

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2016-150

ERASTO MORAN

APPELLANT

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

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

*** **

The Board, at its regular January 2017 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated November 29, 2016, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be, and they hereby are approved, adopted and incorporated herein by reference as a part of this Order, and the Appellant's appeal is therefore **DISMISSED**.

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this 9th day of January, 2017.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

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

**COMMONWEALTH OF KENTUCKY
KENTUCKY PERSONNEL BOARD
APPEAL NO. 2016-150**

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

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

* * * * *

This matter came on for evidentiary hearing on October 20, 2016, at 9:30 a.m., at 28 Fountain Place, Frankfort Kentucky before Brenda D. Allen, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Erasto Moran, was present and was not represented by counsel. The Appellee, Cabinet for Health and Family Services, was present and was represented by the Honorable Mona Womack. Also present was agency representative Larry Gearlds, Human Resource Director of the Glasgow State Nursing Facility for the Cabinet for Health and Family Services.

The Hearing Officer outlined the burden of proof and the issue before the Hearing Officer. The issue was the appropriateness of a three-day suspension without pay imposed upon the Appellant. The burden of proof was upon the Appellee to prove by a preponderance of evidence that the penalty was neither excessive nor erroneous.

BACKGROUND

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

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

3. The Cabinet for Health and Family Services (the "Cabinet") then called on behalf of the Appellee, **Erasto Moran** as its first witness. Mr. Moran testified that he is employed as a Nurse Aide State Registered II at the Glasgow State Nursing Facility, a 24-hour per day facility. He stated that he has been employed there continuously since 2010. He stated that the patients all have some sort of medical need and are admitted from some other state facility and that the residents require around-the-clock care. He testified that typically he is assigned to a shift of 11 p.m. to 7 a.m., unless he has to work mandatory overtime.

4. Mr. Moran identified Appellee's Exhibit 1 as a memorandum provided to him on April 2, 2016, notifying him that he was being placed on Verification of Personal or Family Illness Requirement. He explained this meant that for a period of six months from that date, he would be required to provide a doctor's note for any absences related to illness. Mr. Moran also admitted to understanding that if he called in to work due to absence or illness, the policy required him to do so at least two hours prior to his assigned shift start time. Appellee's Exhibit 1 was entered into the record without objection.

5. Mr. Moran admitted to calling in sick on April 30, 2016, thirty minutes before his assigned start time, and failing to provide a doctor's note upon his return to work for his next scheduled shift. He admitted to calling in on May 3, 2016, approximately 30 minutes prior to his assigned start time, stating that he did not have transportation. He also admitted that when the supervisor offered to have someone pick him up and bring him to work, he declined.

6. Mr. Moran testified that on May 11, 2016, he called in to work stating that he would not be able to come to work for "personal reasons" unrelated to illness. Mr. Moran admitted to calling in on May 12, 2016, unrelated to illness. He admitted that he had not requested and received prior approval for any of the aforementioned days that he had called into work.

7. The witness was asked to identify a document, which was entitled "Attachment #1 Glasgow State Nursing Facility Call-In Notice." Mr. Moran reviewed the document and stated that it appeared to be a document completed by the charge nurse when he called in to work. However, he stated that he had never seen the document before. The Appellee moved entry of the document into the record. The Hearing Officer **OVERRULED** the motion for entry of the exhibit, citing the lack of a proper foundation.

8. The next witness to testify on behalf of the Appellee was **Larry Gearlds**. Mr. Gearlds testified that he serves as the Facilities Services Supervisor for the Glasgow State Nursing Facility. He said that the residents of this facility are mentally disabled and also have some sort of medical need. He testified that the facility is a 100 bed, 24-hour per day, 365-day per year facility charged with responsibility for all aspects of care of the residents including, health care needs, feeding, bathing, dressing and all activities of daily living. He stated that all residents are admitted from a hospital and are approved for admission by the Medical Director. He stated that Mr. Moran's position is direct care and provides the residents with all of the care necessary to meet their needs. Mr. Gearlds outlined that staffing is critical to providing the care for the residents.

9. Mr. Gearlds identified Appellee's Exhibit 2 as the Glasgow State Nursing Facility Policy on Time and Attendance. He discussed the specifics of the policy in detail and stated that supervisors have the discretion to approve or deny a request for leave in order to meet the organizational needs of the facility, and that a call-in for absence or tardiness must be received by the charge nurse at least two hours prior to the start of the employee's shift. He stated that days off must be requested in advance and approved because of the legal requirement that they provide care for the residents. He noted that paragraph 14 of the policy outlines the progressive

discipline to be imposed for unexcused absences or tardiness and that they ranged from a verbal warning for the first occurrence, a written reprimand for the second occurrence, disciplinary fines or suspensions for third and fourth occurrences and dismissal for a fifth occurrence within a two-year period.

10. Mr. Gearlds identified Appellee's Exhibit 3 as the suspension letter issued to Mr. Moran, imposing a three-day suspension on May 20, 2016 for violation of the time and attendance policy. Mr. Gearlds identified documents evidencing disciplinary action leading up to the May 2016 suspension, specifically, Appellee's Exhibit 4, a Verbal Warning issued to Mr. Moran on December 1, 2015; Appellee's Exhibit 5, a Written Reprimand issued on December 30, 2015; and Appellee's Exhibit 6 a Verbal Warning issued on April 2, 2016. The exhibits were entered into the record without objection. Mr. Gearlds testified that at the time of the April 2016 Verbal Warning, Mr. Moran was placed upon a requirement that he provide medical verification of sick leave.

11. Mr. Gearlds testified that absences must be approved in advance and that approval of any request for time off must be granted by the supervisor, based upon organizational needs. Absences that are not approved are deemed unexcused absences and subject the employee to the progressive discipline outlined in the facility policy.

12. The next witness to testify on behalf of the Cabinet was **Jay Klein**, Division Director in the Division of Employee Management in the Office of Resource Management. Mr. Klein testified that in state government, employees do not have the ability to take a day off for a vacation without that leave being approved in advance by the employer. He stated that as it pertains to the Glasgow Nursing Facility, they are legally required to have a certain number of staff to care for the residents. If an employee decides not to come in to work, then that shift must be covered by mandating overtime for the off-going shift of employees or to call someone in, all of which have costs associated with them. He testified that these are the reasons it is critical to abide by the policy.

13. Mr. Klein stated that his office receives all requests for disciplinary action for the Cabinet and they are reviewed along with supporting documentation. He stated this is done to ensure consistent treatment throughout the state. He testified that if he agrees with the proposed disciplinary action, he authorizes the letter to be signed and issued. He stated that, at times, if there is a request for disciplinary action that requires a response from an employee, where that employee's discretion or judgment might be relevant, the employee will be given notice of Major Disciplinary Action, such that the employee can provide a response. He stated that it is not mandatory to do so, and in cases of violations of the time and attendance policy, where the request for disciplinary action is supported by documentation in accordance with the policy, no notice is given prior to issuance of the disciplinary action.

14. Mr. Klein testified that in this case, the request for disciplinary action appeared consistent with policy and with the manner in which similar cases had been administered. However, upon reviewing the exhibits he noted that Mr. Moran should have received a suspension earlier than he did because he was issued a second Verbal Warning in April 2016.

Mr. Klein stated that based upon the number of prior occurrences, a short suspension should have been imposed for the April occurrence instead of an additional Verbal Warning.

15. The next witness to testify on behalf of the Appellee was **Michael Kinslow**, who testified telephonically without objection from the Appellant. Mr. Kinslow testified that he is a Registered Nurse working for the Glasgow facility beginning in April 2016 until October 2016. He stated that he was the Charge Nurse on the 3 p.m. to 11 p.m. shift and that he was responsible for supervising the nurse aides.

16. The witness testified that he was familiar with the Appellant and had supervised him on occasion. He identified Appellee's Exhibit 7 as the Attachment #1 Glasgow Nursing Facility Call-In Notice, the document he completed when Mr. Moran called in on May 11th and stated that he was not coming in for "Personal Reasons." He identified Appellee's Exhibit 8 as the Call-In Notice he completed when Mr. Moran called in on May 12th stating that he was not coming to work because he was taking a "Personal Day." Mr. Kinslow stated that he did not approve either of these days off for Mr. Moran.

17. The final witness to testify on behalf of the Appellee was **Jackie Phillips**, who was formerly an RN assigned to the 3 p.m. to 11 p.m. shift at the Glasgow facility. Ms. Phillips identified Appellee's Exhibit 8, the Call-In Notices she completed when Mr. Moran called in on April 30, 2016, citing illness and on May 3, 2016, citing a lack of transportation. She stated that Mr. Moran declined her offer to provide him a ride to and from work at the time of his May 3rd call-in. The Cabinet rested.

18. Appellant, **Erasto Moran**, then took the stand on his own behalf, stating that he did not need to provide verification of sick leave for days that he took for "personal reasons" and that because he had leave time "on the books" he should be able to take them as needed. He was unable to answer the Hearing Officer's question as to why his conduct did not constitute an "Unexcused Absence" under the policy.

19. The Appellant rested and waived closing. The Appellee provided a closing statement.

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

FINDINGS OF FACT

1. The Appellant, Erasto Moran, was employed as Nurse Aide State Registered II within the Cabinet for Health and Family Services, Glasgow State Nursing Facility. (Appellant's testimony).

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

3. In order to address the critical staffing needs, the facility has developed comprehensive policies and procedures governing time and attendance and the consequences of violations thereof. (Testimony of Gearlds, Appellee's Exhibit 2).

4. The Appellant received a Verbal Warning and a Written Reprimand in December 2015 related to absences. (Appellee's Exhibits 3, 4, and 5.)

5. In April 2016, the Appellant was provided written notice that he was required to provide medical verification of all illness related absences. (Appellee's Exhibit 1)

6. The Appellant was absent during his scheduled shifts on April 30, May 3, May 11 and May 12, 2016.

CONCLUSIONS OF LAW

1. The Appellant, Erasto Moran, engaged in violations of the Glasgow State Nursing Facility Policies on time and attendance on April 30, May 3, May 11 and May 12, 2016.

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

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

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the case of **ERASTO MORAN VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2016-150)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exception that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of the judicial review of those issues not specifically excepted to. On appeal a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W. 3d 560 (Ky. 2004).

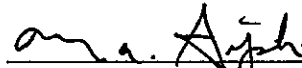
Any document filed with the Personnel Board shall be served on the opposing party.

The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

Each party has thirty (30) days after the date the Personnel Board issues a Final Order in which to appeal to the Franklin Circuit Court pursuant to KRS 13B.140 and KRS 18A.100.

ISSUED at the direction of **Hearing Officer Brenda D. Allen** this 21st day of November 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPER
EXECUTIVE DIRECTOR

A copy this day mailed to:

Hon. Mona Womack
Erasto Moran