

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2016-063

ADAM B. BEAR

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 October 2016 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated September 15, 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 **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 3rd day of November, 2016.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Angela Cordery
Mr. Adam B. Bear
Mr. Rodney E. Moore

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PERSONNEL BOARD
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This matter came on for an evidentiary hearing on July 27, 2016, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Kim Hunt Price, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Adam B. Bear, was present at the evidentiary hearing and was not represented by legal counsel. The Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Angela Cordery.

BACKGROUND

1. The Appellant is employed as a Postal Technician II at the Little Sandy Correctional Complex (LSCC).

2. Appellant received a rating of 191 ("Needs Improvement") on his 2015 Annual Employee Performance Evaluation.

3. Appellant timely filed an appeal with the Personnel Board on or about March 23, 2016, stating, "I feel that I did not get a fair evaluation from my supervisor because I was not told or talked to about any problems with initiative or communication. The progress notes given to me did not reflect any problems with initiative or communication. I do communicate well with others and I work hard and stay on task every day." (Sic)

4. Serena Waddell, the Human Resources Administrator at LSCC has over 19 years of state employment, all in Human Resources. She explained the entire performance evaluation system. The performance evaluation at issue, Appellant's job specifications, the Performance Improvement Plan (PIP) and the progress record were introduced through her.

5. She verified that Appellant's February 1, 2016 letter requesting reconsideration should have been sent to Senior Captain Wallace, the second-line supervisor, rather than the Warden, to whom it was addressed. She acknowledged Captain Wallace did receive same on February 5, 2016.

6. **Paul Crouch**, the Administrative Captain with 16 years of Corrections' experience, is Appellant's first-line supervisor. He testified that Appellant oversees another worker, Amanda Williams, who is a Postal Technician I. Appellant's job is to search and distribute mail.

7. According to Crouch, Appellant does a portion of the job, including magazines and newspapers, but the issue arises with actual correspondence in his poor performance. It has been reported to Crouch that Appellant does not talk much with the other employees in the office, and he has received complaints from the other employees that Appellant will not do any mail other than magazines and newspapers, and likes to read those articles in such mail. Crouch has also received similar complaints from Senior Captain Wallace; that Appellant is reading the papers instead of going through the mail.

8. Crouch specifically discussed the Performance Improvement Plan dated September 30, 2015, (introduced as Appellee's Exhibit 3) with Appellant. A letter that was to be mailed certified from the institution to a former inmate was returned back to the facility because over eight stamps were placed in random areas on the envelope, including over a portion of the address. This information contained legal documents, and Crouch testified to the importance of having those documents delivered timely. Crouch verified that postage is available in multi-dollar increments, and could easily have been effectuated on this letter by using two or three stamps.

9. The Performance Improvement Plan also addressed that there had been numerous complaints that legal staff was having difficulty reading Appellant's handwriting.

10. Crouch also introduced the Progress Record as Appellee's Exhibit 4, wherein he had reflected difficulties with Appellant throughout the year 2015. Specifically, the record included an incident on January 12, 2015, where Appellant had returned legal mail to the Department of Public Advocacy, stating that the inmate was not at the facility when, in fact, he was. Appellant had stated that he must have typed in inmate number in wrong in determining whether the inmate was at the facility. He discussed with the Appellant that he needed to double-check, using both the name and inmate number.

11. On April 15, 2015, there was a discussion of overtime. Crouch stated that there was no particular problem at that time, but he was explaining that if someone was off, the other person would have to work overtime. On April 23, 2015, time sensitive legal mail was returned to the sender for inmate Morehead. Appellant again offered that he must have typed in the name wrong, and Crouch informed him that he needed to put forth more initiative in finding the inmate

in the state computer system. This particular complaint had been brought to Crouch's attention by the Deputy Warden.

12. Finally, on August 26, 2015, the Progress Record reflects that Appellant had recently been on "documentation required" for leave due to missing several days since his last interim evaluation. Crouch noted Appellant needed more supervision than most employees, and Appellant did not realize that. He stated Appellant became defensive and made excuses when these problems were discussed with him.

13. Crouch introduced Appellee's Exhibits 5 and 6, which reflect time periods when Appellant was placed on required documentation for leave. These reflected that from August 1, 2014, through July 31, 2015, Appellant had 14 absences without prior approval; nine of which were immediately preceding or following scheduled days off. From the period of time of August 10, 2015 through February 10, 2016, Appellant had 16 absences without prior approval, of which all were immediately preceding or following scheduled days off. Crouch stated that the policy allowed call-ins up to six times without prior approval.

14. Crouch stated that the policy is that the mail must be done in a timely fashion, which meant, by policy, within close of business on Friday. When he would come in on Monday mornings, there were two or three trays of mail left from the prior week. Most of the complaints concerned legal problems, and such correspondence is time sensitive for the inmates.

15. Crouch felt that Appellant had failed to follow Post Order #PO-11, Page 2 of 5, Item 7(E) which states: "The mailroom will no longer accept any incoming mail with labels, colored envelopes or colored paper, any type of coloring in it (to include, but not limited to, crayons, markers, color pencils, and water colors). Mail will be returned to sender." This is an important regulation because drug strips are often put on colored mailed envelopes or stickers to provide contraband to inmates, and Appellant had been inconsistent on returning items under this area. Post Orders are placed in the mailroom and employees must sign that they have been read daily.

16. Crouch stated that, at one point, Appellant had evaluated Amanda Williams in the Mail Department, and still supervises her on a daily basis because he is a Postal Technician II and she is a Postal Technician I, but another person now performs their evaluations.

17. Crouch also introduced Appellee's Exhibit 9, Little Sandy Correctional Complex Policy No. LSCC 16-02-02, which are the general rules governing the mail staff. Post Orders are more specific. The mail staff receives all outgoing mail from the box, and if anyone is on the flag list, they open their mail and inspect it. The postal service arrives around 8:30 or 9:00 a.m., and picks up outgoing mail and leaves the incoming mail at the warehouse. The warehouse office inspects it and sends it up to the Mail Department. All legal mail, both incoming and outgoing, is logged into the computer system. There had been problems with Appellant's handling of the incoming mail with numerous inmates filing grievances, saying that family had sent things and they were not receiving them. When Appellant was questioned about this, he stated he has had so much mail that he cannot say what is happening to each of it. Legal mail

must be processed, by policy, within 24 hours. There are many instances where it has set for three to four days before an inmate receives it. The 2nd Interim Evaluation Review reflects problems with logging of legal mail. Appellant was not writing legibly, and stated he could not change the way he wrote, so they obtained a computer program to handle this matter, but there had still been problems.

18. Crouch also testified that, at times, there were open records requests that Appellant was responsible for answering, but he had not done so. The same thing occurs with inmate grievances, again usually regarding legal matters.

19. When Crouch was questioned about each section of the employee evaluation form and his scores, he stated:

- A. Under duties with "Shows Initiative" Appellant was ranked a 1 because he has to be supervised on a daily basis to be sure his job was done. There had been some issue with Post Orders being signed daily, but he did finally start doing that.
- B. Under "Adaptability" the rating was 2 and Crouch stated that deadlines were the biggest problem with that. Appellant never accepted responsibility, but was always making excuses in that area that the coworker was not there or he did not have time to do it. Crouch testified that, at one point in time, they had changed the delivery of mail so that Internal Affairs could help with the workload, but that still did not correct the problem.
- C. Under "Employee Conduct" the rating was 2. The communication with staff was short and did not exist at times.
- D. Under "Attendance" Appellant was rated 1, and his timesheet was introduced showing his various absences.
- E. Under "Dependability/Responsibility" Appellant was rated 1 because of the lack of mail being taken care of in a timely fashion.

20. As a result of the 3rd Interim Review, Appellant sent a letter, which resulted in the final evaluation being delayed.

21. Crouch had been Appellant's supervisor in 2014, and there had been similar problems, but they were not as bad. Appellant's ranking in supervising the staff was 2; processing mail was 1; correspondence was 2; and security was a 3. Deficiencies in those areas were similar to the one discussed previously in paragraph 19.

22. **Senior Captain Terry Wallace** had worked with the Department of Corrections for 15 years, and was the second-line supervisor for Appellant. He did the reconsideration of this evaluation.

23. Senior Captain Wallace testified he reviewed the February 1, 2016 letter incorrectly addressed to Warden Meko. Wallace issued a letter dated February 5, 2016, denying the request for reconsideration, stating that he felt the evaluation was fair and he could not change it.

24. Wallace had been present at the corrective conference about the legal mail being sent back with the stamps on the envelope covering the name. Appellant had been standoffish during the meeting and basically said it did not make any difference whether the inmate got the mail. Appellant refused to sign the Performance Improvement Plan and did not agree with what had been said.

25. **Appellant, Adam B. Bear**, testified he had worked with the Department of Corrections for 12 years. Prior to that, he had worked at a university in the mailroom. All of his work had been at the mailroom at LSCC. Appellant stated he works hard. He acknowledged he makes some mistakes. He felt he communicated. He stated he was not a big talker, but did talk straight and to the point about things that needed to be done. He pointed out he did not think his failure to sign some of the documents in connection with his evaluation was unprofessional; that he had not signed them because he did not agree with them. He noted that the Progress Report did not note that he had been argumentative.

26. He acknowledged there was a problem with his handwriting, but felt that using the computer program had helped. He further acknowledged sending inmate mail back for inmates that had been at the facility. After that, he had learned there was another component on the computer program to identify inmates, and he felt he was doing better in that regard.

27. Appellant pointed out that he had a lot of hardships during the past year, as his wife had been bitten by a copperhead, and he had two different surgeries. He pointed out that his absences in December, the month in which most occurred, were largely in relation to medical issues.

28. Appellant testified he requested both Crouch and Wallace to get him some help in the mailroom because the other employee, Amanda Williams, has had some problems requiring her to be out of the office, and they stated they could not get any additional help. He stated there had been an issue about staying for overtime about a month ago, which would not have been reflected on the 2015 evaluation. The only time that overtime was discussed during 2015 was reflected on the Progress Report, and he explained he needed some help at that time. He stated he does work some overtime, and each time it would be an hour or so when he did so.

29. Appellant stated he had a good evaluation for 2014. He acknowledged that the rating for that year had been 274, after a reconsideration.

30. Appellant felt that documenting the call-ins was "hogwash," because he had a valid doctor's excuse for each absence and felt he was being punished for being sick. He was not aware he had to request FMLA leave, and after he learned of that from Serena Waddell, he did what he needed to do in that regard.

FINDINGS OF FACT

1. The Appellant made continual mistakes in inmate legal mail, with two specific examples of a letter being sent back due to multiple stamps being placed on same, and a case of an inmate's mail being returned when, in fact, he was at the facility.

2. The mail was not regularly processed in a timely manner in accordance with policies and procedures and post orders, as mail was often left unprocessed from the week before on Mondays and was required by policy to be processed by Friday.

3. Due to the number of absences Appellant had that occurred in connection with days off preceding or following the unapproved absence, he was placed on documented leave requirements for nearly the entirety of 2015.

4. Appellant was not rude, confrontational or unprofessional in refusing to sign various documents in connection with his performance evaluation.

CONCLUSION OF LAW

The Appellee has met the burden of proof to show that the ratings provided in the 2015 Annual Employee Performance Evaluation are supported by the various defects in Appellant's performance during that time period.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of ADAM B. BEAR V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS, (APPEAL NO. 2016-063) 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 Kim Hunt Price this 15th day of September, 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Angela Cordery
Mr. Adam B. Bear