

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-014

DEAN TOMLINSON

APPELLANT

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

ENERGY AND ENVIRONMENT CABINET
DR. LEN PETERS, APPOINTING AUTHORITY

APPELLEE

** ** *

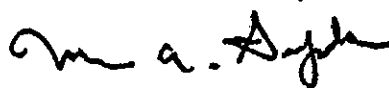
The Board at its regular November 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated October 22, 2014, and being duly advised,

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 19th day of November, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Leesa B. Moorman
Dean Tomlinson
Lynn K. Gillis
Sherry Butler

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VS.

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This matter came on for evidentiary hearing on July 22, 2014, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before Geoffrey B. Greenawalt, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Dean Tomlinson, was present at the evidentiary hearing and was not represented by legal counsel. The Appellee, Energy and Environment Cabinet, was present and was represented by the Hon. Leesa Moorman.

Prior to the taking of testimony, Joint Exhibits 1, 2, 3, 4, 5, and 6 were entered by agreement into the record.

The issue at the evidentiary hearing was the Appellant's three-day suspension without pay. The burden of proof was upon the Appellee to demonstrate by a preponderance of the evidence that the said penalization was neither excessive nor erroneous under the circumstances and was taken for just cause.

BACKGROUND

1. The Appellant, Dean Tomlinson, was suspended from duty and pay as a Network Analyst III in the Administrative Support Branch of the Division of Environmental Program Support, for a period of three working days effective beginning of business January 14, 2014, through the close of business on January 16, 2014.

2. The issue in the evidentiary hearing was to be the disciplinary action imposed on the Appellant. The Appellee was assigned the burden of proof which is to be by a preponderance of the evidence, to demonstrate that the disciplinary action imposed was neither excessive nor erroneous and was taken with just cause.

3. The first to testify at the hearing was **Nina Hockensmith**, who is the Administrative Branch Manager for the Division of Environmental Program and Support. Ms. Hockensmith was the Appellant's first-line supervisor during the time in question.

4. Ms. Hockensmith testified that on December 4, 2013, she and Assistant Director Jason Whisman were looking for the Appellant. He was not at his desk so they asked his coworker, Jeanine Sloan, where he might be. Ms. Sloan told them that the Appellant indicated he was going to the 200 Fair Oaks Lane Building. So Ms. Hockensmith e-mailed the Appellant and asked him to let her know when he was back at his desk. The Appellant did not respond to that particular e-mail, but did respond to a subsequent e-mail sent later that day at around 4:15. [See Appellee's Exhibit 1, which is a copy of the first e-mail from Ms. Hockensmith to the Appellant.]

5. Ms. Hockensmith spoke with the Appellant the next day and was told that the Appellant was at the 200 Fair Oaks Lane Building helping Daniel Bishop with an IT issue. It was later determined that Mr. Bishop was not even at work on that particular day. [See Appellee's Exhibit 2, which is the Sign-In/Sign-Out Sheet for Daniel Bishop.] Ms. Hockensmith then asked the Appellant into her office to confront him with this information.

6. After being confronted with this information, the Appellant admitted that he had lied to Ms. Hockensmith about his whereabouts and later followed up with an e-mail and a response. [See Appellee's Exhibit 3.]

7. Ms. Hockensmith stated that she had already addressed the Sign-In/Sign-Out policy in a previous staff meeting and even sent out an e-mail afterwards. She also testified that in December 2012 she had a time and attendance issue with the Appellant resulting in an e-mail to him with the Time and Attendance Policy attached. [See Appellee's Exhibit 4.] According to Ms. Hockensmith, Joint Exhibit 6 is a copy of the Time and Attendance Policy which was attached to the e-mail marked as Appellee's Exhibit 4. As a result of this instance, a written reprimand was issued to the Appellant. [See Joint Exhibit 4.] The Appellant chose to provide a written response to this reprimand. This response is marked as Joint Exhibit 5.

8. Ms. Hockensmith testified that she also performed the Appellant's Annual Employee Performance Evaluations for the years 2012 and 2013 and noted that he barely met the requirements for punctuality on both evaluations. [See Joint Exhibits 2 and 3.]

9. Ms. Hockensmith recommended that the Appellant be suspended for his time and attendance issues. She also noted that his time and attendance has improved since the suspension.

10. On cross-examination, Ms. Hockensmith estimated that over the course of time she had issues with the Appellant's time and attendance and signing-in procedure five to eight times. She did not really consider that to be a pattern and each instance was dealt with individually. Ms. Hockensmith also stipulated that on the day in question the Appellant worked 7.5 hours as indicated on his timesheet. She also admitted that she never implemented a Performance Improvement Plan (PIP) even though she considered it.

11. The next to testify was **Jason Whisman**. Mr. Whisman is the Division of Environmental Programs supervisor. He is a Director and the Appellant's second-line supervisor. Mr. Whisman concurred with the choice to suspend the Appellant for three days. Mr. Whisman testified that subsequent to the subject incident, he ran into Daniel Bishop and asked him what the Appellant helped him with. It was at that time that Mr. Bishop indicated he was not even at work on that particular day. Mr. Whisman, like Ms. Hockensmith, testified that since the subject suspension, the Appellant has noticeably changed his ways with regard to time and attendance.

12. The testimony of Mr. Whisman marked the end of the Appellee's case in chief.

13. The next to testify at the hearing was the Appellant, **Dean Tomlinson**. Mr. Tomlinson is a Network Analyst III.

14. Mr. Tomlinson did not deny he had attendance issues. He testified that he had been depressed for over one year due to a divorce. However, he stated that the Appellee did not even follow its own policy. He also denied having lied to Ms. Hockensmith about his whereabouts on the day in question.

15. According to Mr. Tomlinson, he did go to the 200 Fair Oaks Lane Building to see Daniel Bishop. When he could not find him he just began strolling around. He noted that the 200 Fair Oaks Lane Building is approximately 200 yards from where he works, which is at the 300 Fair Oaks Lane Building. Mr. Tomlinson did admit that he had failed to notify anybody that he was taking his break when he left his workstation.

16. According to Mr. Tomlinson, Ms. Hockensmith misconstrued his response to her question. He noted that at the time he did not think her question about his whereabouts was that important and so he did not answer it as thoughtfully as he might have otherwise.

17. Mr. Tomlinson referred to Joint Exhibit 6, which is the Appellee's Time and Attendance Policy, and noted that patterns of abuse were to be addressed by taking progressive disciplinary action as outlined therein. According to the policy, after a second occurrence, a PIP could have been issued. After the sixth occurrence a written reprimand should have been issued, and only after an eighth occurrence, along with the employee's failure to comply with his PIP, should he have been suspended. Mr. Tomlinson noted that he was never issued a PIP. He referred to the *Frequently Asked Questions* handout regarding the Appellee's Time and Attendance Policy (marked as Appellant's Exhibit 1) and argued that progressive disciplinary action should only have been taken per the chart. He also noted that the definition of a pattern of abuse was not met. The definition is included on p. 2 of Appellant's Exhibit 1 as follows:

The definition of pattern according to dictionary.com is a 'combination of qualities, acts, tendencies, etc., forming a consistent or characteristic arrangement.' If an employee is 'consistently' late each week, or during a regularly scheduled work activity, they are exhibiting a 'pattern' of tardiness. It is the supervisor's responsibility to notify the employee of this. The employee may not correct their behavior if they are not made aware that it is a problem. The employee should then improve the behavior. If the employee does not improve, the action as outlined on the Progressive Disciplinary chart should begin.

18. The Appellant then noted that page 3 of the GAPS Training handout on PIPs (marked as Appellant's Exhibit 2) sets forth when a PIP should be implemented. In addition, it should be noted that on page 9 of the same, it states that certain steps of the progressive discipline policy may be skipped depending on the severity and nature of the employee's activities.

19. On cross-examination, Mr. Tomlinson admitted that a PIP is not mandated and is only suggested. The Appellant also stated that when he left the office to go to 200 Fair Oaks Lane, he intended to take his fifteen-minute break, but ended up taking an hour and fifteen minute break because he decided to take his lunch break as well.

20. This matter is governed by KRS 18A.095(1) which states:

A classified employee with status shall not be dismissed, demoted, suspended, or otherwise penalized except for cause.

21. The Hearing Officer has considered the entire administrative record, including the testimony and statements therein.

FINDINGS OF FACT

1. The Appellant, Dean Tomlinson, was suspended from duty and pay from his position as a Network Analyst III in the Administrative Support Branch of the Division of Environmental Program Support for three working days, effective the beginning of business on January 14, 2014, through the close of business on January 16, 2014. Essentially, the Appellant was suspended for failing to properly report his whereabouts between approximately 3:00 p.m. and 4:15 p.m. on December 4, 2013, which was deemed an unauthorized absence from his workstation. In addition to the alleged unauthorized absence, the Appellant allegedly failed to properly code his sign-in sheet for the hours worked for the same time period he was absent from his workstation. In addition, it was alleged that the Appellant lied to his supervisor, Nina Hockensmith, concerning his whereabouts on the afternoon on December 4, 2013. Because the Appellant had received a written reprimand for time and attendance issues approximately one year before, a three-day suspension was meted out, pursuant to the Appellee's Progressive Discipline policy.

2. The Appellant, a classified employee with status, timely filed his appeal with the Personnel Board on January 21, 2014, appealing from his three-day suspension from duty and pay.

3. The Appellant admitted that on December 4, 2013, at approximately 3:00 p.m., he left his workstation and did not return until approximately 4:15 p.m. He also admitted that although he did inform his coworkers of his original destination (the same being the 200 Fair Oaks Lane building), he failed to inform his supervisor, Nina Hockensmith, of his whereabouts during his time away from his desk. He also admitted he did not tell anybody how long he would be gone or that he intended to take a long walk to clear his head. [See Appellee's Exhibit 3.] According to the testimony of Nina Hockensmith, the Appellant's immediate supervisor, the Appellant has had time and attendance issues in the past. These issues were typically dealt with individually until December of 2012 when a particular incident resulted in a written reprimand being issued to the Appellant. [See Joint Exhibits 2, 3, 4, 5, and Appellee's Exhibit 4.]

4. As a result of this incident, as more particularly set out in the suspension letter, marked as Joint Exhibit 1, the Appellant was suspended from duty and pay from his position as a Network Analyst III in the Administrative Support Branch of the Division of Environmental Program Support, for a period of three working days effective beginning of business January 14, 2014, through the close of business on January 16, 2014.

CONCLUSIONS OF LAW

1. The Appellant timely filed his appeal with the Personnel Board appealing from his three-day suspension.

2. The Appellant was suspended for a period of three working days from duty and pay from his position as Network Analyst III in the Administrative Support Branch of the Division of Environmental Program Support, for lack of good behavior, as more particularly set forth in Joint Exhibit 1. The evidence demonstrates that although not severe, the Appellant had issues adhering to the Appellee's Time and Attendance policies over the course of 2012 and 2013. This has been demonstrated through the testimony of Nina Hockensmith, the Appellant's annual evaluations (marked as Joint Exhibits 2 and 3) and the written reprimand marked as Joint Exhibit 4. The Appellant also admitted he was absent from his workstation for one hour and fifteen minutes without notifying anybody and without properly logging the same onto his timesheet on December 4, 2013. The Appellant denies having lied to his immediate supervisor, but the evidence of record, specifically the testimony of Nina Hockensmith, demonstrates conclusively that the Appellant admitted to the same regarding his whereabouts on December 4, 2013.

3. The Appellee has demonstrated by a preponderance of the evidence that the disciplinary action taken against the Appellant, the same being a three-day suspension from duty and pay, was neither excessive nor erroneous under the circumstances and was done for just cause.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **DEAN TOIMLINSON VS. ENERGY AND ENVIRONMENT CABINET (APPEAL NO. 2014-014)** be **DISMISSED**.

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 Geoffrey B. Greenawalt** this 22ND day of October, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Leesa Moorman
Dean Tomlinson