COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-298

WALTER R. RAFFERTY **APPELLANT**

VS.

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

JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF CORRECTIONS **APPELLEE**

*** *** *** *** ***

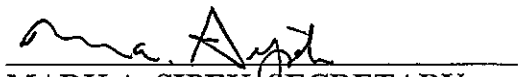
The Board, at its regular July 2016 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated May 26, 2016, Appellant's Exceptions, Appellee's Response to Appellant's Exceptions, and being duly advised,

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 14th day of July, 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Angela Cordery
Hon. Michael Boylan
Mr. Rodney E. Moore

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-298

WALTER R. RAFFERTY **APPELLANT**

VS. **FINDINGS OF FACT, CONCLUSION OF LAW AND RECOMMENDED ORDER**

JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS **APPELLEE**

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This matter came on for an evidentiary hearing on April 13, 2016, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. R. Hanson Williams, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Walter R. Rafferty, was present at the evidentiary hearing and was represented by the Hon. Michael Boylan. The Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Angela Cordery. Appearing as Agency representative was Warden Aaron Smith of the Kentucky State Reformatory.

This matter involves a 10-day suspension given to the Appellant by letter dated November 3, 2015 (a copy attached hereto and incorporated herein as **Recommended Order Attachment A**). The burden of proof was placed upon the Appellee to show, by a preponderance of the evidence, that the discipline imposed was neither excessive nor erroneous and appropriate under all surrounding circumstances.

BACKGROUND

1. The Appellee's first witness was **Teresa Kidwell**. She has been the Human Resources Administrator at the Kentucky State Reformatory (KSR) for the past one and a half years. Her duties include maintaining the files and processing disciplinary actions. In this case, she reviewed the allegations against the Appellant, contrasted those with the policies allegedly violated, then sent her review on to the Warden, who forwarded it to Central Office. Once approval was granted, the suspension letter was then signed by the Warden and issued. In addition, this witness introduced the Intent to Suspend letter dated October 23, 2015, and the actual suspension letter dated November 3, 2015.

2. In addition, Kidwell introduced Appellee's Exhibit 4, a listing of previous disciplinary actions imposed on the Appellant. These included written reprimands for poor work performance on April 11, 2005; November 3, 2005; January 21, 2010; a three-day suspension dated January 28, 2013, and a demotion for misconduct on December 17, 2014.

3. The Appellee's next witness was **John Sparrow**. He is a Lieutenant at the Roederer Correctional Complex (RCC), and has been employed there for 17 1/2 years. The witness testified that KSR is on the same grounds as RCC. He further explained that on October 2, 2015, at approximately 2:50 a.m., he was on perimeter patrol at RCC. Apparently perimeter control usually involves two vehicles that drive in opposite directions on a constant basis around the outside perimeter. This insures security outside the perimeter and is a part of detecting any escape attempts.

4. Sparrow testified that on October 2, 2015, from his vantage point, he noticed a vehicle at KSR parked with the engine running and the lights on. He approached the vehicle and tapped several times on the window, after observing an officer sleeping inside. He explained that after several knocks on the window, the person inside woke up and appeared startled. Sparrow then questioned the officer, who explained, "he was taking his break." Sparrow then opined that this was not proper procedure, as one should not be taking a break on duty unless he had been previously relieved of that duty. In addition, Sparrow added that these perimeter patrols were supposed to be constant and this was not a proper place in which to take one's break.

5. Sparrow then testified that after reporting this to Captain Rice, he was ordered to write an Occurrence Report (Appellee's Exhibit 6). This report confirmed the testimony just given by this witness.

6. On cross-examination, Sparrow explained that the incident occurred less than one quarter mile from the main RCC complex. This witness also added that he is not aware of the policy at KSR governing officers taking their breaks. He added that ordinarily an officer only takes breaks after having been relieved. Questioned as to the time of the incident, the witness explained that his watch had shown it was 2:50 a.m., although he admitted it could have been off by one minute either way.

7. On re-direct, Sparrow stated he was aware of a generic "Post Order No. 1," which provided that officers were to remain on post at all times during their patrols.

8. The Appellee's next witness was **James Coyne**. He has been the Deputy Warden in charge of Security at KSR for the past five years. He oversees the Security staff and insures that the policies and procedures are followed, including those governing the outside perimeter patrols. He explained that there are 43 acres inside the fence encompassing KSR and RCC. He confirmed there are normally two outside perimeter patrols, which go in opposite directions in their vehicles on a continuous basis.

9. Coyne explained that once he was notified of the incident, he convened a meeting with the Appellant. As a result, the Appellant filed a first incident report which reads:

> On 10-2-15, at 2:35 a.m., I, Officer Walter Rafferty 500 stop to empty the trash at the dumpster. The truck sat there for 5 minutes because Captain Steinburger called me to come to Box 1 for the Reverse draft. (sic) (Appellee's Exhibit 8.)

10. Coyne testified that the Appellant then filed a second Incident Report dated October 13, 2015. This report reads:

> On Oct 2 2015 in the OSP 1 Truck I Officer Rafferty had four bag of trash I took the trash to the Dumper to empty. I sat there for 5 minute try to stop my eye from hurting with it shut. I was not asleep or was not there for a hour. I can proof that my eyes were shut for five minutes. I had Doctor them with eye drop to stop the pain. (sic) (Appellee's Exhibit 9.)

11. The witness then explained these two reports were different in that there had been no mention in the first report of having administered medicine to his eyes and shutting them for that reason.

12. The witness continued to testify that he then spoke with the Personnel Director, examined the various previous disciplinary actions, and the policies which he thought were violated. He then discussed these with the Warden, who made the final decision.

13. Coyne then testified that he felt the Appellant's actions were a violation of KSR Policy 03-00-14. Specifically, he felt that Appellant violated KSR 03-00-14 Section I. Prohibited Activities and Conduct, and at (I) "Failure to properly discharge the duties of his position to include, but not limited to, making every reasonable effort to prevent the escape of an inmate."

14. Coyne also felt that this Policy, at Section I(L) Prohibited Activities and Conduct, which read, "Sleeping or inattentive while on duty" had been violated.

15. The Appellee's next witness was **Warden Aaron Smith**. He has been the Warden at KSR for approximately two years, and has worked with Corrections since 1988. He confirmed he had signed Appellant's disciplinary letter. He explained his decision was based on the incident herein, and the prior disciplinary history. He admitted he talked with the Appellant, who told him that his [Appellant's] eyes were bothering him, and that he had put in some drops to alleviate the pain. According to this witness, Appellant did acknowledge that his eyes had been closed and the vehicle was running when he was awakened.

16. The Appellee announced closed.

17. The Appellant's first witness was **Gary Hall**. He has been a Security Officer at KSR for the past three years. He testified that, on October 2, 2015, he, along with the Appellant, were performing outside perimeter patrol duties in their vehicles. He stated that he has never been told he could not take his break in his vehicle while on OSP. He explained that since two

officers per shift are on perimeter duty, it is customary for one officer to tell the other officer when and where he is going to take his break. He also added that the policy has been changed in some manner since this incident.

18. Hall stated that on the night in question, he took his break through 2:27 a.m. and 2:57 a.m. He explained that as he was about to go on break, he flashed his lights and stopped Rafferty's vehicle to explain that he [Hall] was going on break. He added that while he was on his break, he saw no one approach Appellant's vehicle and knock on his window.

19. He stated that he did see the Appellant take his break by the Training Center dumpster, where he dumped trash from his truck.

20. **Appellant Walter Rafferty** then testified. Appellant testified he is currently a Security Officer at KSR. He has worked within Corrections for 13 years, and has been at KSR for the past seven years.

21. He stated he worked on the outside perimeter patrol previously, and added that `the officers are entitled to take breaks. He added that he has never seen anything in writing on how to properly take breaks. He stated he took his break on the day in question just the way he had many times before.

22. He also confirmed Hall's testimony that it is customary for one officer to verbally tell the other officer that he is "going on break" and it is the other officer's duty to keep his vehicle moving while the other is on break.

23. Appellant confirmed Hall's timeline of 2:27 a.m. through 2:57 a.m., and added that at 2:59 a.m. Hall told him he was coming off break, and that Appellant should begin his.

24. He stated his break would have begun at approximately 3:00 a.m. Appellant then confirmed his earlier story that he had emptied trash, and then, because his eyes hurt, had parked in the handicap parking lot, putting medicine in his eyes and shutting them briefly.

25. Appellant then denied anyone had ever knocked on his window to awaken him; he had not parked his vehicle anywhere for an hour; and further denied he had any contact with Lieutenant Sparrow that night.

26. On cross-examination, the witness admitted he had previously been demoted from Correctional Sergeant to Officer.

27. On re-direct, Appellant stated that after October 2, 2015, he had been advised orally of a rule change regarding breaks, in that no breaks in vehicles were allowed.

28. In rebuttal, Appellant called **James Coyne**. He testified that the break policy has always been that officers are never to take breaks in their vehicles while on outside perimeter patrol, unless they have been relieved. Relieved means the officer must give up their weapon when relieved by another officer. Coyne stated he felt the break policy was contained in either

the facility post order or box order. He emphasized that the break method used by the Appellant had never been authorized.

29. On cross-examination, Coyne stated that during his meeting with the Appellant following the incident, Appellant denied his vehicle was there for an hour.

30. Also called on re-buttal was **Warden Aaron Smith**. He testified that during his interview with the Appellant, they did discuss the fact that Lieutenant Sparrow had knocked on Appellant's window.

31. On sur-rebuttal, the **Appellant** testified that he was not in place at 2:50 a.m. when Sparrow supposedly knocked on his window. Instead, Appellant testified that a Captain Steinberger knocked on his window that night, and he never saw Sparrow. He also insisted the incident report filed by Sparrow contained an incorrect time notation.

32. Appellant announced closed.

FINDINGS OF FACT

1. The Hearing Officer finds credible the testimony of Lieutenant John Sparrow, that at approximately 2:50 a.m. on October 2, 2015, he found the Appellant asleep in his vehicle with the engine running and the lights on, at a time when the Appellant was on duty.

2. The Hearing Officer finds credible the testimony of Sparrow and Deputy Warden James Coyne that the method of "taking a break" used by the Appellant was neither proper nor authorized.

3. The Hearing Officer finds finds the testimony of Gary Hall as to the time sequence not to be credible.

4. The Hearing Officer finds the testimony of the Appellant that he had no contact with Lieutenant Sparrow on the night in question is not credible.

5. The Hearing Officer finds the Appellant's actions constituted a violation of KSR Policy and Procedures KSR 03-00-14, I. Prohibited Activities and Conduct, (I) and (L). Such conduct constituted poor work performance under 101 KAR 1:345.

6. The Hearing Officer finds the Appellant has been given numerous disciplinary actions in the past, including a demotion.

CONCLUSION OF LAW

The Hearing Officer concludes as a matter of law that the Appellee carried its burden of proof to show the 10-day suspension of Appellant was neither excessive nor erroneous, and was proper under all surrounding circumstances.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **WALTER R. RAFFERTY V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS, (APPEAL NO. 2015-298)** 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 R. Hanson Williams** this 26th day of May, 2016.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Angela Cordery
Hon. Michael Boylan

Received
APR 15 2016
Personnel Board

DEPARTMENT OF CORRECTIONS

LaDonna H. Thompson
Commissioner

Kentucky State Reformatory
3001 W. Hwy 146
LaGrange, Kentucky 40032
Telephone: 502/222-9441
www.kentucky.gov

Aaron Smith
Warden

November 3, 2015

Walter Rafferty

PERN#

Dear Mr. Rafferty,

After careful consideration of your statements made during your disciplinary hearing held on October 26, 2015, I have determined that the clear weight of evidence establishes that you did commit the charges as outlined in the letter of Intent to Suspend dated October 23, 2015.

Pursuant to 18A.095 you are notified that you are suspended from duty and pay for a period of (10) ten working days, effective beginning of business on **December 03**, 2015 through the close of business on **December 14, 2015**. You are to return to work at your regularly scheduled time on **December 17, 2015**.

You are being suspended from your position as **Correctional Sergeant**, at the Kentucky State Reformatory, for the following reason:

Poor Work Performance: On October 2, 2015, you were assigned to work the Outside Patrol for the Kentucky State Reformatory. At approximately 2:50 am, Lieutenant John Sparrow, from the Roederer Correctional Complex, approached your Outside Patrol vehicle, which was parked at the Central Region Training Center (CRTC). Lieutenant Sparrow stated that the vehicle was running, the parking lights were on, the radio was playing, and you were asleep in the vehicle. Lieutenant Sparrow reported that he had to tap on the driver's side door repeatedly to awake you and as you awoke, you seemed startled.

In a report you completed, dated October 13, 2015, you admitted you had your eyes shut for five (5) minutes, while parked at CRTC.

Your actions are in direct violation of KSR IPP 03-00-14 Prohibited Employee Conduct, Disciplinary Actions, and Appeal Process, Section I. Prohibited Activities and Conduct, L. Sleeping or inattentive while on duty. Additionally, your actions are also in violation of KSR 03-00-14 Prohibited Employee Conduct, Disciplinary Actions, and Appeal Process, Policy and Procedure, I. Prohibited Activities and Conduct, I. Failure to properly discharge the duties of

APPELLEE'S EXHIBIT
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your position to include, but not limited to, making every reasonable effort to prevent the escape of an inmate. Your actions are also a direct violation of 101 KAR 1:345, Section 1, which states, "General Provision. Appointing authorities may discipline employees for lack of good behavior or the unsatisfactory performance of duties"

On December 1, 2014 you were demoted for misconduct. On January 28, 2013, you received a three (3) day suspension for misconduct. You received Written Reprimands for poor work performance on December 21, 2010, November 3, 2005, and April 11, 2005.

As a Department of Corrections' employee it is incumbent upon you to conduct yourself professionally at all times and follow the policies and procedures of the Department of Corrections and the Kentucky State Reformatory. This type of behavior is unacceptable and cannot be tolerated. Failure to improve your conduct may lead to further disciplinary action taken against you, up to and including dismissal.

Additionally, your actions are in violation of 101 KAR 1:345, Section 1, which states, "General Provision. Appointing authorities may discipline employees for lack of good behavior or the unsatisfactory performance of duties".

As a Department of Corrections employee, it is incumbent upon you to conduct yourself professionally at all times and follow the policies and procedures of the Department of Corrections and the Kentucky State Reformatory. Your actions placed yourself, your co-workers, and most importantly, members of the public at risk, and could have resulted in injury or death. This type of behavior is unacceptable and cannot be tolerated. Failure to improve your conduct may lead to further disciplinary action taken against you, up to and including dismissal.

For your information, the Kentucky Employee Assistance Program (KEAP) is a voluntary and confidential assessment and referral service for state employees. This service may help you with any personal problems that may be affecting your job performance. KEAP can be reached at (800) 445-5327 or (502) 564-5788.

In accordance with KRS 18A.095, you may appeal this action to the Personnel Board within sixty (60) days after receipt of this notice, excluding the date notification is received. Such appeal must be filed in writing using the attached appeal form and in the manner prescribed on the form.

Sincerely,

Aaron Smith, Warden

cc: LaDonna Thompson, Commissioner - Department of Corrections
James Erwin, Deputy Commissioner – Department of Corrections
Secretary - Personnel Cabinet
Mark Sipek, Executive Director, Personnel Board
Bobbie Underwood, Director - Division of Personnel Services
Personnel File

Reviewed + Received by + Date: Refused to Sign 11-3-15 GS
Witnessed by + Date: Capt Erich [illegible] 11/3/15
Witnessed by + Date: James Cooper 11-3-15