

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-054**

JUSTIN WEATHERS

APPELLANT

VS.

**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 9, 2015, 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, Justin Weathers, was present at the evidentiary hearing and was not represented by legal counsel. The Appellee, Cabinet for Health and Family Services, was present and was represented by the Hon. Kathleen Hines.

Per the Interim Order dated July 8, 2015, the issue at the evidentiary hearing was the disciplinary action taken against the Appellant by the Appellee, Cabinet for Health and Family Services. The burden of proof was upon the Appellee to demonstrate by a preponderance of the evidence that the disciplinary action taken against the Appellant was neither excessive nor erroneous, and was taken with just cause.

BACKGROUND

1. For the pay period dating between April 1, 2015 and April 15, 2015, the Appellant's wages were reduced by \$291.38, a sum equal to three days' pay based upon his salary of \$1,051 per pay period, as a Patient Aide II with the Department for Behavioral Health, Developmental and Intellectual Disabilities, Hazelwood Center, for allegedly refusing to work mandatory overtime on February 16, 2015.

2. The Appellant timely filed his appeal with the Personnel Board on March 16, 2015, appealing from said wage reduction.

3. The first to testify at the hearing was **Tarron Ray**, who is the Director of Personnel Services at the Hazelwood Center. According to Ms. Ray, Hazelwood Center serves developmentally challenged clients twenty-four hours a day, seven days a week, 365 days a year and must maintain a certain client to staff ratio per federal and state statute. As a result of these ratio requirements, Hazelwood has a mandatory overtime policy to ensure that the Center is able to meet the minimum staffing requirements. Ms. Ray testified that when employees are required to work overtime, supervisors first look for volunteers to fill the shift. If the shift cannot be filled by volunteers, there is a list of employees maintained (referred to as "mandation list") which operates on a rotating basis. Once an employee works overtime (either voluntarily or by mandation), he or she go to the bottom of this list and those on top of the list are the next employees to be called on to work mandatory overtime.

4. Appellee's Exhibit 1 was introduced into the record and is a copy of the mandation list for February 15, 2015. Appellee's Exhibit 2 was introduced into the record and is a copy of Hazelwood Center's Mandatory Overtime policy, Policy No. 7.21. Appellee's Exhibit 3 was introduced into the record and is a copy of the Major Disciplinary Action (MDA) request against the Appellant which was sent to Jay Klein, the Appointing Authority for the Cabinet for Health and Family Services, on or about February 18, 2015. This MDA request resulted from the Appellant's alleged refusal to work mandatory overtime on the 6:00 a.m. to the 2:15 p.m. shift on February 16, 2015. Appellee's Exhibit 4 was introduced into the record and is a copy of the March 5, 2015 letter to the Appellant informing him that his wages would be reduced for a sum equal to three-day's pay. According to Ms. Ray, under the Mandatory Overtime Policy, marked as Appellee's Exhibit 2, refusing to work overtime due to bad weather is not a valid excuse and can be the basis of subjecting an employee to major disciplinary action. Apparently on the day in question (February 16, 2015), a major winter snow storm was set to hit the Louisville, Kentucky area.

5. On cross-examination, Ms. Ray testified that the Appellant turned in a doctor's statement, but she could not recall exactly what it said. Ms. Ray testified that the Appellant was required to turn in his medical statement to his supervisor or someone in the chain of command. On redirect, Appellee's Exhibit 5 was introduced into the record and is a copy of the Appellant's Training Data which indicates he had been trained on and should have been aware of the Mandatory Overtime Policy (see p. 8).

6. The next to testify was **Howard Jay Klein**, the Appointing Authority for the Appellee, Cabinet for Health and Family Services. Mr. Klein is the Director of the Office of Human Resource Management with the Cabinet. Mr. Klein testified that when he receives a request for MDA he assigns it to a Branch Manager who is then responsible for investigating the facts and preparing a draft disciplinary action letter. According to Mr. Klein, the Branch Manager refers to old Cabinet disciplinary logs and compares previous disciplinary actions taken in similar situations to the present situation in order that any disciplinary meted out remains consistent over time. Once this has been accomplished a proposed disciplinary action letter is prepared and forwarded to Mr. Klein for his review. If he agrees with the recommended disciplinary action, he signs off on the letter.

7. Mr. Klein testified that he received and reviewed the disciplinary action letter, marked as Appellee's Exhibit 3, and agreed that a three-day reduction in wages was consistent for a first-time offense for refusing to work mandatory overtime. According to Mr. Klein, keeping up the staffing ratio at Hazelwood is critical due to the nature of the work and that a refusal to work overtime is more similar to an insubordination issue than it is a time and attendance issue. He also noted that a failure to maintain the required staffing ratio could result in a citation from the Office of the Investigator General so it needs to be taken seriously.

8. The next to testify was **Detra Bryant**, the Therapeutic Program Supervisor Assistant at Hazelwood. A portion of Ms. Bryant's job duties involve keeping timesheets and handling other employment issues. Ms. Bryant is the Appellant's third shift supervisor and is familiar with the subject incident.

9. Ms. Bryant testified that on February 16, 2015, there was a need to procure several employees to work overtime on the first shift. She first asked for volunteers and then turned to the mandation list marked as Appellee's Exhibit 1 to fill the remaining overtime openings. According to Ms. Bryant, she asked the Appellant to work mandatory overtime and he told her he could not work the next shift due to the weather. She explained that the handwritten notes on Appellee's Exhibit 1 were hers and that her notes written to the side of the Appellant's name indicated she asked him to work overtime at 5:01 and he refused due to the weather. According to Ms. Bryant, the Appellant never said anything about being sick when she asked him to work overtime. Ms. Bryant then testified the Appellant later brought in a doctor's note, but the same was dated February 17 instead of February 16 (which was the actual date he refused to work overtime). According to Ms. Bryant, she reported the Appellant's refusal to work overtime to her supervisor and forwarded along a copy of the list marked as Appellee's Exhibit 1.

10. The next to testify was the Appellant, **Justin Weathers**. According to Mr. Weathers he was already under doctor's care on February 15, 2015 via webcam, but was trying not to miss work. He testified he initially contacted his doctor via a webcam and did not physically go to the doctor's office until February 17, 2015. Appellee's Exhibit 6 was introduced into the record and is a copy of the doctor's note excusing the Appellant from working on February 16, 2015 through February 19, 2015.

11. According to Mr. Weathers, on February 15, 2015, he had a fever and was throwing up. His doctor told him via the webcam to use his own discretion as to whether he could go to work. According to Mr. Weathers, when he was asked to work mandatory overtime early February 16, 2015, he knew he could not push himself to work another shift then drive himself home through a major snowstorm. Mr. Weathers testified he did not physically go to the doctor's office until February 17, because on that date he was feeling a lot worse and could not get the necessary prescription unless he was physically present. According to Mr. Weathers he most likely turned in his doctor's note before his next scheduled shift, which was February 20, 2015. Appellee's Exhibit 7 was introduced into the record and is a copy of his work schedule demonstrating his next day of work after coming off doctor's restrictions was February 20, 2015.

12. Appellee's Exhibit 8 was introduced into the record and is a copy of the Appellant's written statement regarding the subject incident. According to the Appellant, he was told to prepare this written statement at the same time he was presented with a notice that major disciplinary action had been requested against him. Appellee's Exhibit 9 was introduced into the record and is a copy of the Appellant's doctor's note (previously marked as Appellee's Exhibit 6) with the attached "specific visit information". According to Mr. Weathers, he initially turned in the doctor's note (Appellee's Exhibit 6) on February 20, but turned in the Visit Specific Clinical Summary on February 25, 2015, together with the doctor's note on February 25, 2015, which was the day he first heard about the subject MDA request.

13. Mr. Weathers testified he was trained on the Mandatory Overtime Policy and knew it well. He knew he was required to provide his supervisor with a doctor's note on his next day at work. He also knew he would not get paid for the time he missed work unless he provided a doctor's note. According to Mr. Weathers he turned in his note to Linda Wilder who is actually his first-line supervisor.

14. On cross-examination, the Appellant testified that on February 16 his doctor was not taking appointments due to the bad snow. He did, however, contact his doctor's office on February 16 and made an appointment for the following day.

15. 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."

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

FINDINGS OF FACT

1. The Appellant, Justin Weathers, a classified employee with status, had his wages reduced from his position as a Patient Aide II with the Department for Behavioral Health, Developmental and Intellectual Disabilities, Hazelwood Center, in the amount of \$291.38, a sum equal to three days' pay based upon his salary of \$1,051 per pay period. These wages were taken from the pay period beginning on April 1, 2015 and ending on April 15, 2015. The Appellant was also not allowed to work any overtime hours between April 1 and April 15, 2015. According to the disciplinary letter, marked as Appellee's Exhibit 4, and dated March 5, 2015, the reduction in pay was the result of lack of good behavior. In essence, on the morning of February 16, 2015, the Appellant refused to work mandatory overtime in violation of Hazelwood Center's Policy No. 7.21 (see Appellee's Exhibit 2). According to the Appellee's witnesses, the Appellant refused to work overtime due solely to impending bad weather. However, the weight of the evidence suggests that although the impending bad weather played a role in his decision, the larger reason for not working the overtime shift was that the Appellant did not feel well enough to make it through another shift then drive himself home from work during a major winter snow storm.

2. According to Tarron Ray and Howard J. Klein, Hazelwood Center operates twenty-four hours a day, seven days a week, 365 days a year and is required to maintain a certain staffing ratio with its clients per federal and state statute. As a result, there are occasions when employees must put in mandatory overtime so that staffing levels can be maintained. (See Appellee's Exhibit 2.)

3. On February 15, 2015, the Appellant worked the third shift beginning at 10:00 p.m. and ending at 6:00 a.m. on February 16. At approximately 5:01 a.m. on February 16, 2015, Detra Bryant informed the Appellant he had to work mandatory overtime (during the next shift, which began at 6:00 a.m. and ended at 2:15 p.m.). Ms. Bryant testified the Appellant refused to work mandatory overtime because of the weather, which according to her, did not constitute a valid excuse under Hazelwood Center's Policy No. 7.21 (see Appellee's Exhibit 2).

4. The Appellant had not been feeling well on February 15, 2015, so he contacted his physician via webcam and was advised to use his discretion in deciding whether or not to go to work that day. The Appellant decided to tough it out and went to work on February 15, 2015. However, when he was told to work mandatory overtime at 5:01 a.m. the following morning, because he was not feeling well, he did not believe he could make it through another shift, then drive his way through bad weather on his way home from work. So he declined to work the mandatory overtime first shift on February 16, 2015. The Appellant contacted his physician on February 16, 2015, and, because his doctor was not scheduling office visits that day due to the bad weather, scheduled an office visit for February 17, 2015. The Appellant was treated by a physician on February 17, 2015, as conclusively demonstrated by Appellee's Exhibits 6 and 9. The doctor's note marked as Appellee's Exhibits 6 and 9, was dated February 17, 2015, but stated the Appellant was not to work between February 16 and February 19, 2015. The Appellant presented this doctor's note (marked as

Appellee's Exhibit 6) to his supervisor before his next scheduled shift on February 20, 2015. He testified that upon learning of the Appellee's request for Major Disciplinary Action (MDA) on February 25, 2015, he provided the Appellee with another copy of his doctor's note (marked as Appellee's Exhibit 6) along with his "Visit Specific Clinical Summary" (see Appellee's Exhibit 9). In addition, the Appellant was well aware of Hazelwood Center's Mandatory Overtime Policy and knew he was required to provide his supervisor with a doctor's statement before his next scheduled work shift or he would not be paid for his sick time.

5. Pursuant to Hazelwood Center's Policy No. 7.21 (see Appellee's Exhibit 2), under paragraph 6: "Requests for sick leave, after notification of the need to work mandatory overtime, must be supported by a physician's statement. Physician's statements must be submitted at the beginning of the employee's next scheduled shift. Should the statement not be received at the next scheduled shift, the failure to work mandatory overtime will be considered a refusal and be subject to disciplinary action." The Appellee's position herein is that the Appellant did not request sick leave, but merely refused to work overtime due to the weather. The Appellant denied stating his only reason for not working overtime was due to the weather. The facts herein support a finding that although impending bad weather played a part in his decision not to work overtime, the Appellant requested sick leave after being notified of the need to work mandatory overtime on February 16, 2015, and provided his first-line supervisor with a physician's statement at the beginning of his next scheduled shift. Further, the Mandatory Overtime Policy is silent as to when a doctor's note is to be dated. However, even if it did specify the doctor's note was to be dated on the day of the refusal, in this instance, the Appellant was prevented from scheduling an appointment with his doctor on February 16, 2015, due to the weather conditions and not through any malfeasance of his own. Further, the subject doctor's statement states clearly the Appellant was not to work between February 16 and February 19, 2015. As such, it is found the Appellant adhered to Hazelwood Center's Mandatory Overtime Policy No. 7.21 and that his refusal to work mandatory overtime on February 16, 2015 was due to an excused illness and not due to the weather.

CONCLUSIONS OF LAW

1. The Appellant, a classified employee with status, filed his appeal with the Personnel Board on March 16, 2015, appealing from his three-day reduction in pay in the amount of \$291.38 from his position as a Patient Aide II with the Department for Behavioral Health, Developmental and Intellectual Disabilities, Hazelwood Center. (See Appellee's Exhibit 4.) According to the disciplinary letter, marked as Appellee's Exhibit 4, the reduction in wages was due to the Appellant's alleged breach of Hazelwood Center's Policy 7.21, Mandatory Overtime. (See Appellee's Exhibit 2.)

2. The Appellee failed to prove by a preponderance of the evidence that the disciplinary action taken against the Appellant, the same being a three-day reduction in wages from his position as a Patient Aide II Department for Behavioral Health, Developmental and Intellectual Disabilities, Hazelwood Center, was neither excessive nor erroneous and was taken with just cause.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **JUSTIN WEATHERS VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2015-054)** be **SUSTAINED** and that the wages taken from him during the pay period between April 1, 2015 and April 15, 2015, be reimbursed to the Appellant. Further, Appellee shall reimburse Appellant for any leave time he used attending the hearing and any pre-hearing conferences at the Board, and to otherwise make Appellant whole. [KRS 18A.095(25), KRS 18A.105, and 200 KAR 12:030.]

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

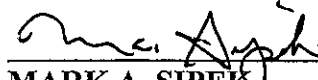
Any document filed with the Personnel Board shall be served on the opposing party.

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

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

ISSUED at the direction of **Hearing Officer Geoffrey B. Greenawalt** this 11th day of January, 2016.

KENTUCKY PERSONNEL BOARD

A handwritten signature in black ink, appearing to read "Mr. Sipek", is written over a horizontal line.

MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Kathleen Hines
Justin Weathers