

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-107**

LYNNE H. STEWART

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 March 2016 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated February 4, 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 **SUSTAINED**.

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 16th day of March, 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Lucas Roberts
Lynne H. Stewart
Jay Klein

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
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VS.

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

APPELLEE

** ** ** ** **

This matter came on for an evidentiary hearing on November 19, 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.

Appellant, Lynne Stewart, was present and not represented by legal counsel. The Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Lucas Roberts. Also present as agency representative was Mr. Bob James.

The issue in this case was Appellant's contention she was penalized when she was denied leave time granted to others working in the L&N Building in downtown Louisville, Kentucky, on April 30, 2015. The burden of proof is on the Appellee to demonstrate, by a preponderance of the evidence, that such denial of leave time to the Appellant, a penalization, was taken with just cause.

The parties gave their opening statements. The rule separating witnesses was invoked and employed throughout the course of the proceedings.

BACKGROUND

1. The first witness for the Appellee was **Bob James**. Mr. James has been employed since June 2014 by the Office of Inspector General as a Staff Assistant. He also serves as Personnel Liaison. His job duties include Budget and Personnel, and he is the Timekeeping Administrator for the Office of Inspector General (OIG).

2. The annual Pegasus Parade was scheduled for Thursday, April 30, 2015, in Louisville. A memo came out ordering the L&N Building closed after 1:00 p.m. that day. He identified Appellee's Exhibit 1 as the memo from J. P. Hamm.

3. The OIG at the L&N Building has three divisions: Healthcare Division; Childcare Division; and Audits and Investigations. Employees who are survey professionals work assignments away from the office. Appellant is a Nurse Consultant Inspector who conducts on-site surveys about three days each week and works in the office (the L&N Building) the remaining two days.

4. Mr. James had a question about Mr. Hamm's memo and directed an inquiry to Beth Feddersen, HR Branch Manager. He asked how such closure would affect the professionals who were not scheduled to be in the office that day. Ms. Feddersen advised that the memo only applied to staff who were assigned to work in the L&N Building that day; it would not apply to any staff assigned to be outside the building that day, either in court hearings, conducting surveys, or conducting investigations. For those individuals, April 30 would be a regular work day. If an employee had scheduled that day off, they also would not receive the closure, that is the "CLOS" pay designation.

5. He identified Appellant's Exhibit 1 as his own email sent May 20, 2015, to all Timekeepers. He read the contents into evidence. He identified Appellant's Exhibit 2 as a surveyor worksheet which shows Appellant had exited her survey facility site on April 30, 2015, at 11:37 a.m. He identified Appellant's Exhibit 3 as the CHFS OIG sign in sheet for April 30, 2015, that showed Ms. Stewart signed into the L&N Building at 12:05 p.m. and signed out at 12:15 p.m.

6. All staff are entitled to take a daily lunch break. Appellant's lunch break was one hour. When presented with Appellant's Exhibit 4, he read that paragraph into evidence pertaining to Kentucky Personnel Cabinet's explanation of the meal period.

7. He testified that according to Millie Zumstein, Appellant had requested the afternoon of April 30 off for personal reasons; she had only been scheduled to work half a day.

8. He identified Appellee's Exhibit 2 as Appellant's timesheet for the pay period of April 16 through 30, 2015. Page two shows a request for annual leave on April 30 from 1:00 p.m. to 4:30 p.m. Page one shows that on April 30, Appellant worked a total of four hours under the coding "1REG" and had three and a half hours coded "ANLL", or annual leave. It showed Appellant signed page one on April 28, 2015, and signed page two on April 27, 2015.

9. Appellant's workstation is in the L&N Building where she has an office.

10. The next witness was **Beth Feddersen**. For the past 18 months Ms. Feddersen has been employed by the Cabinet for Health and Family Services in the office of Human

Resource Management as Human Resource Branch Manager. Her duties include oversight of payroll and personnel.

11. A question had been posed to her whether an employee who had been scheduled to be in a hearing on April 30, 2015, would be able to receive "CLOS" time? Ms. Feddersen inquired with her supervisor as well as the policy advisor in OHRM. She was told if someone was not scheduled to be in the office that day they would not get "closure time." Closure time also would not be applied to employees who were not scheduled to be in the office that day or who had previously asked for the day off.

12. The next witness was **Millie Zumstein** who, for the past six years, has been employed by the Office of Inspector General, as Regional Program Manager for the Northern Enforcement Branch. Her workstation is in the L&N Building in Louisville.

13. On April 30, 2015, she supervised her office employees including Ms. Stewart. She recalls a discussion she had with the Appellant prior to April 30 when Ms. Stewart requested time off for a home repair. Ms. Zumstein believed that request was for the afternoon of April 30.

14. She acknowledged after examining Appellee's Exhibit 2 that Appellant used annual leave on April 30, 2015. Ms. Zumstein, in her normal course of duties, had signed both pages of that timesheet. She acknowledged that pursuant to Appellant's Exhibit 3, Ms. Stewart had signed back into the office on April 30 at 12:05 p.m.

15. She has no knowledge of the date or time Appellant met with her home repair people. Normally, when Appellant wanted a day off, she discussed it with Ms. Zumstein. Appellant would then fill out a form and Zumstein would sign it. Zumstein would then record the event on her own calendar, and hand the form back to Appellant. She acknowledged that Appellant's Exhibit 5 was a representation of a blank leave form that was typically used.

16. She and Appellant both were unable to locate any leave form completed for April 30, 2015. She thought they had signed a form and that she had given it to Appellant. She did have the names of two employees on her calendar for April 30 which indicated time off. A notation for Appellant reflected "noon?". The question mark indicated to her that the employee would have given her a tentative time-off, meaning actual time would be changed later on. However, Ms. Zumstein could not say 100% that a leave form had been filled out in that instance.

17. Ms. Zumstein is the one to give assignments to Ms. Stewart, including surveys. Upon survey completion, the surveyor signs out of the survey site and calls the office to report the results. The surveyor then returns to the office to complete a packet of papers. Zumstein had been instructed that staff who conducted surveys on April 30 needed to be out surveying. That

person would be required to either go out on another survey or take their accumulated time off. She understood surveyors could not get closure time per the instructions from Bob James.

18. The time for completion of a post survey packet varied depending on the type of survey. In the instance of the April 30 survey completed by Appellant, they would have wanted to get the paperwork done fairly soon. The time for completion of this type of survey paperwork of a skilled nursing home would be a little more extensive. On April 30, Appellant followed every procedure she would expect from an employee performing a survey. Appellant's one-hour lunch break that day would have begun after Appellant completed her 20-25 minutes travel time back to the office. Ms. Zumstein recalls having spoken to Appellant sometime between 12:05 p.m. and 12:15 p.m. that day, but does not recall the contents of the conversation.

19. Appellant did not sign the timesheet in her presence. Employees frequently complete and sign timesheets at their own desks before handing them in. Post survey paperwork would normally be completed within the L&N Building. Ms. Stewart was not given another survey assignment on April 30 as she chose to take the afternoon off.

20. Appellee rested its case.

21. The first witness for the Appellant was **Rhonda Durrett**. For the past 17 years Ms. Durrett has been employed by the Office of Inspector General as an Administrative Secretary. She has known the Appellant for about seven years. Ms. Durrett has timekeeping duties.

22. When an employee desires time off, they must submit a completed leave slip similar to that shown in Appellant's Exhibit 5. In the past the Appellant has "consistently" completed such a form for time off throughout her employment.

23. Appellant had signed page one of the applicable timesheet (Appellee's Exhibit 2) on April 28, 2015. Appellant signed page two when that page was blank, on April 27, 2015. The timesheet was turned in on April 28, 2015.

24. The entry on page two was done by Ms. Durrett, and not by the Appellant nor at Appellant's request. Durrett assumed Appellant forgot to write in this type of leave on page two and, as Appellant was no longer in the building, Durrett just entered it on her behalf. Durrett put that information on the form because that is the type of time Appellant had to take; she could not take leave attributable to the closing of the building that day.

25. The building, on Parade Day, normally closes and "CLOS" leave is given to employees. This year people who worked out on surveys were told they would not get "CLOS" time. Appellant could either perform a second survey that day or take her leave time. Durrett

entered "annual" time "... and I just wrote it on there." Appellant gave Ms. Durrett no reason for being out that afternoon.

26. Surveyors did not get "CLOS" time. Appellant did not make a prior request for this absence as she thought she was getting "CLOS" that day. Had the Appellant continued to work on a survey when the building closed, she would have been given pay for regular work time hours.

27. The next witness was **Betty Jo Branham**. For the past three years Ms. Branham has been employed by the Office of Inspector General as Nurse Regulator. She had also been a surveyor for 14 years.

28. Once a survey is completed, one must return to the office and write up the reports. With the computers currently on-hand, one cannot write up the reports at home in the event the L&N Building is closed. Surveyors do not work from home.

29. Before one begins a survey, there is pre-survey paperwork to be completed which takes about two hours. Post-survey paperwork for a revisit survey such as the one completed by Appellant on April 30 takes about three to four hours. There is an expectation that if you have time that day, you must complete your paperwork.

30. For the past 14 years if employees worked in the L&N Building the day of the Pegasus Parade and the building closed, the employees got "CLOS" time. The witness had no expectations of getting it if she worked outside the building on those days when the building closed. She testified surveyors who on such closure day had gotten done early with surveys would return to the building to start reports. If one is in the building doing such report and the building closes, the employee should not be treated differently. In her 14 years as a surveyor, 2015 was the first year the surveyors were treated differently and could not get "CLOS" time.

31. **Theresa Harvey** was the next witness. For the past year and a half Ms. Harvey has been employed by the Office of Inspector General, Division of Regulated Childcare as Regional Program Manager. Her workstation is in the L&N Building where she oversees surveyors who perform daycare surveys and investigations. She does not supervise the Appellant, who works in another division. When surveyors complete an investigation or survey, they return to the office building to write up their reports.

32. On April 30, 2015, Ms. Harvey's staff scheduled that day to work in the office and not out on surveys. With the building closing at 1:00 p.m., her staff was not expected to request the afternoon off. When the building closed, surveyors in the building as well as other administrative staff, left for the day and were all paid "CLOS" time. This was common past practice as she had been a surveyor in past years herself.

33. Upon review of Appellant's Exhibit 1, she acknowledged receipt of that document. Her surveyors were not scheduled to be out conducting surveys that day and so would receive "CLOS" time.

34. The next witness was the Appellant, **Lynne Stewart**. For the past six years Ms. Stewart has been employed by the Office of Inspector General as a Nurse Consultant Inspector.

35. When employees receive notice from Personnel that the L&N Building would be closed on April 30, 2015, due to the Derby Parade, the employees were to be off from work from 1:00 p.m. until 4:30 p.m., which time would be coded "CLOS" because employees could not return to the building to work.

36. On April 28, 2015, she received an email clarification of the upcoming closure from Human Resources. It explained that if one was a surveyor, that employee would have to be out of the building that day on survey.

37. The prior Tuesday of that week Appellant received her assignment. Her normal work week was 7.5 hours a day, five days a week, with no flex time. She normally worked in the office on Mondays and Fridays, and conducted surveys the rest of the week.

38. For that week she had been assigned a facility revisit survey for "Jeopardy tags" to validate the facility's plan of correction. "Tags" all carry monetary fines imposed by the federal government. Surveyors have to complete such survey in a timely manner as fines continue to accrue until the matter is resolved. On April 30, she finished the survey and exited the inspected facility at 11:35 a.m. She returned to the L&N Building at 12:05 p.m.

39. She identified Appellant's Exhibit 6 as a page from the personal planner that she regularly keeps. The planner shows her activities on April 30, 2015. She had a real estate closing scheduled at Chase Bank that afternoon at 4:00 p.m. When she returned to the L&N Building she had not been asked to take another assignment that afternoon. She could not finish paperwork from the survey she had just completed, as the building would close at 1:00 p.m.

40. Appellant's home repair appointment occurred on Monday April 27, 2015 at 6:30 p.m. She testified that on Appellant's Exhibit 9, the planner page for that Monday shows the appointment with the home repair people. At no time had she asked for the afternoon off for April 30 for any reason.

41. On April 30 when she completed the survey she traveled back to the L&N Building, checked in, checked out, and went to lunch. As the building closed at 1:00 p.m., she had no place to go after lunch so she went home.

42. She did have Rhonda Durrett enter 3.5 hours "annual" on her timesheet as Appellant had been told she would not be getting "CLOS" time. Hers was the only department in the building that did not give "CLOS" time to its surveyors.

43. In 2014 she worked on a survey when the building closed. She was given regular hours and comp time. That had been the practice as well in previous years.

44. Appellant testified they were told that if one was a surveyor and out of the building working on that day, they could continue to work. They could not work in the building after 1:00 p.m. If a surveyor was in the building, surveyors were told they could not take "CLOS" time, but had to take comp or annual time. Even if Appellant had been given another survey assignment that afternoon, she would have had to have completed preparation paperwork which takes one to two hours before that survey can be conducted. She could not have completed that paperwork before the building closed at 1:00 p.m.

FINDINGS OF FACT

1. The Appellant Lynne H. Stewart, is a classified employee with status. At all times during 2015 she was employed by the Cabinet for Health and Family Services as a Nurse Consultant Inspector. Her workstation is in the L&N Building in Louisville, Kentucky where she had an office. Her work week is 7.5 hours a day, 5 days a week, with no flex time. She normally works in the office on Mondays and Fridays and leaves the office to conduct site surveys the remainder of the week.

2. J.P. Hamm, Executive Director of Human Resource Management (OHRM) issued a memorandum advising:

The Kentucky Derby Festival Parade Committee has requested to use the parking area facilities of the Cabinet's office located at 908 West Broadway in Louisville on Thursday, April 30, 2015, for the Pegasus Parade.

Employees located at the L&N Building, 9th and Broadway should be dismissed on April 30, 2015, at 1:00 p.m. The time code will be CLOS for the work hours between 1:00 p.m. and the time an employee's regular work day ends. (Appellee's Exhibit 1).

3. Bob James, Staff Assistant for the Office of Inspector General, was uncertain whether Mr. Hamm's memorandum applied to all employees. He made inquiry with Beth Feddersen, HR Branch Manager. Ms. Feddersen told him "CLOS" pay designation would only

apply to employees assigned to work in the L&N Building on April 30; it did not apply to employees who took that day off, or to employees assigned to work outside the building that day either in court hearings, or conducting surveys or investigations. Mr. James then sent out an email clarification to all timekeepers (Appellant's Exhibit 1).

4. At the beginning of that week Ms. Stewart received an assignment to conduct a site survey on the morning of April 30, 2015. She conducted her survey and exited that site at 11:37 a.m. (Appellant Exhibit 2). In the normal course of her duties, and to timely complete paperwork for the just completed survey, she returned to her workstation at the L&N Building at 12:05 p.p. (Appellant Exhibit 3).

5. Upon her return to her office she was entitled to take a one-hour lunch break. She left the building for the day at 12:15PM (Appellant's Exhibit 3). She had not been given any additional assignments or surveys for that day. Millie Zumstein, Appellant's supervisor, did not give Appellant any additional assignments that day, as she mistakenly believed Ms. Stewart had previously requested that afternoon off. Zumstein and Appellant were unable to locate a completed and approved leave request form (similar to form shown by Appellant's Exhibit 5).

6. Appellant signed page one of her timesheet for the April 16-30, 2015, pay period on April 28, 2015. She signed page two of that timesheet, when it was blank, on April 27, 2015. (Appellee's Exhibit 2). She then turned it over to Rhonda Durrett, Administrative Secretary and Timekeeper, on April 28, 2015.

7. The entries shown on page two of the timesheet were made by Ms. Durrett. They were not made by or at the request of the Appellant. Durrett had assumed Appellant forgot to fill in this page, so she (Durrett) entered the information shown, without specific knowledge of the nature of the leave taken; she assumed Appellant could not take "CLOS" time. Appellant had not requested leave for the afternoon of April 30.

8. During the 14 years preceding the April 30, 2015 closure of the L&N Building, surveyors who completed surveys early on the day of the Pegasus Parade received "CLOS" time when the building was closed. 2015 was the first year surveyors in Appellant's division were not given "CLOS" time.

9. Surveyors who worked in the Division of Regulated Child Care, with a workstation in the L&N Building, had foreknowledge the L&N Building would close on the afternoon of April 30, 2015. With that knowledge, they had not been assigned outside survey work that day. When the building closed at 1:00 p.m. these surveyors went home and were paid "CLOS" time. Appellant, as well as the surveyors who worked in Appellant's department, who were at the L&N Building when it closed, did not receive "CLOS" time. Appellant was advised

she could only claim comp or annual time for that afternoon, if she was not out of the building conducting a survey.

10. Appellant filed her appeal with the Kentucky Personnel Board in a timely manner.

CONCLUSIONS OF LAW

1. The issue in this case was Appellant's contention that she was penalized when she was denied leave time granted others working in the L&N Building in downtown Louisville, KY, on April 30, 2015. The burden of proof is on the Appellee to demonstrate by a preponderance of the evidence that such denial of leave time to the Appellant, a penalization, was taken with just cause.

2. Lynne H. Stewart was a classified employee with status. A classified employee with status may not be otherwise penalized except for cause. KRS 18A.095(1).

3. A "penalization" includes, but is not limited to, demotion in an action that diminishes the level, rank, discretion, or responsibility of an employee without proper cause; and the abridgement or denial of other rights granted to state employees. KRS 18A.005(24).

4. "Preponderance of evidence" means: "...evidence which, as a whole, shows that the facts sought to be proved is more probable than not. With respect to burden of proof in civil actions, means greater weight of evidence, or evidence which is more creditable and convincing to the mind." Black's Law Dictionary, 5th Edition, page 1064. The ultimate burden of persuasion in all administrative hearings is met by a preponderance of the evidence in the record. Failure to meet the burden of proof is grounds for a recommended order from the hearing officer. KRS 13B.090(7).

5. On April 30, 2015, the L&N Building in Louisville, Kentucky, was to be closed at 1:00 p.m. to allow citizens watching the annual Pegasus Parade to use the building parking lot. All employees in the L&N Building were to leave the premises at 1:00 p.m. In years prior to 2015, all employees who so left the building, including surveyors, were given closure time, or "CLOS" time. They were not required to use annual or comp time for that afternoon.

6. The evidence is clear that Ms. Stewart did not request time off for any purpose on the afternoon of April 30, 2015. Although she had had preliminary discussions with Ms. Zumstein about a potential home repair that afternoon, no annual leave form was completed for that day. Furthermore, it was Rhonda Durrett, Administrative Secretary and Time Keeper, who assumed Appellant would not receive "CLOS" time and therefore made the entry on Appellant's timesheet.

7. The Office of Human Resource Management issued a memorandum advising employees of the closure of the L&N Building. (Appellee's exhibit 1). That memorandum made no distinction between the types of employees who had their workstation at the building. Clarification of the memo was made by Beth Feddersen, HR Branch Manager when she advised the "CLOS" time did not apply to employees who took that day off, or employees assigned to work outside the building that day at court hearings, on surveys, or in investigations.

8. However, the evidence is clear that application of "CLOS" time was not consistently applied to surveyors of the different divisions in the L&N Building. Surveyors who worked in the Division of Regulated Child Care, having foreknowledge of the building closure, purposely scheduled work assignments for April 30 within the L&N Building. No outside surveys were scheduled. These surveyors were then allowed to go home at 1:00 p.m. and were paid "CLOS" time. Appellant, as well as surveyors who worked in Appellant's division, who were at the L&N Building when it closed, did not receive "CLOS" time. This disparate treatment of similarly situated employees constitute a penalization as Ms. Stewart suffered an abridgement or denial of rights granted to other state employees. KRS 18.005(24).

9. From all the evidence the Appellee has failed to show by a preponderance of the evidence that there was just cause for imposing a penalization on the Appellant in the form of denial of "CLOS" time, when others similarly situated were allowed to and granted that time.

RECOMMENDED ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Kentucky Personnel Board that the appeal of **LYNNE H. STEWART VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2015-107)** be **SUSTAINED** and that Ms. Stewart be awarded "CLOS" time for the hours of 1:00 p.m. to 4:30 p.m., April 30, 2015, that her leave time balances be adjusted accordingly, and Appellee is ordered to reimburse Appellant for any leave time she used in attending the evidentiary hearing and any pre-hearing conferences before the Personnel Board, and to otherwise make Appellant whole. KRS 18A.105, 18A.095(25), and 200 KAR 12:030.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13.B.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).

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 4th day of February, 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Lucas Roberts
Lynne H. Stewart