evidentiary hearing. Ms. Brock testified that she was the Facilities Superintendent of both Hazelwood and Bingham Gardens in the Cabinet for Health and Family Services.

124. She stated her main job duties were ensuring that the function of the facility occurred on a day-to-day basis, ensuring that policies and procedures were in place and ensuring the safety and welfare of the individuals that lived at the facility. She stated her duties also included ensuring that the facility stayed within budget.

125. She stated she had reason to submit a request for an MDA on Appellant on more than one occasion. In this situation, she collected the documents. An MDA form is then completed by Ron Cooper, she reads over it, signs it and it is sent to Jay Klein's office. From there it is assigned to an employee who asks for more information to ensure the documentation is sufficient.

126. Ms. Brock stated that she did not write the letter, but had final say about the outcome and was comfortable with it.

127. She identified several of Bingham Gardens Policies which were marked as Cabinet's Deposition Exhibits 1 through 5. She stated these policies govern how employees are to conduct themselves, what constitutes abuse and neglect and how that is to be reported. The policy on mandatory overtime, she believed to be an older version and that by 2012 a new version had been implemented. She stated this policy outlined how it was to be handled when an employee was being asked to work overtime. She stated the policy on time and attendance outlines what is considered an absence and how time and attendance issues are to be addressed. She stated that employees are trained on the policies and if the policies are updated, they are trained on the updated policies.

128. She identified Cabinet's Deposition Exhibit 6 as the letter of suspension that was issued to the Appellant in February of 2013. She stated that she was copied on the letter. She stated the letter had five charges against Appellant.

129. Cabinet's Deposition Exhibit 7 was identified as the Position Description for the Appellant who served as a Therapy Program Supervisory Assistant. She stated the duties outlined in the position description were consistent with the Appellant's work.

130. Appellant's Deposition Exhibit 8 was the Safety Care Manual which she stated was the emergency restraint procedure they began to train on in March 2012 and implemented on either May 1st or June 1st of that year. She stated they had two months of transition to the new procedure because she knew that people were still going to be holding improperly and it was difficult to transition from one system to another. She stated that progressive discipline would occur if staff continued to do the wrong holds.

131. She stated she sent out an email so everyone would know about the change. She stated there was a moratorium on disciplining staff for a period of time and they would have the Lead Trainer, Jennifer Salvina, re-train the staff without discipline. However she stated the staff continued to utilize the former restraint system, Safe Physical Management, and that was placing the residents at risk when one person was using Safe Physical Management and the other was using Safety Care so she sent out an email that halted all Safe Physical Management and let staff know if it occurred they would be disciplined. She stated that at least by September 2012, Salvina was still doing re-training so by September or October, they stopped Safe Physical Management.

132. Brock described the set up of Bingham Gardens and stated that the residents range from higher function to mid-to-moderate level with a developmental intellectual disability, which used to be called mental retardation. It is a six house unit with four bedrooms in each of the homes and one individual per bedroom. They have a living room, small area in the back for them to sit, utility rooms and each of them has a private bathroom.

133. She said there is a requirement for active treatment of the residents, some have physical therapy, occupational therapy or they may be in the work center. The activities were required by the Center for Medicaid Services regulations.

134. She identified Cabinet's Deposition Exhibit 9 as an email that she sent out because they were having a lot of classes canceled by the staff. She stated the staff was saying that it was for medical or other reasons and she began to receive complaints from guardians that their individuals were sitting at home and not getting the required active treatment.

135. Because staff were indicating that they were canceling their active treatment due to medical reasons, Brock spoke with the Medical Director, Dr. Vance. She stated that those issues should not keep the residents from going to class. They had high turnover in nurses, so the email stated that even nurses could not make the call on whether to cancel an activity without speaking to her (Brock) or the doctor. If it were a weekend, the Administrator on Call would make that decision because Brock was off on weekends.

136. Cabinet's Deposition Exhibit 10 was identified as an email sent to her by the Guardian of CEM who was upset that CEM did not go to his activity. The guardian was upset because she knew that procedure was put in place and the AOC, the doctor or Brock herself had not assessed CEM to say the he could stay home due to a medical reason.

137. Brock testified through her deposition that some of the residents have challenging, aggressive behaviors. She reviewed the incident report of DEM that was identified and marked as Cabinet's Deposition Exhibit 11. It had a date of November 25, 2012 and it states that Chris Merrifield and the Appellant placed DEM in a two person hold when he began to get aggressive.

138. She identified Cabinet's Deposition Exhibit 12 which is the Emergency Restraint Monitoring and Review Form for the same resident for the same date. It outlines that a two-person seated stability hold was used. Cabinet's Deposition Exhibits 13 and 14 were marked and identified as DEM's Positive Behavior Support Plan and the Crisis Intervention Plan, respectively.

139. Brock testified that the Crisis Intervention Plan guides staff and the most restrictive hold that can be used on an individual is a two-person seated stability hold which was not authorized by DEM's Crisis Intervention Plan. The authorized restraints are the forward escort, two-person stability hold or chair restraint. The more restrictive holds put the resident at higher risk of injury because it puts more restrictions on their bones, their structure, arms and joints.

140. Brock stated that everyone that works with DEM is trained in his Crisis Intervention Plan. She stated that the Appellant would have been trained on DEM's holds and trained on the Safety Care method.

141. Brock identified Cabinet's Deposition Exhibits 15 and 16 which were marked. She stated that Cabinet's Deposition Exhibit 15 was an Incident Report for REH dated November 19, 2012, which outlines follow up that should have been completed. Cabinet's Deposition Exhibit 16 was an email from Karen Henderson in Risk Management to her, the Appellant, and others telling the Appellant to complete the follow-up section of the Incident Report and providing him an example of how he could complete it. Brock testified that Henderson was doing this because all incident reports had to be completed because all of the data is reported to Frankfort.

142. She stated that the Appellant did not complete the document properly and that Ms. Henderson had a meeting with the Appellant and told him why it was important to complete it and he still refused. Appellant's response was not appropriate given the operational policies. She reviewed the letter of suspension and testified that charge 4 was appropriate.

143. She identified Cabinet's Deposition Exhibits 17, 18, 19 and 20. Cabinet's Deposition Exhibit 17 were deficiencies found by OIG during an abbreviated survey on June 20, 2012. Exhibit 18 is the same document, but that one is based on federal regulations, and Exhibit 17 is based on state regulations. The facility had to do a plan of correction, Cabinet's Deposition

Exhibit 19 completed for the Department of Medicaid Services and Cabinet's Deposition Exhibit 20 is the one completed for OIG.

144. She stated that the deficiencies came about because a security guard was not able to answer questions about abuse and neglect. So the plan of correction was to probe 100% of staff for six months and a random sampling thereafter to ensure that everyone knew what abuse and neglect was and could speak about it if OIG came back. Supervisors did their shifts as well as other department heads.

145. She stated that the task of administering the probes was covered in Appellant's Job Description in Task 1 which says the person "provides ongoing training and coaching of staff" because the probe was ongoing training and coaching on abuse and neglect.

146. She stated that Appellant's immediate supervisor, Sheila Miles, who was the Residential Director, instructed him to complete the probes. Brock stated that she is convinced that Miles told Appellant to do this because she came to Brock two or three times telling Appellant to complete it and that he just left it on a desk. They had a deadline at the end of the month to get them in to Henderson.

147. She stated when Miles told her Appellant had not finished it, she told her to go back and tell him again and she later found them incomplete on the computer desk in one of the resident homes. This is outlined in the third charge of the letter of suspension and it is correct.

148. She said Bingham Gardens has a policy that deals with mandatory overtime which related to the fourth charge of the letter of suspension. She said they try to prevent some of the overhead costs of employees and use that with the number of staff required to ensure the safety of the residents.

149. She reviewed the policy on Cabinet's Deposition Exhibit 4, and stated that she believed a newer policy existed, but that she believed the provision in the policy on this was the same, so did not believe that it would change the outcome of Appellant's discipline.

150. She stated that Cabinet's Deposition Exhibit 21 is the employee schedule for the staff that gives an overview of who should be scheduled for that day. She stated it is the supervisor's responsibility to call the person in, if needed, and while the policy says it is the Home Manager, the supervisor also has to do so if they are the one on duty.

151. On cross-examination the witness reviewed and stated the job description does require that he write incident reports, specifically it requires "monitoring the incident logs and data and investigates clients' injuries and incidents and writes reports."

152. She stated that she has no document with her that shows that she sent an email that stated there could be no more of the prior physical restraint system. As it pertains to the Incident Report for DEM, it is not possible that a wrong box was checked because you have to write in the box. She states she never went to Appellant to ask him to clarify the Incident

Report. She never looked to see if he was trained on DEM's Crisis Intervention Plan, she has other people who do so.

153. Brock stated she has no documentation that Shelia Miles asked the Appellant to complete the abuse and neglect probes for the month of October nor does she have a copy of the spreadsheet outlining which staff had not completed their probes. Brock stated that she no longer works at the facility and could not take records with her, but the copies are on file with OIG.

154. She stated there could be things throughout the day that would require an increased level of staffing due to the supervision needs of the residents and that would be fine if approved by the administrator on duty.

155. She stated she has requested major discipline on the Appellant three times and cannot recall if she ever requested more discipline on any other merit employee.

156. She stated that she does not know if the Appellant reported abuse by Tony Mitchell in May 2012. She states that she does not recall if she requested MDA on Appellant in June 2012. She states she does recall the Appellant reporting administrator David Corbett after a guardian's mother alleged abuse. She cannot remember if November 2012 was one of the three times she requested an MDA on the Appellant.

157. She reviewed Appellant's Deposition Exhibit 1 and stated that she is familiar with and was trained on the document, the Cabinet's Harassment/Discrimination Summary Acknowledgement Form. She states she does not remember being made aware the Appellant was specifically stating that he was being harassed at the facility.

158. She reviewed and identified Appellant's Deposition Exhibit 2 as Appellant's rebuttal to the Request for an MDA and read a statement in which the Appellant stated that his HR representative said that he was training Appellant so that he could discipline. She stated that she does not know that the statement was made to Appellant, so she was unable to testify that it was.

159. She identified Appellant's Deposition Exhibit 3 as the Request for an MDA that Brock sent to Jay Klein, the appointing authority. The witness identified Appellant's Deposition Exhibit 4 as the Bingham Gardens Policy on a Resident's Right to Refuse Treatment. She stated she was aware of it and it states that an individual or his/her guardian may refuse treatment. She stated that a resident could refuse to attend work services or other treatment and that a worker is not allowed to physically force a resident out the door. The risk of force had to be more beneficial than not. She is not aware of CEM having anything in his plan that would permit staff to pick him up and put him in a car to go to work.

160. She stated staff should honor the resident's choice. She states that she did not review the home log and does not know if it was sent to the Appointing Authority. She stated that she did see Appellant's Deposition Exhibit 5 as the email that was sent to CEM's mother. Brock was copied on the email.

161. She confirmed the email written by Appellant stated that CEM kept refusing to go to the door and that he opted to sit in a chair and that Appellant offered to allow CEM to make up the work hours on Friday. The witness stated that the email was sent November 12, at 12:01 but the email does not list what day CEM missed work.

162. Appellant's Deposition Exhibit 6 was identified as a trip calendar for November 12, 2012. She stated the trip calendar lists CEM as being scheduled to leave the facility for bowling that day from 1:00 to 3:00, but that was not his work activity and that his work activity would be listed on his activity schedule. She stated that she cannot recall how many days per week CEM was scheduled to work, but that it would be listed on his activity schedule.

163. As it pertains to the charge relating to Appellant's failure to complete abuse probes, she stated that she does not have the list of people who had not had the probes. She does not have any documentation to detail that Ms. Miles actually asked him to perform the work or if another supervisor completed their assigned probes for Team 2 employees.

164. She stated she was not aware of any conversation between Appellant and Sheila Miles on October 29, 2012, during which she stated how proud she was that all of Team 2 probes were completed for the month.

165. She testified that on page 3 of the Request for MDA it states Appellant, a breaker, performed supervisory duties when he called in Jessica Oller, DSP. She doesn't know why Ms. Oller was asked to come in to work. She said if a resident had to have an increased level of supervision, it wouldn't necessarily mean the staffing level will change.

166. The Bingham Gardens staffing plan was identified and marked as Appellant's Deposition Exhibit 7. She stated the staffing plan gives supervisors the authority to have enough staff to ensure that the residents are safe. It does not list the maximum number of staff you can have on shift.

167. Brock testified that Appellant's Deposition Exhibit 8, No. 18 says the words Life Safety Minimal, she states that as the facility director and based on the number of staff hired there is a maximum staff number assigned for a team, the minimum is set by regulations. If they go below the minimum then they can be cited for Life safety. If a resident went to a 1:1, then it could be necessary to have a specific person to care for that resident.

168. The witness testified that according to the request for MDA, on August 25, 2012, Meliza Fonseca was supervising. Brock stated she does not remember if she ever requested an MDA on Fonseca while Brock served as Facility Director.

169. As it pertains to the REH Incident Report, Brock testified the supervisor has responsibility to perform follow up and find out the answer to the five questions to complete the report. She stated all supervisors went through the risk management training on how to complete reports.

170. Appellant's Deposition Exhibit 10 was marked and identified as a Notice of Request for MDA for Appellant; she has seen that document before but not the specific one for Appellant. She states that either HR or the supervisor provides it to the employee.

171. She stated that 4:30 is generally the close of business for administration, but because they are a twenty-four hour based facility that would not apply. She stated that upon reviewing the document Appellant signed for the Notice of Request for MDA on November 27, 2012, and she does not know if it was faxed before 4:30 p.m.

172. She identified Appellant's Deposition Exhibit 11 which is an email that Appellant sent to Karen Henderson about the follow up needed on the Incident Report regarding REH. The email indicates it was sent by Appellant November 27, 2012, at 4:33 p.m., which is generally when the administrative staff leaves. Henderson emailed back at 5:44 p.m. It was after staff left, but business never closes in a twenty-four hour facility.

173. She stated that it was her understanding that Henderson went to Appellant and gave him examples of how to complete the follow up section on the incident report, actually provided re-training. She states that she has no knowledge of Sheila Miles ever telling him he did not have to complete the Incident Report as directed by Henderson.

174. Appellant's Deposition Exhibit 12 was reviewed by the witness as the training log for the Appellant which has a date printed of March 1, 2013, after the request for an MDA. She clarified her earlier testimony that she did not state specifically that the Appellant was trained on DEM's Crisis Intervention Plan. She stated the training record on page 7 at the bottom detailed the last time Appellant was trained on DEM's plan was October 26, 2009, and that date was years prior to the alleged improper hold.

175. She stated that she does not know if Appellant was trained on updated plans for DEM and said she was not employed in October 2009 so does not know whether Safe Crisis Management was used at that time or whether DEM was permitted to be placed in floor holds.

176. She stated she did not know why the letter of suspension did not list the last date that Appellant was trained on DEM's behavior plan. She stated that she did recall Appellant requesting refresher training on Safety Care for him and his staff.

177. She reviewed Appellant's Deposition Exhibit 13 which was marked. It was a May 7, 2012 email from Appellant to Brock requesting additional training in Safety Care and further stating that he did not want a resident to be injured due to the staff not being well trained on Safety Care. She stated the date of the email was prior to the November 25, 2012 incident regarding the improper hold of DEM.

178. She stated she did not know if Appellant ever received training and upon review of the training record did not see it listed. She stated that she was aware that Appellant had been trained two additional times on Safety Care but just because it was not listed on the training record did not mean it did not occur.

179. She stated she had formerly referred to the old training program as Safe Physical Management, but it was actually called Safe Crisis Management. She said as the Director she did not ensure that every staff person was trained on every person's Crisis Intervention Plan.

180. She identified what was marked as Appellant's Deposition Exhibit 14, the Support Code Policy. Paragraph 2 requires all staff to quickly report to the designated area and Appellant did have a responsibility to report.

181. She testified that she believed this to be an outdated policy because it listed Safe Crisis Management and Safety Care was the most recent restraint system. She stated that the policies were available to staff and any staff could ask the administrative assistants to look at the policy book behind the front desk. She stated that she had no knowledge of whether the policies were locked in David Corbett's office and she did not know if Medicaid required that policies be kept in each living unit. She stated that the facility had never been cited for this.

182. Brock testified that in a meeting with team supervisors, Appellant did request that policy books be placed on the floor, and there was a plan to do so, but it was not done. She stated that at that time, Appellant was told that they were available on the front desk to anyone who requested to see them. She identified Appellant's Deposition Exhibit 15 as an email Appellant sent to her asking that policies be made available.

183. Brock identified Appellant's Deposition Exhibit 16 as the incident Report for DEM that the Appellee already showed her during the deposition. She stated on the back page it details imminent risk as the clinical justification for the restraint and on No. 14 of a prior page it stated that there were no injuries sustained as a result of the restraint.

184. She testified that the other employee involved, Merrifield, was a Safety Care Trainer and was the supervisor assigned to the home in which DEM resided. She testified that Merrifield was not suspended for the improper hold, he received a write-up for last warning of dismissal. She stated that Merrifield was not a state employee, but a contract employee.

185. She stated that she did not request disciplinary action on everyone who performed an improper hold and she based it on the employee's progressive discipline.

186. The witness identified Appellant's Deposition Exhibit 17 as an email from Chrissy Welker to her requesting review and information on an improper hold. She stated she did not know what incident report Welker was referring to in the email.

187. The witness identified Appellant's Deposition Exhibit 18 as an incident report dated July 28, 2012. She stated she had not seen it prior because she does not review every incident report. She stated she did see emails regarding this.

188. She stated the Incident Report outlined that a three-person hook and carry was used by Bianca Chambers and Ebony Mellons and those restraints were not approved Safety Care holds. She did not recall if she ever initiated disciplinary action on the two individuals.

189. The witness identified Appellant's Deposition Exhibit 19 as a May 30, 2013 Incident Report for DLF. Brock stated she was present for the latter part of the incident because the resident was having some psychiatric instability. The report states a supine was used and it can be authorized by the facility director under the emergency restraint policy. She stated that hold is not listed in the Safety Care Manual. She stated she does not know if that hold is an authorized hold for that client because she does not have his Crisis Intervention Plan.

190. She states she did not witness Anna Hall instructing them how to implement the hold because she was not present at that time, she was dealing with a Behavior Analyst injury. She stated she did instruct them to continue to hold in the supine until the Emergency Psychiatric System arrived to take him away.

191. The witness identified Appellant's Deposition Exhibit 20 as the Bingham Gardens Policy on disciplinary action and it was marked. She stated it had an effective date 9/1/2011 and stated that an employee being suspended more than five days or dismissed must first receive Notice of Intent that outlines the charges and gives the employee and opportunity to respond within two days. She stated she does not know if Appellant was given such notice.

192. She testified that she was not the Appellant's first-line supervisor and that the policy called for the supervisor to initiate the request for MDA. She stated it does not list facility director specifically.

193. The witness identified Appellant's Deposition Exhibit 21 as the Incident Report on REH that was already introduced by Appellee. It does not state in the incident report that REH hit his head.

194. Upon re-examination by Appellee the witness stated that Sheila Miles did have the authority to direct Appellant to complete the probes and Miles told the witness that Appellant failed to do so on more than one occasion.

195. She states that in Appellant's Deposition Exhibit 2 when there is a reference to "my own HR representative," that Appellant was referring to Rawleigh Richardson, the person Appellant filed a grievance upon. She does not recall how the grievance ended, it was so long ago.

196. The witness testified that as it relates to Appellant's Deposition Exhibit 4 that Appellant failed to get follow up from the RN to assess CEM. She states that with the resident it may not have been a refusal as much as the resident not being sure what was being requested of him.

197. He stated that the Appellant assumed that because the resident had trouble sleeping, that was why he was refusing work.

198. As it pertains to Appellant's Deposition Exhibit 6, that one day calendar does not outline the resident's work activity. As it pertains to the probes, Bianca Chambers completed them because Appellant refused.

199. As it compares to Appellant's Deposition Exhibit 8 and Cabinet's Deposition Exhibit 21, both of which are staff schedules for August 2012, the Cabinet's exhibit is the entire document of shifts, and Appellant's is just a partial schedule.

200. As it pertains to Appellant's Deposition Exhibit 12, the training record does not always list all of the training the person had. Frankfort made them go back and work on the training records because a lot of times the training was not listed on the form Appellant provided. There is a hard copy of the training record available. She stated she was aware that Appellant went back through Safety Care Training and that upon reviewing the document during the deposition did not see the second training listed. That led her to believe other trainings were missing.

201. In 2012 policies were accessible to the staff. They were not sitting on a table, but staff could request to look at them. Also for the most part, when the staff was trained on policy they were given a copy. There were times policies were not given out. Appellant is one staff member who requested policies and they were given to him. There was one time when Appellant wanted a policy while he was off and Jay Klein stated that he had to go through discovery. Resident Plans, Life Books and Crisis Intervention Plans are available to the staff.

202. On re-cross, Brock testified she does not know whether staff prompted CEM on the day he did not go to work. She never looked at the home log for CEM and she has never disciplined anyone for deleting anything off a training record. Brock's Deposition concluded.

203. On the second day of the hearing the Appellee called **Galen Linville** as its next witness. Linville works for the Cabinet for Health and Family Services, Office of Human Resource Management, Employee Relations Branch. He investigates requests for Major Disciplinary Actions and answers grievances.

204. Linville testified that he knows Todd McGuire because he has investigated more than one request for an MDA. In investigating he takes the information that has been supplied by the department, reviews it, and looks at witness statements and incident reports. They had incident reports and witness statements reviewed.

205. Ronald Cooper would have been the contact at Bingham Gardens, but he believes he received information from Melissa Brock and Karen Henderson. He found portions of the MDA to be supportable and the suspension letter resulted. He does make a recommendation based on the information available, but Mr. Klein decides. They review comparable actions. He also reviews policies in effect at the time and also considers job duties.

206. Appellee's Exhibit 22 was identified by the witness as a policy of the Cabinet. He states he considered the policy and found Appellant's actions violate this policy as outlined for all the violations in the letter.

207. On Cross Examination, Linville testified that he does not recall if he was provided any of the training records, for Appellant. He recalled there being an email about his failure to complete abuse probes.

208. He stated that as it pertains to Exhibit 22, he believes staff are given the policies, but has no documentation to know if Appellant was trained on the policy.

209. Linville identified Exhibits 23a, b and c as emails to and from him regarding additional information he sought while completing the investigation. Ronald Cooper was the HR contact at Bingham Gardens; Rawleigh Richardson was also in HR. He believes the information he was provided was accurate.

210. On re-cross, Linville stated that he had no documentation to show that Sheila Miles stated that Appellant was being harassed. If he had received such, he would have reported it.

211. Upon questioning from the Hearing Officer, Linville stated that he does not know why the infractions listed in the letter span a period of several months before they were addressed by the Appellee. He stated that he couldn't find anything exactly comparable, but recommended an eight day suspension. The Appellee rested.

212. **William D. Pollard** was called as the first witness for the Appellant. He stated that he formerly worked at Bingham Gardens and started out as a DSP, then to psychology, then to staff development and training. Part of his job was training on behavior plans. DEM was moved to B-2 and he did the training on DEM's Crisis Intervention Plan and Positive Behavior Support Plan. They eliminated floor holds for everyone at one point, when they went to Safety Care, then they started to allow them again. DEM was permitted to be put in floor holds at first. Most of his behaviors were in a chair.

213. Pollard testified that all supervisors were not required to be trained on all residents. He testified that Team 1 was comprised of Houses 1, 2 and 3 and Team 2 was comprised of houses 4, 5 and 6. Staff was trained only on the behavior plans for their assigned team. DEM was not assigned to Appellant's team.

214. Pollard identified Appellant's Exhibit 5 as Appellant's training record. He stated that he is the person who inputs this data on training in the course of his work and prints out the training record. From 2009 until January 2013 he entered the behavior training data along with one other staff person. He is the person who printed out the document on March 30, 2013 and provided it to Appellant. He stated it looks as it did when he gave it to Appellant, to the best of his knowledge. He stated he printed it out because Appellant asked him to and stated that they (Appellee) were coming after him.

215. He stated that in addition to the Training Record of the employee, the resident's record would also show who was trained on that resident's plans. He testified that after he reviewed Appellant's training record Appellant's Exhibit 5, page 6, and saw only a 10/26/2009 training on DEM's behavior plans he went to DEM's record and looked for Appellant's signature

on a training sheet and found only one documented training for Appellant on DEM's plan during orientation on 10/26/2009. He stated that he was the one who trained Appellant on orientation on DEM's plan years ago. He was responsible for training on all resident behavior plans and can't say positively whether all training was input in computer by the other trainers.

216. He stated the document does not show any other time that Appellant was trained on DEM's Positive Behavior Support Plan or Crisis Intervention Plan, even though the plans were revised several times. If he had been trained subsequently, then the previous date would go away and the most recent date would be listed.

217. He stated on the sign-in sheet for training, it states that that the person is acknowledging that they have received the training and understand what is being trained. He said that if a person refused to sign a training form, the trainer seeing that should go to the supervisor. If the date is not listed on the training form then the person is not trained. He stated that they can't say they are trained if we don't have a training document on them. Pollard said they really have to have the signature, if you don't have the signature, the person could say they have not been trained.

218. Pollard stated that he has probably trained Appellant more than fifty times and he had never seen him refuse to sign the sign-in sheet. Pollard states that he counts his people and checks it against the sign-in sheet to make sure they are trained.

219. He states that in approximately 2008 or 2009, when new employees were in orientation, everyone was being trained on every plan for every resident. However, after that, the facility switched to training staff only on their assigned residents. If a staff was moved from one team to another they were trained on the newly assigned residents.

220. Appellants Exhibit 3, the Support Code Policy was reviewed. He stated when a Support Code is called the resident's name is not announced. He has trained staff on Support Codes. Responding staff have to find out who the leader is and then follow the guidelines of the leader. The Support Code leader is usually the first person who calls the support code, or the person with the most information about the situation.

221. He stated that he knew Chris Merrifield and trained him a lot. Merrifield was on first shift and he and the witness worked together in Houses 1, 2 and 3. He stated he spoke to Merrifield about the November 25, 2012 incident involving DEM and that Merrifield admitted that he called the Support Code and he was the one who said to put DEM in the two-person seated stability hold because he thought that it could be done. He stated that Merrifield laughed about not being disciplined over this, because he thought he would have been fired. He stated that Merrifield was a trainer for Safety Care.

222. Pollard stated the original crisis intervention plans are in the medical chart, and that the Life Books are a mess, and in many situations the guardians had not signed off on the plans. Many plans were two years old in the Life Books. He went to a supervisor and reported this got all of them straightened out and got the guardians to sign.

223. He testified that on DEM's Crisis Intervention Plan, Appellee's Exhibit 11, you will see his signature as a witness to the guardian approval May 3, 2012, and the revision date was March 20, 2012. It was put in effect without the guardian's signature and a verbal approval was obtained two months later. DEM's was one of the outdated plans that the witness found and corrected.

224. A supervisor or DSP would not know whether the plan in the Life Book was accurate and updated. People assumed that the case manager was keeping the Life Books updated. The plans were revised several times, but none of those revision dates are listed on the training log. At one time, unless there were medical conditions, all residents could be put in floor holds.

225. The witnesses reviewed Appellant's Exhibit 6 and identified it as the Bingham Gardens policy on Disciplinary Actions. The effective date is when they moved to Bingham Gardens from Central State. Staff was trained on the policy when they moved over from Central State. The policy outlines the process for disciplinary action. Appellant's Exhibit 6 entered into evidence.

226. Pollard testified that numerous times he was trained on policy, but was not able to take a copy of the policy. Some of the policies they were trained on were not dated, some were not signed, some had "draft" stamped on them.

227. He reviewed Appellee's Exhibit 22, stated he never saw it and does not know if staff were trained on it. He said it was his understanding that copies of policy books were to be kept in each living unit. The copy was in the director's office. Only one other person had a key to the Director's office. Many times people would come to him with a question, he was unable to answer the question because he had no access to the policy. When he asked, he was questioned as to why he wanted the policy and was then under suspicion, so he would use another way for someone to get him a copy.

228. Appellant's Exhibit 7 was identified as a document that Appellant sent to the Attorney General and the witness was copied on the email. The email detailed that the Appellant said he was being harassed after reporting abuse and neglect against upper management. Appellant's Number 7 was entered into evidence.

229. Appellant's Exhibit 8 was identified and marked and was the Notice of Request for Major Disciplinary Action that the Appellant had shown Pollard long ago. Rawleigh Richardson the person who delivered the Notice of the MDA was believed to have threatened and bullied people. He testified he is aware the Appellant filed a harassment claim against Richardson. Appellant's Exhibit 8 was entered.

230. With the DEM situation, he is baffled that there was a delay in addressing this improper hold. When there is a restraint, it is reviewed immediately and normally if there is a problem, the employee was pulled from the floor, but this situation came up later.

231. He testified that Merrifield, someone who was trained and is a Safety Care Instructor, was telling Appellant what to do and he was not disciplined but the Appellant was. The protocol is that if there was a problem that occurred because a person acted without knowledge then that person is usually re-trained. This is unheard of. You retrain them, specifically if the staff person does not know better. Appellant's Training Record, Appellant's Exhibit 5 was entered into the record over objection of the Appellee.

232. On cross-examination, Pollard testified that previously, DEM was approved for a two-person seated stability hold and that he has previously put DEM in that hold many times, but it was changed along with several others at some point. There are dangers in utilizing an improper hold, staff or residents can be injured because it does not limit all movement.

233. Pollard testified that he trained the supervisors on the plans for the residents. So Merrifield was trained on the plans for residents in houses 1, 2 and 3, which included the house in which DEM resided. Appellant was not trained on DEM because he was assigned to houses 4, 5 and 6. He stated it was his job to train staff on DEM's behavior plan and he did not get in trouble for not having Mr. McGuire trained on DEM's behavior plan, because Mr. McGuire was not required to be trained.

234. He stated he trained Appellant many times on behavior plans, right to refuse, Safe Crisis Management and updates. Appellant had the opportunity to ask questions. He often gathers documents for staff, even in the course of litigation.

235. He stated he checks the number of people in the room with his sign in sheet because someone could come in late. But for most of his trainings he had tests he administered.

236. People do get disciplined for improper holds, but normally there is just retraining. They look at the intent of the person, and Pollard stated he was responsible for performing the retraining for those people. He stated the protocol was if there was an improper hold, the person is removed from the floor. That is the way it is supposed to happen, but there are times then that they don't do anything to the person, but they are coming after Appellant.

237. The only person who can train on the Behavior Plan is the Behavior Analyst or their designee, which was Pollard and Keisha Johnson, by policy.

238. The Crisis Intervention Plan and the Behavior Plan should be reviewed every year, but he reviewed a Life Book and realized the documents in there were two years old. The medical chart has the original of documents. It is behind closed doors and eventually you can get them.

239. He saw Merrifield and talked to him the day that he was fired for cursing at his supervisor. The witness testified that Merrifield told him that nothing happened to Merrifield relative to this improper hold on DEM.

240. Pollard did not file a complaint on Rawleigh Richardson, but did alert Richardson's supervisor, Cooper, that new orientation employees were complaining about Richardson's tactics. As a result Richardson was pulled from training. The witness was trained in Safety Care in May 2012.

241. Upon re-direct, Pollard testified when they implemented Safety Care, at first there were no floor holds for residents, then later some were approved. DEM will literally bite a hunk out of his arm and if he is on the floor he does not know how you are to stop him from doing so. All residents at one point could be put in a two-person seated stability hold.

242. On questioning from the Hearing Officer, Pollard stated he knows Mr. McGuire through work and would invite twenty to thirty staff from Bingham Gardens out for a drink once per month. Appellant would sometimes be there. A lot of people come to him, want his assistance so that is why Appellant discussed with him and sent him a copy of the email to the Attorney General's Office. He said Appellant told him he was being harassed because he reported something on a staff member who abused a resident and he knew it was going to come back and haunt him and then it did, so he sent the email to the attorney general, copying the witness.

243. On Appellant's Exhibit 6, the policy regarding the Notice of Intent to Suspend, Pollard said he was not trained on any updated policy, so believes it to be the most current one.

244. He stated changes to behavior plans are usually started by Jennifer Salvina or Josh and then it would be given to Pollard and Keisha. They do 90% of the training. Salvina has occasionally done training. The revision dates for the plan for DEM are not listed on Appellant's training record because he was not trained. DEM was not assigned to one of Appellant's houses.

245. When a Support Code is called, it does not matter what house you are assigned to, you go if you can assist. He felt everyone should be trained on everyone's plan, but that was a decision Bingham Gardens made to not do so, because it took too long and cost too much money. As a supervisor, Mr. McGuire was not required to know the plans for all twenty-four residents. In 2008 or 2009, that was the case, but never since that time. He stated there was no one that is trained on all twenty-four plans and the reason he knows is that Pollard was the person who kept the graph on who was trained on what.

246. He testified that between 15-20 times he has personally put DEM in a floor hold. It was his job to read behavior cards, input them in computer. His job included training, enter behavior data, relieve for breaks, take residents on walks and generally do what needed to be done.

247. Once an improper hold occurs and the person is pulled, and then you don't have time to get coverage, the person would have to make phone calls to try to get people in there. Improper holds are reviewed at stand ups the very next day. Investigator goes to the stand up too and would not allow them to talk about it, until investigation is complete.

248. He stated that the facility was supposed to have guardian's signature within 30 days of the verbal approval on a change in plan. DEM's did not. He has been called for a Support Code many times. It's not reasonable to remember the plans for twenty-four people, that is why for a period of time there were no restrictions on floor holds, unless there was a medical reason. It got confusing for the staff.

249. When you walk into a room when a Code is called, you do not know what hold is approved for that specific person. There is nothing on the door that alerts you.

250. There is nothing that indicates that everyone is trained on a change to a plan within five days. It takes more than five days because they don't allow you to overlap shifts, you can't work 10 hour days to get all trained. Some people may be on leave or have been pulled from the floor. There are approximately 120 direct care staff and approximately 8 supervisors. If that were the case, they would be short of staff because who would relieve that person from their duties while Pollard trained them.

251. Jennifer, Josh and Keisha Johnson could train on changes to behavior plans. If one of those people trained staff, the data should have been on a training sheet which has to be logged out, the sheet is logged back in by the person responsible for training. It was never discussed with him that someone was refusing to sign the sign in sheet. You don't let people refuse to sign that because that gives them an excuse.

252. The next witness to be called on behalf of the Appellant was **Christine Welker**. She served as a Qualified Mental Retardation Professional (QMRP) at Bingham Gardens. Her responsibilities included attending morning standup meetings to review incident reports, medical trips.

253. Upon review of Appellee's Exhibit 19, the Incident report involving REH. She has seen the document before. Her signature on page 4 means that she reviewed it with the other members of the team in stand up. On the box relating to the question that no follow up was needed, she checked "No." She did so because no special team meeting or emails needed to be sent because they had already discussed with the PT, Jim.

254. If there are recommendations from the Supervisor in the section above that section completed by Appellant, it would normally be listed there. No one in the standup meeting had a problem with it because they had already spoken with Jim about it. She stated that she believed Appellant was not in charge of the equipment and it would need to be addressed by someone who knows the bed equipment, which was Jim.

255. Appellant's Exhibit 6, the Bingham Gardens discipline policy, was reviewed. She has been trained on this policy. The policy had been revised several times. There have been state policies along these lines that also outline progressive discipline and then to be put up for an MDA. She believes the portion requiring a Notice of Intent to Suspend remained in effect to the best of her knowledge, Appellant did not receive this.

256. Appellee's Exhibit 22 was reviewed by Ms. Welker. She has not previously seen the policy and had not been trained on it. There is no signature or date so she does not know where it came from.

257. She said as it relates to the right to refuse work outings, the resident cannot be forced out the door into a car. She is on Team 2 and familiar with CEM who lives in home 5 and has seen him lethargic, he has seizures and is on seizure medicine. It would be something she would contact a nurse and give her the observations, it was typical for him. He may have had a difficult night.

258. She has seen him refuse work outings many times. She would generally visit the staff and residents every morning before standup meetings. On November 12, 2012, she was working and Appellant came and knocked on her door and asked her to assist in getting CEM to work. CEM had a Positive Behavior Support Plan that required that he be prompted when refusing to do something. She and Appellant both prompted him several times and CEM would not go to work. The resident has a right to refuse going. She does not know of anyone who has intentionally kept CEM from going to work. His mother is adamant that CEM get out of the house, but understanding about if he has a rough night or if he is late getting to an outing.

259. ILP is everything about the resident, who the psychiatrist is, who the guardian is, life goals and visions of the individual. The second portion the CCF is the bulk of medications they are on and previous treatments. The third section is working on objectives, doing things in the community daily objectives. Discharge criteria and transitional information is also listed.

260. She has witnessed several conversations between Appellant and the AOC, when an incident or a restraint occurred and the AOC needed to be contacted, or in an emergency situation. She witnessed a conversation between Appellant and David Corbett, AOC, when Appellant told her that he wanted her as a witness because he felt they were coming after him.

261. He had the phone on speaker phone on her desk. BD's mother indicated that David Corbett, the Assistant Director, was psychologically abusing her daughter because he kept promising to get her a cat because she loves cats and had them when she lived with her mother.

262. She states that Appellant wrote up an incident report that was on her desk at that time. She never saw the report come through the morning standups. After he hung up he stated to the witness, "I'm on the firing line now, they're coming after me. Just wait a few weeks or months and they will be coming after me with an MDA." The witness even made the comment just before he made the phone call. Afterwards, Appellant was disciplined, a fact she was aware of because Appellant told her and because he was not at work.

263. She trained new staff going through orientation on ILP's. All new orientation staff assigned to Team 2, homes 4, 5 and 6 she would have the ILPs laid out and would go over them with the new employees.

264. The staff assigned to Team 1 would not be trained on the ILPs for Team 2. There was no cross training between teams.

265. As QMRP for Team 2 the Positive Behavior Support Plans and Crisis Intervention Plans were revised all the time. She was never trained on the revised plans. The Behavior Analyst or a designee Behavior Tech would be responsible for that training. The plans had to be updated if there was a need and yearly it would have to be reviewed and go to the big committee that would approve or revise and approve.

266. She has audited Life Books and has found times that the Behavior Plans were more than one year old. She has seen some that were a year and a half old or a year and nine months old. The Life Books did not get updated the way they are supposed to. It was the Home Manager's job to keep these updated. Policy books were located in David Corbett's office and staff was not given a key.

267. The administration would always try to train on policies that weren't official, some had draft written on them, some were unsigned. Sometimes they would not give you a copy of it, but would want you to sign that you had been trained on it. Sometimes in blitz trainings they would train on 10 or 12 policies and the trainees were not permitted to take a copy because they said they needed to use the copies for the next class.

268. She was the QMRP for resident DEM only at Central State, but not at Bingham Gardens. In October 2012 she saw Appellant completing abuse probes, she knows because she was released by Melissa Brock to come back to being a QMRP in October and they were both completing them.

269. On cross-examination, Ms. Welker testified she was never terminated by Bingham Gardens. She had a Personnel Board appeal for a five day suspension at the end of November 2012, which she won. A stand-up team consists of home manager, supervisor, behavior person, psychiatrist, nurse and QMRP. She was actually conducting the stand up meetings, so attended them.

270. The incident report Appellant had relative to BGD and the cat, would not have come to the stand up that she conducted because BGD was not assigned to her case load. She personally saw David Corbett promising BGD a cat, but she did not file an incident report about the cat because she did not know the policies on getting a cat and she did not speak to the mother about the mother's concerns of psychological abuse.

271. She trains new employees going through orientation on ILPs, and she would perform retraining if an existing staff person was pulled and needed additional training. Her relationship with Appellant was he was a supervisor assigned to her.

272. If a resident refused work more than three times, they had to have a special team meeting to discuss. Appellee's Exhibit 8, the email Brock sent to all users about canceling work for medical reasons, was reviewed by the witness. She states she did receive it from Brock because it went to all users, but she does not remember receiving it because she gets thousands of emails.

273. Appellant's Exhibit 6, the Policy on Disciplinary Actions was reviewed by the witness and she noted it was signed by Brett Ryan, so it is highly likely that this is not the most updated policy. Appellee's Exhibit 22 was reviewed she has never seen before and does not know where to find it. She does not know whether the Cabinet's policy is on the internet.

274. Welker reviewed Appellee's Exhibit 19, the Incident Report for REH. If follow up was needed or there were blanks, the Risk Management Department, Karen Henderson's team would go through to see if everything was filled out properly. She does not know whether Ms. Henderson required follow up on this particular incident report.

275. Todd, Meliza, Antwan, Bianca, and Chris Merrifield were all supervisors. Team 1 was made up of homes 1, 2 and 3. She was assigned to Team 2, homes 5 and 6. Appellant was in charge of the direct care staff of homes 4, 5 and 6. She has no knowledge of him working in homes on Team 1. She worked as a DSP and at times Appellant did as well or they would do so if someone was on break or if they got pulled or if they called in. She normally would do that in homes 5 or 6 unless she was trained on the resident, then she would also support home 4.

276. When training on residents occurred there was a training sheet that was completed. For new residents coming to facility, everyone would be trained on a person because there was a need for one female and one male.

277. She testified that it is important for a supervisor to fill out page 4 of an Incident Report for OIG and to determine the reasons certain things occurred. She reported the outdated ILPs she discovered to her supervisor and the Facility Director, Karen Henderson, and they stated they were working on it. Keys to the medical records room were in possession of David Corbett, Melissa Brock, Karen Henderson and Carrie Harris.

278. She is aware that Bingham Gardens was cited for activity schedules not being updated and for some environmental problems.

279. Upon questioning from the Hearing Officer, Appellant was a supervisor assigned to the witness' unit, he was not above her and she did not supervise him but they worked in the same unit. Her first-line supervisor was Regina Young and second-line supervisor was Melissa Brock.

280. Work is considered treatment for the residents and she has previously dealt with CEM refusing to go to work. It was the DSP's call on what to do. She would prompt, and there were times the nurse would even prompt. If she felt he was lethargic or if something was off, she would have his vitals checked. She personally had experiences with him not going to work and it ended with him not going to work. Sometimes that issue would go before them at standup meetings. Sometimes she would call his guardian, saying he is not wanting to get up, he is staggering around and the guardian would say keep me posted. She thinks after the email from Brock about canceling activities, the protocol would be to call medical.

281. The nature of Appellant's call to the AOC was that BG's guardian has reported you are going to get her a cat and the guardian has concerns. Corbett was the AOC at that time, and Appellant was reporting the guardian's concerns with Corbett to Corbett, the AOC, but the protocol is to call the AOC so that staff person can get pulled. Corbett just asked basic information about when BG's guardian called. He just got the facts.

282. She stated there are some pets allowed in Bingham Gardens, a hermit crab and a fish, and the Appellant was reporting that "Mom has this concern and I am relaying it to you.

283. When a change is made to a client's Positive Behavior Support Plan or Crisis Intervention Plan, the Behavior Analyst might train, but normally referred to the Behavior Tech who would train the staff. The changes are rolled out immediately, and go through the staffing roster. Supervisors are required to know the Crisis Intervention Plans for their assigned residents only. If a supervisor is going to provide direct support they can look in the Life Book for the resident, but they were not typically kept updated with the most recent plan.

284. She has been called on Support Codes. It is called, you can hear it in the clinic or home, but there were communication problems, sometimes you couldn't hear, but you would see people running past the window and that is how you know. Sometimes you could hear on walkie-talkie. You could have more than 6 or 8 people at a Support Code. The first person on the scene usually knows what's going, you go in there blindly and listen to the people around you to know what to do. She has been on Support Codes for residents in homes 1, 2 and 3 (not her assigned homes) and she did not know the plans of those residents, but trusts the judgment of the staff telling her what to do.

285. By policy, abuse, neglect and exploitation has to be reported to AOC. Appellant used the words "psychological abuse" when reporting to Corbett the concerns of BGD's guardian.

286. On re-cross, Welker testified that she has been trained in Safety Care several times. She is aware of a toll free hotline to call Abuse and Neglect, when an Incident Report is completed and sent to the nurses' station and then to stand-ups.

287. BGD lived in home 4 and she only did stand-ups for 5 and 6. She does not know the outcome of that incident report Appellant filed. But there were times incident reports were not available because they had gone to the Investigator On Call.

288. Next witness was the Appellant, **Todd McGuire**. Upon questioning from the Hearing Officer and through testimony in the narrative, Appellant testified that he had to report abuse on an administrator in May 2012; one month later issued an MDA and suspended a month later. In October 2012 he reported abuse and neglect and in November was given notice of an MDA. He told many people he was being retaliated against.

289. Appellant's Exhibit 9, was identified as a grievance he filed. It was marked and entered. He stated in May 2012 he reported abuse and neglect on Toni Mitchell, Home Manager. The resident was CEB, and the abuse reported was the resident was refusing to go to the doctor

and staff was honoring, but Mitchell was ramming him down the hallway to get him loaded up in the vehicle. He stated he reported to the AOC the same day it occurred and completed the paperwork, but does not have the paperwork. He cannot recall who the AOC was because the AOC rotates weekly. Once reported, he received follow up from OIG, and they did not substantiate abuse because the camera was foggy.

290. Appellant testified that he received a Notice of MDA in June 2012 about an incorrect time sheet and time and attendance. The outcome of the MDA was a three days suspension, but it was reduced down to a one day suspension by the Personnel Board. He stated that per policy when they witness or suspect abuse or neglect they have to report to the AOC.

291. Appellant testified that in October 2012 he reported the BGD incident regarding the cat and psychological abuse alleged by the Guardian. He stated that it is not up to him whether it was reported, he said once they hear those words "psychological abuse" they are required to report. He stated that he has been trained that even if it is suspected he is required to report, and referred to the policies on Incident Reporting and Abuse and Neglect is Appellee's Exhibits 4 and Appellee's Exhibit 5. He stated that Appellee's Exhibit 5 requires that the staff, "Notify Facility Director or Designee" and on weekends the AOC is the designee. He states that had the guardian not used those words "psychological abuse," he would have just reported to the QMRP to address.

292. Appellant stated that with the issue of CEM not going to work, he prompted numerous times. He stated there was no policy after Melissa Brock's email that tells what they are to do. They are to prompt every 15 minutes and document it on the home log. He stated that he had staff continue to prompt and log it. He states he was watching his Ps and Qs so was being very careful.

293. He stated that Melissa Brock in her deposition says she was never made aware that he was being harassed, but on the grievance form she replied to his grievance about harassment. She testified she did not know what occurred with the grievance. Appellant's Exhibit 10 was identified as the Cabinet's Anti-Harassment Anti-Discrimination Policy. All employees who work for the Cabinet have to sign saying they will do what is on the form. They are given a copy of the policy. He states that Ms. Brock said she was trained on the document, but she did not issue a cease and desist letter and did not contact EEOC as required by that policy even though she knew who he alleged was harassing him. Appellant Exhibit 10 was entered in the record.

294. He testified that he contacted Mark Sipek, Jay Klein and Rawleigh Richardson and notified them that he was being harassed. The newest suspension was in retaliation. Marked for identification was Appellant's Exhibit 11 a November 28, 2012 email Appellant sent to several people which was his rebuttal to Notice of Request for Major Disciplinary action. He had already filed one grievance for harassment and no one ever came and investigated or asked him anything.

295. He stated that he had been talking to Ron Cooper, HR Director, who told him if he felt nothing was getting done, he could contact the Attorney General. He stated his Grievance, Appellant's Exhibit 9, was filed in July but nothing was done. He stated he kept complaining that he was being retaliated against for reporting Toni Mitchell in May 2012.

296. The Appellant admitted the administration did respond to the Grievance, but stated no outside agency was brought in to investigate and Ron Cooper said he would do so. He stated in September he sent an email to the Attorney General and then in November received the Notice of Request for MDA from Richardson. Richardson was the person Appellant filed the grievance on for stating he was training Appellant so he could be disciplined.

297. Appellant testified that he signed in on all training forms, and that it would have been insubordination if he had not signed in and as a supervisor he would be called out for that behavior. He stated that Richardson's training him on policies is a level of progressive discipline and in the grievance he wanted the training stricken from the record for that reason.

298. He contacted Jay Klein, the Appointing Authority, by email after being given notice of the request for an MDA. After the email to Klein, Klein directed that he be interviewed. They did come and ask him questions and he gave information, but they did not ask about his retaliation claim.

299. He stated that after the email from Brock about canceling activities, they were given no protocol on what to do. He was called in to assist with getting CEM to work, because staff was having trouble. As a supervisor, he prompted CEM then called in Ms. Welker. The home log would show that they abided by policy, but that document was not produced by the Cabinet and was missing.

300. As it pertains to DEM and the improper hold, all of their witnesses claimed that he was trained on DEM's behavior plans, but did not provide a single training document to show that was true. The document he produced was his training record that shows that he was trained on DEM only in orientation back in 2009. Only the Behavior Analyst or Behavior Tech could have trained.

301. Appellant testified that by policy, he was required to respond to the Support Code and he did so when he was walking from one house to another and heard the call. Merrifield was the supervisor for Team 1 and the Certified Safety Care instructor. He states that when he got there all hell was breaking loose and Merrifield said, "We have to put him in a hold." He did not have time to flip through DEM's Life Book and review his Crisis Intervention Plan. Merrifield was the Support Code Leader and he instructed on what to do and he instructed him to assist with a two-person seated stability hold. DEM was assigned to a home that Merrifield supervised and per policy, he would have been trained on DEM's Crisis Intervention Plan.

302. He is not required to know the plans for all twenty-four residents. It is totally false that he is to know all of them. He was responsible for knowing them for the residents in the homes that he was assigned to. He was rarely ever assigned to a resident in home for the other Team.

303. He states that Merrifield was not disciplined and he told Appellant so. He laughed about it, but apologized to Appellant and said Appellant was following Merrifield's lead and thought DEM could be placed in a two-person seated stability hold.

304. With regard to the abuse probes they claimed he did not complete, Sheila Miles told him to complete them if he had time. He went to two employees, but found they were already trained. He asked Miles for an updated list, but she never gave it to him. He asked her again on October 29th but states she never gave him an updated list.

305. He stated he does not know what Miles was referring to having found on a desk in her documentation supporting the request for MDA. She never followed up with him after that. He states the next time he knew it was a problem was when he got his Notice of Request for MDA.

306. With the August 25, 2012 extra staff being called in, Appellant stated he was called in to work as a breaker because they were short-staffed. Meliza Fonseca was the supervisor and called him in on his day off. When a resident escalated, he was required to supervise a resident 1:1 so an additional staff was necessary. Fonseca asked him if he had Oller's phone number and asked him to call her in, so he did as requested. Fonseca moved to Texas so she was not available as a witness and the Appellee would not agree to allow her to testify by phone.

307. He states that he didn't have access to who was on overtime, but everyone was working overtime during this period. There was a free pass on overtime, they were called into fill the voids and Karen Henderson even testified about being called in to work as DSPs. When he normally had to call in someone, he had no way to know if they were at overtime. If you were off on Tuesday, just call that person and ask if they wanted to work.

308. He states that Appellee did not create a PRN list until after this incident in November 2012, they hired shift supervisors to do this. Then in 2013 the facility created a spreadsheet, but it did not exist in August 2012. There was a list of PRN staff, just name and agency. No phone number to get in contact with them.

309. On his alleged failure to follow up in the Critical Incident Report, Appellant states he found the incident report on his desk in his cubicle in the living area of one of the homes. It was 1:52 when he started the investigation. When he went to complete and ask some questions of the staff, the assigned staff was out with REH and he could not find the nurse. He said he could not give advice on the height of the bed because he is not one of those professionals.

310. He states that on November 19, 2012, the Incident Report went through stand-up and Risk Management is part of the stand-up team and they had no issue. He states that the Notice of Request for Disciplinary Action was received on November 27, 2012, the same day as he received the email from Henderson telling him to complete the report (Appellee's Exhibit 20). He did not complete the Incident Report because he did not have the original incident report because it was sent to personnel as part of the request for MDA. He was not permitted to make

the correction to the copy given to him by Miles, but needed the original. He has never been written-up or disciplined before he reported abuse.

311. On cross-examination Appellant testified that he has worked for four years. He has been suspended three times, but does not recall if he has had verbal warnings. He stated a write-up was in his file and he filed a grievance about it being in his file.

312. He has filed two or three grievances, but can't recall the exact number, it could be four. He has been alleging retaliation and harassment since June 2012. He admitted that Mr. Cooper in HR did provide some methods for him to report his claims of retaliation. Appellant identified Appellee's Exhibit 25 as an email from Mr. Cooper to Appellant responding to Appellant's claim of retaliation and outlining to whom he could report the claims of retaliation.

313. Appellant admitted that he did not call the Attorney General even though Cooper provided a phone number, but he stated he did send an email. He did not call the General Assembly, or the others listed in the email to report his retaliation claims. The Appellant stated that he did not send his Grievance, Appellant's Exhibit 9 to EEOC.

314. He stated that he was trained on Safety Care two or three times and testified that Appellee's Exhibit 26 was an email he sent May 7, 2012 where he stated that there was confusion about Safety Care and asked for retraining. He was not trained after that until September after the August 2012 incident that dealt with an improper hold.

315. Karen Henderson and Jennifer Salvina were lying if they said he was trained on DEM's plan. He prompted CEM, and documented on the home log. He did contact the RN. He admitted that he sent the email to CEM's guardian after CEM's work time, and the email does say, "I *will* contact the nurse to assess."

316. The Appellant admitted that Appellee's Exhibits 4 and 5 outline how to report incidents and suspected abuse and neglect. He stated there were other methods he could have used to report BGD's allegation of psychological abuse by David Corbett; and did not do so. He stated he called the AOC as policy states so the AOC could decide what to do.

317. Appellant admitted he did not do what is outlined in B and C of page 2 of Exhibit 5 in the section entitled "Additional Responsibilities of Team Supervisor."

318. He states he did subpoena Bianca Chambers who is alleged to have finished the abuse probes. He did not enforce the subpoena because she was in the police force.

319. He stated that on August 25, 2012, the day he called in Jessica Oller, he was called in as a breaker, but when a resident in one of his homes escalated he became her 1:1. She became violent with a bat and damaged his car and other property. He did not initiate a hold and he was ultimately put back two weeks later because there was no Safety Care hold to address taking a weapon away. He stated that on that day he was a 1:1 and he did not have access to the PRN list because he was providing direct care, and the PRN list is on the server and the only computer was in house 6, he was not in house 6. The supervisor gave him a directive. He was

not able to have Ms. Fonseca testify today because she is in Texas and the Appellee would not agree to allow her to testify by phone.

320. He is an employee of the Cabinet for Health and Family Services and has not been trained on the policies of the Cabinet. He stated that he obtained Appellant's Exhibit 6, a policy in disciplinary actions during a training blitz when he moved over from Bingham Gardens. He has requested other policies and not been provided all of them. He even had proof that he had done so stating he felt uncomfortable working on the floor without a point of reference. He asked for a copy of the policy. He does not know whether it was responded to.

321. The witness reviewed Appellee's Exhibits 27 and 28 and he testified that it appears consistent with Mr. Klein's testimony. It does not list that the Cabinet requires that an employee be given Notice of Intent to Discipline. Appellee's Exhibits 25, 26, 27 and 28 were entered into the record.

322. Appellant reviewed Appellee's Exhibit 1 and the charges against him; went through each one and outlined his response to each charge.

323. On the charge regarding CEM missing his work activity, he followed the directive of Ms. Brock as outlined in Appellee's Exhibit 8. On the charge, regarding the improper hold on DEM, he did place DEM in an improper hold because he was directed to do so by Merrifield and Appellant was not trained in DEM's behavior plan. As it pertains to the abuse probes, Sheila Miles did not give him abuse probes. He followed the policy on Incident Reporting follow-up. With his calling in Oller on August 25th, the policy (Appellant's Exhibit 2) states that the Home Manager had these duties, but "it is our job to get staff in there." He followed the policy when he called in Ms. Oller because he was directed to by the supervisor.

324. He testified that throughout the process he has been treated unfairly. He has never said Mr. Sipek treated him unfairly but only included Sipek on the email. He did say Jay Klein and Ron Cooper never addressed his claim of harassment and retaliation. He did not include the Attorney General because the Attorney General did not respond to his initial email. Appellee's Exhibit 29 was identified by the Appellant as an email he sent November 29 as his rebuttal to the Request for MDA. Mr. Richardson was sent this email as well. The document attached to the email is the rebuttal he submitted with the email and that is his signature. It states that he did not need the additional time they granted him to respond. Appellee's Exhibit 29 was entered into the record.

325. Upon questioning from the Hearing Officer, the Appellant testified that with regard to completing the Incident Report form as directed by Karen Henderson, he no longer had access to the original Incident Report. Staff present for the incident were not at the facility, but the next day Sheila Miles told him on October 28th, not to worry about completing the incident report.

326. He admits that his failure to complete the incident report was not a charge included in his rebuttal, but states they called him in two times to discuss the MDA. He states that Sheila Miles initially gave him the copy to complete, but then the next day Sheila told him not to do it.

327. He states that when he testified earlier that he didn't complete it because he did not have the original incident report, that his testimony was incorrect. The actual reason that he didn't complete the incident report form was because Sheila Miles told him not to.

328. He stated when he asked for re-training on Safety Care, he was retrained, but it was several months later. He referred to Appellant's Exhibit 5, page 7 that shows Recertification of Safety Care on September 14, 2012.

329. For the residents in the homes that he supervised he was trained for all their plans. At some point, the Behavior Techs or Behavior Analysts would train him on updates to behavior plans and he would sign a training sheet.

330. Appellant's Exhibit 4 was not entered into evidence, it was withdrawn by Appellant so the Hearing Officer noted for the record that there is no Appellant's Exhibit 4.

FINDINGS OF FACT

1. The Appellant, Todd McGuire, was employed as a Therapy Program Supervising Assistant at Bingham Gardens, an Intermediate Care Facility for Intellectual Disability (ICF/ID) in the Cabinet for Health and Family Services.

2. Bingham Gardens consists of six homes with each home housing four residents. Staff are assigned to the homes in two teams, with Team 1 consisting of houses 1, 2 and 3 and Team 2 consisting of houses 4, 5 and 6. Appellant was assigned as a supervisor for Team 2, houses 4, 5 and 6. (Testimony of Appellant, Henderson, Welker, Pollard)

3. All of the twenty-four residents of Bingham Gardens have intellectual disabilities and are court-ordered to Bingham Gardens because they are unable to care for themselves independently and their guardians are unable to care for them in their homes. Some residents also have medical needs. (Testimony of Henderson)

4. The goal for the residents of Bingham Gardens is to assist the residents in gaining independence to be able to bathe, clothe and feed themselves and to work. All of these Activities of Daily Living comprise the resident treatment and the facility is required by state and federal law to implement with each resident to assist the residents in their development. To that end they have a team of professional staff that consists of approximately 120 Direct Support Professionals and 8 supervisors. There are also other professionals including nurses, social service professionals, OT's, PTs, a medical doctor and various facility administrators. (Testimony of Henderson, Pollard, Welker, Salvina and Brock)

5. In February 2013 the Appellant was issued a seven-day suspension for five alleged violations occurring from August to November 2012. The first charge against the Appellant was an allegation that he canceled the work activity for Client #1 CEM on November 12, 2012, in violation of the directive from the facility director Melissa Brock that "Classes and work cannot be canceled for any individual for medical reasons without the medical doctor's approval." (Testimony of Henderson, Brock, McGuire, Appellee's Exhibit 8, 9)

6. Appellant clearly stated in his November 12, 2012 email to the guardian, in his rebuttal documents submitted upon being given Notice of Intent for Major Disciplinary Action and during the hearing that CEM kept refusing to move toward the door to go to work. Appellant testified that he did not cancel CEM's work activity (treatment) for the day but that CEM exercised his right to refuse treatment as he was permitted under the Bingham Gardens Policy. (Testimony of Appellant, Welker, Brock, Appellee's Exhibit 9, 29, Appellant's Exhibit 1)

7. Appellee agrees that the residents do have the right to refuse to go to work. Appellant and his witness, Chrissy Welker, both prompted CEM to go to work, but he refused to do so. Later that day Appellant emailed the Guardian and advised her of her son's refusal to go to work and stated that because CEM seemed tired, he was going to have the nurse assess "to see if anything *else* was going on." (Testimony of Appellant, Welker, Appellee's Exhibit 9).

8. The Hearing Officer finds that Appellant did not cancel CEM's work activity and therefore was not insubordinate relative to Brock's directive regarding canceling work due to medical reasons.

9. Appellant's second charge was unsatisfactory performance of duties relating to his failure to follow the Crisis Intervention Plan of DEM when he assisted another supervisor in placing the resident in a two-person seated stability hold. (Appellee's Exhibit 1, Testimony of Henderson, Brock and Appellant)

10. A Crisis Intervention Plan is an individualized plan developed to address how to deal with aggressive or self injurious behaviors. A Crisis Intervention Plan can be revised based upon the needs of the resident, but must be revised at least annually. A Crisis Intervention Plan may outline appropriate physical restraints if there is an imminent risk of injury to self or others.

11. At times when a staff member needs assistance in dealing with aggressive or self-injurious behaviors, he may initiate a Support Code or call for help. If a Support Code is called, all available staff are required to report to render assistance. In such cases the Support Code Leader, the person with the most information about the situation, determines what is to happen.

12. On November 25, 2012, Chris Merrifield, a supervisor for Team 1, called a Support Code for assistance with DEM a resident in one of his assigned homes. DEM was engaging in aggressive and self injurious behavior to include throwing things at staff, turning over his dresser and biting himself. Upon hearing the Support Code, Appellant who was traveling in between houses, responded to House 1, which was not one of his assigned homes. (Testimony of Henderson, Appellant, Salvina, Pollard)

13. Upon arriving at DEM's room, Merrifield, the Support Code Leader and a Certified Safety Care Instructor, directed Appellant to assist with a two-person stability hold which they held for one minute and then released when DEM went to the ground. When DEM began biting himself, they placed in him in a two-person seated stability hold for approximately five minutes. Thereafter, DEM did not attempt to bite himself and the incident concluded. (Appellee's Exhibit 12, 13)

14. Merrifield completed an Incident Report outlining what occurred. Nurse Slater, who arrived to perform a medical assessment, also completed his portion of the Incident Report stating there was redness and bruising to DEM's arms as a result of his own biting, and a re-opened scab to his arm, but no active bleeding. (Appellee's Exhibit 13)

15. Slater also completed an Emergency Restraint Monitoring Review form to assess what has occurred and whether things were handled appropriately. Slater detailed that DEM presented an imminent risk to himself and others, and that prompts and other de-escalation techniques were not effective prior to the physical restraint. Slater noted that there was no injury as a result of the restraint and that when he bit himself DEM re-opened a wound on his left arm. Slater noted that upon release from the restraint DEM no longer posed an imminent risk to self or others. (Appellee's Exhibit 12)

16. As it pertains to the issue of the holds utilized, the Emergency Restraint Monitoring Review Form details in Question 8 that DEM had a Crisis Intervention Plan and in Question 9 that the Crisis Intervention Plan was implemented as written. (Appellee's Exhibit 12)

17. Appellee's Exhibit 11, the Crisis Intervention Plan of DEM details that the plan had been revised three times after it was implemented in August 2010 with the most recent revision in March 2012 by Jennifer Salvina. In this revision she listed three permissible holds: a forward escort, a two-person stability hold, and a chair restraint. (Appellee's Exhibit 11, Testimony of Henderson, Salvina)

18. Henderson testified that Appellant was trained by Salvina on the March 2012 Revision to DEM's Crisis Intervention Plan. The Appellant contends that he was trained on DEM's Crisis Intervention Plan only once and that was during his October 2009 orientation. After that, he was trained only on the plans for the residents in his assigned houses. His testimony is corroborated by Danny Pollard who was a behavior Tech responsible for training.

19. Salvina, Appellee's witness, contradicted Henderson's testimony. Salvina testified that she did not train Appellant on the March 2012 revision of DEM's Crisis Intervention Plan and that training on the behavior plans was assigned to the Behavior Techs to train the appropriate people. One of the Behavior Techs, Pollard, stated that Appellant was not trained and that he not only reviewed Appellant's Training Log, but DEM's training records.

20. The factual dispute on this issue is resolved in favor of Appellant. Salvina's, Pollard's, and Appellant's testimony on this issue is more credible than Henderson. However the issue of whether Appellant was trained on the March 2012 revision to DEM's Crisis Intervention Plan is not dispositive of this issue.

21. The Appellant testified that he was directed by Merrifield, the Support Code Leader, to place DEM in the two-person seated stability hold and Appellee put on no evidence to refute this.

22. Appellant's testimony is consistent with the Support Code Policy which requires that the Support Code Leader "shall quickly assess the situation, select the therapeutic intervention, direct staff activity until the individual is calm and is the only person to give directions to the individual." Appellee's policy that responding staff are to follow the directives of the support Code Leader is controlling and is consistent with the testimony of Welker, Pollard, and Appellant, all of whom testified that they have responded to Support Codes and that the responding staff are required to trust the Support Code Leader who has the most information of anyone present.

23. Thus, Appellant did not engage in unsatisfactory performance of duties when he followed the directive of the Support Code Leader and placed DEM in a seated two-person stability hold, a hold not authorized by DEM's Crisis Intervention Plan.

24. The third charge against Appellant was an October 2012 charge of insubordination for an alleged failure to follow the directives of his supervisor, Shelia Miles regarding the completion of abuse and neglect probes. (Appellee's Exhibit 1)

25. In July 2012, Bingham Gardens was cited for deficiencies when staff were unable to articulate the definitions of abuse, neglect and exploitation, or the reporting requirements. The facility established a plan of correction that detailed that supervisors would engage in ongoing training of staff by having supervisors conduct verbal abuse and neglect probes of staff. (Testimony of Henderson, Brock, Appellee's Exhibit 15, 16, 17, 18)

26. The probes were required to be completed on a monthly basis for a period of six months. If the Appellee failed to comply with their plan of correction they could be assessed a twenty-three day jeopardy, which required that the facility be closed for twenty-three days until it got into compliance. (Testimony of Henderson, Appellee's Exhibits 17, 18)

27. On October 26, 2012, Appellant's Supervisor, Shelia Miles provided him a list of his staff to conduct the required probes. This directive was a task consistent with Appellant's Job Description. Appellant failed to complete the probes on October 26th and Miles, at the direction of her supervisor, Melissa Brock, again assigned the task to Appellant on October 29th. Appellant did not complete the probes and they were ultimately completed by another supervisor, Bianca Chambers. (Testimony of Brock, Henderson, Appellee's Exhibit 24 and Appellant's Deposition Exhibit 3)

28. Appellant contends that Miles asked him to complete the probes on October 26th if he had time, and stated that upon beginning the probes found that some staff had already had them completed. He contends that he asked Miles for an updated list and never received it.

29. The factual dispute in this issue is resolved in favor of Appellee. Because the end of the month deadline was fast approaching and the consequences for a failure to comply with the Plan of Correction was so significant, the Hearing Officer finds the Appellee more credible.

30. Therefore, the Appellant engaged in insubordinate behavior when he failed to complete abuse and neglect probes as directed by Miles.

31. The fourth charge resulted from an Incident Report Appellant discovered in his cubicle on November 19, 2012. The Incident Report for REH, a blind, wheelchair bound resident was completed when REH fell out of the bed and a discrepancy occurred between the nurse and the DSP as to the appropriate height of the bed. As a supervisor, Appellant was required to complete the investigation follow up section of the Report. However, rather than complete the report, Appellant wrote, "Out of my scope of profession. RN, Medical and L.E.S. Departments need to meet to discuss." (Testimony of Appellant, Henderson, Brock, Appellee's Exhibit 19)

32. Once the Incident Report got to Henderson in Risk Management, she asked Miles to discuss it with Appellant and to have him obtain the information from the staff, and the medical record and to complete the report. Miles did so and returned to Henderson stating that she spoke with Appellant and he was not going to change the report. Appellant corroborated that this occurred through an email he sent to Henderson on November 27, 2012. (Testimony of Henderson, Brock, Appellee's Exhibit 20)

33. In response, Henderson sent Appellant an email outlining that she was not asking him to alter what he had written but that she needed additional information and provided him specific examples of how he could complete the form in light of the fact that he was not present at the time of the incident. (Appellee's Exhibit 20)

34. Appellant did not complete the Incident Report and testified that on the day he received the email from Henderson giving him examples of how to complete the report, he was served with notice of the Major Disciplinary action so the original report was no longer available to him because it was sent to Human Resources as a part of the request for MDA. He stated that he was not able to make the changes to the copy, because the original report was required. Appellant then testified that the assigned staff that he needed to consult with were not available on the first day that he attempted to speak with them to correct the report. He testified that on the second day Sheila Miles told him that he no longer had to complete the report.

35. However, the original email from Henderson made clear that he did not need to utilize the original document or the copy he had in his possession, but stated an alternative method for providing the information, specifically, Henderson wrote: "If you can please retrieve a blank **Investigation Follow up** page and complete what you know, I would appreciate it. This document is not only seen by our eyes but others for audits, investigations, follow ups just to

name a few. The original document you created will not be destroyed but the new page will be added” (Appellee’s Exhibit 20, *emphasis in original*.)

36. The Hearing Officer resolves this factual dispute in favor of the Appellee because the testimony of Appellee’s witnesses and its evidence on the issue are more credible. Because the email from Henderson outlined a list of others who would be reviewing the Incident Report, it is not likely that Miles would advise Appellant that he no longer had to complete the form.

37. Appellant was insubordinate in failing to complete an incident report, a required task for his position.

38. The fifth charge against Appellant, Lack of Good Behavior, was based on an allegation that Appellant called in Jessica Oller to work resulting her being paid overtime in violation of the Bingham Gardens Policies on Mandatory Overtime, and Time and Attendance. (Appellee’s Exhibit 1).

39. On August 25, 2012, Appellant was called in to work on his scheduled day off. He was not working as a supervisor, but as a “breaker,” a person that relieves other staff for breaks and cooks for the residents. Once Appellant was at work, a resident had an incident resulting in an increased 1:1 level of supervision. Appellant was then tasked with serving as the 1:1 staff member who was required to remain with the resident at all times. Appellant contends that his supervisor, Fonseca asked him to call in Jessica Oller and he did so resulting in overtime. (Testimony of Henderson, Appellant)

40. He states that because he was serving as a 1:1 in a home with no computer, he had no access to the PRN list, which was kept on the server and the list had only name and agency. He also states that overtime was approved for staff at that time, and he was in overtime as well. Henderson stated that she believed the PRN list was with the schedule and that in addition to the fact that he called in Oller and not PRN staff, Appellant failed to send the required email at the end of the shift outlining who called in and who was called in to work.

41. The Appellee claims a violation of Bingham Gardens Operational Practice Number OP-200.02.7 Mandatory Overtime which states in part, “4 Before mandatory overtime is required the Home Manager shall exhaust the PRN (as needed) staff list and document calls made.” The Appellee also alleges a violation on the OP 200.04.1 Time and Attendance, as well as the Cabinet for Health and Family Services Policy on Employee Conduct. (Appellee’s Exhibit 1).

42. The provision cited by the Appellee in the letter of suspension is not applicable to Appellant who was working as a “breaker” and then a direct support professional on the day in question. Appellant contends that he was directed by his supervisor Fonseca to contact Oller to see if she wanted to work and he testified that he wanted to call Fonseca to testify by phone, but the Appellee would not agree to do so.

43. The Appellee contends, through the Testimony of Henderson that Appellant was required to carry out the duties of the Home Manager and exhaust the PRN List before calling in Oller, and that he was also required to send out the required email at the end of the shift listing who worked the shift. Because Appellant was working as a DSP, it is not likely he had access to the PRN list whether it was with the schedule as Henderson states or on the server as Appellant states. Yet, Appellee has failed to explain why this duty did not fall to Fonseca, who was working as the scheduled supervisor that day. Moreover, how was Appellant to know that Fonseca had not performed all of these steps prior to calling him in to work overtime before Oller was called later? Brock testified that she did not recall disciplining Fonseca at any time while Brock served as the facility director. (Testimony of Henderson, Appellant, Brock)

44. This factual dispute is resolved in favor of Appellant because the obligation fell to the Home Manager, and in the absence of the Home Manager, the assigned supervisor, not Appellant who worked as a DSP on the day in question.

45. The letter of suspension outlined a prior three-day suspension for Time and Attendance issues. The Appellant testified that upon appeal to the Personnel Board, this was reduced down to one day. (Appellee's Exhibit 1, Testimony of Appellant).

CONCLUSIONS OF LAW

1. Based on the Findings of Fact, the Hearing Officer concludes that because the Appellant failed to complete the abuse probes for his staff for October 2012 after being directed to do so on two occasions and failed to complete the required follow up on an Incident Report after also being told to do so on two occasions, just cause existed for the suspension. KRS 18A.095(1).

2. Although there was just cause for suspension of the Appellant, the Hearing Officer concludes that the Appellee did not prove three of the five charges against Appellant, namely that the Appellant canceled a client's scheduled work activity for medical reasons, or that he was responsible for violation of a resident's Crisis Intervention Plan, or the Appellee's Mandatory Overtime Policy.

3. Thus, the seven-day suspension was excessive and a two-day suspension is more appropriate. KRS 18A.095(22)

4. Appellant engaged in protected activity by reporting suspected abuse and neglect against Mitchell and Corbett, and those reports were corroborated by Brock and Welker. But he failed to present evidence of a causal connection between his protected activity and the disciplinary action taken against him. Thus, the Appellant failed to prove a claim of retaliation.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that appeal of **TODD P. MCGUIRE VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2013-065)** be **SUSTAINED to the extent** that the seven-day suspension be modified to a two-day suspension. The Hearing Officer further recommends that references to the Appellant's insubordination because of cancellation of the work activity of CEM, failure to follow the Crisis Intervention Plan of DEM, and failure to abide by the Policies on Mandatory Overtime and Time and Attendance by calling in staff be expunged from his record, that he be awarded back pay and other benefits to which he is entitled for the five days of suspension which are being restored to him and 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 Brenda D. Allen** this 21st day of August 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Carrie Cotton
Todd P. McGuire



APPELLEE'S
EXHIBIT

1

CABINET FOR HEALTH AND FAMILY SERVICES
OFFICE OF HUMAN RESOURCE MANAGEMENT

Steven L. Beshear
Governor

275 East Main Street, 5C-D
Frankfort, KY 40621
502-564-7770
502-564-3129
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Audrey Tayse Haynes
Secretary

February 15, 2013

Todd P. McGuire

Re: Seven (7) 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 seven (7) working days. The effective dates of your suspension are February 19, 2013; February 20, 2013; February 21, 2013; February 22, 2013; February 25, 2013; February 26, 2013; and February 27, 2013.

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:

Unsatisfactory Performance of Duties. As reported by Facility Director Melissa Brock, you were insubordinate when you failed to follow a directive by cancelling a client's scheduled work activity.

Specifically, on November 12, 2012, you submitted an email to the guardian/parent of Client *1 stating that Client *1 would not be attending a scheduled work activity on this date. However, on October 15, 2012 and October 16, 2012, you received emails from Facility Director Melissa Brock with instructions for all staff regarding cancelling scheduled activities. In this email, Ms. Brock specifically stated, "Classes and work cannot be cancelled for any individual for medical reasons without the medical doctor's approval. A nurse cannot cancel an individual's work or class. If the medical doctor is not available, the cancellation can only occur by the facility director after consultation with the nurse...No trips will be cancelled without prior approval from myself or David Corbett (Fiscal Manager) through the week during administrative hours. During nights and weekends no trips are to be cancelled without AOC (Administrator On Call) approval. It is the responsibility of staff and supervisors to ensure trips occur as scheduled."

Your actions violate Bingham Garden's Operational Practice, Number OP-200.02.3, Employee Conduct; and, the Cabinet for Health and Family Services' (CHFS) Personnel Procedure 2.1, Employee Conduct. Further, your actions constitute unsatisfactory performance of duties for which you may be disciplined pursuant to 101 KAR 1:345, Section 1.

Unsatisfactory Performance of Duties. As reported by Facility Director Melissa Brock, you failed to follow a client crisis intervention plan.

Specifically, at 1:10 p.m. on November 25, 2012, you responded to a support code initiated by Team Supervisor Chris Merrifield, a contract employee of Guardian Healthcare. Client *2 had been expressing aggressive behavior and Mr. Merrifield determined that assistance was required to de-escalate the situation. Upon arrival, you entered Client *2's room who then began to bite himself on the arm. The narrative on page 2 of the incident report completed on November 25, 2012, by Mr. Merrifield states that you and he placed Client *2 in a "...two person stability hold and Client *2 went to the ground. We let him up and he attempted to bite himself again, resulting in another hold."

On November 25, 2012, Registered Nurse Reginald Slater completed an Emergency Restraint Monitoring and Review Form regarding this incident. On this form, Mr. Slater notes that a 2-person stability hold and a 2-person seated stability hold were utilized on Client *2. However, according to the Crisis Intervention Plan established for Client *2 on August 25, 2010, and revised most recently on March 20, 2012, the two person seated stability restraint is not noted as an approved restraint.

Your actions violate Bingham Gardens Operational Practice, Number OP-200.02.3, Employee Conduct; and, the Cabinet for Health and Family Services' (CHFS) Personnel Procedure 2.1, Employee Conduct. Further, your actions constitute unsatisfactory performance of duties for which you may be disciplined pursuant to 101 KAR 1:345, Section 1.

Unsatisfactory Performance of Duties. As reported by Facility Director Melissa Brock, you were insubordinate when you refused to follow a directive issued to you by your supervisor.

On July 13, 2012, the Office of the Inspector General (OIG) issued a statement of deficiencies and plan of correction for Bingham Gardens. In this statement, OIG specifically notes under the plan of correction that, "Current staff and contractors will be queried monthly by Departmental Leaders with formal educational probes in Abuse and Neglect. The Abuse and Neglect Competency Based Task Analysis will be verbally probed to all staff beginning 7.17.12 for six months. After the first six months, a 10% random sampling will be queried thereafter. During the monthly probes, staff will be educated on the spot with the correct responses and sign the document for training records. The results of the Probes will be collected and aggregated by the Risk Manager and reported to the PI Committee monthly for trending. Trending will determine the focus on the next month's Probe/Education."

On October 26, 2012, your supervisor, Unit Manager/Home Manager Sheila Miles provided you with a list of staff for which a monthly "Abuse, Neglect, Exploitation Probe" was required for the month of October 2012. Ms. Miles followed-up with you later that afternoon and discovered you failed to initiate the probes as instructed. After you had left for the day, Ms. Miles discovered the list she had assigned to you on your desk and incomplete.

On October 29, 2012, Ms. Miles again directed you to complete the assigned probes. On that same day, after you had completed your shift and left the facility, Ms. Miles found the assignments on a table in the home in which you had worked and, again, you had failed to complete them. The probes were later completed by Therapy Program Supervisory Assistant Bianca Chambers.

Your actions violate Bingham Gardens Operational Practice, Number OP-200.02.3, Employee Conduct; and, the Cabinet for Health and Family Services' (CHFS) Personnel Procedure 2.1, Employee Conduct. Further, your actions constitute unsatisfactory performance of duties for which you may be disciplined pursuant to 101 KAR 1:345, Section 1.

Unsatisfactory Performance of Duties and Lack of Good Behavior. As reported by Facility Director Melissa Brock, you were insubordinate and exhibited inappropriate and unprofessional behavior when you failed to properly document a behavior incident with a client.

Specifically, at 8:30 a.m., on November 19, 2012, Client *3 was involved in an incident where he fell out of his bed, striking the floor. Registered Nurse Reginald Slater and Direct Support Professional Mario Morales were present in Client *3's room when this incident occurred.

Per facility Bingham Gardens Operational Practice Number OP-1000.02.6, Incident Reporting, Procedure 5, "The team supervisor has the responsibility related to Risk Management and shall take the following actions where appropriate to ensure health, safety and welfare of the individuals, staff and other persons":

Subsection A. Immediately start an incident investigation/follow-up;

Subsection C. Ensure all areas of the Incident Report form 1000.02.6-A and corresponding investigation(s) are completed before submission to the Risk Management Department.

Further, Section 9 states, "The Team Supervisor shall ensure that all areas of the Incident Report Form 1000.02.6-A, and corresponding investigation(s) are completed before placing in the completed Incident Report Binder on the unit.

Incident Report Form 1000.02.6-A is designed to gather additional clarifying information regarding any incident occurring on the property. The form asks the individual completing it to note the following information:

1. Describe the immediate steps taken to secure the scene.
2. Describe the activity at the time of the incident, including: intervention, strategies used with the individual, precipitating event, early warning signs, staffing considerations, and staff actions relating to the incident.
3. Summary of findings. Include a review of the individual's relevant program plan and intervention strategies in comparison to the activities described in #2.
4. Conclusions.
5. Recommendations.

The supervisor on duty at the time of the incident (whether they were a direct witness or witness after the fact) is responsible for interviewing witnesses to an incident and adequately reflecting observations for the facilities review. As you were the supervisor on duty for Home 6 during the incident with Client *3, you completed an Incident Report Form. However, your notation for each of the five sections was, "Out of my scope of profession. RN (Registered Nurse), Medical, and L.E.S. (Life Enhancement Services) to meet to discuss."

On November 27, 2012, you verbally received a directive from Unit Manager/Home Manager Sheila Miles (an employee of Seven Counties Services contracted with Bingham Gardens) to amend your notations on the Incident Report Form. In response to this request, you submitted an email to Ms.

Henderson and Ms. Miles stating, "I do not feel comfortable changing what I wrote on that incident report due to I had no knowledge of the incident that took place (I found the incident report). I figure if medical wants Client *3's bed a certain level and PT (physical therapy) wants his bed at a certain level then they need to meet to figure it out. I am not a medical professional and can't give any recommendations for or against it."

On November 27, 2012, Ms. Henderson responded via email to your statements. Her response specifically notes, "I do not want you to alter the document but document what you know as part of the investigation supervisors are asked to complete, just as you would any other Incident Report." Of note, Ms. Henderson included a generic sample of how you might be able to fully complete the report. Further, Ms. Henderson states that as of January 28, 2013, you have failed to complete the necessary updates to the documentation as directed.

Your actions violate Bingham Gardens Operational Practice, Numbers OP-1000.02.6, Incident Report; OP-1000.02.7, Abuse/Neglect Responsibilities; and OP-200.02.3, Employee Conduct; and, the Cabinet for Health and Family Services' (CHFS) Personnel Procedure 2.1, Employee Conduct. Further, your actions constitute unsatisfactory performance of duties for which you may be disciplined pursuant to 101 KAR 1:345, Section 1.

Lack of Good Behavior. As reported by Facility Director Melissa Brock, despite previous attempts to improve your behavior, you failed to follow Bingham Garden's Operational Practice and unnecessarily called in staff for overtime.

Bingham Garden's Operational Practice, Number OP-200.02.7, Mandatory Overtime, Procedures, states in part, "4. Before mandatory overtime is required, the Home Manager shall exhaust the PRN (as needed) staff list and document calls made."

Specifically, on August 25, 2012, the staffing schedule for Bingham Gardens was established at 14 staff. At 10:09 a.m. on August 25, 2012, you sent a text message to Direct Support Professional (DSP) Jessica Oller to ask her to come in to work. Ms. Oller agreed to report to the facility and arrived at Bingham Gardens at 12:06 p.m. With the arrival of Ms. Oller, the staffing level increased to 16 staff which is above the 14 staff required. Further, Ms. Oller had already exceeded the standard 37.50 hours for the work week. Your action of calling Ms. Oller in when the staff on-site already exceeded the required staffing needs created unnecessary and unauthorized overtime. Further, you failed to maintain records regarding contacting all PRN staff prior to contacting Ms. Oller.

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. Further, your actions constitute lack of good behavior for which you may be disciplined pursuant to 101 KAR 1:345, Section 1.

You previously received the following action:

<u>DATE</u>	<u>ACTION</u>	<u>REASON</u>
July 18, 2012	Three Day Suspension	Time and Attendance

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

Todd P. McGuire
February 15, 2013
Page 5 of 6

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:gil

Attachments

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

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2013-065

TODD P. McGUIRE

APPELLANT

V. INTERIM ORDER

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

** ** *

This matter is before the Hearing Officer for a ruling on the Appellee's "Response as to Competency of Appellant's Proposed Witnesses." An Order was entered giving Appellant time to reply, and at the pre-hearing conference held March 26, 2014, Appellant was given further time to reply, up to and including April 7, 2014. Appellant has not replied in writing to the Appellee's Response, or as the Hearing Officer interprets it, motion regarding the competency of proposed witnesses.

In its pleading, the Appellee contends that two clients for the ICF at which Appellant was employed were not competent to testify as witnesses at a Personnel Board proceeding. The Appellee contends that the proposed witnesses are incompetent to testify, and submitted documents for the Hearing Officer's *in camera* review regarding same. Counsel for the Appellee also contends that the reasons for the February 2013 suspension of Appellant did not involve anything over which these potential witnesses would have relevant knowledge.

Counsel for the Appellee contends that pursuant to Kentucky Rule of Evidence (KRE) 601, Clients #1 and #2 are not competent to testify at the evidentiary hearing. KRE 601 states as follows:

Rule 601. Competency.

(a) **General.** Every person is competent to be a witness except as otherwise provided in these rules or by statute.

(b) **Minimal qualifications.** A person is disqualified to testify as a witness if the trial court determines that he:

- (1) Lacked the capacity to perceive accurately the matters about which he proposes to testify;
- (2) Lacks the capacity to recollect facts;

(3) Lacks the capacity to express himself so as to be understood, either directly or through an interpreter; or

(4) Lacks the capacity to understand the obligations of a witness to tell the truth.

Counsel for the Appellee contends that both Clients #1 (CEM, as identified in Appellee's Response) and #2 (DEM, as identified in Appellee's Response) were involuntarily committed to Bingham Gardens per KRS 202B. Counsel summarized some of the information which was provided for the Hearing Officer's *in camera* review of Clients #1 and #2. Counsel contends that neither individual "has the capacity to perceive the matters concerning Todd McGuire's suspension; nor do they have the capacity to recollect facts from over a year and a half ago."

On the last page of her response, counsel for the Appellee listed why she believed that the testimony of Client #1 and #2 would essentially be irrelevant to the allegations which formed the basis for Appellant's suspension.

The Appellant was specifically given ample time in which to file a written response to the Cabinet's pleading. Appellant stated he would rather just make oral statements as to why he believed Clients #1 and #2 were, in fact, competent to testify, such as, that they are registered to vote, could come and go as they pleased (essentially), and as the Hearing Officer recollects, could hold jobs.

The Hearing Officer has reviewed the *in camera* matters submitted by the Appellee, reviewed the pleading submitted by counsel for the Appellee, and also the statements made by the Appellant concerning why the witnesses would be competent to testify and have relevant information. Having done so, it is not clear to the Hearing Officer whether Clients #1 and #2 would have relevant testimony to offer. What is clear is that Client #1 (CEM) would, based on his functioning level as indicated in the documents submitted for *in camera* review, have difficulty rendering competent testimony, certainly if doing so in an unfamiliar environment. It is equally clear from reviewing the documents submitted for *in camera* review for Client #2 (DEM) that it would not be in the interest of Client #2 (DEM) or possibly in the interests of participants in the evidentiary hearing to require Client #2's (DEM) presence. The Hearing Officer thus will **DENY** Appellant's motion to be allowed to issue subpoenas to secure the presence of Client #1 (CEM) and Client #2 (DEM) for testimony at the evidentiary hearing in the matter of **Appeal No. 2013-065**. The Hearing Officer did not specifically determine that these individuals would have testimony that would not be relevant, nor does the Hearing Officer even determine that they would not be competent to testify. Instead, the Hearing Officer would relies on the broad grant of power found at KRS 13B.080 relevant to the conduct of administrative hearings to determine it is more likely than not that Clients #1's and #2's presence at the hearing would not prove beneficial to the conduct of the hearing, and could prove detrimental to the well-being of Clients #1 and #2.

The Hearing Officer believes this matter should be preserved as a matter from which the Appellant could file exceptions to the Personnel Board, and thus this Order should be attached to

the Findings of Fact, Conclusions of Law and Recommended Order ultimately issued in this case.

[Hearing Officer Note: Any document filed with the Personnel Board shall also be served on the opposing party.]

SO ORDERED at the direction of the Hearing Officer this 25th day of April, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Carrie Cotton
Mr. Todd McGuire