

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NOS. 2015-036 AND 2015-123

BOUALONE NIRAVONG

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 2015 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated September 2, 2015, 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 appeals are 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 14th day of October, 2015.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Jennifer Wolsing
Boualone Niravong
J. P. Hamm

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PERSONNEL BOARD
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**FINDINGS OF FACT, CONCLUSIONS OF LAW
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**CABINET FOR HEALTH AND FAMILY SERVICES
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APPELLEE

** ** ** ** **

This matter came on for evidentiary hearing on July 2, 2015, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Roland P. Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Boualone Niravong, was present and not represented by legal counsel. As English is her second language, and to assist Appellant with understanding the testimony and proceedings, she was accompanied by her daughter, Tina Channkhone. The Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Jennifer Wolsing. Also present as Agency representative was Tarron Ray.

The issues in this case concern the disciplinary actions taken by Appellee against the Appellant, in the nature of disciplinary fines. On February 10, 2015, Appellant was issued a three-day disciplinary fine in the amount of \$351.90. On May 7, 2015, Appellant was issued a five-day disciplinary fine in the additional amount of \$586.50. The burden of proof is on the Appellee to demonstrate by a preponderance of the evidence that each disciplinary action was taken with just cause and was neither excessive nor erroneous.

The rule separating witnesses was invoked and employed throughout the course of the proceeding. Each party presented their respective opening statement.

BACKGROUND

1. The first witness for the Appellee was the Appellant, **Boualone Niravong**. Ms. Niravong has been employed by the Cabinet for Health and Family Services for about fifteen years. She is employed as a Nurse Aide II at Hazelwood Center. She described her duties. She also works a second job and has done so for the past fourteen years as a CAN-CMT at Sacred Heart Village Home.

2. Appellant testified that she had on many occasions submitted the proper request for approval of outside employment and the Cabinet was well aware for more than a decade that she also worked at Sacred Heart Village Home. She identified Appellee's Exhibit 1 as the most recent request she had signed and submitted on or about May 5, 2015.

3. She identified Appellee's Exhibit 2 as the February 10, 2015 disciplinary letter she received notifying her of imposition of a three-day disciplinary fine for alleged actions that occurred on January 4, 2015. Ms. Niravong works third shift at Hazelwood and has done so for quite some time. On January 4, a call went out for volunteers to work overtime for the next first shift. She did not volunteer. When she was thereafter notified that she had been mandated to work overtime, Ms. Niravong informed Ms. Bryant she could not do it as she had to babysit her grandchild and then work at her other job. Both jobs required her to work, if necessary, seven days a week.

4. She identified Appellee's Exhibit 3 as the May 7, 2015 letter she received notifying her of issuance of a five-day disciplinary fine for allegations of events that occurred on March 28, 2015. Again, she had been working the third shift. Missy Leach called for volunteers to work overtime. Appellant did not volunteer. When she was mandated to work the overtime, Appellant advised she could not do it as she had to babysit and had, prior to working her shift at Hazelwood, completed a full shift at Sacred Heart Village.

5. She also identified Appellee's Exhibit 4 as Hazelwood, Del Maria, Windsong and Meadows Policies/Procedures; Mandatory Overtime; Policy No: 7.21.

6. Appellant was aware that she was required to report and request permission to work employment outside her job at Hazelwood. She was also aware that one may be disciplined for not following a supervisor's orders. She stated, however, not all supervisor orders are in the best interest of patient care

7. Appellee's next witness was **Missy Leach**, who is employed as a Therapy Program Supervisor Assistant (TPSA) by River Valley Behavior Health. Her work station is at the Hazelwood Center. She briefly described her duties which includes making sure there is sufficient employee coverage in the facility. Ms. Leach works the third shift.

8. She has known the Appellant for about sixteen years and at times has acted as her supervisor. Ms. Leach knew early on, and for at least the past five years, that Appellant had a job outside Hazelwood. She had also trained Appellant on procedures pertaining to mandatory overtime. When personnel are required to fill in, a call first goes out for volunteers to work that overtime. If the call fails to secure a sufficient number of volunteer employees, she consults the Mandation List to see what staff members are present that night and accordingly who is next on the list for mandation. She then notifies such employees that they are required to work the

specific mandated overtime. Once an employee volunteers to work overtime, or works a mandated overtime, their name goes to the bottom of the mandated overtime list.

9. She identified Appellee's Exhibit 5 as Hazelwood, Del Maria, Windsong and Meadows Practice Guidelines; Mandatory Overtime Practice; No. 37.18.

10. She identified Appellee's Exhibit 6 as the Inservice/Training Report Form she completed on January 13, 2015 when she conducted the Mandatory Overtime Training pertaining to Policy No. 37.18. The second page of that exhibit shows Appellant had signed in and participated in that training.

11. Ms. Leach had observed another employee, George Smithers, who had conducted training, discuss mandatory overtime with the Appellant. Appellant asked him what would happen if she had to work at a second job. Mr. Smithers advised that working at Hazelwood is the first priority and she would have to make other arrangements pertaining to the outside job. He also mentioned that an employee who refused mandation was subject to suspension or fines.

12. On March 29, 2015, Ms. Leach requested volunteers to work overtime. Not receiving a sufficient number of volunteers, she consulted the mandation list and advised Appellant she had been mandated for overtime. Appellant refused the mandation stating she had signed up to work overtime on her other job.

13. She identified Appellee's Exhibit 7 as the April 23, 2015 e-mail she had sent to Tracy Kraus in response to an inquiry whether Appellant had refused to work overtime on March 29, 2015. She identified Appellee's Exhibit 8 as the Overtime/Leave Reporting Form she had completed on March 29, 2015, recording that Appellant had refused mandation.

14. Policy No. 7.21 (Appellee's Exhibit 4) identifies specific instances when an employee may be excused from mandation: If the employee has worked two shifts (16 hours), or if the employee experiences the onset of a sudden illness. Unless one gets approval from upper management to release an employee, no other excuses for release from mandation are possible.

15. In the past, Appellant has volunteered one or two times to work overtime.

16. **Mr. Tarron Ray**, who for the past six months, has served as Director of Personnel Services at Hazelwood Center, employed by River Valley Behavior Health, offered his testimony. He briefly described his job duties including responsibilities for the human resources development, staff development, and training.

17. The Hazelwood Center is a facility that operates twenty-four hours a day, seven days a week. The mandatory overtime policy exists to ensure the facility maintains minimum staffing levels to be able to safeguard the safety of the clients, employees, and visitors.

Employees are first asked if they will volunteer to work overtime when staff is needed to cover the required ratios for client care. If not enough volunteers are secured, then certain staff employees are required to stay over and work the overtime until such time as they are able to get staff levels up, or such individual may be required to stay the entire shift. State employees who do work the overtime get time and a half that rolls into compensatory time.

18. If a state employee refuses to work overtime, they are subject to disciplinary action. Such action is usually a fine where the salary is reduced for a certain period. Following the normal progressive disciplinary process can be counter-productive. Failure to perform mandatory overtime is a serious offense. The facility has to maintain certain staffing levels to provide a safe environment. Fines are used to discourage employees from refusing overtime, where a written reprimand would not be as effective. Suspensions are not handed out for such violation as the facility would still have to replace that individual's absence during a suspension.

19. Employees know that working at Hazelwood is their primary job and function. There are emergency situations when an employee would be allowed an excuse from mandatory overtime. The policy, however, sets out that sudden onset of illness or having recently worked two consecutive shifts, are grounds for excusal. Having a second job or responsibilities for childcare does not constitute sufficient cause for release from mandatory overtime.

20. Mr. Ray was familiar with the allegations contained in both the February 10, 2015, and May 7, 2015, disciplinary letters. It was his opinion that if the allegations contained therein are true, Appellant had violated Policy No. 7.21. The reasons she gave for refusing mandatory overtime are outside those listed in this policy. He also testified that such activity by Appellant constituted non-threatening misconduct and a violation of Policy No. 7.13.2 (Appellee's Exhibit 9). Appellant had been insubordinate by not following a supervisor's directive to engage in mandatory overtime.

21. Appellant had also violated Policy No. 2.1, Employee Conduct, #20, by having failed to carry out assignments directed by her supervisors (Appellee's Exhibit 10).

22. Regarding outside employment, Mr. Ray testified employees are required to complete requests for outside employment per Cabinet policy 2.9 (Appellee's Exhibit 11). This is required by the Executive Branch Ethics Code. The facility discovered that it did not have documents to show Appellant had requested or given notice of outside employment. Ms. Niravong was asked to supply the proper documents and she did so as shown by Appellee's Exhibit 1. It is possible Appellant may have made such submission before and that the form was never placed in her file at Hazelwood.

23. The next witness for the Appellee was **Howard J. Klein**. Mr. Klein is employed by the Cabinet for Health and Family Services as Division Director of the Division of Employee

Management, Office of Human Resource Management. He described his duties which include the oversight of disciplinary actions and acting as Appointing Authority.

24. He had reviewed, approved, and signed the February 10, 2015 disciplinary letter as the Appointing Authority (Appellee's Exhibit 2). A three-day fine was consistent with what had been issued by the Cabinet in the past for refusal to engage in mandation. It is very important there be proper staffing. Discipline in this type of situation starts at the level of a three-day fine.

25. About nine to ten years ago, the Cabinet decided such a violation was not a time and attendance issue, which itself has progressive discipline. It is important to have the right number of people present at the facility. It costs more to find a contractor to rush in to replace staff at the last minute. Refusal of mandation is more than a time and attendance issue, but not serious enough for termination. Some type of discipline is required to get the person's attention that this is an essential part of their job requirements. One's responsibilities in providing childcare duties or working outside employment were not valid reasons to be excused from mandatory overtime.

26. Mr. Klein also acknowledged he had authored, and signed as Appointing Authority, the May 7, 2015 disciplinary letter issuing Appellant a five-day disciplinary fine (Appellee's Exhibit 3). A five-day fine was issued as these violations were close in time to the preceding refusal to engage in mandation. This was a second offense and, therefore, the progression to five days was proper. When an employee is fined in this manner, their compensation cannot drop below the state's minimum wage. That is why her fine was spread over two pay periods.

27. There are two charges in this letter against the Appellant. Either charge standing alone would have been sufficient to have imposed the five-day fine. Again, working overtime at another job or providing childcare were not valid reasons to refuse mandation at Hazelwood.

28. Once an employee makes a request for outside employment and such request is approved, the employee is not required to take any further action unless her situation changes.

29. The Appellee rested its case.

30. The first witness for the Appellant was the Appellant, **Boualone Niravong**. She stated she understands that the facility needs to keep staffing up. There are many times, however, when there are too many people on the floor with nothing to do after having been mandated overtime.

31. On January 4, 2015, Ms. Niravong had worked second shift at her other job. She had gone home and taken care of her granddaughter. She then reported for third shift at

Hazelwood. When Ms. Bryant asked her to work overtime, she responded that she could not do it as she had worked a shift immediately prior at her outside job. She was advised that if she did not engage in overtime she would be marked as having "refused."

32. Appellant had on prior occasions volunteered to work overtime. There were many times when she tried to work overtime but was told she could not because she had accumulated too much compensatory time.

33. The mandation list is placed on a table for employees to review. She is able to see where she is on such list. However, the list is confusing because it does not indicate which employees are not present that day or who it is that cannot work overtime because of prior consecutive shifts.

34. On March 28, 2015, she had given Ms. Leach the same reasons for not being able to work overtime. She had worked the second shift at Sacred Heart and her regular third shift at Hazelwood.

35. Ms. Niravong has worked for seventeen years for the Cabinet, fifteen of which as a state employee. She has also worked the last fourteen years at Sacred Heart.

36. The next witness for the Appellant was **Todd McGuire**. Mr. McGuire had worked for the state since 2010. He was employed by the Cabinet for Health and Family Services as a "TPSA" at Hazelwood until April 2014.

37. He explained that before mandation of overtime is employed at Hazelwood, supervisors are required to ask for volunteers to work the next shift. Supervisors try to get enough volunteers so mandation is not necessary. When McGuire worked third shift at Hazelwood, he always asked for volunteers before he mandated workers. Ms. Niravong never volunteered to work overtime when he asked her. She explained that she had another job and often had to babysit her grandchild. She did at times come to work during days she had time off from her second job.

38. **Nicholas Senior** was the next witness for Appellant. Since 2009 Mr. Senior has been employed by the Cabinet for Health and Family Services at Hazelwood Center as a TPSA, otherwise known as a Floor Supervisor.

39. There are two types of employees who work at Hazelwood Center: state employees and agency employees. If an agency employee refuses to work mandatory overtime, they are issued a verbal reprimand. A "three strike rule" is employed in that if such employee refuses on three separate occasions to work mandatory overtime and thus accumulates three verbal reprimands within a certain period of time, they are subject to possible termination.

However, there is a time period where an earlier verbal reprimand may be erased, by virtue of the passage of time, and the facility would have the right to continue issuing verbal reprimands.

40. A state employee, however, is subject to disciplinary fines for failure to engage in mandatory overtime. Mr. Senior receives e-mail notice from the Human Resources Department when it institutes an administrative fine against an employee. He is also notified that such employee, during the time of the disciplinary fine, cannot work any overtime. He has observed that in the past, such disciplinary fines start at three days and progress to five days and ten days. He has never seen the issuance of anything less than a three-day fine.

41. The next witness for the Appellant was **Detra Bryant**. Ms. Bryant is employed at Hazelwood as an Agency employee through River Valley. She has worked at Hazelwood for sixteen years and has known Ms. Niravong that entire time.

42. On January 4, 2015, Ms. Bryant oversaw the Hazelwood facility during the third shift. She visited all workers throughout the facility and asked all direct care personnel (DCP) to volunteer to work first shift. Once she accomplished that task, she counted the numbers to see if she had to mandate any employees to work overtime.

43. At times when she mandated workers, Bryant told that person his or her number on the mandation list. She would then give the worker a form to fill out. On January 4, 2014, she mandated the Appellant; however, Appellant refused because she had to babysit her grandchild.

44. The next day Ms. Bryant e-mailed her supervisor information about who volunteered, who was mandated, who refused mandation, and the reasons for refusal of mandation. She identified Appellant's Exhibit 1 as the first page to the e-mail she sent to her supervisor on January 5, 2015. She identified Appellant's Exhibit 2 as the Mandation List for March 29, 2015. On that list, Appellant is listed fourth for mandation and Barbara Wo listed first. Many of the individuals on the Mandation List had "double" or "volunteer" next to their names. Those with "double" by their names had just worked a double shift and, therefore, could not be mandated. Those with "volunteer" next to their names had volunteered to work that overtime.

45. Ms. Bryant knew Appellant worked a second job, but did not know her hours. Sometime in 2015 she gave Appellant an application to request approval for secondary employment.

46. Appellant rested her case and no further testimony was offered. Both parties presented closing arguments and the matter was submitted to the Hearing Officer for his Recommended Order.

FINDINGS OF FACT

1. Appellant, Boualone Niravong, has for the past fifteen years been employed by the Cabinet for Health and Family Services as a Nurse Aide II at Hazelwood Center. For the past fourteen years she also held a second job as a CAN-CMT at Sacred Heart Village Home. Ms. Niravong is a classified employee with status.

2. She has worked third shift at Hazelwood and did so on January 4, 2015. During that shift, Detra Bryant, who oversaw the Hazelwood facility, knowing additional personnel were needed to staff the upcoming first shift, put out a call for volunteers from the third shift. Appellant did not volunteer. An insufficient number of volunteers were secured.

3 Ms. Bryant then consulted the Mandation List. This was a document showing the order of mandation of third-shift employees. If an employee selected for mandation had just completed working two shifts, or had come down with a sudden illness, that employee could not be mandated. Bryant moved to the next employee on the list. She mandated Appellant to work the first shift. Ms. Niravong refused to work overtime stating she had to babysit her grandchild.

4. On January 5, 2015, Ms. Bryant sent an e-mail to her supervisor, identifying three employees who had volunteered to work overtime, four employees who were mandated, and two employees, including Appellant, who had refused mandation. (Appellant's Exhibit 1.)

5. As a result of Appellant's mandation refusal, Ms. Niravong was, on February 10, 2015, notified by letter that such act constituted a lack of good behavior, was in violation of certain policies, and, as a result, she would be assessed a three-day disciplinary fine reducing her wages in one pay period by \$351.90. (Appellee's Exhibit 2.)

6. Missy Leach, Therapy Program Supervisor Assistant (TPSA), is employed by River Valley Behavior Health with a workstation at Hazelwood Center where she works third shift. She has known the appellant for sixteen years and at times has been her supervisor. She had also trained Appellant on procedures pertaining to mandated overtime.

7. On March 29, 2015, Ms. Leach requested volunteers to work overtime. Appellant did not volunteer. An insufficient number of employees volunteered.

8. Ms. Leach consulted the Mandation List and thereafter told Appellant she had been mandated to work overtime. Appellant refused, stating she had signed up to work overtime on her other job. Leach completed an Overtime/Leave Reporting Form on March 29, 2015, recording Appellant had refused mandation. (Appellee's Exhibit 8.)

9. On April 23, 2015, Ms. Leach sent an e-mail to Tracy Kraus in response to an inquiry whether Appellant had refused to work overtime on March 29, 2015. (Appellee's Exhibit 7.)

10. As a result of Appellant's mandation refusal, Ms. Niravong was, on May 7, 2015, notified by letter that such act constituted a lack of good behavior. She was also notified she had failed to complete a request to seek approval of outside employment. The letter stated such acts violated certain policies and as a result, she would be assessed over two pay periods, a five-day disciplinary fine reducing her wages by \$586.50 (Appellee's Exhibit 3.)

11. At the time of the alleged acts cited in the disciplinary fine letters of February 10, 2015, and May 7, 2015, the following policies were in full force and effect:

- Hazelwood, Del Maria, Windsong and Meadows Policies/Procedures, Mandatory Overtime; Policy No: 7.21 (Appellee's Exhibit 4);
- Hazelwood, Del Maria, Windsong and Meadows Practice Guidelines; Mandatory Overtime Practice, No. 37.18 (Appellee's Exhibit 5);
- Hazelwood, Del Maria, Windsong and Meadows Policies/Procedures, Misconduct: Non-Threatening, Policy No. 7.13.2 (Appellee's Exhibit 9);
- Cabinet for Health and Family Services Policy No. 2.1, Employee Conduct (Appellee's Exhibit 10);
- Cabinet for Health and Family Services Policy No. 2.9, Outside Employee and Board/Committee Service (Appellee's Exhibit 11).

12. Ms. Niravong had been employed at Sacred Heart Village Home the last fourteen of her sixteen years of employment with the Cabinet. Missy Leach had knowledge of this for at least the past five years (Testimony of Ms. Leach). It is possible Appellant may have submitted the proper request form earlier and that such form had never been put in her personnel file at Hazelwood. (Testimony of Tarron Ray.) At least one agent of the Appellee had prior knowledge of Appellant's outside employment. Appellant testified she had previously submitted the proper request form. As she had outside employment the past 14 years, it is highly likely Appellee had previously approved that employment and mislaid the paperwork.

13. Cabinet employees are required, prior to accepting employment outside the Cabinet, to complete and submit a request for approval of outside employment (CHFS Policy No. 2.9 – Appellee's Exhibit 11; and Executive Branch Ethics Code – KRS 11A *et seq.*) When Hazelwood discovered it did not have documents in its file to show Appellant had made such

request, it immediately asked Appellant to complete and tender that form. Appellant immediately completed and tendered the form in May 2015. (Appellee's Exhibit 1.)

14. Once an employee makes a request for approval of outside employment, and such request is approved, the employee is not required to take any further action unless her situation changes. (Testimony of Howard J. Klein.)

15. A facility such as Hazelwood operates 24 hours a day, 7 days a week. It is crucial that the facility be properly staffed to meet minimum required staffing ratios. Issuance of discipline to an employee who fails to work mandated overtime must be of a nature to (1) place the employee on notice that such refusal is a serious act, and (2) keep the employee at her worksite to avoid additional staff shortage issues.

16. Howard J. Klein, Appointing Authority, took into account the seriousness of an employee's failure to work mandated overtime, and that Appellant had received a July 9, 2013 verbal warning, as well as an April 24, 2013 written reprimand, when he issued the February 10, 2015 three-day disciplinary fine. (Appellee's Exhibit 2.)

17. When Ms. Niravong refused mandation on March 28, 2015, Mr. Klein also took into consideration a short period of time (less than three months) between Appellant's mandation refusals, and a failure to request approval of outside employment, when he issued the May 7, 2015 five-day disciplinary fine. (Appellee's Exhibit 3.)

18. There were two separate charges made against Appellant in the May 7, 2015 letter. The mandation refusal was the second time Appellant had done so since January 4, 2015. She was also cited for failure to request approval of outside employment. Either charge standing alone would have been sufficient, according to the appointing authority to impose this five-day disciplinary fine.

CONCLUSIONS OF LAW

1. "A classified employee with status shall not be . . . otherwise penalized except for cause." [KRS 18A.095(1).] Appointing authorities may discipline employees for lack of good behavior for the unsatisfactory performance of duties. (101 KAR 1:345, Section 1.)

2. Appellee issued Ms. Niravong a three-day disciplinary fine by letter of February 10, 2015. [Appellee's Exhibit 2.] That penalization was based on an allegation of lack of good behavior by insubordination exhibited on January 4, 2015, when Appellant refused a mandation to work overtime. Appellant was alleged to have violated Hazelwood Centers Policies/Procedures 7.13.2, Misconduct: Non-Threatening; 7.21, Mandatory Overtime, and the Cabinet for Health and Family Services' Personnel Procedure 2.1, Employee Conduct. Her

actions were further alleged to constitute lack of good behavior under 101 KAR 1:345, Section 1. The three-day disciplinary fine resulted in a reduction of wages in the amount of \$351.90.

3. Appellee issued Ms. Niravong a five-day disciplinary fine by letter of May 7, 2015 (Appellee's Exhibit 3.) Such penalization was based on an allegation of lack of good behavior by way of insubordination for Appellant having refused mandation on March 28, 2015. It was alleged that Appellant's actions violated Hazelwood Center's Policies/Procedures 7.13.2, Misconduct: Non-Threatening; 7.21, Mandatory Overtime; Practice Guideline 37.18, Mandatory Overtime Practice; and the Cabinet for Health and Family Services' Personnel Procedure 2.1, Employee Conduct. It was further alleged her actions constituted lack of good behavior pursuant to 101 KAR 1:345, Section 1. It was alleged her actions in failing to report outside employment constituted violation of Cabinet for Health and Family Services' Procedure 2.9, Outside Employee and Board/Committee Service; and lack of good behavior. As a result of this action, a fine in the amount of \$586.50 was assessed.

4. The evidence shows that Boualone Niravong did refuse to work mandatory overtime on January 5, 2015. Appellee did follow proper policy in first requesting volunteers for such overtime, in compliance with Hazelwood Policies/Procedures 7.21. There was an insufficient number of volunteers and thus, Mandatory overtime was properly initiated. Such policy, however, fails to set out the circumstances by which an employee who is mandated for overtime, may legitimately be excused from mandation. Paragraph 4 of the policy, which has been cited by witnesses for the Appellee, merely addresses when an employee may be released from mandatory overtime once that employee has begun to work such overtime:

Should management determine that an employee may be released from mandatory overtime; the employee must have worked a minimum of 8 minutes to be credited for working a turn of mandatory overtime and have their name placed at the bottom of the list. This is ONLY for instances where mandatory overtime is ruled unnecessary, e.g., staffing levels increase, employees reporting late for work, etc.

That portion sets out when an employee who begins to participate in mandatory overtime may be released from same under certain circumstances including the increase of staff level for that shift.

However, for other instances of an employee not working a full shift of mandatory overtime, e.g., sudden onset of illness, the employee must work a minimum of four (4) hours to be credited for a turn. Their name will then be placed at the bottom of the mandatory overtime list.

That portion of paragraph 4 states that once an employee begins working mandatory overtime, the employee may be released due to sudden illness, but will not be credited with having worked that mandatory overtime unless they had worked a minimum of four hours.

One may imply from a reading of paragraphs 5 and 6 that employees who are limited to working double shifts on two consecutive days, or those who make a request for sick leave after notification of the need to work mandatory overtime, may be excused.¹ There was no evidence that Ms. Niravong worked a double shift that week for Hazelwood. Employees are advised that employment at Hazelwood is their primary duty and obligation and that outside employment cannot interfere.²

5. Practice Guidelines No. 37.18, as well as Policy/Procedures No. 7.21, specifically set out that an unexcused failure to work mandatory overtime will lead to a suspension or fine for the first offense, or lead to disciplinary action. (Appellee's Exhibits 4 and 5.)

6. While the term "insubordination" has a negative tenor, such behavior includes a refusal to follow the directive of a supervisor or superior. On January 5, 2015, the Appellant, by refusing mandation, was insubordinate and, therefore, violated policy/procedures No. 7.13.12. Such conduct also constituted lack of good behavior, in violation of Cabinet's Policy No. 2.1, Employee Conduct (Appellee's Exhibit 10). Therefore, Appellee has demonstrated by a preponderance of the evidence that the disciplinary action taken in the nature of a three-day disciplinary fine in the sum of \$351.90, by letter of February 10, 2015, was taken with just cause and was neither excessive nor erroneous.

7. The evidence has shown that Boualone Niravong on March 29, 2015, refused mandation to work overtime. The reasons she offered her supervisor at that time were insufficient to excuse her from mandation. Such refusal did constitute insubordination and, therefore, a violation of Policy/Procedures No. 7.13.12, as well as a lack of good behavior in violation of the Cabinet's Policy 2.1, Employee Conduct. (Appellee's Exhibits 9 and 10.)

8. The evidence was unconvincing, however, that Appellant failed to previously report outside employment. She had worked at least the past fourteen years at this outside employment with the full knowledge of at least one agent of the Cabinet (if not more). It is not probable that her employer had no knowledge of such outside employment or that this

¹ The prohibition on working more than a double shift on two consecutive days under Policy No. 7.21 appears to conflict with mandatory overtime practice guidelines No. 37.18, paragraph 4, where it states: "Employees will only be allowed to work double shifts on two consecutive days. If an employee *has already worked two consecutive double shifts of overtime and a Sunday-Saturday week they cannot be mandated*. Supervisors should ask the employees *if they have worked two double shifts on two consecutive days and then verified by checking the assignment sheet*." Is an employee excused from mandatory overtime by having worked a double shift on two consecutive days or two consecutive double shifts of overtime on a Sunday-Saturday week?

² While the "double shift" policy applies to employment by the Cabinet, the evidence has shown that patient care and safety is of the utmost importance. While it might be a better practice for Appellee, prior to mandating an employee for overtime to make inquiry whether such employee has worked a double shift at any employment during the Sunday-Saturday week prior, to ensure safe operation and provision of care by such employee, that apparently is not the policy in place at the present time.

employment had not been previously approved. There is no reason to disbelieve Appellant's testimony that she had indeed submitted a form for approval of outside employment in the past. Furthermore, the evidence shows that when she was recently requested to complete the form, after the Cabinet could not find such information in its file at Hazelwood, she began the process on or about April 27, 2015, and submitted the completed forms on or about May 5, 2015. (Appellee's Exhibit 1). There is a lack of a preponderance of the evidence to support an allegation that Appellant failed to comply with the Cabinet's procedure 2.9, Outside Employee and Board/Committee Service or that such constituted a lack of good behavior. Therefore, the Appellee has failed to demonstrate by a preponderance of the evidence that any disciplinary action taken against Appellant for failure to report outside employment was taken with just cause. Such was, in view of the evidence, erroneous, as well as any disciplinary action attributable to this allegation. However, considering the testimony of Howard J. Klein, Appointing Authority, that either of the two allegations stated in the May 2015 letter standing alone, would constitute sufficient grounds for imposition of the five-day disciplinary fine, particularly in view of the refusal of mandation occurring as a second event in close proximity to the earlier cited event, the Cabinet has demonstrated by a preponderance of the evidence that the disciplinary action of a five-day disciplinary fine, for the allegation of refusal of mandation in March of 2015, was taken with just cause and was neither excessive nor erroneous.

RECOMMENDED ORDER

The Hearing Officer recommends to the Kentucky Personnel Board that the appeal of **BOUALONE NIRAVONG VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NOS. 2015-036 AND 2015-123)** be:

1. **SUSTAINED to the extent** that the allegation of lack of good behavior based on violation of Cabinet for Health and Family Services Procedure 2.9, Outside Employee and Board/Committee Service, be stricken and deleted; and
2. **DISMISSED** as to all other allegations made against the Appellant, leaving the Disciplinary Fines undisturbed.

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 Roland P. Merkel** this 2nd day of September, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Jennifer Wolsing
Ms. Boualone Niravong